

**STATE COMMISSION ON THE EFFICACY OF THE CON PROGRAM**

Sanders Fireplace Room at the Capitol Education Center  
180 Central Avenue, Atlanta, Georgia

February 27, 2006; 9:30 am

**Daniel W. Rahn, MD, Chair, Presiding**

**MEMBERS PRESENT**

Senator Don Balfour  
Donna Johnson, Esq.  
Robert Lipson, MD  
Dan Maddock  
Rhonda Medows, MD  
Ronnie Rollins  
Joseph "Rusty" Ross, Esq.  
Representative Austin Scott

**MEMBERS ABSENT**

Jeff Anderson  
Melvin Deese, MD

**GUESTS PRESENT**

Bill Lewis, Lewis Consulting  
Bill Sellers, Archbold Medical Center  
Brian Looby, Medical Association of Georgia  
Bryan Ginn, Medical College of Georgia  
Charles Gregory, A C Gregory, LLP  
Charles Hayslett, GA. Alliance of Community Hospitals  
Christi Carmichael, Emory  
Clay Campbell, Archbold Medical Center  
David Henderson, University Hospital of Augusta  
Deb Bailey, Northeast Georgia Health System  
Dodie Putman, Hospital Corporation of America  
Don Fears, DeKalb Medical Center  
Donald Palmisano, Medical Association of Georgia  
Senator Eric Johnson  
Elizabeth Fullerton, Nelson Mullins  
Holly Snow, Piedmont  
Jeffrey Baxter, Nelson Mullins  
Julie Windom, Ga. Alliance of Community Hospitals  
Kevin Taylor, Archbold Medical Center  
LaMar McGinnis, ACS  
Larry Lloyd, Innovative Consultants  
Larry Myers, Smith Moore, LLP  
Marvin Noles, Medical Center of Central Georgia

**STAFF PRESENT**

Sidney Barrett, Esq.  
Karesha Berkeley  
Doris Berry  
Neal Childers, JD  
Charemon Grant, JD  
Richard Greene, JD  
Bruce Henderson  
Matthew Jarrard, MPA  
Julie Kerlin  
Brigitte Maddox  
Robert Rozier, JD  
Landry Smith  
Rhathelia Stroud, JD  
Stephanie Taylor, MPS

Moira Sheehan, Family Health & Birth Center  
Monty Veazey, GA. Alliance of Community Hospitals  
Tarry Hodges, St. Joseph's/ Candler  
Temple Sellers, Georgia Hospital Association  
Tommy Chambless, GA. Alliance of Community Hospitals  
Victor Moldovan, Phears & Moldovan

## **WELCOME & INTRODUCTION OF COMMISSIONER RHONDA MEDOWS, MD**

Dr. Rahn called the meeting to order at 9:30 am. He introduced Rhonda Medows, MD, Commissioner, Department of Community Health and called on Dr. Medows to provide introductory comments.

Dr. Medows in her remarks to the Commission noted that she has worked through many CON issues in the State of Florida. She said that there are several priority areas that the Department will address among them access to services (not just trauma care and burn centers) but access to care for patients in the Medicaid and PeachCare Programs and access to care by the state's indigent and uninsured population. She said that quality of care is another area of priority. She noted that quality would be defined by performance measures, both by the Department and by other health partners. Dr. Medows further said that best practices from other states should be considered in the Commission's work and that the competitive process between providers in the state should not be the primary focus of the Commission. She expressed excitement about the Commission's work.

## **APPROVAL OF MINUTES OF DECEMBER 14, 2005**

Dr. Rahn called for a motion to approve the minutes of the December 14, 2005 meeting. The minutes were unanimously approved by the Commission, as presented. Dr. Rahn also recognized President Pro Tem, Senator Eric Johnson.

## **REVIEW AND AFFIRMATION OF CONSENSUS POINTS**

Dr. Rahn said that he and Jeff Anderson, Commission Vice-Chair developed some observations that reflected the Commission's discussions, to date. He said that he would like the Commission to examine its duties, as part of enabling legislation, and develop a workplan to address these specific duties (See Appendix A).

Dr. Rahn further said that the Commission's work is scheduled to be completed by June 31, 2007. He said that the Commission has discussed completing its work by the end of CY2006 so that the Commission could make some proposals for possible legislation during the next (2007) legislative session. He said that the Commission has not formally adopted this schedule but has discussed this process. He asked members to discuss whether this planning process is reasonable and to vote on this timeline.

