

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORTH SHORE MEDICAL CENTER, INC.,)
)
Petitioner,)
)
vs.) CASE NO. 92-4992
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent.)
_____)
VICTORIA HOSPITAL PARTNERSHIP,)
d/b/a VICTORIA HOSPITAL,)
)
Petitioner,)
)
vs.) CASE NO. 92-4993
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to written notice, a formal hearing was held in these consolidated cases on December 1 through 4, 1992, at Tallahassee, Florida, before Eleanor M. Hunter, the designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner, Louise T. Jeroslow, Attorney
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For Petitioner, Paul H. Amundsen, Attorney
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For Respondent, Edward G. Labrador, Attorney
Agency for Agency for Health Care Administration
Health Care 2727 Mahan Drive, Suite 103
Administration: Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

Whether either or both of the certificate of need applications of North Shore Medical Center, Inc., and Victoria Hospital Partnership should be approved.

PRELIMINARY STATEMENT

In the March 1992 batching cycle, North Shore Medical Center, Inc. ("North Shore"), and Victoria Hospital Partnership d/b/a Victoria Hospital ("Victoria") filed certificate of need (CON) applications for the conversion of acute care medical beds to adult general psychiatric beds, at their facilities located in Dade County, Florida, District 11. The Agency for Health Care Administration ("AHCA") comparatively reviewed the applications and preliminarily denied both on the basis that there was no need for additional adult psychiatric beds in the district. North Shore and Victoria appealed AHCA's action, and a hearing was held from December 1-4, 1992. The transcript of the final hearing was filed with the Division of Administrative Hearings on December 22, 1992. Proposed recommended orders were received on January 28, 1992.

At the final hearing, North Shore presented the testimony of Jennifer R. Kaye, Director of Mental Health Services at North Shore (expert in health care planning and administration), Donald F. Gardner, Chief Financial Officer of North Shore (expert in hospital finance), and Juan B. Espinosa, M.D., co-chair of the Department of Psychiatry at North Shore (expert in psychiatry). Nine exhibits were received in evidence without objection on behalf of North Shore.

Victoria presented the testimony of Ralph Aleman, Ana Mederos, R.N., M.B.A. (expert in health care administration and nursing), Pedro Rodriguez, M.D. (expert in psychiatric medicine), and Sharon Gordon-Girvin (expert in health planning). Victoria's exhibits one through ten were received in evidence without objection.

AHCA presented the testimony of Elizabeth Dudek, and Morgan Riley Gibson (expert in health care planning). AHCA's exhibits one through eight and ten through twelve were received in evidence. AHCA exhibit nine was not received in evidence.

The parties stipulated that the criteria in the following subsections of Section 381.705, Florida Statutes (1991), were either not at issue or were satisfied: (1)(c)--the ability to provide quality of care; (1)(h)--the availability of staff, management and financial resources; (1)(i)--immediate and long term financial feasibility, provided that the applicants' projected utilization is proven reasonable; (1)(m)--costs and methods of construction; (1)(e)--shared health care services; (1)(f)--services not available in adjoining areas; and (1)(k)--services not provided in area. The parties also stipulated to the inapplicability of or the applicants' compliance with rules which correspond to these statutes.

Disputed statutory criteria include the following subsections of Section 381.705 1/, Florida Statutes (1991): (1)(a)--need for health care service in relation to district and state plan; (1)(b)--availability, quality of care, efficiency, adequacy of existing health care facilities; (1)(d)--availability and adequacy of other health care services; (1)(g)--need for research and educational facilities; (1)(h)--availability of resources, and alternatives; (1)(l)--impact on competition; and (1)(n)--history of indigent and Medicaid service; and the rules corresponding to these subsections.

MOTIONS SUBSEQUENT TO FORMAL HEARING

On April 2, 1993, AHCA filed a Motion To Reopen The Record And Motion For Summary Recommended Order Against Victoria Hospital Partnership. AHCA asserted that Victoria Hospital had been sold. That sale, according to AHCA violated Florida Administrative Code Rule 59C-1.008(1)(c), which provides:

The applicant for a project shall not change from the time a letter of intent is filed, or from the time an application is filed in the case of an expedited review project, through the time of the actual issuance of a Certificate of Need. Properly executed corporate mergers or changes in the corporate name are not a change in the applicant.

On April 21, 1993, counsel for Victoria filed a Memorandum of Law in Opposition to Motion to Reopen The Record and for Summary Recommended Order and filed a Notice of Hearing on AHCA's motion. On April 28, 1993, Victoria filed a Notice of Cancellation of the hearing.

On July 7, 1993, Victoria filed a Motion for Entry of a Recommended Order. On August 19, 1993, the undersigned scheduled a hearing on both pending motions.

At the hearing on September 2, 1993, Victoria and AHCA disagreed on the following:

1. whether an agency interpretation of the term "corporate" in the Rule as applying to corporations, not partnerships, is reasonable; and
2. whether a merger or a sale has occurred in this case.

The parties agreed to the following:

1. that the issue should be resolved in this recommended order, or would, if not addressed, likely be the subject of remand from AHCA;
2. that this is a case of first impression on the interpretation of the rule, that the rule has not been the subject of a rule challenge; and
3. AHCA has not defined "corporate" in its rules.

The applicant in this case, Victoria Hospital Partnership, is a Florida general partnership, which is defined as an "association of two or more persons to carry on a business for profit as co-owners." See Subsection 620.585(1), Florida Statutes. The term "corporate" meaning related to corporations, makes it reasonable to conclude that the corporate entities referred to in the rule are those governed by Chapters 607 and 617, Florida Statutes, among other laws. In contrast to other business entities, the state's relationship to and control over corporations provides a rational basis for treating such entities differently. See, *Gray v. Central Florida Lumber Co.*, 140 So. 320 (Fla. 1932), on rehearing, 141 So. 604 (1932), cert. denied, 287 U.S. 634, 77 L.Ed 549, 53 S.Ct. 84 (1932). The distinction between the characteristics and powers of corporations and partnerships also provides a rational basis for a rule favoring the former. Some cases which illustrate the importance of the distinctions for purposes of tort or contractual liability are cited in *Vantage View, Inc. v. Bali East Development Corporation*, 421 So2d 728 (Fla. 4th DCA 1982).

