



STATE HEALTH PLANNING AND DEVELOPMENT AGENCY

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

LORETTA J. FUDDY, A.C.S.W., M.P.H.
ACTING DIRECTOR OF HEALTH

RONALD E. TERRY
ADMINISTRATOR

1177 Alakea St., #402, Honolulu, HI 96813 Phone: 587-0788 Fax: 587-0783 www.shpda.org

February 17, 2011

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

IN THE MATTER OF

RAINBOW DIALYSIS, LLC

Applicant

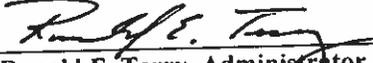
CERTIFICATE OF NEED APPLICATION
No.09-13

DECISION ON THE RECONSIDERATION

DECISION ON THE RECONSIDERATION

The Reconsideration Committee ("Committee") of the State Health Planning and Development Agency (hereinafter "Agency") has considered the written and oral testimony, exhibits, arguments and other filings submitted by Rainbow Dialysis, LLC (hereinafter, "Rainbow"), Intervenor Liberty Dialysis-Hawaii, LLC (hereinafter "Liberty"), the Agency and other affected persons, the recommendations of the Tri-Isle Subarea Health Planning Council, the Certificate of Need Review Panel, and the Statewide Health Coordinating Council. Having heard and weighed all the evidence and testimony adduced at the hearings, having observed the demeanor of the witnesses and evaluated their credibility and candor, having heard the arguments of counsel and considered the memoranda submitted, and pursuant to HRS ch. 323D and related Agency rules, the Committee hereby

I hereby certify that this is a full, true, and correct copy of the original on file in this office.


Ronald E. Terry, Administrator
State Health Planning and Development Agency

makes the Agency's Decision on the Reconsideration in this matter pursuant to Hawai'i Revised Statutes ("HRS") §323D-47 including the following Findings of Fact, Conclusions of Law, Order and Written Notice. Where appropriate, Findings of Fact shall operate as Conclusions of Law, and Conclusions of Law shall operate as Findings of Fact. As many of the criteria for CON are interrelated, each of the criteria and subheadings within the Findings of Fact shall be deemed to incorporate and include all other Findings of Fact to the extent relevant. Any citation to evidence in the record provided in the Findings of Fact is not intended to be exhaustive, but merely illustrative of evidence supporting the Finding. Any finding of fact proposed by a party to this proceeding is disapproved except to the extent incorporated and contained in the findings set forth herein.

FINDINGS OF FACT

1. This case concerns an application by Rainbow for a Certificate of Need ("CON") for the establishment of Outpatient Chronic Renal Dialysis Facilities in Wailuku, Hawai'i and Lahaina, Hawai'i, on the Island of Maui.
2. Rainbow is a limited liability corporation whose sole member is Kaiser Foundation Health Plan Inc. ("Kaiser").
3. The Agency administers the State of Hawai'i's CON Program, pursuant to HRS Chapter 323D and Title 11, Chapter 186, Hawai'i Administrative Rules ("HAR").

4. On September 28, 2009, Rainbow filed with the Agency a CON application for the establishment of Outpatient Chronic Renal Dialysis Facilities at 80 Mahalani Street, Wailuku, Hawai'i (for 10 hemodialysis stations plus one isolation station) and 305 Keawe Street, Lahaina, Hawai'i (for 5 hemodialysis stations plus one isolation station), at a total capital cost of \$3,609,352 (the "Proposal"). On November 3, 2009, November 13, 2009 and November 17, 2009, Rainbow submitted additional information. On November 18, 2010, the Agency determined the Proposal was complete. For administrative purposes, the Agency designated the Proposal as Certificate #09-13.

5. The period for Agency review of the Proposal commenced on November 25, 2009, the day notice was provided to the public pursuant to HAR11-186-39.

6. The Proposal was reviewed by the Tri-Isle Subarea Health Planning Council at a public meeting on December 3, 2009. The Council voted 4 to 1 in favor of recommending approval of the Proposal.

7. The Proposal was reviewed by the Certificate of Need Review Panel at a public meeting on December 11, 2009. The Panel voted 5 to 0 in favor of recommending disapproval of the Proposal.

8. The Proposal was reviewed by the Statewide Health Coordinating Council at a public meeting on December 17, 2009. The Council voted 7 to 4 in favor of recommending disapproval of the Proposal.

9. The Agency extended its period of review for 60 days to April 23, 2010 to give Rainbow and Liberty an opportunity to collaboratively explore and resolve dialysis planning issues for the benefit of Maui County pursuant to HAR 11-186-41. This did not result in any resolution.

10. On April 22, 2010, the Agency requested Rainbow to provide additional information pursuant to HAR 11-186-54. On April 29, 2010, the additional information requested by the Agency was timely provided by Rainbow.

11. Rainbow's application was reviewed in accordance with HAR 11-186-15.

12. On May 3, 2010, the Decision on the Merits ("Decision on the Merits") was filed by the Agency in accordance with HAR 11-186-70, with notice of rights to request reconsideration in accordance with HAR 11-186-82. The Decision on the Merits was a Conditional certification and required acceptance of its three stated conditions by May 26, 2010.

13. On May 26, 2010, in accordance with the Order set forth in the Decision on the Merits, Rainbow timely certified in writing that it accepted all three conditions of the Decision on the Merits, and that its Proposal was thereby modified accordingly. The term "Proposal" thus includes the modifications that were automatically effected by Rainbow's written certification of its acceptance of those conditions on May 26, 2010.

14. On May 11, 2010, a request for reconsideration was filed by Liberty pursuant to HRS §323D-47(5). On May 14, 2010, a request for

reconsideration was filed by Unite Here Local 5 pursuant to HAR 11-186-82(1)(2)(3) and (5).

15. On June 14, 2010, the Reconsideration Committee convened to hear the requests for reconsideration, and voted 5-0 to grant reconsideration based upon HAR 11-186-82(b)(5)(to the same effect as HRS § 323D-47(5)), in that good cause had been shown for reconsideration because the decision of the Administrator differed from the recommendation of the Statewide Council.

16. The Agency appointed Andrew Tseu, D.D.S., J.D, as Hearings Officer for the case to facilitate pre-hearing conferences and hearing procedures for the Reconsideration Committee.

17. On September 7, 2010, Liberty filed its Motion to Intervene as a party to the Reconsideration hearing. Rainbow filed its Memorandum in Opposition to Liberty's Motion to Intervene. Oral argument was heard on Liberty's Motion by the Hearings Officer on September 27, 2010. Liberty's Motion to Intervene was granted by the Hearings Officer by Order dated September 30, 2010.

18. Rainbow filed a Motion to Exclude Unite Here Local 5 as a Party to the Contested Case Hearing. No opposition memorandum or Motion to Intervene was filed by Unite Here Local 5. Oral argument on Rainbow's Motion was heard by the hearings officer on September 27, 2010. Rainbow's Motion to Exclude Unite Here Local 5 was granted by the Hearings Officer by Order dated September 30, 2010.

19. The operative Scheduling Orders issued by the hearings officer are the first Scheduling Order dated October 22, 2010, the 2nd Revised Scheduling Order dated November 8, 2010, the stipulated Scheduling Order No. 3 dated December 28, 2010 and the Scheduling Order No. 4 dated December 29, 2010.

20. Pursuant to the 2nd Revised Scheduling Order, the Reconsideration Hearing consisted of a public hearing and a contested case hearing, including a hearing on the parties' motions.

21. Notice of the public hearing contested case hearing was published and timely posted at the Lieutenant Governor's office and with the Maui News and Honolulu Star Advertiser on December 11 and 18, 2010.

22. Pursuant to the Agency's Public Notice of Hearing, the issue to be determined by the Committee was whether Rainbow's Proposal meets the legal requirements for the issuance of a CON pursuant to HRS § 323D-43 and HAR 11-186-15.

23. It was uncontested that Liberty had the burden of proof in this Reconsideration proceeding pursuant to HRS §91-10(5) because Liberty initiated the Reconsideration proceeding and acknowledged in writing its burden of proof.

