STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SACRED HEART HOSPITAL OF PENSACOLA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92-1508
	)	
STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
BAPTIST HOSPITAL,	)	
	)	
INTERVENOR.	)	

RECOMMENDED ORDER

Notice was provided and on May 20-22, 1992, in Tallahassee, Florida, at the offices of the Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida, a hearing was held in this case. The hearing was a formal hearing conducted in accordance with Section 120.57(1), Florida Statutes. Charles C. Adams was the Hearing Officer.

APPEARANCES

For Petitioner: Karen O. Emmanuel, Esquire
Emmanuel, Sheppard & Condon
Post Office Drawer 1271
Pensacola, Florida 32596

For Respondent: Richard Patterson, Esquire
Department of Health and
Rehabilitative Services
103 Fort Knox Executive Center
2727 Mahan Drive
Tallahassee, Florida 32301

For Intervenor: Stephen A. Ecenia, Esquire
Katz, Kutter, Haigler, Alderman,
Davis, Marks & Rutledge, P.A.
106 East College Avenue, Suite 1200
Post Office Box 1877
Tallahassee, Florida 32302-1877

STATEMENT OF ISSUES

Two issues are raised in this case. The first issue concerns the question of whether the Petitioner must seek review and permission by and from the Respondent before engaging in this project to provide inpatient radiation therapy. See Section 381.706(1)(h), Florida Statutes. If that question is answered in the affirmative, then the next question to be answered is whether Petitioner is entitled to a certificate of need to provide inpatient radiation therapy services at its hospital in Pensacola, Florida. In answering the initial question reference is made to the case of Scared Heart Hospital of Pensacola v. Department of Health and Rehabilitative Services, and Baptist Hospital, DOAH Case No. 90-3576. That reference is made because Intervenor in the present case has made a motion in limine which asserts that the Petitioner here is estopped from raising the issue of whether jurisdiction resides with the Respondent to require a certificate of need based upon the belief that DOAH Case No. 90-3576 has answered that question in the affirmative. Thus, as argued in the motion in limine, Petitioner in the present action should be barred by doctrines of collateral estoppel and res judicata from further examining that issue. Both issues are addressed in the fact finding and conclusions of law which follow, to include a ruling on the motion in limine.

At the commencement of the hearing in discussing the motion in limine an examination was made of the significance, if any, of the Petitioner having failed to clearly state its opposition to the Respondent's assertion of jurisdiction over the subject matter and that party in the Petition contesting the decision on the merits to deny the application for certificate of need. Consequently, the issue of whether Petitioner has waived its right to contest the jurisdiction is also addressed in the Recommended Order.

PRELIMINARY STATEMENT

Petitioner applied for a certificate of need to provide inpatient radiation therapy services at its hospital in Pensacola, Florida. That application was denied. In turn Petitioner requested a formal hearing to contest the decision to deny. The case was forwarded to the Division of Administrative Hearings to conduct the hearing. The case was initially scheduled for hearing to be held on May 6-9, 1992. Petitioner moved to continue. The case was reset for May 20-22, 1992, the dates upon which the hearing was held. Prior to the hearing, Intervenor had been granted leave to intervene as a full party.

The witnesses and exhibits presented by the parties together with hearing officer exhibits placed with the record to preserve the integrity of the record are indexed in the transcript volumes forwarded with the Recommended Order.

The parties have offered a prehearing stipulation which is included with this record.

The parties upon an extended schedule for submitting proposed recommended order have filed their proposals. The proposed recommended order submitted by the Respondent and Intervenor is a joint submission. By extending the schedule for submitting proposed recommended orders, the parties have waived the requirement to have the hearing officer enter a Recommended Order within thirty days of receipt of the transcript. See Rule 22I-6.031, Florida Administrative Code.

Fact finding suggested by the parties is addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

MOTION IN LIMINE
(DOAH Case No. 92-3576)

1. On the prior occasion described in DOAH Case No. 90-3576, Petitioner had applied to Respondent for a certificate of need to institute radiation therapy services and to construct a radiation therapy facility at the campus of its hospital in Pensacola, Florida. That center was to serve inpatients and outpatients. The projected capital expenditure for that project approximated 3.7 million dollars.

2. Petitioner contended that the radiation therapy center that would be constructed would be an extension to an existing oncology program as contrasted with the establishment of a "new service." Consistent with that position Respondent asserted that the basis for requiring a certificate of need was found in the language at Section 381.706(1)(c), Florida Statutes, which states:

> A capital expenditure of $1 million or more by or on behalf of a health care facility or hospice for a purpose directly related to the furnishing of health services at such facility; provided that a certificate of need shall not be required for an expenditure to provide an outpatient health service, or to acquire equipment or refinance debt, for which a certificate of need is not otherwise required pursuant to this subsection. The department shall, by rule, adjust the capital expenditure threshold annually using an appropriate inflation index.

3. By resort to Section 381.706(1)(c), Florida Statutes, as the basis for declaring jurisdiction, the Respondent in its preliminary position did not perceive that the proposed project constituted establishment of new institutional health services or a substantial change to the existing health services, rather, it was believed to be constituted of construction costs as a capital expenditure related to the existing oncology program which expenditure met the $1 million threshold.