Because a change in the applicant has occurred which is neither a corporate merger nor a corporate name change, because the applicant is not a corporation, the recommendation in this Order is that the application of Victoria Hospital Partnership be denied. The issue of whether the transaction which has occurred is or is not a merger is not reached.

FINDINGS OF FACT

Victoria Hospital's Proposal

1. Victoria Hospital ("Victoria") is an acute care hospital licensed for 300 beds. It is located close to downtown Miami in an area called "Little Havana." It has been in existence as a private hospital in Miami since 1924. Over ninety percent (90 percent) of Victoria's patients and medical staff are Hispanic. One hundred percent (100 percent) of its psychiatrists are Hispanic.

2. The hospital is owned and operated by Victoria Hospital partnership, which is a partnership of a group of one hundred physicians and Columbia Hospital Corporation formed in 1988.

3. Of its three hundred (300) beds, two hundred sixty (260) are acute-care beds, twenty (20) are psychiatric, and twenty (20) are substance abuse beds.

4. In its CON application, Victoria proposes to convert ten (10) acute care beds (which were 47 percent occupied in 1990-91) to ten (10) additional adult psychiatric beds for a capital expenditure of \$142,586.30. The existing 20-bed adult psychiatric unit was 88 percent occupied in 1990-91.

5. Victoria Hospital is accredited by the Joint Commission on Accreditation of Health Organizations.

North Shore's Proposal

6. North Shore Medical Center, Inc. ("North Shore"), is a private, not-for-profit corporation which owns and operates North Shore Medical Center, a three hundred fifty seven (357) bed acute care facility, which has operated a psychiatric unit since 1985. North Shore is located in an area of Dade County, which is north of Northwest 20th Street and east of the Palmetto Expressway. The total service area population is over 800,000, and ninety percent (90 percent) of North Shore's patients reside in the service area.

7. North Shore's existing twenty (20) bed adult psychiatric unit is a locked or closed unit, which is a designated Baker Act receiving facility. As such, North Shore admits court ordered involuntary patients for examination to determine whether hospitalization is needed. Some Baker Act patients are among the most seriously ill psychiatric patients, therefore, a locked or closed unit is required by the state to prevent involuntary patients from leaving. North Shore meets code requirements for safety in locked units, including break-away shower and curtain rods, protective features on all windows, secure areas, and policies for removing sharp and glass objects from patients.

8. North Shore proposes to convert up to twenty (20) medical/surgical beds (utilized in 1990 at less than 40 percent) to up to twenty (20) additional adult general psychiatric beds for a project cost not to exceed \$300,000. The existing twenty (20) adult psychiatric beds were 87 percent occupied in 1990. North Shore proposes to accept a condition to provide 5 percent of its total

psychiatric unit patient days to Medicaid patients and 5 percent to indigent care. To serve more physically frail patients, North Shore proposes to use new beds approved as a medical/psychiatric unit to treat psychiatric patients who also need medical care. Currently, psychiatric patients in need of medical care are treated in the psychiatric unit when they do not require intravenous or oxygen therapy, treated on the medical floors of North Shore, or sent to nursing homes.

AHCA Review

9. The Agency for Health Care Administration (AHCA) is the single state agency authorized by statute to issue, deny or revoke CONs in Florida. See, Subsection 408.034(1), Florida Statutes (Supp. 1992).

10. The parties have stipulated to the following facts:

- A. The applicants' letters of intent, public notices, application fees, applications and omissions responses, were timely received and in proper form
- B. The applicants' projections for project completion costs and project completion forecasts are reasonable.
- C. The architectural drawings and floor plan layouts and costs of construction presented by the two applicants are reasonable and adequate.
- D. The projects proposed by both applicants are financially feasible in the short and long term, provided that the applicants' projected utilization is proven to be reasonable and attained.
- E. The projections concerning the proposed staffing of the project are reasonable and adequate.
- F. Each applicant has a history of providing quality of care and has demonstrated an ability to provide such care.

Prehearing Stipulation, paragraph 8.

11. On February 7, 1992, the Agency published a fixed need pool for inpatient adult psychiatric beds in its District 11. The published pool reflected a zero net need for additional adult psychiatric beds in the district.

12. The Agency calculation of numeric need for additional adult psychiatric beds was performed in accordance with methodology requirements found in the inpatient psychiatric services rule ("psych rule"), Rule 59C-1.040(4)(c), Florida Administrative Code. The July 1997 planning horizon projection for District 11 showed a need for two beds without adjustment for occupancy. However, since the District 11 occupancy for the applicable period was 73.57 percent, or below the 75 percent occupancy threshold requirement, numeric need defaulted to zero.

13. Subsection (4)(a) of the psych rule provides that additional adult psychiatric beds are not normally approved by the Agency in the absence of a need shown pursuant to the rule methodology.

14. Subsection (4)(d) of the psych rule specifies one example of a condition in which an existing provider of adult psychiatric services may be approved for additional beds without a determination of numeric need and in the absence of district average occupancy requirements. That exception applies to providers with occupancy rates equal to or in excess of 85 percent for the 12 month period ending 6 months prior to the quarter in which the fixed need pool is published. This rule provision is one, but not the sole, factor in considering whether a provider should be granted additional beds. Other factors are those in Section 381.705, Florida Statutes (1991), and in other subsections of the psych rule.

15. AHCA agrees that, for the July 1990 to June 1991 utilization period, both Victoria and North Shore had an average occupancy in their adult psychiatric units which equaled or exceeded eighty-eight percent (88 percent) and eighty-seven percent (87 percent) respectively.

Review criteria as applied to the Victoria Hospital Proposal Subsection 381.705(1)(a)--District 11 Plan

16. The 1990 District 11 health plan includes preferences for the review of CON proposals for inpatient psychiatric services which apply to the review of the Victoria application.

