

**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)
Project I.D. Nos. O-6434-01 and O-6665-02)**

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 N.C.G.S. § 150B-4 and 10A NCAC 14A .0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

Cape Fear Diagnostic Imaging, Inc. (“CFDI”) and Cape Fear Mobile Imaging, LLC (“CFMI”) (collectively “Petitioners”) have requested a declaratory ruling allowing for changes in host sites for Project I.D. No. O-6434-01 (the “CFDI Project”) and for Project I.D. No. O-6665-02 (variously the “Wesvill Project” or the “CFMI Project”) on the grounds that the changes do not constitute material changes in physical location or a failure to materially comply with the representations made by the applicants in the Certificate of Need (“CON”) applications for their projects. N.C.G.S. §§ 131E-181(a) and (b). This ruling will be binding upon the Department and the entities requesting it, as long as the material facts stated herein are accurate. 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. Denise M. Gunter of Nelson Mullins Riley & Scarborough LLP has requested this ruling on behalf of the Petitioners and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for Petitioners and as drawn from Agency files are set out below.

STATEMENT OF THE FACTS

A. The CFDI Project

Effective 23 July 2002, pursuant to a settlement agreement, the CON Section issued a CON to CFDI for Project I.D. No. O-6434-01 to acquire a mobile MRI scanner (the “Project Unit”) to provide MRI services at “two or more” host sites. The initial host sites were CFDI’s Wilmington office in New Hanover County and Columbus County Hospital, Whiteville, Columbus County.

After several changes authorized by declaratory rulings, as of 12 November 2008, CFDI provided mobile MRI services to its Wilmington office in New Hanover County, to Atlantic Diagnostic Center, P.A. in Morehead City, Carteret County, and to Jacksonville Diagnostic Imaging in Jacksonville, Onslow County. On 12 November, CFDI submitted a declaratory ruling request to redistribute its five days of service in Wilmington to two other sites: (1) Cary Diagnostic Imaging at 3700 NDW Cary Parkway, Cary, Wake County for three days (the “Cary site”), and (2) Cape Fear Diagnostic Imaging, LLC d/b/a/ North Carolina Diagnostic Imaging – Waterford in Brunswick County (the “Brunswick Site”). On 2 December 2008, I issued a ruling approving the addition of the Brunswick Site, but declining the request to add the Cary Site.

In this request, CFDI states that it intends to move forward with providing service to the Brunswick Site as part of the CFDI Project. It now seeks to add Carolina Imaging LLC of Fayetteville, located at 3628 Cape Center Drive, Fayetteville, Cumberland County (the “Cumberland County Site”) for three days per week to the CFDI Project. The Cumberland County Site is currently served by the CFMI Project mobile MRI scanner, which Petitioners seek to relocate as described below. CFDI asserts that the addition of the Cumberland County Site is

not a material change in location of the CFDI Project because Cumberland County is contiguous to Bladen County, which was included in the CON application for the CFDI Project.

B. The CFMI Project

Pursuant to a Settlement Agreement dated February 23, 2004 (“2004 Settlement Agreement”), Wesvill, LLC was issued a CON for the Wesvill Project, and authorized to acquire a mobile MRI scanner to provide mobile MRI services at Brunswick Community Hospital in Brunswick, and at Atlantic Diagnostic in New Hanover County. Subsequently, CFMI became the successor in interest to Wesvill, LLC. (The “Wesvill Project” therefore is hereinafter referred to as the “CFMI Project.”) A Settlement Agreement executed in May 2006, and amended in June 2006 (the “2006 Settlement Agreement”), provides “in the event that the CFMI mobile scanner should no longer serve the Greensboro site authorized herein, CFMI shall request a declaratory ruling to relocate it to (1) an alternate site within the city limits of Greensboro if the alternate site will serve the same provider, or (2) an alternate site in HSAs IV, V or VI.” Declaratory rulings issued in 2006 and 2007 have authorized the CFMI Project to serve the Cumberland County Site and Southern Pines Diagnostic Imaging, in Southern Pines, Moore County, which are both in HSA V.

CFMI now seeks to relocate the CFMI Project mobile MRI scanner to provide services at the Cary Site for three days per week, while continuing services at the Southern Pines site. CFMI notes that the Cary Site is in Wake County, within HSA IV.

C. Costs, Charges and Service Agreements

Petitioners represent that there will be no capital costs associated with the CFDI Project at the Cumberland County Site or with the CFMI Project at the Cary Site because both sites already have mobile pads and electrical hookups. They state that there will be no change in

scope of the projects originally proposed. Petitioners assert that they will enter into service agreements at the two sites that are substantially similar to the agreements signed with other host sites. There will be no change in persons named in the CON applications resulting from these changes.

Petitioners represent that there will be no increases in costs or charges to CFDI, CFMI or to the public for the provision of mobile MRI scanner services as a result of these proposed relocations.

ANALYSIS

The CON law would require a full review of Petitioners' proposed changes of host site if those changes were to represent material changes in the physical location or scope of the projects. N.C.G.S. § 131E-181(a).

With respect to the CFDI Project, the Cumberland County Site is located in a county contiguous to CFDI's original primary service area as represented in the CON application and settlement materials. With respect to the CFMI Project, the Cary Site is within HSA IV as provided in the 2006 Settlement Agreement. The changes in host sites proposed by the Petitioners, therefore, do not constitute a material change in the physical location of the projects. In addition, the changes in host sites will not affect the scope of services offered or the costs and charges to CFDI, CFMI, or to the public for the provision of mobile MRI services. In addition, there is no proposed change in the persons named in the applications that would result in a violation of N.C.G.S. § 131E-181(a).

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that subject to the conditions set out herein, the addition of the Cumberland County Site

as a host site for CFDI's mobile MRI scanner, Project ID No. O-6434-01, will not constitute a material change in the physical location or scope of the project, will not violate N.C.G.S. § 131E-181, and will not constitute a failure to satisfy a condition of the CON in violation of N.C.G.S. § 131E-189(b). Similarly, the addition of the Cary Site as a host site for CFMI's mobile MRI scanner, Project ID No. O-6665-02, will not constitute a material change in the physical location or scope of the project, will not violate N.C.G.S. § 131E-181, and will not constitute a failure to satisfy a condition of the CON in violation of N.C.G.S. § 131E-189(b)

This ruling is subject to the following conditions:

- (1) Petitioners shall enter into service agreements with the new host sites that are substantially similar to the agreements signed by their other host sites.
- (2) Petitioners shall satisfy all the requirements and representations regarding the host sites in their original CON applications.

This ruling is not intended, and should not be interpreted, to authorize any increases in the approved capital expenditure for these projects, a change in the approved timetable, a change in the conditions placed on the certificate of need, or any other change in the approved projects.

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

CERTIFIED MAIL

Denise M. Gunter
Nelson Mullins Riley & Scarborough LLP
Suite 530
380 Knollwood Street
Winston-Salem, NC 27103

This the _____ day of _____, 2008.

Jesse Goodman
Acting Chief Operating Officer