STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNIVERSITY COMMUNITY HOSPITAL, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent, and HEALTHSOUTH OF LARGO LIMITED PARTNERSHIP, d/b/a HEALTHSOUTH REHABILITATION HOSPITAL OF LARGO, Intervenor.	)	Case No. 04-3133CON
BAYCARE LONG TERM ACUTE CARE, INC., Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent, and HEALTHSOUTH OF LARGO LIMITED PARTNERSHIP, d/b/a HEALTHSOUTH REHABILITATION HOSPITAL OF LARGO, AND KINDRED HOSPITALS EAST, LLC, Intervenors.	)	Case No. 04-3156CON

UNIVERSITY COMMUNITY HOSPITAL, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION AND BAYCARE LONG TERM ACUTE CARE, INC., Respondents, and HEALTHSOUTH OF LARGO LIMITED PARTNERSHIP, d/b/a HEALTHSOUTH REHABILITATION HOSPITAL OF LARGO, Intervenor.	)	Case No. 04-3157CON

RECOMMENDED ORDER

This cause came on for formal hearing before William R. Pfeiffer, Administrative Law Judge with the Division of Administrative Hearings, on November 29 and 30, 2004, and on December 1-3, 6 and 7, 2004, in Tallahassee, Florida. Subsequent to the submissions of Proposed Recommended Orders, the case was assigned to Administrative Law Judge Harry L. Hooper.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether BayCare Long Term Acute Care Hospital, Inc.'s Certificate of Need Application No. 9753 and University Community Hospital's Certificate of Need Application No. 9754,

both submitted to the Agency for Health Care Administration, should be approved.

PRELIMINARY STATEMENT

In an application dated March 10, 2004, BayCare Long Term Acute Care, Inc. (BayCare), submitted a Certificate of Need (CON) application to the Agency for Health Care Administration (the Agency) seeking approval to establish a new long-term acute care hospital (LTCH). In an application dated April 14, 2004, University Community Hospital, Inc. (UCH), also a submitted a Certificate of Need (CON) application to the Agency for Health Care Administration seeking approval to establish a new long-term acute care hospital. The applications sought permission to establish these LTCHs in the Agency's Health Planning District 5 (District 5). On June 10, 2004, the Agency issued a State Agency Action Report (SAAR) preliminarily denying both applications.

Both applications were filed in the First Hospital Beds and Facilities Batching Cycle of 2004.

On July 16, 2004, a Petition for Formal Administrative Hearing, which became DOAH Case No. 04-3157CON, was filed by UCH naming both the Agency and BayCare, as Respondents. On August 17, 2004, UCH filed a Petition for Formal Administrative Hearing naming only the Agency as Respondent, and this became DOAH Case No. 04-3133CON. Both petitions were filed with the

Division of Administrative Hearings (DOAH) on September 2, 2004. On the same date, Kindred Hospitals East, LLC (Kindred), an existing LTCH in District 5, filed a Petition for Leave to Intervene.

On July 15, 2004, BayCare filed a Petition for Formal Administrative Hearing, naming the Agency as Respondent, and it was filed with DOAH as Case No. 04-3156CON on September 2, 2004. On that same date, Kindred filed a Petition for Leave to Intervene.

On September 23, 2004, Case Nos. 04-3156CON and 04-3157CON were consolidated and on October 13, 2004, Case No. 04-3133CON was joined. On September 17, 2004, HealthSouth of Largo Limited Partnership, a Comprehensive Medical Rehabilitation hospital (CMR), filed an Amended Petition to Intervene and was granted intervention on Oct 13, 2004. The Order Granting Petition to Intervene reserved ruling on Kindred's Petitions for Leave to Intervene. Ultimately, Kindred was permitted to intervene.

On November 3, 2004, Kindred, and on November 29, 2004, HealthSouth, withdrew their Petitions to Intervene in the UCH cases. Thus, the final alignment of the parties resulted in only the Agency contesting UCH's application while Kindred, HealthSouth, the Agency, and UCH opposed BayCare's application. UCH's opposition to BayCare's application was not vigorous.

