

Constantino, Mike

From: Kara Friedman [KFriedman@Polsinelli.com]
Sent: Tuesday, March 08, 2011 4:23 PM
To: Avery, Courtney
Cc: Constantino, Mike
Subject: Comment to SAR for 10-066
Attachments: doc20110308160930.pdf

RECEIVED

MAR 08 2011

HEALTH FACILITIES &
SERVICES REVIEW BOARD

Please see attached. If you don't mind, shoot me an email back to let me know that you've received this.

Thanks,
Kara

-Kara Friedman
312-873-3639

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Kara M. Friedman
(312) 873-3639
kfriedman@polsinelli.com

161 N. Clark Street, Suite 4200
Chicago, IL 60601
(312) 819-1900
Facsimile: (312) 819-1910
www.polsinelli.com

March 8, 2011

Ms. Courtney R. Avery
Administrator
Illinois Health Facilities and Services Review Board
525 W. Jefferson
2nd Floor
Springfield, IL 62761

**Re: Comments to State Agency Report for Fresenius Medical Care Joliet,
Project No. 10-066 (the "CON Applicaton")**

Dear Ms. Avery:

This letter is written on behalf of DaVita, Inc. It is written pursuant to Section 3960/6 of the Illinois Health Facilities Planning Act which provides that members of the public may submit a written response to a State Agency Report ("SAR") for a pending certificate of need ("CON") application. We request that you consider the comments in this letter and revise the findings in the SAR accordingly. Specifically, because of inconsistent and misleading information in the CON Application for Project Number 10-066, Fresenius Medical Care Joliet, there are errors in the SAR.

There are two primary problems with the SAR which result from misrepresentations, misstatements and inconsistencies within the CON Application and the SAR should be corrected. **Specifically, based on the CON Application, the State Agency Report should reflect a negative finding on Criterion 1120.120 - Availability of Funds and Criterion 1120.130 - Financial Feasibility.** To detail in summary:

- The correct evidence of financing for the project which is required by Section 1120.120 of the rules of the Health Facilities and Services Review Board ("HFSRB") was not provided. Rather, materials asserting eligibility of the proposed project for the financial viability waiver provided by Section 1120.130(a) of the HFSRB rules were included in the CON Application. These materials indicated that Fresenius Medical Care Holdings, Inc. is funding the project notwithstanding other inconsistent statements in the CON Application asserting that each member of the proposed operating entity is contributing its *pro rata* portion of the required capital.

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• Relatedly, notwithstanding the applicants' contrary assertion in the CON Application, the project does not qualify for the financial viability waiver. Thus, pursuant to Section 1120.130 of the HFSRB rules each applicant is required to provide financial viability ratio information and to meet the financial viability ratio standards in order for the HFSRB staff ("State Agency") to make a positive finding on Criterion 1120.130(a) (Financial Feasibility) of the HFSRB's rules.

Discussion

The CON Application states that Fresenius Medical Care of Plainfield, LLC d/b/a Fresenius Medical Care Joliet, the planned operator of the proposed dialysis facility, is a joint venture between Fresenius Medical Care Ventures, LLC and Kidney Care Center of Northern Illinois, LLC. According to the CON Application, Fresenius Medical Care Ventures, LLC will own 60% of the planned dialysis facility with Kidney Care Center of Northern Illinois, LLC owning the other 40%. (App. p 27). The applicants state financing for capital costs not funded through the real estate lease are to be borne on a *pro rata* basis based on this 60%/40% ownership split. (App. pp 39, 41). It is unclear from the CON Application whether a portion of the required capital costs will be financed by a lease but Page 39 of the CON Application suggests that the entire project cost will be financed by *pro rata* capital contributions of each of the limited liability company members. Part of the narrative on Page 41 of the CON Application confirms that not all of the project costs will be borne by Fresenius Medical Care Holdings. This narrative states: "this project is going to be a Joint Venture lowering the cost to Fresenius." This *pro rata* capital requirement described in the CON Application would be consistent with the regulatory framework to which health care joint ventures involving referring physicians are subject. This legal framework requires that a referring physician's investment in a health care venture be proportionate to the equity and returns he receives from the venture.

Notwithstanding the contrary information describing the structure and financing of the planned operating entity contained on Pages 27, 29 and 41 of the CON Application, on Page 16 the co-applicants assert the project is eligible for a financial viability waiver. The CON Application does not include any financial information demonstrating that the limited liability company members can fund or have funded their proportionate share of the required capital.