Senator Balfour said that the General Assembly is interested in moving ahead with some legislation. He said that while the Commission has passed a Resolution that encouraged the General Assembly to take no action during this legislative session, that this measure doesn't preclude the General Assembly from acting. He recommended that the Commission develop its conclusions before the end of December 2006 (perhaps by mid-November 2006). He said that any Bill regarding CON would likely be introduced in January 2007.

Representative Scott recommended that the Commission's report be presented in two sections, namely a "minority report" and a "majority report". He said that he anticipates that there will be

areas where there will be agreement and disagreement. He said that this format may be a mechanism to facilitate the Commission's work.

Dr. Rahn said that given the short timeline, the Commission has to develop a workplan. He said that following the development of the "Observations" document (See Appendix B), Dr. Lipson provided feedback, which is included in member packets (See Appendix C). He reviewed each of the bulleted items in the "Observations" document and asked members to try to reach consensus on each area. The following summarizes the committee discussions of each area:

1. Some modification/s of the CON program, rather than its complete abolition, seems to be the general direction in which the Commission is headed.  
*Members voted in agreement with this statement.*
2. Georgia's CON Rules treat current providers of a service who wish to expand services differently from new entrants who wish to offer the same service as a new service, with respect to four specific categories of service, by making available a "utilization exception" to current providers.  
*Members voted in agreement with this statement.*

Additional committee discussion on this item included the following:

- a. There is a need for equity of treatment among providers.
  - i. What is the reasoning behind LNR process v. CON process?
  - ii. Why was the LNR process instituted?
- b. Are the CON thresholds artificially low?
- c. Some members indicated that there are inequities of CON Review process with regard to surgery centers (CON v. LNR)

**Commission members asked about the exceptions in the Department's Rules for hospitals ambulatory surgery services. Department staff noted that if the cost to expand the service is under the CON threshold, there is no CON requirement however if the facility is seeking to expand the service of a shared OR for inpatients then the hospital would be required to submit a CON.**

**Senator Balfour recommended that those applications that are always approved via the CON process should be removed from CON review. He requested a list of all applications that are always approved. He also asked Department staff to make recommendations about those components of the current Rules that should be removed from CON regulation.**

Members noted that there is a critical physician shortage facing the state in several key areas, including anesthesia. Members agreed that there is a particular concern about the shortage of physicians, particularly those willing to accept Medicaid and Medicare assignments. This is impacting the rural areas of the state most severely.

Dr. Rahn asked whether it is appropriate for the Commission to make recommendations about workforce shortages. Commission members said that this is an issue that needs to remain at the core of the group's discussions. Some members indicated that many hospitals refer Medicaid patients to

other regional centers while other hospitals have disproportionate share of Medicaid and indigent patients. Members said that these business practices should be discouraged.

Following committee discussion, Dr. Rahn noted that the Commission has been provided with a wide range of information, including presentations from Department staff. The presentation reviewed all current CON rules, overview of planning area maps for each regulated service, overview of number of applications, (approved/denied/appealed), and the administration of the CON review process and other state materials. Additionally, members listened to presentations from several stakeholders, and received a hard copy and CD that provided a partial bibliography of published articles on CON, Dept. of Justice (DOJ) Report & American Health Planning Association's (AHPA) response to the DOJ Report. A list of possible consultants, that was provided by the DOJ was also provided. He said that what the Commission has not done is examined its duties and determine how to respond to its statutory responsibilities. He said that the Commission has to decide how to carry out the duties, despite not having the internal wherewithal (funding or resources) to address all of its duties. He said that the Commission has not made a specific request to the legislature for funding.

He cited the following outstanding duties of the Commission:

1. Study the financial impact of continuing/discontinuing the CON program
2. Study the impact of continuing/discontinuing or modifying CON on quality, availability and cost of healthcare, specifically to Medicaid and indigent patients
3. Evaluate the experience and results of other states (we have a listing of what states have done; but no plan on how we could evaluate their experiences based upon what they have done)
4. Study the impact of continuing/discontinuing or modifying CON on trauma services, critical access hospitals and public hospitals

Some members suggested that there is a need for independent speakers to address the commission.

Dr. Medows suggested that four (4) subgroups, representing the specific areas above be convened. Each subcommittee would have the responsibility to determine the types of experts that are needed and would present specific recommendations to the Commission. The Commission would make final recommendation on each recommendation. She said that membership on each subgroup would be determined at random.

Representative Scott said that the impact of CON on healthcare is regional (i.e. different rates for the same service throughout the state). He expressed an interest in know what State Merit System is paying for services in metropolitan area versus southwest region of the state).

Dr. Rahn said that Richard Greene has been trying to secure some data with regard to this issue. He asked Mr. Greene to provide the Commission with an update of his research to-date.

