STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELECT SPECIALTY HOSPITAL-MARION, INC.,

Petitioner,

vs. Case No. 04-0444CON

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

KINDRED HOSPITAL-BAY AREA-TAMPA,

Intervenor.

RECOMMENDED ORDER

This case was heard by David M. Maloney, Administrative Law Judge of the Division of Administrative Hearings on May 24 and 25, 2005, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

Select Specialty Hospital-Marion, Inc.'s CON Application 9710, filed with the Agency for Health Care Administration, seeks establishment of a 44-bed Long Term Care Hospital (an "LTCH") in Polk County, AHCA Health Care Planning District 6. The Agency preliminarily denied the application. Select-Marion has challenged the denial and Kindred-Bay Area seeks intervention in the proceeding.

The issues in this case are two: whether Kindred-Bay Area has proven it has standing to intervene in the proceeding and whether the application should be approved.

PRELIMINARY STATEMENT

On February 9, 2004, the Agency for Health Care Administration ("AHCA" or the "Agency") filed a Notice with the Division of Administrative Hearings ("DOAH"). The notice advised DOAH that AHCA had received a request for a formal hearing from Select Specialty Hospital-Marion, Inc. (Select-Marion). The Agency further requested that DOAH assign the matter to an administrative law judge to conduct all proceedings required by law including submission of a recommended order to the Agency.

Attached to the notice was Select-Marion's petition. It requested appropriate administrative relief, including approval of Select-Marion's CON Application No. 9710.

On February 10, 2004, the undersigned was designated as the administrative law judge to conduct the proceedings and an Initial Order was sent to the parties. Shortly thereafter, the case was consolidated with DOAH Case No. 04-0460CON initiated by a petition from SemperCare Hospital of Lakeland, Inc. SemperCare had filed an application for an LTCH in the same service district in which Select-Marion sought approval of its CON application and in the same batching cycle. Its application also had been denied by the Agency.

A Notice of Hearing was issued on February 25, 2004. It set final hearing for a four-week period in November 2004. In the meantime, Petitions to Intervene were filed in both cases by Kindred Hospital-Central Tampa and Kindred Hospital-Bay Area-Tampa ("Kindred-Bay Area") and Select-Marion's Petition to Intervene in DOAH Case No. 04-0460CON were granted subject to proof of standing at hearing. The case was continued and final hearing was set to take place in April 2005.

On February 22, 2005, Kindred Hospital-Central Tampa dismissed its Petition to Intervene in the two cases. A motion for continuance was granted without objection and the case was scheduled for two weeks in May 2005. In April 2005, SemperCare

filed a voluntary dismissal of its petition and DOAH Case No. 04-0460CON was closed.

This case proceeded to final hearing on May 24 and 25, 2005. Select-Marion proceeded first. It presented the testimony of three witnesses: Marsha Medlin, an expert in fields of nursing, LTCH nursing, ICU nursing, and LTCH operations; Gregory Sassman, an expert in the field of LTCH development; and Patricia Greenberg, an expert in the fields of health care planning, health care finance and financial feasibility. Ten exhibits were marked for identification sequentially as Select Nos. 1-10. All were admitted into evidence except for Select No. 6, which was not offered into evidence.

The Agency presented the testimony of Jeffrey Gregg, AHCA's Chief of the Bureau of Health Facility Regulation, and offered three exhibits marked for identification as Agency Nos. 1-3. The three exhibits of the Agency were admitted into evidence.

Kindred-Bay Area presented the testimony of one witness, Sally Hoffman, an expert in the field of long-term hospital administration. It offered nine exhibits, marked for identification as Kindred Nos. 1-9, all of which were admitted into evidence.

At the conclusion of the final hearing, the parties agreed to file proposed recommended orders by Monday, July 18, 2005.

The three-volume transcript of the final hearing, however, was not filed at DOAH until July 15, 2005. At the urging of either Select-Marion or Kindred-Bay Area, several motions for extensions of time to file the proposed recommended orders were filed or made ore tenus, without objection. The motions were granted. Proposed recommended orders were filed by Select-Marion and Kindred-Bay Area on August 9, 2005. This Recommended Order follows.

FINDINGS OF FACT

The Parties

1. Select-Marion, the applicant, is a wholly-owned subsidiary of Select Medical Corporation. Select Medical Corporation provides long-term acute care services at 99 LTCHs in 26 states through various subsidiaries. In addition, Select Medical Corporation operates 741 outpatient clinics and has more than 400 "contract therapy locations for freestanding rehabilitation hospitals[.]" (Tr. 65.) Select has approximately 21,000 employees.

2. The Agency is the state agency responsible for the administration of the Certificate of Need program in Florida. See § 408.034(1), Fla. Stat.

