COMPETITIVE COMMENTS ON

2024 MECKLENBURG COUNTY ACUTE CARE BED APPLICATIONS

SUBMITTED BY NOVANT HEALTH

December 2, 2024

Two CON applications were submitted in response to the 2024 SMFP need determination for 89 additional acute care beds in Mecklenburg County, including:

> CON Project ID# F-012574-24 Atrium Health CMC: Add 89 acute care beds at Carolinas Medical Center (CMC)
>
> CON Project ID# F-012570-24 Novant Health Presbyterian Medical Center (NHPMC): Add 80 acute care beds at NHPMC.

As the foregoing list shows, the total number of beds applied for exceeds the SMFP need determination. Atrium Health ("AH") has applied for all 89 acute care beds; Novant Health has applied for less than the 2024 need determination. As the smaller health system in Mecklenburg County with a demonstrated need for the 80 beds at its flagship, tertiary level medical center, the Novant Health application should be approved for 80 beds at NHPMC. The following comments demonstrate that the AH application is not approvable and that no beds should be awarded to AH. If the Agency determines otherwise, the maximum number of beds for which AH should be approved is nine.

These comments are submitted by Novant Health in accordance with N.C. Gen. Stat. § 131E-185(a1)(1) to address the representations in the applications, including a comparative analysis and a discussion of the most significant issues regarding the applicants' conformity with the statutory and regulatory review criteria (the "Criteria") in N.C. Gen. Stat. §131E-183(a) and (b). Other non-conformities and errors in the competing applications may exist and Novant Health reserves the right to develop additional opinions, as appropriate upon further review and analysis.

This project will allow NHPMC to meet growing demand and enhance competition between it and the other health system in Mecklenburg County. This is in the best interests of patients because it promotes competition which increases choices, leads to lower prices, and enhances quality and innovation. As the Novant Health application demonstrates, it conforms to all applicable review criteria and rules and is the comparatively superior applicant in this review.

COMPARATIVE ANALYSIS

Pursuant to G.S. § 131E-183(a)(1) and the 2024 State Medical Facilities Plan, no more than 89 acute care beds may be approved for Mecklenburg County in this review. Because the applications in this review collectively propose to develop 169 additional acute care beds in Mecklenburg County, both applications cannot be approved for the total number of beds proposed. Therefore, a comparative review is required as part of the Agency findings after each application is reviewed independently against the applicable statutory review criteria. The following factors have recently been utilized by the Agency for all reviews regardless of the type of services or equipment proposed:

- Conformity with Statutory and Regulatory Review Criteria
- Scope of Services
- Geographic Accessibility
- Historical Utilization
- Access by Service Area Residents
- Access by Underserved Groups: Medicaid
- Access by Underserved Groups: Medicare
- Competition (Access to a New or Alternate Provider)
- Projected Average Net Revenue per Patient
- Projected Average Total Operating Expense per Patient

These are the factors the Agency used in the 2023 Mecklenburg County Acute Care Bed Review. *See* Findings in Project I.D.#s: F-12439-23, F-12444-23, F-12446-23, & F-12457-23, dated March 28, 2024. The Agency may use its discretion to add other comparative factors based on the facts of the competitive review. The following summarizes the competing applications relative to the potential comparative factors.

Conformity with CON Review Criteria and Rules

Only applicants demonstrating conformity with all applicable review Criteria and rules can be approved, and only the application submitted by Novant Health demonstrates conformity to all Criteria:

Conformity of Applicants

Applicant	Project I.D.	Conforming/ Non-Conforming
CMC	F-012574-24	No
NHPMC	F-012570-24	Yes

The Novant Health application is based on reasonable and supported volume projections and adequate projections of cost and revenues. As discussed separately in this document, the CMC application contains errors and flaws which result in one or more non-conformities with statutory and regulatory review Criteria. Therefore, the Novant Health application is the **most effective** alternative regarding conformity with applicable review Criteria and rules.

Scope of Services

NHPMC and CMC each represent the flagship hospital in Mecklenburg County for their respective health systems.

Novant Health notes the Agency found that CMC was a more effective alternative regarding scope of services in the 2023 Mecklenburg County competitive acute care bed review based on CMC's status as an academic medical center (AMC) and a Level I trauma center. Novant Health respectfully disagrees with the Agency's 2023 determination. There is no real connection between CMC's status as an AMC and Level I Trauma Center and the proposed projects. The beds at CMC will not be used specifically for teaching purposes or for trauma patients. Any patient could be admitted to the beds at CMC, and any physician with admitting privileges could see the patient. The SMFP does not grant priority status for AMCs and trauma centers proposing to add more acute care beds. All hospitals, regardless of their classification, are treated the same for purposes of the acute care bed need determination, provided they meet the criteria set forth on pages 34 and 35 of the 2024 SMFP. The criteria merely require "the hospital" to offer a 24-hour emergency services department and inpatient medical care to both surgical and non-surgical patients.[1] Thus, *any* hospital that meets these criteria may apply for the beds. There is no question that both CMC and NHPMC meet the criteria on pages 34 and 35 of the 2024 SMFP. Accordingly, they should be treated the same for purposes of the scope of services factor.

To the extent teaching and trauma are relevant here, NHPMC has training and teaching programs similar to CMC, including residencies in pharmacy, emergency medicine, infectious diseases, and oncology.[2] Furthermore, as described in its application, NHPMC's recent designation as a Level II Trauma Center is expected to significantly increase the demand for acute inpatient services. The hospital's trauma leadership team projects that this designation will result in several hundred additional inpatient admissions annually. *See* application pages 43-44. This increase in trauma-related admissions further supports the need for expanded inpatient capacity at NHPMC. Therefore, NHPMC and CMC are **equally effective** alternatives regarding the scope of services.

Geographic Accessibility

NHPMC and CMC each propose to develop new acute care beds in Charlotte. Both applications propose the development of new acute care beds to existing facilities. The following table summarizes the average population per existing and approved acute care beds in the Mecklenburg County municipalities.

[1] An applicant proposing a new hospital must also demonstrate that it will offer services in at least five of the listed MDCs listed on pages 34 and 35 of the 2024 SMFP. Neither applicant in this review is proposing a new hospital, so the MDCs are not relevant to this review.

[2] https://www.novanthealth.org/medical-education/residency-programs/

Ratio of Acute Care Beds per 1,000 Population

Area	2023 Population^	Beds Available*	Beds / 1K Population
Charlotte	**911,311**	**1,994**	**2.19**
Pineville	11,153	293	26.27
Huntersville	64,688	147	2.27
Matthews	30,934	166	5.37
Mint Hill	27,815	36	1.29
Cornelius	33,139	30[+]	0.91

^US Census Bureau Quick Facts
*Existing and approved acute care beds as of October 2024
[+]Approved but not operational

Charlotte has a lower ratio of acute care beds per 1,000 population compared to Pineville, Matthews, and Huntersville. Therefore, the proposed project is an effective alternative to increase geographic access to acute care beds in Mecklenburg County.

Novant Health's proposed project effectively increases access to acute care services in Mecklenburg County. The proposed project increases access in a populous and growing area in Mecklenburg County. NHPMC is centrally located in Charlotte just off I-277 and US 74 and is therefore accessible to patients from throughout the county.

AH proposes to develop additional acute care beds at CMC, which is also located in Charlotte.

The CMC and NHPMC applications are **equally effective** alternatives regarding geographic accessibility.

