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CAROLINAEAST
HEALTH SYSTEM

Comments in Opposition to the Petition from Affordable Health Care Facilities, LLC

August 26, 2009

CarolinaEast Health System (CarolinaEast), based in New Bern, Craven County, North Carolina is hereby providing comments on the petition filed by Affordable Health Care Facilities, LLC (AHCF) for an expansion of the Single Specialty Ambulatory Surgery Demonstration Project. While we will address concerns we have with specific parts of the petition, we also have some general comments about the petition. We note that the petition is similar in its message, but not identical, to a petition filed in the Spring by the same entity. On that basis, CarolinaEast will not repeat comments made on the Spring petition; rather these comments will primarily address any new ideas presented in the petition filed July 31, 2009, such that they exist.

CarolinaEast also wishes to convey its appreciation to the SHCC and the various committees and workgroups who have considered this demonstration project. We believe that the SHCC's work has thoroughly vetted the ideas presented by AHCF's original petition, filed in 2008, along with the contribution of many other individuals with extensive health care planning and regulatory experience. As a result, CarolinaEast believes that the demonstration project that has evolved from this process is a much more sound approach to examine the issues raised in AHCF's petitions, compared to the much broader approach favored by the petitioner.

As expressed in our petition filed in the Spring in response to similar petitions filed by AHCF and others, CarolinaEast believes that sufficient empirical evidence exists to confirm that the majority of single specialty Ambulatory Surgery Centers do not provide significant amounts of charity care or care to historically medically underserved payors, namely Medicaid. To that extent, a demonstration project has already existed for many years in North Carolina, and has shown that single specialty Ambulatory Surgery Centers do not generally improve access to the medically underserved or indigent.

AHCF's petition proposes several revisions, most notably to expand the demonstration projects by expanding the demonstration areas out of the three

metropolitan areas to include counties with populations of 85,000 or more and one hospital, or 125,000 or more and two hospitals, as well as to remove the limit on the number of demonstration projects that can be approved. CarolinaEast believes that this suggestion should be rejected, for several reasons. First, the petition contains no rationale for the selection of these criteria, nor how these criteria show that single specialty Ambulatory Surgery Centers are needed in a particular area. In fact, the SHCC has in the past denied petitions for additional operating rooms when the petitions used population ratios as a criterion for demonstrating need[1]. Thus, without any additional basis for these criteria, the SHCC should similarly reject this revision. Next, this suggested revision would not account for counties that already have significant excess of surgical capacity. For instance, Craven County, with a population of around 100,000 and one hospital, exceeds the criterion suggested by AHCF. However, as shown in the *Proposed 2010 SMFP*, Craven County has a surplus of nearly four operating rooms. To allow for open development in Craven and other counties that meet the petition's criteria but have excess surgical capacity would directly contradict the Findings of Fact in the CON Statute, specifically § 131E-175(4) and (6), which state,

> *(4) "That the proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services."*
>
> *(6) "That excess capacity of health service facilities places an enormous economic burden on the public who pay for the construction and operation of these facilities as patients, health insurance subscribers, health plan contributors, and taxpayers."*

Finally, it is our understanding that the reason for a demonstration project is to allow the development of only a small number of facilities in order to study the effectiveness and impact of the single specialty Ambulatory Surgery Centers (ASC's). Removing the limit on the number of demonstration projects is contrary to the nature of demonstration projects. Moreover, the SHCC has often expressed concern that these types of projects cannot be easily "undone." Opening the door to dozens or scores of new ASC's that are likely to remain in place permanently is not a prudent method of conducting a demonstration project. Finally, with no evidence to support the petitioner's recommendations, CarolinaEast believes the demonstration project should not be expanded to other counties and that the limited number of demonstration projects should be

[1] See, for example, Agency Report on petition from Randolph Hospital, page 3, from the September 2008 Acute Care Services Committee meeting.

maintained, given the real possibility of unnecessary duplication and underutilization that could result from approving this portion of the petition.

A final recommendation in the AHCF petition involves a reimbursement ceiling for private payors and under- and uninsured patients. CarolinaEast notes that the current petition suggests a ceiling of 250 percent of Medicare, while the petition filed in March 2008, recommended a ceiling of only 200 percent of Medicare (See page 5 of AHCF petition filed March 5, 2008). Notwithstanding the 25 percent inflationary factor in AHCF's current recommendation, CarolinaEast believes that such a recommendation is difficult, if not impossible, for the SHCC to monitor. While some states do have price controls for health care services, North Carolina does not, and such an approach would likely require legislative changes.

While the above comments address the recommendations in the AHCF petition, CarolinaEast also wishes to comment on some of the statements made in the body of the petition. First, AHCF attacks the SHCC on page 3, by asserting that the SHCC members have "conflicts of interest." CarolinaEast notes that through Executive Order 10, Governor Perdue has recognized the importance of having SHCC members that are knowledgeable about health care matters, but has instructed them regarding their conduct where a possible conflict of interest might exist. Both before and since the issuance of that Executive Order, the SHCC members have clearly made their best efforts to indicate any possible conflicts that might exist and to abstain from voting on matters for which there is a possible conflict. It should also be noted that the SHCC formed the Single Specialty ASC workgroup, which has made the recommendations for the demonstration project that appears in the Proposed 2010 SMFP, following the petition filed by AHCF. Notwithstanding the SHCC's perceived "conflicts of interest" asserted by AHCF, a demonstration project for much of what that organization proposed has been approved after the input and deliberation of many members of the SHCC and others.