At the hearing, UCH presented the testimony of nine witnesses and offered Exhibit Nos. 1 through 34, which were received into evidence. The depositions of seven witnesses were offered and received into evidence.

BayCare presented the testimony of nine witnesses and offered Exhibit Nos. 1 through 24, which were received into evidence. The depositions of seven witnesses were offered and received into evidence.

HealthSouth presented the testimony of two witnesses and offered Exhibit Nos. 1 through 3, which were received into evidence. The deposition testimony of one witness was received into evidence.

Kindred presented the testimony of one witness and offered Exhibit Nos. 1 through 4, which were received into evidence.

The Agency presented the testimony of one witness and offered Exhibit Nos. 1 and 2, which were received into evidence.

All parties entered into a Joint Stipulation that was received into evidence as Joint Exhibit No. 1.

A Transcript was filed on February 1, 2005. After orders granting enlargements of time for filing Proposed Recommended Orders, all parties timely filed their Proposed Recommended Orders on May 23, 2005, and they were considered in the preparation of this Recommended Order.

The parties agreed that the case should be decided pursuant to the law contained in Florida Statutes (2004) and any statutes cited are to that law unless otherwise noted.

FINDINGS OF FACT

LTCHs defined

1. An LTCH is a medical facility which provides extended medical and rehabilitation care to patients with multiple, chronic, or clinically complex acute medical conditions. These conditions include, but are not limited to, ventilator dependency, tracheotomy care, total parenteral nutrition, long-term intravenous anti-biotic treatment, complex wound care, dialysis at bedside, and multiple systems failure.

2. LTCHs provide an interdisciplinary team approach to the complex medical needs of the patient. LTCHs provide a continuum of care between short-term acute care hospitals and nursing homes, skilled nursing facilities (SNFs), or comprehensive medical rehabilitation facilities. Patients who have been treated in an intensive acute care unit at a short-term acute care hospital and who continue to require intensive care once stabilized, are excellent candidates for care at an LTCH.

3. Included in the interdisciplinary approach is the desired involvement of the patient's family. A substantial number of the patients suitable for treatment in an LTCH are in excess of 65 years of age, and are eligible for Medicare.

4. Licensure and Medicare requirements dictate that an LTCH have an average length of stay (ALOS) of 25 days. The Center for Medicare and Medicaid Services (CMS) reimburses for care received through the prospective payment system (PPS). Through this system, CMS reimburses the services of LTCHs separately from short-term acute care providers and other post acute care providers. The reimbursement rate for an LTCH under PPS exceeds that of other providers. The reimbursement rate for an LTCH is about twice that of a rehabilitation facility. The increased reimbursement rate indicates the increased cost due to the more intensive care required in an LTCH.

The Agency

5. The Agency is a state agency created pursuant to Section 20.42. It is the chief health policy and planning entity for the State of Florida. The Agency administers the Health Facility and Services Development Act found at Sections 408.031-408.045. Pursuant to Section 408.034, the Agency is designated as the single state Agency to issue, revoke, or deny certificates of need.

6. The Agency has established 11 health service planning districts. The applications in this case are for facilities in District 5, which comprises Pinellas and Pasco counties.

UCH

7. UCH is a not-for-profit organization that owns and operates a 431-bed tertiary level general acute care hospital and a 120-bed acute care general hospital. Both are located in Hillsborough County. UCH also has management responsibilities and affiliations to operate Helen Ellis Hospital, a 300-bed hospital located in Tarpon Springs, and manages the 300-bed Suncoast Hospital. Both of these facilities are in Pinellas County. UCH also has an affiliation to manage the open heart surgery program at East Pasco Medical Center, a general acute care hospital located in Pasco County.

8. As a not-for-profit organization, the mission of UCH is to provide quality health care services to meet the needs of the communities where it operates regardless of their patients' ability to pay.

