COPA MONITOR ANNUAL REPORT

YEAR ENDING JUNE 30, 2023

LARRY L. FITZGERALD, COPA MONITOR

FEBRUARY 29, 2024

Tennessee Department of Health Commissioner Ralph Alvarado, MD, FACP

Attorney General, Jonathan Skrmetti

Deputy Attorney General, Kevin Kreutz

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Joe Hilbert, Deputy Commissioner Virginia Department of Health

Alan Levine, Ballad Health, Executive Chairman, President and Chief Executive Officer

Dr. Brian Noland, Vice Chair/Lead Independent Director

David Lester, Ballad Health Board Treasurer

David Golden, Audit/Compliance Board Committee Chair

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I. INTRODUCTION AND BACKGROUND

A Certificate of Public Advantage (COPA) was granted by the Tennessee Department of Health (TDH) when it determined that the benefits outweighed the public disadvantages associated with a reduction in competition that would result from the merger of Mountain States Health Alliance (MS) and the Wellmont Health System (WM) into a new company named Ballad Health. With the issuance of the COPA, TDH and the Attorney General's Office became responsible for regulating and actively supervising Ballad Health to ensure the merger provided a public advantage. In effect, competition was replaced with regulation.

A Terms of Certification (TOC) document was negotiated and signed as part of the COPA process that outlines the procedure for active supervision of Ballad Health by the State of Tennessee. Since the TOC was issued, it has been amended four times. The TOC as amended can be accessed here:
https://www.tn.gov/content/dam/tn/health/documents/copa/FourthAmendedandRestatedTOCGoverningtheCOPA_FINAL.pdf

This oversight includes the computation of a numerical score for three Sub-Indexes and a pass or fail score for a fourth Sub-Index. When combined, the Sub-Indexes represent the Index, a composite score. The purpose of this Index is to provide an objective evaluation of whether there is a continuing public advantage from the merger by tracking progress in four categories: 1) Population Health; 2) Access to Health Services; 3) Economic; 4) Other (Quality). This Index is to be computed annually for the life of the COPA.

The TDH will consider the Index score; Ballad Health's degree of compliance with the TOC; Ballad Health's performance trends; and, other factors to make an annual determination of the ongoing public advantage of Ballad Health to the Northeast Tennessee and Southwest Virginia regions.

In addition to the objective evaluation system by which TDH will track the ongoing public advantage provided by Ballad Health, there are other elements of active supervision. The active supervision structure includes two distinct functions: 1) COPA Compliance Office and (2) COPA Monitor. The COPA Monitor is responsible for evaluating the continued public advantage of the COPA by monitoring Ballad Health's compliance with the TOC, and by collaborating with the Commissioner of Health and the Attorney General's Office to evaluate performance against the Index. The COPA Monitor conducts audits; reviews reports from the Compliance Office and Ballad Health; and makes recommendations to the Commissioner of Health, the TDH, and the Attorney General.

The COPA Monitor Annual Report includes the following: the Index score; updates on compliance with the COPA and the TOC; status of existing corrective actions; any recommended enforcement mechanisms; recommendations; and any other information requested by the Commissioner of Health and the Attorney General's Office.

II. INDEX SCORE

As part of TDH's exercise of active supervision, an Index to annually track demonstration of ongoing public advantage is computed. The Index consists of four Sub-Indexes that correspond to categories of potential benefits and potential disadvantages from the merger that formed Ballad Health. The four Sub-Indexes are: Population Health, Access, Economic, and Other (Quality). The Index score for fiscal year 2023 was 93.55 points out of a total of 100 possible points. The TOC Exhibit J classifies a score of 93.55 as being reflective of a clear and convincing public advantage to the community from Ballad Health's compliance with the TOC. A more detailed report on the Index Score was issued to the Commissioner of Health and the Deputy Attorney General on December 31, 2023, by the COPA Monitor and is Attachment A.

III. COMPLIANCE WITH THE COPA AND TERMS OF CERTIFICATION

- Complaints filed with the COPA Compliance officer, COPA Monitor, or TDH

Two complaints were filed with the COPA Compliance officer that alleged the COPA and Terms of Certification had not been followed. After a review, it was determined that the complaints were not a violation of the COPA and the Terms of Certification.

Other complaints were filed with the TDH that were determined to be related to subjects that were not in the scope of the COPA or Terms of Certification. However, each complaint was forwarded to the appropriate state agency or Ballad Health for followup.

A complaint was filed in July 2022, with TDH alleging that the cardiac catheterization labs at Johnson City Medical Center were not adequately available to meet the TOC section 4.03, access standard. The complaint alleged that the lack of available cardiac catheterization availability had a negative impact on patient and physician satisfaction. Furthermore, necessary patient care was being delayed. The complaint was filed by one physician but was supported by a letter signed by fourteen cardiologists.

A limited scope review was completed of the accuracy of the complaint, and it determined that the cardiac catheterization labs had not been operating at the level necessary to meet the reasonable patient demand. Ballad Health developed an action plan that, when executed, should bring the operating hours for cardiac catheterization services up to the necessary level to meet the demand. However, the execution of the action plan did not result in the operating hours of the cardiac catheterization labs meeting the required minimum for any month in fiscal year 2023.

- Tennessee Department of Health COPA Public Hearing

Primarily due to the Force Majeure Event, there have been no public meetings to seek input about the TOC since January 25, 2021. TDH held a public meeting on June 12, 2023, for the public to comment on Ballad Health's compliance with the COPA and to discuss revisions to the TOC under the COPA.

Fifty-nine individuals signed on the speaker sign-up sheet. There was inadequate time in the meeting for everyone to speak. Written comments were sent to TDH from individuals who did not get to speak and from others. The spoken and written comments were both positive and negative.

The written comments are posted on the TDH website:
https://www.tn.gov/content/dam/tn/health/documents/**copa**/Master-PDF-of-Public-Hearing-comments.pd

A transcript of the public meeting was posted on the TDH website:
fhttps://www.tn.gov/content/dam/tn/health/documents/**copa/COPA**-meeting-TRANSCRIPT-6-12-23.pdf

The number of comments indicates that the public desires to share thoughts about Ballad Health. I recommend the TOC be amended to require public meetings be held at a minimum of annually.