3. Kindred-Bay Area operates a 73-bed freestanding, long-term care hospital in Tampa, Hillsborough County, Florida, in AHCA District 6, the health services planning district in which

Select-Marion hopes to construct and operate the applied-for project. Kindred-Bay Area is owned and operated by Kindred Hospitals, East, LLC, which also owns and operates a number of other long-term hospitals in Florida and other states.

LTCH Services

4. The length of stay in an acute care hospital (a "short-term hospital" or a "general hospital") for most patients is three to five days. Some hospital patients, however, are in need of acute care services on a long-term basis. A long-term basis is 25 to 30 days of additional acute care service after the typical three to five day stay in a short-term hospital. Although some of these patients are "custodial" in nature (see paragraph 19, below) and not in need of LTCH services, many of these long-term patients are better served in an LTCH than in a traditional acute care hospital.

5. In the health care continuum, LTCH care constitutes a component dedicated to catastrophically ill and medically complex patients in need of acute care services that exceed by a considerable amount the average length of stay for those patients in a general hospital. Typically medically unstable for the entire time of stay in the general hospital, these patients require extensive nursing care with daily physician oversight usually accompanied by some type of technologically

advanced support. Quite commonly, the technological support includes a ventilator.

6. Most often elderly, LTCH patients may be younger if victims of severe trauma. Whatever the age of the patients, for a variety of reasons, once they exceed the short-term length of stay in a general hospital intensive care unit ("ICU"), they rarely receive the health care treatment that is most appropriate for them in health care settings other than an LTCH.

7. LTCH patients are not able to tolerate, for example, the three hours per day of therapy associated with comprehensive medical rehabilitation and so are not appropriate for Comprehensive Medical Rehabilitation ("CMR") units or hospitals. As compared to LTCH patients, moreover, CMR patients usually require significantly less nursing care. They receive on average 4 to 4.5 hours of nursing care per patient day, as compared to the average eight hours of nursing care per patient day required by LTCH patients.

8. The services in an LTCH are distinct from those provided in a skilled nursing facility ("SNF") or a skilled nursing unit ("SNU") in that more nursing hours are dedicated to the patient and physician oversight is provided with more regularity, that is, on a daily basis. Patients in SNFs or SNUs are not likely to receive daily physician visits and observation

or, in terms of hours, the intensity in nursing services required by the patient appropriate for LTCH care.

9. The level of care provided in an LTCH is analogous to that provided in an ICU progressive care unit in a short-term acute care hospital. But staff orientation at an ICU in a short-term care hospital is different from LTCH staff orientation. The ICU staff is focused on stabilizing the patient and moving the patient to the next level of care within the continuum of care. With such a focus, it is difficult for the ICU in a general hospital to sustain the level of care for the long-term as required by a patient in need of long-term intensive care. Furthermore, when a patient has "fallen off . . . [the] clinical pathway" (tr. 19) and does not leave the ICU within the short time projected for the standard short-term acute care patient, the patient is viewed as a failure by the ICU staff. Staff perspective that there is little hope for the patient's recovery dampens the motivation necessary to provide consistently the service the patient requires over the long-term if the patient is to recover.

<u>Federal Government Recognition of LTCHs</u>

10. The federal government recognizes the distinct place based on the high level of patient acuity occupied by LTCHs in the continuum of care. The Prospective Payment System ("PPS") of the federal government treats LTCH care as a discrete form of

care. LTCH care therefore has its own system of diagnostic related groups ("DRGs") and case mix reimbursement that provides Medicare payments at rates different from what PPS provides for other traditional post-acute care providers.

11. Effective October 1, 2002, the Centers for Medicare and Medicaid Services ("CMS") implemented categories of payment designed specifically for LTCHs, the "LTC-DRG." The LTC-DRG is a decisive sign of the recognition by CMS and the federal government of the differences between general hospitals and LTCHs when it comes to patient population, costs of care, resources consumed by the patients and health care delivery.

CON Application Process

12. Select-Marion submitted CON Application 9710 in the second CON Application Review Cycle of 2003. The application was reviewed in comparison with CON Application 9709, submitted by SemperCare Hospital of Lakeland, Inc., through which SemperCare-Lakeland sought a 30-bed "hospital in a hospital" at Lakeland Regional Medical Center in Polk County.

13. The Agency evaluated the applications in a State Agency Action Report ("SAAR"). The SAAR recommended denial of both applications. A basis for the denial of Select-Marion's application is summed up as follows:

> The applicant contends that Polk County LTCH appropriate patients are remaining in acute care hospitals within the county as no

> appropriate or available alternatives exist with an acceptable distance. The applicant did not demonstrate that Polk County residents are being denied access to existing appropriate post-acute care services including LTCH services. There are two licensed LTCHs with an average occupancy in calendar year 2002 below 75 percent located in adjacent Hillsborough County. Travel distances to existing LTCHs, skilled nursing facilities, comprehensive medical rehabilitation facilities, or any appropriate provider of post-acute care were not demonstrated to be unreasonable.