4. If the basis for jurisdiction was found within Section 381.706(1)(c), Florida Statutes, then the would-be intervenor in that case, the same intervenor here, would be denied intervention. The basis for denial is found within the limitations placed upon those persons who may participate in a decision involving certificate of need for a capital expenditure as identified in Section 381.706(1)(c), Florida Statutes. That contest is between the Respondent and an applicant for the certificate. Third parties have no right to participate.

5. On the other hand, if the basis for jurisdiction is as argued by the petition for intervention in the prior case, that basis being the jurisdiction established by Section 381.706(1)(h), Florida Statutes, then a third party health care provider in competition with the applicant seeking a certificate of need could participate in that decision. The language in Section 381.706(1)(h), states:

> The establishment of inpatient institutional health services by a health care facility, or a substantial change in such services, or the obligation of capital expenditures for the offering of, or a substantial change in, any such services which entails a capital expenditure in any amount, or an annual operating cost of $500,000 or more. The department shall, by rule, adjust the annual operating cost threshold annually using an appropriate inflation index.

6. The Hearing Officer in DOAH Case No. 90-3576, heard the matter and entered his Recommended Order to resolve the right of the present intervenor to intervene in that cause. In doing so the Hearing Officer generally addressed the jurisdictional basis upon which the agency could review the application. Nothing in that process attempted to distinguish between inpatient and outpatient costs by way of a discrete analysis and allocation of those costs. Observations were made in passing concerning the aggregate amount of inpatient and outpatient costs. In particular reference was made to the capital expenditure of approximating 3.7 million dollars.

7. No attention was given the issue of the threshold amount associated with annual operating costs identified in Section 381.706(1)(h), Florida Statutes. Factual reference to that jurisdictional amount associated with annual operating costs was left for some other occasion. The thrust in DOAH Case No. 90-3576 was to determine whether the appropriate basis for the jurisdictional claim would be found in Section 381.706(1)(c), Florida Statutes, as initially contended by the Respondent or upon resort to Section 381.706(1)(h), Florida Statutes, as contended by the petition for intervention, without a more complete analysis concerning the jurisdictional amount set out in Section 381.706(1)(h), Florida Statutes, should the hearing officer be persuaded that the latter provision constituted the grounds for review generally stated.

8. In the factual and legal conclusions by the hearing officer in DOAH Case No. 90-3576, he determined that the project in question for inpatient and outpatient radiation therapy services constituted the establishment of new inpatient institutional health services or at least constituted a substantial change in the services that were being provided by the applicant. Thus the petition for intervention was deemed appropriate and the motion to dismiss that petition was recommended for denial.

9. Through the Final Order which followed, with some minor modifications which have no influence on the present case, the Respondent adopted the findings of fact of the hearing officer in DOAH Case No. 90-3576, and granted the petition to intervene.

10. The Recommended Order was entered on April 3, 1991, and the Final Order on May 21, 1991. The parties in DOAH Case No. 90-3576 did not proceed to hearing before the present case was heard. The decision by the hearing officer in DOAH Case No. 90-3576 was to defer consideration of the matter pending hearing in the present case. That choice was upon a request by all parties in DOAH Case No. 90-3576.

PARTIES STIPULATIONS
CONCERNING REVIEW CRITERIA

11. The parties agree that Petitioner's Certificate of Need Application No. 6772, the present application, meets the following statutory criteria: Section 381.705(1)(c), (h), except for the third clause which is not applicable and the fourth clause which is at issue, (i), (m), except that Intervenor contends that the project costs were not properly allocated to Petitioner's Certificate of Need Application No. 6772, and (n) to Section 381.705(1). The parties also agree that the following statutory criteria are not applicable to Petitioner's application: Section 381.705(1)(e), (f), (g) and (j), Florida Statutes.

12. Within the context of the stipulation as to criteria, the parties agree that the following issues are to be litigated:

a. The need for the proposed project in relation to the applicable district plan and state health plan.

b. The availability, quality of care, efficiency, appropriateness, accessibility, extent of utilization, and adequacy of like and existing health care services in the service district.

c. The availability of and adequacy of other health care facilities and services in the service district, which may serve as alternatives for the services proposed to be provided by Scared Heart Hospital.

d. The impact of the proposed project on the cost of providing health services proposed by Scared Heart Hospital.

e. Whether less costly, more efficient, or more appropriate alternatives to the proposed services are available.

f. Whether existing inpatient facilities, providing inpatient services similar to those proposed are being used in an appropriate and efficient manner.

g. Whether patients will experience serious problems in obtaining inpatient care of the type proposed, in the absence of the proposed new service.

h. The need that the population served or to be served has for the health services proposed to be offered, and the extent to which residents in the district are likely to have access to those services.

i. The contribution of the proposed service in meeting the health needs of members of such medically underserved groups.

BACKGROUND FACTS

13. On August 22, 1991, Petitioner gave notice that it intended to apply for the September 19, 1991, batch review cycle to initiate inpatient radiation therapy services at its Pensacola, Florida facility. That notification referred to the fact that the Petitioner was presently constructing an outpatient cancer center to provide radiation therapy services and that the anticipated opening date for that outpatient facility was December, 1991.

14. Petitioner did apply for the September 19, 1991 batch review for initiation of inpatient radiation therapy services. At that time the construction of the outpatient radiation therapy services was proceeding. Petitioner had received a letter of non-reviewability for the construction of the outpatient cancer treatment facility on a prior date.

