

Constantino, Mike

From: Bhuvan Chawla [B.Chawla@esunhealth.com]
Sent: Tuesday, November 23, 2010 3:51 PM
To: Constantino, Mike
Subject: URGENT - Opposition to Project 10-066; Fresenius /Joliet
Attachments: Opposition to Project No. 10-066 Fresenius Joliet.pdf

Dear Mr. Constantino,

Please find attached my letter of opposition to Project No. 10-066; Fresenius Medical Care (Joliet). I am also sending a copy by fax and Fedex overnight.

I would really appreciate your bringing this to the attention of the board.

Sincerely,

Bhuvan Chawla, M.D.
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Sun Health

Bhuvan Chawla, MD
Medical Director

Services

Hemodialysis
LDL Apheresis
Dietary Counseling
Social Services

VIA EMAIL, FAX & OVERNIGHT MAIL

SunNephrology

November 23, 2010

Services

Chronic Kidney Disease Clinic
Clinical Laboratory
IV Infusion Therapy
Medical Nutrition Therapy
ADA Recognized-
Diabetes Education Program

Mr. Dale Galassie
Acting Chairman
Illinois Health Facilities and Services Review Board
525 West Jefferson, Second Floor
Springfield, IL 62761

**Re: Opposition to Project No. 10-066: Fresenius Medical Care
(Joliet)**

Dear Chairman Galassie:

On behalf of Sun Health, Inc. ("Sun Health"), I submit this letter of opposition to Fresenius' certificate of need ("CON") permit request and implore you and the other members of the Illinois Health Facilities and Services Review Board ("HFSRB") to reject Project Number 10-066.

Despite multiple opportunities to set the record straight, Fresenius continues to skew "the reality of the situation" in Joliet and the surrounding communities. Based on the HFSRB's own data, the local service area clearly has an excess number of dialysis stations. Furthermore, many operational dialysis facilities are under-utilized based on the state's dialysis station utilization standard, which is another factor against the proposed project. Moreover, the unchecked expansion of Fresenius' market share will inevitably place Sun Health at an insurmountable competitive disadvantage and threaten its continued viability. Our dialysis facility is already shut out of large health insurance provider networks due to national exclusive contracts with companies like Fresenius. Patients with commercial insurance are thus denied access to treatment at Sun Health, even if Sun Health is the closest facility to their homes. These patients are either prevented from coming to Sun Health, or subsequently forced to transfer out to less convenient Fresenius facilities or hospital facilities.

The "reality of the situation" is simple—the proposed facility is unnecessary because existing dialysis providers in Joliet and the surrounding area have



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enough capacity to meet current patient need. The HFSRB's own estimates support this position and show (1) an excess of 51 dialysis stations exists in Health Service Area ("HSA") 9 and (2) significant under-utilization is present at 10 out of 14 dialysis facilities in the service area. In addition, the HFSRB does not account for a growing number of Medicare Part B home dialysis programs that exist at nursing homes, which will further reduce the need for new dialysis stations.

On behalf of Sun Health, I have consistently opposed CON projects that increase dialysis stations in the area. Thus, Fresenius cannot claim that Sun Health's opposition is inconsistent with previous statements submitted to the HFSRB. In fact, I opposed Silver Cross' most recent request to expand dialysis station capacity as part of its efforts to relocate to New Lenox, Illinois. Unfortunately, that opposition letter had little effect on the outcome of the Silver Cross permit application.

I am concerned that the HFSRB did not fully review the concerns raised in Sun Health's opposition letter. At the July 27, 2010 meeting, the HFSRB staff initially indicated that Silver Cross' CON application was unopposed. Only one HFSRB member appeared to catch the misstatement and asked Silver Cross to address the Sun Health letter. Silver Cross, however, failed to fully address the elements of our opposition and successfully avoided further discussion on the matter. Therefore, I will restate many of Sun Health's concerns in this letter and provide the HFSRB with another opportunity to hear our concerns.

Sun Health cannot sit back and simply watch the unchecked growth of dialysis services continue in the service area. Martin Luther King, Jr. said "the ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy." If unnecessary dialysis stations continue to be approved and over-development is allowed to continue, the HFSRB may create an insurmountable challenge for Sun Health and eventually threaten our existence. Therefore, for the reasons set forth in this letter, I respectfully ask the HFSRB to reject Fresenius' CON permit application.

