

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GALEN OF FLORIDA, INC., d/b/a	)	
WESTSIDE REGIONAL MEDICAL CENTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93-4880
	)	
AGENCY FOR HEALTH CARE	)	
ADMINISTRATION,	)	
	)	
Respondent,	)	
and	)	
	)	
NORTH BROWARD HOSPITAL DISTRICT,	)	
and PLANTATION GENERAL HOSPITAL,	)	
L.P.,	)	
	)	
Intervenors.	)	
_____	)	
SOUTH BROWARD HOSPITAL DISTRICT,	)	
d/b/a MEMORIAL HOSPITAL WEST,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93-4881
	)	
AGENCY FOR HEALTH CARE	)	
ADMINISTRATION,	)	
	)	
Respondent,	)	
and	)	
	)	
PLANTATION GENERAL HOSPITAL, L.P.,	)	
and HCA HEALTH SERVICES OF	)	
FLORIDA, INC., d/b/a NORTHWEST	)	
REGIONAL HOSPITAL,	)	
	)	
Intervenors.	)	
_____	)	

SUMMARY RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its assigned Hearing Officer, James W. York, held an evidentiary hearing on April 12, 1994, in Tallahassee, Florida. This hearing was held pursuant to North Broward Hospital District's Motion for Summary Recommended Order.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this proceeding is whether, pursuant to current statutory and regulatory provisions, the change in licenseholder of Westside Regional Medical Center from Galen of Florida, Inc., to Columbia Hospital Corporation of South Broward, requires rejection of Certificate of Need application No. 7248, filed by Galen and summary dismissal of Galen's petition for formal hearing.

PRELIMINARY STATEMENT

In February 1993, Galen of Florida, Inc., (Galen) filed a letter of intent, seeking Certificate of Need (CON) approval to convert ten acute care beds at Westside Regional Medical Center to ten Neonatal Intensive Care Level II beds. The Agency for Health Care Administration (AHCA), the agency responsible for the administration of the CON program, designated Galen's CON application as CON Action No. 7428. AHCA notified Galen of its intent to preliminarily deny Galen's CON application, and Galen subsequently filed a timely petition to challenge AHCA's decision (DOAH Case No. 93-4880).

The South Broward Hospital district, d/b/a Memorial Hospital West (Memorial), a co-batched applicant, filed a competing application to establish ten Neonatal Intensive Care Level II beds at its campus in Western Broward County. AHCA designated Memorial West's CON application as CON Action No. 7249. AHCA notified Memorial West of its intent to preliminarily deny Memorial West's CON application, and Memorial West subsequently filed a timely petition to challenge AHCA's decision (DOAH Case No. 93-4881).

The North Broward Hospital District (NBHD) and Plantation General Hospital, L.P. (Plantation) filed timely petitions to intervene in DOAH Case No. 93-4880, and both were granted leave to intervene.

Plantation and HCA Health Services of Florida, Inc., d/b/a Northwest Regional Hospital filed timely petitions to intervene in DOAH Case No. 93-4881, and both were granted leave to intervene. These two cases were consolidated by an order entered on September 3, 1993.

On or about November 5, 1993, Galen executed a bill of sale, transferring ownership of Westside Regional Medical Center to Columbia Hospital Corporation of South Broward, Inc. (Columbia). Pursuant to a Change of Ownership application submitted to AHCA, a new license to operate Westside Regional Medical Center was issued to Columbia on November 5, 1993.

On January 7, 1994, NBHD filed the instant Motion for Summary Recommended Order, seeking to dismiss Galen's Petition for Formal Administrative Hearing. NBHD contends that, as a result of the sale and transfer of assets to Columbia Hospital Corporation of South Broward, Inc., Galen is no longer the applicant for CON No. 7248.

At the hearing on NBHD's motion, NBHD presented the testimony of Elizabeth Dudek, Chief of the Certificate of Need and Budget Review Sections for the AHCA, tendered and accepted as an expert in Health Care Planning specifically related to CON administration. The parties to this motion introduced SRO Exhibits 1-5, and SRO Exhibit D, which were admitted and received into evidence.