Historical Utilization

The following table illustrates historical acute care bed utilization for the existing facilities in this review based on acute care days as reported in Table 5A of the 2024 SMFP.

Facility	FFY 2022 Acute Care Days	ADC	# of Acute Care Beds*	Utilization Rate	Projected (Surplus)/Deficit
CMC	328,618	900	1,170	92.0%	139
NH Presbyterian	129,926	356	519	75.9%	42

*Existing and approved acute care beds
Source: 2024 SMFP, Table 5A, Proposed 2024 SMFP, Table 5A

It is important to highlight that CMC is licensed for more than twice the number of acute care beds compared to NHPMC. A comparison of historical utilization is inconclusive because the facilities are not

comparable in size. If the Agency does such a comparison, the Novant application is the stronger of the two based on historical growth.

Based on the acute care bed methodology, each of the facilities in this competitive review exhibits bed deficits that contributed to the 2024 Mecklenburg County acute care bed need determination. No single facility or system generated the need in the 2024 SMFP, and even if one facility or system did generate the need, it would not entitle that facility or system to any beds. Each applicant must demonstrate the need for the project proposed in its application.

The need for additional acute care beds in the 2024 SMFP is triggered by the utilization of the total number of existing and approved acute care beds within a given service area. To project inpatient days of care in 2025, the total annual percentage of change during 2015-2019 is divided by four to determine the historical percentage change for the county. For positive annual percentages of change, as is the case for Mecklenburg County, add one to determine the county growth rate multiplier. For counties with a positive county growth rate multiplier, 2026 projected days of care are calculated by compounding the growth rate multiplier over the next four years. Mecklenburg County's growth rate multiplier is 1.0325. The historical days of care used to calculate the Mecklenburg County growth rate multiplier are summarized in the following table.

Mecklenburg County Acute Care Days

	2015 Days	**2016 Days**	**2017 Days**	**2018 Days**	**2019 Days**	**Average Annual Change**
Atrium Health Total Days	377,117	382,846	395,604	405,977	421,703	
Atrium Health Annual Change		*1.5%*	*3.3%*	*2.6%*	*3.9%*	2.84%
Novant Health Total Days	185,521	182,594	185,596	190,746	217,163	
Novant Health Annual Change		*-1.6%*	*1.6%*	*2.8%*	*13.8%*	4.17%
County Total Days	562,638	565,440	581,200	596,723	638,866	
County Annual Change		*0.5%*	*2.8%*	*2.7%*	*7.1%*	**3.25%**

Source: DHSR Healthcare Planning Section, Table 5A: Acute Care Bed Need Projections

As illustrated in the previous table, Novant Health's systemwide acute days of care have experienced a higher rate of growth compared to Atrium Health.

If Novant Health's system projected bed need were calculated based on its historical rate of change (4.17%) instead of the county rate of change, the Novant Health system projected bed need would increase from 10 beds in Column K of Table 5A of the 2024 SMFP to 87 beds.

Novant Health System Projected Acute Care Bed Need Based on Historical Growth Rate Multiplier

Facility Name	Licensed Acute Care Beds	Adjustments	IP DOC	GRM	Projected Days of Care	2026 ADC	2026 Beds Adjusted for Target Occ.	Projected Deficit/ (Surplus)
Novant Health Ballantyne Medical Center	0	36		1.0417	0	0	0	-36
Novant Health Huntersville Medical Center	135	12	30,175	1.0417	37,018	101	142	-5
Novant Health Matthews Medical Center	146	20	44,195	1.0417	54,218	149	223	57
Novant Health Mint Hill Medical Center	36	0	11,078	1.0417	13,590	37	56	20
Novant Health Presbyterian Medical Center	469	7	129,926	1.0417	159,391	437	560	84
Novant Health Steele Creek Medical Center	0	32		1.0417	0	0	0	-32
Novant Health System Total	786	107	215,374		264,217	724	980	**87**

Source: Bed need calculated based on 2024 SMFP acute care bed methodology substituting Novant Health's historical growth rate multiplier (1.0417) instead of the Mecklenburg County growth rate multiplier (1.0325).

For the foregoing reasons, Novant Health's proposal to develop 80 additional acute care beds at NHPMC is the most effective alternative regarding historical utilization.

Competition (Patient Access to a New or Alternate Provider)

The following table illustrates the existing and approved providers located in the service area. Considering the applicants in this competitive review are each existing providers in the service area, the expansion of an existing provider that currently controls fewer acute care beds than another provider would encourage all providers in the service area to improve quality and lower costs in order to compete for patients.

Currently, there are 2,666 existing and approved acute care beds, allocated between 10 existing and approved hospitals owned by two providers (Atrium and Novant) in the Mecklenburg County Service Area, as illustrated in the following table.

Mecklenburg County Acute Care Hospital Campuses Excluding NICU	
Facility	**Existing/(Approved) Beds**
AH Lake Norman	0 (+30)
AH Pineville	268 (+51)
AH University City	95 (+51)
CMC-Main*	979 (+303)
Atrium Total	**1,342 (+405)**
NH Ballantyne Medical Center	(+36)
NH Huntersville Medical Center	147
NH Health Matthews Medical Center	146 (+20)
NH Health Presbyterian Medical Center	476 (+26)
NH Mint Hill Medical Center	36
NH Steele Creek Medical Center	0 (+32)
Novant Total	**841 (+78)**
Mecklenburg County Total	**2,183 (483)**

Source: Table 5A, pages 42-43, Proposed 2025 SMFP; Novant Health facilities updated based on licensed beds as of October 2024.

Atrium Health controls 65.5 percent of the existing and approved acute care beds in Mecklenburg County. Novant Health controls only 34.5 percent of the existing and approved acute care beds in Mecklenburg County. Despite CON approval of 26 additional acute care beds during the 2023 Mecklenburg Acute Care Bed Review, Novant Health continues to maintain a minority share of acute care beds in the service area. Therefore, the proposed additional acute care bed capacity at NHPMC will positively impact competition by narrowing the gap of control that remains between Novant Health and Atrium Health in Mecklenburg County. The project will positively impact cost effectiveness, quality, and access by medically underserved groups.

A decision to approve Atrium application and disapprove the NHPMC application would actually worsen the competitive imbalance that presently exists in Mecklenburg County. This is not in patients' best interests.

The Agency has repeatedly recognized that improving competition in Mecklenburg County is an important issue and has repeatedly determined that Novant Health is the more effective alternative regarding competition in Mecklenburg County acute care bed reviews. *See, e.g.*, Findings is 2023 Mecklenburg County Acute Care Bed Review, p. 119 (March 28, 2024), Findings in 2022 Mecklenburg County Acute Care Bed Review, p. 118 (March 24, 2023); Findings in 2021 Mecklenburg County Acute Care Bed Review, p. 129 (March 29, 2022); Findings in 2020 Mecklenburg County Acute Care Bed Review, p. 185 (May 4, 2021); Findings in 2019 Mecklenburg County Acute Care Bed Review, p. 223 (April 2, 2020); and Findings in 2018 Mecklenburg County Acute Care Bed Review, p. 172 (April 5, 2019). The facts have not changed. The Agency should analyze competition in the same way it has in the last several reviews and determine that the NHPMC Application is the more effective alternative with respect to competition.

Therefore, regarding patient access to a new or alternate provider, the application submitted by Novant Health is the most effective alternative, and the application submitted by Atrium Health is the least effective alternative.