15. The completion of the outpatient radiation therapy services center at the Petitioner's facility was completed and Petitioner began to provide outpatient radiation treatment in April, 1992.

16. The cancer treatment program at Petitioner's facility is a comprehensive cancer center providing radiation therapy, chemotherapy, IV. hydration, blood transfusion, nutrition counseling, social work counseling and a library. The outpatient facility for radiation therapy is fully staffed and supplied. It was placed on the books of the Petitioner as an active asset in the year 1991.

17. Before submitting the application for review in September, 1991 review cycle, Petitioner conferred with Respondent and was instructed to submit an application for the initiation of inpatient services and to allocate costs to the project based upon a percentage of the total facility which would be devoted to inpatient services. Through the application Petitioner noted that the total cost of the establishment of the radiation therapy services projected to open in December, 1991, was $4,124,475. Pursuant to the instruction by the Respondent $618,671 was allocated as an estimate of capital expenditures for inpatient radiation therapy services. This approximates 15 percent of patients being treated as inpatients of the total number of patients treated by radiation therapy. Generally stated, the experience of most providers is that 10 to 15 percent of radiation therapy is delivered on an inpatient basis with the balance of the radiation therapy being delivered on an outpatient basis. The allocation of capital expenditures to inpatient therapy was an artificial device mandated by the Respondent. It does not reflect the actual experience.

18. In actuality the incremental project costs related to capital expenditures for the inpatients receiving radiation therapy are zero. The reason for this finding is based upon the fact that the equipment for providing the inpatient radiation therapy is already in place, the facility for providing that care had been constructed, there is no associated incremental depreciation for inpatient care, the project has been fully paid for from funded depreciation cash and has been placed upon the books of the facility at 100 percent of that total. In essence, the capital costs have been incurred before the advent of the inpatient radiation therapy services.

19. Additional costs promoted by the provision of care for inpatients who receive radiation therapy at the facility would be supply expenses attributable to those inpatients and the possibility of additional salaries attributable to overtime work done by staff to serve the inpatients. These are minimal costs.

20. Operating costs were also artificially allocated to inpatients in the application. For the first year of operation, salaries allocated to inpatient care were estimated at $64,950.00, with associated benefits at $9,898.00, other patient care expenses at $17,925.00 and depreciation in the amount of $51,135.00. Even when resort is made to this certificate the proposal to institute inpatient radiation therapy does not reach the $500,000.00 threshold in annual operating costs, in addition to having no fiscal impact by way of capital expenditures.

21. Petitioner is a 391 bed acute general hospital located in Pensacola, Florida. The services that it provides are available to inpatients and outpatients. Among those services are an open heart facility, neonatal intensive care Level II and Level III units, and freestanding 50 bed children's hospital.

22. The patients receiving care for cancer are provided screening programs, risk assessments, preventative education programs, diagnostic services, surgery, chemotherapy and radiation therapy on an outpatient basis.

23. The application for inpatient radiation therapy was not favorably reviewed in the State Agency Action Report issued on or about January 8, 1992. This led to the present hearing when Petitioner contested the decision to deny the application.

24. Intervenor and West Florida Hospital, both of Pensacola, Florida, and the same planning district where Petitioner is located, have certificates of need to provide inpatient radiation therapy. They also provide outpatient radiation therapy. The other two hospitals treat patients referred by Petitioner for radiation therapy needs.

25. The inpatients of the Petitioner requiring radiation therapy must be transported to the other two hospitals to receive that care. The majority of those patients who are being transported are referred to the Intervenor. Pediatric cancer patients from Petitioner's facility are transported to West Florida.

26. The patients who are transported from Petitioner's facility to the Intervenor's facility are received by the Intervenor as outpatients. When they return to the Petitioner's facility they are perceived as inpatients.

27. Each of the other two facilities who offer radiation therapy pursuant to certificates of need have two linear accelerators to provide inpatient and outpatient radiation therapy. Petitioner seeks to have its single linear accelerator which now provides outpatient radiation therapy made available to provide inpatient radiation therapy.

28. There are also two non-hospital based radiation therapy centers which have single linear accelerators to provide outpatient radiation therapy services. Those non-hospital based providers are located in Ft. Walton Beach and Crestview, Florida, within the same planning district that is associated with this application.

REVIEW CRITERIA 1/

29. Section 381.705(1)(a), Florida Statutes, requires that an application be reviewed for its consistency with the state and district health plans. Neither of those plans addresses the provision of radiation therapy services. As a consequence, neither plan sets forth need allocation factors that would address this type application. In view of the silence of the state and local health plans concerning inpatient radiation therapy, the application cannot be seen as inconsistent with those plans.

