

BRIEFING MEMO

MaineHealth

Southern Maine Medical Center Membership in MaineHealth

DATE: March 10, 2009

TO: Brenda M. Harvey, Commissioner, DHHS

THROUGH: Catherine Cobb, Director, Division of Licensing and Regulatory Services

FROM: Phyllis Powell, Manager, Certificate of Need Unit
Steven R. Keaten, Health Care Financial Analyst
Larry Carbonneau, Health Care Financial Analyst
Richard April, Health Care Financial Analyst

SUBJECT: Webber Hospital Association d/b/a Southern Maine Medical Center becoming a subsidiary of MaineHealth.

ISSUE ACTIVATED BY: The referenced proposal requires Certificate of Need (CON) approval as defined in "The Maine Certificate of Need Act of 2002," 22 MRSA §326 et seq., as amended.

REGISTERED AFFECTED PARTIES: None

I. BACKGROUND:

- MaineHealth, located in Portland, Maine, is a non-profit healthcare corporation that is the parent corporation for the following five hospitals: Maine Medical Center; Miles HealthCare, Inc.; Western Maine HealthCare Corp; Spring Harbor Hospital; St. Andrews Hospital; and Waldo County Healthcare, Inc. MaineHealth is also the parent corporation for HomeHealth Visiting Nurses of Southern Maine, NorDx Laboratory, Spring Harbor Counseling, Maine PHO and Syneret. These entities had assets in excess of \$1.3 billion on September 30, 2007. MaineHealth also has numerous strategic affiliation agreements with other Maine hospitals. By virtue of its size, MaineHealth is the largest healthcare organization in the state.
- Webber Hospital Association d/b/a Southern Maine Medical Center, located in Biddeford, Maine, is a non-profit healthcare corporation that is the parent of Southern Maine Medical Center, a 150-bed acute care community hospital, and several other healthcare related entities located in northern York County, Maine.
- MaineHealth's members are State Licensed and CMS certified. Several are Joint Commission Accredited.
- Southern Maine Medical Center's (SMMC) current license is valid until February 28, 2010. SMMC is Medicare and MaineCare certified. SMMC is accredited by the Joint Commission. Currently not all member hospitals of MaineHealth are Joint Commission

accredited. SMMC is presently considered a Tier 1 hospital for the State Employees Health Plan.

- In the preliminary analysis, CONU determined that the applicant satisfied review criteria and recommended that the Commissioner approve the application subject to the following conditions:
 - 1) The applicants will be required to produce the letter from the Department of Justice/Federal Trade Commission that waived the 30-day waiting period requirement from the Hart-Scott-Rodino Antitrust Improvement Act.
 - 2) Carry out the conditions set forth in the Certificate of Public Advantage (COPA).
 - 3) Report cost savings attributable to this merger for a period of three years from merger date.
 - 4) Report improvements in quality outcomes as a result of this merger for a period of three years from merger date.

Preliminary Analysis Condition 1 has been rewritten at the applicant's request.

Preliminary Analysis Condition 3 will be deleted as it is similar to a condition set forth in the approval in the Certificate of Public Advantage (COPA). The COPA requirement satisfies CONU Condition 3, and the COPA report produced from the applicant will be incorporated into the CON file when received.

II. PROJECT DESCRIPTION:

MaineHealth and SMMC entered into a "Definitive Agreement" that would make SMMC a subsidiary corporation of MaineHealth (Membership).

According to the applicant, "as a member of MaineHealth, SMMC will continue and increase its participation in development and implementation of MaineHealth-initiated and sponsored health status improvement, clinical integration, and quality improvement initiatives. SMMC will also have access to shared administrative resources of the MaineHealth system, including legal services, financial services, strategic planning, program development and human resource management. SMMC may also participate in MaineHealth's health benefit and workers' compensation plans, and its professional liability insurance trust."