(1) CON APPLICATION DISPLAYS A PATTERN OF INACCURATE AND MISLEADING DATA

According to 77 Ill. Adm. Code § 1110.1430(b)(3), the HFSRB must determine whether the number of stations proposed in a request to establish a new in-center hemodialysis service is necessary to accommodate the service demand in the planning area. For a new dialysis facility, an applicant is required to submit projected referrals from nephrologists in their application. The referring nephrologists must certify that their referral information is true and correct. I am greatly concerned that the historical patient data provided by Dr. Alausa, which is included by Fresenius in this application, is dramatically different from Sun Health's records. As a result, I believe that Dr. Alausa should appear before the HFSRB and fully explain why he submitted such apparently erroneous data.

The following chart shows the inconsistencies between data submitted by Dr. Alausa and Sun Health's records (as reported to The Renal Network).

| Historical Patient Data for Dr. Alausa at Sun Health | 2007 Patients | 2008 Patients | 2009 Patients |
|---|----------------------|----------------------|----------------------|
| Sun Health Data | 13 | 9 | 8 |
| Application Data (PN 10-066) | 10 | 21 | 19 |
| Difference | - 3 | + 12 | + 11 |
| Revised Application Data (11/11/2010) | 12 | 16 | 5 |
| Difference | - 1 | + 7 | - 3 |

In the 2nd quarter of 2010, Dr. Alausa reports that he had 10 patients at Sun Health, whereas Sun Health finds only 7. In the 3rd quarter, his patient census has dropped further to 5 patients.

Because Dr. Alausa's data errors are not isolated to Sun Health's data, the HFSRB should question the veracity of the entire CON permit application. I was shocked when Silver Cross Hospital revealed that significant differences also existed between the hospital's records and the data reported by Dr. Alausa in the CON application and in the subsequent filing of amended data. I hoped that Fresenius would submit revised data for Sun Health and clear up what we originally believed was an isolated mistake.

I find, however, that Fresenius' October 29 and November 12 letters do not fully address or correct the erroneous data submitted by Dr. Alausa. **Specifically, Fresenius failed to correct its data related to Sun Health (which was first reported on pages 51-53 of the original application).** In the subsequent filings, Fresenius did not provide amended data to properly reflect Dr. Alausa's patients at Sun Health. Fresenius files enough CON applications to know better than to plead oversight as an excuse. Therefore, I believe that the HFSRB must review this application with heightened scrutiny and closely examine the remaining data. Moreover, I also believe that the HFSRB should investigate Fresenius' previous applications and determine whether those permits were based on similarly inaccurate and misleading data submissions.

The application also fails to disclose that a physician is leaving Dr. Alausa's practice group. In his letter dated November 11, 2010, Dr. Alausa contends that he is adding two more new nephrologists by the end of 2010 to address the "excessive growth" in his practice. He specifically fails to mention that Dr. Wang is leaving his practice this week, resulting in a 33% reduction in his physician manpower immediately. What if Dr. Alausa does not hire two new nephrologists by the end of 2010? In that situation, his anticipated referrals would be even less.

Dr. Alausa claims that he will refer 41 patients to the proposed facility in it first year. This projection appears to be way out of line with the self-reported growth in his dialysis practice. The average annual growth of his dialysis practice over this three year period is only 18 patients, and yet he claims that he will add 41 patients to Fresenius-Joliet, and refer 80 additional patients to other facilities in the first year

alone. The following chart illustrates the pace of growth in Dr. Alausa's practice, which does not demonstrate a rapidly growing practice as he contends in the application. This updated data is apparently being used by Fresenius in its modified application dated October 29, 2010 to justify need for this project. **The numbers simply do not add up.**

| Year | Dialysis Patient Census | Change |
|------|-------------------------|--------|
| 2007 | 34 | -- |
| 2008 | 59 | 25 |
| 2009 | 56 | (3) |
| 2010 | 82 | 26 |