30. Section 381.705(1)(b), Florida Statutes, speaks in terms of the availability, quality of care, efficiency, appropriateness, accessibility, and extent of utilization and adequacy of like and existing health care services in the service district to be served by the applicant. As stated before inpatient radiation therapy is being delivered by two other providers. Those providers make available and could continue to make availability the quality of care, which is efficient, appropriate, accessible and adequate in delivering inpatient radiation therapy to those patients which Petitioner would serve if granted the certificate of need to do so. The inpatient radiation therapy services offered by those two providers are not over-utilized at present nor would they be in the foreseeable future. The exception to these findings would be related to a quality of care issue not pertaining to the actual delivery of radiation therapy to patients referred from the Petitioner to the other two providers but related to the inconvenience in preparing those patients for transport for delivery of therapy and the transport itself. For some patients who are required to undergo the preparation for transport and transport, that process can be quite painful. Patients have refused to be transported to receive radiation therapy and this has complicated their treatment. It would be a less uncomfortable process if the patients were undergoing the radiation therapy at the Petitioner's facility. Physician's practice patterns in this community where some physicians choose to practice in a single hospital notwithstanding their admission privileges in multiple hospitals complicates the issue in that a patient may be admitted to Petitioner's facility because the admitting physician chooses to practice there alone. Once a diagnosis is made and a decision reached that the patient in that hospital needs to undergo radiation therapy, the need to transport for those treatment ensues. Moreover, as suggested, the decision to utilize radiation therapy in the treatment is not ordinarily made at the initial moment of admission when health care professionals are trying to make the initial diagnosis concerning the patients complaints in deciding whether they are associated with cancer or not and if radiation therapy would benefit the patient or even in the instance where the patient is known to have a history of that illness whether radiation therapy is indicated. Therefore, there might not be a reason to try and place the patient in a facility that has inpatient radiation therapy available if that treatment regime upon evaluation does not seem indicated.

31. The issue concerning the ability to transfer a patient from one facility to another for the overall hospitalization to include provision of inpatient radiation therapy such that a patient who has been determined to need radiation therapy could be transferred from Petitioner's facility to Intervenor's facility for overall care, while theoretically possible does not seem practicable. Additionally, the patients who receive outpatient radiation therapy through Petitioner's facility who would need at some future point in treating the condition to be transferred to another facility to receive radiation therapy once admitted as an inpatient in Petitioner's facility breaks the continuity of the management of the care by requiring the patient to undergo an evaluation by two different radiation therapists, disrupting the patient-

physician relationship in a setting which is complicated by the patient's condition. Nonetheless, the quality of care is not so compromised by the need to transport for the inpatients at the Petitioner's facility to receive radiation therapy to conclude that it constitutes a reason standing alone to grant the certificate of need.

32. In a similar vein, as contemplated by Section 381.705(1)(d), Florida Statutes, the availability and adequacy of other health care facilities and services and hospices in the service district of the applicant, such as outpatient care and home care services, which might serve as alternatives for the applicant's proposal have been considered. Out of that list, only the possibility of the use of outpatient care provided by the existing facilities who offer outpatient radiation therapy would arguably have pertinence to this inquiry. They would not constitute an available and adequate substitute for inpatient radiation therapy for reason that patients who are admitted to a hospital are distinguished from those who come to the facility from other places for purposes of receiving outpatient radiation therapy. That distinction has to do with the gravity of the condition of the patient which caused the patient to be admitted to the hospital in the first instance, and to receive, together with medical attention and other therapies, the provision of radiation therapy.

33. Concerning that portion of Section 381.705(1)(h), Florida Statutes, which describes the applicant's need to address the availability of alternative uses of resources for the provision of other health services, that clause was referred to as an issue in the prehearing stipulation but was not advanced at the hearing.

34. Through the prehearing stipulation the parties did not include reference to Section 381.705(1)(k), Florida Statutes, as a provision about which there was an agreement concerning compliance or the need to comply with its terms. The record reveals that the applicant and the existing providers address the need for radiation therapy of individuals who are not residing in the service district. This project does not appear to have a pronounced influence in improving or diminishing health care for persons not residing in the service district.

35. Section 381.705(1)(l), Florida Statutes, addresses the probable impact of the project on the cost of providing health services proposed by the applicant and it takes into consideration the effects of competition on the supply of health services being proposed and any improvements or innovations in the financing and delivery of health services which foster competition and serve as a promotion of quality assurance and cost effectiveness. Whether the applicant delivers services to the inpatients that it would gain with recognition of its application or some other entity serves the needs of those patients, the basic costs of providing health services would be relatively the same. The exception is the improvement in the circumstance of health care costs related to the transport of the patients from the Petitioner's facility to the two other facilities for provision of the radiation therapy of inpatients in the Petitioner's facility and the attendant costs of duplication of patient charges and professional fees charged by the physician therapist potentially associated with having a patient move from the status of an outpatient at the Petitioner's facility to an admitted patient at that facility who receives radiation therapy at one of the other two facilities while undergoing inpatient care in the Petitioner's facility. These additional costs in transport and potential for patient charges associated with procedures in the other two hospitals and physicians fees in those other two hospitals which are duplicative of efforts made by the Petitioner's outpatient radiation program in its procedures and the

physician's fees associated with those outpatient radiation therapy procedures could be done away with if the project were approved. There is no indication of any significant improvements or innovations in the financing and delivery of health services associated with this application which might foster competition and serve to promote quality assurance and cost effectiveness. The cost improvements that are discussed here standing alone do not justify the applicant being granted a certificate of need.

36. The advent of an inpatient radiation therapy service will not be so adverse in its impact that it will cause the Intervenor or any other existing facility to lose financial viability concerning the ability to maintain an appropriate level of utilization of existing facilities.