24. The Committee convened on January 3, 2011 at 9:10 a.m. at the Maui Arts and Cultural Center, for the public hearing, which concluded at 11:00 a.m., in accordance with the procedures established in the 2nd Revised Scheduling Order.

25. The contested case proceeding began on January 3, 2011, shortly following the public hearing, and began with hearing of motions filed by the

parties. The following motions and related memoranda, exhibits and argument were heard, considered and determined by the Committee on January 3, 2011, as described below:

- a. Liberty Dialysis-Hawaii, LLC's Motion to Disqualify Ronald E. Terry - Denied;
- b. Liberty Dialysis-Hawaii, LLC's Motion to Disqualify Anne Trygstad - Denied;
- c. Liberty Dialysis-Hawaii, LLC's Motion to Withdraw Rainbow Dialysis, LLC's Certificate of Need No. 09-13 Because the Tri-Isle Subarea Council's Vote on the Application Was Unlawful - Denied;
- d. State Health Planning and Development Agency's Motion to Preclude the Testimony of Ronald Terry (with Rainbow's Joinder) - Granted;
- e. Rainbow Dialysis, LLC's Motion to Strike Liberty Dialysis, LLC's Naming of Ronald Terry as a Witness (with SHPDA's Joinder) - Granted;
- f. Liberty Dialysis-Hawaii, LLC's Motion to Withdraw Rainbow Dialysis, LLC's Certificate of Need No. 09-13 Because the State Health Planning and Development Agency Failed to Satisfy the Requirements of HAR § 11-186-76 - Denied;
- g. Liberty Dialysis-Hawaii, LLC's Motion to Withdraw Rainbow

Dialysis, LLC's Certificate of Need No. 09-13 Because the Applicant Failed to Satisfy the Requirements of HRS § 323D-46 and HAR § 11-186-77 - Denied;

- h. Rainbow Dialysis, LLC's Motion to Strike Liberty's Evidence Outside the Scope of the Hearing - Denied;
- i. Rainbow' Dialysis, LLC's Motion to Strike Liberty Dialysis-Hawaii, LLC's Naming of Marilyn Matsunaga as a Witness - Denied;
- j. Rainbow Dialysis, LLC's Motion to Strike Liberty Dialysis-Hawaii, LLC's Naming of James Dannemiller as a Witness - Denied;
- k. Rainbow Dialysis, LLC's Motion to Strike Liberty's Testimony Regarding Utilization Data and Financial Impact - Denied; and
- l. Rainbow Dialysis, LLC's Motion for Sanctions on Liberty's Prohibited Conduct Under HAR 11-186-58 - Denied.

26. The Committee held hearings on January 3, 4 and 5, 2011 in the contested case proceeding and heard sworn written and/or oral testimony from the following witnesses: Ryan Pardo, Jane Gibbons, Ron Sawyer, Marilyn Matsunaga, James Dannemiller, Pattee DeLima, Sheila Nicholas-Smith, Melissa Ann Souza, David Lightfoot, C.P.A., for Liberty and Joan Y.N. Danieleley, Daryl Kurozawa, M.D., Thomas Ueno, C.P.A., Michael Caps, M.D., and Susana Mendoza, M.D. for Rainbow. Joan Y.N. Danieleley also provided testimony as a

hostile witness for Liberty and Maureen Naganuma provided testimony as the Custodian of Records for Liberty.

27. On January 3, 2011, Rainbow filed its Objections to Exhibits regarding Liberty's exhibits, which Objections were considered and overruled by the Committee without oral argument. Liberty filed no written objections to Rainbow's exhibits. The Committee ruled that exhibits of the parties were admitted, subject to matters of weight and relevancy.

28. The following exhibits were admitted into evidence in this matter: Exhibits L 1 - 67 and L 200 - 201; Exhibits R 1 - 201, 301 - 349, 500, 510A, 511, and 512; and SHPDA Exhibits S 1 - S 1159. Exhibits L 201 and R-510A, 511 and 512 were admitted into evidence under seal, subject to a stipulated confidentiality agreement and protective order separately entered in this case. Exhibits R-504-508 were placed in the record pursuant to an offer of proof from Rainbow but were not admitted into evidence.

29. End Stage Renal Disease ("ESRD") is a life-threatening disease in which the kidneys can no longer function to rid the body of toxins. Patients with ESRD will die if they do not regularly undergo dialysis or obtain a kidney transplant. Because there is a major shortage of kidneys available for transplant, most patients with ESRD spend the rest of their lives being dialyzed a minimum of 3 days a week. Dr. Kurozawa Direct ¶ 4.¹

¹ Direct Written Testimonies submitted by witnesses on November 29, 2010 are noted as "Direct" by paragraph number; similarly, Rebuttal Written Testimonies submitted by witnesses on December 9, 2010 are noted as "Rebuttal" by paragraph number.

30. ESRD rarely happens alone; patients who suffer this condition typically have many other health problems as well. The most common of these “co-morbidities” include hypertension, diabetes and cardiovascular disorders. Individually, these are each complex conditions that require the delivery of skilled care. When a patient struggles with one or more of these conditions in addition to kidney failure, the delivery of skilled, coordinated care is vital to the patient's health. With such care, a patient can be promptly diagnosed, stabilized and treated in a manner that improves patient outcomes while reducing the risk and cost of hospitalization. Danieley Direct ¶¶ 45-46.

31. Kaiser is a non-profit health maintenance organization that has provided high-quality and affordable health care to the people of Hawai'i for more than 50 years. Kaiser serves more than 227,000 members in the State of Hawai'i and over 48,000 on Maui. Danieley Direct ¶ 6.

32. Kaiser formed Rainbow as a separate entity so that dialysis services would be available and accessible not only to Kaiser's own members, but also to other patients in need of dialysis services, including those who may be covered by other insurers or uninsured. Danieley Direct ¶ 13.

33. Rainbow is wholly owned by Kaiser (Rainbow's sole member). Kaiser oversees Rainbow's operations and activities in accordance with Kaiser's mission of high quality and affordable health care. Danieley Direct ¶15.

A. REGARDING THE RELATION OF THE PROPOSAL TO THE STATE HEALTH SERVICES AND FACILITIES PLAN (HSFP)

Statewide and Regional Priorities are Met

34. The Proposal satisfies the requirements of the 2009 Hawaii State Health Services and Facilities Plan ("HSFP") as well as the priorities of the Statewide Health Coordinating Council and Maui County/Tri-Isle Subarea Council set forth in the HSFP.

35. The Proposal meets the Statewide Health Coordinating Council priority of promoting and supporting the long-term viability of the health care delivery system, by allowing Kaiser to control charges it pays for dialysis services on Maui while providing these dialysis services within Kaiser's integrated care model. A cost-effective alternative to the charges Kaiser currently pays for dialysis services on Maui will help keep insurance premiums affordable and promote and support the long-term viability of the health care delivery system. Ex. R-37, p. 33.

36. The Proposal meets the Statewide Health Coordinating Council priority of expanding and retaining the healthcare workforce to enable access to the appropriate level of care in a timely manner. Ex. R-37, p.33. The Rainbow facilities will be managed by DaVita, a Fortune 500 company known for its superior patient clinical outcomes and employee training programs. DaVita was named in 2008 to *Modern Healthcare's* list of top 100 Best Places to Work in

Healthcare, and in 2009, Training Magazine ranked DaVita the #1 national health care service provider for its employee training programs. DaVita has a nationally recognized training program for dialysis nurses and patient care technicians involving 400 hours of training and also has a well-established national corporate recruitment program, which will help to retain and expand Hawai'i's healthcare workforce and provide specialized training in dialysis services. Incorporating dialysis services into Kaiser's integrated care model will improve patient access to quality care in a timely manner. Patients with kidney disease typically have other associate chronic conditions and complications can be quickly addressed and monitored within Kaiser's integrated care model, facilitated by patient care teams across medical specialties with electronic access to patient medical records through Kaiser's HealthConnect. Ex. S-000019.

