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September 27, 2002

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Comments Regarding Competition Law and Policy & Health Care

Dear Mr. Clark:

I represent Prairie Health Purchasing Alliance (PHPA), a non-profit corporation which was formed with the assistance of the Southwest Regional Development Commission (SRDC). I am writing to you at the request and on behalf of PHPA, which encompasses the nine rural counties in Southwestern Minnesota. SRDC is an economic development organization governed by area county commissioners, with public funding from the federal, state and local levels. Currently our area has the age demographics that the rest of the country will experience by the year 2030. Traditional models for delivery of health and human services are no longer relevant in our area.

With the continuous support of both local and state officials, PHPA has spent the last five years developing a fully-insured, health care coverage product that will be marketable to the many small employers in our area. Of special interest to us is our significant number of working uninsured or underinsured. Recent state health department survey statistics indicate that number is growing as small employers drop their sponsorship of a health plan for their employees. This has economic implications for our rural area. Families who leave our area in search of a job with health care coverage, also deplete our schools, our local retail establishments and many other community resources. Uninsured families who stay may either delay seeking necessary health care or add to the amount of uncompensated care delivered by our economically fragile health care providers. Many of our hospitals have been designated by the federal government as Critical Access facilities. Some area clinics have been designated legally by our state as Essential Community Providers.

Against this backdrop, a fierce medical specialty referral battle has been waging between two health systems -- across the border in Sioux Falls, S.D., the closest tertiary care for many of our residents. The competing health systems manage or own the majority of health facilities in our area and both hold Minnesota HMO licenses. Currently, one of the

health systems has refused to cooperate with our efforts to launch a product that includes all critical access facilities and essential providers in our area. Representatives of the health system have openly admitted in our discussions with them that they would prefer to do business with us only if we are not contracting with their competitor. We believe this refusal by the health system to cooperate, at a fair price, is in violation of the essential facilities provisions of federal anti-trust law.

As more hospitals are designated to be federally approved Critical Access Hospitals, my client suggests to the FTC that a clear policy is needed that encourages access in rural areas. The market practice we are currently experiencing is clearly inhibiting access for some of our residents. This is most evident because of the delay in PHPA and its licensed partner accessing a state-created and funded "Purchasing Alliance Stop Loss Pilot Project" fund, established by the 2001 Legislature and available on 7/1/02. This fund was set up to "bring back" to the insured market employers and farmers with 1-10 employees who have not offered employer sponsored coverage in the past year. In essence, the state is partnering with three rural purchasing alliances, including PHPA, to encourage rather than avoid marketing to these currently uninsured businesses. PHPA has not been able to access these state funds, which otherwise can reduce premium costs for uninsured workers at these smallest of companies. The delay in tapping these funds is solely caused by the delay in launching the product due to the uncooperative responses from Avera McKennan Health System.

The state has shown its support for PHPA's efforts in other ways as well. Herewith is a brief chronology of my client's activities:

- 1997 - Community Purchasing Arrangements Act (MS 62T) enacted, which allows formation of community-focused purchasing alliances for the purpose of negotiating with a licensed entity for a fully-insured product.
- February, 1998 – SRDC and area providers host nine public forums to ascertain interest in the purchasing alliance concept. Response is overwhelmingly positive.
- Spring, 1999 – Legislature appropriates $100,000 to SRDC for the development of what eventually is the PHPA ($50,000 each year for two years; same amount is appropriated to NW Minnesota group). A volunteer board is formed, made up of local elected officials and area employers.
- December, 1999 – PHPA sends out a Request for Information to all licensed health plans in Minnesota. Copies of this RFI are shared with local providers, including Avera officials.
- January, 2000 - PHPA receives three responses from viable, licensed healthplans: Blue Cross Blue Shield of Minnesota, U-Care HMO and Sioux Valley Health Plan of Minnesota. Avera could not officially respond because it did not have an HMO or indemnity license at that time, nor did it indicate an interest in forming an Accountable Provider Network (a special license allowed by the state for contracting with purchasing alliances), as referenced as an option in the RFI. PHPA interviewed officials from both Blue Cross/Blue Shield and Sioux Valley and made the decision to contract with Sioux Falls-based Sioux Valley Health Plan of Minnesota.
- Spring, 2001 – Legislature enacts HF1337 which establishes a "Purchasing Alliance Stop Loss Pilot Project" in Northwest, Central and Southwest Minnesota. $1.7

million is appropriated for the fund plus one more year of development funding for NW and SW plus development funds for Central and NE Minnesota. SRDC also receives an award for its work on the purchasing alliance from the National Association of Development Organizations (NADO).

- Summer, 2001 – PHPA receives a grant from the state Board on Innovation.
- Fall, 2001 – Draft contracts finalized with Sioux Valley Health Plan except for the remaining issue of access to three Avera-managed or owned facilities: Ivanhoe and Tyler Hospitals (both Critical Access Facilities); Tyler Clinic (an Essential Community Provider under state law) and Pipestone Hospital (30+ miles from next hospital). Extensive written and in-person communication with Avera officials and agreed upon deadlines result in no progress of any kind.
- September, 2002 – On behalf of PHPA, the state attorney general is contacted, citing MS 62J.73, subd. 3 and 4. These Subdivisions state as follows:

Subd. 3. Prohibition regarding essential facilities and services. *(a) No health plan company, provider, or group of providers may withhold from its competitors health care services, which are essential for competition between health care providers within the meaning of the essential facilities doctrine as interpreted by the federal courts. (b) This subdivision should be construed as an instruction to state court in interpreting federal law.*

Subd. 4. Violations. *Any provider or other individual who believes provisions of this section may have been violated may file a complaint with the attorney general's office regarding a possible violation of this section.*

Clear guidance from the FTC regarding the essential facilities doctrine and specifically if Critical Access Hospitals are such facilities would assist us and surely would assist many other rural efforts across the nation.

Thank you for your time and attention to our comments.

Very truly yours,

BENJAMIN VANDER KOOI, JR.
VANDER KOOI LAW OFFICES, P.A.

cc: Ann B. Kinsella, Minnesota Attorney General's Office, Health Commissioner Jan Malcolm, PHPA Board Members, Liz Quam Berne, AMOM Technical Assistance, area legislators