Applicable HFSRB Rules

Criterion 1120.120 - Availability of Funds

Section 1120.120 of the HFSRB rules provides that each applicant must "document that financial resources shall be available and be equal to or exceed the estimated total project cost plus any related project costs by providing evidence of sufficient financial resources" from the specified sources.

Section 1120.120 of the HFSRB rules require that an applicant provide audited financial statements or other evidence demonstrating that the amount of cash and securities required for the project is available. Since the planned operator is not a wholly owned subsidiary of

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Fresenius Medical Care Holdings, Inc., the assertion on Page 87 of the CON Application that the previously submitted financial statements for Fresenius Medical Care Holdings, Inc. adequately demonstrate the availability of capital for the project is inconsistent with the assertion that the joint venture will be funded 40% by the physician owner. The applicants failed to provide financial statements for the joint venture demonstrating sufficient cash and securities to fund the project. Accordingly, a positive finding on this criterion cannot be made.

Based on the Availability of Funds criterion, the CON Application should have included a financial statement of the limited liability company which demonstrated that each of the limited liability company members had made their proportionate capital contribution. No such documentation was included. Thus, the State Agency should change the Availability of Funds finding in the SAR to reflect a negative finding for Criterion 1120.120.

Criterion 1120.130(b) – Financial Viability

Section 1120.130 of the HFSRB rules states “the applicant or co-applicant that is responsible for funding or guaranteeing funding of the project shall provide viability ratios for the latest three years for which audited financial statements are available and for the first full fiscal year at target utilization, but no more than two years following project completion. When the applicant's facility does not have facility specific financial statements and the facility is a member of a health care system that has combined or consolidated financial statements, the system's viability ratios shall be provided.” Furthermore, “[t]o develop the above ratios, facilities shall use and submit audited financial statements. If audited financial statements are not available, the applicant shall use and submit Federal Internal Revenue Service tax returns or the Federal Internal Revenue Service 990 report with accompanying schedules. If the project involves the establishment of a new facility and/or the applicant is a new entity, supporting schedules to support the numbers shall be provided documenting how the numbers have been compiled or projected.”

The CON Application states that because the project will be funded by Fresenius Medical Care Holding's cash, it is eligible for a financial viability waiver. However, the financial viability waiver applies only if “all project capital expenditures, including capital expended through a lease, are completely funded through internal resources (cash, securities or received pledges),” and the applicant can document the availability of internal resources on the date the application is deemed complete. On page 39 of the application, the applicants state Kidney Care Center of Northern Illinois, LLC will be responsible for \$1,758,384 of the project costs; however, the applicants provided no evidence that the requisite funds had been paid in by the limited liability company members or that there was sufficient cash on hand in the limited liability company's bank account to fund the capital costs. Because this planned dialysis facility will not be funded exclusively by Fresenius Medical Care Holdings, Inc's cash on hand, the project is not eligible for the financial viability waiver that wholly-owned Fresenius Medical Care Holdings, Inc. subsidiaries might qualify for. Each applicant should have provided financial viability ratios (and related worksheets) for the latest three years for which audited financial statements are available and for the first full fiscal year at target utilization for each of the applicants, Fresenius Medical Care of Plainfield, LLC and Fresenius Medical Care Holdings, Inc. Instead, because

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Page 86 of the CON Application indicated complete financing of the cash requirements of the facility through the Fresenius organization, the State Agency made a positive finding regarding Part 1120.130 of the HFSRB rules relating to the financial viability. This Financial Viability finding should change to reflect a negative finding.

Copies of pertinent pages of the CON application relating to the errors in the SAR are included as enclosures to this letter.

Based on the foregoing, we respectfully request that the State Agency review this information and correct the SAR to reflect the deficiencies in the CON Application for Fresenius Medical Care Joliet. Because more than 30 days have passed since the HFSRB vote to give the project an intent to deny and the correct information has not been provided to the State Agency by the applicants, it would not be appropriate to allow the applicants to submit this information at this time.

Sincerely,



Kara M. Friedman

Enclosures

Cc: Mike Constantino

IX. 1120.130 - Financial Viability

All the applicants and co-applicants shall be identified, specifying their roles in the project funding or guaranteeing the funding (sole responsibility or shared) and percentage of participation in that funding.