17. The first preference is given when a conversion from acute care beds to psychiatric beds is proposed by an applicant which has provided the highest proportion of charity care and Medicaid days, as indicated by reimbursement as a disproportionate share provider. AHCA agrees that for 1990-1991, Victoria was a disproportionate share hospital.

18. Secondly, publicly funded facilities receive a preference when applying for psychiatric beds. Victoria is not a publicly funded facility, and is not entitled to the preference.

19. The third district preference is given to applicants for adult psychiatric beds who have a history of using, or who propose to use, treatment modalities resulting in an average length of stay of twenty days or less, with individualized follow-up care. Victoria is entitled to this preference, having established that its average length of stay is 12.8 days. See, also Finding of Fact 21.

20. The fourth district preference is given to applicants for inpatient psychiatric programs accredited by the Joint Commission on Accreditation of Health Care Organizations ("JCAHO"). Victoria Hospital and its psychiatric programs are accredited by the JCAHO.

21. The fifth district preference applies to applicants who include discharge planning and follow-up case management proposals. Victoria has an extensive discharge planning and follow-up program.

22. Finally, the district plan has a preference for an applicant who will meet a demonstrated need for services for an identified ethnic group. With a showing that its therapies are provided in Spanish and that its psychiatric program takes into consideration cultural differences of some Hispanic persons, Victoria has demonstrated a commitment to serve an identified ethnic group.

Subsection 381.705 (1)(a)--State Health Plan

23. The preferences related to inpatient psychiatric services in the 1989 Florida State Health Plan also apply as review criteria in this case.

24. A preference for applicants proposing the conversion of excess acute care hospital beds to establish a separate and distinct psychiatric unit, is supportive of Victoria's CON application. See, Finding of Fact 4.

25. Preference is also given to an applicant who includes among its patients, the most seriously mentally ill people. Even though it does not have a locked unit, Victoria has proposed to treat a wide range of serious mental illnesses, particularly those combined with substance abuse problems.

26. Preference is also given to an applicant who proposes to serve indigent and Baker Act patients. As a for-profit hospital without a locked unit, Victoria is not eligible for Baker Act designation. Victoria also proposed to make no commitment, as a condition for the approval of the CON, to serve indigents. However, Victoria's status as a disproportionate share provider outweighs its failure to commit to charity or medicaid patient days in a 10-bed psych unit.

27. The state health plan also includes a preference for proposals which include a continuum of care, with follow-up outpatient programs. Victoria's proposal meets the preference.

28. By its past participation in Medicaid and its projection of 50.5 percent Medicaid patient days in the psychiatric unit, Victoria meets the preference for providers serving Medicaid patients.

29. Victoria Hospital also qualifies for a separate state preference as a disproportionate share hospital for fiscal year 1990-1991, although the testimony about its subsequent status was inconclusive.

30. The percentage of psychiatric beds located in acute care hospitals in District 11 is .28 per 1,000 population, which exceeds the minimum of .15 per 1,000 favored in the state health plan. Therefore, the preference cannot be met by Victoria.

31. Two other state health plan preferences (1) for the construction of separate structures for children and adolescents, and (2) for services to substance abusing pregnant and postpartum women are not applicable to or included in the programs proposed by Victoria.

Subsection 381.705(1)(b), (c) and (d)--increasing access, availability, efficiency, history of quality care, alternatives and need.

32. AHCA preliminarily denied Victoria's application based, in large part, on Victoria's failure to adequately explain why access to the proposed services is not available in other underutilized facilities in the district. At hearing, although it disputed the applicability of the requirement, Victoria showed that most of the underutilized facilities have a mix of patients by payer categories which differs significantly from the norm for the district. In the case of specialty hospitals, for example Medicaid reimbursement is not available, although 22 percent of the psychiatric patients in District 11 are Medicaid patients. In three of five underutilized general acute care hospitals, the Medicaid percentage as compared to the district norm was also low. In another hospital, the payer mix was composed of more than double the district norm for commercially insured patients.

33. The parties, by Prehearing Stipulation, agreed that Victoria has historically provided quality care, and has been appropriately staffed and managed. See, also Subsections 381.705(1)(c) and (h). Victoria's proposal also meets other psych rule requirements which positively impact the quality of care, including minimum unit size, outpatient services, screening procedures, and ancillary therapies.

34. Victoria has demonstrated a need for its service to Hispanic patients and to Medicaid patients.

35. The alternative of having psychiatrists refer patients to other facilities is currently being used by Victoria within the constraints of financial accessibility. See, Finding of Fact 32.

Subsection 381.705(1)(i)--Utilization and Financial Feasibility

36. AHCA questioned, in Victoria's financial pro forma, its projected increase in utilization. With a psychiatric unit waiting list averaging 11 patients per week and an increase in admitting staff psychiatrists from 33 in 1991 to 37 in 1992, Victoria's projections of an increase of 2 to 4 additional admissions per week is reasonable.

37. As a result of the finding that Victoria's projected utilization is reasonable, as stipulated, Victoria's proposal is, financially feasible in the immediate and long term. In addition, as stipulated, Victoria's construction plans are reasonable and adequate.

Balancing Criteria

38. Of the inpatient psychiatric services preferences in the state health plan, Victoria's application is not supported by the preferences for health maintenance organizations and for facilities serving Baker Act patients.

39. Of the local health plan preferences, Victoria's application is not consistent with the preference for publicly funded facilities.

40. On balance, Victoria's proposal complies with applicable review criteria, and will have a positive institutional effect of shifting beds to a needed, profitable service, thereby increasing cost effectiveness. In addition, there was no evidence of any adverse impact on other providers of inpatient psychiatric services.

Review criteria as applied to North Shore's Proposal, Subsection 381.705(1)(a)--District 11 plan

41. The 1990 District 11 plan also applies to the review of the North Shore CON application, which is also the subject of review in this case.

42. North Shore is not a disproportionate share provider and is not a publicly funded facility. See, Findings of Fact 17 and 18.

