

Comments on Petitions filed by Novant Health and Alliance Imaging Requesting Removal of Policy TE-4

*Submitted by Joanne Watson, COO
Raleigh Radiology, LLC
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Purpose

Raleigh Radiology appreciates the time and energy that the Agency and members of the SHCC devoted to considering the many comments and submissions regarding Policy TE-4 of the Proposed 2021 State Medical Facilities Plan. We continue to maintain that the SHCC should retain the first part of that policy, which addresses fixed MRI equipment that operates under service contract arrangements with mobile providers. We agree with commenters and petitioners that the second part of the policy regarding replacement of mobile service contracts with mobile units needs more discussion. It warrants removal and further discussion next year.

Background

Raleigh Radiology, LLC (“RRL”) filed a petition in March 2020 requesting a new MRI policy. In response, Alliance had the opportunity to, and did, file comments opposing RRL’s petition.

After a standard review of the petition and Alliance’s opposing comments, the Agency recommended that the Technology and Equipment Committee (“Committee”) adopt Policy TE-4—*which is a policy that accomplishes exactly what RRL requested*. Martha Frisone, Chief, Healthcare Planning and Certificate of Need Section and a long time veteran of the Agency, was closely involved in drafting TE-4. In turn, the Committee voted to recommend the inclusion of TE-4 in the Proposed 2021 SMFP, and subsequently, the SHCC voted to accept the recommendation.

All of the foregoing occurred in full accordance with the procedures in the SMFP and the longstanding practice of the SHCC and Agency.

During the July 2020 public hearings on the Proposed SMFP, Alliance took these steps to comments on TE-4:

- Alliance had at least 7 different individuals address the SHCC;
- Alliance filed 21 different comments (for a total of 52 pages); and
- Alliance representatives spoke to the SHCC 21 times.

In addition, and in case Alliance had not made its point clearly before, Alliance filed a 22 page Petition on July 29, 2020, reiterating its opposition. This is not a complete list of all comment documents Alliance submitted regarding TE-4 and related matters. In coming weeks, the Committee and SHCC will take their final votes on TE-4.

TE-4 Should Remain in the Proposed 2021 SMFP

Through RRL's original petition and written comments during the public hearings, the Committee and SHCC more than understand the policy reasons for including TE-4. Moreover, the Agency fully understands and appreciates the policy related to TE-4 because it deals day-in and day-out with such matters, and it recommended TE-4 be included in the Proposed 2021 SMFP. Hence, RRL does not need to explain further the compelling policy rationale for TE-4.

The SHCC also understands that Alliance's business model might influence Alliance's views on TE-4. Hence, for the numerous reasons that the Agency, Committee, and SHCC already understand, RRL requests affirmation of the prior decision to retain TE-4 in the Proposed 2021 SMFP. Of course, as RRL suggested in its written comments, certain clarifying edits might enhance TE-4. RRL is confident that the Agency, the Committee, and the SHCC will appropriately address such edits.

We trust that Alliance's erroneous assertions that the process for TE-4 was somehow "improper" will not distract the Committee and SHCC. The Agency knows that the process was appropriate and consistent with the SMFP provisions and the statutes governing the creation of the Proposed SMFP. The Agency can give all needed assurances to the Committee and SHCC about these matters. However, we note two items related to process.

First, North Carolina law gives the SHCC and Agency the full and complete authority over the proposed SMFP's contents. Specifically, the North Carolina General Statutes expressly state that the SHCC and the Agency are the parties who "develop," "prepare," and "adopt" the proposed SMFP. (See, e.g., *N.C. Gen. Stat. §§ 131E-176(17), (25), 131E-177(4)*.) Their authority is not limited and no other party has their authority.

The North Carolina Supreme Court directly addressed this back in 1999, by explaining the SHCC's broad power and role as follows:

The Governor appoints [the SHCC's] twenty-seven members, designates its chair and vice chair, and sets out its duties and responsibilities. . . . **Under the statutes, the role of the [SHCC] and the Department is to "prepare" or "develop" the SMFP.** *N.C.G.S. §§ 131E-176(25), 131E-177(4).*
~*Frye Regional Medical Center, Inc. v Hunt, 350 N.C. 39 (1999) (emphasis added).*

These matters are beyond dispute. Because the SHCC and Agency are the parties who develop, prepare, and adopt the proposed SMFP, it is clear that they could have included Policy TE-4 in the proposed SMFP, *even if no one had filed a petition requesting a new policy*. The SHCC and Department may include whatever provisions they deem appropriate in the proposed SMFP. There is no limitation on this basic authority, and Alliance cannot make a good faith argument to the contrary.

Second, Alliance's repeated assertions that it was not given an opportunity to provide input about TE-4 is utterly without merit—please see the previous section of these Comments which recite the numerous opportunities Alliance has taken to speak orally or provide written comments to the Agency, Committee, and SHCC about TE-4.

Impact on Population

Neither Alliance, nor Novant's petitions considered the adverse impact of these service contracts on the population served. As such, the petitions are, at best, incomplete. Their statements about population are actually statements about their desire to eliminate competition with themselves.

There are many adverse impacts on the population of North Carolina if the SHCC excludes an improved version of TE-4 from the 2021 Plan. As stated before, the state has no mechanism for regulating quality of the grandfathered MRI units. Once a client's MRI volume exceeds its contracted Alliance hours, providers can request incremental hours for an additional charge. This increased cost for increased volume model is economically challenging. In true mobile units, providers contracting for the service accept these limitations in order to make services initially available to their patients. However, when the service volume reaches the urban county threshold, the inability to set quality standards, the absence of any accountability to the provider for data reported to the state, and the absence of state enforcement authority on data reporting is a health planning and patient care problem. This is clearly an access and quality problem for the population.

MRI is a standard imaging modality used in treatment of heart disease, cancer, stroke, diabetes, and a host of other diseases and injuries. Novant's statement that a policy not related to COVID-19 issues should not be included in the 2021 Plan is ingenuous and unfair to the majority of North Carolinians who continue to contract and cope with other diseases. Most COVID-19 cases are still asymptomatic and patients recover with no apparent harm. North Carolina's August 2020 COVID-19 unadjusted death rates are only 0.2 per 1,000 population compared to 2018 age adjusted heart disease at 1.5, stroke at 0.5 and cancer at 1.6, according to CDC and the NC Center for Health Statistics. In fact, by early reports the quarantine in 2020 that suspended services may have increased the acuity of these other diseases.

Competition

Statements by both about less competitive Certificate of Need applications are equally ingenuous. Novant has the advantage of exemptions in statute that let it spend an unlimited amount of money on capital investments on its main campus without even filing a Certificate of Need ("CON"); and Novant hospitals and surgery centers qualify for an unlimited number of CON applications for interoperative MRI units under State Medical Facilities Plan Policy TE-2.

Alliance has 15 MRI units that are subject to no restrictions, not even material compliance with an approved CON. Alliance contends that this was just good business. It overlooks the fact that all of these were acquired with no regard to health planning and can continue to operate without regard to health planning norms or state policies.

On July 29, RRL submitted comments with proposed improvements to Policy TE-4. RRL stands by those comments.

Conclusion

RRL believes the reasons for retaining Policy TE-4 are compelling. In the event there are any concerns about TE-4 that cannot be favorably resolved, then, at a minimum, the SHCC should defer TE-4 and formally schedule further discussion and consideration during the 2021 planning year for the Proposed 2022 SMPF.

RRL greatly appreciates all of the attention the Agency, Committee, and SHCC have devoted to TE-4 this year.