Access By Service Area Residents

On page 32, the 2024 SMFP defines the service area for acute care beds as "the acute care bed service area in which the bed is located. The acute care bed service areas are the single and multicounty groupings shown in Figure 5.1." Figure 5.1, on page 36, shows Mecklenburg County as a single-county acute care bed service area. Thus, the service area for this review is Mecklenburg County. Facilities may also serve residents of counties not included in their service area.

The following table illustrates access by service area residents during the third full fiscal year following project completion.

Projected Service to Mecklenburg County Residents, Project Year 3

	CMC	NHPMC
# of Mecklenburg County Patients	25,141	24,181
% of Mecklenburg County Patients	50.9%	68.0%

Source: CON applications, Section C.3

As shown in the previous table, NHPMC plans to serve a substantially higher percentage of patients from Mecklenburg County during the third project year.

Novant Health acknowledges the Agency has determined in previous reviews that an analysis of access by service area residents was inconclusive in Mecklenburg County. In the 2023 Mecklenburg County acute care bed review the Agency stated, "*the acute care bed need determination methodology is based on utilization of all patients that utilize acute care beds in Mecklenburg County and is not only based on patients originating from Mecklenburg County*." 2023 Findings, p. 121. The Agency stated that CMC's Level I trauma center and academic medical center status, "*is likely to pull in many patients from significant distances who are seeking the specialized level of health care offered by Carolinas Medical Center*." Id. Additionally, in its concurrent 2024 Mecklenburg County applications, AH contends that it is not appropriate to determine the comparative effectiveness of access by service area residents.

Novant Health respectfully disagrees with the Agency's 2023 inconclusive determination and AH's contention. Every acute care service area serves patients from counties outside the service area, *i.e.*, in-migration. Moreover, as previously discussed, CMC's status as an AMC and Level I Trauma Center is not relevant to this review because the beds in question would be used for any patient, not just trauma patients or patients seeking services that are only available at CMC. A comparison of acute care in-migration among other urban counties reveals that Mecklenburg County has a comparatively lower percentage of patients in-migrating compared to other counties. Please see the following table.

Percentage of Patients In-migrating to Service Area

County/Service Area	No. of Acute Care Beds (Existing & Approved)	In-Migration (% of Patients from Other Counties)
Orange	859	83.43%
Durham	1,411	65.18%
Moore	371	60.97%
Pitt	861	60.78%
Forsyth	1,625	56.74%
New Hanover	729	55.10%
Buncombe	749	52.09%
Mecklenburg	2,666	43.79%
Wake	1,553	31.05%

Source: Proposed 2024 SMFP, 2024 Acute Care Patient Origin Report: Patient Origin by County of Service
Excludes neonatal beds

As shown in the previous table, the majority of acute care discharges that occurred in Mecklenburg County during FY2023 were residents of Mecklenburg County (56%). Only 44% of acute care discharges that occurred in Mecklenburg County were those of residents from other counties. Orange, Durham, Moore, Pitt, Forsyth, New Hanover, and Buncombe counties each have much higher percentages of patients in-migrating from counties outside the respective service area. Novant Health notes that the 2020 Forsyth Acute Care Bed Review included a conclusive determination of access by service area residents and Forsyth County has a comparatively higher percentage of in-migration compared to Mecklenburg County.[3]

The Agency's statement from the 2023 Mecklenburg County acute care bed review that "*the acute care bed need determination methodology is based on utilization of all patients that utilize acute care beds in Mecklenburg County and is not only based on patients originating from Mecklenburg County*" is true for any respective acute care service area. Novant Health would note the Agency has also determined that, "*regarding this comparative factor, the application projecting to serve the largest number of service area residents is the more effective alternative based on the assumption that residents of a service area should be able to derive a benefit from a need determination for additional acute care beds in the service area where they live*." See page 121 of Agency Findings for 2023 Mecklenburg Acute Care Bed Review. Therefore, consistent with the intent of the comparative factor and in consideration of the comparatively lower percentage of in-migration that occurred in Mecklenburg County during FY2023, it is reasonable and appropriate to reach a conclusive determination regarding access by service area residents in this review. The result of making this conclusive determination is that the Novant Health application is the most effective alternative with respect to access by service area residents.

[3] Agency Findings for 2020 Forsyth Acute Care Beds Review, pp. 59-60 (January 2, 2021).

Access By Underserved Groups

Underserved groups are defined in G.S. § 131E-183(a)(13) as follows:

"Medically underserved groups, such as medically indigent or low-income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services, particularly those needs identified in the State Health Plan as deserving of priority."

For access by underserved groups, applications are typically compared with respect to Medicare patients and Medicaid patients. [4] Access by each group is treated as a separate factor.

The Agency may use one or more of the following metrics to compare the applications:

- Total Medicare or Medicaid patients
- Medicare or Medicaid admissions as a percentage of total patients
- Total Medicare or Medicaid dollars
- Medicare or Medicaid dollars as a percentage of total gross or net revenues
- Medicare or Medicaid cases per patient

The above metrics the Agency uses are determined by whether or not the applications included in the review provide data that can be compared as presented above and whether or not such a comparison would be of value in evaluating the alternative factors.

Projected Medicare

The following table compares projected access by Medicare patients in the third full fiscal year following project completion for all the applicants in the review.

Projected Medicare Revenue – 3rd Full FY

Applicant	Form F.2b Total Medicare Revenue	Form C.1b Discharges	Avg Medicare Rev. per Discharge	Form F.2b Gross Revenue	% of Gross Revenue
CMC	$681,081,098	49,409	$13,785	$1,741,568,628	39.1%
NHPMC	$1,390,542,902	35,581	$39,081	$2,872,938,981	48.4%

[4] Due to differences in definitions of charity care among applicants, comparisons of charity care are inconclusive.

Generally, the application projecting to provide the most service to Medicare patients, as measured by revenue, is the more effective alternative for this comparative factor. As shown in the previous table, NHPMC is the most effective alternative with respect to average Medicare revenue per discharge.

NHPMC's pro formas are not structured the same way as those from CMC. In the assumptions and methodology for Form F.2, Novant Health states that the acute care gross charges include nursing units, inpatient surgery revenue, ED services, imaging, obstetrics/newborn costs, and all ancillary services. In the assumptions and methodology for Forms F.2 and F.3, CMC states, gross revenue includes acute care bed charges and expenses only and does not include any ancillary services such as lab, radiology, or surgery.

Based on the differences in the presentation of pro forma financial statements, one cannot make a conclusive comparison of the Medicare access provided by each applicant for purposes of evaluating which application was more effective regarding this comparative factor. Accordingly, the Agency should determine that this factor is inconclusive. *See also* Findings in 2023 Mecklenburg County Acute Care Bed Review, p. 122.

Projected Medicaid

The following table compares projected access by Medicaid patients in the third full fiscal year following project completion for all the applicants in the review.

Projected Medicaid Revenue – 3rd Full FY

Applicant	Form F.2b Total Medicaid Revenue	Form C.1b Discharges	Avg Medicaid Rev. per Discharge	Form F.2b Gross Revenue	% of Gross Revenue
Carolinas Medical Center	$377,541,044	49,409	$7,641	$1,741,568,628	21.7%
Novant Presbyterian Medical Center	$348,429,930	35,581	$9,793	$2,872,938,981	12.1%

As previously described, NHPMC's pro formas are not structured the same way as those from CMC. In the assumptions and methodology for Form F.2, Novant Health states the acute care gross charges include nursing units, inpatient surgery revenue, ED services, imaging, obstetrics/newborn costs, and all ancillary services. In the assumptions and methodology for Forms F.2 and F.3, CMC states that gross revenue includes acute care bed charges and expenses only, and do not include any ancillary services such as lab, radiology, or surgery.