"MaineHealth has also submitted a letter of intent to the Department in anticipation of filing an application for a Certificate of Public Advantage (COPA) for the proposed acquisition of control by MaineHealth of SMMC as a subsidiary corporation (Membership). The issuance of a Certificate of Public Advantage is governed by the Hospital and Health Care Provider Cooperation Act, 22 M.R.S.A. Chapter 405-A, which prescribes a review process for evaluation of the transaction under detailed statutory standards."

III. HIGHLIGHTS:

Letter of Intent filed:	July 11, 2008
Technical assistance meeting held:	July 31, 2008
CON application filed:	October 24, 2008
CON certified as complete:	October 24, 2008
Public Information Meeting Held:	November 17, 2008
Public Hearing held:	November 17, 2008
Public comment period ended:	December 17, 2008
Preliminary Analysis Released:	February 9, 2008
Public comment period ended:	February 26, 2008

IV. PUBLIC COMMENTS RECEIVED IN RESPONSE TO THE PRELIMINARY ANALYSIS:

Following release of the Preliminary Analysis, no public comments were received. GOHPF and the Attorney General submitted comments on the COPA, but did not submit comments on CON *per se*. GOHPF did comment that it felt the project with the proposed CONU conditions was consistent with the State Health Plan.

V. APPLICANT'S RESPONSE TO PRELIMINARY ANALYSIS (condensed)/CONU COMMENTS:

The applicant submitted additional information on February 26, 2009, addressing the conditions recommended by CONU in the Preliminary Analysis.

Preliminary Analysis Condition 1: The applicants will be required to produce the letter from the Department of Justice/ Federal Trade Commission that waived the 30-day waiting period requirement from the Hart-Scott-Rodino Antitrust Improvement Act.

Applicant's Response:

"The Preliminary Analysis recommends that the Applicants be required to produce a letter from the Department of Justice/Federal Trade Commission that waived the 30-day waiting period requirement from the Hart-Scott-Rodino Antitrust Improvement Act."

"This condition needs to be adjusted, because there is no requirement that the FTC or Department of Justice issue such a letter."

"Section 7A of the Clayton Act, 15 U.S.C. § 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and U.S. Department of Justice, Antitrust Division, advance notice and report of the transaction, Phyllis Powell Re: MaineHealth/Southern Maine Medical Center February 26, 2009 Page 4 and to wait designated periods before consummation of the transaction. The thresholds governing the obligation to make such a report under Hart-Scott-Rodino Act – size of parties; size of

transaction – apply regardless of whether the parties are in the same line of business or same geographic area, and thus apply regardless of whether the parties to the transaction are competitors in any line of commerce.”

“MaineHealth and Southern Maine Medical Center will be filing initial notifications and reports to FTC and U.S. Department of Justice concerning their Definitive Agreement promptly after the Department issues its Certificate of Public Advantage. The Certificate will be included in the notice and report to the FTC, and forms part of the basis for the Applicants’ position that the MaineHealth/SMCC transaction is governed by the “state action” doctrine and therefore outside the ambit of federal antitrust law prohibitions. Once the initial notifications and reports are filed, Section 7A(b)(2) of the Clayton Act permits the agencies, in individual cases, to terminate the waiting period prior to its expiration and requires that notice of this action be published in the Federal Register. However, there is no requirement of early termination, and thus no requirement that a notice of early termination issue.”

“Accordingly, the Applicants propose that the condition regarding notification of early termination of the waiting period be re-worded as follows.”

“The Applicants shall provide to the Department any letter from the Department of Justice/Federal Trade Commission acknowledging the filing of the Notice and Report under the Hart-Scott-Rodino Antitrust Improvement Act for the MaineHealth/SMMC transaction, and also provide subsequent correspondence, if any, indicating that the Department of Justice/Federal Trade Commission have granted a request for early termination of 30-day waiting period requirement of the Hart-Scott-Rodino Antitrust Improvement Act.”

CONU Comment:

CONU will rewrite the condition as requested by the applicant.

Preliminary Analysis Condition 2: Carry out the conditions set forth in the Certificate of Public Advantage (COPA).

Applicant’s Response:

No response

CONU Comment:

This condition will remain.