Galen presented the testimony of Elizabeth Dudek. Prior to its direct examination of Ms. Dudek, Galen attempted to introduce into evidence Elizabeth Dudek's deposition taken in connection with a pending rule challenge proceeding (DOAH Case No. 94-0404RX). Opposing counsel objected to its introduction, which objection was sustained. Subsequent to the hearing, an Order was entered reversing the prior ruling, allowing the deposition to be entered into evidence. On May 2, 1994, a telephonic hearing was held in response to SBHD's request to reconsider the Order. SBHD's request was denied and the deposition was ordered admitted into evidence. /1

At the hearing, all participating parties were given the opportunity to file proposed summary recommended orders. Galen and Memorial each filed timely proposed summary recommended orders. NBHD and AHCA filed a timely joint proposed summary recommended order. Specific rulings on the proposed findings of fact submitted by the parties are included in the Appendix to this Summary Recommended Order.

#### FINDINGS OF FACT

##### The Change of Ownership

1. In March 1993, Galen filed an application for a CON to add a ten-bed Level II Neonatal Intensive Care Unit (NICU) at its hospital known as Westside Regional Medical Center, located in Broward County in District X. This application, CON No. 7248, was initially denied by the Agency. Galen filed a Petition for Formal Administrative Hearing on August 12, 1993, challenging that denial and seeking approval of its application.

2. In the same batching cycle, Memorial filed an application for a ten bed Level II NICU, Con No. 7249, which the Agency also preliminarily denied. On August 13, 1993, Memorial filed its petition for formal administrative hearing. The cases were consolidated for hearing by Order entered September 3, 1993.

3. Two existing providers of Level II NICU services in the District sought and were granted leave to intervene: NBHD and Plantation.

4. On January 7, 1994, NBHD filed a Motion for Summary Recommended Order. The basis for summary relief was that subsequent to the filing of its application for the Westside facility, Galen had sold or transferred that facility to Columbia and that Columbia had become the new license holder for the facility.

5. Galen responded in opposition that no material facts set forth in the application for the CON to establish the Level II NICU at Westside had changed as a result of the transfer to Columbia. Furthermore, Galen contends that its application must be permitted to undergo the de novo comparative review process.

6. The Galen application was deemed complete, preliminarily reviewed and initially denied. The basis of the initial denial was unrelated to any change in ownership. Galen timely sought de novo comparative review by invoking the administrative hearing process on August 12, 1993. The application has not been withdrawn.

7. On November 5, 1993, Galen entered into a purchase and sale agreement with Columbia. Under the terms of that agreement, Columbia undertook legal responsibility for all liabilities and contractual obligations related to the Westside facility.

8. As required by law, Columbia filed a change of ownership application (CHOW) with the Agency which ultimately issued a new license to Columbia for the operation of the Westside facility.

9. The Agency's CHOW file establishes that the Agency received and reviewed the following documents, among others, related to Columbia: A list of the officers and directors of Columbia; Columbia's articles of incorporation; the certificate of incorporation of Columbia issued by the State of Florida; Columbia's audited financial statements; affidavits asserting that Columbia would accept all outstanding liabilities due and payable to the State of Florida, including but not limited to any outstanding liabilities to the Medicaid Program; assertions that Columbia would correct deficiencies, if any, on the facilities most recent license survey; and assertions that Columbia would comply in all respects with applicable provisions under Chapter 766, Florida Statutes (regarding the Florida Patient's Compensation Fund).

10. The deposition of Mr. James A. Cruickshank, chief Operating Officer for Westside Regional Medical Center, was admitted into evidence by NBHD. Mr. Cruickshank testified that he had been employed at Westside since 1987. He is directly responsible for the operations of the facility, and held that position and those duties both before and after the transfer of assets to Columbia. He participated in the preparation of the CON application and is familiar with its contents.

