

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

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY NORTH CAROLINA )       DECLARATORY RULING  
BAPTIST HOSPITAL )  
Project I.D. No. G-2861-87 )**

I, Robert J. Fitzgerald, as Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services (“Department” or “Agency”), do hereby issue this Declaratory Ruling pursuant to North Carolina General Statute § 150B-4 and 10A NCAC 14A.0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

North Carolina Baptist Hospital (“NCBH”) has requested a declaratory ruling allowing it to operate its air ambulance service, Project I.D. No. G-2861-87, on a temporary basis with a backup aircraft pending its application and receipt of a Certificate of Need (“CON”) for a permanent replacement aircraft. For the reasons stated below, I approve the request.

This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. S. Todd Hemphill of Bode, Call & Stroupe, L.L.P. has requested this ruling on behalf of NCBH and has provided the material facts upon which this ruling is based. Wallace C. Hollowell, III, of Nelson Mullins Riley & Scarborough, L.L.P., has submitted comments opposing the NCBH request on behalf of Med-Trans Corporation (“MTC”).

## **STATEMENT OF THE FACTS**

Effective 7 April 1987, the CON Section issued a CON to NCBH for Project I.D. No. G-2861-87, pursuant to which NCBH replaced its air ambulance unit with a Bell-412 twin engine aircraft (the “Existing Helicopter”). NCBH operated the Existing Helicopter under lease with Air Methods Corporation. NCBH states that on 26 July 2007, the Existing Helicopter was being transported by tractor trailer for maintenance when the main rotor mast struck a highway bridge. NCBH represents that the Existing Helicopter sustained irreparable damage and is a total loss.

NCBH has worked with the lessor of the Existing Helicopter, Air Methods, to provide a backup aircraft (the “Interim Helicopter”) to continue its air ambulance service. The Interim Helicopter is being provided under the terms of the current lease for the Existing Helicopter.

By letter dated 9 October 2007, NCBH requested a declaratory ruling that it could acquire a permanent replacement aircraft without first obtaining a CON. On 5 December 2007, I issued a declaratory ruling that the proposed replacement aircraft was not exempt from CON review, and denied NCBH’s request.

NCBH now represents that it anticipates being prepared to file its CON application for the replacement aircraft on or before 15 May 2008. It states that its current lease with Air Methods is scheduled to expire on 31 December 2008. NCBH intends to enter into a new lease with Air Methods upon approval of its CON.

## **ANALYSIS**

If NCBH 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 Helicopter as a temporary replacement for the Existing Helicopter does not constitute

a new institutional health service, because NCBH has no ownership or property interest in the Interim Helicopter, and it is simply using it as a temporary replacement for an out-of-service aircraft during a limited period of time while it undertakes to acquire a new aircraft for its air ambulance service. The Existing Helicopter was damaged beyond repair, and the Interim Helicopter is necessary to continue NCBH's air ambulance service for which a need has previously been established.

This ruling does not permit NCBH to use the Interim Helicopter on a permanent basis or even indefinitely. NCBH has represented that it intends to submit an application for a CON authorizing its proposed permanent replacement aircraft not later than 15 May 2008. If NCBH does not submit an application by the designated date, NCBH shall be required to seek an additional or a revised ruling to extend the period of time it uses the Interim Helicopter based on the facts and circumstances at the time.

The comments submitted on behalf of MTC argue that the Interim Helicopter should require a CON just as a replacement aircraft should. (The comments also note MTC's basic position that the CON requirement for air ambulance services is preempted by federal law. That position is currently the subject of litigation in federal court.) As noted above, if the Interim Helicopter constituted a new institutional health service, it would require a CON. Here, however, the Interim Helicopter is a temporary measure to allow the continuation of a health service for which a need has been identified and a CON issued, while NCBH addresses the exceptional circumstance of a replacing an aircraft damaged beyond repair.

### **CONCLUSION**

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that NCBH's use of the Interim Helicopter as a temporary replacement for the Existing

Helicopter does not violate its CON. If NCBH does not submit its application for a CON before 16 May 2008, NCBH shall be required to seek an additional or a revised ruling extending the time for using the Interim Helicopter based on the facts and circumstances at the time.

. This the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

---

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 first-class, postage pre-paid envelope addressed as follows:

**CERTIFIED MAIL**

S. Todd Hemphill  
Bode, Call & Stroupe, L.L.P.  
3105 Glenwood Avenue, Suite 300  
Raleigh, NC 27612

With a courtesy copy to:

Wallace C. Hollowell, III  
Nelson Mullins Riley & Scarborough, LLP  
Glen Lake One, Suite 200  
4140 Parklake Avenue  
Raleigh, North Carolina 27612

This the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

---

Jeff Horton  
Chief Operating Officer