43. North Shore has an average length of stay of 18.1 days in its psychiatric unit, and is entitled to preference as a provider with an average length of stay below 20 days with appropriate discharge and after care planning. See, Findings of Fact 19 and 21.

44. North Shore's hospital and psychiatric program are JCAHO accredited. See, Finding of Fact 20.

45. North Shore proposes to serve identified ethnic groups, particularly Haitians and Hispanics. All signs and directions in the hospital are in English, Spanish and Creole. Its staff of 291 bilingual employees is able to communicate in 21 languages. See, Finding of Fact 22.

Subsection 381.705(1)(a)--State Health Plan

46. North Shore's application meets the preference for conversion of 20 excess acute care beds, with 45.83 percent utilization in 1990-1991, to a 12 or 20 bed adult psychiatric unit. From 1990-1991, the existing 20 psychiatric beds were utilized in excess of 85 percent. See, Finding of Fact 8.

47. North Shore is a non-for-profit hospital, which qualifies for the preferences for serving Baker Act and other seriously mental ill adults. See, Findings of Fact 7, 25 and 26.

48. North Shore is willing to accept a CON conditioned on its providing 5 percent of total patient days in the additional psychiatric beds to indigents. See, Finding of Fact 26.

49. North Shore's proposed medical/psychiatric services will include follow-up and outpatient services. See, Finding of Fact 27.

50. In 1990, HCCB data showed that North Shore provided 6.8 percent total Medicaid patient days, and 2 percent in its existing psychiatric unit, but North Shore does not qualify as a disproportionate share Medicaid provider.

51. The special preference for applicants in districts with fewer than .15 psychiatric beds per 1000 population in acute care hospitals does not apply to this case. See, Findings of Fact 30.

52. North Shore is proposing to coordinate its psychiatric, substance abuse and prenatal programs to pregnant or postpartum women. There is no proposal to serve children and, therefore, no proposal to construct a separate facility for children. See, Finding of Fact 31.

Subsection 381.705(1)(b), (c) and (d)--Increasing Access, Availability, Quality of Care; Alternatives and Need

53. Although AHCA conceded that the North Shore proposal will partially improve availability and access without any adverse impact, AHCA preliminarily denied the CON application of North Shore, in large part based on North Shore's failure to explain why facilities operating at 75 percent occupancy or below do not provide adequate alternatives.

54. In March 1990, North Miami Medical Center closed and six of its psychiatrists moved their practices to North Shore. As a result, North Shore's admissions increased 48 percent and occupancy reached 95 percent. North Shore has a policy of delaying patient admissions for 24 hours so that a bed is always available for emergency, suicidal or Baker Act patients.

55. More specifically, in evaluating the availability of alternatives, North Shore noted that the district occupancy is 73.57 percent but is in excess of 75 percent in the five facilities nearest to North Shore.

56. In the district, the psychiatric services at Jackson Memorial Hospital and Palmetto are most like those at North Shore, provided in general acute care hospitals which can accept Medicaid and Baker Act patients. In 1990-91, Jackson Memorial's occupancy was 77.76 percent and Palmetto's was 80.3 percent. The general acute care hospitals under 75 percent occupancy without Baker Act certification, were considered as possible alternatives for North Shore's voluntary adult patients. They are Deering, Humana-Biscayne, Larkin, Mercy and Mt. Sinai. Deering and Larkin are 45 minutes to 1 hour south of North Shore. Humana-Biscayne and Mt. Sinai are Medicare providers at 78 percent and 94 percent respectively, indicating service to geriatric patients in greater numbers than the norm for the district. Mercy, with a payer mix most comparable to the overall district, had an occupancy rate in excess of the district average threshold of 75 percent (78.87 percent) for the approval of new beds in 1990-1991. Another alternative considered by North Shore at hearing is Charter Hospital. Charter's occupancy is only 59.66 percent, but its location is approximately an hour west of North Shore. In addition, Charter, Southern Winds, Harbor View and Grant Center are specialty hospitals which cannot accept Medicaid.

57. North Shore has established the need for some medical/psychiatric beds in the district, because there are no beds in the district to meet these combined needs. In addition, alternative providers of adult psychiatric services for comparable payer groups, which are geographically accessible to North Shore's area, exceed 75 percent occupancy.

Subsection 381.705(1)(i)--Utilization and
Financial Feasibility

58. AHCA contends that North Shore's reliance on its waiting list to support projected admissions is in error, because the waiting list is, in reality, a "reservations" system. In support, AHCA notes that 22 percent of wait listed patients cancel and refuse treatment. AHCA also questioned North Shore's projections of the number of admissions which will result from the waiting list and from the emergency room.

59. North Shore asserted that voluntary mental patients sometimes refuse treatment in locked units. In addition, medically ill patients cannot be accommodated in a locked unit. These were considerations given in planning an "unlocked" medical/psychiatric unit.

60. Between January 1991 and December 1991, 209 patients were placed on the waiting list. As mentioned by AHCA, 22 percent of those reservations were cancelled. The expectation of fewer cancellations for an unlocked unit is reasonable. North Shore was able to establish that fourteen patients on the waiting list were admitted elsewhere, and three to North Shore in a subsequent month. Of the fourteen admitted elsewhere, five had conditions which could be served in medical/psychiatric units, but were admitted to medical/surgical units.

61. North Shore's projection that it could have admitted two to four patients from its waiting list to a medical/psychiatric unit is supported by its analysis of the ultimate placement of patients on the 1991 waiting list. North Shore quantified and reasonably projected these admissions based on the following: one patient a week from the emergency room, approximately two patients a week from the medical floor, additional admissions based on patient referrals by new staff psychiatrists, fewer refusals of voluntary treatment in

an unlocked unit, and the ability to serve patients in an unlocked unit who are referred to the existing psychiatric unit but do not meet the current admissions criteria.

62. North Shore will achieve a forty percent (40 percent) occupancy in the first year, if one patient per week is admitted to the unit. North Shore's projected utilization is reasonable and, by stipulation, the project is financially feasible in the immediate and long term.