37. The Proposal meets the Statewide Health Coordinating Council priority of ensuring that any proposed service will at least maintain overall access to quality health care at a reasonable cost. The cost of services at the Rainbow facilities will be substantially less than what is currently being charged by Liberty, the sole provider of dialysis services on Maui. Exs. S-000043-000047. The care described in the Proposal will be provided in an integrated care setting with a coordinated team of health care specialists ready to provide high quality comprehensive care and treatment for dialysis patients. Exs. S-000007, S-000019-000021; S-000031-000040.

38. The Proposal also meets the Statewide Health Coordinating Council priority of striving for equitable access to health care services at a reasonable cost. Although the Rainbow facilities will primarily serve Kaiser members, Kaiser established Rainbow so that non-members will have access to the Rainbow facilities on an as-available basis, as further explained in the Need and Accessibility Criteria section below. Exs. S-000026-000027. Approximately 14% of patients served by Kaiser in Maui are non-Kaiser members. Increased shifts and hours of operation, and development of home care plans will help ensure patient access to dialysis. Kaiser bilingual personnel will work to reduce cultural and language barriers that impede access to care. Health education classes and programs at Kaiser's Wailuku Clinic are open to all Maui residents. Danieley Direct ¶ 70.

39. The Proposal also meets regional and statewide continuum of care priorities because dialysis is a life sustaining treatment for patients with ESRD and Hawai'i statistics indicate a growing ESRD trend on Maui. Exs. R-23; R-306-319.

40. The Proposal also meets the Maui County/Tri-Isle Subarea Council priorities for education and disease prevention. In addition to patient and community outreach programs offered by Kaiser for prevention, detection, and education, on-site dieticians at the Rainbow facilities will counsel patients to take personal responsibility for their diet and lifestyle to manage and optimize their health. A host of DaVita programs, resources and initiatives will also be aimed at

kidney care, education and disease prevention will be made available to the community. Exs. S-000010-000011; S000020-000021.

41. The Proposal is also consistent with the Maui Health Initiative Task Force Report to the Legislature (December 2007)(authorized by Act 219), that identifies as priorities "dialysis," "more home care programs" and "the provision of integrated, accessible health care services by clinicians who are accountable for addressing a large majority of personal health needs, developing a sustained partnership with patients and practicing in the current context of family and community." Exs. S-000020-000021; R-40. Rainbow will meet all of these regional priorities. Danieley Direct ¶¶ 82-83.

Utilization (Capacity) Thresholds are Met

42. The Proposal also meets the Utilization Thresholds of the HSFP. Exs. S-000019-000021.

43. Under the HSFP, the capacity threshold for a new service is met when the minimum annual utilization for each provider in the service area is 600 treatments per unit, and the utilization of the new unit/service is projected to meet the minimum utilization rate by the third year of operation. Ex. R-37, p. 29.

44. Rainbow presented evidence showing, and the Committee finds, its Proposal meets all applicable utilization thresholds of the HSFP, including Rainbow's projected utilization by its third year of operation and that the minimum annual utilization for the existing provider in the service area was met. Exs. R-91; R-92; R-99; R-123; Danieley Direct ¶¶ 118, 120.

45. Liberty contends that Rainbow's Proposal does not meet utilization thresholds of the HSFP, however, Liberty's evidence was not credible or substantiated in this regard.

46. Additionally, in response to the *subpoena duces tecum* issued to Liberty's Custodian of Records in this case, Liberty failed or refused to produce numerous items of potentially relevant and material information to support its allegations on utilization, including but not limited to information regarding Liberty's patient census; methodologies of calculating utilization; the number of dialysis treatments at each facility; and the number and reason for new dialysis stations built and the dates of their installation, governmental approval and actual use for dialysis provision. Tr. 1/4/11 p.m., pp. 301-306; Tr. 1/5/11a.m. pp. 3-9, 102-109 and 145-162.² Because Liberty did not provide the information, the Committee infers that this information either does not exist at all or does not support Liberty's allegations and finds, for this independent reason, Liberty has not borne its burden of proof on the issue of utilization.

47. Accordingly, based upon the credible and persuasive evidence presented, the Committee finds that Rainbow's Proposal meets HSFP utilization thresholds, both with respect to the existing provider in the service area and Rainbow's projected utilization by its third year of operation.

² Transcript cites ("Tr.") for the Reconsideration hearing are noted by the date and "a.m." or "p.m." and by page number of the transcript.

Sub-optimum Utilization Standards are also Met

48. Notwithstanding the above finding that Rainbow satisfies the utilization thresholds set forth in the HSFP, even if one were to accept as credible Liberty's claims regarding utilization, the Committee finds the Proposal also meets sub-optimum utilization standards of the HSFP, because the benefits of the Proposal clearly outweigh the costs to the community of any duplication or under-utilization of services, facilities, or technologies. Exs. S-000015-000018.

49. As made explicit in the HSFP, utilization thresholds merely guide the initial determination of need for a service area and applications are neither approved nor disapproved solely on the basis of whether the utilization thresholds are met or not met. Pursuant to the HSFP, utilization thresholds may be modified to allow for suboptimum utilization if certain plan criteria are met. Ex. R-37, pp. 31-32. Exs. R-79-80.

50. The 2009 HSFP (Ex. R-37, pp. 31-32) provides a recognition that sub-optimum utilization is appropriate in the following instances relevant here:

'...Sub-optimum utilization may be proposed if the benefits clearly outweigh the costs to the community of duplicating or under-using services, facilities, or technologies. Benefits are defined as the form of improved access for the service area(s) population combined with significant improvement in quality and/or significant reduction in cost to the public.'

51. Rainbow's Proposal will improve access to dialysis services for the service area's population. Exs. S-000015-000019; S-000091; Danieley Direct ¶ 139.

52. There are clearly measurable cost reductions attached to the dialysis treatment associated with this Proposal. Rainbow projects the net benefit from annual costs savings to be \$4,561,347 in the first full year of operation \$5,215,458 in year 2, \$5,891,576 in year 3, \$6,642,293 in year 4, and \$7,475,633 in year 5, for a total cost savings of approximately \$29,000,000 during the first five years of operation. Ex. R-182; Dr. Caps Direct ¶ 25.

53. Rainbow has provided a written implementation plan committing to use the cost savings from Rainbow 100% toward reduction of Kaiser health care premiums, so as to lower the premium base that would otherwise result if Kaiser continued to pay Liberty for dialysis services on Maui. This will help reduce the cost of health care on Maui as well as throughout Hawai'i for employees, employers, and other members who pay health care premiums, and for members of the public who need more affordable health care. Ex. S-000978-000987; Ex. R-182; Danieleley Direct ¶¶ 67-68.

54. Kaiser's cost-savings will benefit the public because Kaiser's members are an integral part of the Maui community. Kaiser is the health care provider for approximately 40% of Maui's residents overall, including an ethnically and financially diverse population. Kaiser's members on Maui also include many elderly Medicare Senior Advantage members on fixed incomes, along with approximately 42% of the island's QUEST members, many of whom have very limited income and substantial disabilities. Dr. Kurozawa Direct ¶ 43; Ex. S-000007.

55. Based on Liberty's examples of typical Kaiser premium costs for families and employees, Rainbow's cost savings in premium reductions translates to approximately \$240 per year for a family plan and approximately \$80 per year for an individual employee, for experience-rated employer sponsored health plans on Maui, assuming average use of dialysis services by their group members. Danieley Rebuttal, ¶ 34; Ex. R-182.

56. Reduced premium expenses will also reduce costs for Maui employers because employers contribute a significant portion of the employee member premiums to provide health care coverage for workers. Danieley Direct ¶ 71.

57. The cost savings from Rainbow will also be passed on through a lower premium base and lower premium rates to help create more affordable health plans for individuals who need coverage for their medical needs. Danieley Direct ¶ 72; Ex. R-182.

58. Given the significant reduction in the costs to the public and improved access to a high quality comprehensive and integrated renal care program, the benefits of Rainbow's Proposal clearly outweigh the costs to the community of any alleged duplication or under-utilization of Liberty's Maui facilities. Exs. S-000015-000018.