(2) HFSRB DATA DOES NOT DEMONSTRATE NEED

A. Excess Station Supply

Fresenius proposes to establish a new dialysis facility in Joliet, Illinois and add 16 more dialysis stations to HSA 9. Sun Health opposes this application because our service area clearly has an over-supply of dialysis stations. The revised bed need determinations issued on October 31, 2010 report that **HSA 9 has the largest number of excess dialysis stations in the state.** Thus, the HFSRB's own calculations show that additional dialysis stations are unnecessary. Local, stand-alone, dialysis providers like Sun Health already struggle to maintain a viable patient base and find it difficult to achieve the dialysis facility target utilization standard of 80%. The HFSRB will only exacerbate the station excess and further challenge current providers' ability to achieve state standards if the Fresenius application is approved. **The following chart highlights the current station excess in HSA 9.**

| REVISED BED NEED DETERMINATIONS – ESRD STATIONS (10/31/2010) | | | | |
|--|----------------------------|-------------------------|----------------------------|----------------------|
| HSA Area Service ESRD | Approved Existing Stations | Calculated Station Need | Additional Stations Needed | Excess ESRD Stations |
| HSA 1 | 131 | 134 | 3 | 0 |
| HSA 2 | 143 | 149 | 6 | 0 |
| HSA 3 | 143 | 142 | 0 | 1 |
| HSA 4 | 156 | 164 | 8 | 0 |
| HSA 5 | 173 | 142 | 0 | 31 |
| HSA 6 | 983 | 1,083 | 100 | 0 |
| HSA 7 | 1,040 | 1,068 | 28 | 0 |
| HSA 8 | 342 | 295 | 0 | 47 |
| HSA 9 | 213 | 162 | 0 | 51 |
| HSA 10 | 80 | 56 | 0 | 24 |
| HSA 11 | 151 | 155 | 4 | 0 |
| TOTAL | 3,555 | 3,550 | 149 | 154 |

Furthermore, this HFSRB data does not account for Medicare Part B home dialysis services that are being offered at local nursing homes. As a result, these nursing home dialysis programs will reduce the number of potential in-center dialysis patients and reduce dialysis station need even further. Two nursing home

dialysis programs have been started in Joliet recently, one at Deerbrook Care Centre and another at Fairview Nursing Home. Although Medicare Part B home dialysis programs located at nursing facilities are not reviewable under the CON program, the HFSRB must still account for the existence and scope of this service line to fully account for dialysis station need in Joliet. Sun Health conducted unofficial research and found that Fairview and Deerbrook combined have 13 home dialysis stations on-site at the nursing homes (seven at Fairview and six at Deerbrook). Home dialysis stations should be considered relevant and provide the HFSRB with additional evidence that the Fresenius facility is not necessary.

B. Current Under-Utilization Shows Proposed Stations Are Unnecessary

After the HFSRB identifies whether additional dialysis stations are needed under their rules, the next inquiry is whether existing facilities have capacity to meet the needs of the service area’s patients. **HSA 9 clearly has existing capacity, as only 4 out of 14 dialysis facilities have attained the state’s target utilization standard.**

The following chart identifies each facility’s utilization rate and shows that capacity already exists in the planning area.

| ESRD Facilities in HSA 9 | | | | | |
|--------------------------------|-------------|----------|----------|-------------|-------------------|
| Facility Name | City | Stations | Patients | Utilization | State Target Met? |
| Silver Cross Renal Ctr. West | Joliet | 29 | 156 | 89.66% | Yes |
| Fresenius Oswego | Oswego | 10 | 52 | 86.67% | Yes |
| Silver Cross Renal Center | Joliet | 14 | 86 | 102.38% | Yes |
| RCG Morris | Morris | 9 | 38 | 70.37% | NO |
| Silver Cross Renal Ctr. Morris | Morris | 9 | 19 | 35.19% | NO |
| Sun Health | Joliet | 17 | 57 | 55.88% | NO |
| Provena St. Mary’s | Kankakee | 25 | 97 | 64.67% | NO |
| Manteno Dialysis | Manteno | 15 | 36 | 40.00% | NO |
| Bolingbrook Dialysis Center | Bolingbrook | 20 | 111 | 92.50% | Yes |
| Kankakee County Dialysis | Bourbonnais | 12 | 30 | 41.67% | NO |
| Fresenius Mokena | Mokena | 12 | 33 | 45.83% | NO |
| Fresenius Plainfield | Plainfield | 12 | 27 | 37.50% | NO |
| Yorkville Dialysis | Yorkville | 8 | 9 | 18.75% | NO |
| Fresenius Lockport | Lockport | 12 | 0 | 0.00% | NO |

Note: Yorkville Dialysis, approved 1/15/2008, PN 07-123 and Fresenius Lockport, approved 12/1/2009, PN 09-037 are new facilities, which explains the low utilization percentage.