AHCF continues by attacking the NC CON law on pages 3 and 4, stating that NC did not repeal its CON laws "unlike other states." The petition goes on to characterize the NC CON laws as an "anachronism" that "promotes monopoly behavior." It should first be noted that although some states have repealed their CON laws, the majority of states (approximately 30 or more) still have CON laws in place. AHCF also quotes from a 1973 NC Supreme Court decision to imply that the current NC CON law is unconstitutional. AHCF omits the essential fact that the Supreme Court decision related to the NC CON law that was enacted July 21, 1971. The Aston Park decision did find the 1971 CON law unconstitutional; it was re-written and re-enacted in 1977 and forms the basis for our current CON law. Thus, AHCF's assertion that the 1977 CON law is

unconstitutional based on the Supreme Court's ruling on the 1973 law is without merit.

AHCF then refers to a report from the Dartmouth Atlas which indicates that hospitals can be "dangerous places." The petition then states that the majority of ASC's currently in the state are associated with hospitals, and then makes a giant leap in logic to assert that only freestanding, non-hospital associated ASC's are safe. On the contrary, when the Dartmouth Atlas report is read in context, the report is commenting on the wide disparity in health care expenditures across the country. One of the chief findings in the report is that where there are more resources per capita (e.g. hospital beds, CT scanners), more utilization will occur, which raises the costs. Thus, AHCF's recommendation to allow an unlimited number of applicants for these demonstration projects would increase the operating room resources per capita, and by extension, increase the utilization of and costs of these services, according to the Dartmouth Atlas report.

AHCF also comments that hospitals can horizontally integrate by hiring surgeons, which will mitigate the impact of expanding the demonstration project. While it is true that recent trends have resulted in an increasing number of physicians becoming employed, the employment trend is driven by increasing reimbursement pressure and a desire for a better quality of life, among other factors. Thus, it is physicians, not hospitals, that are driving this change. It is interesting to note that AHCF points to this trend, then asserts that it may be problematic because of "monopoly considerations;" therefore, it is unclear whether AHCF believes this trend will exist for the long term or if it believes it should.

AHCF also refers to the disproportionate share (DSH) payments received by hospitals to provide evidence that expanding the demonstration project will not harm the existing providers. Given the current economic situation and the ongoing discussion regarding health care reform, there is no certainty that these DSH payments will continue. In addition, AHCF provides no evidence of the percentage of costs that are actually covered by the DSH payments to support its assertion.

On page 6, AHCF reveals the actual reason for its petition, stating that it is an ASC development company and is seeking to develop 10 ASC's across the state. CarolinaEast believes this is a real conflict of interest, compared to those asserted by AHCF regarding the SHCC. Notably missing from the petition is any discussion of the counties in which AHCF believes there is a need for additional ASC's or any of the characteristics of those counties that would merit consideration for a special need allocation by the SHCC. Without identifying the counties, much less providing any statistical or qualitative evidence of a need,

CarolinaEast does not believe the SHCC should approve this petition, which would certainly encourage other providers to submit petitions with statewide implications for the development of an unlimited number of facilities.

AHCF concludes by once again impugning the integrity of the SHCC and its process related to the development of the Single Specialty Demonstration Project. CarolinaEast notes that all meetings of the SHCC, its committees and workgroups, along with all documents presented at those meetings, are available online through the DHSR website. Further, all meetings are open to the public, including those conducted by conference call. AHCF continues by threatening the SHCC and stating that legal action may be the best course for obtaining desired changes. The petitioner also cites the Hope: A Women's Cancer Center and Raleigh Orthopaedic Clinic case. What the petition fails to mention, however, is that this case is under appeal because the parties failed to prove to the Superior Court what AHCF now also alleges regarding the SHCC and the North Carolina health planning process. CarolinaEast believes it is in poor taste at best to file a SHCC petition that includes a threat to the SHCC if the petitioners demands are not met. We believe that not only did the SHCC fully consider AHCF's various petitions, but the currently proposed demonstration project is a direct result of those petitions, without which the demonstration would not exist. Clearly the SHCC did consider the AHCF petition, and regardless of the petitioners belief that the entire petition should have been approved, it is obvious that AHCF is itself a party with a conflict of interest, and its petition should be considered in that light.

In summary, CarolinaEast believes that considerable time and effort has been spent by the SHCC, its committees and workgroups to develop the proposed Single Specialty ASC Demonstration Project. The AHCF petition contains many unfounded assertions, insinuations, and outright threats and is clearly written by an organization with its own agenda. On these bases, CarolinaEast believes that the petition should be denied.