59. The 2009 HSFP (Ex. R-37, pp. 31-32) also provides for recognition that sub-optimum utilization is appropriate in the following instances relevant here:

"In addition, beyond regional factors, thresholds may be modified to:

Incorporate current and best clinical practices; ...

Allow for the cost-effective introduction of modern technology to replace existing technology;

Address the documented needs of an actual population rather than on statistical generalizations;

Create opportunities for price reduction through competition, without sacrificing quality or cost-effectiveness of care; and

Encourage innovation in improving health care services that contribute to enhancing a community's health status."

60. Rainbow meets each of these criteria, any one of which is sufficient to satisfy the HSFP under the circumstances presented here.

61. Factors supporting sub-optimum utilization include the following factors identified in Ms. Danieley's Direct Testimony (¶ 128):

- Incorporate current and best clinical practices and cost-effective introduction of modern technology. Rainbow's proposal will add dialysis services within Kaiser's integrated and comprehensive health care delivery system, thus providing use of computerized monitoring of ESRD patients' electronic medical records, care coordination among their primary and specialty care physicians, and an evidence-based approach to create clinical recommendations for cost-effective and efficient disease management.
- Cost-efficient and cost-effective resource use. Kaiser seeks to incorporate dialysis services in its integrated health care delivery model allowing access to and delivery of a continuum of high quality, comprehensive and affordable renal care to a significant segment of the community. Cost-effectiveness is served when limited health care

resources in the community are directed to programs that prevent illness and intervene in the early stages of the disease.

- Address documented needs of an actual and identified population such as ESRD patients on the island of Maui rather than basing case design on statistical generalizations. The integration of dialysis with Kaiser's renal care program will allow clinical input into its HealthConnect electronic medical records system to more closely monitor the health needs of its chronic kidney disease population that could provide more timely intervention and fewer hospitalizations.
- Create opportunities for price reduction through competition where previously none existed, without sacrificing quality or cost-effectiveness of care. Approving Rainbow's CON will clearly provide an opportunity for lower cost dialysis services on Maui, where the lack of competition has allowed the sole provider, Liberty, to dictate the commercial rates for dialysis services at over twice the cost for these same services on Oahu (where there are at least two providers). Rainbow's Proposal projects the net benefit from costs savings to be in excess of \$29,000,000 in the first five years of its operations. Provision of these services within Kaiser's integrated management system and facilities makes the proposal cost-effective, while also integrating the patients' treatments within Kaiser's continuum of quality renal care. This may delay the onset of ESRD and reduce the frequency of hospitalizations that impact patients' quality of life and community costs of health care on Maui.
- Encourage innovation in improving health care services that contribute to enhancing the community's health status. Internalization of dialysis services within Kaiser's integrated health care delivery system provides an innovative approach in providing improved health care services to a significant portion of the Maui community.

62. Accordingly, the Proposal meets the criteria in HAR 11-186-15(a)(9).

B. REGARDING NEED AND ACCESSIBILITY CRITERIA

Growth of the ESRD Population and Dialysis Needs on Maui

63. There is a strong and growing need for Rainbow's Proposal, as kidney disease is growing at an alarming rate on Maui and throughout the State:

- The National Kidney Foundation of Hawai'i estimates that more than 150,000 residents have chronic kidney disease and another 100,000 are predisposed to it. Ex. R-25.
- Nearly 3,000 Hawai'i residents suffer from kidney failure and require dialysis, a number that is constantly increasing. Ex. R-41; Ex. R-42; Ex. R-43.
- Liberty in its reports to ESRD Network 17 for the Wailuku and Kahana clinics has shown a growth of approximately 45 percent for its ESRD patients from late 2006 (with 179 patients) to late 2009 (with 259 patients). Ex. R-44.
- Liberty stated in its 2005 CON Application that the "rate of kidney failure in Hawai'i is 30% higher than the national average" and the "need for dialysis services in the state is projected to nearly double in the next 10 years." Ex. R-50, pp. 5B, 5D, 5G.

64. Rainbow states the average annual growth rate for ESRD on Maui was 5.7% in the last five years prior to Rainbow's Proposal, and relies upon this 5.7% growth rate in its forecasting of dialysis needs and financial savings related to its Proposal. Rainbow's 5.7% rate is, if anything, conservative, as Maui has experienced an average annual growth of 10.3% of ESRD patients and an

average annual growth of 7.5% of ESRD patients in-center (those receiving hemodialysis at Maui dialysis centers), based on the 5 most recent years of official dialysis data (2003-2009) from ESRD Network 17. Dr. Mendoza, Rebuttal ¶ 6; Exs. R-306-319.

65. Liberty alleges the dialysis growth rate that should be used for Maui is only 2.8%, which Liberty states is derived from its own data from 2007 through part of 2010. Gibbons written testimony, p. 2. However, Liberty's growth rate data differs from the official Network 17 data. Ex. R-500. Network 17 data is the official CMS published source of ESRD and dialysis data, and is based on information reported by Liberty and other dialysis providers. The measuring period Liberty uses to create a growth rate is also unreasonably short for projecting future dialysis needs. Ueno, Tr. 1/5/11 p.m., pp. 99-100. The Committee finds Liberty's data in this regard is not credible.

66. Additionally, in response to the *subpoena duces tecum* issued to Liberty's Custodian of Records in this case, Liberty failed and refused to produce potentially relevant and material patient census data and treatment data. Tr. 1/4/11 p.m., pp. 301-306; Tr. 1/5/11 a.m., pp. 3-9, 102-109 and 145-162. Because Liberty did not provide the information, the Committee infers that this information either does not exist at all or does not support Liberty's allegations and finds, for this independent reason, Liberty has not borne its burden of proof on need and accessibility issues.

67. The need for dialysis services is likely to be even greater in the coming years, as clinical evidence calls for more frequent dialysis treatment. In November 2010, the New England Journal of Medicine published findings of a landmark study showing that more frequent dialysis (4 -6 times per week) correlates to reduced patient mortality and reduced costly cardiovascular complications, compared to standard dialysis rates of only 3 times a week. Ex. R-16; Ex. R-17. This study may result in more frequent use of higher dialysis rates (4 to 6 times a week). Ex. L-62. This may dramatically increase dialysis demand by 33% or more, independent of any growth in patient census. Dr. Caps, Direct ¶ 10.

68. It is critical to Maui's health care system to have available the additional dialysis capacity that Rainbow will provide to meet Maui's growing need for dialysis services.

69. Rainbow facilities will also serve as a back up for Liberty patients should a power outage or emergency situation arise. This will help avoid a mass emergency evacuation of hundreds of dialysis patients on Maui to other islands or the mainland if a power outage or other emergency occurs on Maui that interrupts Liberty's services. Kaiser's strong generator capacity can be used to secure dialysis patients' uninterrupted access to the life-saving care they need. Patients have expressed concerns to Liberty since 2008 for a generator to protect their dialysis needs in the event of an emergency. Tr. 1/4/11 p.m., pp. 289-290. Despite this fact and its five years of operations in Maui, Liberty is still

in the process of installing its first and only generator there. Ex. R-72; Danieley Direct ¶ 146.

70. Rainbow will not only meet the needs of Kaiser's members, but will also be available to meet dialysis needs for Maui patients and visitors on a non-discriminatory, as-available basis, including the elderly, low income persons, racial and ethnic minorities, women and other underserved groups, as it always has. Ex. S-000011. All income levels will be served, as they are now, at Kaiser's Maui clinics. Plans are for day, evening and nocturnal shifts to enhance access to dialysis services. Danieley Direct ¶ 16. Rainbow facilities will also be available for patients who travel to Hawai'i as well as enable Maui residents to access DaVita's 1,500 facilities on the mainland, including Las Vegas. Danieley Direct ¶ 144. Rainbow plans to provide 3% of its services for charity care, plus services provided to Quest members. Exs. S-000026-000027.