37. There are no costs of construction and the method of proposed construction need not be considered in that the construction has been concluded as previously discussed. Consequently, the necessity to address the costs and methods of the proposed constructions as described in Section 381.705(1)(m), Florida Statutes, is not relevant to the inquiry. Nor are the references within Section 381.705(2), Florida Statutes, having to do with capital expenditures pertinent to the outcome in examining the review criteria.

LACK OF A VIABLE
NEEDS FORMULA

38. Respondent does not have a rule which calculates the need for inpatient radiation therapy by resort to a formula which derives need.

39. Neither does the Respondent have an emergent policy which it is developing to formulate the amount of inpatient radiation therapy services needed in a given review cycle. Respondent and the private litigants have attempted to examine the need for inpatient radiation therapy contemplated by this application by devising various mathematical formulas to determine need. Each explanation is fundamentally flawed in that they fail to address the discrete issue contemplated for examination by the review process, that is the need for inpatient radiation therapy. Instead, these methods look at all radiation therapy both inpatient and outpatient. The statute does not contemplate that form of evaluation. It is the 10 to 15 percent of all radiation therapy patients that constitute the inpatients. It is the provision of care to those persons that is subject to examination. If need is to be derived by use of a formula, a knowledge of the circumstances existing for outpatients, a category of patient for whom no certificate of need must be obtained to serve them, should not enter in to the analysis.

40. The formulas exercised by the parties in measuring the overall need for inpatient and outpatient radiation therapy services derive the answers by identifying the number of linear accelerators needed in the district or in one instance for the applicant's facility alone. In that exercise a count is made of the four linear accelerators in the district belonging to the two hospitals which have been granted certificates of need which would allow inpatient radiation therapy to be delivered as well as outpatient therapy and the three programs that serve outpatients on three additional linear accelerators. The total number of linear accelerators is seven counting the linear accelerator the Petitioner has to serve outpatients. No attempt by formula has been made to ascertain whether more than four linear accelerators found within the two hospitals who have certificates of need to provide inpatient radiation therapy service are warranted.

41. Thought provoking questions have been raised by the several parties in critiquing the needs calculation made by an opponent or opponents. However, it is not necessary to choose among these competing theories because in selecting any theory one cannot derive the amount of inpatient radiation therapy services needed in the district. Furthermore, case law does not allow the trier of fact to utilize the basic information provided by the parties to construct a formula for determining need for inpatient radiation services independent of the efforts of the parties in the person of their experts whom they have consulted with on this subject. This means that the decision here must be made by a review of applicable criteria without resort to a preliminary determination of numeric needs. This has been done.

42. On balance, when taking into account the combination of improvements to quality of care for a patient being transported from the Petitioner's facility to receive radiation therapy and the improvement concerning the removal of the cost of that transport and duplication of charges and fees for certain patients who move from an outpatient posture under treatment by the Petitioner and into an inpatient status with Petitioner receiving radiation therapy at one of the two other hospitals which has been discussed in preceding paragraphs, the project is justified and the application should be granted.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction to consider the matters in dispute. See Section 120.57(1), Florida Statutes.

44. On the subject of the motion in limine, DOAH Case 90-3576 is not dispositive of the jurisdictional issue. The hearing officer in the prior case was called upon to decide the matter of the attempted intervention by the present Intervenor in this cause. In arriving at his recommendation he did so by deciding that the basis for claiming jurisdiction would be premised upon Section 381.706(1)(h), Florida Statutes having to do with the establishment of inpatient institutional health services or a substantial change in the oncology service that was being performed as contrasted with the Respondent's preliminary impression that the basis for jurisdiction to require a certificate of need was associated with a capital expenditure of one million dollars or more as referred in Section 381.706(1)(c), Florida Statutes. That section as a basis for jurisdiction that does not allow the participation by third parties in the decision to grant a certificate of need, whereas Section 381.706(1)(h), Florida Statutes would allow a third party to participate. Thus the recommendation was to allow the intervention and that recommendation was followed by the entry of a Final Order by the Respondent. In this decision the hearing officer in DOAH Case No. 90-3576 was not called upon to critically examine the threshold amount necessary to declare the jurisdiction under Section 381.705(1)(h), Florida Statutes. The task to be performed was to decide between Sections 381.706(1)(c), Florida Statutes, and Section 381.706(1)(h), Florida Statutes in generally identifying the basis for jurisdiction. It was left to another occasion to address the specific proof necessary to sustain the jurisdictional basis set out in Section 381.706(1)(h), Florida Statutes. It is also noted that the application under consideration at that time was one in which both inpatient and outpatient services were being established simultaneously. The present case looks at inpatient radiation therapy services following the establishment of outpatient radiation therapies in which all capital expenditures had been made when the outpatient radiation therapy services were brought on line.

45. In denying the motion in limine, any claim that the Petitioner had waived its right to raise the issue of jurisdiction of the subject matter and

parties by failing to advise the other parties that this opposition to jurisdiction was being advanced through its petition in challenge to the preliminary decision by the Respondent to deny the application for the certificate of need for inpatient radiation therapy services is not accepted. Jurisdictional issues may be raised at any point in the proceeding absent prejudice which transpires with delay in raising the jurisdictional issue.

