

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

**IN RE: REQUEST FOR )  
DECLARATORY RULING BY )     **DECLARATORY RULING**  
ALLIANCE IMAGING, INC. )**

I, Robert J. Fitzgerald, Director of the Division of Facility Services (the “Department”), hereby issue this declaratory ruling to Alliance Imaging, Inc. (“Alliance”) pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0103, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. Alliance has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling as to the applicability of Chapter 131E, Article 9 of the North Carolina General Statutes to the facts described below. For the reasons given below, I conclude that Chapter 131E, Article 9 does not apply to the transaction proposed by Alliance.

This ruling is binding on the Department and the person requesting it if the material facts stated in the Request are accurate and no material facts have been omitted from the request. The ruling applies only to this request. Except as provided by N.C.G.S. § 150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. Wallace C. Hollowell, III, of Nelson Mullins Riley & Scarborough, LLP has requested this ruling on behalf of Alliance and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for Alliance are set out below.

**STATEMENT OF THE FACTS**

Alliance intends to submit a bid proposal in response to a solicitation from the United States Department of Veterans Affairs (“VA”) to provide mobile positron emission tomography (“PET”) scanner services to four VA medical centers (two in North Carolina and two in

Virginia), with an option on the part of the VA for PET services at four additional VA medical centers (two additional in North Carolina, one additional in Virginia, and one in West Virginia). The solicitation is referred to hereinafter as the “VA Project.”

Alliance currently holds the only two certificates of need (“CON”) issued by the Department for mobile PET scanners in the State of North Carolina, but it is unable to utilize those units for the VA Project because of existing agreements to provide mobile PET services.

The State Medical Facilities Plan (“SMFP”) for 2007 states: “There is no need for any additional mobile dedicated PET scanners anywhere in the state.” 2007 SMFP p. 115. Therefore, Alliance states that if North Carolina law applies to the VA Project, no provider would be able to provide the PET services sought in the VA Project solicitation.

The four North Carolina VA medical centers identified in the solicitation are in Asheville, Buncombe County; Durham, Durham County; Fayetteville, Cumberland County; and Salisbury, Rowan County (collectively the “North Carolina VA medical centers”). Alliance has provided a document dated June 30, 1962, entitled “Inventory Report on Jurisdictional Status of Federal Areas with the States,” compiled by the General Services Administration. The inventory shows that the North Carolina VA medical centers are under exclusive federal jurisdiction and were acquired between 1922 and 1952. The inventory defines “exclusive federal jurisdiction” as applying when “the Federal Government possesses, by whichever method acquired, all of the authority of the State, and in which the State concerned has not reserved to itself the right to exercise any of the authority concurrently with the United States except the right to serve civil or criminal process in the area for activities which occurred outside of the area.”

Alliance asserts, on information and belief, that the North Carolina VA medical centers are all on property over which the State of North Carolina has ceded jurisdiction pursuant to N.C.G.S. § 104-7 to the United States Government and over which the United States Government has accepted exclusive federal jurisdiction.

### **ANALYSIS**

N.C.G.S. § 131E-178(a) provides that a person seeking to offer or develop a “new institutional health service” must first obtain a CON from the Department. The definition of “new institutional health service” includes: “furnishing of mobile medical equipment to any person to provide health services in North Carolina, which was not in use in North Carolina prior to the adoption of this provision, if such equipment would otherwise be subject to review in accordance with G.S. 131E-176(16)(fl).” N.C.G.S. 131E-176(16)(s). PET scanners are included in this category. Therefore, if Chapter 131E, Article 19 applies to the VA Project, Alliance would be required to obtain a CON before offering or providing PET services to the Project.

Article I, Section 8, Clause 17 of the United States Constitution provides Congress with the power: “To exercise exclusive legislation [over the District of Columbia] and to exercise like authority over all places purchased by the consent of the legislature of the state in which same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.”

This clause has been interpreted to apply to cases where the United States acquires private lands with the consent of the legislature of the state for the described federal purposes, *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). The General Assembly gave such permission for the North Carolina VA medical centers pursuant to the version of N.C.G.S. § 104-7 in effect at the time of their acquisition by the United States.

The purpose of the CON law, *inter alia*, is to review and evaluate new institutional health services to be offered within the State of North Carolina for the general welfare and protection of the lives, health and property of the people of the State of North Carolina and to promote efficiencies in delivering health care throughout the State. *See* N.C.G.S. § 131E-175. The CON law does not regulate federal health care programs or services offered by the federal government on federal property located within the boundaries of North Carolina. Accordingly, the provision of mobile PET scanner services to the North Carolina VA medical centers is not subject to CON review. However, Alliance may not utilize a mobile PET scanner in the State for any other purpose or at any other location without first obtaining a CON or a declaratory ruling pursuant to N.C.G.S. Chapter 131E.

### **CONCLUSION**

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that Alliance's proposed use of a mobile PET scanner for the VA Project to serve the North Carolina VA medical centers does not require a CON from North Carolina. Alliance may not use its mobile PET scanner in the State for any other purpose or at any other location without first obtaining a CON or a declaratory ruling pursuant to N.C.G.S. Chapter 131E.

This the \_\_\_\_ day of May, 2007.

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Robert J. Fitzgerald, Director  
Division of Facility Services  
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**

Wallace C. Hollowell, III  
Nelson Mullins Riley & Scarborough, LLP  
GlenLake One, Suite 200  
4140 Parklake Avenue  
Raleigh, NC 27612

This the \_\_\_\_\_ day of May, 2007.

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Jeff Horton  
Chief Operating Officer