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Comprehensive legal review by former top lawyers to Owens and Ritter shows path for lawmakers to create Hospital Provider Fee enterprise

DENVER — In a comprehensive legal review (attached) conducted for a statewide group of business and community organizations, attorneys Jon Anderson and Trey Rogers concluded that proposals for a state-owned business that would charge, collect, and administer a hospital provider fee similar to the current one, exempt from state revenue limits, would be “legally sound and fiscally responsible.”

Colorado Springs Mayor and former Colorado Attorney General (2005-2014) John Suthers agreed, saying “The way Hospital Provider Fees are accounted in the state budget has created a serious problem. If this situation is not addressed soon, important state programs will be cut that negatively impact Colorado Springs and every other local community in Colorado. Transportation funding, in particular, will continue to suffer. **Based on my experience, I believe that some form of a Hospital Provider enterprise could be designed to be constitutional under state law.**”

While this recent legal review is at odds with a 2015 memorandum from the Office of Legislative Legal Services, Anderson and Rogers note that the OLLS memo does not appear to have been drafted or intended to serve as “comprehensive, complete or definitive analysis.”

Anderson, a partner with Holland & Hart, and Rogers, a partner with Lewis Roca Rothgerber Christie, served as chief legal counsel to governors Owens and Ritter, respectively.

“The only point on which we differ with OLLS is the question of whether a self-sufficient, state-owned provider fee business would qualify as an enterprise under TABOR. We believe it would.” Rogers added, “TABOR is intended to limit the growth of government that is paid for by our tax dollars, but it is not intended to limit the growth of self-sufficient, government-owned businesses that receive no tax dollars.”

The pair said the OLLS memo concluded, “incorrectly, that the new entity ‘would lack the characteristics of a business required for and shared by enterprises that are exempt from state revenue limits.

Anderson cited the University of Colorado as an enterprise similar to what would be envisioned for the hospital fee.

“CU provides a great service to its students and, as a result of that great service, attracts more students and money through tuition, which is good growth and the type of growth the

Taxpayers Bill of Rights was not intended to limit. This is precisely why CU is an enterprise and thus when the school brings in more revenue through more students' tuition that revenue does not trigger a refund from the general fund," he said. "By the same token, a provider fee enterprise could be created that is a self-sufficient, government-owned business helping hospitals defray the costs of serving their patients. That's why growth of the provider fee shouldn't trigger a refund from the general fund as it would today."

The provider fee enterprise would charge a fee to its customer hospitals, obtain matching federal funds, and pay the combined fee and federal funds back to the hospitals to provide care for low-income patients. It would keep a portion of its revenues to pay employees, cover its costs of operation and to provide other valuable services to hospitals. It would do all this with no financial support from the state. That's exactly the kind of self-supporting state-owned business TABOR identifies as an enterprise.

A provider fee enterprise created by the legislature would have additional legal clout, Rogers and Anderson said.

"Our courts have said that statutes enacted by the General Assembly enjoy a strong presumption of constitutionality and will not be overturned unless the statute is unconstitutional beyond a reasonable doubt," Rogers said. "It is hard to imagine a court would find a provider fee enterprise to be unconstitutional beyond a reasonable doubt."

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