- Charity Care

The TOC requires that charity care provided by Ballad Health each year must be greater than a base amount increased for inflation. The base amount of charity care is the amount of charity care on IRS Form 990 for fiscal year 2017. If the charity care provided by Ballad Health in any year does not meet the required amount, the COPA Monitor may waive the noncompliance with the charity care requirement. The amount of charity care provided in fiscal year 2023 was below the minimum amount required by the TOC due to expanded patient enrollment and enhanced payment rates made to the Medicaid program in both states. The Commonwealth of Virginia expanded its Medicaid program after 2017; therefore, a number of Virginia residents whose care would have been classified as charity in 2017 qualified for Medicaid in 2023. Additionally, the Commonwealth of Virginia increased the amount paid by Medicaid for services by a significant amount after 2017, and thus the loss Ballad Health incurred for treating Virginia Medicaid patients was reduced. Additionally, payments made by TennCare to Ballad Health in 2023 were significantly greater than payments made in 2017. Based on the analysis provided by Ballad Health, the request was approved to waive the Terms of Certification minimum total charity care requirement for fiscal year 2023. The charity care waiver is Attachment B.

Ballad Health has requested a waiver of the minimum charity care requirement for every year, and the request has been granted each year. The COPA Monitor Annual Reports for fiscal years 2019, 2021, and 2022 included a recommendation that the minimum charity requirement be adjusted to reflect the current payment and coverage rules for the state Medicaid programs. The recommendation has not been adopted. The recommendation will be repeated in this COPA Monitor Annual Report.

- Monetary Commitment

The TOC requires that Ballad Health spend a minimum of $308,000,000 (the monetary commitment) over 10 years on initiatives in six plan areas: Behavioral Health Services, Children's Services, Rural Health Services, Health Research and Graduate Medical Education, Population Health Improvement, and Region-wide Health Information Exchange. Only new and incremental capital and operating expenditures paid by Ballad Health pursuant to plans approved prospectively, count toward satisfaction of the monetary commitment.

Ballad Health computed a baseline spending amount for each of the six plan areas. The baseline is the average annual spending for the three years that ended June 30, 2017, in each of the six plan areas. Spending toward the monetary commitments is defined as being incremental spending after the baseline spending for the fiscal year has been met. Ballad Health did not meet its baseline spending obligation for fiscal year 2023 for Rural Health Services and Region-wide Health Information Exchange. The baseline spending shortfall for these two plans was subtracted from the monetary commitment spending.

The actual spending toward the baseline spending obligation and the monetary obligations reported by Ballad Health were audited by the Ballad Health Internal Audit Department. The COPA Monitor reviewed the work of the Internal Audit Department and performed additional verification work. The conclusions were that the monetary commitments for Children's Services, Population Health Improvement, Rural Health Services, and Health Research and Graduate Medical Education were met through June 30, 2023. However, the monetary commitment for Behavioral Health Services and Region-wide Health Information Exchange were not met by June 30, 2023.

The shortfall in meeting the monetary commitment for Behavioral Health Services and Region-wide Health Information Exchange are events of Noncompliance with the TOC. TOC Section 6.05 (d) and Exhibit H give the state the right to invoke one or more Corrective Actions when an event of Noncompliance occurs. One of the possible Corrective Actions available is to require Ballad Health to make a remedial contribution to the Population Health Initiatives Fund in an amount of up to $1,000,000 for each event of Noncompliance.

In previous years, when Ballad Health was not in compliance with the monetary commitments, the state made a concession to Ballad Health, and in lieu of a remedial contribution, required Ballad Health to establish an escrow account, separately identified on the balance sheet, in the amount of the spending shortfall toward the monetary commitment.

It is likely that Ballad Health will meet its monetary commitment to invest in several of the plan areas by the end of fiscal year 2025. It will continue to have the obligation to meet the baseline spending obligations even if the monetary commitments have been met since they are an annual obligation and excess spending in one year cannot be used to offset future year obligations. New three year plans are due in fiscal year 2025. I recommend that the state and Ballad Health reach an understanding about the requirement to have new three year plans in areas where the monetary obligations have been met.

The COPA Monitor annual report on Ballad Health's spending for fiscal year 2023 toward the plan spending commitments is Attachment C.

- Addendum 1

The objective of Addendum 1 is to protect the patients, payors, employers, and others who utilize the services of Ballad Health from price increases above a maximum amount set by Addendum 1. All new payor contracts and revisions to existing contracts were reviewed by the COPA Monitor before they were signed by Ballad Health. No new payor contract or revised payor contract included payment increases to Ballad Health in excess of the Addendum 1 maximum in fiscal year 2023.

Ballad Health made a request for a temporary suspension of the maximum price increases permitted by Addendum 1. The temporary suspension was not granted. However, it was agreed that if Ballad Health negotiates a price increase above the Addendum 1 maximum allowed price increase, it might be approved based on the underlying facts and circumstances. The TDH letter responding to Ballad Health's request for a waiver to the maximum rate increase allowed by Addendum 1 is on the TDH website:
https://www.tn.gov/content/dam/tn/health/documents/copa/2022-12-20-TDH-AG-response-to-Ballad-A1-rate-cap-request.pdf

- Facility Maintenance and Capital Expenditures

The TOC Section 3.07 requires Ballad Health to " maintain and repair all of its systems, equipment, and facilities consistent with industry norms for similarly sized healthcare systems." There is no published and formally recognized industry norm. However, most experts suggest that at a minimum, capital spending should be equal to annual depreciation expense. A Ballad Health document includes the following phrase: "historical capital spending targeted at 100% of depreciation".

The TOC requires Ballad Health to prepare a three year capital plan for the three years ending June 30, 2021. That capital plan did not require TDH approval. However, in the ensuing three years, had Ballad Health not invested 90% of the capital plan dollars, the TOC established a process to be followed that included the engagement of a facilities consultant to conduct a review of the condition of the facilities and submit a Facility Assessment. This section of the TOC was under temporary suspension due to a Force Majeure Event. As a result of the Force Majeure Event, an evaluation of the facility maintenance requirements in the TOC by the COPA Monitor for the first four years of the TOC term ending June 30, 2022, was not required, regardless of the amount of capital spending.

A new three year capital plan was due during the spring of 2022 for the three year period ending June 30, 2025. Fiscal year 2023 would have been the first year for the new three year period. Ballad Health notified TDH that it was experiencing material unforeseen economic circumstances and requested to be relieved of the three year term of the capital plan and to submit a one year capital plan for fiscal year 2023. The request was granted.

Ballad Health submitted a new capital plan in the spring of fiscal year 2023 for the three years ending June 30, 2026. As stated previously, the three year capital plan does not require TDH approval. The submitted capital plan included capital spending at a percentage that is less than 60% of projected depreciation expense for the three years ending June 30, 2026. The capital plan will not maintain the systems, equipment, and facilities at industry norms. However, following the TOC provisions in Section 3.07, there will be no facility assessment required unless Ballad Health does not spend 90% of the capital plan for the three years ending June 30, 2026.

