

April 5, 2013

**VIA ELECTRONIC MAIL**

Karen Nidermayer, Analyst  
Washington State Department of Health  
Certificate of Need Program  
Mail Stop 47852  
Olympia, WA 98504-7852  
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**RE: Certificate of Need Application #13-08 – Pivotal Unresolved Issue**

Dear Ms. Nidermayer:

On behalf of several state and national advocacy and legal organizations, we write to provide the Department of Health's Certificate of Need Program with comments on the draft Operating Agreement submitted by PeaceHealth related to the Department's pivotal unresolved issue on the affiliation of PeaceHealth with United General Hospital in Sedro-Woolley.

The draft Operating Agreement submitted by PeaceHealth fails to assuage any of the concerns previously identified by the undersigned parties with PeaceHealth's Certificate of Need Application #13-08. Rather, the Agreement validates our concerns about the imposition of religious restrictions on access to health care services and raises new concerns about the proposed affiliation. We urge the Department of Health not to approve PeaceHealth's Certificate of Need application unless the District and PeaceHealth take steps to remedy the alarming deficiencies with the proposed affiliation discussed in this letter.

**A. The Agreement Contemplates Restrictions on Access to Health Care Services, Counseling and Referrals Based on Religious Doctrine in Violation of the U.S. Constitution and State Law.**

By stating that "PeaceHealth will conduct Healthcare Operations in compliance with PeaceHealth's mission, vision, values and ethical policies," the Agreement confirms that PeaceHealth will operate United General Hospital consistent with the Ethical and Religious Directives for Catholic Health Care Services ("the Directives").<sup>1</sup> As the undersigned parties have noted in prior comments on this Certificate of Need application, the Directives restrict access to health care services based on religious doctrine. Except for a very short enumerated list of "Major Decisions" which require the written consent of both PeaceHealth and the District,<sup>2</sup> PeaceHealth retains full control to "make all decisions regarding the Healthcare Operations" at United General Hospital.<sup>3</sup> The Agreement further provides that "PeaceHealth's CEO for the

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<sup>1</sup> Operating Agreement (Draft Jan. 15, 2013), at § 2.c.

<sup>2</sup> *Id.* at Exhibit D.

<sup>3</sup> *Id.* at § 2.d.

Northwest Services Area shall set strategic direction and lead network-wide strategic and operational planning for the Northwest Service Area, including Healthcare Operations in the District.”<sup>4</sup> The Agreement, which contemplates an initial 30-year operating period, with automatic renewal for two additional 10-year terms,<sup>5</sup> puts at risk the availability of comprehensive family planning services, STD reduction counseling, emergency reproductive care, and end-of-life counseling and referrals at United General Hospital. Although United General Hospital may not currently provide for certain reproductive health services because it does not have an obstetrical unit, it would be short-sighted to approve PeaceHealth’s application on the basis that there is no actual change in or denial of health care services when the population and health care needs of the Skagit County community may change over the course of the proposed 50-year contract term.

The Establishment Clause of the U.S. Constitution prohibits the imposition of religious restrictions on land or in a facility that is owned by a government entity. At a minimum, the U.S. Constitution requires a government entity to mitigate the effect of religious imposition. The Agreement permits PeaceHealth to amend medical staff bylaws “to reflect PeaceHealth’s standard language and other requirements,” creating an opening for PeaceHealth to introduce a requirement that all medical staff adhere to the Directives.<sup>6</sup> The Agreement also affords PeaceHealth significant control over management and governance of the hospital, including the selection of a community board, which will increase PeaceHealth’s ability to impose restrictions on health care services based on religious doctrine.<sup>7</sup> The District would be impermissibly permitting and even supporting the imposition of PeaceHealth religious restrictions on health care in District-owned facilities under these Agreement provisions. At a minimum, the District should be allowed to appoint at least half of the members of the contemplated community board.

