

BEFORE THE DEPARTMENT OF JUSTICE  
FOR THE STATE OF MONTANA

---

In the Matter of the Application by Benefis  
Healthcare for Repeal of the Certificate of  
Public Advantage

)  
)  
) **FINDINGS OF FACT**  
)  
)

---

**SECTION ONE**

This matter is before the Department of Justice (“Department”) pursuant to Section 17.3 of the Certificate of Public Advantage (COPA) issued by the Department of Justice on July 9, 1996, which states that, “[w]ithin ten years following the effective date of this COPA, the Department shall conduct a review to determine the extent to which these Terms and Conditions should be maintained, modified, amended or repealed in order to further the purposes of Mont. Code Ann. §§ 50-4-601 to -623.” The purposes of this legislation are “controlling health care costs and improving the quality of and access to health care.” Within 90 days following the commencement of that review, the Department shall issue findings of fact supporting its decision to maintain, modify, amend or repeal any of these Terms and Conditions.” Review began on July 15, 2006, and these findings are being issued within the 90-day timeframe.

**I. PROCEDURE**

Prior to commencing the ten-year review, the Department requested input from Benefis concerning its views on “the extent to which the terms and conditions of the COPA should be maintained, modified, amended or repealed.” Benefis submitted a

proposal on April 20, 2006, recommending repeal of the COPA upon its ten-year anniversary. Notice of a public hearing to receive public comment was disseminated through the newspaper and television media in May 2006. On June 27, 2006, a public hearing was held in Great Falls, Montana, in which various members of the public gave testimony in favor of discontinuing or retaining the COPA. A transcript of the hearing and Benefis's April 20, 2006, letter was placed on the Department's website. Written comments were received by July 10, 2006, to which Benefis was given an opportunity to respond by August 15, 2006. Fifty-eight written comments from concerned and interested members of the consumer and professional medical communities were received. There were 38 commenters at the public hearing on June 27, 2006. The Department representatives interviewed various commenters in the month of August 2006.

## **II. COMMENTS**

The comments may be briefly summarized as follows:

### **A. For Elimination of the COPA**

Benefis's arguments for repealing the COPA may be summarized as follows:

1. The COPA is no longer needed as a substitute for price competition to maintain lower costs because the increase in competition after 1996 has replaced the need for regulation.

2. The COPA is no longer needed to insure that the objective of cost containment has been met. Benefis states that cost reductions mandated by the COPA's

revenue cap have been achieved and incorporated into the lower prices. Also, because a large portion of Benefis's revenues are fixed reimbursement from Medicare and Medicaid, Benefis will be forced to maintain lower costs.

3. The COPA is no longer necessary to ensure access to the medical services specified in the COPA since Benefis asserts it will continue to provide these services.

4. The COPA is no longer needed to assure quality of care because ongoing quality assurance monitoring by private organizations and the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) will remain in place without the COPA.

5. Benefis is resolved to continue to pass on low costs to the community, to provide high-quality care.

In addition to Benefis, many others submitted comments supporting repeal of the COPA. These comments by and large, repeated the arguments made by Benefis.

**B. Comments for Retention of the COPA**

The Department received and considered a variety of comments opposing repeal of the COPA for the following reasons:

1. Benefis does not face competition for inpatient services because it is the sole full-tertiary hospital provider in the service area. The competitive changes identified by Benefis do not affect competition for inpatient services.

2. Without the COPA revenue regulation, there is no check on the rate increases that Benefis can charge to private payors. The fact that approximately

two-thirds of Benefis's revenues are derived from the government means there is a greater incentive for Benefis to increase prices paid by private payors and individuals with insurance or private resources.

3. The COPA does not threaten Benefis's financial viability.
4. The COPA is necessary to prevent Benefis from eliminating services.
5. Eliminating "open staff" requirements of the COPA will result in Benefis denying hospital privileges to Great Falls Clinic physicians for economic reasons, i.e., through use of economic credentialing.
6. Eliminating the COPA-mandated referral policy will result in Benefis unfairly steering patients to its own service and equipment providers.
7. Failure to maintain the revenue cap will result in higher costs for patients.
8. Benefis's challenge to the Central Montana Hospital needs to be resolved before going forward with the decision to discontinue the COPA.
9. The COPA is needed to prevent Benefis from eliminating important services like the Emergency Room, air ambulance and other services.
10. The COPA has not prevented Benefis from improving its financial performance, health and viability. Under the COPA, Benefis has been able to substantially increase gross and net revenues, generate significant profits and expand its campus substantially.

11. Certain services would be made unavailable in the community because of the market power Benefis has over inpatient services.

## **SECTION TWO**

Pursuant to Section 17.3 of the COPA, the Department makes the following findings based upon its review of the materials and information submitted by Benefis in support of its request to repeal the COPA; written public comments; the information presented at the public hearings on June 27, 2006 in Great Falls; and, the evaluation conducted by the Department's consultants, as well as additional information submitted by Benefis and other interested parties in response to inquiries from the Department.