AHCA Ex. 2, p. 34. The SAAR also recommended denial of SemperCare-Lakeland's application.

14. On December 10, 2003, authorized representatives of AHCA adopted the recommendation contained in the SAAR and released it. See id., p. 37.

15. Both Select-Marion and SemperCare-Lakeland timely challenged the denials of their respective applications. The petitions of the two were referred to DOAH and consolidated for purposes of hearing. SemperCare-Lakeland subsequently withdrew its challenge. An order was entered closing the DOAH file on the Sempercare challenge, see DOAH Case No. 04-0460CON, leaving this case to proceed on its own.

Issues

16. Aside from the standing issue with regard to Kindred-Bay Area, the issue in this case is approval of Select-Marion's application. This primary issue breaks into related sub-issues

reflected in the provision of the SAAR, quoted above. Has Select-Marion demonstrated that there is need for an LTCH in Polk County despite the existence of other LTCHs in the district and given their less-than-optimal occupancy rates? If so, would an LTCH in Polk County enhance access to LTCH service for District 6 residents and specifically for those who reside or are hospitalized in Polk County? Put another way, is there a legally cognizable barrier to access for Polk County patients to LTCH beds available elsewhere in the district that would justify approval of the application?

LTCH Need Methodology and AHCA's Concerns

17. The Agency has not adopted a need methodology for LTCH services. Consequently, it does not publish fixed need pools for LTCHs.

18. In response to a rise in LTCH applications over the last several years, the Agency has consistently voiced concerns about identification of the patients that appropriately comprise the LTCH patient population. Because of a lack of specific data from applicants with regard to the composition of LTCH patient population, the Agency is not convinced that there is not an overlap between the LTCH patient population and the population of patients served in other healthcare settings. In the absence of data identifying the LTCH patient population, AHCA has reached the conclusion "that there are other options available

to those patients [the population targeted by the LTCH applicant], depending on . . . things such as physician preference." (Tr. 175.)

19. Another expression of the Agency's view is that LTCH applicants have taken an "overly-broad" (id.) approach to determining the LTCH patient population with an emphasis on long lengths of stay in general hospitals. The Agency accepts that the candidate population for placement in a long-term care hospital includes at least some of those patients with extended lengths of stay in an acute care setting. But "in the absence of better data that evaluated severity of illness, as well," AHCA fears that the approval of an LTCH application "has a tendency to allow less severely ill people to drift into these otherwise very expensive facilities [that is, LTCHs]." (Tr. 175-176.) A better approach in AHCA's view would be to focus on severity of illness because some long stay patients in general hospitals whose stays are more custodial in nature are not appropriate candidates for LTCH services. These long stay "custodial" patients are neither catastrophically ill nor medically complex. For them, rather than the more specialized and highly technological-based services accompanied by intensive nursing care required by the LTCH patient, fewer services of less complexity suffice.

20. When there is an oversupply of LTCH beds, moreover, they tend to attract less severely ill patients than those who are appropriate for LTCH services.

21. The Agency draws support for its concerns from a report to the Congress in June 2004 by MedPAC.[1] MedPAC's concern about LTCHs stems from the cost associated with LTCH services: a cost that is higher than other skilled nursing facilities or inpatient rehabilitation facilities. Just as the Agency has concluded, MedPAC expects LTCHs with an oversupply of LTCH beds to attract patients who are not severely ill enough to be appropriate for LTCH care. In a setting whose costs are higher than is appropriate for them, more Medicare dollars are expended on these patients than is necessary.

22. The Agency's concerns about LTCH applications in general are compounded in this case by declining occupancies in LTCHs in District 6. "For the calendar year 2002, they were at 74.47%, and for calendar year 2004 they're at 66.65%, according to our [AHCA] records." (Tr. 178.)

Existing LTCHs in District 6

23. There are currently two licensed LTCHs operating in District 6: Kindred Hospital-Central Tampa, and the Intervenor in this case, Kindred-Bay Area. Kindred-Bay Area is approximately 50 to 60 miles, and within an hour's drive of the Winter Haven Area where Select-Marion intends to locate its

proposed LTCH; Kindred Hospital-Central Tampa is 5 to 7 miles closer to Winter Haven than is Kindred-Bay Area.

24. Kindred-Central Tampa is a 102-bed LTCH. It is JCAHO accredited. The recent trend in its average occupancy is a declining one. In 2002, the average occupancy rate was 79.4%. In 2003, it fell to 70.6%. In 2004, it fell, yet again, although the decline was less dramatic, to 69.6%. On the average day, Kindred-Central Tampa had 30 to 32 beds available to accommodate additional patients.