As noted above, Sun Health’s dialysis stations are operating at approximately a 60% utilization rate. Fortunately our current utilization is stable; but, the Sun Health facility clearly has the capacity to accommodate additional dialysis patients from HSA 9 and other nearby areas. **Unfortunately, Sun Health’s utilization rate cannot increase if the HFSRB continues to approve new dialysis stations in our area.**

In the alternative, I ask the HFSRB to delay its consideration of this application and first learn why nephrologists refer most, if not all, of their patients to dialysis facilities owned and operated by Silver Cross Hospital or by large providers such as Fresenius rather than to small providers like Sun Health. If the HFSRB were to look closely, it would discover that Sun Health's utilization rate is below the state's standard not because of station capacity, staff levels, or geographic location, but instead, **our under-utilization is an unintended consequence related to the over-development of multiple dialysis facilities owned by corporate giants, and the ability of hospitals to influence physician referrals.**

C. Sun Health's History and Dialysis Facility Development in HSA 9

Sun Health decided to develop a stand-alone dialysis facility in 1989, after Silver Cross Hospital rejected our request to jointly develop a dialysis facility on the west side of Joliet. Sun Health submitted its first CON application in October 1989 (PN 89-116) and received Medicare certification on June 6, 1991. Silver Cross Hospital then submitted its CON application for Renal Center West (to be located 2.6 miles from Sun Health) on September 12, 1990 (PN 90-018), and received Medicare certification on October 8, 1991. Subsequently, the HFSRB has approved the establishment of new dialysis facilities owned either by Silver Cross Hospital or by large-scale, multi-national dialysis providers like Fresenius and DaVita. **By allowing these corporate giants to establish several dialysis facilities in HSA 9, the HFSRB inadvertently gave these larger providers significant power over time.** The power gained by Silver Cross Hospital and large providers like Fresenius **allowed them to enter exclusive contracts with big insurance providers, which has hindered Sun Health's ability to keep existing patients and generate new patients** because we have been unable to secure in-network provider status. In essence, Sun Health has had to bear the adverse consequences of this overdevelopment and finds itself at 60% occupancy even after 20 years of operation.

D. Unintended Consequences

Sun Health cautions the new HFSRB members that voting to approve new dialysis facilities can have unintended effects. In HSA 9, previous CON approvals allowed a major hospital and international companies to gain significant shares of the market, thereby creating an unfair competitive environment for small dialysis providers like Sun Health. Over time, the HFSRB has indirectly allowed these providers to assert their power and marginalize small dialysis providers like Sun Health.

For example, **United HealthCare has repeatedly refused to negotiate a provider contract with Sun Health,** even after its contract with Silver Cross Hospital was terminated and Sun Health was the only other dialysis provider in Will County. **United HealthCare claimed that its network was closed, apparently on the basis of some exclusive contractual relationship with Fresenius.** Sun Health has encountered similar problems in our attempts to negotiate fair provider contracts with Aetna and Cigna.

In a recent case, one of my pre-end stage renal disease patients needed to begin dialysis. My patient had commercial health insurance through Aetna. **Aetna, however, refused to negotiate a provider contract with Sun Health and forced my patient to**

transfer to Silver Cross Renal Center West for his dialysis treatments. The hospital's facility was part of Aetna's provider network. We ask the HFSRB, how can we be expected to achieve the state's utilization standard or 80% when big insurance companies are allowed to have exclusive contracts with our competitors, shut us out of the private insurance market, and do not provide us with a fair opportunity to serve our own patients?

Recently, Rush Medical Center referred a patient with commercial insurance to Sun Health because it was the dialysis facility closest to his home; however, the patient was promptly diverted to Fresenius-Plainfield by his health insurance company. Sun Health was not part of that insurance company's provider network.

