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## **Anderson Shackelford's Comments in Opposition to Proposed Policy TE-4 Offered at July 10, 2020 Public Hearing**

My name is Anderson Shackelford, and I am a health care attorney with Williams Mullen. I'm here today to address Proposed Policy TE-4, which is troubling for a number of reasons, not the least of which is that it will eliminate competition in the CON process.

Proposed Policy TE-4 is wholly unnecessary. It attempts to solve a problem that simply does not exist. The State Medical Facilities Plan already allows those using contract scanners to seek an Adjusted Need Determination and present information on perceived efficiencies in supplanting contract scanners.

But the Proposed Policy is not simply superfluous, which would be reason enough for setting it aside. A substantially greater concern is that Policy TE-4 has disastrous implications for competition in the CON process and could well be more widely used than anticipated.

When a provider secures an Adjusted Need Determination, anyone can apply to fill that need. This is an intentional feature in the health planning process – when multiple applicants apply, the CON Section can undertake a Comparative Analysis and use significant factors to choose the most effective alternative. This competition incentivizes applicants to make robust commitments to providing charity care, keeping costs low for patients, and ensuring their services comport with high quality standards. When a provider knows they are playing a zero-sum game, they will go the extra mile to make sure their proposals are compelling, and this inures to the benefit of North Carolinians.

In contrast, because Proposed Policy TE-4 defines a “qualified applicant” as a party to a contract with an unrelated person for an MRI scanner, every CON Review under Proposed Policy TE-4 will be non-competitive. The CON Section will have no mechanism to perform a Comparative Analysis to evaluate competing CON proposals and no way to base its decision on a comparison of costs, charity care access or any of several important comparative factors.

The Agency Report introducing Policy TE-4 appears to suggest that only a limited number of providers could avail themselves of the opportunity to apply per the Policy. Not so. As the Agency Report acknowledges, there are several providers with vendor contracts that have high enough volume that they could use TE-4. Incidentally, several of those providers are located in counties for which a need determination is forecasted in the SMFP.

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However, the Agency Report fails to consider that there are other providers which would qualify to apply for their own scanners under TE-4 if they simply contracted for one day of mobile MRI service with an MRI vendor. And there is a litany of them, including numerous hospitals across the State. These hospitals do not currently contract for MRI services, but could easily do so. If these providers contracted for a single day of MRI service on a mobile scanner, they would easily meet Proposed Policy TE-4's volume threshold of 3,328 weighted MRI procedures across all their service sites. With that, they could declare themselves qualified under Policy TE-4 to acquire their own mobile MRI scanners in non-competitive reviews, even though they are in counties with no need determinations in the 2021 State Plan. These providers would be able to keep their fixed scanners in place, but also secure CON approval for mobile scanners that could serve their Hospitals as well as other sites. Surely, the Agency did not intend to allow providers to flood North Carolina with new mobile scanners throughout Counties across the State, even absent need determinations, and not require them to compete to do so. Yet, as Policy TE-4 is drafted, it wouldn't be difficult for multiple providers to do just that.

There is currently no need methodology in the SMFP for mobile MRIs. Instead, providers currently must seek an adjusted need determination and, if such an adjusted need is included in the Plan, potentially compete with others for the CON. Proposed Policy TE-4 would simply eliminate competition from the equation altogether. So long as a provider met the Proposed Policy's volume thresholds, it would have a clear path to a mobile MRI. And, this would likely suppress future need determinations for fixed magnets, thereby reducing or eliminating any possibility that new providers might have to apply for new MRIs.

And there is no limit to the number of times a provider could invoke Proposed Policy TE-4. So long as they met the policy's standards, providers could continue to claim "qualified applicant" status and apply for additional magnets as many times as they would like, all the while suppressing future need determinations. Some providers might use the proposed policy for anti-competitive reasons.

Policy TE-4 serves no real benefit for patients or providers because it simply allows providers that already have a contract MRI service to apply to replace their existing service. Providers can already do just that by way of Petition and participation in a competitive review. Policy TE-4 would accomplish nothing other than side-stepping the Petition process and eliminating competition from the MRI calculus. For that reason, it should be set aside.