

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

IN RE: REQUEST FOR DECLARATORY)	
RULING BY FORSYTH MEMORIAL)	
HOSPITAL, INC. D/B/A FORSYTH)	DECLARATORY RULING
MEDICAL CENTER AND FOUNDATION)	
HEALTH SYSTEMS CORP. D/B/A)	
HAWTHORNE SURGICAL CENTER)	
Project I.D. No. G-7416-05)	

I, Robert J. Fitzgerald, Director of the Division of Health Service Regulation (the “Department”), hereby issue this declaratory ruling to Forsyth Memorial Hospital, Inc. d/b/a Forsyth Medical Center ("FMC") and Foundation Health Systems Corp. d/b/a Hawthorne Surgical Center ("HSC") (collectively “Petitioners”) 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. Petitioners have filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling as to the applicability of N.C.G.S. Chapter 131E, Article 9 to the facts described below. For the reasons given below, I conclude that an increase in the number of operating rooms under the license of FMC does not require a certificate of need ("CON") on the facts described below; and that good cause exists to transfer ownership of the CON that was issued to HSC for Project I.D. No. G-7416-05.

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. Denise M. Gunter of Nelson Mullins Riley & Scarborough, LLP has requested this ruling on behalf of Petitioners

and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for Petitioners are set out below.

STATEMENT OF THE FACTS

On March 14, 2007, the Department issued to HSC a certificate of need ("CON"), Project I.D. No. G-7416-05, for the relocation of two existing gastrointestinal endoscopy rooms from FMC to HSC and conversion of those rooms to ambulatory surgical operating rooms. HSC is an ambulatory surgical facility with four operating rooms on the campus of FMC in Winston-Salem. HSC and FMC are currently separately licensed facilities. Both HSC and FMC are owned by Novant Health, Inc., which Petitioners describe as the ultimate parent entity.

At the time the CON was issued, the endoscopy rooms to be relocated, and which were approved to be converted to operating rooms, were licensed under FMC's hospital license. Petitioners represent that HSC is in the process of developing the operating rooms approved in Project I.D. No. G-7416-05, but the project is not yet finished. For the reasons explained below, HSC now seeks to transfer the undeveloped CON for two ambulatory surgical operating rooms to FMC, thereby transferring the two rooms to FMC's hospital license. Petitioners represent that development of the CON will otherwise proceed as planned and outlined in the CON. The site, physical structure, and capital costs of the CON for Project I.D. No. G-7416-05 will not change or exceed the \$3,998,973 authorized in the CON. The only change in the project will be the transfer of the license for the operating rooms to FMC's license. Simultaneously, FMC has filed a Notice of Exempt Acquisition pursuant to § 131E-184(8) to acquire HSC in its entirety and convert HSC and its assets to a department of FMC operating under FMC's consolidated license. Petitioners state that this consolidation will not ultimately result in a change in ownership or

control of the two facilities because both facilities will continue to be owned and controlled by Novant.

Petitioners offer the following rationale for the proposed transactions. On January 1, 2008, the Centers for Medicare and Medicaid Services ("CMS") will modify the existing ambulatory surgery center pay structure to pay ambulatory surgery centers through the ambulatory payment category ("APC") methodology. At the time HSC's CON application was filed and the CON was issued, the new CMS rule for ambulatory surgery payments had not yet been promulgated. HSC will be required to become compliant with the APC billing structure by January 1, 2008, in order to continue treating and billing Medicare patients. HSC's current charge system cannot support the APC methodology, and Petitioners state that conversion to an itemized chargemaster would be very time-consuming and expensive to implement before the January 1 deadline.

Petitioners represent that approximately 70 percent of HSC's patients are Medicare beneficiaries. Novant has determined that the more cost efficient and effective way to address the issue is to convert HSC into a department of FMC so that FMC's resources may be utilized to streamline billing, medical records, and integration with ancillary systems.