46. In denying the motion in limine it is concluded that the Petitioner is not precluded from raising the jurisdictional issue based upon grounds of estoppel or the doctrine of res judicata. As described, the issues litigated in DOAH Case 90-3576 were different from the issues raised in the present case. See Hollingsworth v. Department of Environmental Regulation, 466 So.2d 383 (Fla. 1st DCA 1985) and Thomoson v. Department of Environmental Regulation, 511 So.2d 989 (Fla. 1987).

47. The argument in opposition to Respondent's claim of jurisdiction is well taken. The policy explanation made by Respondent at hearing through remarks of its policy maker is not compelling. Ordinarily, deference is afforded an agency in interpreting its own statutes; however, that would not be appropriate here. The Respondent's attempt to refer to annual operating costs of the radiation therapy service attributable to outpatients as well as inpatients to declare jurisdiction under Section 381.706(1)(h), Florida Statutes is contrary to the statute. The correct approach is to limit a consideration of the possible jurisdiction to the annual operating costs associated with inpatients. This interpretation coincides with the statute. See Cataract Surgery Center v. Healthcare Cost Containment Board, 581 So.2d 1359 (Fla. 1st DCA 1991).

48. At Section 381.702(13), Florida Statutes the definition of institutional health services is that of

> "Institutional health service" means a health service which is provided by or through a health care facility and which entails an annual operating cost of $500,000 or more. The department shall, by rule, adjust the annual operating cost threshold annually using an appropriate inflation index.

The form of institutional health service which is subject to Respondent's jurisdiction in this instance is an inpatient institutional health service by a health care facility which is being established, not an outpatient institutional health service by a health care facility already established which is being supplemented by the establishment of an inpatient institutional health service by the same health care facility.

49. For ease of reference Section 381.706(1)(h), Florida Statutes is restated as follows:

> (h) The establishment of inpatient institutional health services by a health care facility, or a substantial change in such services, or the obligation of capital expenditures for the offering of, or a substantial change in, any such services which entails a capital expenditure in any amount, or an annual operating cost of

> $500,000 or more. The department shall, by rule, adjust the annual operating cost threshold annually using an appropriate inflation index.

50. In analyzing the language set forth in Section 381.706(1)(h), Florida Statutes which Respondent uses in declaring its jurisdiction, the definition of institutional health service at Section 381.702(13), Florida Statutes is carried forward to respond to an inpatient setting. Consequently the inpatient radiation therapy service must entail an annual operating cost of $500,000 or more associated with this new inpatient radiation therapy service that is being established to confer jurisdiction to require a certificate of need. It does not, given that the outpatient radiation therapy service has already been established and the operating costs associated with the inpatient radiation therapy service are minimal. Even when a percentage allocation is made concerning the annual operating costs, an artificial exercise required by the Respondent which does not comport with reality, the threshold for annual operating costs of $500,000 more is not reached.

51. The decision to bring about inpatient radiation services is not a substantial change to an existing service over which the Respondent has jurisdiction. Radiation therapy services are distinct services separate and apart from other oncology services. The addition of inpatient radiation therapy services, although similar to outpatient radiation therapy services is not the substantial change in services referred to in Section 381.706(1)(h), Florida Statutes in that outpatient radiation therapy services are not subject to requirements to obtain a certificate of need.

52. Likewise, there is no obligation of capital expenditures or any substantial change in existing services which would entail a further capital expenditure related to the project to provide inpatient radiation therapy.

53. The phrase within Section 381.706(1)(h), Florida Statutes which describes an annual operating cost of $500,000 or more restates or is redundant to the definitional statement at Section 381.702(13), Florida Statutes describing the same annual operating costs. As used in Section 381.706(1)(h), Florida Statutes the legislature is referring to establishment of inpatient institutional health services by the health care facility or substantial changes to existing inpatient institutional health services by health care facilities which amount to $500,000 or more in annual operating cost as a means to declare the jurisdiction. Again, this project does not involve a substantial change to an existing radiation therapy service over which the Respondent had jurisdiction to require a certificate of need for that existing radiation therapy service and the amount of annual operating costs associated with the inpatient radiation therapy services which are being instituted is not $500,000 or more.

54. Should the decision be reached that the Respondent does have jurisdiction to require a certificate of need then the Petitioner must prove its entitlement to the certificate of need. See Florida Department of Transportation v. J.W.C., Co., 396 So.2d 778 (Fla. 1DCA 1981) and Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 475 So.2d 260 (Fla. 1st DCA 1985).

55. In deciding whether Petitioner has sustained the burden the applicable criteria in Section 381.705, Florida Statutes, and Rule 5.011, Florida Administrative Code, must be examined. See Balsam v. Department of Health and Rehabilitative Services, 486 So.2d 1341 (Fla. 1st DCA 1986). The criteria that

are applicable are weighed and balanced and the weight to be afforded individual criteria will vary depending on the facts of the particular case and the circumstances that exist in that case. See Collier Medical Center, Inc., v. Department of Health and Rehabilitative Services, 462 So.2d 83 (Fla. 1st DCA 1985); Department of Health and Rehabilitative Services v. Johnson and Johnson, 447 So.2d 361, (Fla. 1st DCA 1984).

