

BRIEFING MEMO

MaineHealth

Pen Bay Healthcare Membership in MaineHealth

DATE: October 13, 2010

TO: Brenda M. Harvey, Commissioner, DHHS

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

FROM: Phyllis Powell, Assistant Director, Planning, Development and Quality
Steven R. Keaten, Health Care Financial Analyst
Larry Carbonneau, Health Care Financial Analyst

SUBJECT: Pen Bay Healthcare 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 seven hospitals: Maine Medical Center; Miles HealthCare, Inc.; Stephens Memorial Hospital; Spring Harbor Hospital; St. Andrews Hospital; Southern Maine Medical Center; 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.
- Pen Bay Healthcare, located in Rockport, Maine, is a non-profit healthcare corporation that is the parent of Pen Bay Medical Center, a 109-bed acute care community hospital, and several other healthcare related entities that serve towns in their primary and secondary service areas of Knox, Waldo and Lincoln counties.
- MaineHealth's members are State Licensed and CMS certified. Several are Joint Commission Accredited.
- Pen Bay Medical Center's (PBMC) current license is valid until May 31, 2011. PBMC is Medicare and MaineCare certified. PBMC is accredited by the Joint Commission; PBMC was last accredited on August 21, 2009. PBMC is presently considered a Tier 1 hospital for the State Employees Health Plan through a special pilot project.

- 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 Certificate of need approval is subject to the determination of approval from the Department of Justice/Federal Trade Commission. The applicants will be required to submit a copy of all correspondence of acceptance or denial from the Department of Justice/Federal Trade Commission.*
 - 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.

* Note: Preliminary Analysis Condition 1 has been rewritten at the applicant's request to the following:

- The Applicants shall provide to the Department any letter from the Department of United States of Justice or Federal Trade Commission indicating any of the following: 1) that the Department of Justice or Federal Trade Commission has granted a request for early termination of 30-day waiting period requirement of the Hart-Scott-Rodino Antitrust Improvement Act for closing on the MaineHealth/Pen Bay Healthcare transaction; or 2) that the Department of Justice or Federal Trade Commission has issued a second request for information under 15 U.S.C. § 18a(e)(2) concerning the MaineHealth/Pen Bay Healthcare transaction. Otherwise, the Applicant shall inform the Department if the 30 day waiting period contemplated by 15 U.S.C. §18a(b)(1) has expired without early termination, or the issuance of a second request, by the Department of Justice or Federal Trade Commission.

II. PROJECT DESCRIPTION:

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

According to the applicant, "as a member of MaineHealth, PBHC will continue and increase its participation in development and implementation of MaineHealth-initiated and sponsored health status improvement, clinical integration, and quality improvement initiatives. PBHC 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. PBHC 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 PBHC 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:	January 13, 2010
Technical assistance meeting held:	February 3, 2010
CON application filed:	May 11, 2010
CON certified as complete:	May 11, 2010
Public Information Meeting Held:	June 28, 2010
Public Hearing held:	June 28, 2010
Public comment period ended:	July 28, 2010
Preliminary Analysis Released:	September 16, 2010
Public comment period ended:	October 1, 2010

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

Following release of the Preliminary Analysis, no public comments were received regarding CON. The Attorney General did submitted comments on the COPA portion of the application.

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

The applicant submitted additional information on September 30, 2010, addressing the conditions recommended by CONU in the Preliminary Analysis.

Preliminary Analysis Condition 1: The Certificate of need approval is subject to the determination of approval from the Department of Justice/Federal Trade Commission. The applicants will be required to submit a copy of all correspondence of acceptance or denial from the Department of Justice/Federal trade Commission.

Applicant’s Response:

“The Preliminary Analysis (p.120) states that the recommended Certificate of Need approval “is subject to the determination of approval from the Department of Justice/Federal Trade Commission. The Applicants will be required to submit a copy of all correspondence of acceptance or denial from the Department of Justice/Federal Trade Commission.””

“This condition needs to be clarified, because there is no requirement that the FTC or Department of Justice make a “determination of approval” of the transaction under the Hart-Scott-Rodino Antitrust Improvements Act, or provide “correspondence of acceptance or denial.””