AHCA's Application of Other Rules Comparable to
the Eighty-five Percent (85 percent) Occupancy Rules

63. Comparable occupancy exceptions are also included in the substance abuse rule [Rule 59C-1.041(4), Florida Administrative Code], acute care rule [Rule 59C-1.038(7), Florida Administrative Code], the neonatal intensive care rule [Rule 59C-1.042(3), Florida Administrative Code], and the comprehensive medical rehabilitation rule [Rule 59C-1.039(5), Florida Administrative Code].

64. According to AHCA witness Elizabeth Dudek, there have been several circumstances, probably under five, where the Department has awarded beds when there was no need and the minimum district occupancy standard was not met, but an institution's occupancy exceed the threshold in the rule.

CONCLUSIONS OF LAW

65. The Division of Administrative Hearings has jurisdiction on the subject matter of and the parties to this proceeding. See, Subsections 120.57(1) and 381.709(5), Florida Statutes (1991).

66. The applicant for a Certificate of Need (CON) bears the burden of establishing by competent substantial evidence, its entitlement to a CON. A decision on whether to grant or deny a certificate of need must be made upon weighing and balancing all of the relevant criteria. See, e.g., Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447 So.2d 361 (Fla. 1st DCA 1984). As was testified at the hearing by AHCA, no single criterion, except perhaps the applicant's financial inability, is outcome determinative.

67. Rule 59C-1.040(4)(d), Florida Administrative Code, provides as follows:

Additional hospital inpatient general psychiatric beds for adults may be approved at a hospital with licensed hospital inpatient general psychiatric services for adults in the absence of need shown under the formula in paragraph (4)(c), or the provision specified in subparagraph (4)(e)3., and regardless of the average annual district occupancy rate determined under subparagraph (4)(e)4. if the occupancy rate of the hospital's inpatient general psychiatric beds for adults equalled or exceeded 85 percent for the 12-month period ending 6 months prior to the beginning date of the quarter of the publication of the fixed bed need pool.

68. The absence of numeric need cannot, in and or itself, be the reason for denial of a certificate of need application. By the clear language of Rule 59C-1.040(4)(d), Florida Administrative Code, new beds may be approved in the absence of numeric need, regardless of the allocation of beds in general hospitals and regardless of the average district occupancy rate.

69. Victoria and North Shore argue that the agency has imposed an unreasonable burden by requiring them to demonstrate why other providers in the district are unable to meet the excess demand. The position of Victoria and North Shore is rejected. While the rule provides that the average district occupancy rate may be disregarded, it does not also authorize the agency to ignore other statutory and rule criteria. Some of these criteria require a comparison of the proposed services to existing ones. For example, the following subsections of Section 381.705, Florida Statutes, require that analysis:

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

* * *

(d) 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 ambulatory or home care services, which may serve as alternatives for the health care facilities and services to be provided by the applicant.

70. The Department has discretion in interpreting its own rules and the interpretation requiring compliance with other statutory and rule criteria is reasonable. See, *Balsam v. Department of Health and Rehabilitative Services*, 486 So.2d 1341 (Fla. 1st DCA 1986). In *Balsam*, the court admonished the Department that it had placed too much emphasis upon the bed need formula when it failed to consider other statutory and rule criteria. The court noted that:

[w]hile the bed need formula shifts the burden from HRS to the applicant to show a need where none is shown by calculations under the formula, HRS should not simply stand on these calculations and abandon its responsibility to consider and weigh the other criteria.

Id. at 1349.

71. Similarly, a CON may not be denied solely because of the absence of numeric need nor awarded solely because the applicant's occupancy exceeds eight-five percent (85 percent). In *Humana, Inc. v. Department of Health and Rehabilitative Services*, 469 So.2d 889 (Fla. 1st DCA 1985), the court also recognized that applicants may demonstrate need by showing that existing facilities are unavailable or inaccessible. The agency's requirement that these applicants make a showing that existing facilities are not available or accessible is supported by the rule, statutes, and case law.

72. Victoria proved (1) that there are facilities in the district that cannot or do not accept Medicaid patients--the class of payers that Victoria's

psychiatric unit serves the most, (2) that psychiatric units in the district that experience less than 75 percent occupancy attract a patient payer mix that is different than the norm for the district, and (3) that Victoria Hospital's psychiatric services are provided for Hispanic patients.

73. Victoria's proposal meets applicable rule criteria and preferences in the state and local health plans, except those for Baker Act and publicly funded facilities. Victoria's expanded unit will provide 50.5 percent of its patient days for Medicaid patients, who cannot be served in specialty hospitals and are not served in numbers proportionate to the district norm in underutilized hospitals.

74. North Shore has demonstrated: (1) high occupancy levels at nearby hospitals, (2) geographic inaccessibility of underutilized hospitals, particularly those which are non-Baker Act and low Medicaid providers, (3) inaccessibility for general adult psychiatric patients at facilities with admissions policies or programs favoring Medicare or pediatric patients, and (4) the absence of medical/psychiatric adult beds in the district.

75. There was no evidence that the addition of ten beds at Victoria or the addition of up to 20 beds at North Shore would adversely affect any other provider of psychiatric services in the district or increase the cost of those services in the district.

76. Prior cases provide guidance in evaluating whether the facts established by Victoria and North Shore demonstrate a need for the expanded capacity to provide the service at their hospitals. In *HCA Health Services of Florida, Inc. v. DHRS et al.*, DOAH Case No. 91-1591 (Recommended Order November 7, 1991), the parties, including the agency, stipulated that additional acute care beds should be approved at a hospital with a 93.87 percent occupancy rate, in the absence of both a finding of numeric need and the threshold average district occupancy rate. Similarly, in the absence of numeric need and despite an average district occupancy rate of 64.5 percent, the agency approved additional neonatal intensive care beds due to programmatic access problems and transportation inadequacies in a district. *NME Hospitals, Inc. v. DHRS,, DOAH Case Nos. 90-7037 and 91-1533* (Final Order April 8, 1992).