Large insurance companies are able to exclude small providers like Sun Health from the private pay market, at least in part, because the HFSRB indirectly allowed the creation of a more attractive network of dialysis facilities that are owned by hospitals or large-scale dialysis providers like Fresenius. In my experience, commercial insurance companies prefer to deal with larger providers and offer such providers more attractive contracts and reimbursement rates. In the alternative, if small-scale providers like Sun Health are able to secure a contract, they are offered less attractive contract terms and significantly lower reimbursement rates (i.e., we are basically offered take it or leave it contracts).

Consequently, Sun Health is living the story of David versus Goliath. Sun Health, a small-scale provider, is being forced to compete with a growing number of giants like Silver Cross Hospital and Fresenius. Making matters more untenable, I see many of our commercial insurance patients redirected from Sun Health to in-network providers for their dialysis treatments. The redirection of our commercially insured patients is the consequence of other facilities parent corporations' ability to secure exclusive national contracts with large insurance providers. Sun Health, therefore, cares for a disproportionate share of underinsured and impoverished patients, which could ultimately affect our ability to operate a viable facility.

E. Dr. Alausa's Referral Claims

In their October 29, 2010 letter, Fresenius correctly states that only 20 more patients will bring Sun Health's utilization rate up to 80%. Fresenius then suggests that Dr. Alausa will actually refer more patients to Sun Health. This statement is ambiguous and possibly disingenuous.

In this statement, Dr. Alausa and Fresenius fail to take any steps to combat the status quo and make no commitment to have Dr. Alausa refer additional patients to Sun Health and move our facility towards the target utilization rate. In fact, I believe that the opposite is more likely to occur if Fresenius-Joliet is approved. In my opinion, Dr. Alausa will be motivated to refer most, if not all, of his patients to the new Fresenius facility because, not only is he aligned with Fresenius as the Medical Director for Fresenius Medical Care Plainfield, but he is also committing in the application to refer a sufficient amount of patients to the new facility to meet the operational targets set in the application. As of the writing of this letter, Dr. Alausa only has five patients at Sun Health. I believe this shows Dr. Alausa will not be committed to referring his patients to Sun Health's facility.

The statement is also qualified, in that Dr. Alausa and Fresenius indicated that referrals will be made to Sun Health if they are “appropriate” or per “patient choice.” **Sun Health is a Medicare-certified dialysis facility and has extensive experience in providing dialysis treatments; therefore, in most cases our facility offers an appropriate choice for Dr. Alausa’s patients.** Their statement also fails to disclose that many patients cannot use their preferred provider because they are required to use only their insurance company’s in-network providers. Thus, **patient choice may be irrelevant if this Fresenius facility is added to several existing insurance provider networks,** from which Sun Health is excluded.

F. Dr. Alausa’s Referrals

Dr. Alausa also fails to disclose the nature of the patients he refers to Sun Health. In our experience, Dr. Alausa rarely refers patients with private insurance and limited needs. In the alternative, he is much more likely to refer patients with inadequate insurance coverage or a person that is likely to present significant health issues or exhibit disruptive behavior at the dialysis facility.

(1) Patients Referrals Have Inadequate Insurance Coverage

In 2006, Dr. Alausa only referred two patients with private insurance to Sun Health. One of these patients died within 10 days and the other was eventually converted to home dialysis. In 2007 and 2008, Dr. Alausa did not refer any patients who had private insurance. In 2009, one of his private insurance patients received treatments at Sun Health from April to June 2009, and then transferred to Fresenius’ facility in Plainfield, Illinois. I imagine that Dr. Alausa’s referrals to Fresenius represent the most preferred patients (i.e., persons with adequate insurance coverage and no extenuating circumstances).

Medicare and Medicaid reimbursement has tended to be insufficient to cover the cost of providing dialysis care, and this cost is subsidized by patients with commercial insurance; thus each facility needs a certain number of patients with commercial insurance in order to function.

