

Constantino, Mike

From: Moon, Shawn K [skmoon@uhl.com]
Sent: Wednesday, September 21, 2011 6:00 PM
To: Constantino, Mike
Subject: Response to August 5, 2011, Holland & Knight Letter
Attachments: Response to 8-5-11 Holland & Knight Letter.pdf

Good Afternoon Mike,
Please find the attached PDF copy of a letter written in response to the August 5, 2011 letter submitted by Holland & Knight. This letter is submitted in connection with the U.S. Renal Care Bolingbrook Dialysis, U.S. Renal Care Oak Brook Dialysis, and U.S. Renal Care Streamwood Dialysis certificate of need applications, project numbers 11-025, 11-024 and 11-026, respectively.

Please feel free to contact me with any questions or comments.

Thanks,
Shawn

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September 21, 2011

Mike Constantino
Illinois Department of Public Health
525 West Jefferson
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Re: Response to August 5, 2011, Holland & Knight Letter

Dear Mr. Constantino:

On August 5, 2011, Ms. Clare Connor Ranalli of Holland & Knight sent you an e-mail referencing a prior telephone conversation between the two of you and attaching a letter of the same date related to U.S. Renal Care, Inc., by virtue of its association with the three limited liability companies applicants, for applications Nos. 11-024, 11-025 and 11-026 ("U.S. Renal Care Applications") for dialysis centers that are that located in Planning Areas 7 and 9 (the "Letter"). The Letter appears to be sent to you on behalf of Fresenius Medical Care ("FMC") and includes the caption "Response to Repeated False and/or Misleading Claims."

On behalf of U.S. Renal Care, please consider the following information in assessing the Letter.

First, regarding the Letter's Claim Three, the applicants in the U.S. Renal Care Applications have not alleged, and do not allege, that FMC's market dominant position constitutes "illegal activity." The term "illegal activity" was used by FMC in its Letter and not by U.S. Renal Care. U.S. Renal Care does not allege any "illegal activity" by FMC.

Nevertheless, FMC enjoys market dominance in Planning Areas 7 and 9, and that market dominance has ramifications directly related to several provisions of the Illinois Health Facilities Planning Act (the "Act") and rules adopted pursuant thereto.

For example, the purpose of the Act, as stated in Section 2, is in part to accomplish a health care system characterized by cost containment, quality and access. 20 ILCS 3960/2. Market dominance by any entity can create impediments to cost containment, quality and access.

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Historically, this has been recognized by market observers and economists:

Anticipating a prompt reaction by his rivals that will quickly nullify his gains from price-cutting, the seller in a highly concentrated market will be less likely to initiate a price cut than his counterpart in the atomized market.

Judge Richard A. Posner, AntiTrust Law, at 56 (The University of Chicago Press 2 ed. 2001) (1976).

Further, the price problem posed by an entity's market dominance directly relates to the statutory standard for approval of an application by the Illinois Health Facilities and Services Review Board ("Board"). That standard, set forth at 20 ILCS 3960/6(d), includes in subsection (2):

that economic feasibility is demonstrated in terms of effect on the existing and projected operating budget of the applicant and of the health care facility; in terms of the applicant's ability to establish and operate such facility in accordance with licensure regulations promulgated under pertinent state laws; **and in terms of the projected impact on the total health care expenditures in the facility and community.**

Because the Board is statutorily required to consider the impact an application will have on the cost of care for the health care system, the Board should consider (i) whether de-concentrating care in a Planning Area, and (ii) whether authorizing care competitive to a market dominant entity is likely to have an impact on health care cost.

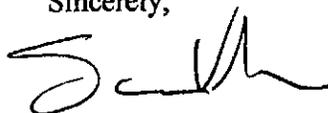
Regarding Claim Two, the Letter accurately describes one set of admission denials which resulted in patients being prohibited access by FMC. A careful review of the U.S. Renal Care application materials, verified in accordance with the statute, demonstrate several others. For instance, in the U.S. Renal Care Bolingbrook Dialysis application, U.S. Renal Care has provided a certified letter detailing the experience of three patients denied admission for dialysis treatment on multiple occasions at a FMC location, due to their lack of an AV Fistula access. Each of these patients were unable to undergo placement of an AV Fistula access and, due to the admissions policy of the nearby FMC location, are and will be required to travel longer distances in order to obtain their care.

The admission denials detailed quite simply constitute a denial of access to care.

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The projects that are the subject of the U.S. Renal Care Applications will increase access to care and provide much needed dialysis services to the changing populations of the projects' service areas. These applications have received broad support from both patients and area hospitals and we look forward to discussing these applicants at the October meeting to obtain the Board's support.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sam Vinson', written in a cursive style.

Sam Vinson