Further, under the Agreement, PeaceHealth promises to “operate” and “maintain access” to primary care services, and “to the extent clinically safe and financially sustainable, ancillary services (including diagnostic services) and specialty provider services.”<sup>8</sup> To the extent that PeaceHealth, due to its adherence to the Directives, will not provide services, counseling, or referrals on the full range of reproductive health services, which are considered primary care services for women, the District will be violating the Reproductive Privacy Act, which prohibits the government from denying or interfering with a woman’s fundamental rights to choose or refuse birth control or abortion and from discriminating against the exercise of these rights.<sup>9</sup> The Department of Health should not approve PeaceHealth’s Certificate of Need application unless the Department receives legally binding written assurances that health care services, counseling, and referrals will not be restricted based on religious doctrine.

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<sup>4</sup> *Id.* at § 2.g.

<sup>5</sup> *Id.* at § 4.a, .b.

<sup>6</sup> *Id.* at § 2.f.

<sup>7</sup> *Id.* at § 2.g.

<sup>8</sup> *Id.* at § 7.a.vii.

<sup>9</sup> RCW 9.02.

**B. The Agreement Contemplates a Taxpayer-Funded Subsidy That Violates the Washington Constitution.**

The Agreement contemplates the provision of a taxpayer-funded subsidy to PeaceHealth consisting of 90 percent of annual taxes allocated to the District,<sup>10</sup> or an estimated \$807,000 each year,<sup>11</sup> in exchange for \$10 to rent District-owned health care facilities.<sup>12</sup> As previously noted by the undersigned parties, the Washington Constitution provides that “no public money or property” shall be used to support “any religious establishment.”<sup>13</sup> This annual subsidy to PeaceHealth, along with the District’s assessment of only nominal rent, would impermissibly support the religious restrictions on health care imposed by PeaceHealth.

**C. The Agreement Contemplates Permitting PeaceHealth to Discriminate in the Provision of Health Care Services in Violation of the Washington Law Against Discrimination.**

Under the Agreement, PeaceHealth covenants not to discriminate in its Healthcare Operations based on race, color, sex, marital status, sexual orientation, ethnicity, or national origin.<sup>14</sup> The Agreement does not, however, incorporate the Washington Law Against Discrimination, implying that PeaceHealth is free to discriminate on the basis of creed, honorably discharged veteran or military status, the presence of any sensory, mental, or physical disability, or the use of a trained dog or service animal by a person with a disability.<sup>15</sup> As a place of public accommodation, PeaceHealth may not discriminate in the provision of health care services based on any of the characteristics protected by state law. The Department of Health should not approve PeaceHealth’s Certificate of Need application unless PeaceHealth provides legally binding written assurances that it will not discriminate in the operation of United General Hospital.

**D. The Agreement’s Exclusivity and Non-Compete Provisions Likely Violate State Law and Public Policy.**

The sole purpose of a public hospital district is to provide health care services to District residents. This public policy is threatened by the exclusivity and non-competes provisions of the Agreement. Under the Agreement, “PeaceHealth has been granted the *exclusive* right and responsibility to conduct Healthcare Operations in the District” during the term of the Agreement.<sup>16</sup> The District “shall not, within the District Service Area, directly or indirectly, *operate* or *invest* in medical services,” except for certain community health outreach programs enumerated in Exhibit C, or with PeaceHealth’s prior consent.<sup>17</sup> The Agreement also contains a

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<sup>10</sup> Operating Agreement, at § 17.b, Exhibit G.

<sup>11</sup> Based on reported tax levy of \$897,418.10 payable to the District in 2013. Skagit County, Office of the Assessor, *2012 Property Tax Assessments and Levies Payable in 2013*, available at <http://www.skagitcounty.net/Assessor/Documents/2013Taxinfo.pdf>.

<sup>12</sup> Operating Agreement, at § 5.a.

<sup>13</sup> Wash. Const. art. I, § 11.

<sup>14</sup> Operating Agreement, at § 7.a.vi.

<sup>15</sup> Other protected characteristics under the WLAD. *See* RCW 49.60.

<sup>16</sup> Operating Agreement, at § 16 (emphasis added).