(2) Sun Health’s Admission Policies and Selective Referral

Dr. Alausa incorrectly claims that Sun Health has restrictive admission policies. Dr. Alausa, however, fails to disclose all of the facts about why Sun Health cannot admit his referred patients. Dr. Alausa and Fresenius do not explain that his referrals to Sun Health mostly include patients with unusually complex medical needs and/or are underinsured or on government-funded health care programs like Medicaid. **Dr. Alausa rarely refers patients with commercial health insurance coverage.** Alternatively, Dr. Alausa has referred a disproportionately high number of complex cases and persons with inadequate health care coverage when compared with the number of commercially insured patients referred to Sun Health. **Thus, the number of patients being turned away by Sun Health is not about restrictive admission policies; rather, it is evidence that Dr. Alausa continues to selectively refer patients to our dialysis facility.**

Dr. Alausa should know that Sun Health cannot serve a number of the persons he is referring, either because we cannot meet the patient's complex needs or because we are not able to accept additional government-funded patients due to inadequate reimbursement and unanticipated payment delays. For example, patients referred to Sun Health that were ultimately denied admission to our facility include persons with behavioral issues such as fighting, a long-standing history of noncompliance with their dialysis treatments, drug abuse, alcohol abuse, or other complex psych-social issues.

I believe that the **selective referral of such patients to unaffiliated facilities needs to be closely scrutinized by the HFSRB**. The HFSRB should also examine Sun Health's experience and determine whether Fresenius' patient selectivity is isolated to my community or is a policy that adversely affects patients throughout the state.

(3) POPULATION GROWTH DATA MUST BE QUESTIONED

CON applicants often argue that the HFSRB does not fully account for rapid population growth in certain regions in an attempt to justify the establishment of new dialysis facilities. However, population data estimates that are submitted by applicants must be questioned because the data used is in an applicant-friendly format and may not tell the whole story. Sun Health agrees that Will County, including Joliet, experienced significant population growth from 2006 through 2008. The decline in our economy, however, continues to affect population growth, limits new construction projects, and most likely will reduce the need for new health care services throughout the health service area.

Furthermore, more recent population reports no longer portray Will County as the growing and robust region it once was. For example, in a recent State of the County address, Will County Executive Lawrence Walsh referenced new population data and noted that the county's population boom was slowing and housing starts were on the decline. Therefore, the HFSRB must be prudent and consider how the slowing population growth in Will County might affect dialysis station need in HSA 9.

CONCLUSION

This letter outlines Sun Health's opposition to Fresenius' CON permit application. We understand that certain HFSRB members may view opposition letters from providers who compete with a CON applicant as less significant than letters from community groups and organizations that do not have a vested interest. We understand how the HFSRB might conclude that such opposition is merely an extension of normal business competition and may not raise concerns that affect the community as a whole. Sun Health's opposition, however, is not based on everyday business competition. Alternatively, Sun Health is fighting to survive and is left with no other choice than to oppose large providers and corporate entities that continue to request and receive CON permits and then use their combined strength against us. Therefore, we oppose this project as it threatens our ability to operate a financially viable dialysis facility.

In the present case, Fresenius simply cannot demonstrate a need for the proposed project, especially since the application asks for an addition of 16 dialysis stations in a service area with an HFSRB-acknowledged over-supply of 51 dialysis

stations, which does not account for a growing number of home dialysis programs at local nursing homes. I contend that the HFSRB should not approve new facilities and stations when current providers, like Sun Health, have existing station capacity and can immediately meet the needs of new dialysis patients. The HFSRB must question why Sun Health is excluded from provider networks because of exclusive contracts with Fresenius. I further argue that the project cannot be justified by population growth estimates for Will County, as population growth in 2010 and 2011 is uncertain. Therefore, Sun Health finds that the project proposed by Fresenius is unnecessary and respectfully requests the HFSRB to reject this CON permit application.

I also call on the HFSRB to strongly consider initiating an investigation of Fresenius to determine the true cause of the data errors that accompany this CON permit application. The HFSRB also must ascertain whether the underlying problem is isolated to this application or is a systemic problem that brings into question previous applications submitted by Fresenius.

Sun Health welcomes the opportunity to discuss this letter further and hopes that the HFSRB directs providers, like Silver Cross Hospital and Fresenius, to work more closely with small-scale dialysis providers and identify a solution that directs patients to existing stations at facilities that have not reached full capacity. If you have any questions, do not hesitate to call me at (815) 744-9300.

Sincerely,



Bhuvan Chawla, M.D.
Sun Health, Inc.

cc: State Senator A. J. Wilhelmi
State Representative Jack McGuire