

FINAL REPORT

Southern Maine Medical Center and MaineHealth Application for Certificate of Public Advantage

DATE: March 4, 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, Healthcare Financial Analyst
Larry Carbonneau, Healthcare Financial Analyst

SUBJECT: Proposal by SMMC and MaineHealth for a certificate of public advantage for the definitive agreement whereupon SMMC is to become a subsidiary corporation of MaineHealth.

ISSUE ACTIVATED BY: The referenced proposal requires approval as defined in "Maine's Hospital and Health Care Provider Cooperation Act," 22 MRSA Section 1841 et seq., as amended.

Persons Requesting Notification of an application from the department:

Anthem Blue Cross and Blue Shield
Julius Ciembroniewicz, Esquire - Kozak & Gayer, P. A.

Intervenors:

Office of the Attorney General - 22 M.R.S.A. §1855 (6)
Governor's Office of Health Policy and Finance – 22 M.R.S.A. §1855 (6)

I. BACKGROUND:

- Southern Maine Medical Center (SMMC) has entered into a definitive agreement with MaineHealth to become a subsidiary of MaineHealth. SMMC is a not-for-profit corporation located in Biddeford, Maine. SMMC is licensed for 150 acute care beds. SMMC's primary service area is Northern Coastal York County.
- MaineHealth is a not-for-profit charitable corporation organized and existing under the laws of the State of Maine headquartered in Portland, Maine. MaineHealth oversees a system of healthcare providers, including Maine Medical Center in Portland; Stephens Memorial Hospital in Norway; Miles Memorial Hospital in Damariscotta; St. Andrews Hospital in Boothbay Harbor; Spring Harbor Hospital in Westbrook; Home Health Visiting Nurses; NorDx; Synernet; MMC Physician Hospital Organization; Maine Physician Hospital Organization; and Maine Medical Partners.
- The Division of Licensing and Regulatory Services, Medical Facilities Unit, confirms that SMMC is a general hospital licensed in the State of Maine and is MaineCare and Medicare certified. The Medical Facilities Unit also confirms that the hospital

subsidiaries of MaineHealth are general hospitals licensed in the State of Maine and are MaineCare and Medicare certified. SMMC and Maine Medical Center, MaineHealth's largest subsidiary, are both accredited by the Joint Commission.

- The cooperative agreement included in the record is styled "Definitive Agreement" between MaineHealth and SMMC, and signed by the Chief Executive Officers of each of the parties on February 28, 2008.
- Neither SMMC nor MaineHealth have previously applied for a Certificate of Public Advantage (COPA).

II. HIGHLIGHTS:

Letter of Intent dated	May 21, 2008
Application and Signed Copy of Definitive Agreement filed	October 24, 2008
Notice of Public hearing published	October 31, 2008
Public hearing held	November 17, 2008
Record closed	December 17, 2008
Preliminary analysis released	February 9, 2009
Preliminary analysis published in newspapers	February 11, 2009
Record closed	February 26, 2009

III. PUBLIC COMMENTS RECEIVED IN RESPONSE TO THE PRELIMINARY COPA ANALYSIS:

Following release of the Preliminary COPA Analysis no public comments were received.

IV. APPLICANTS' AND INTERVENORS' RESPONSES TO PRELIMINARY COPA ANALYSIS (condensed)/CONU ANALYSIS:

Applicants Response

The Applicant responded to the Preliminary Analysis on February 26, 2009. Their response, as it relates to the COPA, is pertinent, as follows:

"With appropriate clarifications, discussed below, the Applicants are agreeable to the conditions recommended by the Division to be attached to the COPA."

The Applicant stresses the importance of closing the MaineHealth/SMMC transaction as soon as possible. The Hart-Scott-Rodino Act requires that the parties to a reportable transaction wait 30 days following a notice and report to the FTC before closing. The COPA is a central part of the Applicants' case to the FTC that the transaction is not subject to federal antitrust laws by virtue of the 'state action doctrine.'

The Applicant urges the Department to issue its final COPA decision no later than March 16, 2009.

The attorney for the Applicants submitted a revised COPA format for CONU consideration. However, the record does not reflect that this revised document was agreed to by the Intervenors.