I recommend the TOC Section 3.07, Facility Maintenance and Capital Expenditures, be rewritten. My recommendation is that the TOC require Ballad Health to invest annually in property, plant, and equipment, an amount that at an absolute minimum is equal to annual depreciation. The annual depreciation is the minimal amount of investment needed to maintain the facilities in their current condition.

Ballad Health has not violated the TOC rules for Facility Maintenance and Capital Expenditures. Regardless of the TOC terms, Ballad Health has an obligation to provide modern, well-maintained, and technologically current facilities and equipment. This maintenance requires an investment in property, plant, and equipment at an amount that is at least equal to annual depreciation. Since the merger date, Ballad Health has invested in its facilities 83% of its depreciation expense (source is publicly available audited financial statements). Furthermore, for the last two fiscal years, Ballad Health's investment in its facilities has been 74% of its depreciation expense (source is publicly available audited financial statements). The amount of capital investment is not consistent with the maintenance of facilities at the level of similar systems. A detailed analysis on capital budgeting and spending is Attachment D.

IV. CORRECTIVE ACTIONS

Ballad Health has not met the spending commitment for Behavioral Health and Region-wide Health Information Exchange for the five years ending June 30, 2023. The Tennessee Department of Health may take corrective action for the two spending shortfalls

V. ENFORCEMENT MECHANISMS

The TDH required Ballad Health to maintain an escrow of $342,000 for the shortfall in spending for Region-wide Health Information Exchange from fiscal year 2021.

VI. RECOMMENDATIONS

Follow-up on recommendations from prior year in COPA Monitor Annual Reports that remain open as of June 30, 2023 are the following:

Charity Care:

In three previous COPA Monitor Annual Reports, the recommendation has been made to change the TOC minimum charity care requirement to an amount that reflects the current payment structure for Medicaid patients by the two states. The current minimum payment amount that is based on fiscal year 2017 charity care is not applicable to the current payment environment, making the TOC charity care minimum inappropriate. I recommend the minimum charity care obligation for fiscal year 2024, and thereafter, be adjusted to the charity care reported on IRS Form 990 for fiscal year 2022.

2023 COPA Monitor recommendations:

Plan Spending:

1.The spending for Region-wide Health Information Exchange, based on current projections, will not reach the ten year plan spending obligation. However, the monitors made the recommendation that the policy goals for Region-wide Health Information Exchange had been met in a reasonable manner so that Monetary spending is no longer required. TOC Section 3.06 (b) states the following:

"In the event the policy goals associated with a spending commitment plan are satisfied by the New Health System spending less than the Total Incremental Spending Obligation for that category, the New Health System shall propose reallocation of the remaining spending obligation to another spending category. For example, if the Department determines that the policy goals for the Region-wide HIE are satisfied in Fiscal Year 2023 and the New Health System has only spent $3,000,000 of the $8,000,000 spending obligation, the New Health System shall propose reallocation of the remaining $5,000,000 to another spending category (e.g., Rural Health) and the Department may waive the requirement that the New Health System submit a replacement plan for future years."

Recommendation: The TOC provision listed above be implemented.

2.The TOC plan spending obligations for some of the plan areas will be met before the next set of plans are prepared in the Spring of 2025. The baseline spending obligation is an annual obligation, and thus the commitment for baseline spending for each plan will continue for the ten year period, regardless of the plan spending.

Recommendation: The state and Ballad Health come to agreement about the expectations of the content of a Plan or a Plan budget, when the plan spending obligation has been met for a Plan.

3.There were four plan spending strategies and budget dollars associated with each of the four plans that were approved by the state. However, Ballad overspent the approved budget amounts by 51% to 136%. The TOC requires spending to be approved prospectively. Variances of that magnitude do not meet the prospective approval requirement.

Recommendation: Ballad Health ask for budget approval for any spending strategy that will exceed the approved budget amount by the greater of $50,000 or 10% of the approved budget during a fiscal year.

Facility Maintenance and Capital Expenditures:

I recommend the TOC Section 3.07, Facility Maintenance and Capital Expenditures, be rewritten. My recommendation is that the TOC require Ballad Health to invest annually in property, plant, and equipment, in an amount that at an absolute minimum is equal to annual depreciation. Annual depreciation is the minimal amount of investment needed to maintain the facilities in their current condition.

Public Meetings:

Due to the large participation by the public in the meeting held in July, 2023, I recommend another meeting be held during fiscal year 2024 to seek input from the public. Meetings should be held annually to ensure public participation.

Additional Findings:

The first COPA Monitor Annual Report that was for the five months ending June 30, 2018, included the following recommendation:

"The COPA Monitor has no responsibility for the financial performance of Ballad Health. However, if Ballad Health does not achieve the necessary financial results of operations, it will be challenging to achieve public advantage, so the COPA Monitor has a keen interest in the financial results. The results of operations for the first 13 months of operations were minimally adequate. My recommendation is that financial results be monitored carefully, even though this monitoring is not a specific TOC requirement."

The Tennessee COPA Monitor and the two Virginia monitors have closely monitored the financial performance of Ballad Health. The cash flow from operations has not been adequate to investment in property, plant, and equipment at the minimal level of an amount equal to annual depreciation expense, and at the same time, to meet its other cash requirements. To illustrate the concern expressed by the monitors, purchase of property, plant, and equipment for the two years ending June 30, 2023, was 74% of the depreciation expense for the same two years (source is the publicly available audited financial statements). The result of inadequate investment in property, plant, and equipment is that, over time, Ballad Health will operate sub-par facilities with older equipment.

The findings are a repetition from the COPA Monitor Annual Report for the five months ending June 30, 2018. Without adequate cash flow Ballad Health will struggle to meet the objectives of the TOC such as:

- Consistent high quality patient care
- Appropriate physician, employee, and patient satisfaction
- Improvement in population health
- Expanded access to care for the community, especially the rural community
- Maintaining technologically current diagnostic and therapeutic testing equipment

VII. SUMMARY

The Ballad Health Index Score is in the range of "clear and convincing" evidence of continuing public advantage.

Ballad Health did not meet all of its obligations to make investments in two of the six plan areas. The state may take one of several Corrective Actions as a result of Ballad Health's noncompliance with the TOC.

Ballad Health has not invested in the maintenance of its property, plant, and equipment at the amount of its annual depreciation expense. The long term impact of low investment in property, plant, and equipment is that the facilities will deteriorate below a standard that the physicians and the community being served will find acceptable.

