



U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 28 1994

John R. Cummins, Esquire
Greenbaum Doll & McDonald
3300 First National Tower
Louisville, Kentucky 40202-3107

Dear Mr. Cummins:

This letter responds to your request, on behalf of Physician Care, Inc. ("PCI"), for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6, regarding PCI's proposal to establish a health care provider network in south-central Kentucky. For the reasons set forth below, the Department has no present intention of challenging PCI's proposed activities under the antitrust laws.

From information provided by you, we understand that PCI will be formed as a non-profit Kentucky corporation headquartered in Bowling Green, which is located in Warren County, Kentucky. PCI's service area encompasses much of south-central Kentucky, an area known as the Barren River Area Development District ("BRADD").¹ PCI intends to offer physician services to self-insured employers and other third-party payers in this area. At least initially, PCI does not intend to affiliate with any hospitals.

Of the approximately 276 physicians practicing in the service area, 71 physicians have become members of PCI and an additional 29 physicians have been accepted for membership but have not signed participation agreements. PCI will be nonexclusive: individual member providers are free to affiliate or contract with competing health care provider organizations and health insurance plans.

¹ The Barren River Area Development District is a ten-county area surrounding the city of Bowling Green. It includes the following counties: Warren, Butler, Edmonson, Ohio, Hardin, Hart, Barren, Allen, Simpson, and Logan.

The non-physician Executive Director of PCI and its legal counsel will negotiate contracts with third-party payers. Once a contract has been finalized and submitted to the board of directors of PCI for approval, the board and individual member physicians will be afforded the opportunity to accept or reject the contract. The Executive Director will provide comments and suggestions on fee schedules offered by health plan sponsors and develop internal fee schedules needed for any plan. No PCI physician member will have access to another member's fees, pricing data or other financial information.

PCI will establish utilization standards and other measures to help contain health care costs, including peer review, quality assurance, physician and patient education, and the development of practice parameters designed to provide guidance to physicians in the efficient practice of medical care. If a physician's utilization falls outside the parameters developed, the parameters will be used as an education tool by the utilization review committee. The physician members of PCI will share risk through their provision of services at a capitated rate or on the basis of discounted fee-for-service rates with a 20 percent "withhold" of their fees, to be distributed among PCI members only if PCI's group cost containment and utilization goals are met. Physicians will also contribute an initiation fee toward administration costs, one to two percent of revenues annually, and be subject to periodic assessments.

After careful consideration of the information you have provided, the Department has concluded that it has no present intention of challenging PCI's proposal, as set out in this letter, on antitrust grounds. PCI appears to be a bona fide joint venture in which the participating physician members will share substantial financial risk by participating in capitated contracting arrangements or fee withhold arrangements. See Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, at 70-71 (Sept. 27, 1994) ("1994 Joint Enforcement Policy Statements"). PCI has the potential to be procompetitive by offering consumers of health care services in Bowling Green and other areas of south-central Kentucky an additional alternative health care delivery system. At the same time, however, the Department would be concerned if the purpose or effect of PCI's proposed activities were to facilitate collusion or otherwise reduce competition between or among market participants. Based on the information you have provided and our independent investigation, however, the Department has concluded that PCI is unlikely to have such anticompetitive effects.

In conducting our competitive analysis of PCI we analyzed each physician specialty as a separate market. We note that there may be several markets within the service area alleged by PCI to constitute the relevant market. For example, the city of Bowling Green may be a market for some specialties with regard to which patients do not tend to travel long distances for treatment, for example, uncomplicated obstetrical services. The results of our analysis, however, does not differ between a smaller Bowling Green only market and a larger BRADD market.

Our review of the possible effects of the new venture has convinced us that PCI's entry is unlikely to be anticompetitive. It is possible that the formation of PCI could reduce competition by reducing physician willingness to contract with managed care insurers. BRADD area healthcare purchasers, however, indicate that they have had no difficulty in recruiting physicians who are members of an existing Preferred Provider Organization and view the formation of the new joint venture as a positive competitive development.

Although the 1994 Joint Enforcement Policy Statements establish a "safety zone" for nonexclusive physician networks that include 30 percent or less of the physicians in each physician specialty within the relevant market, 1994 Joint Enforcement Policy Statements at 68-70, we do not believe that the fact that the percentage of physicians in this network overall and in specific specialties is greater than the percentage set forth in the safety zone dictates disapproval of PCI's proposal. First, the percentage of physicians in the service area in this network overall, approximately 37 percent, is not substantially greater than the 30 percent safety zone. While it is true that the percentage of physicians in particular specialties is in some cases significantly higher than 30 percent, the percentage representation above 30 percent in these specialty areas appears necessary to provide adequate coverage for enrollees. Second, since PCI will be nonexclusive, its participating physicians are free to contract individually with any managed care payor or to affiliate with any competing venture in the market and our investigation indicates their willingness to do so. Finally, the participation by physicians in PCI will not likely have a spill-over collusive effect in other areas of their practice because they will not have access to specific pricing data and will not be directly involved in negotiating fees.

For the foregoing reasons, the Department has no present intention to challenge PCI. In accord with our normal practice, however, the Department remains free to bring whatever action or proceeding it subsequently concludes is required by the public

interest if actual operation of PCI proves anticompetitive in purpose or effect.

This statement of the Department's enforcement intentions is made in accord with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public immediately. Your supporting documents will be publicly available within 30 days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

A handwritten signature in cursive script, reading "Anne K. Bingaman". The signature is written in dark ink and is positioned above the typed name and title.

Anne K. Bingaman
Assistant Attorney General