11. Mr. Cruickshank testified that, as Chief Operating Officer, he was familiar with the following matters, none of which had changed, or were expected to vary from the representations made in the CON application, as a result of the transfer of assets to Columbia:

- A. Administration - no change;
- B. Admission and discharge policies - no change;
- C. Operational Management - no change;
- D. Personnel - no change;
- E. Staffing - no change;
- F. Medical staff - no change;
- G. Medical committees - no change;
- H. Financial personnel - no change;
- I. Charges of fees - no change;
- J. Financial policies or procedures - no change;
- K. Budgeting process - no change;
- L. Financial commitments - no change;
- M. Projected costs - no change;
- N. Financial feasibility - no change;
- O. Data or underlying assumptions - no change;
- P. Admissions or discharge data - no change;
- Q. Average length of stay data - no change;
- R. Scope of services - no change;
- S. Level of proposed services for NICU unit, including: Nursing, Specialty Nursing, Surgical, Emergency, Respiratory therapy, X-Ray; Obstetrics; Ultrasound; Clinical laboratory; Nutritional; Anesthesia; or social services - no change from those represented in the CON application.
- T. Quality of care - no change;
- U. Standards and qualifications for medical staff - no change;
- V. Ratios for medical specialists - no change;
- W. Nursing staff qualifications, specialists or ratios - no change;
- X. Patient stations, equipment or physical plant and layout - no change;
- Y. Licensed bed capacity - no change;
- Z. Accessibility of services - no change;
- AA. Extent to which proposed NICU unit will address patient need in district - no change;
- BB. Extent to which the medically under served individuals in the district use or will use the Westside facility - no change;
- CC. Ability of the facility to meet any federal regulations requiring uncompensated care, community service or access by minority and handicapped service to federally assisted programs - no change;
- DD. Utilization data - no change;
- EE. Recruitment - no change;

Mr. Cruickshank's testimony in this regard is accepted.

12. Mr. Cruickshank testified that the financial feasibility and stability of this proposal is strengthened by the Columbia acquisition: Westside is the only facility owned by Columbia; the only capital projects or expenditures for which Columbia would be responsible would thus be significantly less than the \$27,755,000 listed on Schedule 2 of the CON application; and the source of funds for the proposed NICU is from operating expenses. Mr. Cruickshank's testimony in this regard is also accepted.

13. Mr. Cruickshank, testified that Galen's board no longer has operational responsibility for or exercises any control over Westside Regional Medical Center. /2 Galen is no longer financially committed to the proposed project.

14. Galen's letter of intent was accompanied by a resolution of its board. Galen's CON Application No. 7248 included a listing of Galen of Florida, Inc.'s board. Columbia and Galen do not share any of the same board members.

15. Mr. Cruickshank testified that Galen's CON application only provided Galen's audited financial statements, and did not contain Columbia's audited financial statements. No audited financial statements for Columbia have been provided to AHCA in relation to CON application 7248.

#### Statutory and Regulatory Criteria

16. Rule 59C-1.008, Florida Administrative Code (the Rule), provides an outline for what is required of a CON applicant to have an application accepted and reviewed by AHCA.

17. The Rule implements the statutory criteria in Section 408.037, Florida Statutes, which specifies the CON "Application Content" requirements.

18. Section 408.037, Florida Statutes, provides, in part, that an application for a CON shall contain:

- (2) A statement of the financial resources needed by and available to the applicant to accomplish the proposed project. This statement shall include:
  - (a) A complete listing of all capital projects . . . pending, approved, or underway in any state at the time of the application . . . [and] shall include the applicant's actual or proposed financial commitment to those projects and an assessment of their impact on the applicant's ability to provide the proposed project . . .
  - (c) A detailed financial projection . . . [which] shall include a detailed evaluation of the impact of the proposed project on the cost of other services provided by the applicant . . .
- (3) An audited financial statement of the applicant . . . includ[ing] . . . a balance sheet and a profit-and-loss statement of the two previous fiscal year's operation . . .
- (4) A certified copy of a resolution by the board of directors of the applicant , or

other governing authority if not a corporation, authorizing the filing of the application; authorizing the applicant to incur the expenditures necessary to accomplish the proposed project; certifying that if issued a certificate, the applicant shall accomplish the proposed project within the time allowed by law and at or below the costs contained in the application; and certifying that the applicant shall license and operate the facility. [Emphasis added.]