Larry D. Fitzgerald
COPA Monitor

ATTACHMENT A
FISCAL YEAR 2023 SCORING INDEX

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December 31, 2023

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Dr. Alvarado and Mr. Kreutz:

To comply with the Terms of Certification (TOC) responsibilities for the COPA Monitor, I have reviewed the details submitted by Ballad for fiscal year 2023 for each of the four Sub-Indices, that when combined is the Index that is referred to as the Score. The four Sub-Indices are the Population Health Sub-Index, Access Sub-Index, Economic Sub-Index and the Other Sub-Index. The Other Sub-Index measures the quality of care portion of the Score.

POPULATION HEALTH SUB-INDEX (50%)

The population health sub-index has two components:

- Investment - 25% of 50% - The TOC requires Ballad to continue to spend operating dollars at the Annual Baseline Spending Level that is at least at the level of the historical spending amounts prior to the merger. For population health,the baseline is $2,994,045 per year. Additionally, the TOC requires Ballad to invest in new initiatives that are incremental spending and for projects that are prospectively approved by the state to improve population health in the amount of $75,000,000 over the ten year term of the TOC. The later obligation is named the Monetary Commitment in the TOC.

Ballad submitted its fiscal year 2023 actual spending toward the Annual Baseline and MonetaryCommitments for review. Working in collaboration with the Virginia monitors, the submitted Baseline and Monetary Commitment spending was reviewed and subjected to a limited scope audit. The audit did not reveal any errors in the data submitted by Ballad. Ballad achieved its Annual Baseline and Monetary Commitments for fiscal year 2023, and therefore received 12.5 of 100 points.

- Achievement of Process Measures identified in the Population Health Plan - 75% of 50%

The state approved fifteen process measures for fiscal year 2023. All fifteen of the measures were achieved.

For fiscal year 2023, Ballad achieved 100% of the possible points for the Population Health Sub-Index that represents 50 points toward the total potential score of 100 points.

ACCESS SUB-INDEX (30%)

The access score for fiscal year 2023 is based on 25 measures that are each weighted from 1.5% to 10% of the total Access Sub-Index score. Ballad did not achieve a passing score for four of the measures that are listed: Population within 10 miles of an urgent care center open nights and weekends; follow-up after hospitalization mental health discharge within seven days; follow-up after hospitalization mental health discharge within 30 days; and antidepressant medication management effective continuation phase 180 days.

One of the 25 measures is Pediatric Readiness of the Emergency Department. The description of the metric is the average score of Ballad's emergency departments on the National Pediatric Readiness Project Survey from the National EMSC Data Analysis Resource Center. The source of the data for Ballad's evaluation is a self-assessment. Ballad received a passing score for this measure. I reviewed the Ballad self assessment and determined that it had been appropriately prepared.

An access measure is excessive emergency department wait times. The description of the measure is the percentage of all hospital emergency department visits in which the wait time to see an emergency department clinician exceeds the recommended time frame (15 minutes). The source of the data for scoring purposes is Ballad's records. Ballad's composite score for the measure is that for 44.9% of the emergency department visits, a clinician saw a patient within 15 minutes that exceeded the standard of 40.7%. However, there were complaints about excessive emergency department wait times in the public meeting. Ballad operates 21 general emergency rooms and/or an emergency room for pediatric patients. Of the 21 emergency care sites, eleven did not receive a passing score. This is part of the explanation why Ballad received a composite passing score for the measure, but at the same time, there were public complaints about long emergency department wait times.

CMS reports other emergency department measures: percentage of patients who left the emergency department before being seen, and average time patients spent in the emergency department before leaving from the visit. We do not have a composite score for Ballad for these two measures. There are scores on the CMS Compare website for Bristol Regional Medical Center, Holston Valley Medical Center, Johnson City Medical Center, Indian Path Hospital, and Johnston Memorial Hospital. The percentage of patients who left the emergency department before being seen and the average time patients spent in the emergency department before leaving from the visit are equal to or better than the national average for three of the five hospitals but below the national average for Indian Path Hospital and Johnston Memorial Hospital. Generally for both measures, the Ballad scores are good; however, there are exceptions which may account for patient complaints.

An access measure is Patient Satisfaction and Access Survey - Response Report. The description is a report that documents a satisfactory plan for Ballad to address deficiencies and opportunities for improvement related to perceived access to care services and documents satisfactory progress towards the plan. The source is Ballad records. As a part of the review of Ballad's scoring, the report listing strategic imperatives written by Ballad was reviewed. Ballad does have a plan.

For the Access Sub-Index Ballad received 86.3% the possible point total of 30, that represents 25.9 points toward the total score of 100 potential points.

ECONOMIC SUB-INDEX (PASS OR FAIL)

The economic sub-index is scored on a basis of pass or fail. Ballad's ongoing compliance with the provisions of TOC Article V Managed Care Contracts and pricing limitations, and also for Addendum 1 COPA Managed Care Contract Pricing Limitations and Auditing Process, constitutes measures within the Economic Sub-Index. I reviewed and determined that each new or revised managed care contract signed by Ballad in fiscal year 2023 was compliant with TOC Article V and Addendum One.

TOC Article V includes the following provisions:

- Health Plan Negotiations and Restrictions
- Managed Care Contract Terms
- Competing Services
- Physician Services
- Vendor Contracts
- Communication with Payors

It is my opinion that Ballad has complied with all of the provisions listed above.

I recommend a Pass score for the Economic Sub-Index.

OTHER (QUALITY) SUB-INDEX (20%)

The quality score has two components:

- Target Quality Measures - 25% of the 20% - 17 measures that Ballad is required to improve performance or otherwise maintain performance such that Ballad's performance remains either (i) above the baseline or (ii) the then-current national and/or state estimates of the measures, whichever is associated with the better quality outcomes.
- Quality Monitoring Measures - 75% of the 20% - approximately 81 measures. Ballad must report the scores for the 81 measures for monitoring purposes. There is no performance requirement for Ballad, only a reporting requirement.

Target Quality Measures:

Ballad achieved a passing score for 9 of the 17 measures. It achieved 52.9% of the 5 points; therefore, Ballad is awarded 2.65 points.

Quality Monitoring Measures:

For 27 Quality Monitoring Measures, information for scoring is not available. Ballad provided a score for 54 Quality Monitoring Measures, and its score was below the baseline score for 50 of 54 Quality Monitoring Measures. However, Ballad's actual performance for the Quality Monitoring Measures has no impact on the score. Ballad's requirement is to report its scores for the Quality Monitoring Measures. Ballad has reported the score; therefore, it will be awarded 100% of the possible points.

For the Other Sub-Index Ballad received 17.65 points toward the total score potential points of 100.

CONCLUSION

In total, Ballad is awarded 93.55 points out of a total of 100 possible points. TOC Exhibit J classifies a score of 93.55 as being reflective of a clear and convincing public advantage to the community from Ballad's compliance with the TOC for Tennessee.