77. Problems with the placement of Medicare patients in skilled nursing beds and the existence of a waiting list for that service were viewed by the agency as indicia of need in *HCA West Florida Regional Medical Center v. DHRS, et al.*, 11 FALR 3143 (HRS 5/23/89). The First District Court has specifically held:

. . . it is not error for HRS to consider indigent and Medicaid need when reviewing an application for a Medicare home health agency.

St. John's Home Health Agency v. DHRS, et al., 509 So.2d 367 at 368 (Fla. 1st DCA 1987). The recommended order, in that case quoted in the court's opinion, explains the interrelationships among services to various payer classes, as follows:

There is a need for Medicaid and indigent home health services which can only be addressed if Medicare certification is granted

. . . . to establish an adequate financial balance which allows provision of the Medicare and indigent services.

509 So.2d at 368. In the absence of numeric need, the agency has approved a CON for an applicant whose proposal would meet the unmet needs of Medicaid, Baker Act, and indigent patients for economic access to psychiatric services. *Wuesthoff Hospital v. DHRS, et al.*, 11 FALR 4602 (HRS 8/4/89).

78. Victoria's high rate of occupancy and its demonstration of its ability to meet the unmet need for inpatient psychiatric services for Medicaid patients and for Hispanic patients is consistent with prior CON approvals under similar circumstances.

79. North Shore's high rate of occupancy and its showing of geographic and programmatic inaccessibility for medically needy adult psychiatric inpatients in the district is also consistent with prior CON approvals.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that, although Vicotria has otherwise demonstrated its entitlement to Certificate of Need Application No. 6955 to convert ten (10) acute case beds to general adult psychiatric beds, the Agency for Health Care Administration issue a Final Order denying such application due to a change in the identity of the applicant, in violation of Rule 59C-1.008(1)(c), Florida Administrative Code, and granting Certificate of Need Application 6956 to convert up to twenty (20) acute care beds to general adult psychiatric beds at North Shore with the condition that 5 percent of the patient days for the additional 20 beds be dedicated to each Medicaid and indigent care.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 9th day of September 1993.

ELEANOR HUNTER
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 10th day of September, 1993.

ENDNOTES

1/ Subsequently renumbered as Section 408.035, Florida Statutes (Supp. 1992).

APPENDIX TO RECOMMENDED ORDER, CASE NOS. 92-4992 AND 92-4993

North Shore

1. Accepted in Finding of Fact 1.
2. Accepted in Finding of Fact 1.
3. Addressed in 52.
4. Addressed in 45.
5. Accepted in Finding of Fact 8.
6. Subordinate in Finding of Fact 62.
7. Accepted in Findings of Fact 7 and 8.
8. Accepted in Finding of Fact 8.
9. Subordinate to Finding of Fact 48.
10. Subordinate to Finding of Fact 48.
11. Accepted in Finding of Fact 8.
12. Accepted in Finding of Fact 7.
13. Accepted in Finding of Fact 7.
14. Accepted in Finding of Fact 7.
15. Accepted in Finding of Fact 56.
16. Accepted in Finding of Fact 7.
17. Accepted in Finding of Fact 59.
18. Subordinate to Finding of Fact 10F
19. Subordinate to Finding of Fact 20.
20. Accepted in Finding of Fact 47.
21. Subordinate to Finding of Fact 61.
22. Subordinate to Finding of Fact 61.
23. Subordinate to Finding of Fact 61.
24. Accepted in Finding of Fact 43.
25. Accepted in Finding of Fact 43.
26. Accepted in Findings of Fact 8 and 46.
27. Subordinate to Finding of Fact 43.
28. Accepted in Finding of Fact 6.
29. Accepted in Findings of Fact 8 and 57.
30. Subordinate to Finding of Fact 8.
31. Subordinate to Finding of Fact 8.
32. Accepted in Finding of Fact 8.
33. Subordinate to Finding of Fact 8.
34. Subordinate to Finding of Fact 7.
35. Subordinate to Finding of Fact 8.
36. Subordinate to Finding of Fact 8.
37. Subordinate to Finding of Fact 8.
38. Subordinate to Finding of Fact 8.
39. Accepted in Findings of Fact 58 and 60.
40. Accepted in Finding of Fact 60.
41. Subordinate to Finding of Fact 60.
42. Accepted in Findings of Fact 61 and 62.
43. Accepted in Finding of Fact 61.
44. Subordinate to Findings of Fact 61 and 62
45. Accepted in Finding of Fact 62.
46. Subordinate to Finding of Fact
47. Subordinate to Finding of Fact 56.
48. Subordinate to Findings of Fact 53 and 55.

49. Accepted in Finding of Fact 54.
50. Accepted in Finding of Fact 15.
51. Accepted in Findings of Fact 15 and 46.
52. Accepted in Findings of Fact 15 and 46.
53. Subordinate to Finding of Fact 15.
54. Subordinate to Finding of Fact 54.
55. Subordinate to Finding of Fact 15.
56. Subordinate to Findings of Fact 58 and 60.
57. Subordinate to Finding of Fact 60.
58. Accepted in Finding of Fact 55.
59. Subordinate to Finding of Fact 55.
60. Accepted in Conclusions of Law 67 and 68.
61. Subordinate to Findings of Fact 56 and 57.
62. Accepted in Findings of Fact 56 and 57.
63. Accepted in Finding of Fact 56.
64. Accepted in Finding of Fact 56.
65. Subordinate to Finding of Fact 56.
66. Accepted in Findings of Fact 55 and 56.
67. Accepted in Finding of Fact 56.
68. Accepted in Finding of Fact 56.
69. Accepted in Finding of Fact 56.
70. Accepted in Finding of Fact 56.
71. Accepted in Finding of Fact 56.
72. Accepted in Finding of Fact 56.
73. Subordinate to Finding of Fact 57.
74. Subordinate to Finding of Fact 57.
75. Subordinate to Findings of Fact 61 and 62.
76. Accepted in Finding of Fact 43.
77. Accepted in Finding of Fact 44.
78. Accepted in Findings of Fact 43 and 49.
79. Subordinate to Finding of Fact 10.
80. Subordinate to Findings of Fact 10, 43 and 49.
81. Accepted in Finding of Fact 10.
82. Accepted in Finding of Fact 53 and Conclusion of Law 75.
83. Accepted in Conclusion of Law 75.
84. Subordinate to Finding of Fact 10.
85. Accepted in Finding of Fact 62.
86. Subordinate to Findings of Fact 6 and 56.
87. Subordinate to Finding of Fact 10.
88. Subordinate to Finding of Fact 10.
89. Accepted in Findings of Fact 46-52.
90. Accepted in Finding of Fact 41-45.
91. Accepted in Finding of Fact 53.
92. Accepted in Finding of Fact 10.
93. Subordinate to Finding of Fact 10.
94. Subordinate to Finding of Fact 56.
95. Accepted.
96. Subordinate to Finding of Fact 61.
97. Accepted in Finding of Fact 56.
98. Accepted in Finding of Fact 63.
99. Accepted in Finding of Fact 64.