<p>Financial Viability Waiver</p> <p>The applicant is not required to submit financial viability ratios if:</p> <ol style="list-style-type: none"> 1. All of the projects capital expenditures are completely funded through internal sources 2. The applicant's current debt financing or projected debt financing is insured or anticipated to be insured by MBIA (Municipal Bond Insurance Association Inc.) or equivalent 3. The applicant provides a third party surety bond or performance bond letter of credit from an A rated guarantor. <p>See Section 1120.130 Financial Waiver for information to be provided</p> <p>APPEND DOCUMENTATION AS ATTACHMENT-40, IN NUMERIC SEQUENTIAL ORDER AFTER THE LAST PAGE OF THE APPLICATION FORM.</p>

The applicant or co-applicant that is responsible for funding or guaranteeing funding of the project shall provide viability ratios for the latest three years for which audited financial statements are available and for the first full fiscal year at target utilization, but no more than two years following project completion. When the applicant's facility does not have facility specific financial statements and the facility is a member of a health care system that has combined or consolidated financial statements, the system's viability ratios shall be provided. If the health care system includes one or more hospitals, the system's viability ratios shall be evaluated for conformance with the applicable hospital standards.

Provide Data for Projects Classified as:	Category A or Category B (last three years)			Category B (Projected)
Enter Historical and/or Projected Years:				
Current Ratio	APPLICANT MEETS THE FINANCIAL VIABILITY WAIVER CRITERIA IN THAT ALL OF THE PROJECTS CAPITAL EXPENDITURES ARE COMPLETELY FUNDED THROUGH INTERNAL SOURCES, THEREFORE NO RATIOS ARE PROVIDED.			
Net Margin Percentage				
Percent Debt to Total Capitalization				
Projected Debt Service Coverage				
Days Cash on Hand				
Cushion Ratio				

Provide the methodology and worksheets utilized in determining the ratios detailing the calculation and applicable line item amounts from the financial statements. Complete a separate table for each co-applicant and provide worksheets for each.

2. Variance NOT APPLICABLE

Applicants not in compliance with any of the viability ratios shall document that another organization, public or private, shall assume the legal responsibility to meet the debt obligations should the applicant default.

<p>APPEND DOCUMENTATION AS ATTACHMENT 41, IN NUMERIC ORDER AFTER THE LAST PAGE OF THE APPLICATION FORM.</p>
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Operating Identity/Licensee

[Provide this information for each applicable facility, and insert after this page.]

Exact Legal Name: *Fresenius Medical Care of Plainfield, LLC d/b/a Fresenius Medical Care Joliet*

Address: *920 Winter Street, Waltham, MA 02451*

- | | | | | | |
|-------------------------------------|---------------------------|--------------------------|---------------------|--------------------------|-------|
| <input type="checkbox"/> | Non-profit Corporation | <input type="checkbox"/> | Partnership | | |
| <input type="checkbox"/> | For-profit Corporation | <input type="checkbox"/> | Governmental | | |
| <input checked="" type="checkbox"/> | Limited Liability Company | <input type="checkbox"/> | Sole Proprietorship | <input type="checkbox"/> | Other |

- o Corporations and limited liability companies must provide an Illinois Certificate of Good Standing.
- o Partnerships must provide the name of the state in which organized and the name and address of each partner specifying whether each is a general or limited partner.
- o Persons with 5 percent or greater interest in the licensee must be identified with the % of ownership.

Certificate of Good Standing at Attachment – 1.

Ownership

Fresenius Medical Care Ventures, LLC has a 60% membership interest in Fresenius Medical Care of Plainfield, LLC.

Kidney Care Center of Northern Illinois, LLC has a 40% membership interest in Fresenius Medical Care of Plainfield, LLC. Its address is 95 - 129th Infantry Drive, Joliet, IL 60435.

Alternatives

1) All Alternatives

A. Proposing a project of greater or lesser scope and cost.

There was only one alternative considered that would entail a lesser scope and cost than the project proposed in this application, however it was not determined to be a feasible option. This was the alternative of doing nothing. Dr. Alausa's practice has seen continued growth of ESRD and pre-ESRD in the Joliet area. The facilities they refer to have consistently operated at high utilizations despite station additions. As well, Dr. Alausa is Medical Director of the nearby Fresenius Plainfield facility which is already at 50% utilization after only being operational for 9 months. The high utilizations, growth, number of pre-ESRD patients in the Joliet market area as well as the ratio of patients to stations (1/6,960) warrants a responsibility to plan for these patients to keep access to dialysis treatment available. There is no monetary cost associated with this alternative.