Richard Greene noted that Data Subcommittee has met on this issue. Hoped that major carriers such as BCBS would be willing to share data with Commission. Thus far, they have been unwilling to do so. Payment mechanisms vary and it is difficult to determine what is an "average cost" of

procedure. Some industries have varying discount rates, while others have flat fee. Most carriers consider this information proprietary and will not share the detailed type of information that the Commission have been requesting. The Department has been unable to obtain meaningful data.

Scott - Need to be able to access some of the statewide data and turn it into useful information for the average consumer. State Merit System – are we paying the same rate for the same procedure across the state?

Lipson- It may be reasonable to look at hospital margins. What margin is needed to sustain growth? Most providers would not discuss negotiated rates. Look at hospital margins, as a whole.

Commission needs to focus on how to ensure that CON is not used as an anti-trust measure.

Rahn – Overarching goal of the commission is whether current process for regulating services meets the public good.

Scott – There is a bilateral contract between major employers – monopolistic practices are being used

Areas of state where employers are forced to negotiate their reimbursement based on percentage of Chargemaster.

Rahn – summarized that Dr. Medows recommended groups of two person assume responsibilities for taking lead on the four areas that the Commission is charged with (indicated above). Members would work with staff to develop a strategy for consultative support and bring back to Commission and go forward. Concern of this strategy because issues are intertwined.

- Cross-subsidization – a mechanism that hospitals maintain revenue in excess of cost;
- Way in which certain services have higher margins than others because of way the payment structure is designed;
- Competition for highest paying patients, that can generate the largest margins
- Potential anti-competition

He reiterated that it is not the charge of the Commission to design payment reform or healthcare in Georgia. The way that healthcare is currently financed, cross-subsidization is an integral part of this process. We are permitted to make recommendations about other issues (i.e. cross subsidization). Dr. Medows noted that the Commission can make a recommendation regarding any of these issues.

Questions regarding how two persons will be able to fulfill this charge. Consultants would be engaged in this process. Two persons would take the lead on getting the initial research and bring it back to the Commission. The Commission would make final decisions.

The common denominator is the DCH staff.

What role staff can play to frame the type of consultative support that the Commission will provide. The DCH staff will support the Commission in whatever way is necessary.

Rahn- staff will frame the approach to consultative engagement that would be necessary to answer the four remaining questions;

Subgroups from the Commission would work with staff according to how the work gets divided up. Make assignments- Four subgroups might not be the most appropriate way to address these issues.

Randomly assign work – seconded by Scott

Unanimously approved by Commission

Next meeting is driven by staff and creation of working groups and consultative engagement when there is work to review by the entire Commission.

Dr. Rahn and Anderson and Dr. Medows will get with staff look at remaining sub-areas, make proposed committee assignments.

Generated a list of potential consultants should  
Commission members who has a list of potential consultants should forward this information to Stephanie Taylor.

#### OTHER BUSINESS

Told HSC that would report back to the Council regarding the issues relating to of Letters of NonReviewability and CON for Ambulatory Surgery Centers. HSC received testimony from hospitals and physician providers. HSC approved from 12-9 to table further consideration of this issue until the CON Commisison has completed its deliberation.

Scott – CON signed Resolution indicating that they would not bring forward any legislation regarding to CON during this year. Thought that HSC supposed to continue to operate.

DCH- Advice from Office of Attorney General and Office of General Counsel that this issue cannot be handled at the Department-level. Based on decision of Court of Appeals, a change in status of General Surgery with regard to this issue would have to be accomplished legislatively

### **Observations:**

- 1) Some modification of the CON program, rather than its complete abolition, seems to be the general direction in which the Commission is headed.
- 2) Georgia's CON Rules treat current providers of a service who wish to expand services differently from new entrants who wish to offer the same service as a new service, with respect to four specific categories of service, by making available a "utilization exception" to current providers.
- 3) There is currently no mechanism to routinely monitor and/or enforce those representations made in an original CON application are actually achieved in practice, nor a consequence if those representations are not achieved.
- 4) The CON program has no statutory authority to assure the clinical quality of services approved through a CON application process.
- 5) Payment issues, specifically cross subsidization at the service line, DRG, and payer level have a significant impact on provider financial stability, the availability of safety net services, and how the CON program is structured and utilized.
- 6) A major area of controversy surrounding CON in Georgia revolves around ambulatory surgery centers, due in large part to the market distortions introduced by payment mechanisms.
- 7) The Department does not have the statutory authority to request data and information from providers who are authorized to offer services through the issuance of Letters of Non-Reviewability.