Petitioners state that FMC expects that 95 percent of the patients treated at HSC will not experience any change in expenses. The majority of patients receiving services at HSC who may experience a change in expenses possess secondary insurance coverage that is adequate to compensate for the difference in charges. Further, those procedures performed at HSC which are not typically performed at FMC have been identified by Novant and financial analysts are working to ensure those procedure charges remain price neutral, i.e., no increase in charges, after the January 1, 2008 conversion.

After the proposed transactions, the number of operating rooms on FMC's license will increase. However, there will be no overall change in the number of operating rooms owned by Novant in Winston-Salem as the parent of both FMC and HSC. Petitioners represent that there will be no physical changes to the existing operating rooms. There will be no change in scope or cost to the operating rooms approved in the CON for Project I.D. No. G-7416-05. Thus, the proposed transactions will have no additional capital cost.

ANALYSIS

N.C.G.S. § 131E-178 provides that no person shall offer or develop "a new institutional health service" without first obtaining a CON. N.G.C.S. § 131E-176(16)u defines "new institutional health service" to include:

[t]he construction, development, establishment, increase in the number or relocation of an operating room or gastrointestinal endoscopy room in a licensed health service facility, other than the relocation of an operating room or gastrointestinal endoscopy room within the same building or on the same grounds or grounds not separated by more than a public right-of-way adjacent to the grounds where the operating room or gastrointestinal endoscopy room is currently located.

N.C.G.S. § 131E-184 provides that the Department shall exempt from certificate of need review certain new institutional health services if the Department receives prior written notice from the entity proposing the new service with an explanation of why the new service is required. Among the enumerated reasons for exemption is for the proposing entity to "acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition." N.C.G.S. § 131E-184(a)(8).

N.C.G.S. § 131E-184 applies to FMC's intended acquisition of HSC and its existing operating rooms.

N.C.G.S. § 131E-181(a) provides that a CON “shall be valid only for the defined scope, physical location, and person named in the application. A certificate of need shall not be transferred or assigned except as provided in G.S. 131E-189(c).”

N.C.G.S. § 131E-189(c) provides:

The Department may immediately withdraw any certificate of need if the holder of the certificate, before completion of the project or operation of the facility, transfers ownership or control of the facility, the project or the certificate of need. . . . Transfers resulting from death or other good cause, as determined the Department, shall not result in withdrawal if the Department receives prior written notice of the transfer and finds good cause. . . .

Petitioners have shown good cause for the transfer of the CON because (1) the scope and physical location of the operating rooms approved in the CON for Project I.D. No. G-7416-05, remain unchanged, (2) HSC’s acquisition by FMC reflects a corporate reorganization to meet the practical requirements of a change in the Medicare billing methodology, and (3) the transfer will not result in any change in services to patients or in the ultimate number or location of operating rooms in the county or on the campus.

N.C.G.S. § 131E-181(b) requires that a recipient of a CON, or any person who may subsequently acquire the service for which a CON was granted, is required to materially comply with the representations made in its application for the CON. Petitioners, therefore, must ensure that the proposed transaction is price-neutral with respect to procedure charges to patients consistent with the representations of their CON application.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true and subject to the condition set out below, I conclude that on the facts presented here, the increase in the number of operating rooms under FMC's license resulting from the proposed transaction does

not require a CON; and (2) Petitioners have shown good cause to transfer the CON for Project I.D. No. G-7416-05 from HSC to FMC. This transfer does not violate N.C. Gen. Stat. § 131E-181, and does not constitute a failure to satisfy a condition of the CON in violation of N.C. Gen. Stat. § 131E-189(b) or any of the rules of the Department. The transfer is subject to the condition that the transfer be price-neutral with respect to procedure charges to patients consistent with the representations of the CON application.

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

Denise M. Gunter
Nelson Mullins Riley & Scarborough LLP
380 Knollwood Street
Winston-Salem, NC 27103

This _____ day of _____, 2007.

Jeff Horton
Chief Operating Officer