Victoria

1. Accepted in Finding of Fact 10.
2. Accepted in Finding of Fact 2.
3. Accepted in Finding of Fact 2.

4. Accepted in Finding of Fact 3.
5. Subordinate to Finding of Fact 5.
6. Accepted in Finding of Fact 5.
7. Accepted in Findings of Fact 17, 26 and 29.
8. Accepted in Findings of Fact 17, 26 and 29.
9. Accepted in Findings of Fact 17, 26 and 29.
10. Accepted in Findings of Fact 17, 26 and 29.
11. Accepted in Finding of Fact 29.
12. Subordinate to Finding of Fact 28.
13. Subordinate to Finding of Fact 28.
14. Accepted in Finding of Fact 28.
15. Accepted in Findings of Fact 4-24.
16. Accepted in Finding of Fact 25.
17. Accepted in Finding of Fact 19.
18. Subordinate to Finding of Fact 20.
19. Subordinate to Finding of Fact 20.
20. Subordinate to Finding of Fact 20.
21. Subordinate to Finding of Fact 20.
22. Subordinate to Finding of Fact 20.
23. Accepted in Findings of Fact 19 and 27.
24. Accepted in Finding of Fact 26.
25. Accepted in Finding of Fact 4.
26. Accepted in Finding of Fact 40.
27. Accepted in Finding of Fact 4.
28. Accepted in Findings of Fact 4 and 15.
29. Accepted in Finding of Fact 36.
30. Accepted in Findings of Fact 4 and 15.
31. Accepted in Finding of Fact 1.
32. Accepted in Finding of Fact 1.
33. Accepted in Finding of Fact 1.
34. Accepted in Finding of Fact 22.
35. Accepted in Finding of Fact 22.
36. Subordinate in Finding of Fact 22.
37. Subordinate to Finding of Fact 22.
38. Subordinate to Finding of Fact 22.
39. Subordinate to Finding of Fact 22.
40. Subordinate to Finding of Fact 22.
41. Subordinate to Finding of Fact 22.
42. Subordinate to Finding of Fact 22.
43. Subordinate to Finding of Fact 22.
44. Accepted in Finding of Fact 11.
45. Accepted in Finding of Fact 14.
46. Accepted in Finding of Fact 15.
47. Accepted in Conclusions of Law.
48. Accepted in Findings of Fact 32 and 56.
49. Accepted in Findings of Fact 32 and 56.
50. Accepted in Findings of Fact 32 and 56.
51. Accepted in Findings of Fact 32 and 56.
52. Accepted in Findings of Fact 32 and 56.
53. Accepted in Findings of Fact 32 and 56.
54. Accepted in Findings of Fact 32 and 56.
55. Accepted in Findings of Fact 32 and 56.
56. Accepted in Findings of Fact 32 and 56.
57. Accepted in Finding of Fact 36.
58. Subordinate to Finding of Fact 14.
59. Subordinate to Findings of Fact 15 and 32.
60. Accepted.

61. Accepted in Finding of Fact 14.
62. Accepted in Findings of Fact 36, 37 and 40.
63. Accepted in Findings of Fact 36, 37 and 40.
64. Accepted in Findings of Fact 36, 37 and 40.
65. Subordinate to Finding of Fact 36.
66. Subordinate to Finding of Fact 36.
67. Subordinate to Finding of Fact 36.
68. Accepted in Finding of Fact 40.
69. Accepted in Finding of Fact 36.
70. Accepted in Finding of Fact 36.
71. Accepted in Finding of Fact 36.
72. Accepted in Finding of Fact 36.
73. Accepted in Finding of Fact 36.
74. Subordinate to Finding of Fact 36.
75. Subordinate to Finding of Fact 36.
76. Subordinate to Finding of Fact 36.
77. Accepted in Finding of Fact 37.
78. Subordinate to Finding of Fact 23.
79. Accepted in Finding of Fact 31.
80. Accepted in Findings of Fact 26 and 38.
81. Accepted in Finding of Fact 24.
82. Accepted in Finding of Fact 25.
83. Accepted in Finding of Fact 27.
84. Accepted in Finding of Fact 28.
85. Accepted in Finding of Fact 29.
86. Rejected in Finding of Fact 30.
87. Subordinate to Finding of Fact 33.
88. Subordinate to Finding of Fact 33.
89. Accepted in Finding of Fact 16.
90. Accepted in Finding of Fact 17.
91. Accepted in Finding of Fact 18.
92. Accepted in Finding of Fact 19.
93. Accepted in Finding of Fact 20.
94. Accepted in Finding of Fact 21.
95. Accepted in Finding of Fact 22.
96. Accepted in Finding of Fact 39.
97. Subordinate in Finding of Fact 19.
98. Accepted in Finding of Fact 19.
99. Accepted in Finding of Fact 25.
100. Subordinate to Finding of Fact 35.
101. Accepted.
102. Accepted.
103. Accepted in Finding of Fact 40.
104. Subordinate to Finding of Fact 40.
105. Accepted in Finding of Fact 40.