Intervenors' Response

The Attorney General responded to the Preliminary Analysis on February 26, 2009. Her response is, pertinent, as follows:

“The Attorney General has entered an agreement with the Applicants (and also the Governor’s Office of Health Policy and Finance) that sets forth terms and conditions which, if incorporated into a Certificate of Public Advantage, we believe satisfies the statutory criteria under 22 M.R.S.A. §1844 (5). The Agreement imposes significant requirements for evaluation, planning and reporting on cost efficiencies, quality improvements and increased access, as well as implementation commitments for forthcoming plans. It also incorporates substantial identified, quantified and enforceable commitments by the Applicants that will result in cost savings and improved access in the first few years of the Certificate. The Attorney General believes that with the conditions set forth in the Agreement on Conditions, the likely benefits resulting from the membership of Southern Maine Medical Center in the MaineHealth system, as contemplated by the Definitive Agreement, outweigh any disadvantages attributable to any reduction in competition likely to result from the membership.”

“While the Attorney General engaged in a very different competitive analysis, we share the DLRS’ ultimate conclusion that, with appropriate conditions, the likely benefits outweigh the disadvantages likely to result from the proposal.”

“The Attorney General has no objection to those additional conditions” included in the recommendations by CONU/DLRS.

“In sum, the Attorney General supports the issuance of a Certificate of Public Advantage with conditions for the Applicants’ Definitive Agreement consistent with the recommendation of DLRS.”

The Governor’s Office of Health Policy and Finance (GOHPF) responded to the Preliminary Analysis on February 26, 2009. Their response is, pertinent, as follows:

“GOHPF made note that certain provisions of the application reflected the maintenance of a rational system of health care and promotes the development of the health care workforce.” Certain goals of the SHP are reflected in the application.

“GOHPF supports the issuance of a COPA in this matter, with the Agreement on Conditions contained in Attachment B incorporated into the Certificate.”

CONU Response

In the Preliminary COPA analysis, CONU recommended that the Commissioner issue a certificate of public advantage with conditions, for a cooperative agreement because the Applicants have demonstrated by a preponderance of the evidence that the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition likely to result from the agreement. CONU recommended the Commissioner make the following findings subject to the conditions specified below.

- A. The following benefits are likely to result from the cooperative agreement:
- 1) Enhancement of the quality of care provided to citizens of the State;
 - 2) Preservation of hospitals or health care providers and related facilities in geographical proximity to the communities traditionally served by those facilities;
 - 3) Gains in the cost efficiency of services provided by the hospitals or others;
 - 4) Improvements in the utilization of hospital or other health care resources and equipment;
 - 5) Avoidance of duplication of hospital or other health care resources; and
 - 6) Continuation or establishment of needed educational programs for health care providers.
- B. The following disadvantages are not likely to result from the cooperative agreement:
- 1) An adverse impact on the ability of health maintenance organizations, preferred provider organizations, managed health care service agents or other health care payors to negotiate optimal payment and service arrangements with hospitals or health care providers;
 - 2) An adverse impact on patients or clients in the quality, availability and price of health care services; and
 - 3) An adverse impact on the access of persons enrolled in in-state educational programs for health professions to existing or future clinical training programs.
- C. The following disadvantages are likely to result from the cooperative agreement:
- 1) Disadvantages attributable to reduction in competition among covered entities or other persons furnishing goods or services to, or in competition with, covered entities that are likely to result directly or indirectly from the cooperative agreement as evidenced by, for example, the increased purchasing power of MaineHealth.
 - 2) The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition likely to result from the agreement such as, for example, having MaineHealth modify its affiliate agreement.
- D. The likely disadvantages may be ameliorated by the enforceable conditions included
- 1) Attachment B, as well as the following conditions recommended by CONU:
Reporting of free care; MaineHealth and SMMC will report free care as required by 22 M.S.R.A. §1716.
 - 2) Submitting all tax returns for all entities under the control of MaineHealth for the term of the Certificate of Public Advantage.
 - 3) Reporting any changes to the agreement with UNE regarding training of medical students for the term of the Certificate of Public Advantage.
- E. CONU recommends to the Commissioner that all conditions of approval stand, with one additional condition. CONU recommends that the Commissioner also adopt the following condition:

Upon each submission of the required review materials to the Department, at 27 and 54 months (per the 2008 Agreement on Conditions signed by the Applicants and the Intervenor) following the date of when SMMC becomes a member of MaineHealth, the aggregate sum of \$5,000 shall be submitted by the Applicant to be used by the

Department to fund expenses for consultants or experts necessary for the continuing supervision of the agreement.

V. RECOMMENDATION:

Based upon information contained in the record the Certificate of Need Unit recommends this proposal be **Approved subject to conditions.**

CONU recommends the Commissioner make the recommended findings subject to the conditions specified.

The likely disadvantages may be ameliorated by the conditions included as approved by the Applicants and intervenors (A-I), as well as the following conditions recommended by CONU (J-L). Conditions A-I are reasonably enforceable and subject to future measurement or evaluation to assess compliance with these conditions. Conditions J-M are designed to achieve public benefits.