Based on the differences in the presentation of pro forma financial statements, one cannot make a conclusive comparison of the Medicaid access provided by each applicant for purposes of evaluating which application was more effective regarding this comparative factor. Accordingly, the Agency should determine that this factor is inconclusive. *See also* Findings in 2023 Mecklenburg County Acute Care Bed Review, p. 123.

Projected Average Net Revenue per Patient

The following table shows the projected average net revenue per patient in the third year of operation for each of the applicants, based on the information provided in the applicants' pro forma financial statements (Section Q). Generally, the application proposing the lowest average net revenue is the more effective alternative regarding this comparative factor since a lower average may indicate a lower cost to the patient or third-party payor.

Projected Average Net Revenue per Patient – 3rd Full FY

Applicant	Form C.1b Discharge	Form F.2b Net Revenue	Average Net Revenue per Discharge
Carolinas Medical Center	49,409	$459,385,520	$9,298
Novant Presbyterian Medical Center	35,581	$825,095,299	$23,189

As previously described, NHPMC's pro formas are not structured the same way as those from CMC. In the assumptions and methodology for Form F.2, Novant Health states the acute care gross charges include nursing units, inpatient surgery revenue, ED services, imaging, obstetrics/newborn costs, and all ancillary services. In the assumptions and methodology for Forms F.2 and F.3, CMC states that gross revenue includes acute care bed charges and expenses only, and do not include any ancillary services such as lab, radiology, or surgery.

Therefore, a comparison of projected net revenue per patient is inconclusive. *See also* Findings in 2023 Mecklenburg County Acute Care Bed Review, p. 124.

Projected Average Operating Expense per Patient

The following table shows the projected average operating expense per patient in the third full fiscal year following project completion for each facility. Generally, the application projecting the lowest average operating expense per patient is the more effective alternative with regard to this comparative factor to the extent it reflects a more cost-effective service which could also result in lower costs to the patient or third-party payor.

Projected Average Operating Expense per Patient – 3rd Full FY

Applicant	Form C.1b Discharge	Form F.2b Operating Expense	Average Operating Expense per Discharge
Carolinas Medical Center	49,409	$446,002,318	$9,027
Novant Presbyterian Medical Center	35,581	$817,768,097	$22,983

As previously described, NHPMC's pro formas are not structured the same way as those from CMC. In the assumptions and methodology for Form F.2, Novant Health states the acute care gross charges include nursing units, inpatient surgery revenue, ED services, imaging, obstetrics/newborn costs, and all ancillary services. In the assumptions and methodology for Forms F.2 and F.3, CMC states that gross revenue includes acute care bed charges and expenses only, and do not include any ancillary services such as lab, radiology, or surgery. Therefore, a comparison of the projected average operating expense per patient is inconclusive. *See also* Findings in 2023 Mecklenburg County Acute Care Bed Review, p. 124.

Summary

The following table lists the comparative factors and states which application is the more effective alternative.

Comparative Factor	Novant Health	CMC
Conformity with Review Criteria	**More Effective**	Less Effective
Scope of Services	Equally Effective	Equally Effective
Geographic Accessibility	Equally Effective	Equally Effective
Historical Utilization	**More Effective**	Less Effective
Enhance Competition	**More Effective**	Less Effective
Access by Service Area Residents: % of Patients	**More Effective**	Less Effective
Access by Underserved Groups		
Projected Medicare	Inconclusive	Inconclusive
Projected Medicaid	Inconclusive	Inconclusive
Projected Average Net Revenue per Patient	Inconclusive	Inconclusive
Projected Average Operating Expense per Patient	Inconclusive	Inconclusive

For each of the comparative factors previously discussed, NHPMC's application is determined to be more effective alternative for the following factors:

- Conformity with Review Criteria
- Scope of Services
- Geographic Accessibility
- Historical Utilization
- Enhance Competition
- Access by Service Area Residents: Number of Patients
- Access by Service Area Residents: % of Patients

COMMENTS REGARDING CRITERION (3)

The CMHA System is *Not* Chronically Underbedded

As it has done for the past several years in every Mecklenburg County acute care bed application it has filed, CMC's 2024 application contains discussions of "Overview of Unmet Need" and "The CMHA System is Chronically Underbedded (Unlike Any Other Hospital or System in NC)." The Agency should not be persuaded by these overly dramatic and factually incorrect assertions. AH's alleged system-based need and comparisons to other North Carolina health systems do not inform the Agency why the specific proposed project conforms to Criterion (3). The applicant must still demonstrate the need for the specific project it proposes.

Similar narratives were included in AH's 2022 and 2023 Mecklenburg County applications. The Agency has not used these narratives in its discussion of Criterion (3) conformity and there is no reason why it should change course now. Specifically, the following provides excerpts from the Agency's findings in the 2023 and 2022 Mecklenburg Acute Care Bed Reviews.

2023 Mecklenburg Acute Care Bed Review
Project ID #s: F-12439-23, F-12444-23, F-12446-23, & F-12457-23
Page 116

Table 5B on page 44 of the 2023 SMFP identifies a need for 164 additional acute care beds in Mecklenburg County. As shown in Table 5A, pages 40-41, the Novant Health system shows a projected deficit of 70 acute care beds for 2025 and the Atrium Health system shows a projected deficit of 159 acute care beds for 2025, which in combination with the need determinations from the 2023 SMFP results in the Mecklenburg County need determination for 164 acute care beds. However, the application process is not limited to the provider (or providers) that show a deficit and create the need for additional acute care beds. Any qualifying provider can apply to develop the 164 acute care beds in Mecklenburg County. Furthermore, it is not necessary that an existing provider have a projected deficit of acute care beds to apply for more acute care beds. However, it is necessary that an applicant adequately demonstrate the need to develop its project, as proposed.

2022 Mecklenburg Acute Care Bed Review
Project ID #s: F-12280-22, F-12281-22, F-12282-22, & F-12293-22
Page 24

Analysis of Need – In Section C, pages 45-77, the applicant combined its discussion of need for additional acute care beds at CMC with discussion of the Atrium health system need for acute care beds and comparisons which are not part of the analysis of whether the application is conforming with Criterion (3). The discussion that follows in this section focuses only on the need as it relates to CMC in this specific application under review.

In Section C, Atrium discusses how acute care bed need determinations in Mecklenburg County have been generated entirely by Atrium facilities. However, on page 47 in Chapter 5 of the 2022 SMFP, it states:

> *"Any person can apply to meet the need, not just the health service facility or facilities that generated the need."*

Atrium has the burden of demonstrating the need for the proposed acute care beds in its applications as submitted. In Section C, page 50, the applicant states:

"[Atrium] *acknowledges that a provider that generates the need for additional capacity is not entitled to that need; it must submit an approvable application and demonstrate that it has the most effective alternative for the entire allocation."*

Consistent with the Agency's previous approach, the Agency should decline to give credit to AH's self-serving and irrelevant "Overview of Unmet Need" and "The CMHA System is Chronically Underbedded (Unlike Any Other Hospital or System in NC)."