AHCA

1. Accepted in Findings of Fact 1, 2 and 3.
2. Accepted in Finding of Fact 6.
3. Accepted in Finding of Fact 9.
4. Accepted in Finding of Fact 1.
5. Accepted in Finding of Fact 12.
6. Accepted in Finding of Fact 13.
7. Accepted in Finding of Fact 14.
8. Accepted in Finding of Fact 14 and Conclusions of Law 66, 70 and 71.
9. Accepted in Finding of Fact 15.

10. Subordinate to Finding of Fact 36.
11. Accepted in Finding of Fact 36.
12. Subordinate to Finding of Fact 36.
13. Rejected, except first sentence to Finding of Fact 36.
15. Subordinate to Finding of Fact 62.
16. Rejected in Finding of Fact 62.
17. Subordinate to Finding of Fact 62.
18. Subordinate to Findings of Fact 60 and 61.
19. Accepted in Finding of Fact 61.
20. Rejected in Findings of Fact 58 and 60 and Conclusions of Law 76.
21. Subordinate to Finding of Fact 61.
22. Accepted in Findings of Fact 58 and 60.
- 23-26. Subordinate to Findings of Fact 10, 11, 12, 13, 14, 15, and 33.
27. Accepted in Findings of Fact 16, 17, 18, 19, 20, 21, 22, and 41-45.
28. Accepted in Findings of Fact 23-31, and 46-52.
29. Accepted in Finding of Fact 53.
- 30 & 31. Rejected in Findings of Fact 32-35, and 54-57.
32. Rejected in Findings of Fact 4, 8, 36, 37, 58, 60, 61 and 62.
33. Rejected in Findings of Fact 31-34, 35, and 54-57.
34. Accepted.
35. Rejected in Findings of Fact 36, 37, 58, 60, 61 and 62.
36. Accepted.
37. Accepted in Finding of Fact 28.
38. Accepted in Findings of Fact 8 and 48.
39. Accepted in Findings of Fact 17 and 26.

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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 ten 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

NORTH SHORE MEDICAL CENTER,
INC.,

Petitioner,

CASE NO.: 92-4992

CON NO.: 6956

vs.

RENDITION NO.: AHCA-93- 151-FOF-CON

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent.

VICTORIA HOSPITAL PARTNERSHIP,
d/b/a VICTORIA HOSPITAL,

Petitioner,

CASE NO.: 92-4993

CON NO.: 6955

vs.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent.

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 September 10, 1993, by Hearing Officer Eleanor M. Hunter is incorporated by reference.

RULING ON EXCEPTIONS FILED BY
VICTORIA HOSPITAL PARTNERSHIP (VICTORIA)

Counsel excepts to the Hearing Officers conclusion that Victoria's application must be denied because of a sale of the facility which occurred after the filing of the notice of intent to apply for a CON. The applicable rule is found at Section 59C- 1.008(1)(c), Florida Administrative Code, which provides:

The applicant for a project shall not change from the time a letter of intent is filed, or from the time an application is filed in the case of an expedited review project, through the time of the actual issuance of a Certificate of Need. Properly executed corporate mergers or changes in the corporate name are not a change in the applicant.

Counsel maintains that the change in ownership was in the nature of a corporate merger, and that the transaction therefore falls within the exception for corporate mergers. Neither the applicant, Victoria Hospital Partnership, nor the successor entity, Cedars Health Care Group, Ltd. are corporations. The word corporation (and the adjective form, corporate) has a well established meaning in the law as noted by the Hearing Officer. The word corporate cannot be disregarded as urged by counsel. I concur with the Hearing Officer; the exceptions are denied.

RULING ON EXCEPTIONS FILED BY AHCA

Counsel for the agency concurs with the Hearing Officers conclusion that Victoria's application must be denied because the facility was sold subsequent to the filing of the Letter of Intent. Because denial is required under this circumstance, counsel excepts to the other factual and legal conclusions pertaining to the Victoria application as irrelevant. The exception is granted. Exceptions 2, 3, and 7 address specific findings pertaining to the Victoria application. Having concluded that the challenged findings are irrelevant, it is not necessary to further consider these findings.

In exceptions 4, 5, 6, and 8 counsel challenges paragraphs 56, 57, 74, and 79 wherein the Hearing Officer implied that geographic inaccessibility of underutilized hospitals was established based on the travel time between Northshore and the other hospitals. Counsel correctly points out that the standard for determining geographic access is set forth in Section 59C- 1.040(6) which reads as follows:

Access Standard. Hospital inpatient general psychiatric services should be available within a maximum ground travel time of 45 minutes under average travel conditions for at least 90 percent of the districts total population.

The exception is granted.

FINDINGS OF FACT

The agency hereby adopts and incorporates by reference the findings of fact set forth in the Recommended Order except where inconsistent with the Rulings on Exceptions.

CONCLUSIONS OF LAW

The agency hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order except where inconsistent with the Ruling on Exceptions.

Based upon the foregoing, it is

ADJUDGED, that the application of Victoria Hospital Partnership for CON 6955 be DENIED. It is further adjudged that the application of North Shore Medical Center, Inc. for CON 6956 to convert twenty acute care beds to adult psychiatric beds be APPROVED.

DONE and ORDERED this 8th day of November, 1993, in Tallahassee, Florida.

Douglas M. Cook, Director
Agency for Health Care
Administration

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Elizabeth Dudek (AHCA/CON)

Elfie Stamm (AHCA/CON)

Alberta Granger (AHCA/CON)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the above named people by U.S. Mail this 9th day of November, 1993.

R. S. Power, Agency Clerk
State of Florida, Agency for
Health Care Administration
325 John Knox Road
The Atrium Building, Suite 301
Tallahassee, Florida 32303
(904) 922-3808

NOTICE OF RIGHT TO JUDICIAL REVIEW

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 AHCA, 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.