Sincerely,

Larry L. Fitzgerald
Tennessee COPA Monitor

ATTACHMENT B
FISCAL YEAR 2023 CHARITY CARE WAIVER

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January 11, 2024

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Dr. Alvarado and Mr Kreutz:

The Terms of Certification (TOC) requires Ballad to provide Total Charity Care each year in an amount greater than Base Charity Care defined as the combined amount of charity care provided by Wellmont Health System and Mountain States Health Alliance in 2017 increased by inflation to the year being measured. If Total Charity Care is below Base Charity Care for any annual reporting period, the TOC allows Ballad to include in its Annual Report an explanation of the reduction. The COPA Monitor will provide a decision about the appropriateness of the explanation provided by Ballad. Ballad has requested a waiver from the minimum charity care requirement every year since the TOC was signed and each request was granted.

Ballad reported that fiscal year 2023 Total Charity Care is estimated to be $66,137,644. The Base Charity Care minimum requirement for fiscal year 2023 is $112,226,405. Ballad fell short of its minimum Total Charity Care obligation by $46,088,761. Ballad requested a waiver from the Total Charity Care requirement for fiscal year 2023.

Tennessee and Virginia have made significant enhancements to their Medicaid programs since 2017. The Medicaid programs in both Virginia and Tennessee have expanded the number of patients who qualify for Medicaid and the amount of payment for Medicaid services rendered. There is a significant number of patients in 2017 who would have been classified as charity patients with no payment for services provided by Ballad. However, in 2023, these patients would have qualified for Medicaid.

Additionally, Medicaid services were paid at a higher rate 2023 compared to 2017, thus the loss from treating Medicaid patients was materially reduced. Therefore, the impact of changes to the Medicaid program in each state accounts for the reduction in Total Charity Care provided by Ballad in 2023 as compared to 2017.

In 2023, the Tennessee COPA Monitor and the Virginia COPA Monitor did not receive any complaints from citizens suggesting care was not provided or delayed because the patient was uninsured.

In two previous COPA Monitor Annual Reports, the recommendation has been made to change the TOC minimum charity care requirement to an amount that reflects the current payment structure for Medicaid patients by the two states. The current minimum payment amount which is based on fiscal year 2017 charity care is not applicable to the current payment environment, making the TOC charity care minimum irrelevant. A recommendation will be included in the fiscal year 2023 COPA Monitor Annual Report to adjust the minimum charity care obligation to an amount that is relevant based on the current payment rules for Medicaid and charity patients.

Based on the analysis provided by Ballad, I approve the request to waive the Terms of Certification minimum Total Charity Care requirement for fiscal year 2023.

Sincerely,

Larry L. Fitzgerald
COPA Monitor

ATTACHMENT C
FISCAL YEAR 2023
BASELINE AND PLAN SPENDING

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Dr. Alvarado and Mr. Kreutz:

The Terms of Certification (TOC) section 3.01 through 3.06 establishes two distinct monetary obligations for spending toward the six state-approved Plans. With each Plan is a baseline spending obligation and plan spending obligation.

The baseline spending obligation is the average spending for each Plan for the three years ending June 30, 2017. In each fiscal year during the ten year term of the TOC, Ballad is required to spend at least up to the baseline obligation for each Plan. In the event Ballad spends less than its baseline spending obligation in any fiscal year, the TOC requires the shortfall to be subtracted from the plan spending for that fiscal year. In effect, plan spending is treated as baseline spending to the extent baseline spending is below the baseline spending obligation for any fiscal year. The intent of the baseline spending obligation is to insure that Ballad does not fund its Plan spending obligations by reducing its historical baseline spending in the Plan areas.

Plan spending must meet three requirements. First, the plan spending must be incremental to baseline spending for a Plan. Plan spending can only be counted after the baseline obligation has been met. Second, the spending must be on new programs. Third, the spending must be included in a state-prospectively approved Plan. The plan spending obligation is to invest over ten years $308 million in the six Plans. The plan spending obligation is a Plan-by-Plan obligation; it is not a lump sum obligation.

The monitors asked the Ballad internal audit department to audit the spending amounts reported by Ballad toward the plan spending commitment and the baseline spending commitment. The objective of the audit was to determine that the amounts reported by Ballad were consistent with Article III of the Terms of Certification. The monitors reviewed the work performed by the Ballad internal audit department and made requests for additional documentation for the larger expenditures.

BASELINE SPENDING FOR FISCAL YEAR 2023:

The TOC requires Ballad to spend in each of the six Plan areas an amount at least equal to its spending during the baseline period for each of the six Plan areas. No audit adjustments were made to the baseline spending submitted by Ballad.

For fiscal year 2023, the baseline spending obligations that were not met include the following:

Rural Health $584,672
Health Information Exchange $277,568

The TOC requires that baseline spending shortfalls be deducted from plan spending for those two Plans before plan spending can be counted toward the plan spending obligations.

PLAN SPENDING FOR FISCAL YEAR 2023:

The TOC requires Ballad to invest in six Plan areas over the ten year term of the TOC. The spending obligation is a Plan by Plan obligation. (Overspending in one Plan is not offset against underspending in a different Plan). No audit adjustments were made to the plan spending submitted by Ballad. However, plan spending for four tactics was deemed to not meet the TOC criteria that requires plan spending to be prospectively approved by the states.

	Plan Spending Submitted by Ballad	Baseline Spending Shortfall	Plan Spending Disallowances	Fiscal Year 2023 Monitor Approved Plan Spending
Children's	$ 5,177,674			$5,177,674
Rural	5,590,484	$ 584,672		5,005,812
Behavioral	9,650,153		$569,824	
			817,850	
			382,755	7,879,724
Pop Health	11,810,020			11,810,020
HR/GME	10,931,810		378,761	10,553,049
HIE	297,135	277,568		19,567

Plan spending submitted by Ballad was disallowed for the following four tactics:

1. Behavioral Health walk-in clinic at Woodridge $569,824 (The expense was 51% above the state approved budget.)
2. Greene County Residential Center $817,850 (The expense was 99% above the state approved budget.)
3. Telehealth $382,755 (The expense was 99% above the state approved budget.)
4. Expansion of Addiction Medicine $378,761 (The expense was 136% above the state approved budget.)

The TOC requires plan spending to be prospectively approved by the state. The variances listed above were so material as an absolute number and as a variance from the state-approved amounts that they do not meet the criteria of being pre-approved by the state. There were other plan spending amounts in excess of the state-approved budget, but they were deemed to be within reasonable parameters.

