

## **BRIEFING MEMO**

### **Acquisition of EMMC Dialysis Center Assets by DaVita, Inc. (d/b/a Total Renal Care).**

**DATE:** October 19, 2012

**TO:** Mary C. Mayhew, Commissioner, DHHS

**THROUGH:** Ken Albert III, Director, Division of Licensing and Regulatory Services

**FROM:** Phyllis Powell, Assistant Director, Medical Facilities  
Larry Carbonneau, Senior Health Care Financial Analyst

**SUBJECT:** DaVita, Inc. (d/b/a Total Renal Care, Inc.) purchase of Eastern EMMMC's Dialysis Center Assets.

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**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 Section 326 et seq., as amended.

**REGISTERED AFFECTED PARTIES:** None

#### **I. BACKGROUND:**

Total Renal Care, Inc. ("TRC") is a wholly owned subsidiary of DaVita Inc. ("DaVita"), a Fortune 500® company and leading provider of kidney dialysis services in the United States for patients suffering from chronic kidney failure, also known as end stage renal disease ("ESRD"). As one of its primary operating segments, DaVita owns or provides administrative services to over 1800 dialysis facilities in the United States, serving approximately 142,000 patients at these facilities. TRC operates 640 of the DaVita dialysis centers in 35 states and the District of Columbia. TRC holds assets worth more than \$2 billion.

DaVita is one of the nation's largest dialysis providers. The company is a leader (patients served annually) in delivering services to patients with chronic kidney failure and end stage renal disease (ESRD) treatment. DaVita was honored for seven consecutive years (2005-2011) as one of the "Top 125" ranked companies of employer-sponsored workforce training and development. In 2012, the American Association of Kidney Patients (AAKP) awarded its Medal of Excellence to Allen Nissenson, MD, FACP, Chief Medical Officer of DaVita. In 2010, DaVita received the National Health Information Award for consumer health information programs and materials that address the growing needs of healthcare consumers.

Eastern Maine Medical Center ("EMMC") has provided inpatient acute, outpatient chronic, and home based dialysis programs for many years in northern and eastern Maine. EMMC currently operates outpatient chronic dialysis centers in Bangor (Union Street), Ellsworth and Lincoln.

#### **II. PROJECT DESCRIPTION:**

Total Renal Care, Inc. (TRC), a wholly owned subsidiary of DaVita, Inc. proposes to acquire assets of Eastern Maine Medical Center (EMMC) relating to EMMC's outpatient dialysis business, home dialysis program, and acute inpatient dialysis treatments rendered at EMMC's

main hospital campus. EMMC has provided inpatient acute, outpatient chronic, and home based dialysis programs for many years in northern and eastern Maine.

Total Renal Care, Inc. seeks approval to purchase the dialysis assets from Eastern Maine Medical Center. The estimated capital expenditure associated with the asset purchase and the associated lease(s) is \$17,300,000.

The Preliminary Review by Healthcare Oversight staff, dated September 28, 2012, concluded that this application met all of the CON review criteria with the following condition:

The applicant must present a plan to Certificate of Need Unit, 15 days before the project is commenced, for the development of a Patient Support Board, describing its responsibilities, proposed meeting schedule and other pertinent information. An approved summary of Board activities will be forwarded to CONU within 60 days of each board meeting. This Patient Support Board will be required to meet at least quarterly for the first three years following commencement of this project.

### **III. HIGHLIGHTS:**

Letter of Intent filed: March 5, 2012  
Technical Assistance meeting held: March 14, 2012  
CON application filed: April 11, 2012  
CON application certified as complete: April 11, 2012  
Public Informational Meeting held: May 25, 2012  
Public Hearing Held: July 10, 2012  
Public comment period ended: August 9, 2012  
Preliminary analysis released on: September 28, 2012  
Public comment period ended on: October 12, 2012

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

Following release of the Preliminary Analysis, public comments were received regarding the preliminary analysis. The comments were received from one person. Kathy Day, RN spoke at both the public information meeting and the public hearing about her disapproval of the project. Her comments were also sent to Representative Adam Goode as well as CONU staff.

Nurse Day complained that the condition is "wimpy and incomplete." "This Patient Support Board should have some rules attached, and DaVita should not be the ones making the rules. Patients and/or family members, community representatives, and I should be part of that board. Otherwise, if DaVita makes the rules, and chooses who they want, we would be depending on the goodness of their hearts to do right by patients. (Big mistake). Another problem is that this condition is self-limiting by only being for 3 years. That is random and a lot could change in 3 years, including Medicare coverage for care. NO dialysis patient should ever be turned away for care regardless of ability to pay. Dialysis is not a choice, it is a necessary lifesaving treatment. DaVita is private and FOR PROFIT...meaning basically, they can make their own rules when it comes to providing care or refusing care."