“The Hart-Scott-Rodino Antitrust Improvements Act, otherwise known as Section 7A of the Clayton Act, 15 U.S.C. § 18a, was added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This Act does not contemplate DOJ or FTC pre-authorization

for mergers or acquisition. Instead, the Act requires only notification to federal antitrust enforcement authorities of the intended merger or acquisition, and then a short waiting period before the parties close on the transaction. Specifically, Section 7A(a) and (b) of the Act require persons contemplating certain mergers or acquisitions to file in advance a notice and report of the transaction with the Federal Trade Commission, and then to wait 30 days before consummating the transaction. Section 7A(b)(2) of the Act permits the FTC, in individual cases and in its discretion, to terminate the waiting period prior to the expiration of the 30 day waiting period, in which case a notice of early termination will be published in the Federal Register. Otherwise, the 30 day waiting period will expire without notice from the Federal Trade Commission. The Federal Trade Commission also has the option to extend the waiting period by issuing a “second request” for information –i.e., for information not included in the notice and report form – in which case the waiting period is extended until 30 days following the production of requested information. Section 7A(e)(2).”

In this instance, MaineHealth and Pen Bay healthcare, Inc. filed their respective notifications and reports to FTC on September 27, 2010. If the FTC shortens the 30 day waiting period, the Applicants will receive a letter from the FTC to this effect. If the 30 days period expires without any notice, the Applicants will receive no written notification from the FTC confirming the expiration of the 30 day period. If the FTC decided to issue a request for more information, the applicants will receive a formal notification.”

“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 United States of Justice or Federal Trade Commission indicating any of the following: 1) that the Department of Justice or Federal Trade Commission has granted a request for early termination of 30-day waiting period requirement of the Hart-Scott-Rodino Antitrust Improvement Act for closing on the MaineHealth/Pen Bay Healthcare transaction; or 2) that the Department of Justice or Federal Trade Commission has issued a second request for information under 15 U.S.C. § 18a(e)(2) concerning the MaineHealth/Pen Bay Healthcare transaction. Otherwise, the Applicant shall inform the Department if the 30 day waiting period contemplated by 15 U.S.C. § 18a(b)(1) has expired without early termination, or the issuance of a second request, by the Department of Justice or Federal Trade Commission.”

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:

No response.

CONU Comments:

This condition will remain.

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:

No response

CONU Comments:

This condition will remain.

Additional Applicant's Response:

"For reasons stated at pp. 31-32 of its May 12, 2010 CON application, MaineHealth respectfully disagrees with the Division's apparent conclusion (Preliminary Analysis, p. 1) that the change of control transaction between MaineHealth and Pen Bay entails a new capital expenditure for CON statutory purposes."

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.

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.

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 PBHC since the application was filed.

VI. CONCLUSION:

The Preliminary Analysis by CONU staff dated September 16, 2010, 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 four 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 United States of Justice or Federal Trade Commission indicating any of the following: 1) that the Department of Justice or Federal Trade Commission has granted a request for early termination of 30-day waiting period requirement of the Hart-Scott-Rodino Antitrust Improvement Act for closing on the MaineHealth/Pen Bay Healthcare transaction; or 2) that the Department of Justice or Federal Trade Commission has issued a second request for information under 15 U.S.C. § 18a(e)(2) concerning the MaineHealth/Pen Bay Healthcare transaction. Otherwise, the Applicant shall inform the Department if the 30 day waiting period contemplated by 15 U.S.C. § 18a(b)(1) has expired without early termination, or the issuance of a second request, by the Department of Justice or Federal Trade Commission.
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 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>	
\$ 94,226,246	Capital costs as Approved
<u> \$ 0</u>	Contingency
\$ 94,226,246	Total Approved Capital Costs
<u>Incremental 3rd Year Costs</u>	
(\$ 286,000)	Approved Incremental Costs (Savings)
<u>Capital Investment Fund</u>	
\$ 0	Approved CIF
<u> \$ 0</u>	Total CIF Debits