25. Kindred-Bay Area is a 73-bed LTCH in Hillsborough County. Also JCAHO accredited, it is licensed as an acute care hospital and is designated as an LTCH by the Medicare program. It offers a variety of long-term care services: respiratory/ventilator services, IV services, neurological services, wound care, dialysis and others. Kindred has a 4-bed ICU, an 8-bed "step down" unit, and 61 med-surg beds.

Need Demonstration: the Applicant's Responsibility

26. It is the applicant's responsibility to demonstrate under Florida Administrative Code Rule 59C-1.008(2)(e)2., that there is a need for the services for which approval is sought. The Agency analyzes LTCH applications on a district basis. The approach offered by Select-Marion, however, was a different one from the Agency's. The approach is outlined in Select-Marion's application. Extensive testimony about the approach, moreover,

was offered at hearing through Select-Marion's expert health planner, Patricia Greenberg.

Select-Marion’s Application and Proposal

27. Submitted in the second application cycle for 2003, Select-Marion’s application was assigned CON 9710.

28. Select-Marion estimates its total project costs to be approximately $11,244,000. It has not yet acquired the site for its proposed LTCH but anticipates that the facility will be located near or in Winter Haven in the central eastern region of Polk County. Select-Marion, however, has not conditioned its application on the location of the facility in the Winter Haven area. It has only offered to condition the application on the location of the facility in Polk County.

29. If located in the Winter Haven area, the proposed LTCH will be within 20 miles of the existing acute care providers in the county, a location sufficiently close to the major referral sources for the facility.

Uncontested Statutory and Rule Criteria

30. By stipulation of the parties it has been agreed that Select-Marion's application meets most of the statutory and rule criteria applicable to CONs or that those criteria are not applicable. The primary exception to the parties' agreement is need. As testified at hearing by the Agency's sole witness, the

applicant's alleged failure to demonstrate need is the sole reason the application was denied. (See Tr. 169.)

Ms. Greenberg's Testimony

31. Patricia Greenberg is the President of National Health Care Associates, "a health care consulting firm that specializes in health care planning, health care finance and health care operations." (Tr. 100.) She has extensive experience as a consultant on health care projects "including Certificate of Need work." (Tr. 101.)

32. Since the Agency does not have an LTCH need methodology in rule nor an Agency policy on LTCH need methodology in place, Select-Marion is responsible for demonstrating need through a needs assessment methodology which must include, at a minimum, consideration of the following topics:

a. Population, demographics and dynamics;

b. Availability, utilization and quality of like services in the district, sub-district or both;

c. Medical treatment trends; and,

d. Market conditions.

See the testimony of Ms. Greenberg at tr. 115 and Florida Administrative Code Rule 59C-1.008(2)(e). Select-Marion addressed each of these topics in its application.

33. On the basis of the each of the above-quoted topics and using several numeric need methodologies that follow general health planning principles, generally accepted by AHCA in other contested LTCH CON cases, as testified by Ms. Greenberg, there is a need for at least 44 LTCH beds in Polk County.

34. Ms. Greenberg's analysis does not overlook the beds that are available elsewhere in the district, that is, in Hillsborough County where Kindred-Central Tampa and Kindred-Bay Area are located. But in her words, "[t]he facilities in the neighboring county [Hillsborough] are not accessible to this [the Polk County] population." (Tr. 135.) Ms. Greenberg elaborated on this point later in her testimony when discussing the extent of impact to Kindred-Bay Area that might occur should the application be granted, "Kindred-Bay Area may have beds, but they're not accessible to that population, or they would be using them." (Tr. 150.)

35. The gist of the testimony with regard to accessibility was reiterated by Ms. Greenberg when asked directly whether the Kindred facilities in Tampa are "reasonable alternatives to the patients in Polk County":

> No, they are not reasonable alternatives at all. [The two Kindred facilities] have beds that are available. The physicians that support the need for the project, in the depositions I have reviewed[2], say they're not an alternative, they're not sending patients to them, they only get a few

> patients going [to the Kindred facilities] because of the family hardship, continuity of care, ... They're not an alternative at all for that patient population.

(Tr. 162, 163.)

36. In contrast to the approach of Select-Marion to need on a "Polk County" basis, as explained by Ms. Greenberg in her testimony, AHCA, however, does not approach LTCH need on a sub-district basis. The Agency approaches LTCH need on a district basis. Polk County is but one county in the multi-county health planning district in which it is located: District 6.

District 6

37. At the time of filing of the application, the population in District 6 was over 1,955,700. The population included 323,869 in the age cohort of 65 and over, the age cohort eligible for Medicare services, and the cohort that contains patients primarily served by LTCHs.

38. The population of Polk County at the time of the filing of the application was 507,839, including 94,950 in the age cohort, 65 and over. Approximately one-third of the District's Medicare eligible population lives in Polk County.