Agreed Upon Conditions:

A. Administrative Savings

1. Commitment: During the initial 24 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth and SMMC will achieve administrative expense savings for SMMC of at least \$1 million.
2. Target: MaineHealth and SMMC have established a target of \$5 million savings in administrative expenses for SMMC in the 6 years following the date upon which SMMC becomes a member of MaineHealth. At 18 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth will submit a report to the Department, describing the savings to date, and the plan for achieving the target. The study will include an analysis of the extent to which savings have been or can be achieved in information technology, employee benefits, finance and accounting, and other sectors. The Department may thereafter modify the conditions of the certificate to incorporate the plan proposed by MaineHealth.
3. Report: At 48 months and 66 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth will report to the Department the savings in administrative expenses then achieved. The failure to have achieved savings for SMMC of at least \$2 million for the initial 48 months following the date upon which SMMC becomes a member of MaineHealth, if not substantially justified, may be treated as an "unanticipated circumstance" within the meaning of 22 M.R.S.A. §1845(3)(b).

B. Ambulatory Electronic Medical Record System Deployment

1. Commitment: Consistent with the objectives of Maine's 2008-2009 State Health Plan (April 2008), which identifies the deployment and use of electronic medical record systems as a state health policy objective, MaineHealth will

provide financial support of at least \$2.2 million for the deployment and integration of ambulatory electronic medical record systems for use by employed and non-employed members of SMMC's medical staff during the 6 years following the date upon which SMMC becomes a member of MaineHealth,. This amount will not be recovered by MaineHealth or Southern Maine Medical Center as charges from patients or payors.

2. Target: Within 48 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth and SMMC will have at least fifty (50) physician members of the SMMC medical staff using ambulatory electronic medical records.

3. Report: At 48 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth and SMMC will submit a report to the Department describing the level of electronic medical record system deployment achieved, and the plan for achieving the targeted level, if not yet achieved. The failure to achieve the targeted deployment within 48 months, if not substantially justified, may be treated as an "unanticipated circumstance" within the meaning of 22 M.R.S.A. §1845(3)(b).

C. Access to Care

1. Medical Staff Recruitment and Retention

i. Commitment: MaineHealth will assist SMMC in its efforts to secure the administrative and financial resources needed to implement its 5-year (2008-2013) medical staff recruitment and retention plan, as modified and approved by the SMMC Board, and as provided in Section 2.7.1 of the Definitive Agreement.

ii. Reporting: At 24 months, 48 months and 66 months following the date upon which SMMC becomes a member of MaineHealth, SMMC will report to the Department on its progress to date in achieving its medical staff recruitment and retention plan.

2. Access to Primary Care for MaineCare and Uninsured Patients

i. Commitment: During the six years following the date upon which SMMC becomes a member of MaineHealth, SMMC will require all physicians employed by SMMC to accept patients without regard to the patient's insurance status or ability to pay, consistent with SMMC's charity care policies. During the same period, SMMC's charity care policy will continue to provide that person(s) whose incomes are below 175% of the then current DHHS federal poverty guidelines will receive free care.

ii. Report: At 24 months, 48 months and 66 months following the date upon which SMMC becomes a member of MaineHealth, SMMC

will report to the Department the number of charity care patients and MaineCare patients served by SMMC- employed physicians.

- iii. Feasibility Study: At 18 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth and SMMC will submit to the Department a report analyzing the feasibility of extending the Care Partners program to eligible residents within SMMC's primary service area. The report will propose, as appropriate, a plan for improving and extending the availability of the Care Partners program to eligible residents within SMMC's primary service area. The Department may thereafter modify the conditions of the certificate to incorporate the plan proposed.

3. Emergency Department Use

- i. Target: By 48 months following the date upon which SMMC becomes a member of MaineHealth, SMMC will offer the services of a primary care physician or physician extender for follow-up care to each patient discharged from SMMC's emergency department who received non-emergent ambulatory care and who does not already have a regular primary care provider.
- ii. Interim Program and Report: Beginning 3 months following the date upon which SMMC becomes a member of MaineHealth, SMMC will implement a program utilizing the available capacity of current SMMC-employed primary care physicians to offer follow-up appointments with and assignments to primary care physicians for those patients discharged from the SMMC emergency department who lack a regular primary care provider. At 18 months following the date upon which SMMC becomes a member of MaineHealth, SMMC will report to the Department the numbers and percentage of patients discharged from the SMMC emergency department who were offered primary care provider access through this program, and changes in emergency department use at SMMC during the interim program.
- iii. Feasibility Study. MaineHealth and SMMC will conduct a study to determine the feasibility of longer-term measures by which emergency department demand at SMMC can be re-routed to lower cost alternatives without compromise in patient care, and the practicality of benchmarks to measure the success of such a plan. At 36 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth and SMMC will report to the Department the results of their study and on changes in emergency department use at SMMC during the preceding 36 months. The report will propose, as appropriate, a plan for achieving any further re-routing of demand beginning no later than 48 months following the date upon which SMMC becomes a member of MaineHealth, and any benchmarks by which to measure the success of such a plan. The Department may

thereafter modify the conditions of the certificate to incorporate the plan proposed.