Section 17.3 of the COPA provides that "within ten years following the effective date of this COPA, the Department shall conduct a review to determine the extent to which these terms and conditions should be maintained, modified, amended or repealed in order to further the purposes of Montana Code Ann. §§ 50-4-601 through 603." The purposes of the COPA legislation are "controlling health care costs and improving the quality of and access to health care."

### **I. MODIFICATION OR AMENDMENT OF THE COPA**

Following the adoption of the COPA in 1996, the Department made several modifications to the COPA in response to changing conditions in the market for health care services. On December 6, 2002, Benefis filed a petition with the Department requesting several modifications it claimed were necessary to adjust for changes in the

health care industry that resulted in increased costs to Benefis not anticipated when the Revenue Cap Model was adopted in 1996.

On April 4, 2003, the Department issued a Decision granting many of the requested modifications. The Department modified the COPA to increase the inflation factor in an amount necessary to provide sufficient funding to Benefis and to ensure quality health care. The Department also granted Benefis's request to allow exclusive contracts with anesthesiologists, to modify the annual survey requirement and to eliminate the annual reporting requirements in Sections 1.5-2, 1.5-3, and 1.5-4 of the COPA.

Neither Benefis nor any other interested party submitting comments to the Department during its ten-year review of the COPA has proposed or requested that the COPA be modified or amended. Data produced to the Department by Blue Cross Blue Shield of Montana (BCBSMT) confirms that for the nine-year period following implementation of the COPA in 1997, Benefis's net prices have been consistently lower than the prices charged by the three other large Montana hospitals. Benefis has been able to offer lower prices to consumers while maintaining healthy profit margins.<sup>1</sup> Benefis

---

<sup>1</sup>The profit margin on operating income for Benefis Healthcare (excluding subsidiaries and investment income) was approximately 4.5 for 2005. That solid financial performance (and the substantial capital renovations and technological improvements made by Benefis during the past nine years) demonstrates that the COPA has not prevented Benefis from successfully responding to increased competition in the past. Benefis does, however, raise legitimate concerns about the impact of "specialty hospitals" that may justify modification of the COPA as the nature and extent of the competition becomes more certain.

continues to provide access to all medical services offered as of December 31, 1995, as required by Section 4.1 of the COPA. Based on these findings, the Department concludes that the COPA revenue cap regulation is achieving the statutory purpose of “controlling health care costs” while maintaining access to health care.

Accordingly, pursuant to Section 17.3 of the COPA, the Department determines that there is no present need to modify or amend the Terms and Conditions of the COPA “in order to further the purposes of Montana Code Ann. §§ 50-4-601 to 603.”

## **II. REPEAL OF THE COPA.**

In response to the Department’s request for recommendations concerning the Ten Year Review required by Section 17.3, Benefis proposed that the COPA be repealed in its entirety. Benefis contends that the COPA is no longer needed as a substitute for price competition to maintain lower costs because the increase in competition after 1996 has replaced the need for regulation.

### **A. Increased Competition Generally**

The Department agrees with Benefis’s assertion that there have been significant increases in competition for certain health care services provided by Benefis. In 2005, the joint venture between Benefis and the Great Falls Clinic to provide outpatient surgery services was terminated. The Great Falls Clinic opened a new facility that competes directly with Benefis in several service areas including outpatient surgery, laboratory, radiology, non-invasive cardiology, gastroenterology, and other services. It should be noted that the Great Falls Clinic and Essentia may expand their cardiology program in the

near future. The Great Falls Clinic also opened a cancer center in 2005 that competes with Benefis for cancer-related medical services. That same year the Clinic sold a one-third interest in its surgery center to Essentia Health, a large Minnesota-based national health/hospital system.

In addition to the competition from the Great Falls Clinic and Essentia, Benefis contends that it also faces competition from other medical destination centers around Montana, as well as outside the state. Benefis contends that “because of the growth of providers in competition with Benefis over the last ten years, the COPA is no longer needed as a substitute. The competitive marketplace has now stepped in and competitive pressures will only continue to increase in the future.”

Benefis also argues that the COPA is no longer needed to further the purposes of “controlling health care costs and improving the quality of and access to health care” because “the cost savings from consolidation have been achieved and cost containment measures will continue to be in place.” See, 4-20-06 letter from Neil Ugrin to the Montana Department of Justice at page 4. According to Benefis, roughly two-thirds of its patient revenues are paid by Medicare and Medicaid, “payors that do not pay for services based on Benefis’ charges; rather they establish their own payments rates.” Benefis asserts that when “two-thirds of a hospital’s volume drives cost decisions, there is little need for another mechanism to do so.”