Baycare

9. BayCare is a wholly-owned subsidiary of BayCare Healthsystems, Inc. (BayCare Systems). BayCare Systems is a not-for-profit entity comprising three members that operate Catholic Health East, Morton Plant Mease Healthcare, and South Florida Baptist. The facilities owned by these organizations are operated pursuant to a Joint Operating Agreement (JOA) entered into by each of the participants.

10. BayCare Systems hospitals include Morton Plant Hospital, a 687-bed tertiary level facility located in Clearwater, Pinellas County; St. Joseph's Hospital, an 887-bed tertiary level general acute care hospital located in Tampa, Hillsborough County; St. Anthony's Hospital, a 407-bed general acute care hospital located in St. Petersburg, Pinellas County; and Morton Plant North Bay, a 120-bed hospital located in New Port Richey, Pasco County.

11. Morton Plant Mease Health Care is a partnership between Morton Plant Hospital and Mease Hospital. Although Morton Plant Mease Healthcare is a part of the BayCare System, the hospitals that are owned by the Trustees of Mease Hospital, Mease Hospital Dunedin, and Mease Hospital Countryside, are not directly members of the BayCare System and are not signatories to the JOA.

HealthSouth

12. HealthSouth is a national company with the largest market share in inpatient rehabilitation. It is also a large provider of ambulatory services. HealthSouth has about 1,380 facilities across the nation. HealthSouth operates nine LTCHs. The facility that is the Intervenor in this case is a CMR located in Largo, Pinellas County.

Kindred

13. Kindred, through its parent company, operates LTCH facilities throughout Florida and is the predominant provider of LTCH services in the state. In the Tampa Bay area, Kindred operates three LTCHs. Two are located in Tampa and one is located in St. Petersburg, Pinellas County.

14. The currently operating LTCH in District 5 that may be affected by the CON applications at issue is Kindred-St. Petersburg. Kindred-St. Petersburg is a licensed 82-bed LTCH with 52 private beds, 22 semi-private beds, and an 8-bed intensive care unit. It operates the array of services normally offered by an LTCH. It is important to note that Kindred-St. Petersburg is located in the far south of heavily populated District 5.

The Applications

15. UCH proposes a new freestanding LTCH which will consist of 50 private rooms and which will be located in Connerton, a new town being developed in Pasco County. UCH's proposal will cost approximately $16,982,715. By agreement of the parties, this cost is deemed reasonable.

16. BayCare proposes a "hospital within a hospital" LTCH that will be located within Mease Hospital-Dunedin. The LTCH will be located in an area of the hospital currently used for obstetrics and women's services. The services currently

provided in this area will be relocated to Mease Hospital-Countryside. BayCare proposes the establishment of 48 beds in private and semi-private rooms.

Review criteria which was stipulated as satisfied by all parties

17. Section 408.035(1)-(9) sets forth the standards for granting certificates of need. The parties stipulated to satisfying the requirements of subsections (3) through (9) as follows.

> a. With regard to subsection (3), 'The ability of the applicant to provide quality of care and the applicant's record of providing quality of care,' all parties stipulated that this statutory criterion is not in dispute and that both applicants may be deemed to have satisfied such criteria.
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> b. With regard to subsection (4), 'The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation,' it was stipulated that both applicants have all resources necessary in terms of both capital and staff to accomplish the proposed projects, and therefore, both applicants satisfy this requirement.
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> c. With regard to subsection (5), 'The extent to which the proposed services will enhance access to health care for residents of the service district,' it was stipulated that both proposals will increase access. Currently there are geographic, financial and programmatic barriers to access in District 5. The only extant LTCH is located in the southernmost part of District 5.

d. With regard to subsection (6), 'The immediate and long-term financial feasibility of the proposal,' the parties stipulated that UCH satisfied the criterion. With regard to BayCare, it was stipulated that its proposal satisfied the criterion so long as BayCare can achieve its utilization projections and obtain Medicare certification as an LTCH and thus demonstrate short-term and long-term feasibility. This issue will be addressed below.