Atrium's claims of chronic "under-beddedness" are nothing new. The Agency has heard these arguments many times before, and, as the chart on page 50 of the CMC application shows, the Agency has *always* awarded AH at least *some* beds every time it has applied in the last seven reviews. AH *always* applies for *all* beds available in the Mecklenburg County need determination so as to make each Mecklenburg County bed review a zero-sum game where AH gets everything and Novant Health gets nothing. The Agency, however, has wisely rejected that "all or nothing" approach, and it should do so in this review. AH is applying for 89 additional acute care beds when the respective AH facilities collectively have 405 approved beds that have yet to be developed. As shown in Table 5A of the Proposed 2025 SMFP, CMC alone is approved for 303 additional acute care beds that have not been developed. Thus, AH is sitting on a stockpile of acute care beds in Mecklenburg County.

Still, AH is not satisfied and seems to believe that if it keeps making exaggerated claims of capacity constraints, the Agency will capitulate and award AH everything it asks for, every time it asks. The CON Law and the SMFP do not support this distorted result for several reasons. First, it unfairly tilts the competitive scales in AH's favor, which harms patients and payors. Second, it encourages the Agency to avoid analyzing applications according to their individual merit and conducting a reasonable comparative analysis. Third, it eliminates any incentive for AH to manage its capacity constraints using a massive inventory of 1,747 existing and approved acute care beds in Mecklenburg County. The Agency should disregard AH's hyperbole and analyze the application according to the law.

AH provides a comparison of Novant and AH utilization on page 60 of the CMC application using FFY2023 data from the Proposed 2025 SMFP. This merely reiterates the obvious fact that the 2024 SMFP acute care bed methodology relies upon FFY2022 data and a county growth rate from 2015-2019 pre-pandemic reporting years. NHPMC's application provides more recent 2024 data in its demonstration of need for the services proposed and projected utilization.

2024 SMFP Acute Care Bed Methodology

The CMC application includes a discussion of the projected bed need generated by AH facilities based on the 2024 SMFP acute care bed need methodology. However, similar narratives were included in AH's 2023 and 2022 Mecklenburg County applications and were not influential in the Agency's analyses of conformity to Criterion (3). Specifically, the following provides excerpts from the Agency's findings in the 2023 and 2022 Mecklenburg Acute Care Bed Review.

2023 Mecklenburg Acute Care Bed Review
Project ID #s: F-12439-23, F-12444-23, F-12446-23, & F-12457-23
Page 116

Table 5B on page 44 of the 2023 SMFP identifies a need for 164 additional acute care beds in Mecklenburg County. As shown in Table 5A, pages 40-41, the Novant Health system shows a projected deficit of 70 acute care beds for 2025 and the Atrium Health system shows a projected deficit of 159 acute care beds for 2025, which in combination with the need determinations from the 2023 SMFP results in the Mecklenburg County need determination for 164 acute care beds. However, the application process is not limited to the provider (or providers) that show a deficit and create the need for additional acute care beds. Any qualifying provider can apply to develop the 164 acute care beds in Mecklenburg County. Furthermore, it is not necessary that an existing provider have a projected deficit of acute care beds to apply for more acute care beds. However, it is necessary that an applicant adequately demonstrate the need to develop its project, as proposed.

2022 Mecklenburg Acute Care Bed Review
Project ID #s: F-12280-22, F-12281-22, F-12282-22, & F-12293-22
Page 24

In Section C, Atrium discusses how acute care bed need determinations in Mecklenburg County have been generated entirely by Atrium facilities. However, on page 47 in Chapter 5 of the 2022 SMFP, it states:

"Any person can apply to meet the need, not just the health service facility or facilities that generated the need."

The following table summarizes projected acute care bed deficits for the facilities in this review based on the acute care bed methodology in the 2024 SMFP.

Facility	FFY 2022 Acute Care Days	ADC	# of Acute Care Beds	Utilization	Projected (Surplus)/Deficit
CMC	328,618	900	979	92.0%	**139**
NHPMC	129,926	356	469	75.9%	**42**

Source: 2024 SMFP, Table 5A

Each of the facilities in this competitive review has a projected bed deficit that contributed to the 2024 Mecklenburg County acute care bed need determination. No single applicant drove the need or is entitled to any beds.

As described on page 58 of the CMC application, the 2024 SMFP Mecklenburg County growth rate multiplier is 1.0325. The historical days of care used to calculate the multiplier are summarized in the following table.

Mecklenburg County Acute Care Days

	2015 Days	2016 Days	2017 Days	2018 Days	2019 Days	Average Annual Change
Atrium Health Total Days of Care	377,117	382,846	395,604	405,977	421,703	**2.84%**
Novant Health Total Days of Care	185,521	182,594	185,596	190,746	217,163	**4.17%**
Mecklenburg Co. Total Days of Care	562,638	565,440	581,200	596,723	638,866	**3.25%**

Source: 2018 SMFP - 2024 SMFP, Table 5A: Acute Care Bed Need Projections

As illustrated in the previous table, Novant Health's systemwide acute days of care experienced a much higher rate of growth compared to AH. Mecklenburg County's growth rate multiplier is therefore attributed to Novant Health's robust historical utilization. In other words, regarding projected bed need per the acute care bed methodology, AH artificially benefits from Novant Health's robust historical utilization via the application of a growth rate (3.25%) that is higher compared to AH's historical utilization (2.84%).

Novant Health System Projected Acute Care Bed Need Based on Novant Health Historical Growth Rate

NH Growth Rate Multiplier	2024 SMFP Bed Inventory	2026 Projected Days of Care	2025 Projected ADC	2026 Beds Adjusted for Target Occupancy	Projected 2026 Deficit or (Surplus)
1.0417	893	264,217	724	980	**87**

Source: Bed need calculated based on 2024 SMFP acute care bed methodology substituting Novant Health's historical growth rate instead of the Mecklenburg County growth rate for acute care days.

The previous analysis is provided for illustrative purposes and to underscore the fact that AH is not entitled to any need-determined acute care beds in this review. If the Agency determines that the AH application conforms to all statutory review criteria and administrative rules, then the decision is ultimately based on the comparative analysis. As previously described, the Novant Health application is comparatively superior to the AH application and should be approved for all 80 beds proposed in its application.

COMMENTS REGARDING CRITERION (6)

AH is applying for 89 additional acute care beds when the respective AH facilities collectively have 405 approved beds that have yet to be developed. This is larger than the entire licensed acute care bed inventory of most North Carolina hospitals. See Table 5A of the 2024 SMFP. As shown in Table 5A of the Proposed 2025 SMFP, CMC alone is approved for 303 additional acute care beds that have not been developed. AH Pineville is approved for 51 additional acute care beds that have not been developed and AH University City is approved for 51 additional acute care beds that have not been developed. Despite claims that additional acute care bed capacity is needed "today," AH has failed to identify any solutions for implementing incremental acute care bed capacity in the near term. AH has not demonstrated in the application as submitted that the current or past capacity issues raised in its application will exist once the approved beds are developed. Additionally, it will be many years before these beds are developed at CMC, thus discrediting the claim that Atrium needs capacity "today."

According to Table 5A of the 2025 SMFP, the Novant Health system is approved for 97 acute care beds which is less than one-third of AH's approved but undeveloped beds.

Accordingly, the AH application proposes an unnecessary duplication of existing *or approved* capacity, and should be disapproved.