Section 408.037, Florida Statutes.

19. Elizabeth Dudek, Chief of CON and Budget Review for Respondent AHCA, testified that an applicant's failure to comply with the statutory requirements concerning submission of the letter of intent and board resolution would result in the rejection of the application.

20. Pursuant to the above statutory criteria, if an applicant fails to submit audited financial statements, AHCA would deem the application incomplete, and the application would be withdrawn from consideration.

21. The Rule also incorporates the letter of intent and board resolution provisions found in Section 408.039(2), Florida Statutes. This statute provides:

. . . a letter of intent shall be filed by the applicant . . . [which] describe[s] the proposal with specificity, including proposed capital expenditures, number of beds sought . . . [and the] identity of the applicant, including the names of those with controlling interest in the applicant. The letter of intent shall contain a certified copy of a resolution by the board of directors of the applicant . . . authorizing the filing of the application described in the letter of intent; authorizing the applicant to incur the expenditures necessary to accomplish the proposed project; certifying that if issued a certificate, the applicant shall accomplish the proposed project within the time allowed by law and at or below the costs contained in the application; and certifying that the applicant shall license and operate the facility. [Emphasis added.]

Section 408.039(2)(a-c), Florida Statutes.

22. Ms. Dudek testified that, pursuant to this statute, the licenseholder for Westside Regional Medical Center is required to be the applicant for a CON.

23. At the time Galen submitted the letter of intent, Galen was the licenseholder for Westside Regional Medical Center. Columbia has not filed a letter of intent or board resolution for CON Application No. 7248.

24. In the case of an existing licensed facility, the "applicant" referred to in the statute and the Rule must attest that they will license and operate the facility, and thus is required to be the facility's licenseholder.

25. If AHCA issued a CON to the applicant, Galen, for the proposed project, Galen would not be able to meet the requirement that it license and operate the project because Galen no longer holds the license for Westside Regional Medical Center.

26. Rule 59C-1.008(1)(n), Florida Administrative Code, 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. /3

27. Nothing in the statute specifically mandates that the licenseholder cannot change or that such change compels involuntary withdrawal of the application from comparative review.

28. Ms. Dudek testified that when she received notice that AHCA had issued a new license which changed the ownership of Westside Regional Medical Center of Columbia, she determined that, pursuant to Rule 59C-1.008, the CON application filed by Galen was no longer an application that could be reviewed because the entity submitting the application was no longer the licenseholder.

29. Ms. Dudek explained that in circumstances where the licenseholder sells the facility to another corporation who then becomes the new licenseholder, as is the case here, the rule requires that AHCA reject the CON application because it would not contain a letter of intent, board resolution, audited financial statements, capital project listing and proforma's for the acquiring entity.

30. Galen did not offer testimony to show that the change in the applicant had occurred as a corporate name change or as a corporate merger.

31. Ms. Dudek testified that subsequent to the omissions period, applicants are not permitted to amend the application, and AHCA is prohibited by rule from considering subsequent events in the application review process. Rule 59C-1.010(2)(b), Florida Administrative Code, provides in pertinent part:

Subsequent to an application being deemed complete by the agency, no further application information or amendment will be accepted by the agency.

32. Ms. Dudek testified that the purpose for this prohibition is to set forth parameters in terms of what information will be reviewed for a particular period of time, so that each applicant knows what the agency considers, and that it is considering the same information for all applicants as of the date each is deemed complete.



33. Without amending or supplementing the application, there is no outlet for Columbia to produce, or for the agency to consider, information concerning the new licenseholder. Amending and supplementing the application is prohibited by Rule 59C-1.010, Florida Administrative Code, as discussed in finding of fact #31.