e. With regard to subsection (7), 'The extent to which the proposal will foster competition that promotes quality and cost-effectiveness,' the parties stipulated that approval of both applications will foster competition that will promote quality and cost effectiveness. The only currently available LTCH in District 5, unlike BayCare and UCH, is a for-profit establishment.

f. With regard to subsection (8), 'The costs and methods of the proposed construction, including the costs and methods of energy provision and the availability of alternative, less costly, or more effective methods of construction,' the parties stipulated that the costs and methods of construction for both proposals are reasonable.

g. With regard to subsection (9), 'the applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent,' it was stipulated that both UCH and BayCare have a demonstrated history and a commitment to providing services to Medicaid, Medicaid HMO, self-pay, and underinsured payments. Technically, of course, BayCare has no history at all. However, its sponsors do, and it is they that will shape the mission for BayCare.

BayCare's Medicare certification as an LTCH

18. The evidence of record demonstrates that BayCare can comply with Medicare reimbursement regulations and therefore can achieve its utilization projections and obtain Medicare certification as an LTCH. Thus short-term and long-term feasibility is proven.

19. Because BayCare will be situated as a hospital within a hospital, in Mease Hospital Dunedin, and because there is a relationship between that hospital and BayCare Systems, Medicare reimbursement regulations limit to 25 percent the number of patients that may be acquired from Mease Hospital Dunedin or from an organization that controls directly or indirectly the Mease Hospital Dunedin.

20. Because of this limitation, it is, therefore, theoretically possible that the regulator of Medicare payments, CMS, would not allow payment where more than 25 percent of admissions were from the entire BayCare System. Should that occur it would present a serious but not insurmountable problem to BayCare. BayCare projects that 21 percent of its admissions will come from Mease Hospital Dunedin and the rest will come from other sources.

21. BayCare is structured as an independent entity with an independent board of directors and has its own chief executive officer. The medical director and the medical staff will be

employed by the independent board of directors. Upon the greater weight of the evidence, under this structure, BayCare is a separate corporate entity that neither controls, nor is controlled by, BayCare Systems or any of its entities or affiliates.

22. One must bear in mind that because of the shifting paradigms of federal medical regulation, predictability in this regard is less than perfect. However, the evidence indicates that CMS will apply the 25 percent rule only in the case of patients transferring to BayCare from Mease Hospital Dunedin. Most of the Medicare-certified LTCHs in the United States operate as hospitals within hospitals. It is apparent, therefore, that adjusting to the CMS limitations is something that is typically accomplished.

23. BayCare will lease space in Mease Hospital Dunedin which will be vacated by it current program. BayCare will contract with Mease Hospital Dunedin for services such as laboratory analysis and radiology. This arrangement will result in lower costs, both in the short term and in the long term, than would be experienced in a free-standing facility, and contributes to the likelihood that BayCare is feasible in the short term and long term.

Criteria related to need

24. The contested subsections of Section 408.035 not heretofore addressed, are (1) and (2). These subsections are illuminated by Florida Administrative Code Rule 59C-1.008(2)(e)2., which provides standards when, as in this case, there is no fixed-need pool.

25. Florida Administrative Code Rule 59C-1.008(2)(e)2., provides as follows:

> 2. If no agency policy exists, the applicant will be responsible for demonstrating need through a needs assessment methodology which must include, at a minimum, consideration of the following topics, except where they are inconsistent with the applicable statutory or rule criteria:
>
> 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.

Population Demographics and Dynamics

26. The applicants presented an analysis of the population demographics and dynamics in support of their applications in District 5. The evidence demonstrated that the population of District 5 was 1,335,021 in 2004. It is anticipated that it will grow to 1,406,990 by 2009. The projected growth rate is

5.4 percent. The elderly population in the district, which is defined as persons over the age of 65, is expected to grow from 314,623 in 2004, to 340,676, in 2009, which represents an 8.3 percent increase.

