

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY CAPE FEAR DIAGNOSTIC) **DECLARATORY RULING**
IMAGING, INC. AND CAPE FEAR)
MOBILE IMAGING, LLC)**

I, Robert J. Fitzgerald, as Director of the Division of Health Service Regulation (the “Agency”), do hereby issue this declaratory ruling to Cape Fear Diagnostic Imaging, Inc. (“CFDI”) and Cape Fear Mobile Imaging, LLC (“CFMI”) (collectively “Petitioners”) pursuant to N.C.G.S. §150B-4 and 10 N.C.A.C. 3B.0310 under the authority delegated to me by the Secretary of the Department of Health and Human Services. CFDI and CFMI have requested a declaratory ruling that a proposed exchange of mobile MRI scanners is not in conflict with the Certificate of Need (“CON”) laws, N.C.G.S Chapter 131E, Article 9.

For the reasons set out herein, the proposed equipment exchange is exempt from certificate of need review. This ruling will be binding on this Agency so long as the material facts stated herein are accurate. This ruling applies only to this request. Except as provided by N.C.G.S. §150B-4, the Agency reserves the right to change the conclusions that are contained in this ruling. Robert V. Bode of the law firm Bode, Call & Stroupe, L.L.P., counsel for Petitioners, has requested this ruling on behalf of CFDI and CFMI, and has provided the facts set out below:

STATEMENT OF FACTS

Cape Fear Mobile Imaging, LLC (“CFMI”) is solely owned by Cape Fear Diagnostic Imaging, Inc. (“CFDI”), a subsidiary company of MQ Associates, Inc. CFDI was issued a CON for Project I.D. No. O-6434-01 to acquire one mobile MRI scanner to be used at CFDI’s

Wilmington office and at Columbus County Hospital. Based on a declaratory ruling issued on August 13, 2007, CFDI currently provides mobile MRI scanner services to its Wilmington office and to Atlantic Diagnostic Center in Morehead City.

On February 24, 2004, Wesville LLC was issued a CON for Project I.D. No. O-6665-02 to establish a mobile diagnostic center and acquire a mobile MRI scanner to be used at Atlantic Diagnostic Center and Brunswick Community Hospital. The mobile diagnostic center was subsequently acquired by CFMI. Based on a declaratory ruling issued on February 1, 2007, CFMI currently provides mobile MRI scanner services to Southern Pines Diagnostic Imaging (“SPDI”) three days per week and to Carolina Imaging in Fayetteville four days per week.

According to Petitioners, the City of Southern Pines, NC, recently requested that SPDI construct an enclosure in which to house CFMI’s mobile MRI scanner. After completing construction, SPDI determined that the enclosure, because of its dimensions, did not allow the CFMI scanner enough clearance space to ventilate properly. Without sufficient clearance for ventilation, the scanner is prone to overheat and shut down, delaying service to MRI patients. The cost to renovate the enclosure would be almost the same cost as initially required to build it.

Petitioners represent that the CFDI’s mobile MRI scanner (serial R2193) is substantially identical to the CFMI scanner (serial EM174) in terms of magnet strength (both are GE 1.5 Tesla) and other relevant equipment. However, the CFDI scanner is on a smaller tractor-trailer chassis, and is positioned lower to the ground, than the CFMI scanner. Consequently, the CFDI scanner will not be adversely affected by the SPDI enclosure.

Petitioners propose to exchange mobile MRI scanners. They represent that the requested exchange of equipment will allow the space to ventilate properly and will not require any

additional construction at SPDI. There are no changes in host sites or costs associated with this request.

ANALYSIS

Absent an exemption, the CON law would require a full review of Petitioners' proposed exchange of equipment because it constitutes an acquisition of each MRI scanner. N.C.G.S. §§ 131E-176(16)f1, 131E-178. However, N.C.G.S. § 131E-184(a) exempts a new institutional health service from review under limited circumstances if the entity proposing the transaction provides notice and an explanation of why the new institutional health service is required. One of the permitted categories of exemption is to replace equipment. N.C.G.S. § 131E-184(a) (7).

The transaction proposed by Petitioners is effectively the replacement of each Petitioner's mobile MRI scanner with the other's scanner. Through their request for a declaratory ruling, the Petitioners have provided notice of the proposed transaction and an explanation of why it is required. The proposed exchange of equipment falls within the definition of "replacement equipment" in N.C.G.S. § 131E-176(22a) because each scanner will be acquired to replace comparable medical equipment currently in use, and it will be disposed of by the owner when replaced. A review of the Department's files shows that the fair market value of each scanner at this time is less than \$2,000,000. On the unique set of circumstances presented here, the replacement equipment exemption applies to Petitioners' proposed transaction.

CONCLUSION

For all of the foregoing reasons, assuming the statement of facts in the request to be true, I conclude that the exchange of the mobile MRI scanners between CFDI and CFMI is exempt from CON review pursuant to N.C.G.S. § 131E-184(a)(7).

This the _____ day of _____, 2007.

Robert J. Fitzgerald
Director, Division of Health Service Regulation

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 first-class, postage pre-paid envelope addressed as follows:

CERTIFIED MAIL

Robert V. Bode
Bode, Call & Stroup, LLP
3105 Glenwood Avenue, Suite 300
Raleigh, NC 27612

This the _____ day of _____, 2007.

Jeff Horton
Chief Operating Officer