71. Liberty contends that Rainbow's Proposal proposes to care for Kaiser patients and a few others on an as available basis and allows Kaiser to reap the benefits of providing care to a limited population group without shouldering its fair share of the burden of providing care to the uninsured and underinsured. Delima Direct p-6.

72. The Committee finds that the Proposal meets the need criteria in HAR 11-186-15(a)(1), however, to ensure that the Proposal meets the accessibility criteria, the Committee finds that Rainbow's Proposal, if modified in

accordance with condition 2 on page 45 of this Decision, will fully meet the criteria in HAR 11-186-15(a)(1).

C. REGARDING QUALITY AND LICENSURE CRITERIA

73. Rainbow's Proposal to incorporate dialysis services into Kaiser's comprehensive, integrated care model, as compared to the current fragmentation of services with dialysis provided only at separate facilities, will significantly enhance the quality of care of Maui patients with kidney disease who typically have other associated chronic conditions, and will help to improve patient outcomes. Exs. S-000007, S-000019-000021; S-000031-000040.

74. Kaiser has been recognized as a quality health care leader in the State of Hawai'i and the Nation, winning accolades that include being ranked by the National Council for Quality Assurance (NCQA) as the number 2 Medicaid Plan in the United States, the number 12 Medicare plan in the United States, the 47th overall among all commercial health plans nationally and the best health plan in Hawai'i. Exs. R-36; R-64; R-69; R-70; Dr. Kurozawa Direct ¶ 21.

75. Kaiser has also been recognized as having the best integrated care program for chronic kidney disease in the United States. Exs. R-63-69. Kaiser is an innovator in integrated and coordinated care, having pioneered this team-based approach to medicine over the past 50 years. In an integrated medical care model, providers and departments all work together in alignment to provide care that is in the best interests of the patient. Dr. Kurozawa Direct ¶ 6. Kaiser's integrated model of care is uniquely suited to provide a

unified team of health care providers using Kaiser's electronic medical record system (KP HealthConnect) that allows real-time access to the patient's complete medical record, and inter-related care practices that can provide stronger preventive care and outreach, earlier detection of diseases, and more targeted and timely care than would otherwise be the case. Dr. Kurozawa Direct ¶¶ 6-7.

76. Because Rainbow is wholly owned by Kaiser, Rainbow will have full access to and its records will be integrated with Kaiser's electronic medical records system. This will allow physicians and patient care team members to immediately access detailed medical histories, laboratory tests and treatment results within the Kaiser system. Liberty has no equivalent access or integrated record system.

Dr. Kurozawa Direct ¶ 8.

77. Dr. Brian Lee, a Kaiser nephrologist, has spearheaded a study showing that Kaiser's integrated care model can achieve better health outcomes for chronic kidney disease patients and reduce new dialysis starts by fully 20%, compared to traditional, non-integrated care. Tr. 1/3/11 a.m., pp. 37-38. Dr. Lee used Kaiser's electronic medical record system to perform a world-renown study of 10,000 Kaiser kidney disease patients in Hawai'i. Exs. R-65-68. This study allowed early identification of patients with kidney disease and provided early referral to kidney specialists, which helped reduce late referrals to specialists by two thirds, resulting in avoided progression of kidney disease, prevention of kidney failure and management of diabetes early, before it

becomes life threatening. Late referrals for kidney disease are related to poorer health outcomes and earlier death. Reducing hospitalizations has the potential to save lives, improve the quality of life, and save substantial health care costs. Exs. R-65-68; Dr. Kurozawa Direct, ¶¶ 9-10.

78. By integrating outpatient dialysis into Kaiser's clinics, Rainbow has the opportunity to create similar life-saving outcomes for patients already on dialysis. Rainbow plans to use an integrated care model to achieve early diagnosis and intervention, continuous monitoring and care throughout the course of ESRD and dialysis, and reduce the life-threatening complications of ESRD, while improving health outcomes for ESRD patients. These life-saving goals will have the best chance of success with the type of integrated health care program Rainbow and Kaiser will provide. Thus, Rainbow's Proposal will provide the opportunity to improve health outcomes, enhance patients' quality of life, and ultimately save lives. Dr. Kurozawa Direct ¶¶ 12-14.

79. As explained by Dr. Caps (Rebuttal ¶ 63), additional quality outcomes and clinical benefits of Rainbow's Proposal include:

- The ability for the nephrologist and vascular surgeon to regularly round on patients while they are dialyzing will be enhanced greatly. These physicians can identify problems with the surgical access sooner and suggest alternative access sites and techniques, which can be implemented immediately on site where there is full staff and appropriate resources to address their needs.
- Patients will more easily be able to get needed X-rays, meds, and labs (all frequent occurrences in dialysis patients) if they are dialyzing within Kaiser's

facilities. Currently patients who are short of breath and need a chest X-ray while at Liberty have to be transported out of the Liberty facility, usually by ambulance to Maui Memorial Hospital. There are multiple doctors on site in Kaiser's clinics, available to provide immediate help to dialysis patients who are having clinical problems.

- The results of these clinical tests and medication changes will be more readily available to all Kaiser clinicians because they will be on Kaiser's electronic medical record system. The results will also be available more rapidly, versus seeking Liberty's reports since Liberty sends its labs to the mainland, incurring unnecessary delays in obtaining vital information about the patient's condition.

80. However, Dr. Caps also provided testimony that transferring dialysis patients from one provider to another is a significant event and can cause problems for some patients who are used to their routines and are comfortable with the same people putting needles in their arms. Tr. 1/5/11 p.m., p. 144.

81. Dr. Susana Mendoza, Kaiser's nephrologist on Maui, described additional quality improvements which Rainbow would provide (in Ex. R-127):

- All patients will have expanded access to NxStage home dialysis machines, and
- One Medical Director would be overseeing just 2 facilities, compared to 14 Liberty facilities overseen by 3 Medical Directors.

82. Integrated, coordinated care of kidney patients is currently not available on Maui because the existing dialysis provider – Liberty – only delivers dialysis services. As a result, every kidney patient on Maui today must go

somewhere else to receive the rest of their medical care. Lost are all the benefits of a coordinated care team under one roof with a unified electronic medical record. Fragmentation of medical care results has serious implications for these medically fragile patients, including increased complications, hospitalization, and death. Danieleley Direct ¶¶ 47-48.

83. Rainbow's facilities will be managed by DaVita. Kaiser selected DaVita, a national leader in dialysis, to be an integral part of a comprehensive renal care program with the goals of improving quality of care and services, treatment modality choice, physician access and clinical outcomes at a reasonable cost. DaVita is an experienced dialysis provider with strong documented quality rankings and a nationally recognized Continuous Quality Improvement program. DaVita provides patient centric programs, lifestyle/nutrition education, and compassionate care, proven quality treatments and continues to set benchmarks for high quality clinical outcomes. The DaVita Continuous Quality Improvement program incorporates all areas of the dialysis program, and monitors and evaluates all activities related to clinical outcomes, operations management and process flow. DaVita cares for nearly 1 in 3 dialysis patients in the United States and delivers clinical outcomes among the Nation's very best in every clinically measured renal disease category. Exs. S-000019-000021; S-000031-000040; Ex. R-18; Ex. R-118; Exs. R-122-123; R-127-128; Danieleley Direct ¶ 155.