39. Polk County is one of five counties that comprise AHCA Health Care Planning District 6. (The other four are Hillsborough, Manatee, Hardee, and Highlands Counties.) The two LTCHs that presently exist in the District are Kindred-Central

Tampa and Kindred-Bay Area. Evidence was presented as to Kindred-Bay Area's Patient Recruitment and Admissions Practices, the sources of its admissions, market conditions and impacts to Kindred-Bay Area's census and the adverse impact to Kindred-Bay Area.

Kindred-Bay Area's Patient Recruitment and Admissions Practices

40. Kindred-Bay Area has "clinical liaisons" who serve to educate health care providers as to the availability of Kindred's services to build relationships with potential referral sources, and to gather information for the evaluation of potential LTCH patients from other health care facilities. The majority of Kindred's referrals and admissions come from short-term acute care hospitals, primarily intensive care units within such hospitals but also the med-surg units.

41. The clinical liaison's job includes conducting "in-service training" to educate hospital staff as well as physicians and other health care professionals of the services and treatments Kindred offers, and the types of patients for whom Kindred may be an appropriate placement option. Kindred-Bay Area's clinical liaison for Polk County, Mindy Wright, has been performing in-service training in Winter Haven for ten years, typically once a year but more frequently if turnover demands. She attempts a visit to the Winter Haven area at least every two weeks and frequently for periods of every week.

42. The clinical liaison also gathers information concerning potential referrals to Kindred from acute care hospitals in the Winter Haven area. The clinical liaison transmits this information to the hospital and the information is evaluated by a team consisting of the hospital's CEO, CFO, internal case manager, and a nurse or physician to make a decision on admission.

43. There is an incentive for LTCHs to admit patients who meet medical criteria for admission. Reimbursement from Medicaid and Medicare programs may be denied if a patient has not met appropriate admission criteria. Reimbursement, moreover, may be reduced if the patient initially met appropriate criteria but then turns out to have a relatively short length of stay in the LTCH.

44. Some patients are denied admission to Kindred-Bay Area for clinical reasons. For example, the patient may not meet Interqual criteria for admission. Failure to meet clinical admission criteria can occur if the patient has been kept in the short-term acute care hospital too long, possibly even for several months, when the patient should have been referred to Kindred much sooner.

45. The majority of patients referred to Kindred-Bay Area are admitted.

46. Patients are also denied admission to Kindred for financial reasons. On principle, Select does not decry such a practice, acknowledging that it also seeks to assure that some revenue stream is available to assist in providing the expensive care that comprises LTCH services.

Sources of Admissions to Kindred-Bay Area

47. Kindred-Bay Area draws the majority of its patients (60 to 75%) from Hillsborough and Polk Counties and specifically from the cities of Tampa and Lakeland and the Brandon and Winter Haven areas. It has also drawn patients from the Orlando/Orange County area, other areas of Polk County, and from as far south as the Naples Area.

48. In 2003, Kindred-Bay Area underwent renovations. The renovations limited the number of patients it could admit. In 2004, Mindy Wright, the clinical liaison responsible for the Orange County and Polk County areas, was on maternity leave for four months. Her absence significantly reduced Kindred's presence in Polk County health care facilities. The hospital did not replace Ms. Wright. Although other clinical liaisons provided some coverage in her area, it was not as effective as Ms. Wright had been. The result was not unexpected; when clinical liaisons are not in regular contact with short-term acute care hospitals and other providers, referrals and

admissions to the LTCH from such facilities usually drop significantly.

49. In addition to renovations and Ms. Wright's absence, there were several other factors that had an impact on admissions to Kindred-Bay Area in the last few years. First, several hurricanes in 2004 had an impact on Central Florida. They seriously disrupted the delivery of health care services, particularly in Polk County. The disruption resulted in a drop in referrals and admissions to Kindred-Bay Area from Polk County. Second, turnover in staffs at hospitals to which Ms. Wright was assigned, including Winter Haven, had an impact on referrals. If the social worker at the hospital does not know about Kindred and its capabilities, the social worker may not identify patients meeting Kindred's criteria for admission.

50. The conditions that led to declining admissions to Kindred-Bay Area from Polk County were temporary. So far in 2005, the downward trend in admissions between 2002 and 2004 has been reversed. Admissions through the first four months of 2005 at Kindred-Bay Area have been 20% higher for the same period in 2004, higher than the same period in 2003 and nearly at the same level for the period in 2002.

51. Admissions from Orange County, on the other hand, have dropped and are not likely to rebound. Orange County admissions went from 50 in 2002 to 28 in 2003 and only 10 in 2004. An LTCH

operated by SemperCare, subsequently acquired by Select Medical Corporation, opened in Orange County in June 2003 (at a location about an hour's drive from Winter Haven). The drop in Orange County admissions is likely to be exacerbated by the opening of another CON-approved Select facility in Orange County, a 40-bed, freestanding facility.