CUMULATIVE PLAN SPENDING FISCAL YEARS 2019 - 2023 (FIRST FIVE YEARS OF TOC TERM):

The cumulative plan spending by Plan for the first five years on the TOC term was as follows:

PLAN	PLAN OBLIGATION	OVER (UNDER) SPENDING
Children's Services	$11,000,000	$2,092,037
Rural Health Services	12,000,000	8,719,950
Behavioral Health Services	25,000,000	-7,175,833
Population Health Improvement	20,000,000	7,979,015
Health Research/GME	26,000,000	4,137,002
Health Information Exchange	3,000,000	-2,729,580

The overspending for Children's Services, Rural Health Services, Population Health Improvement, and Health Research/GME will be carried forward to offset the plan spending commitments in future years.

REMAINING PLAN SPENDING OBLIGATIONS:

Based on the current plan spending trajectory and approved Plan amendments, the ten year plan spending obligations will be met by fiscal year 2025 for Children's Services and Rural Health Services; fiscal year 2026 for Population Health Improvement; and by fiscal year 2028 for Health Research/GME.

Behavioral Health Services is a Plan where the trajectory of spending does not suggest the Plan spending obligations will be met within the TOC ten year term. However, Plan Amendments might be filed that, if approved, can account for a shortfall in Behavioral Health Services plan spending within the ten year TOC term.

The Baseline spending obligation is an annual obligation, so it will remain as an obligation for each Plan over the ten year TOC term. New three year plans will be due in the spring of 2025. I recommend that the state and Ballad come to agreement in the next few months about the expectation for new Plans in any Plan area where the plan spending obligations have been met.

The spending for Health Information Exchange will not reach the ten year plan spending obligation. However, the monitors made the recommendation that the policy goals for health information exchange had been met in a reasonable manner so that plan spending is no longer required. TOC Section 3.06 (b) states the following:

"In the event the policy goals associated with a spending commitment plan are satisfied by the New Health System spending less than the Total Incremental Spending Obligation for that category, the New Health System shall propose reallocation of the remaining spending obligation to another spending category. For example, if the Department determines that the policy goals for the Region-wide HIE are satisfied in Fiscal Year 2023 and the New Health System has only spent $3,000,000 of the $8,000,000 spending obligation, the New Health System shall propose reallocation of the remaining $5,000,000 to another spending category (e.g., Rural Health) and the Department may waive the requirement that the New Health System submit a replacement plan for future years."

I recommend the TOC provision listed above be implemented.

EVENTS OF NONCOMPLIANCE:

Ballad is not compliant with the plan spending obligations for Behavioral Health Services and Health Information Exchange. The TOC states that the state can assess a fine for noncompliance with the Incremental Spending Obligations of $251,000 to $1,000,000 for each violation. The fine, if levied, is to be deposited into the Population Health Improvement Fund. Since the event of Noncompliance occurred twice, with Behavioral Health Services and Health Information Exchange, the fine may be levied twice.

In earlier years when Ballad was in noncompliance with the Incremental Spending Commitments, rather than levy a fine, the states required Ballad to establish an escrow account for the underspent amount. The escrow account was shown on Ballad's Balance Sheet.

TOC Section 6.04 (d) states as follows:

"(ii) In addition, if at any time the New Health System determines that a Noncompliance has occurred, or, to the Knowledge of the New Health System, is reasonably likely to occur, the New Health System shall notify the Department within fifteen (15) days thereof. Such notification shall include an explanation and supporting documentation, and any actions proposed to Cure (as defined in Section 6.05(c)) such Noncompliance. Each such report and all attachments shall be certified by the Chief Executive Officer and Chief Financial Officer of the New Health System as being true and correct in all material respects to their best knowledge, after due inquiry."

Ballad made statements in its quarterly reports that it might not be in compliance with the plan spending obligations. However, it did not give formal notification to the state of the likely event of noncompliance, nor did Ballad list actions to cure the event of noncompliance. TOC Exhibit H lists noncompliance with TOC section 6.04 as an event where the state may assess a remedial contribution for Noncompliance. The range of the fine is $10,000 to $100,000 for each day the report is late.

SUMMARY:

The review of baseline and plan spending, with the experience of five years, has become routine with no audit or monitor adjustments. Ballad can avoid disallowances by making budget amendments during a fiscal year when a "budget bust" has occurred. However, it is possible a budget amendment might not be approved by the state. It is more professional to discuss potential differences of opinion prospectively, rather than after the fiscal year has been completed.

The state and Ballad should come to agreement about the expectations of the content of a Plan or a Plan budget, when the plan spending obligation has been met. Even after the plan spending obligation has been met, the baseline spending obligation remains in effect.

The state should take action on the two events of noncompliance with the TOC.

Sincerely,

Larry L. Fitzgerald
Tennessee COPA Monitor

ATTACHMENT D

CAPITAL BUDGETING

Larry L. Fitzgerald
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August 9, 2023

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Dear Dr. Alvarado and Kevin:

Since Ballad does not have inpatient competition, it is not subject to the normal market pressures to maintain quality and updated property, plant, and equipment (PPE). In a competitive environment, hospitals will differentiate themselves from competitors by offering the most modern facilities and the latest technology. Hospitals advertise such things as all private rooms and emerging technology with the objective of acquiring a competitive edge over other hospitals. In lieu of competition, the regulatory document, Terms of Certification (TOC), includes a commitment for Ballad to submit a three year capital budget, submitted every three years, to the COPA Monitor and the state. However, the TOC does not require state approval of the capital budget.

The TOC has established a standard for the capital budget that Ballad, "shall maintain and repair, as needed, upgrade or replace, its medical equipment and related software support, physical plant equipment, building systems, and other machinery, facilities and non-medical equipment at a quality and technological level consistent with industry norms for similarly-sized healthcare systems." However, if the capital budget does not meet the standard, the TOC does not penalize Ballad. The only consequence of an inadequate capital budget is its impact on the decision for continuing public advantage from the COPN that is made annually by the Commissioner.

The following summarizes thoughts about the historical capital spending, three year capital budget, and the TOC regulations that address capital expenditures. The conclusion is that capital spending has been lagging annual depreciation expense, the three year capital budget does not meet the TOC standard, and the TOC section on capital expenditures is in need of a total rewrite. However, there are no specific violations of the TOC from underinvesting in the facility and not planning, through the budget process, to invest an adequate amount over the next three years.

The commitments to maintain PPE are in TOC Section 3.07, Facility Maintenance and Capital Expenditures. The paragraphs in Section 3.07 are copied below with COPA Monitor comments.