COMMENTS REGARDING CRITERION (18a)

In deciding which conforming applications to approve or partially approve, the Agency should consider the public interest in maintaining a competitive balance in the largest healthcare market in North Carolina. There is a public interest in creating, maintaining, and improving competitive balance to keep AH from becoming even more dominant and enabling Atrium to dictate rates to commercial payors, self-insured employers, and individuals. As the Agency is aware from comments submitted in previous Mecklenburg County acute care bed reviews, Atrium Health has been sued on antitrust grounds by the United States Department of Justice and private parties for abusing its dominance. *See, e.g., United States v. The Charlotte-Mecklenburg Hospital Authority*, 3:16-cv-00311 (W.D.N.C.); *Benitez v. The Charlotte-Mecklenburg Hospital Authorit*y, 992 F.3d 229 (4th Cir. 2021); *DiCesare v. The Charlotte-Mecklenburg Hospital Authority*, 376 N.C. 63, 852 S.E.2d 146 (2020). The USDOJ's antitrust case against Atrium Health culminated in a Final Judgment, a copy of which is attached to these comments. The only policy tool the Agency has to improve competitive balance in Mecklenburg County is its CON decisions. The CON Law exists to protect patients, and patients benefit from competition because it lowers cost and improves

quality. Therefore, the Agency should continue to evaluate the competitive balance of acute care beds in Mecklenburg County.

As described in NHPMC's application, AH controls 65.5% of the existing and approved acute care beds in Mecklenburg County. Novant Health controls only 34.5% of the existing and approved acute care beds in Mecklenburg County. Despite CON approval of 26 additional acute care beds during the 2023 Mecklenburg Acute Care Bed Review, Novant Health continues to maintain a minority share of acute care beds in the service area. Therefore, the proposed additional acute care bed capacity at NHPMC will positively impact competition by narrowing the gap of control that remains between Novant Health and AH in Mecklenburg County.

The AH application is non-conforming with Criterion (18a) and should be disapproved.

CONCLUSION

With regard to acute care beds, only the application submitted by Novant Health is fully conforming to all applicable Criteria and rules and the NHPMC application is also comparatively superior to the CMC application. Therefore, the NHPMC application should be approved as submitted. If the Agency finds the CMC application conforming with all CON criteria and performance standards, the CMC application is a less effective alternative than the NHPMC application and should be denied or partially approved (for a maximum of nine beds) on that basis. Fostering competitive balance in Mecklenburg County, or not unnecessarily worsening competitive imbalance, will maximize healthcare value by incentivizing high-quality care, lowering costs, and expanding patient choice.

ATTACHMENT: FINAL JUDGEMENT, United States v. The Charlotte-Mecklenburg Hospital Authority, 3:16-cv-00311 (W.D.N.C.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:16-cv-00311-RJC-DCK

UNITED STATES OF AMERICA and THE STATE OF NORTH CAROLINA, Plaintiffs, v. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS HEALTHCARE SYSTEM, Defendant.	)	ORDER

FINAL JUDGMENT

THIS MATTER comes before the Court on Plaintiff United States' Unopposed Motion for Entry of Modified Proposed Final Judgment, (Doc. No. 98), and the parties' associated briefs and exhibits. WHEREAS, Plaintiffs, the United States of America and the State of North Carolina (collectively "Plaintiffs"), filed their Complaint on June 9, 2016; Plaintiffs and Defendant The Charlotte-Mecklenburg Hospital Authority d/b/a Atrium Health f/k/a Carolinas HealthCare System (collectively the "Parties"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, the Plaintiffs and Defendant agree to be bound by the provisions of this Final Judgment pending its approval by this Court;

AND WHEREAS, the essence of this Final Judgment is to enjoin Defendant from prohibiting, preventing, or penalizing steering as defined in this Final Judgment;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

The Court has jurisdiction over the subject matter of and each of the Parties to this action. The Complaint states a claim upon which relief may be granted against Defendant under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

For purposes of this Final Judgment, the following definitions apply:

A. "Benefit Plan" means a specific set of health care benefits and Healthcare Services that is made available to members through a health plan underwritten by an Insurer, a self-funded benefit plan, or Medicare Part C plans. The term "Benefit Plan" does not include workers' compensation programs, Medicare (except Medicare Part C plans), Medicaid, or uninsured discount plans.

B. "Carve-out" means an arrangement by which an Insurer unilaterally removes all or substantially all of a particular Healthcare Service from coverage in a Benefit Plan during the performance of a network-participation agreement.

C. "Center of Excellence" means a feature of a Benefit Plan that designates Providers of certain Healthcare Services based on objective quality or quality-and-price criteria in order to encourage patients to obtain such Healthcare Services from those designated Providers.

D. "Charlotte Area" means Cabarrus, Cleveland, Gaston, Iredell, Lincoln, Mecklenburg, Rowan, Stanly, and Union counties in North Carolina and Chester, Lancaster, and York counties in South Carolina.

E. "Co-Branded Plan" means a Benefit Plan, such as Blue Local with Carolinas HealthCare System, arising from a joint venture, partnership, or a similar formal type of alliance or affiliation beyond that present in broad network agreements involving value-based arrangements between an Insurer and Defendant in any portion of the Charlotte Area whereby both Defendant's and Insurer's brands or logos appear on marketing materials.

F. "Defendant" means The Charlotte-Mecklenburg Hospital Authority d/b/a Atrium Health f/k/a Carolinas HealthCare System, a North Carolina hospital authority with its headquarters in Charlotte, North Carolina; and its directors, commissioners, officers, managers, agents, and employees; its successors and assigns; and any controlled subsidiaries (including Managed Health Resources), divisions, partnerships, and joint ventures, and their directors, commissioners, officers, managers, agents, and employees; and any Person on whose behalf Defendant negotiates contracts with, or consults in the negotiation of contracts with, Insurers. For purposes of this Final Judgment, an entity is controlled by

Defendant if Defendant holds 50% or more of the entity's voting securities, has the right to 50% or more of the entity's profits, has the right to 50% or more of the entity's assets on dissolution, or has the contractual power to designate 50% or more of the directors or trustees of the entity. Also for purposes of this Final Judgment, the term "Defendant" excludes MedCost LLC and MedCost Benefits Services LLC, but it does not exclude any Atrium Health director, commissioner, officer, manager, agent, or employee who may also serve as a director, member, officer, manager, agent, or employee of MedCost LLC or MedCost Benefit Services LLC when such director, commissioner, officer, manager, agent, or employee is acting within the course of his or her duties for Atrium Health. MedCostLLC and MedCost Benefits Services LLC will remain excluded from the definition of "Defendant" as long as Atrium does not acquire any greater ownership interest in these entities than it has at the time that this Final Judgment is lodged with the Court.

G. "Healthcare Provider" or "Provider" means any Person delivering any Healthcare Service.

H. "Healthcare Services" means all inpatient services (*i.e.*, acute-care diagnostic and therapeutic inpatient hospital services), outpatient services (*i.e.*, acute-care diagnostic and therapeutic outpatient services, including but not limited to ambulatory surgery and radiology services), and professional services (*i.e.*, medical services provided by physicians or other licensed medical professionals) to the extent offered by Defendant and within the scope of services covered on an in-network basis pursuant to a contract between Defendant and an Insurer.

"Healthcare Services" does not mean management of patient care, such as through population health programs or employee or group wellness programs.