BCBSMT submitted comments in opposition to Benefis’s request to repeal the COPA. BCBSMT asserts that “conditions in the marketplace have not changed to the extent that competition would promote reductions in cost and improvements in access



and quality better than does the agreement or transaction at issue.” BCBSMT further asserts that Benefis’s argument that increased competition has eliminated the need for regulation “is focused upon physician networks and outpatient services, making little or no mention of inpatient hospital services or its role as the sole tertiary hospital in the service area.” According to BCBSMT, the “competition” Benefis identifies is not significant competition and has little, if any, effect on its inpatient rates. BCBSMT also states that “the Attorney General should take notice that Benefis is involved in litigation aimed at eliminating much of the competition presented as justifying repeal of the COPA.” See, BCBSMT 7-7-06 Comments at page 4.

**B. Competition for Inpatient Services**

The Department agrees with Benefis’s contention that the relevant inquiry for purposes of determining whether repeal of the COPA is justified is whether “the growth in providers in competition with Benefis over the last ten years” has eliminated the need for a COPA to “serve as a substitute for competition.” Benefis’s 4-20-06 Proposal Letter at H. As BCBSMT points out, however, the increase in competition necessary to justify repeal must include competition for inpatient hospital services.

Benefis has identified several developments in the market for health care services in the Great Falls area which have the potential to act as a competitive restraint on the provision of inpatient hospital services by Benefis. The most significant developments, however, have only recently occurred, and the viability and competitive impact of those changes cannot be adequately evaluated until uncertainties in the evolving marketplace are resolved.

## 1. The Great Falls Clinic

The Great Falls Clinic recently opened a large specialty clinic building in Great Falls to compete with Benefis in the areas of outpatient surgery, radiology, laboratory, non-invasive cardiology, gastroenterology and cancer-related services. It is not yet clear, however, the extent to which that competition can be used by health insurers and other consumers to negotiate lower prices for inpatient hospital services. For example, BCBSMT claims that Benefis's power over inpatient hospital services is evidenced by the fact that as of July 1, 2005, "Benefis reduced its previous 10% discount on services to only 3%, a 7 point increase in rates without any consideration of the volume of business provided by BCBSMT to Benefis." BCBSMT Comments at page 6. Benefis argues that it offered BCBSMT a 15% discount if it would open its Montana Care Plan to all physicians, not just physicians affiliated with the Great Falls Clinic. In a competitive market, Benefis's position would reflect a type of "selective contracting" that is consistent with competition. The Department finds, however, that the increase in competition from the Great Falls Clinic, by itself, does not provide a sufficient basis for eliminating COPA regulation over inpatient hospital services.

The Great Falls Clinic has expressed an intention to develop a regional cardiovascular program including invasive cardiology and surgery in the near future. The inpatient and outpatient competitive impact of implementing this program is unknown.

## 2. Central Montana Hospital

The Central Montana Hospital provides a direct source of competition for Benefis. The future status and viability of that competition, however, remain uncertain pending the

outcome of litigation over the licensing of that facility. Shortly after the Great Falls Clinic and Essentia announced plans to jointly operate Central Montana Hospital as a for-profit inpatient/outpatient competitor, Benefis filed an action in Montana District Court requesting injunctive relief to prevent the Montana Department of Public Health and Human Services from issuing a license to Montana Health Partners, a Montana limited liability company owned by Essentia and the Great Falls Clinic. On March 23, 2006, the District Court denied Benefis's motion for a preliminary injunction. The Montana Supreme Court affirmed that decision on October 4, 2006. The Supreme Court emphasized that its decision "is not intended to express and does not express any opinion about the ultimate merits of the individual issues or the case."

The merits of Benefis' argument--that the challenged transaction violates Montana law and constitutes a type of competition that the Montana legislature has determined is harmful to the public interest--are not before the Department at this time. Until that challenge is resolved, however, the Department cannot conclude that this potential source of competition provides a sufficient basis for repealing the COPA under existing market conditions.

### 3. Hospitals Outside of Great Falls.

Hospitals outside Great Falls may also compete with Benefis for inpatient services in certain geographic areas. To properly evaluate the existence and extent of this potential source of competition, the Department would need access to patient discharge information for hospitals outside of Great Falls. The Montana Hospital Association (the private entity that receives and maintains such information for all Montana hospitals)

declined the Department's request for this information, citing the confidentiality concerns of participating hospitals. Benefis also requested this information but was unable to obtain the consent of the other hospitals necessary to permit public disclosure. The Department elected not to pursue efforts to compel production of the information at this time due to uncertainty over the future of the Montana Central Hospital.

**C. Conclusion**

The Department finds that there is not sufficient evidence to conclude that increases in competition have eliminated the need for regulation over inpatient hospital services. Accordingly, repeal of the COPA at this time would not further the purposes of Montana Code Ann. § 50-4-601. The Department will continue to monitor competitive developments in the marketplace that may justify modification, amendment or repeal of the COPA. Such action may be necessary due to the rapidly changing health care services market in Great Falls.

Dated this \_\_\_\_ day of October, 2006.

---

MIKE McGRATH  
Attorney General