3.07. Facility Maintenance and Capital Expenditures.

(a) General. During the COPA Term, the New Health System and the other NHS Entities shall maintain and repair, and as needed upgrade or replace, their medical equipment and related software support, physical plant equipment, building systems (HVAC, elevators,parking, etc.), and other machinery, facilities and non-medical equipment at a quality and technological level consistent with industry norms for similarly-sized healthcare systems, each case promptly when needed. In connection with this commitment, the New Health System shall incur annual capital expenditures for each Fiscal Year, consistent with the plans required by Section 3.07(b), which plans shall exclude any capital expenditures related to the branding or rebranding of the Applicants to the New Health System, other one-time capital expenditures related to the consummation of the Affiliation, capital expenditures related to the other Monetary Commitments set forth in this Article III, and any ordinary course expenses of maintenance or repair that are not capitalized in accordance with GAAP. For the avoidance of doubt, the New Health System shall timely maintain and repair all of its systems, equipment and facilities referenced above, consistent with industry norms for similarly-sized healthcare systems, regardless of whether any maintenance and repair expense is capitalized or not capitalized pursuant to GAAP or other applicable guidance.

Capital investment standard:

Most hospital financial consultants suggest that the standard for investment in the PPE for a hospital is its annual depreciation expense. If a hospital invests an amount equal to its annual depreciation expense, it should be maintaining, but not improving, its PPE. However, the hospital would be investing current dollars, and the depreciation is a reflection of investment in earlier years, probably on average about 7 years. Even if investments match depreciation expense, when inflation is considered, the hospital is likely falling behind in maintaining its PPE by investing at the level of depreciation expense.

Ballad states its standard for capital investment in its recent report to the credit agencies where it is stated, “historical capital spending targeted at 100% of depreciation”.

From audited financial statements for fiscal year 2021 (the most recent year publicly available), listed below is the ratio of capital spending to depreciation expense for six randomly selected health systems:

Carilion Clinic	143%
Centra Health	90
UVA	215
Pikeville Medical Center	119
Valley Health (Winchester, VA)	92
Augusta Health (Staunton,, VA)	156

The ratio of capital spending to depreciation expense is over 90% for each of the six systems, and the average is over 100%.

Based on my experience with maintaining hospital PPE in a competitive environment, the statement made by Ballad in its credit agency report, and the information I gathered from audited financial statements of other systems, the minimum standard for capital investment consistent with industry norms is annual depreciation expense.

Capital investment since July 1, 2018:

Ballad made a commitment to maintain its PPE as an industry norm for similarly-sized systems. In the recent credit rating agency report, Ballad listed actual capital spending as a percentage of depreciation expense as follows:

FY 20	82%
FY 21	65%
FY 22	65%
FY 23	77% (budgeted percentage)

A simple average for the four years is 72%. Also, the numbers above include capital investment in Plans that the TOC does not count toward capital spending. The spending toward Plans is new and incremental spending and not money spent in replacement of routine normal capital obligations. Without even making the subtraction from spending noted above, the investment in PPE has been below the minimum TOC standard since Ballad was formed.

When a health system under invests in its PPE over a period of time, the quality of the PPE systematically deteriorates. The deterioration does not occur immediately but rather occurs over time. In a competitive environment, a health system that under invests in its PPE will lose market share. The normal market forces do not impact Ballad's need to maintain its PPE.

The actual spending indicates that Ballad has not complied with the TOC standard to maintain the PPE at an industry norm.

Three year capital budget starting July 1, 2023:

The TOC establishes a process whereby Ballad submits a three year capital budget to the COPA Monitor and the state. The budget should meet the standard set above. However, the budget does not require state approval. The intent of Section 3.07 is that the submitted capital budget will meet the standard set forth in the TOC. However, there is no benchmark that shows future capital budgets for health systems. Therefore, the COPA Monitor has relied on historical trends and Ballad's statements to assess compliance of the capital budget to the TOC standard.

Ballad cannot count capital investments made pursuant to an approved Plan as capital investment toward meeting the standard. In effect, the TOC does not permit Ballad to count the capital spending twice, once to meet the capital investment standard and once to meet the Plan obligations. Ballad's capital budget appears to be in compliance with that requirement.

Ballad's capital budget, following the TOC rules, is $226,293,000. Depreciation for the same three years will be approximately $430,000,000. The capital budget is 53% of the projected depreciation. The capital budget presented to the COPA Monitor and the state does not meet the standard stated in the TOC, "the Health System and the other NHS Entities shall maintain and repair, and as needed upgrade or replace, their medical equipment and related software support, physical plant equipment at a quality and technological level consistent with industry norms for similarly-sized healthcare systems, in each case promptly when needed. "

(ii) Replacement Capital Plans.
With respect to each Capital Plan, no later than ninety (90) days prior to the expiration of an existing plan, the New Health System shall develop and submit to the COPA Monitor and the Department a new Capital Plan every three (3)
Fiscal Years during the COPA Term to replace the expiring plan. Each Capital Plan shall not require the approval of the Department, but is subject to the provisions of Sections 3.07(b)(iii) and (iv) below. As part of each Annual Report, the New Health System shall include a report on the status of implementation of the then-current Capital Plan, including a summary of all capital expenditures made or not made as scheduled under the Capital Plan and any unplanned, additional capital expenditures made during the year. Each Capital Plan shall not be modified except in accordance with this Section 3.07.

Ballad submitted a three year capital plan on June 30, 2023. The capital plan has not been approved by the Ballad Board of Directors. The TOC does not state that the submitted capital budget must be a Board-approved budget, but I believe the authors of the TOC expected a submitted budget would be approved by the Board. I reviewed the budget assuming it will be approved by the Board, but this is an assumption only.

(iii) Facilities Assessment.

If, at the end of the third Fiscal Year under each Capital Plan, the New Health System has spent less than ninety percent (90%) of the aggregate required spending for the three (3) year period, the New Health System shall engage a facility consultant experienced with healthcare systems (the "Facilities Consultant") selected by the COPA Monitor to conduct a review of each COPA Hospital where a scheduled Capital Project was not completed in accordance with the Capital Plan (the "Facilities Assessment"). The Facilities Assessment at each relevant COPA Hospital will include a review of all building structures, building systems (HVAC, elevators, parking, etc.), medical equipment and related software support, physical plant equipment, and other machinery, facilities and non-medical equipment. The Assessment shall examine the need for replacement, repair and/or renovation of such items based on applicable code requirements, physical deterioration, functional obsolescence and technological obsolescence, and shall further categorize each identified need for maintenance, repair, and/or upgrade or replacement as an immediate, short-term, intermediate or long-term need. The Facilities Consultant shall complete and submit the Facilities Assessment to the New Health System, the COPA Monitor and the Department. Within three (3) months after completion of the Facilities Assessment, the New Health System and the COPA Monitor shall jointly develop and submit to the Department for its approval a new Capital Plan incorporating the findings from the Facilities Assessment (such new Capital Plan may also be referred to as a "Jointly-Developed Capital Plan"). Within thirty (30) days of receipt of any such plan, the Department shall approve or deny the plan in its discretion, to be exercised in accordance with Section 9.03.