Preliminary Analysis Condition 3: Report cost savings attributable to this merger for a period of three years from the merger date.

Applicant’s Response:

“The Preliminary Analysis recommends that the Applicants be required to report cost savings attributable to this merger for a period of three years from merger date.”

“For the sake of clarity, and in order to avoid duplicative reporting, the Applicants request that the condition be re-worded to cross reference and incorporate the cost savings reporting requirements included in the December 16, 2008 Agreement on Conditions for the Certificate of Public Advantage, Section A. (Administrative Savings). Par.2, which contemplates reports of savings at 18 and 48 months after closing.”

CONU Comments:

This condition will be deleted as the conditions set forth in the Certificate of Public Advantage will satisfy this condition.

Preliminary Analysis Condition 4: Report improvements in quality outcomes as a result of this merger for a period of three years from the merger date.

Applicant’s Response:

“The Applicants agree to report on selected quality outcomes for a period of three years from closing. The Applicants anticipate that the report will include, at a minimum, pneumonia, heart failure, heart attacks, surgical site infections, hand hygiene and blood transfusions.”

CONU Comments:

This condition will remain.

Additional Applicant’s Response:

“The Applicants do not subscribe to all of the analysis reflected in the Division’s work product. For example, for the reasons stated at pp. 27-29 of its October 24, 2008 CON application, MaineHealth respectfully disagrees with the Division’s conclusion that the change of control entails a capital expenditure. However, this disagreement is academic, at least in respect to the MaineHealth/SMMC transaction, because as noted above the Applicants are willing to accept the conditions recommended by the Division. Accordingly, such differences in viewpoints will not be discussed in these comments.”

CONU Comment:

The applicants have challenged the calculation of the CON filing fee specific to the conclusion that this change of control entails a capital expenditure. The applicant paid the minimum filing fee when they filed their CON application.

Past acquisitions of hospitals by other hospital entities and/or holding companies have also resulted in fees in excess of the minimum fee. The salient discussion of the use of “capital expenditure” is limited to the context of the rules and statute regarding the determination of the fee. Other “merger/acquisition control” applications have, in the past, paid a fee based upon net property, plant and equipment. CONU will, in this case, follow this determination for payment. Based on this method, the total net property, plant and equipment for SMMC exceeded \$55,000,000 at the time of their last audit. This yields a revised CON fee of \$56,000. This fee has been received in full.

It also should be noted that the fee should be reconsidered at the time of the closing of the transaction and may be adjusted then to reflect additional net property and equipment of SMMC since the application was filed.

VI. CONCLUSION:

The Preliminary Analysis by CONU staff dated February 9, 2009, concluded that this application, with conditions, satisfied CONU review criteria. For all the reasons set forth in the Preliminary Analysis, in the record, and considering the clarifying information provided by the applicant, CONU concludes that the review criteria have been satisfied and recommends the approval of a CON with conditions. The applicant has agreed to the three remaining conditions.

VII. RECOMMENDATION:

The CONU recommends this proposal be **Approved with the following conditions:**

- 1) The Applicants shall provide to the Department any letter from the Department of Justice/Federal Trade Commission acknowledging the filing of the Notice and Report under the Hart-Scott-Rodino Antitrust Improvement Act for the MaineHealth/SMMC transaction , and also provide subsequent correspondence, if any, indicating that that the Department of Justice/Federal Trade Commission have granted a request for early termination of 30-day waiting period requirement of the Hart-Scott-Rodino Antitrust Improvement Act.
- 2) Carry out the conditions set forth in the Certificate of Public Advantage (COPA).
- 3) Report improvements in quality outcomes as outlined in its application and as a result of this merger for a period of three years from the merger date.

<u>Capital Costs</u>	
\$ 101,837,236	Capital costs as Approved
\$ 0	Contingency
<u>\$ 101,837,236</u>	Total Approved Capital Costs
<u>Incremental 3rd Year Costs</u>	
\$ 0	Approved Incremental Costs
<u>Capital Investment Fund</u>	
\$ 0	Approved CIF
<u>\$ 0</u>	Total CIF Debits