

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

**IN RE: REQUEST FOR) DECISION TO DECLINE TO ISSUE
DECLARATORY RULING BY) DECLARATORY RULING
TRIAD NEUROSURGERY, LLC)**

Triad Neurosurgery, LLC (“Triad Neurosurgery”) has requested the North Carolina Department of Health and Human Services, Division of Health Service Regulation (the “Department” or the “Agency”) to issue a declaratory ruling interpreting the applicability of 10A NCAC 14C.2103(b)(1) and 10A NCAC 14C.2103(c) to a certificate of need (“CON”) application that Triad Neurosurgery filed with the Department’s CON Section for the 1 November 2008 review. Triad Neurosurgery states that it seeks to establish a new ambulatory surgery facility in Greensboro by relocating two existing operating rooms. Administrative rules 10A NCAC 14C.2103(b)(1) and 10A NCAC 14C.2103(c) relate to performance standards that must be satisfied to approve an application for proposed surgical services and operating rooms.

Pursuant to N.C. Gen. Stat. § 150B-4, 10A NCAC 14A.0103, and the authority granted to me by the Secretary of the Department of Health and Human Services, and for the reasons given below, I hereby decline to issue any ruling to Triad Neurosurgery.

The North Carolina Administrative Procedure Act (“APA”) provides that:

On request of a person aggrieved, an agency shall issue a declaratory ruling . . . as to the applicability to a given state of facts of a statute administered by the agency . . . except when the agency for good cause finds issuance of a ruling undesirable.

N.C. Gen. Stat. § 150B-4. The APA also provides that an agency “shall prescribe in its rules the circumstances in which rulings shall or shall not be issued.” *Id.* Consequently, the Department has adopted a rule that provides that:

Whenever the Director [of the Division of Health Service Regulation] believes for good cause that the issuance of a declaratory ruling will not serve the public interest, he may refuse to issue one. When good cause is deemed to exist, the

Director will notify the petitioner of his decision in writing stating reasons for the denial of a declaratory ruling.

10A NCAC 14A.0103.

Triad Neurosurgery filed its Request for Declaratory Ruling on 19 September 2008. On 15 October 2008, Triad Neurosurgery filed an application for a CON to establish a new ambulatory surgical facility in Greensboro by relocating two existing operating rooms. The review period for the application began 1 November 2008, which also is the date that 10A NCAC 14C.2103(b)(1) and 10A NCAC 14C.2103(c) became effective as permanent rules. During the comment period for these two permanent rules, Triad Neurosurgery did not provide any comment to the Agency recommending any changes to the proposed permanent rules.

The ruling sought by Triad Neurosurgery does not serve the public interest for several reasons. First, the CON Section's interpretation of its review criteria should not be changed during the period after applications are filed and a review has commenced. Second, the issuance of a ruling could lead to judicial review of the ruling in Superior Court at the same time that the CON Section's decision on the application is under review in the Office of Administrative Hearings. This would violate the principle of judicial economy and would deprive the Department of the opportunity to decide the matter administratively before the courts are involved.

CONCLUSION

For the reasons given above, I decline to issue any ruling in response to the Request for Declaratory Ruling filed by Triad Neurosurgery.

This the _____ day of November, 2008.

Jeff Horton, Acting 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

Marcus C. Hewitt
Williams Mullen, P.C.
Post Office Drawer 19764
Raleigh, North Carolina 27619-9764

Maureen Demarest Murray
Smith Moore Leatherwood, LLP
300 N. Greene Street, Suite 1400
Greensboro, North Carolina 27401

This the _____ day of November, 2008.

Jeff Horton
Acting Director