TOC Section 3.07 was temporarily suspended by the Attorney General and TDH due to the period of public emergency. The suspension ended for TOC Section 3.07 on June 30, 2022. The percentage of the three year capital budget actually invested, which expired June 30, 2021, was not computed due to the temporary suspension of section 3.07. The provisions in this section have never been applied.

(iv) Proposed Modification by the New Health System.
In response to material unforeseen circumstances, and so long as the New Health System is not presently Jointly-Developed Capital Plan, the New Health System may at any time notify the COPA Monitor and request a modification of the existing Capital Plan. If the COPA Monitor determines the modification is a material change that necessitates obtaining additional information from an objective third party, the New Health System shall then engage a Facilities Consultant selected by the COPA Monitor to conduct a Facilities Assessment of the COPA Hospitals affected by the proposed modification in the same manner as set forth in Section 3.07(b)(iii). Promptly following the completion of the Facilities Assessment, the New Health System and the COPA Monitor shall jointly develop and submit to the Department for its approval a Jointly-Developed Capital Plan. The Department shall approve or deny any such plan within thirty (30) days of receipt of the plan.

Due to the temporary suspension of TOC Section 3.07, the provisions above have not been applied.

(v) Noncompliance under a Jointly-Developed Capital Plan. If at any During the COPA Term the New Health System does not complete any Capital Project identified in a Jointly-Developed Capital Plan, the New Health System shall deposit in a separate account restricted for such purpose the amount of any shortfall necessary to cover the cost of such capital expenditure until such item is completed. If the New Health System continues in a state of Noncompliance with respect to performance of any Capital Project identified in such Jointly-Developed Capital Plan for an unacceptable period of time (as will be determined by the Department based on the timeline proposed in such Jointly-Developed Capital Plan, but no longer than 180 days), the New Health System shall forfeit the lesser of $2,000,000 or an amount equal to twenty percent (20%) of the amount of the required capital expenditure. The Department may assess additional forfeitures annually if the New Health System continues in Noncompliance with respect to any Capital Project. Each such forfeiture payment shall be paid within ten (10) days of the Department's request to the Population Health Initiatives Fund by transfer from the separate account referenced above.

Due to the temporary suspension of TOC Section 3.07, the provisions above have not been applied.

In summary, the steps in the TOC relating to capital budgeting are as follows:

1. Ballad must submit a three year capital budget to the COPA Monitor and the state for each three year cycle. However, the budget does not require state approval.

2. The budget must meet the standard stated in the TOC. The standard is subjective and therefore difficult to monitor. Furthermore, future capital budgets for hospitals are not publicly available. Additionally, if the budget does not meet the standard in the opinion of the state, there are no direct consequences to Ballad.

3. If Ballad does not spend at least 90% of the dollars included in the three year capital budget that had been submitted, there are consequences.

Ballad is motivated to submit a low capital budget, most likely below the TOC standard, and by doing so will protect themselves from the consequences of not spending 90% of the budgeted dollars over three years.

The TOC section addressing capital budget and investment can be improved. Attachment B is a summary of changes to the capital budget section of the TOC that I submit for consideration.

Finally, Ballad has underinvested in its PPE since July 1, 2018, which has created a need to catch up on capital spending. However, the three year capital budget, which is 53% of projected depreciation expense, does not meet the TOC standard even without considering the low capital spending during the previous four years. However, the TOC does not provide for penalties as a result of inadequate capital spending and an inadequate capital spending budget.

It is my recommendation that the Commissioner give consideration to the impact of inadequate investment in Ballad's property, plant, and equipment on the decision of continuing public advantage from the COPA.

Furthermore, I recommend that the TOC regulations for facility maintenance and capital expenditures be rewritten. Attachment A lists recommendations for consideration about redrafting the section.

Sincerely,

Larry L. Fitzgerald
Tennessee COPA

EXHIBIT
CONSIDERATIONS FOR TOC REQUIREMENTS
FACILITY MAINTENANCE AND CAPITAL EXPENDITURES

The language in the TOC Section 3.07, Facility Maintenance and Capital Expenditures provides limited assurance that Ballad will continue to invest an amount in its PPE to continue to provide modern facilities and current technology. The provisions are summarized below:

1. Ballad must submit a three year capital budget to the COPA Monitor and the state for each three year cycle. However, the budget does not require approval.
2. The budget must meet the standard stated in the TOC. The standard is subjective and therefore difficult to monitor. Additionally, if the budget does not meet the standard in the opinion of the state, there are no direct consequences to Ballad.
3. However, if Ballad does not spend at least 90% of the dollars included in the three year capital budget that had been submitted, there are consequences.

Ballad is motivated to submit a low capital budget, likely below the TOC standard, but by so doing protect themselves from the consequences of not spending 90% of the budgeted dollars over three years. The language does serve the needs of Tennesseans.

The COPA Monitor submits the following considerations for a new TOC Section addressing capital budgets.

1. A one year capital budget will be submitted for state approval 90 days before the ensuing fiscal year. For example the capital budget for fiscal year 2025 would be due April 1, 2024.
2. The capital budget submitted to the state for approval must have Board of Director approval or be deemed as being non compliant with the TOC.
3. The minimum standard for the amount of the capital budget is estimated depreciation expense for the current fiscal year. For example, if depreciation expense is estimated to be $150,000,000 for fiscal year 2024, the capital budget for fiscal year 2025 must be at least $150,000,000.
4. The actual dollars invested or contractually committed for an approved capital budget must be 95% of the approved budget within two years of the conclusion for the fiscal year for the applicable capital budget. For example, if the capital budget for fiscal year 2025 is $150,000,000, by June 30, 2027, $142,500,000 must have been actually spent or contractually committed.
5. Projects that are included in a Plan or Plan Amendment cannot be counted toward the minimum capital budget requirement.

6. The capital budget cannot be disproportionately allocated to one state versus the other.. This is a subjective requirement so it cannot really be enforced. However, it is an appropriate provision for the TOC.
7. Failure to comply with the provision 1-5 above represents noncompliance with the TOC and is subject to remedial contributions in Exhibit H of the TOC range of fines between $251,000 - $1,000,000.

The provisions above are objective standards that can be monitored. The standard of investing at an amount that is at least as large as depreciation expense is the standard Ballad quotes in their report to the credit rating organizations.