D. Quality Improvements

1. Commitment: During the 6 years following the date upon which SMMC becomes a member of MaineHealth, SMMC will continue its current level of participation in MaineHealth-sponsored clinical integration programs (identified in its October 24, 2008 Joint Application for a Certificate of Need and Certificate of Public Advantage, pp. 55-56), and SMMC will participate in any new clinical integration programs hereafter established by MaineHealth for all of its hospital members. SMMC will publish the results of its participation in such programs in the same manner and to the same extent as other hospital members of the MaineHealth system.
2. Report and Plan. At 24, 48 and 66 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth and SMMC will report to the Department on the extent of SMMC's participation in MaineHealth's clinical integration programs, and any gains in quality achieved by SMMC during the period covered by the report.

E. Clinical Efficiencies

1. Report and Plan. At 24 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth and SMMC will report to the Department the results of their efforts to date to identify any unnecessary redundancies in current clinical services, and describe any measures deployed to reduce or avoid such redundancies in future clinical services. The report will propose, as appropriate, a plan for pursuing additional clinical efficiencies within 48 months following the date upon which SMMC becomes a member of MaineHealth, and benchmarks by which to measure the success of such a plan. The Department may thereafter modify the conditions of the certificate to incorporate the plan proposed.
2. Follow-up Reporting. At 48 months and 66 months following the date upon which SMMC becomes a member of MaineHealth, MaineHealth and SMMC will report to the Department the extent to which benchmarks identified in the plan have been achieved. The failure to achieve the additional benchmarks starting with 48 months following the date upon which SMMC becomes a member of MaineHealth, if not substantially justified, may be treated as an "unanticipated circumstance" within the meaning of 22 M.R.S.A. §1845(3)(b).

F. Limitation on Operating Margin

1. Target. During the term of the certificate, SMMC will set its annual consolidated budgeted operating margin at a level less than or equal to 3% of its total operating revenue.

2. Notification. During the term of the certificate, if SMMC's budgeted consolidated operating margin exceeds 3% of total operating revenue, SMMC will notify the Department within 60 days thereafter, and provide an explanation for the reasons therefore.
 3. Report. At 24 months, 48 months and 66 months following the date upon which SMMC becomes a member of MaineHealth, SMMC will report to the Department the extent to which its consolidated operating margin during the period of the certificate, averaged to an annual basis, has conformed to the target. At 48 months following the date upon which SMMC becomes a member of MaineHealth, if the average annual consolidated operating margin has exceeded the targeted level, and is not substantially justified by factors beyond the control of SMMC, the occurrence may be treated as an "unanticipated circumstance" within the meaning of 22 M.R.S.A. §1845(3)(b).
- G. Report: Any report submitted by MaineHealth or SMMC under the terms of this Agreement on Conditions shall be simultaneously provided to the Attorney General and the Governor's Office of Health Policy & Finance.
- H. Review. Supervisory review by the Department will occur at 27 months and at 54 months following the date upon which SMMC becomes a member of MaineHealth. The Department may conduct additional supervisory reviews as necessary in response to reports filed by the applicants in accordance with these conditions.
- I. Term: The certificate will expire in 6 years.
- J. Report: MaineHealth and SMMC will report free care as required by 22 M.S.R.A. §1716.
- K. Report: MaineHealth will submit all tax returns for all entities under its control of for the term of the Certificate of Public Advantage.
- L. Report: Any change to the agreement with UNE regarding training of medical students for the term of the Certificate of Public Advantage.
- M. Upon each submission of the required review materials to the Department, at 27 and 54 months (per the 2008 Agreement on Conditions signed by the Applicants and the Intervenors) following the date of when SMMC becomes a member of MaineHealth, the aggregate sum of \$5,000 shall be submitted by the Applicant to be used by the Department to fund expenses for consultants or experts necessary for the continuing supervision of the agreement.

CONU recommends the Commissioner issue a COPA for a cooperative agreement because the Applicants have demonstrated by a preponderance of the evidence that the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition likely to result from the agreement.