I. "Insurer" means any Person providing commercial health insurance or access to Healthcare Provider networks, including but not limited to managed-care organizations, and rental networks (*i.e.*, entities that lease, rent, or otherwise provide direct or indirect access to a proprietary network of Healthcare Providers), regardless of whether that entity bears any risk or makes any payment relating to the provision of healthcare. The term "Insurer" includes Persons that provide Medicare Part C plans, but does not include Medicare (except Medicare Part C plans), Medicaid, or TRICARE, or entities that otherwise contract on their behalf.

J. "Narrow Network" means a network composed of a significantly limited number of Healthcare Providers that offers a range of Healthcare Services to an Insurer's members for which all Providers that are not included in the network are out of network.

K. "Penalize" or "Penalty" is broader than "prohibit" or "prevent" and is intended to include any contract term or action with the likely effect of significantly restraining steering through Steered Plans or Transparency. In determining whether any contract provision or action "Penalizes" or is a "Penalty," factors that may be considered include: the facts and circumstances relating to the contract provision or action; its economic impact; and the extent to which the contract provision or action has potential or actual procompetitive effects in the Charlotte Area.

L. "Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity.

M. "Reference-Based Pricing" means a feature of a Benefit Plan by which an Insurer pays up to a uniformly-applied defined contribution, based on an external price selected by the Insurer, toward covering the full price charged for a Healthcare Service, with the member being required to pay the remainder. For avoidance of doubt, a Benefit Plan with Reference-Based Pricing as a feature may permit an Insurer to pay a portion of this remainder.

N. "Steered Plan" means any Narrow Network Benefit Plan, Tiered Network Benefit Plan, or any Benefit Plan with Reference-Based Pricing or a Center of Excellence as a component.

O. "Tiered Network" means a network of Healthcare Providers for which (i) an Insurer divides the in-network Providers into different sub-groups based on objective price, access, and/or quality criteria; and (ii) members receive different levels of benefits when they utilize Healthcare Services from Providers in different sub-groups.

P. "Transparency" means communication of any price, cost, quality, or patient experience information directly or indirectly by an Insurer to a client, member, or consumer.

III. APPLICABILITY

This Final Judgment applies to Defendant, as defined above, and all other Persons in active concert with, or participation with, Defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT

A. The contract language reproduced in Exhibit A is void, and Defendant shall not enforce or attempt to enforce it. The contract language reproduced in Exhibit B shall not be used to prohibit, prevent, or penalize Steered Plans or Transparency, but could remain enforceable for protection against Carve-outs. For the Network Participation Agreement between Blue Cross and Blue Shield of North Carolina and Defendant's wholly-owned subsidiary Managed Health Resources, effective January 1, 2014, as amended, Defendant shall exclude from the calculation of total cumulative impact pursuant to Section 6.14 of that agreement any impact to Defendant resulting from Blue Cross and Blue Shield of North Carolina disfavoring Defendant through Transparency or through the use of any Steered Plan.

B. For Healthcare Services in the Charlotte Area, Defendant will not seek or obtain any contract provision which would prohibit, prevent, or penalize Steered Plans or Transparency including:

1. express prohibitions on Steered Plans or Transparency;

2. requirements of prior approval for the introduction of new benefit plans (except in the case of Co-Branded Plans); and

3. requirements that Defendant be included in the most-preferred tier of Benefit Plans (except in the case of Co-Branded Plans). However, notwithstanding this Paragraph IV(B)(3), Defendant may enter into a contract with an Insurer that provides Defendant with the right to participate in the most-preferred tier of a Benefit Plan under the same terms and conditions as any other Charlotte Area Provider, provided that if Defendant declines to participate in the most-preferred tier of that Benefit Plan, then Defendant must participate in that Benefit Plan on terms and conditions that are substantially the same as any terms and conditions of any then-existing broad-network Benefit Plan (*e.g.*, PPO plan) in which Defendant participates with that Insurer. Additionally, notwithstanding Paragraph IV(B)(3), nothing in this Final Judgment prohibits Defendant from obtaining any criteria used by the Insurer to (i) assign Charlotte Area Providers to each tier in any Tiered Network; and/or (ii) designate Charlotte Area Providers as a Center of Excellence.

C. Defendant will not take any actions that penalize, or threaten to penalize, an Insurer for (i) providing (or planning to provide) Transparency, or (ii) designing, offering, expanding, or marketing (or planning to design, offer, expand, or market) a Steered Plan.

V. PERMITTED CONDUCT

A. Defendant may exercise any contractual right it has, provided it does not engage in any Prohibited Conduct as set forth above.

B. For any Co-Branded Plan or Narrow Network in which Defendant is the most-prominently featured Provider, Defendant may restrict steerage within that Co-Branded Plan or Narrow Network. For example, Defendant may restrict an Insurer from including at inception or later adding other Providers to any (i) Narrow Network in which Defendant is the most-prominently featured Provider, or (ii) any Co-Branded Plan.

C. With regard to information communicated as part of any Transparency effort, nothing in this Final Judgment prohibits Defendant from reviewing its information to be disseminated, provided such review does not delay the dissemination of the information. Furthermore, Defendant may challenge inaccurate information or seek appropriate legal remedies relating to inaccurate information disseminated by third parties. Also, for an Insurer's dissemination of price or cost information (other than communication of an individual consumer's or member's actual or estimated out-of-pocket expense), nothing in the Final Judgment will prevent or impair Defendant from enforcing current or future provisions, including but not limited to confidentiality provisions, that (i) prohibit an Insurer from disseminating price or cost information to Defendant's competitors, other Insurers, or the general public; and/or (ii) require an Insurer to obtain a covenant from any third party that receives such price or cost information that such

third party will not disclose that information to Defendant's competitors, another Insurer, the general public, or any other third party lacking a reasonable need to obtain such competitively sensitive information. Defendant may seek all appropriate remedies (including injunctive relief) in the event that dissemination of such information occurs.

VI. REQUIRED CONDUCT

Within fifteen (15) business days of entry of this Final Judgment, Defendant, through its designated counsel, must notify in writing Aetna, Blue Cross and Blue Shield of North Carolina, Cigna, MedCost, and UnitedHealthcare, that:

A. This Final Judgment has been entered (enclosing a copy of this Final Judgment) and that it prohibits Defendant from entering into or enforcing any contract term that would prohibit, prevent, or penalize Steered Plans or Transparency, or taking any other action that violates this Final Judgment; and

B. For the term of this Final Judgment Defendant waives any right to enforce any provision listed in Exhibit A and further waives the right to enforce any provision listed in Exhibit B to prohibit, prevent, or penalize Steered Plans and Transparency.

VII. COMPLIANCE

A. It shall be the responsibility of the Defendant's designated counsel to undertake the following:

1. within fifteen (15) calendar days of entry of this Final Judgment, provide a copy of this Final Judgment to each of Defendant's commissioners and officers, and to each employee whose job responsibilities include negotiating or approving agreements with Insurers for the purchase of Healthcare Services, including personnel within the Managed Health Resources subsidiary (or any successor organization) of Defendant;

2. distribute in a timely manner a copy of this Final Judgment to any person who succeeds to, or subsequently holds, a position of commissioner, officer, or other position for which the job responsibilities include negotiating or approving agreements with Insurers for the purchase of Healthcare Services, including personnel within the Managed Health Resources subsidiary (or any successor organization) of Defendant; and

3. within sixty (60) calendar days of entry of this Final Judgment, develop and implement procedures necessary to ensure Defendant's compliance with this Final Judgment. Such procedures shall ensure that questions from any of Defendant's commissioners, officers, or employees about this Final Judgment can be answered by counsel (which may be outside counsel) as the need arises. Paragraph 21.1 of the Amended Protective Order Regarding Confidentiality shall not be interpreted to prohibit outside counsel from answering such questions.

