

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

**IN RE: REQUEST FOR)
DECLARATORY RULING BY REX)
HEALTHCARE, INC. AND SMITHFIELD) **DECLARATORY RULING**
RADIATION ONCOLOGY, LLC)**

I, Robert J. Fitzgerald, Director of the Division of Health Service Regulation (the “Department”), hereby issue this declaratory ruling to Smithfield Radiation Oncology, LLC (“SRO”) and Rex Healthcare, Inc. (“Rex”) (collectively “Petitioners”) 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. Petitioners have filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a declaratory ruling that Rex may increase its membership interest in SRO to 100% without certificate of need (“CON”) review.

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. Gary S. Qualls of Kennedy Covington Lobdell & Hickman, L.L.P., counsel for Petitioners, has requested this ruling on behalf of Petitioners and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for Petitioners are set out below.

STATEMENT OF THE FACTS

Except as noted, the following statement of the facts is based on the representations of Petitioners in the Request.

Petitioner SRO is a North Carolina limited liability company. Rex currently holds a 25% membership interest in SRO. The remaining members are the physician owners of Triangle Radiation Oncology Services. Petitioners state that Rex will be increasing its membership interest in SRO to 100%, thereby becoming the sole member of SRO.

SRO provides linear accelerator and radiation therapy services. Under prior law, because of the provisions in effect at the time, it was not subject to CON review either as an oncology treatment center or in connection with its acquisition of a linear accelerator.

Petitioners represent that ownership of SRO's linear accelerator will be unaffected by the proposed transaction; it will continue to be owned by SRO. They state that SRO will continue to provide cancer treatment services in materially the same manner as it has done for several years at its existing operational center.

ANALYSIS

N.C.G.S. § 131E-178 provides that no person shall offer or develop "a new institutional health service" without first obtaining a CON. N.G.C.S. § 131E-176(16) defines "new institutional health service" to include: (1) "The acquisition by purchase, donation, lease, transfer, or comparable arrangement" of a linear accelerator "by or on behalf of any person," N.G.C.S. § 131E-176(16)f1.5a, and (2) "The obligation by any person of a capital expenditure exceeding two million dollars (\$2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service," N.C.G.S. § 131E-176(16)b.

The transaction described by Petitioners does not constitute the acquisition of a linear accelerator by any person because ownership of the linear accelerator here will not change. SRO will continue to be the owner of this equipment, and SRO's legal status as a limited liability company will not change.

Similarly, the transaction is not an obligation to develop or expand a health service or a health service facility, since Petitioners represent that SRO will continue to operate at the same location in a manner that is the same in all material respects as it operated prior to the transaction. In addition, pursuant to S.L. 2005-325, oncology treatment centers are not “health service facilities” for purposes of the CON law.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that the acquisition by Rex of 100% of the membership interest of SRO, in the manner represented by Petitioners in the Request, is not subject to CON review.

This ruling is subject to the condition that, after the transaction, SRO continues to operate its radiation therapy center at the same location in Smithfield, Johnston County, North Carolina, in the same manner in which it operated prior to the transaction in all material ways.

This ruling is not intended to address, expand or validate any activities or status of SRO with respect to the requirements of the CON law as it relates to SRO. The ruling is limited to the specific facts presented in the Request.

This ____ day of December, 2007.

Robert J. Fitzgerald, Director
Division of Health Service Regulation
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

Gary S. Qualls
Kennedy Covington Lobdell & Hickman, L.L.P.
430 Davis Drive, Suite 400
Morrisville, NC 27560

This _____ day of December, 2007.

Jeff Horton
Chief Operating Officer