84. ESRD patients receiving dialysis treatments in DaVita dialysis facilities receive high quality dialysis services resulting in better or improved outcomes (Exs. S-000031-000032; R-18; R-327; R-328):

Table C1: Dialysis Industry Clinical Measures

Measure	Description	Impact of poor performance	DaVita	Other Providers*
KtV > 1.2 (higher % is better)	Measures how well toxins were removed from the patient's blood (the main purpose of dialysis)	Increased hospitalizations resulting from toxin build-up Increased mortality	95%	92%
Albumin \geq 4.0 (higher % is better)	Measures the nutritional status of the patient	Increased mortality	42%	30%
Fistulas in use (higher % is better)	The preferred access to deliver the best dialysis treatment	Increased hospitalizations	53%	51%
CAxP < 55 (higher % is better)	Measures bone and mineral metabolism	Bone fractures; calcium deposits in blood vessels	72%	57%

*Other providers defined as the national average less Large Dialysis Organization
 Source: KtV and Albumin reported in 2007 CPM Report (2006 Data); Fistula data reported in January '09 Fistula First Outcomes Report; Calcium-phosphate product – avg from Planting a study

85. One of many positive changes Rainbow's Proposal will bring is using local laboratory services in Hawai'i so that lab results can be obtained quickly for dialysis patients and the results inputted into Kaiser's electronic medical record system more efficiently, allowing the patients' entire care team to act promptly on lab reports with intervention and treatment. By contrast, Liberty still sends its laboratory specimens to the mainland, leading to delays in the laboratory testing, the need for duplicate testing, and difficulties in integrating those results within Kaiser's integrated medical record system. Dr. Kurozawa Rebuttal ¶ 17.

86. All nurses and technicians will be licensed /certified to confirm competency in hemodialysis and peritoneal dialysis. Ex. S-000033. Rainbow has also committed to operate its facilities in compliance with all existing laws and regulations. Danieley Direct ¶159.

87. Rainbow states in its Proposal that "State licensure and accreditation is not required for outpatient dialysis facilities in the State of Hawai'i. However, to establish and maintain federal Medicare certification, each facility undergoes the process established by the state in which the facility operates. Medicare certification is established through surveys conducted by the Department of Health Facility and Licensing Division." Ex. S-000033.

88. Accordingly, the Proposal meets the certificate of need criteria in HAR 11-186-15(a)(6). The Committee finds that the Proposal also meets the criteria in HAR 11-186-15(a)(7), however, to ensure that the continuity of care is preserved for those dialysis patients who are significantly affected by a change in their dialysis routine, the Committee finds that Rainbow's Proposal, if modified in accordance with condition 1 on page 45 of this Decision, will fully meet the criteria in HAR 11-186-15(a)(7).

D. REGARDING THE COST AND FINANCIAL CRITERIA

89. Rainbow will achieve cost savings for Maui's dialysis patients by providing a more cost effective provider within Kaiser's non-profit mission. Savings realized from Rainbow will benefit Kaiser members, employers and individuals who pay for health care premiums or who seek more affordable care.

90. Liberty charges Kaiser's commercial patients 250% more for dialysis rates on Maui than Oahu, and 450% more on Maui than Oahu for Epogen medication. Ex. R-33; Dr. Caps Rebuttal ¶ 29.

91. Liberty's billed charges to Kaiser for some dialysis-related medications are 1,000 - 7,000% of Medicare charges for the same medications. Ex. R-13 and R-14. Dr. Caps Rebuttal ¶ 25. There is no limit under Liberty's contract for the amount of its billed charges to Kaiser's Maui patients for all medications except Epogen. Tr. 1/4/11 a.m., pp. 94, Tr. 1/4/11 a.m., pp. 101-102, 189.

92. Liberty alleges these high charges to Kaiser's commercial members are offset by Kaiser's Medicare Senior Advantage members, where Liberty states Kaiser pays 25% more on Oahu than on Maui, for dialysis. Sawyer Direct Test. p. 7. Rainbow denies this is so and presented testimony that in 2008, it paid Liberty for Medicare patients about \$49,000 per patient, versus about \$42,000 per patient on Oahu, completely contrary to Liberty's allegations regarding Medicare. Tr. 1/5/11 a.m., p. 270. Further, there is no flat rate for Medicare patients on Maui under Liberty's contract and the cost instead depends upon many variable patient-based factors, such as age, weight, dialysis procedures and medications, so that costs may range hundreds of percentage points in difference for Medicare patients based on these factors.
Dr. Caps Rebuttal ¶ 36.

93. Moreover, Kaiser's total costs for dialysis services on Maui, as well as Kaiser's per-patient costs for dialysis services on Maui -- including both commercial and Medicare patients -- rose over 350% in the three years after Liberty took over from St. Francis, a time period when Kaiser experienced only modest increase in the number of dialysis patients. Exs. R-11; R-12; Dr. Caps Rebuttal ¶ 24.

94. The applicant projects that the total operating revenue for the first full year of operations will be \$4,303,722 and that the net income from operations for the first full year will be \$21,008. The applicant projects that the total operating revenue for the third full year of operations will be \$5,293,374 and that the net income from operations for the third year will be \$414,047. Ex. S-000084.

95. There are clearly measurable cost reductions attached to the dialysis treatment associated with this Proposal. Rainbow projects the net benefit from annual costs savings to be \$4,561,347 in the first full year of operation \$5,215,458 in year 2, \$5,891,576 in year 3, \$6,642,293 in year 4, and \$7,475,633 in year 5, for a total cost savings of approximately \$29,000,000 during the first five years of operation.

Ex. R-182; Dr. Caps Direct ¶ 25.

96. Rainbow's annual projected cost savings of approximately \$5 million is equal to a quarterly loss suffered by Kaiser in mid-2010 -- an impact that

contributed to a need for higher premiums for Kaiser members. Dr. Caps
Rebuttal ¶ 32; Ex. R-53.

97. Thomas Ueno, a Hawai'i accounting expert, examined Rainbow's methodology, projections and supporting evidence regarding its projected cost savings. Mr. Ueno confirms the appropriateness of Rainbow's financial assumptions and methodology and verified the accuracy and consistent application of the methodology. Exs. R-7-8; R-339. Mr. Ueno is the Chair of the Hawai'i Board of Accountancy and has served as the President of the Hawai'i Association of CPAs.

98. Rainbow has provided a written implementation plan committing to use the cost savings from Rainbow 100% toward reduction of Kaiser health care premiums, so as to lower the premium base that would otherwise result if Kaiser continued to pay Liberty for dialysis services on Maui. This will help reduce the cost of health care on Maui as well as throughout Hawai'i for employees, employers, and other members who pay health care premiums, and for members of the public who need more affordable health care. Ex. S-000978-000987; Ex. R-182; Danieleley Direct ¶¶ 67-68.

99. Kaiser's cost-savings will benefit the public because Kaiser's members are an integral part of the Maui community. Kaiser is the health care provider for approximately 40% of Maui's residents overall, including an ethnically and financially diverse population. Kaiser's members on Maui also include many elderly Medicare Senior Advantage members on fixed incomes, along with

approximately 42% of the island's QUEST members, many of whom have very limited income and substantial disabilities. Dr. Kurozawa Direct ¶ 43; Ex. S-000007.

100. Based on Liberty's examples of typical Kaiser premium costs for families and employees, Rainbow's cost savings in premium reductions translates to approximately \$240 per year for a family plan and approximately \$80 per year for an individual employee, for experience-rated employer sponsored health plans on Maui, assuming average use of dialysis services by their group members. Danieley Rebuttal, ¶ 34; Ex. R-182.

101. Reduced premium expenses will also reduce costs for Maui employers because employers contribute a significant portion of the employee member premiums to provide health care coverage for workers. Danieley Direct ¶ 71.

102. The cost savings from Rainbow will also be passed on through a lower premium base and lower premium rates to help create more affordable health plans for individuals who need coverage for their medical needs. Danieley Direct ¶ 72; Ex. R-182.

103. Liberty alleges that its high charges to Kaiser are justified by regulatory changes, inflationary adjustments, and Kaiser's alleged overutilization of dialysis services and Epogen. However, none of these allegations was substantiated and all were directly refuted by Dr. Caps. Dr. Caps Direct ¶¶ 42-44.

104. The Committee does not find credible the evidence Liberty produced regarding cost and financial criteria.

105. Liberty also failed and refused to produce numerous items of potentially relevant and material information regarding its income, financial statements, payor sources, number of treatments and patient mix in response to the *subpoena duces tecum* issued to its Custodian of Records, and failed to produce credible evidence to refute Kaiser's evidence in regard to Kaiser's costs paid to Liberty for dialysis care on Maui and Oahu, and cost savings resulting from Rainbow. Tr. 1/4/11 p.m., pp. 301-306; Tr. 1/5/11 a.m., pp. 3-9, 102-109 and 145-162. Because Liberty did not provide the information, the Committee infers that this information either does not exist at all or does not support Liberty's allegations and finds, for this independent reason, Liberty has not borne its burden of proof on issues regarding cost and financial criteria.