B. For the purposes of determining or securing compliance with this Final Judgment, or any related orders, or determining whether the Final Judgment should be modified or vacated, and subject to any legally-recognized privilege, from time to time authorized representatives of the United States or the State of North Carolina, including agents and consultants retained by the United States or the State of North Carolina, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or the Attorney General for the State of North Carolina, and on reasonable notice to Defendant, be permitted:

1. access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

C. Within 270 calendar days of entry of this Final Judgment, Defendant must submit to the United States and the State of North Carolina a written report setting forth its actions to comply with this Final Judgment, specifically describing (1) the status of all negotiations between Managed Health Resources (or any

successor organization) and an Insurer relating to contracts that cover Healthcare Services rendered in the Charlotte Area since the entry of the Final Judgment, and (2) the compliance procedures adopted under Paragraph VII(A)(3) of this Final Judgment.

D. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or the Attorney General for the State of North Carolina, Defendant shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

E. The United States may share information or documents obtained under Paragraph VII with the State of North Carolina subject to appropriate confidentiality protections. The State of North Carolina shall keep all such information or documents confidential.

F. No information or documents obtained by the means provided in Paragraph VII shall be divulged by the United States or the State of North Carolina to any Person other than an authorized representative of (1) the executive branch of the United States or (2) the Office of the North Carolina Attorney General, except in the course of legal proceedings to which the United States or the State of North Carolina is a party (including grand jury proceedings), for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

G. If at the time that Defendant furnishes information or documents to the United States or the State of North Carolina, Defendant represents and

identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States and the State of North Carolina shall give Defendant ten (10) calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

H. For the duration of this Final Judgment, Defendant must provide to the United States and the State of North Carolina a copy of each contract and each amendment to a contract that covers Healthcare Services in the Charlotte Area that it negotiates with any Insurer within thirty (30) calendar days of execution of such contract or amendment. Defendant must also notify the United States and the State of North Carolina within thirty (30) calendar days of having reason to believe that a Provider which Defendant controls has a contract with any Insurer with a provision that prohibits, prevents, or penalizes any Steered Plans or Transparency.

VIII. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any Party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. The Parties hereby agree that the Final Judgment should be interpreted using ordinary tools of interpretation, except that the terms of the Final Judgment should not be construed against either Party as the drafter. The parties further agree that the purpose of the Final Judgment is to redress the competitive harm alleged in the Complaint, and that the Court may enforce any provision of this Final Judgment that is stated specifically and in reasonable detail, *see* Fed. R. Civ. P. 65(d), whether or not such provision is clear and unambiguous on its face.

C. In any enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved prior to litigation, Defendant agrees to reimburse the United States for the

fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

X. EXPIRATION OF FINAL JUDGMENT

Unless the Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendant that the continuation of the Final Judgment is no longer necessary or in the public interest.

XI. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The Parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, any comments thereon, and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

XII. CONCLUSION

IT IS THEREFORE ORDERED THAT Plaintiff United States' Unopposed Motion for Entry of Final Judgment, (Doc. No. 98), is **GRANTED**.

Signed: April 24, 2019

Robert J. Conrad, Jr.
United States District Judge

Exhibit A

Aetna

Section 2.8 of the Physician Hospital Organization Agreement between and among Aetna Health of the Carolinas, Inc., Aetna Life Insurance Company, Aetna Health Management, LLC, and Defendant states in part:

> "Company may not . . . steer Members away from Participating PHO Providers other than instances where services are not deemed to be clinically appropriate, subject to the terms of Section 4.1.3 of this Agreement."

In addition, Section 2.11 of the above-referenced agreement states in part:

> "Company reserves the right to introduce in new Plans . . . and products during the term of this Agreement and will provide PHO with ninety (90) days written notice of such new Plans, Specialty Programs and products. . . . For purposes under (c) and (d) above, Company commits that Participating PHO Providers will be in-network Participating Providers in Company Plans and products as listed on the Product Participation Schedule. If Company introduces new products or benefit designs in PHO's market that have the effect of placing Participating PHO Providers in a non-preferred position, PHO will have the option to terminate this Agreement in accordance with Section 6.3. Notwithstanding the foregoing, if Company introduces an Aexcel performance network in PHO Provider's service area, all PHO Providers will be placed in the most preferred benefit level. As long as such Plans or products do not directly or indirectly steer Members away from a Participating PHO Provider to an alternative Participating Provider for the same service in the same level of care or same setting, the termination provision would not apply."

Blue Cross and Blue Shield of North Carolina

The Benefit Plan Exhibit to the Network Participation Agreement between Blue Cross and Blue Shield of North Carolina and Defendant (originally effective January 1, 2014), as replaced by the Fifth Amendment, states in part:

> "After meeting and conferring, if parties cannot reach agreement, then, notwithstanding Section 5.1, this Agreement will be considered to be beyond the initial term, and you may terminate this Agreement upon not less than 90 days' prior Written Notice to us, pursuant to Section 5.2."

Cigna

Section II.G.5 of the Managed Care Alliance Agreement between Cigna HealthCare of North Carolina, Inc. and Defendant states in part:

> "All MHR entities as defined in Schedule 1 will be represented in the most preferred benefit level for any and all CIGNA products for all services provided under this Agreement unless CIGNA obtains prior written consent from MHR to exclude any MHR entities from representation in the most preferred benefit level for any CIGNA product. . . . As a MHR Participating Provider, CIGNA will not steer business away from MHR Participating Providers."

Medcost

Section 3.6 of the Participating Physician Hospital Organization agreement between Medcost, LLC and Defendant states in part:

> "Plans shall not directly or indirectly steer patients away from MHR Participating Providers."

UnitedHealthcare

Section 2 of the Hospital Participation Agreement between UnitedHealthcare of North Carolina, Inc. and Defendant states in part:

> "As a Participating Provider, Plan shall not directly or indirectly steer business away from Hospital."

Exhibit B

Cigna

Section II.G.5 of the Managed Care Alliance Agreement between Cigna HealthCare of North Carolina, Inc. and Defendant states in part:

> "CIGNA may not exclude a MHR Participating Provider as a network provider for any product or Covered Service that MHR Participating Provider has the capability to provide except those carve-out services as outlined in Exhibit E attached hereto, unless CIGNA obtains prior written consent from MHR to exclude MHR Participating Provider as a network provider for such Covered Services."

UnitedHealthcare

Section 2 of the Hospital Participation Agreement between UnitedHealthcare of North Carolina, Inc. and Defendant states in part:

> "Plan may not exclude Hospital as a network provider for any Health Service that Hospital is qualified and has the capability to provide and for which Plan and Hospital have established a fee schedule or fixed rate, as applicable, unless mutually agreed to in writing by Plan and Hospital to exclude Hospital as a network provider for such Health Service."

In addition, Section 3.6 of the above-referenced agreement states in part:

> "During the term of this Agreement, including any renewal terms, if Plan creates new or additional products, which product otherwise is or could be a Product Line as defined in this Agreement, Hospital shall be given the opportunity to participate with respect to such new Product Line."