

**NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF HEALTH SERVICE REGULATION
RALEIGH, NORTH CAROLINA**

**IN RE: REQUEST FOR)
DECLARATORY RULING BY) DECLARATORY RULING
DUKE UNIVERSITY HEALTH SYSTEM)
d/b/a/ DUKE UNIVERSITY HOSPITAL)**

I, Robert J. Fitzgerald, Director of the Division of Health Service Regulation (the “Department”), hereby issue this declaratory ruling to Duke University Health System d/b/a Duke University Hospital (“Duke”) pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0103, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. Duke has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling that Duke may operate its air ambulance service on a temporary basis with backup aircraft pending its application and receipt of a Certificate of Need (“CON”) for permanent replacement aircraft. For the reasons given below, I conclude that the Request should be granted, subject to the conditions stated below.

This ruling is binding on the Department and the person requesting it if the material facts stated in the Request are accurate and no material facts have been omitted from the Request. The ruling applies only to this request. Except as provided by N.C.G.S. § 150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. Duncan Yaggy, Chief Planning Officer of Duke, has requested this ruling on behalf of Duke and has provided the statement of facts upon which this ruling is based. The material facts as provided by Duke are set out below.

STATEMENT OF THE FACTS

Effective 7 June 2001, Duke was issued a CON for Project ID No. J-6364-01 “to acquire a new rotary-wing air ambulance to replace its existing rotary-wing air ambulance for a total of two rotary-wing air ambulances upon completion of the project.” Duke states that it purchased two new, identical helicopters (the “Original Aircraft”) in 2001. One was acquired pursuant to the certificate of need and the second was acquired to replace its existing helicopter that crashed in October 2000. It states that it has recently concluded that the Original Aircraft were not well-suited to operating with the necessary reliability for its air ambulance service. Duke grounded both of the Original Aircraft on 28 April 2007 after repeated episodes of mechanical troubles affecting both engines on each of the Original aircraft.

Duke states that part of its existing contract with the company responsible for the operation and maintenance of its air ambulance helicopters, CJ Systems Aviation, Group, Inc. (“CJ”), requires CJ to supply suitable backup aircraft when either of the primary helicopters are to be out of service for more than 36 hours. Duke represents that it has requested, and CJ has supplied, backup helicopters (the “Interim Aircraft”) to continue its air ambulance service since April, 2007. Duke states that it notified the North Carolina Office of Emergency Medical Services of the substitution when it was effected. Duke represents that it obtained the services of the Interim Aircraft to temporarily replace the Original Aircraft as part of its broader service agreement with CJ, and that it has not acquired any property or ownership interest in the Interim Aircraft. Duke reports that both of the Original Aircraft have been disposed of by sale to a broker in August 2007 for transport out-of-state and resale.

Duke states that it has determined the Interim Aircraft are not suitable to provide the full range of services and missions that its air ambulance service crew is trained and prepared to

provide. Accordingly, it is preparing to submit CON applications proposing the acquisition of two air ambulances to replace the Interim Aircraft and serve as primary helicopters for its service. Duke states that it intends to submit the CON applications on or before 15 November 2007. The Request seeks confirmation that it may continue to operate using the Interim Aircraft pending receipt of a CON for permanent replacement aircraft.

ANALYSIS

If Duke were offering or developing a new institutional health service, it would be required to obtain a CON. N.C.G.S. § 131E-178(a). On the narrow facts of this case, the use of the Interim Aircraft as temporary replacements for the Original Aircraft does not constitute a new institutional health service, because Duke has no ownership or property interest in the Interim Aircraft, and it is simply using them as temporary replacements for out-of-service aircraft during a limited period of time while it undertakes to acquire new aircraft for its air ambulance service. The Original Aircraft were grounded for reliability concerns, which impacted the public health and safety, and the Interim Aircraft are necessary to continue Duke's air ambulance service for which a need has previously been established.

This ruling does not permit Duke to use the Interim Aircraft on a permanent basis or even indefinitely. Duke has represented that it intends to submit applications for a CON authorizing its proposed permanent replacement aircraft not later than 15 November 2007. If Duke does not submit applications by the designated date, Duke shall be required to seek an additional or a revised ruling to extend the period of time it uses the Interim Aircraft based on the facts and circumstances at the time.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that Duke's use of the Interim Aircraft as temporary replacements for the Original Aircraft does not violate its CON. If Duke does not submit applications before 16 November 2007, Duke shall be required to seek an additional or a revised ruling extending the time for using the Interim Aircraft based on the facts and circumstances at the time.

This ____ day of _____, 2007.

Robert J. Fitzgerald, Director
Division of Health Service Regulation
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States postal service in a first class, postage prepaid envelope addressed as follows:

CERTIFIED MAIL

Duncan Yaggy
Chief Planning Officer, DUHS
3100 Tower Blvd., Box 80
University Tower, 10th Floor
Durham, NC 27707

This _____ day of _____, 2007.

Jeff Horton
Chief Operating Officer