56. Associated with the consideration of the review criteria is the possible use of a numeric need formula to assist in that analysis. The Respondent does not have a rule in place. Nor is it developing incipient policy to describe by a numeric formula the identification of the need for inpatient radiation therapy services. For reasons discussed in the fact finding the attempt by the parties to offer a case specific numeric need determination is rejected. The hearing officer may not derive a numeric need formula independent of those attempts. See Upjohn Healthcare Services v. Department of Health and Rehabilitative Services, 496 So.2d 147 (Fla. 1st DCA 1986). Consequently, the decision here is reached upon the weighing and balancing of applicable statutory and rule criteria unassociated with a numeric need calculation.

57. Based upon the improvements to quality of care as envisioned by Section 381.705(1)(b), Florida Statutes, and the cost of providing health services referred to in Section 381.705(1)(l), Florida Statutes, discussed in the fact finding and in view of other applicable criteria, Petitioner has sustained the burden to establish entitlement to the grant of a certificate of need for provision of radiation therapy services.

RECOMMENDATION

Based upon the consideration of the facts, and in view of the conclusions of law, it is,

RECOMMENDED:

That a Final Order be entered which declines jurisdiction to require a certificate of need for inpatient radiation therapy services or in the alternative grants a certificate of need for inpatient radiation therapy services.

DONE and ENTERED this 20th day of August, 1992, in Tallahassee, Florida.

CHARLES C. ADAMS, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 1992.

ENDNOTES

1/ The discussion of the review criteria is being made to facilitate entry of a final order in a setting in which the agency might not agree with the opinion that the agency is without jurisdiction to require review.

APPENDIX
Case No. 92-1508

The following discussion is given concerning the proposed facts of the parties.

Petitioner's Fact
Facts Associated with the Motion in Limine

1. - 12. Are subordinate to facts found.

13. Constitutes a conclusion of law.

14. Is subordinate to facts found.

15. - 16. Constitute an analysis of the policy position by the Respondent associated with conclusions of law.

17. Is subordinate to facts found.

Findings of Facts Unassociated with Motion in Limine

1. - 3. Are subordinate to facts found.

4. Is not necessary to the resolution of dispute.

5. - 10. Are subordinate to facts found.

11. Is not necessary to the resolution of dispute.

Paragraphs 12 and 13 and the first sentence to paragraph 14 are subordinate to facts found. The balance of paragraph 14 through paragraph 25 as a calculation of need by use of a formula are rejected.

26. Rejected in that although the staff at West Florida may be closed the facility still serves patient needs.

27. - 36. Are subordinate to facts found.

37. While accepted does not form the basis for establishing need.

38. See discussion of paragraph 37.

39. - 40. Are subordinate to facts found.

41. See discussion of paragraph 37.

42. See discussion of paragraph 37.

43. - 44. Are subordinate to facts found.

45. Rejected.

46. - 47. Subordinate to facts found.

48. - 49. Rejected.

50. Subordinate to facts found.

51. - 53. Rejected.

54. Not necessary to the resolution of dispute.

55. - 57. Are subordinate to facts found.

Respondent and Intervenor Facts

1. - 2. Are subordinate to facts found.

3. - 12. Constitute discussion of Respondent's policy position related to a conclusion of law.

13. - 15. Subordinate to facts found.

16. - 24. Are not necessary to the resolution of dispute.

25. Is subordinate to facts found.

26. - 34. Are not necessary to the resolution of dispute.

35. Is subordinate to facts found.

36. Is not necessary to the resolution of dispute.

37. Is subordinate to facts founds.

38. Is not necessary to the resolution of dispute.

39. Rejected.

40. Is subordinate to facts found.

41. - 43. Are not necessary to the resolution of dispute.

44. - 48. Are subordinate to facts found.

49. - 51. Are not necessary to the resolution of dispute.

52. Is subordinate to facts found.

53. The alternative suggested in paragraph 53 was not shown to be a viable alternative even if such permission could be received to adequately equip that vehicle.

54. - 58. Are subordinate to facts found.

59 - 63. Are not necessary to the resolution of dispute.

64. Rejected.

65. Is subordinate to facts found.

66. Rejected.

67 - 94. Discussion of need by use of a formula is rejected.

95. Is not necessary to the resolution of dispute.

96 -98. Rejected as a means to determine need.

99.-115. Are subordinate to facts found.

116.-121. Are accepted with the exception that the impact of the project on the Intervenor is more likely to be associated with the lower amount quoted in paragraph 121.

122. Is not necessary to the resolution of dispute.

123. Is subordinate to facts found.

124. Does not lead to the conclusion that the radiation therapy program at the Intervenor's facility will no longer be viable with the advent of inpatient radiation therapy services at Petitioner's facility.

COPIES FURNISHED:

Sam Power, Department Clerk
Department of Health and
Rehabilitative Services
1323 Winewood Boulevard
Tallahassee, Florida 32399-0700

Karen O. Emmanuel, Esquire
Emmanuel, Sheppard & Condon
Post Office Drawer 1271
Pensacola, Florida 32596

Richard Patterson, Esquire
Department of Health and
Rehabilitative Services
103 Fort Knox Executive Center
2727 Mahan Drive
Tallahassee, Florida 32301

Stephen A. Ecenia, Esquire
Katz, Kutter, Haigler, Alderman,
Davis, Marks & Rutledge, P.A.
106 East College Avenue, Suite 1200
Post Office Box 1877
Tallahassee, Florida 32302-1877

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

==========

AGENCY FINAL ORDER

==========

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SACRED HEART HOSPITAL OF PENSACOLA,

Petitioner,

vs.

