

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

<b>IN RE: REQUEST FOR DECLARATORY</b>	)	
<b>RULING BY DUKE UNIVERSITY</b>	)	
<b>HEALTH SYSTEM, INC. d/b/a DUKE</b>	)	<b>DECLARATORY RULING</b>
<b>UNIVERSITY HOSPITAL</b>	)	
<b>Project I.D. No. J-7939-07</b>	)	

I, Jeff Horton, as Acting Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services (“Department” or “Agency”), do hereby issue this Declaratory Ruling pursuant to North Carolina General Statute § 150B-4 and 10A NCAC 14A.0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

Duke University Health System, Inc. d/b/a Duke University Hospital (“Duke”) has requested a declaratory ruling allowing it to substitute sites for the base of its air ambulance service in Johnston County, Project I.D. No. J-7939-07. For the reasons stated below, I approve the request.

This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate, to the extent permitted by applicable law and court orders. This ruling pertains only to the matters referenced herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. Catharine W. Cummer, counsel for Duke, has requested this ruling on behalf of Duke and has provided the material facts upon which this ruling is based.

## STATEMENT OF THE FACTS

Effective 18 December 2007, the CON Section issued a CON to Duke for Project I.D. No. J-7939-07, allowing Duke to base an existing rotary air ambulance at Johnston Memorial Hospital (“JMH”) in Smithfield, Johnston County, North Carolina (the “Original Location”). Duke now proposes to base the existing rotary air ambulance and flight crew at Johnston County Airport (the “Airport Location”) rather than Johnston Memorial Hospital.

Duke represents that the current hospital administration at JMH would now prefer that Duke relocate its air ambulance base operation to the Airport Location because JMH’s existing landing pad is sometimes needed for other helicopters and JMH would have to give up needed parking lot space to create a space for Duke to use the site as its regular base. The Airport Location is approximately five miles from the Original Location and is approximately the same distance from Duke University Hospital in Durham, North Carolina. Duke further represents that the change of sites for the base will not affect the scope of services offered or the costs and charges by Duke or to the public of providing air ambulance services. Duke agrees to satisfy all the requirements and representations made in its original CON application.

## ANALYSIS

Pursuant to an Order of Permanent Injunction entered on 16 October 2008 by the Honorable Louise W. Flanagan in the case of *Med-Trans Corp., Inc. v. Dempsey Benton, et al.*, 2008 U.S. Dist. LEXIS 78396, the Department is “permanently enjoined from enforcing North Carolina’s CON Law, presently codified as N.C. Gen. Stat. § 131E-175 *et. seq.*, against plaintiff or any other federally-regulated air carrier.”

However, on 17 November 2008, the prospective intervenors in the *Med-Trans* case, including Duke, filed a notice of appeal to the Fourth Circuit Court of Appeals and a motion to

stay the injunction. As this appeal will likely not be resolved prior to the deadline imposed by 10A N.C.A.C. 14A.0103(e) to issue this declaratory ruling, I will consider Duke's request out of an abundance of caution.

The CON law would require a full review of Duke's proposed change of base for its rotary air ambulance if that change were to represent a material change in the physical location or scope of the project. N.C.G.S. § 131E-181(a). The proposed substitution of the Airport Location as the base for Duke's existing rotary air ambulance does not constitute a material change in the physical location or the scope of the proposed project because the use of the Airport Location as a base will not affect the scope of services offered or the costs and charges to Duke or to the public for the provision of air ambulance services. The Airport Location is in the same county as the Original Location. In addition, there is no proposed change in the person to whom the CON was issued that would result in a violation of N.C.G.S. § 131E-181(a).

N.C.G.S. § 131E-189(b) allows the Agency to withdraw Duke's CON if Duke fails to develop the service in a manner consistent with the representations made in the application or with any conditions that were placed on the CON. Duke will not be developing its project in a manner that is materially different from the representations made in its application, nor will it be developing its project in a manner that is inconsistent with any of the conditions that were placed on its CON.

### **CONCLUSION**

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that Duke's substitution of the Johnston County Airport as the approved air ambulance base in Johnston County, Project I.D. No.J-7939-07, will not constitute a material change in the

physical location or scope of the project and will not violate N.C.G.S. § 131E-181. This ruling is not intended to be an attempt to enforce the CON Law against Duke's air ambulance service.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

---

Jeff Horton, Acting 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 pre-paid envelope addressed as follows:

**CERTIFIED MAIL**

Catharine W. Cumber  
149 Cedar Hills Cir.  
Chapel Hill, NC 27514

This the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

---

Jesse B. Goodman  
Acting Chief Operating Officer