34. Ms. Dudek testified that when an existing facility submits a CON application, the "applicant" is required by Agency rule to be the current licenseholder. Rule 59C-1.008(1)(m), Florida Administrative Code, provides in pertinent part:

An applicant for a project subject to Certificate of Need review which affects an existing licensed health care facility . . . must be the license holder. . . . If agency records indicate information different from that presented in the letter of intent with respect to the identification of the holder of the license and the licensure status, then the agency records create a rebuttable presumption as to the correctness of those records and therefore the application will be rejected.

35. Ms. Dudek testified that agency records show that Columbia currently holds the license for Westside Regional Medical Center. Mr. Cruickshank confirmed that Columbia, and not Galen, is the current licenseholder for Westside Regional Medical Center.

#### CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties in this proceeding. Section 120.57, Florida Statutes, and Section 408.039, Florida Statutes.

37. A summary recommended order is comparable to summary judgment in a civil proceeding. The movant has the burden to demonstrate that it is entitled to judgment as a matter of law and any doubts are to be resolved against summary disposition. *Martin v. Golden Corral Corp.*, 601 So.2d 1316 (Fla. 2d DCA 1992).

38. In this case competent, substantial evidence clearly shows that the original license holder and applicant in these proceedings was Galen. The application was filed with the AHCA in March 1993. The evidence in this case also clearly establishes that Galen entered into a purchase and sale agreement with Columbia in the fall of 1993. The change in ownership of Westside Regional Medical Center obviously occurred prior to the issuance of a CON. In addition, Columbia applied for and received a change of ownership application and a new license for the facility in question. Therefore, both the original applicant and the original license holder have changed since the application was filed in March 1993.

39. Galen has not presented evidence that the transactions with Columbia which are at issue fall within the corporate name change or merger exception to Rule 59-1.008(1)(n) and acknowledges, in its proposed recommended order that it has not pursued this defense to the application of the rule. Therefore there is

no genuine issue of fact present here with respect to the application of the rule. There has been a clear departure from Rule 59-1.008., Florida Administrative Code in this case.

40. In addition, it was clearly established at hearing that the identity of the original applicant and license holder in this case occurred after the agency made a determination that the application was complete, therefore, the agency is now prohibited from allowing any amendment to the original applications by Rule 59C-1.010(2)(6), Florida Administrative Code, which provides in pertinent part:

Subsequent to an application being deemed complete by the agency, no further application or amendment will be accepted by the agency.

41. Galen's argues that the rules should not apply here because the management, direction, staffing and funding of the facility at issue will not be any different as a result of the change in the original applicant. Galen's argument is not persuasive. The agency has established that its rules for review of CON applications are intended to establish parameters in terms of specific information that will be considered at relevant time points within the process. The agency rules appear to be an attempt of AHCA to promote predictable, equal and fair treatment to all applicants.

42. Galen argues that the application of these agency rules to dismiss its petition under these facts amounts to applying "form over substance." This is not the case. Instead, the agency, by dismissing Galen's petition in this proceeding, would simply be adhering to its rules which are designed to promote consistency and predictability in the CON process. Where, as here, a change in CON applicant has occurred after the application has been deemed by the agency to be complete, the application should be denied. See *North Shore Medical Center, Inc. v. Agency for Health Care Administration*, 15 F.A.L.R. 4661 (AHCA 1993).

43. The facts developed at the evidentiary hearing conducted in this case also establish that the applicant no longer holds the license to operate the facility in question. Reasonable interpretation of and adherence to the statutory and rule provisions applicable in this case require that only the license holder of the existing facility be permitted to apply for and receive the CON at issue. See, *Brookwood-Jackson Convalescent Center v. Dept. of Health and Rehabilitative Services*, 591 So.2d 1083 (Fla. 1st DCA 1992).

44. Further the application at issue contains only Galen's letter of intent, board resolution approving the proposed project and certifying that the project would be completed, and audited financial statements. Therefore, the agency properly takes the position that the Galen application is incomplete and fails to meet unconditional statutory requirements. See, Sections 408.039(2)(c), and 408.037(3), Florida Statutes. See also *Humhosco, Inc. v. Dept. of Health and Rehabilitative Services*, 561 So.2d 388 (Fla. 1st DCA 1990).