“I still strongly believe that this is the wrong decision for Maine dialysis patients, but I am not surprised by the decision....DaVita pandered to the anti-union sentiment in Augusta, and characterized me as a monster. Nothing could be further from the truth. All I care about is patients getting and keeping safe care.”

“I have some concerns about transparency regarding the board you have stipulated for DaVita. I believe that assigning the rule writing and organization of this Patient Support Board strictly to DaVita is a mistake.

1. The State of Maine should lay out some rules for this Patient Support Board
2. Patients and/or their families must be fairly represented on this Board
3. DaVita must not have the voting majority on this Patient Support Board.
4. A process must be put in place that patients can use and contact this board without fear of reprisal
5. It must be made clear who this board reports to. i.e. The State DHHS, EMMC, or the communities of Bangor, Lincoln, and Ellsworth.
6. It must also be made clear that this board is to benefit patients, to give them an outlet for concerns and complaints and to allow and encourage them to engage in their own care.
7. All reports out of this board must be public
8. If after 3 years there are lingering concerns about the DaVita clinics, the board will be renewed. Or, if concerns arise after the 3 years is over, the board may be resumed at any time.”

“Involving patients, their families, the communities, and advocates like me in a Patient Support Board will preserve the integrity and transparency of these dialysis practices. The most important goal of anything that you, the State DHHS, DaVita, EMMC and all other concerned parties/stakeholders is to preserve Patient safety, high quality of care and accessibility of care. Effective oversight is imperative.”

In response to this patient advocates concern regarding issue #8 , this condition is limited to 3 years in length because CONU does not have the scope of regulatory review to extend past three years.

The applicant has commented below that they have, in addition to developing a response to the condition, additional assets and programs in place to ensure patient satisfaction and care.

Additional safeguards are in place to ensure safe practices. The certification process for CMS compliance requires many of the safety procedures and equipment that Ms. Day discussed. The Survey and Certification staff of the Division of Licensing and Regulatory Services will conduct regular surveys of these facilities and ensure compliance with the standards in place for these facilities. Patients have access to the department's complaint line to register complaints.

## **V. APPLICANT'S RESPONSE TO PRELIMINARY ANALYSIS (condensed)/HEALTHCARE OVERSIGHT COMMENTS:**

The applicant responded to the preliminary analysis on October 8, 2012.

The applicant commented on three aspects of the Preliminary Analysis. The comments indicate that the applicant agrees with the proposed condition and is reviewing programs currently

available to its facilities in order to ensure that the facilities operating in Maine will meet the condition in this CON.

#### Peer Support Board

“Peer support Groups are comprised of patients, their family members or legal representatives, and DaVita staff. The Peer Support Groups are led by a DaVita Social Worker, Dietician, or Registered Nurse, including facility administrators. The Peer Support Group provides a group setting for patients to discuss various issues relating to their dialysis treatment. Topics may range from lifestyle issues to discussing the dialysis program and expectations. Though the Peer Support Group is not the forum for a patient grievance, it is possible that a patient may raise a specific complaint or grievance during a peer Support group meeting. If the grievance is specific to the individual, then the facility will follow CMS regulations relating to patient grievances and DaVita policies in accordance therewith. The patient will be provided the appropriate forms and DaVita’s grievance resolution process will take its normal course, outside the Peer Support Group meeting. If the complaint is more general in nature then the group leader will remind participants of the right to grieve, but also let the discussion develop organically. Consistent with the Healthcare Oversight condition of approval, the Peer Support Group will meet at least quarterly, and the minutes of the meetings will be provided to Healthcare Oversight no more than sixty (60) days after the meeting.”

#### Review of Clinical Operations at ESRD Facilities

“Regarding the requirement for “review of clinical operations at the ESRD facilities” as a way to ensure “local control,” we note that DaVita has in place a Continuous Quality Improvement Program, including Quality Improvement and Facility Management Meetings (QIFMM). The Quality Improvement Program contemplates a comprehensive review of clinical operations on a monthly basis. Required at the QIFMM meeting are the following members of the local team: the Medical Director, Facility Administrator/Nurse Manager, Social Worker, Registered Dietitian, and Biomedical Technician.”

#### Purchase Price

“With respect to the Preliminary Analysis, we simply note that at page 20 there is discussion that the parties have not finalized the purchase price. However, the parties have finalized the purchase price at \$17,300,000 as reported [to Certificate of Need Unit staff] on September 2, 2012.”

### **VI. CONCLUSION:**

For all the reasons set forth in the Preliminary Analysis and in this memorandum, CONU concludes that the review criteria have been satisfied. CONU recommends that the Commissioner approve a Certificate of Need for this applicant with a condition.

### **VII. RECOMMENDATION:**

The Certificate of Need Unit recommends this proposal be **Approved with the included condition.**