LTCH Market Conditions and Impact on Census

52. Kindred-Bay Area's census has declined in recent years, from an average daily census of 52 patients (72% occupancy) in 2002 to 48 patients (66%) in 2003 to 46 patients (63%) in 2004. On the average day in 2004, Kindred-Bay Area had beds available to accommodate another 27 patients. At the time of final hearing, Kindred-Bay Area's occupancy level was at 60% or about 44 beds. Optimal occupancy for Kindred-Bay Area would be 69 to 70 patients or about 95% occupancy.

53. The existence of a decline in occupancy rates for District 6 LTCHs is supported by AHCA data which shows a decline from about 74.5% in 2002 to 66.7% in 2004. It is also reasonable to assume that some patients from eastern Polk County will follow historic trends and flow to the existing LTCH and approved LTCH in Orange County. The combination of declining occupancy in District 6 LTCHs and possible outmigration of eastern Polk County residents to Orange County for LTCH services

diminish Select-Marion's claim that an LTCH is needed in Polk County.

54. Other changes in the LTCH market are also likely to impact Kindred-Bay Area in terms of referrals and admissions from other areas. Select has won a recommendation for approval for an LTCH in Lee County in a formal administrative proceeding. At the time of filing of proposed recommended orders in this proceeding the recommended order in the Lee County proceeding was pending. Kindred-Bay Area maintains a clinical liaison in Lee County to seek referrals in much the same manner as conducted by Ms. Wright. If a Select facility opens in Ft. Myers, it will have an impact on the referrals that Kindred-Bay Area receives from Ft. Myers and surrounding areas.

55. In addition, HealthSouth has received CON approval for an LTCH in Sarasota expected to open in August 2005. Kindred-Bay Area does not directly market to the Sarasota area. Another Kindred Hospital, Kindred-St. Petersburg markets in that area. It is reasonable to assume that the areas south of Sarasota toward Ft. Myers will begin to refer patients to the closer HealthSouth-Sarasota facility rather than continuing referrals to Kindred-Bay Area. Further, as HealthSouth-Sarasota seeks to establish its present in the market, it will likely engage in some marketing in the Tampa Bay area, in areas currently served by Kindred-Bay Area.

56. Kindred-Bay Area's sister hospital, Kindred-Central Tampa, no longer a party to this proceeding, does not contend that the opening of a Select facility would result in the loss of patients to Kindred-Central Tampa. Kindred-Central Tampa, however, is available to accept referrals from Polk County health care providers, either directly or at the request of Kindred-Bay Area. Kindred-Bay Area, like Kindred-Central Tampa, has an open medical staff and any physician can apply for admitting or consulting privileges and would be granted them if they met qualifications. Further, declining occupancy levels at Kindred-Central Tampa, a 102-bed facility, demonstrates that there is available capacity at Kindred-Central Tampa to absorb patients from Polk County, just as there is capacity at Kindred-Bay Area to absorb additional patients from Polk County who are in need of LTCH services.

Adverse Impact on Kindred

57. For the periods of calendar years 2002 and 2003 and the first half of 2004, the gross revenue impact on Kindred-Bay Area attributable to the number of patients from Polk County that Kindred-Bay Area would have lost to Select-Marion's proposed facility ranged from $1.75 million to $4.7 million.

58. In terms of net revenue and after-tax margin, however, the losses would be substantially smaller. For the 32 patients

from Polk County admitted to Kindred-Bay Area in 2004, the total after-tax margin impact would be only $240,000.

59. Furthermore, Kindred-Bay Area is not likely to lose all of its Polk County patients if the proposed project is located in the Winter Haven area since Lakeland area patients, located closer to Tampa than Winter Haven, might still choose LTCH services at Kindred-Bay Area over the proposed Select facility.

60. As found earlier in this order, however, Select-Marion has not conditioned its CON on locating the proposed facility in Winter Haven. A Winter Haven facility, moreover, with a primary service area with a 20-mile radius would capture Lakeland in its primary service area.

61. On balance, the impact of the proposed facility located in Polk County on Kindred is not substantial enough to confer standing on Kindred-Bay Area.

The SAAR

62. Following its review of Select's application, AHCA issued its State Agency Action Report (the "SAAR") recommending that CON 9710 be denied. Following the signature of officials at the Agency indicating approval of the recommendation, the SAAR became the preliminary action of the Agency subject to challenge under Chapter 120, Florida Statutes.

63. At trial, the Agency, through its witness, Jeffrey Gregg, Chief of the Agency's Bureau of Health Facility Regulation, testified that the only reason the application was denied is the Select-Marion's failure in AHCA's view to demonstrate need for the facility.