CASE NO.: 92-1508
CON NO.: 6772
RENDITION NO.: HRS-92-37-FOF-CON

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

BAPTIST HOSPITAL,

Intervenor
_____/

FINAL ORDER

This cause came on before me for the purpose of issuing a final agency order. The Hearing Officer assigned by the Division of Administrative Hearings (DOAH) in the above-styled case submitted a Recommended Order to the Agency for Health Care Administration (AHCA).

The Recommended Order entered August 20, 1992, by Hearing Officer Charles C. Adams is incorporated by reference.

RULING ON EXCEPTIONS FILED BY AHCA

AHCA excepts to the Conclusions of Law at pages 24 and 25 wherein the Hearing Officer concluded that the agency is without jurisdiction to require a Certificate of Need for Petitioner's proposed inpatient radiation therapy program. Section 381.706(1)(h), Florida Statutes (1991), requires a Certificate

of Need for the "establishment of inpatient institutional health services." See St. Mary's Hospital Inc. vs. Department of Health and Rehabilitative Services, 12 FALR 2727, 2750 (DOAH 1990), affirmed Baptist Hospital vs. Department of Health and Rehabilitative Services, 578 So2d 1104 (Fla. 1st DCA 1991); State vs. City of Boca Raton, 172 So2d 230, 233 (Fla. 1965). [The last expression of legislative will is the law in cases of conflicting provisions in the same statute; the last in order of arrangement in such statute prevails.] A "radiation therapy program" is an institutional health service. See Sacred Heart Hospital vs. Department of Health and Rehabilitative Services, DOAH Case No. 90-3576, Order Granting Intervention filed May 17, 1991.

Respondent also excepts to Findings of Fact Numbers 19 and 20 and the Conclusions of Law at page 26 wherein the Hearing Officer concluded that only the incremental operating cost associated with the establishment of an inpatient component of a radiation therapy program may be considered in determining the agency's jurisdiction to require a Certificate of Need for the establishment of an inpatient institutional health service. The allocation of inpatient costs is irrelevant to the issue of jurisdiction. Section 381.706(1)(h), Florida Statutes (1991), requires a Certificate of Need for the establishment of inpatient institutional health services, regardless of annual operating cost. Therefore, the agency has jurisdiction over Petitioner's proposal. The exceptions are granted.

RULINGS ON EXCEPTIONS FILED BY BAPTIST HOSPITAL

Baptist excepts to Finding of Fact 20. See the ruling on exceptions filed by AHCA. The exception to Finding of Fact 41 is denied as the finding is supported by competent, substantial evidence. Baptist maintains that because it can be inferred from the Hearing Officer's findings that existing providers have adequate capacity to serve inpatient need, Sacred Heart's proposal must be rejected. A Certificate of Need decision must be based on a consideration of all review criteria; therefore the capacity of existing providers is not dispositive.

Baptist's exceptions to the Conclusions of Law are addressed in the ruling on the AHCA exceptions.

FINDINGS OF FACT

The department hereby adopts and incorporates by reference the findings of fact set forth in the Recommended Order except for the characterization as an artificial device, the department's requirement that capital costs be allocated to Petitioner's proposal to initiate inpatient radiation therapy services. Petitioner has previously established its outpatient radiation therapy program at a cost of $4,124,475.000. It would be illogical from an accounting and health planning perspective to assume that Petitioner's proposal is without cost simply because additional equipment and space would not be required to initiate inpatient service. Likewise, the characterization as artificial, the allocation of operating costs is rejected. The last sentence in paragraph 37 of the Findings of Fact is rejected.

CONCLUSIONS OF LAW

The department hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order except as modified in this Final Order.

Based upon the foregoing, it is

ADJUDGED, that the application of Sacred Heart Hospital of Pensacola for Certificate of Need 6772 to initiate inpatient radiation therapy services be APPROVED.

DONE and ORDERED this 22nd day of October 1992, in Tallahassee, Florida.

_____

Douglas M. Cook, Director
Agency for Health Care
Administration

COPIES FURNISHED:

Charles C. Adams
Hearing Officer
DOAH, The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

Karen O. Emmanuel, Esquire
EMMANUEL, SHEPPARD & CONDON
Post Office Box 1271
Pensacola, Florida 32596

Richard Patterson, Esquire
Department of Health and
Rehabilitative Services
2727 Mahan Drive, Suite 103
Fort Knox Executive Center
Tallahassee, Florida 32308

Stephen A. Ecenia, Esquire
KATZ, KUTTER, HAIGLER, ALDERMAN
DAVIS, MARKS & RUTLEDGE
First Florida Bank Building
215 South Monroe Street, Suite 400
Tallahassee, Florida 32302-1877

Wayne McDaniel (AHCA)

Wendy Thomas (AHCA)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy a the foregoing was sent to the above named people by U.S. Mail this 28th of October, 1992.

_____

R. S. Power, Agency Clerk
Assistant General Counsel
Department of Health and
Rehabilitative Services
1323 Winewood Boulevard
Building One, Room 407
Tallahassee, FL 32399-0700
(904)488-2381

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF HRS, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.