B. Pursuing a joint venture or similar arrangement with one or more providers of entities to meet all or a portion of the project's intended purposes' developing alternative settings to meet all or a portion of the project's intended purposes.

The preferred Fresenius model of ownership is for our facilities to be wholly owned, however we do enter into joint ventures on occasion, such is the case in this proposed facility. Fresenius Medical Care Ventures, LLC is in partnership with Kidney Care Center of Northern Illinois, LLC, which is a 60%/40% Joint Venture. Fresenius Medical Care always maintains control of the governance, assets and operations of a facility it jointly owns. Our healthy financial position and abundant liquidity indicate that that we have the ability to support the development of additional dialysis centers. The total cost of the project is \$4,395,960, and Fresenius Medical Care Ventures, LLC will be responsible for \$2,637,576 of this amount and Kidney Care Center of Northern Illinois, LLC will be responsible for the remainder of \$1,758,384.

C. Utilizing other health care resources that are available to serve all or a portion of the population proposed to be served by the project

The option of sending Dr. Alausa's pre-ESRD patients to underutilized facilities in the area as they require dialysis treatment is an option that is already being acted upon. Dr. Alausa and his partners admit to Silver Cross Hospital, Silver Cross Renal West, Sun Health and Fresenius Plainfield. Aside from the patients identified for the Fresenius Joliet facility, they have patients who live closer to the above mentioned facilities and also to the not yet operational Fresenius Lockport facility that they will refer to. However, considering the facility utilizations and the number of pre-ESRD patients of Dr. Alausa alone, not to mention those of the other nephrologists in the region, there has been a decline in available services and there simply will not be adequate access to dialysis services in the near future. The only facility within 30 minutes travel time that has considerable access is the Lockport facility which is not due to be operational for another year yet. The physicians supporting that facility have identified 78 patients from the immediate Lockport area that they will refer to that facility in the first two years of operation. Dr. Alausa also has 41 pre-ESRD patients from Lockport that he will likely refer there. These patients are not included in the number of pre-ESRD patients identified for the Joliet facility.

2) Comparison of Alternatives

	Total Cost	Patient Access	Quality	Financial
Maintain Status Quo	\$0	Gradual loss of access as facilities fill up with identified pre-ESRD patients of Dr. Alausa and unidentified pre-ESRD of other area nephrologists.	Patient clinical quality would remain above standards in the Fresenius Medical Care facilities.	No effect on patients
Pursue Joint Venture	\$2,637,576 \$1,758,384	Cost to Fresenius Medical Care Cost to Kidney Care Center of Northern Illinois, LLC	Patient clinical quality would remain above standards	No effect on patients Fresenius Medical Care is capable of meeting its financial obligations and does not require additional funding, however <u>this project is going to be a Joint Venture lowering the cost to Fresenius</u> * Fresenius Medical Care will maintain control of the facility and therefore final financial responsibility.
Utilize Area Providers	\$0	Dr. Alausa currently admits to other area providers and will also admit to Fresenius Lockport upon its opening. If patients sent out of market area for treatment it would create transportation problems as patients would not have access to shifts with available county/township transportation. Loss of access to treatment schedule times Would create ripple effect of raising utilization of area providers to or above capacity	Dr. Alausa currently sees patients at Silver Cross Hospital, Silver Cross West, Sun Health and Fresenius Plainfield. If patients sent out of market area for treatment the result would be loss of continuity of care which would lead to lower patient outcomes	No financial cost to Fresenius Medical Care Cost of patient's transportation would increase with higher travel times
Establish Fresenius Medical Care Joliet	\$4,395,960	Continued access to dialysis treatment as patient numbers continue to grow. Improved access to favored treatment schedule times.	Patient clinical quality would remain above standards Patient satisfaction would improve with facilities closer to patient's home resulting in decreased travel times.	This is an expense to Fresenius Medical Care only who is able to support the development of additional dialysis facilities and is capable of meeting all financial obligations.

Criterion 1120.310 Financial Viability

Financial Viability Waiver

This project is being funded entirely through cash and securities
thereby meeting the criteria for the financial waiver.

2009 Financial Statements for Fresenius Medical Care Holdings, Inc. were submitted previously to the Board with #10-036, Fresenius Medical Care Mundelein and are the same financials that pertain to this application. In order to reduce bulk these financials can be referred to if necessary.