64. Select-Marion's expert health care planner testified that there is need in Polk County for the facility. The need is based on need methodologies that are both reasonable and appropriate from a health planning perspective and that are consistent with methodologies approved by final orders of the Agency.

65. As discussed, above, however, there is a critical difference in the application of the need methodologies in this case from other cases. In this case the need methodologies developed by Select-Marion applied only to Polk County and not to the district as a whole. The Agency determines need on a district-wide basis.

66. Select-Marion maintains that there are barriers to Polk County patients' access to existing LTCH facilities. The barriers are described as geographical based on physician referral patterns and family participation in rehabilitation.

Patient and Physician Preference and Practice

67. Select-Marion largely bases its case for need on allegations of the preferences of patients, family members and their physicians.

68. As to family members, it is not to be doubted that family members wish to avoid the burdens of travel. To the extent, however, that family members value specialized care, they are more likely to have the patient travel the distance necessary to receive it. Indeed, some Polk County families of LTCH patients are willing to travel the distance necessary to visit family members who are patients outside Polk County.

69. With regard to referring physicians, the majority of referring physicians choose not to serve as the attending physician for their patients once referred to an LTCH, even when the LTCH is located in the same city as the referring physician. Typically, a referring physician relies upon another doctor or a practice group to attend to his or her patient in the LTCH setting.

CONCLUSIONS OF LAW

70. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.568, 120.57 and 408.039(5), Fla. Stat.

71. Select-Marion has the burden to prove by a preponderance of the evidence that its CON application should be

approved. See Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 475 So. 2d 260 (Fla. 1st DCA 1985). In order to intervene, Kindred-Bay Area has the burden of proving that its substantial interests would be affected if Select-Marion's CON application is approved. Neither Kindred-Bay Area nor Select-Marion has met its respective burden of proof.

Intervention by Kindred-Bay Area

72. Based on the evidence and this order's findings of fact, Kindred-Bay Area does not have standing to intervene in this proceeding. It has not proven that an established program of Kindred-Bay Area's will be substantially affected by the approval of Select-Marion's application. See § 408.039(5)(c), Fla. Stat.

The Merits of Select-Marion's Case

73. In light of the parties' stipulation, the issues to be addressed concern need for the proposed facility under Section 408.035(2) and (7), Florida Statutes, and Florida Administrative Code Rule 59C-1.008(2)(e)2. Appropriately, Select-Marion has addressed and emphasized these statutory and rule provisions in its case. But its case falls short.

74. There are two problems with Select-Marion's case. The first is that its need methodology is keyed to need in Polk County rather than need at-large in District 6, the health

service planning district of concern in this case and established by Section 408.032(5):

> "District" means a health service planning district composed of the following counties:
>
> *   *   *
>
> District 6.--Hillsborough, Manatee, Polk, Hardee, and Highlands Counties.

The plain meaning of the language in Section 408.032(5), Florida Statutes, indicates intent that health planning is to be conducted on a district-wide basis. No statute or rule has been shown in this administrative proceeding to allow LTCH planning to be done on a county basis when the county is in a multi-county health services planning district as is Polk County.

75. Consistent with the definition of "district" quoted above, the Agency evaluates LTCH applications on a district-wide basis. Aside from the clear indication of legislative intent found in the statute's definition of "district" that health planning be conducted on a district-wide basis, when it comes to issues of availability, utilization and access, the Agency's approach is required by Section 408.035(2), Florida Statutes, a provision whose application is squarely at issue in this proceeding:

> **408.035 Review Criteria.--**The agency shall determine the reviewability of applications and shall review applications for certificate-of-need determinations for

> health care facilities and health services
> in context with the following criteria:
>
> * * *
>
> (2) The availability, quality of care, accessibility, and extent of utilization of existing health care facilities and health services <u>in the service district of the applicant</u>.

(emphasis supplied). The service district of the applicant in this case is District 6. Beds are available in District 6. It has not been proven, however, that there is a legally cognizable barrier impeding access by Polk County patients to LTCH beds available in District 6, which leads to the second problem with Select-Marion's case.

76. A second basis for determining that Select-Marion did not carry the burden of proof in this case, is an internal inconsistency in its case with regard to the access issue it raises, an inconsistency which is neither adequately explained nor resolved.

77. The excess LTCH bed capacity in District 6 are beds available at the two Kindred LTCH facilities in Hillsborough County. According to Select-Marion there is an access problem to the Kindred beds because they are located an hour or so driving distance away from the location of the patients in Polk County. Distance creates a problem from two perspectives: from the points of view of the patients families and the patients'

physicians. First, it creates hardship for the patients' families who wish to visit them and monitor their hospital stay. Second, Select-Marion posits that physicians in Polk County will not refer their potential LTCH patients in Polk County to Kindred's facilities both because of the hardship created for families by the distance and on the basis of continuity of care. With regard to the latter point, Select-Marion argued that if a patient enters an LTCH and is not attended-to in some form or fashion by the treating physician in the general hospital then, according to Select-Marion, continuity of care is disrupted. This latter contention, however, was not supported by the evidence.