45. Based upon the forgoing findings and conclusions Galen's application should be deemed incomplete, and its petition in this cause should be dismissed.

RECOMMENDATION

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

RECOMMENDED that a summary final order be entered dismissing the Petition for Formal Administrative Hearing filed by Galen of Florida, Inc., d/b/a Westside Regional Medical Centers in this case.

DONE and ORDERED this 11th day of May 1994, in Tallahassee, Florida.

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JAMES W. YORK, 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 11th day of May 1994.

ENDNOTES

1/ SBHD preserves its objection to the introduction of the subject transcript during the final hearing on this matter in that, pursuant to Rule 1.330, Florida Rules of Civil Procedure, Ms. Dudek's deposition, taken in connection with the rule challenge proceeding (DOAH Case No. 94-0404RX), may not be admitted into evidence in this proceeding against parties who were not represented or present at the taking of the deposition, or who did not receive reasonable notice of the taking of the deposition.

2/ Galen provided a board resolution with its letter of intent, approving the proposed project and certifying that the project would be completed, that it would be accomplished within the time allowed by law, and that Galen would license and operate the facility.

3/ Rule 59C-1.008(1)(n), Florida Administrative Code, is the subject of a rule challenge, filed by Galen, in DOAH Case No. 94-0404RX, a separate proceeding.

APPENDIX

Rulings on proposed findings of fact submitted by Galen of Florida, Inc.

- 1-5. Adopted, in substance, in paragraphs 1-5 of the order.
6. Proposed finding of fact is hereby accepted.
- 7-9. Adopted, in substance, in paragraphs 6-8 of the order.
10. Adopted in part in paragraph 9 of the order. Portions of this proposed finding are conclusory and argumentative and therefore rejected.
11. Proposed finding of fact is hereby accepted
- 12-14. Adopted, in substance, in paragraphs 10-12 of the order.
15. Adopted in paragraph 26 of the order.
16. Rejected in part as conclusory and argument. The final sentence in proposed finding of fact 16 is adopted in paragraph 27 of the order.

17-18. Proposed finding of fact 18 is hereby accepted.

19. Rejected as conclusory and argument. Ms. Dudek's testimony in this regard is on the record and speaks for itself.

20. Rejected as argument.

Rulings on proposed findings of fact submitted by South Broward Hospital District d/b/a Memorial Hospital West.

1-4. Adopted in paragraphs 16-19 of the order.

5. Adopted in paragraph 14 of the order.

6. Adopted in paragraph 13 of the order.

7. Adopted in paragraph 20 of the order.

8. Adopted in paragraph 15 of the order.

9-14. Adopted in paragraphs 21-26 of the order.

15-16. Adopted in paragraphs 28-29 of the order.

17. Proposed finding of fact 17 is hereby adopted.

18-23. Adopted in paragraphs 30-35 of the order.

Rulings on proposed findings of fact submitted by North Broward Hospital District and the Agency for Health Care Administration

1-3. Proposed findings of fact 1-3 are hereby adopted.

4. Adopted in paragraph 1 of the order.

5-6. Proposed findings of fact 5 & 6 are hereby adopted.

7-8. Adopted, in substance, in paragraph 1 of the order.

9-10. Adopted, in substance, in paragraph 8 of the order.

11. Adopted, in substance, in paragraph 7 of the order.

12. Adopted, in substance, in paragraph 8 of the order.

13. Adopted, in substance, in paragraph 14 of the order and otherwise hereby adopted.

14. Adopted in paragraph 26 of the order.

15. Proposed finding of fact 15 is hereby adopted.

16-18. Proposed finding of fact 15 is hereby adopted.

19. Proposed finding of fact 15 is hereby adopted.

20. Adopted, in substance, in paragraph 28 of the order.

21. Proposed finding of fact 21 is hereby adopted.

22. Rejected, not supported by the record.

23. Proposed finding of fact 23 is hereby adopted.

24. Is cumulative and not necessary to the conclusion reached.

25-27. Proposed findings of fact are hereby adopted.

COPIES FURNISHED:

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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 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.