<sup>17</sup> *Id.* at § 17.a (emphasis added).

non-compete provision that bars the District from “directly or indirectly own[ing], leas[ing], manag[ing], operat[ing], market[ing], or engag[ing] in any business, enterprise, or other activity relating to the operation of a hospital, clinic, home health, or medical clinics, or any other health-care-related activity within the District Service Area,” other than those activities otherwise permitted under the Agreement, for the term of the Agreement, plus two years in the event of termination of the Agreement due to District default.<sup>18</sup> These provisions impermissibly tie the hands of the District should it seek to provide or contract for the provision of health care services that PeaceHealth will not provide due to its adherence to the Directives. In addition, the non-compete provision impermissibly bars the District from fulfilling its statutory obligations to taxpayers who formed and fund the District “to provide hospital services and other health care services” for District residents.<sup>19</sup> The Department of Health should not approve PeaceHealth’s Certificate of Need application unless these provisions are removed from the Agreement.

#### **E. The Agreement Permits PeaceHealth to Transfer Its Rights or Obligations to a More Restrictive Health Care Corporation.**

Under the Agreement, without the District’s consent or approval, PeaceHealth may “sublet, transfer, assign, or delegate any portion of its rights or obligations . . . to an affiliated or successor entity, including a member corporation or other entity, in which it has an ownership interest, directly or indirectly, or with which it may merge, affiliate, acquire or be acquired.”<sup>20</sup> Although PeaceHealth and Catholic Health Initiatives recently announced that they are suspending negotiations over forming a partnership,<sup>21</sup> the threat of further restrictions on access to health care services remains, as the health care corporations have stated that they “will remain actively engaged in exploring other opportunities to work together.”<sup>22</sup> The Department of Health should not approve PeaceHealth’s Certificate of Need application unless it receives legally binding written assurances that any transfer of PeaceHealth’s interest in the operation of United General Hospital will not result in the imposition of religious restrictions on health care services.

#### **Conclusion**

United General Hospital is an essential source of critical medical care in Skagit County, and the citizens of Skagit County have funded the District for the provision of hospital and health care services unrestricted by religious doctrine. The state and federal constitutions prohibit the government from subsidizing health care facilities that deny health care services to the community based on such doctrine. It is clear that PeaceHealth intends to restrict health care services in violation of state law and public policy under the terms of the draft Operating Agreement. It is also clear that under the Agreement, the District will be in breach of its obligations to District residents.

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<sup>18</sup> *Id.* at § 16. *See also id.* at § 2.h (restricting District activities).

<sup>19</sup> RCW 70.44.003.

<sup>20</sup> Operating Agreement, at § 15.

<sup>21</sup> Aaron Corvin, *PeaceHealth, CHI Suspend Negotiations Over Forming Partnership*, THE COLUMBIAN, Apr. 3, 2013, available at <http://www.columbian.com/news/2013/apr/03/peacehealth-chi-suspend-negotiations-over-forming/>.

<sup>22</sup> *Id.*

We request that the Department of Health seek legally binding written assurances that the citizens of Skagit County seeking care at United General Hospital and/or Hospice of the Northwest will continue to receive treatment that is in accordance with medically-accepted standards of care currently provided by those facilities, and will continue to have access to comprehensive family planning services, STD reduction counseling, emergency reproductive care, and end-of-life counseling and referrals. In addition, PeaceHealth must guarantee that in the event of any transfer of its rights or obligations under the agreement to Catholic Health Initiatives or any other religiously affiliated health care corporation, no restrictions on health care services based on religious doctrine will be introduced at United General Hospital. Lastly, we request that the Department of Health acknowledge and guarantee that United General Hospital, a publicly-owned and taxpayer-supported hospital, does not permit the introduction of restrictions on health care services based on religious doctrine.

We appreciate the opportunity to submit comments on Certificate of Need Application #13-08 for the Department of Health's consideration. If you have any questions regarding our comments, please contact Margaret Chen or Sarah Dunne at (206) 624-2184.

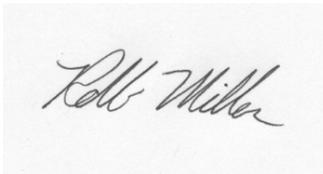
Sincerely,



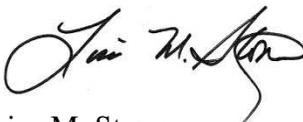
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Deborah Oyer, MD  
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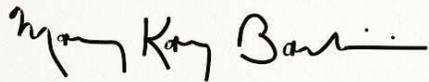
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