78. As for hardship, requiring physician and family members to travel the distances from Polk County, particularly from the Winter Haven area, to Tampa could very well be a hardship. But hardship is a relative term.

79. There is little question that referring physicians in Polk County are not likely to travel the distance to attend to an LTCH patient at a District 6 LTCH facility outside of Polk County. But if LTCH services are valued by physicians, the physician will relinquish attending to the patient in need of LTCH services. The patient's treating physician in a general care hospital usually relinquishes care of the patient to LTCH physicians when it is not difficult for the physician to travel

to the LTCH. If continuity of care is not a concern in these cases, there was no reason offered for why it should be a concern when the LTCH is not easily accessible to the referring physician.

80. For family members, travel can certainly be a hardship. Where, however, for family members is the line drawn between convenience and true lack of accessibility? If LTCH services are valued by family members, the relatively short distance between Polk County and available LTCH beds, however inconvenient for the family, should not be an impediment unless in the judgment of the family member, the LTCH services are not worth the relatively minor inconvenience.

81. More damaging to the consistency of Select-Marion's argument than the value placed on LTCH services by patients' families is the value they appear to be accorded by physicians who refuse to refer Polk County patients that are candidates for LTCH services to Kindred's facilities where LTCH beds are available. If a patient really needs LTCH services in the judgment of a treating physician at the general hospital, it would seem that the physician would refer the patient to a facility less than two hours driving time away despite the hardship to the families and any continuity of care issue. Perhaps the physicians are making the judgment that contact with the patients family provides therapeutic value outweighed by

LTCH services but any such contention was neither advanced nor proven in this case. Quite simply, there is inadequate data in this proceeding to reach any of the conclusions Select-Marion advances as the basis for why potential LTCH patients in Polk County are not utilizing the Kindred beds available elsewhere in the district.

82. The testimony of Select-Marion's Health Care Planner, in essence, is that if access were not a problem, then Polk County patients in need of LTCH services would utilize the beds in an adjacent county less than two hours driving time away. This straightforward assertion, as obvious as it may be, is not enough data, however, to explain the underlying reason for why Polk County patients in need of LTCH services choose to go without such services rather than to make use of the beds available in the health services planning district or to justify a conclusion in the context of a CON proceeding that access is a problem.

83. Without better data than that offered in this case for justifying a problem of access by potential LTCH Polk County patients to LTCH beds available elsewhere in the district, this case appears to support the fears consistently expressed by AHCA since LTCH applications increased in the last few years. Beds are available but not used; concerns for family hardship and physician reluctance, in the context of the data offered in this

case, indicate that LTCH services may not be as valued as they have appeared to be in other cases or as some of the rest of the evidence in this case suggests. The internal inconsistency in Select-Marion's case should defeat its application.

84. Aside from the internal inconsistency in Select-Marion's case, there is a legal impediment to departing from the Agency's approach to bed need on a district basis, rather than the Polk County "sub-district" approach used by Select-Marion in its need methodology. Select-Marion has the burden of proof in this case. It has not met it.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Agency for Health Care Administration deny CON 9710 filed by Select Specialty-Marion, Inc.

DONE AND ENTERED this 31st day of October, 2005, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October, 2005.

ENDNOTES

1/ The Medicare Payment Advisory Commission ("MedPAC") is an independent federal body established by the Balanced Budget Act of 1997 (P.L. 105-33) to advise the U.S. Congress on issues affecting the Medicare program. The Commission's statutory mandate is quite broad: In addition to advising the Congress on payments to private health plans participating in Medicare and providers in Medicare's traditional fee-for-service program, MedPAC is also tasked with analyzing access to care, quality of care, and other issues affecting Medicare.

2/ Depositions of physicians were introduced into evidence by Select-Marion. See Select Exhibits 8 and 9. These two depositions support Ms. Greenberg's testimony that the distance between Winter Haven hospitals and the Hillsborough LTCHs are both problematic for the families of patients and for referring physicians and caused concerns about the disruption of continuity of care. See Select Ex. 8, Deposition of Christopher Lopez, M.D., pgs. 9 and 12 and Select Ex. 9, Deposition of Jose Martinez-Salas, M.D., pgs. 13, 14, and 17. Dr. Martinez-Salas also offered that, on occasion, there were legal impediments to patients receiving needed LTCH services and that Kindred, on occasion, refused to accept patients "for one reason or another . . . ." Id., p. 14. Elizabeth Starling's deposition, Select Ex. 10, generally supported this same line of testimony.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.