106. Accordingly, the Proposal meets the criteria in HAR 11-186-15(a)(3), (4) and (5).

E. REGARDING THE RELATIONSHIP OF THE PROPOSAL TO THE EXISTING HEALTH CARE SYSTEM OF THE AREA

107. Kaiser has reasonably determined that Rainbow Dialysis is both the most cost-effective option and the best option for improving quality of health outcomes for the patients served on Maui. Ex. S-000047. Other options pursued were more costly, not less costly, and included joint ventures, purchasing financial interests in outside dialysis centers and internalizing dialysis without a

management agreement. Kaiser has reasonably concluded that Rainbow "best serves the Maui community with quality care at the best price." Ex. S-000047.

108. When Liberty filed its CON application for administrative review to acquire St. Francis Medical Center's dialysis facilities in 2005, Liberty represented that it would maintain access to care that would be cost-effective, as reasonable in cost as St. Francis and that there would be no effect on other providers. Ex. R-50, pages 5A, 5C, and 5G. However, the opposite occurred. Kaiser paid St. Francis \$2.4 million for dialysis services in 2005 for its Maui patients. Kaiser payments to Liberty increased over 300% during the three years after Liberty took over, while the number of Kaiser patients treated increased by only 4% to 5% each year during that same period. Exs. R-11; R-12. In 2008, Kaiser paid approximately \$6.8 million for dialysis services for Maui members, an increase of 51% in the cost of such services from 2007. Exs. R-11; R-12; Danieley Direct ¶ 12.

109. The Committee finds that Maui will benefit from competition and the presence of Rainbow as a second, as well as an emergency back-up, dialysis services provider on Maui.

110. Liberty has agreed competition is good in its own CON entreaties elsewhere, noting that "competition between dialysis provide{r}s has a positive impact on infrastructure, patient and physician treatment options and access to cutting edge products and value provided per health care dollar." Ex. R-22, p. 31.

111. Liberty contends that Rainbow's Proposal endangers its financial stability and may cause loss of dialysis services to underinsured and uninsured patients, and patients in Hana and Molokai. However, these claims were not substantiated by Liberty. First, because of the broad Medicare coverage rules for ESRD, virtually all dialysis patients are covered by some form of insurance, either commercial or government insurance and thus, contrary to Liberty's claims, it is providing virtually no true "charity care" related to dialysis. Second, Liberty has not shown that its provision of services at Hana or Molokai are not profitable; in fact, dialysis services in Hana are operated primarily by Hui Laulima O Hana, not Liberty, and are funded largely through community donations. Third, Rainbow plans to offer dialysis services to non-Kaiser members, including the disadvantaged and so can assist in serving less profitable patients. Dr. Caps Rebuttal. ¶ 61.

112. Liberty has failed to show that it cannot successfully compete on Maui. Liberty's parent company has competed successfully side by side with other dialysis providers in over 20 states and many communities. Ex. R-20. Liberty competes alongside Fresenius on Oahu and the coexistence of two providers there has resulted in lower costs, more choices, and higher quality care. Dr. Kurozawa Rebuttal ¶ 3.

113. It is reasonable to expect that Liberty's operations will continue to be profitable with the opening of Rainbow's dialysis facilities. Tom Ueno, CPA, analyzed the limited financial information Liberty had provided prior to his testimony

and estimates Liberty's losses as approximately \$340,000, which would still leave Liberty a profit of about \$1,900,000 in the first year of Rainbow's operation. Ex. R-339 p. 4; Tr. 1/5/11 a.m., pp. 108-109.

114. When Mr. Ueno examined Liberty's claims of adverse financial impact from Rainbow and related evidence provided by Liberty, Mr. Ueno found Liberty's claims in this regard were internally inconsistent and unsupported. Exs. R-7-8; R-339.

115. The Committee does not find credible Liberty's claims of financial harm, given the totality of evidence in the case.

116. Liberty has failed to provide any detailed financial information essential to substantiating its claim that it will operate at a loss as a result of Rainbow. Exs. R-73; R-75-78. The very little financial information provided by Liberty was only very general state-wide information with no breakdown for particular islands or facilities. Ex. R-78; Danieley Direct ¶103.

117. Liberty also failed and refused to produce numerous items of potentially relevant and material information regarding its income, financial statements, patient census, payor source, patient mix, and facility –specific information in response to the *subpoena duces tecum* issued to its Custodian of Records, and failed to produce credible evidence to support its claims of adverse financial impact related to Rainbow. Tr. 1/4/11 p.m., pp. 301-306; Tr. 1/5/11 a.m., pp. 3-9, 102-109 and 145-162. Because Liberty did not provide the information, the Committee infers that this information either does not exist at all

or does not support Liberty's allegations and finds, for this independent reason, Liberty has not borne its burden of proof on issues regarding its claims of financial impact.

118. Accordingly, the Proposal meets the criteria in HAR 11-186-15(a)(11). Although the Committee has found that it is reasonable to expect that Liberty's operations will continue to be profitable with the opening of Rainbow's dialysis facilities, to ensure that Rainbow's Proposal preserves or enhances the existing health care system of the area, the Committee finds that Rainbow's Proposal, if modified in accordance with condition 3 on page 45 of this Decision, will meet the criteria in HAR 11-186-15(a)(10).

F. REGARDING THE AVAILABILITY OF RESOURCES

119. Kaiser and DaVita do not intend to recruit staff from existing medical providers, and will strive to hire or train from within the Kaiser system or utilize DaVita's resources for locating, hiring and educating qualified dialysis center employees to serve Maui patients.

120. There is currently an adequate if not ample supply of nurses available in Hawai'i. Ex. R-54.

121. The staffing needs for this project will be met through:

Maui Community College has a nursing degree program that graduated 61 nurses and 70 LPNs in 2008, and is expected to graduate 50 nurses in 2009.

Kaiser Permanente is an existing provider in the community with a pool of nurses, including 42 FTE RNs on Maui, and 781 FTE RNs in the State of

Hawai'i. Three of the Kaiser RNs on Maui are already dialysis trained.

DaVita has a training program for dialysis nurses involving 400 hours of training over a three (3) month time span.

DaVita has a well-established national corporate recruitment program, if required.

122. There are no financing contingencies for this project. The project will be financed with cash and retained earnings of Rainbow Dialysis's parent company, Kaiser Foundation Health Plan, Inc. Danieley Direct ¶165.

123. Liberty has alleged but not proven any undue strain on Maui's water resources from Rainbow's proposal, since whether dialysis patients are treated at a Liberty or Rainbow facility does not change the water consumption needed for their treatment. Ex. R-339, p. 4.

124. Accordingly, the Proposal meets the criteria in HAR 11-186-15(a)(12).

G. OTHER MATTERS

125. Rainbow timely certified in writing that it accepted all three conditions in the Decision on the Merits on May 26, 2010, including the submission of: (1) Rainbow's and Kaiser's written Joint and Several Undertaking to establish dialysis services in Molokai and Hana of equal or enhanced quality and accessibility, if Liberty should cease providing chronic renal dialysis services in those locations within 10 years of the May 3, 2010 Decision on the Merits; (2) Rainbow's Implementation Plan showing how Rainbow and Kaiser will allocate to the public and the community the significant cost reduction associated with the

Proposal; and (3) a written Acknowledgement and agreement that Rainbow's CON can be withdrawn by the Agency, if there is a failure to fulfill or implement the Implementation Plan or the Joint and Several Undertaking. Rainbow and Kaiser have re-affirmed their commitment to those conditions during these hearings.

126. By Rainbow's acceptance of the conditions of the Decision on the Merits, the Proposal was automatically modified to include those conditions. The Proposal considered here by the Committee includes and is fortified by these conditions and is thus a stronger application than the one originally submitted, that was the subject of the Decision on Merits filed May 3, 2010.

127. Notwithstanding that Rainbow timely certified in writing that it accepted all three conditions, and have re-affirmed their commitment to those conditions during these hearings, the Committee further finds that the submission of: (1) Rainbow's and Kaiser's written Joint and Several Undertaking to establish dialysis services in Molokai and Hana of equal or enhanced quality and accessibility, if Liberty should cease providing chronic renal dialysis services in those locations within 10 years of the May 3, 2010 Decision on the Merits; (2) Rainbow's Implementation Plan showing how Rainbow and Kaiser will allocate to the public and the community the significant cost reduction associated with the Proposal, and (3) the written Acknowledgement and agreement that Rainbow's CON can be withdrawn by the Agency, if there is a failure to fulfill or implement the Implementation Plan or the Joint and Several Undertaking and that Rainbow

and Kaiser pursuant to HAR, are lawful amendments to the application pursuant to HAR 11-186-57, and are accepted as such by the Committee.

128. Liberty has alleged that SHPDA materially violated a number of its own rules in reaching its May 3, 2010 Decision on the Merits as stated in its various motions, memoranda, arguments of counsel and testimony of Marilyn Matsunaga.

129. Rainbow and SHPDA have denied that any material violations of SHPDA's rules have occurred in SHPDA reaching its May 3, 2010 Decision on the Merits, as set forth in their various memoranda, arguments of counsel and testimony of Joan Danieley.

130. Having fully considered the conflicting allegations and arguments on these issues, during both the motions phase and the testimony phase of the hearing, the Committee finds no credibility or merit to any of Liberty's allegations or arguments regarding alleged material violations by the Agency of SHPDA rules, and thus finds that no material violation of SHPDA rules by the Agency has been shown in reaching its May 3, 2010 Decision on the Merits.

131. Notwithstanding the above finding that no material violation of SHPDA rules by the Agency has been shown in reaching its Decision on the Merits dated May 3, 2010, the Committee finds that Liberty's allegations that SHPDA materially violated a number of its own rules in reaching its May 3, 2010 Decision on the Merits are immaterial to this Decision on the Reconsideration

since, pursuant to HAR 11-186-70(d), the Decision on the Merits filed on May 3, 2010 is the not a final decision of the Agency. The Committee's Decision on the Reconsideration herein is the Final Decision of the Agency pursuant to HRS §323D-47 and HAR 11-186-82(d).

132. Pursuant to HRS § 323D-43(b), the Committee finds that:
 - (a) There is a public need for this Proposal.
 - (b) The cost of the service will not be unreasonable in light of the benefits it will provide and its impact on health care costs.

CONCLUSIONS OF LAW

Having taken into consideration the records pertaining to Certificate of Need Application No. 09-13 on file with the Agency, all of the oral and written testimony, exhibits, oral arguments and related filings submitted by the parties and other affected persons pertaining to this Reconsideration proceeding, the Reconsideration Committee concludes as follows:

1. Rainbow's Proposal has met certificate of need criteria in HAR Subsections 11-186-15(a) (3), (4), (5), (6), (9), (11), and (12), for the issuance of a certificate of need.
2. Rainbow's Proposal, if it were modified as specified in the Order below, would meet the certificate of need criteria in HAR Subsections 11-186-15(a) (1), 11-186-15(a) (7), and 11-186-15(a) (10), and for the issuance of a certificate of need. All conditions specified in the Order directly relate to criteria established by law, namely, HAR Subsections 11-186-15(a) (1), 11-186-15(a) (7) and 11-186-15(a) (10).
3. The certificate of need criteria in Subsections 11-186-15(a) (2) and 11-186-15(a) (8), HAR are not applicable to this Proposal.

Conditional Certification

ORDER

Pursuant to the findings of fact and conclusions of law contained herein, IT
IS HEREBY DECIDED AND ORDERED THAT:

The State Health Planning and Development Agency hereby APPROVES
and ISSUES a CONDITIONAL certificate of need to Rainbow Dialysis, LLC, for
the Proposal described in Certificate of Need application No. 09-13.

The conditions are that Rainbow shall modify its Proposal to provide the following:

1. That Rainbow will give Kaiser Permanente members, who are receiving dialysis at Liberty on Maui on the date that Rainbow commences its operations under the Proposal, the option to continue to receive dialysis treatments at Liberty Dialysis on Maui for as long as they wish, without any financial penalty or coercive efforts implying loss of coverage or other harm by staying with Liberty.
2. That Rainbow will accept all dialysis patients at their Maui facilities regardless of their ability to pay.
3. That Rainbow and Kaiser Foundation Health Plan Inc. will provide a joint and several written undertaking stating that, in the event that Liberty Dialysis-Hawaii, LLC should cease providing chronic renal dialysis services to Hana or Molokai within 10 years of the date of the Decision on the Reconsideration, Rainbow Dialysis, LLC or Kaiser Foundation Health Plan Inc. shall, subject to regulatory approvals, immediately establish chronic renal dialysis services to the community(s) vacated by Liberty Dialysis-Hawaii, LLC upon receipt of written notice by the Agency to fulfill the said undertaking herein. The undertaking to establish services herein shall be to replace the vacated capacity level, with chronic renal dialysis services in Hana or on Molokai of equal or enhanced quality and accessibility to that which was vacated by Liberty.

These modifications are required for the application to successfully meet the criteria for a certificate of need.

As provided under Section 323D-46, HRS and Section 11-186-77 HAR, the Agency establishes Noon, March 16, 2011 as the date by which the applicant must certify, in writing, that it accepts these conditions and that its Proposal is thereby modified accordingly, otherwise this application shall be deemed to be DENIED as provided under Section 11-186-77 HAR.

The certification shall contain the following acknowledgment:

The applicant acknowledges and agrees that failure to fulfill any condition herein, in whole or in part, shall be deemed to be a breach of Subsection 11-186-91(a) (2), Hawaii Administrative Rules (HAR) and upon such failure, the Agency may withdraw Certificate of Need #09-13 upon 60 days notice by the Agency to the applicant.

As required under Section 323D-43(b), Hawaii Revised Statutes (HRS), the Agency finds that, if modified as specified in the above Order:

1. There will be a public need for this proposal.
2. The cost of the service will not be unreasonable in light of the benefits it will provide and its impact on health care costs.

The maximum capital expenditure allowed under this conditional approval is \$3,609,352.

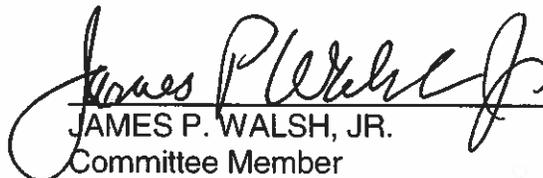
WRITTEN NOTICE

This Decision is the Agency's final action on the reconsideration. This Decision is the Final Decision of the Agency, pursuant to HRS §323D-47 and HAR 11-186-82(d). Any person adversely affected by this final decision may appeal in the manner provided in chapter 91, as provided by HRS ¶323D-48.

DATED: Honolulu, Hawai'i, February 17, 2011.



RONALD E. TERRY
Committee Chairperson



JAMES P. WALSH, JR.
Committee Member



PATRICIA UYEHARA WONG
Committee Member



ANGELA TOKUDA
Committee Member

ANNE TRYGSTAD
Committee Member

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WRITTEN NOTICE

This Decision is the Agency's final action on the reconsideration. This Decision is the Final Decision of the Agency, pursuant to HRS §323D-47 and HAR 11-186-82(d). Any person adversely affected by this final decision may appeal in the manner provided in chapter 91, as provided by HRS §323D-48.

DATED: Honolulu, Hawai'i, February 17, 2011,

RONALD E. TERRY
Committee Chairperson

JAMES P. WALSH, JR.
Committee Member

PATRICIA UYEHARA WONG
Committee Member

ANGELA TOKUDA
Committee Member


ANNE TRYGSTAD
Committee Member