BayCare

27. BayCare's service area is defined generally by the geographic locations of Morton Plant Hospital, Morton Plant North Bay Hospital, St. Anthony's Hospital, Mease Hospital Dunedin, and Mease Hospital Countryside. These hospitals are geographically distributed throughout Pinellas County and southwest Pasco County and are expected to provide a base for referrals to BayCare.

28. There is only one extant LTCH in Pinellas County, Kindred, and it is located in the very southernmost part of this densely populated county. Persons who become patients in an LTCH are almost always moved to the LTCH by ambulance, so their movement over a long distance through heavy traffic generates little or no problem for the patient. Accordingly, if patient transportation were the only consideration, movement from the north end of the county to Kindred in the far south, would present no problem.

29. However, family involvement is a substantial factor in an interdisciplinary approach to addressing the needs of LTCH patients. The requirement of frequent movement of family

members from northern Pinellas to Kindred through congested traffic will often result in the denial of LTCH services to patients residing in northern Pinellas County or, in the alternative, deny family involvement in the interdisciplinary treatment of LTCH patients.

30. Approximately 70 letters requesting the establishment of an LTCH in northern Pinellas County were provided in BayCare's application. These letters were written by medical personnel, case managers and social workers, business persons, and government officials. The thread common to these letters was, with regard to LTCH services, that the population in northern Pinellas County is underserved.

UCH

31. Pasco County has experienced a rapid population growth. It is anticipated that the population will swell to 426,273, in 2009, which represents a 10.1 percent increase over the population in 2004.

32. The elderly population accounts for 28 percent of the population. This is about 50 percent higher than Florida as a whole.

33. Rapid population growth in Pasco County, and expected future growth, has resulted in numerous new housing developments including Developments of Regional Impact (DRI). Among the approved DRI's is the planned community of Connerton, which has

been designated a "new town" in Pasco County's Comprehensive Plan. Connerton is a planned community of 8,600 residential units. The plan includes space for a hospital and UCH has negotiated for the purchase of a parcel for that purpose within Connerton.

34. The rate of growth, and the elderly population percentages, will support the proposed UCH LTCH and this is so even if BayCare establishes an LTCH in northern Pinellas County.

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

35. The Agency has not established sub-districts for LTCHs.

36. As previously noted, Kindred is the only LTCH extant in District 5. It is a for-profit facility. Kindred was well utilized when it had its pediatric unit and added 22 additional beds. Subsequently, in October 2002, some changes in Medicare reimbursement rules resulted in a reduction of the reimbursement rate. This affected Kindred's income because over 70 percent of its patients are Medicare recipients. Kindred now uses admission criteria that have resulted in a decline in patient admissions.

37. From 1998, the year after Kindred was established, until 2002, annual utilization was in excess of 90 percent.

Thereafter, utilization has declined, the 22-bed addition has been shut down, and Kindred projects an occupancy of 55 percent in 2005.

38. Kindred must make a profit. Therefore, it denies access to a significant number of patients in District 5. It denies the admission of patients who have too few "Medicare-reimbursable days" or "Medicaid-reimbursable days" remaining. The record indicates that Kindred only incurs charity care or Medicaid patient days when a patient admitted to Kindred with seemingly adequate funding unexpectedly exhausts his or her funding prior to discharge.

39. Because of the constraints of PPS, Kindred has established admission criteria that excludes certain patients with conditions whose prognosis is so uncertain that it cannot adequately predict how long they will require treatment. Kindred's availability to potential patients is thus constrained.

40. HealthSouth, a licensed CMR, is not a substitute for an LTCH. Although it is clear that there is some overlap between a CMR and an LTCH, HealthSouth, for instance, does not provide inpatient dialysis, will not accept ventilator patients, and does not treat complex wound patients.

41. The nurse staffing level at HealthSouth is inadequate to provide for the type of patient that is eligible for

treatment in an LTCH. The fact that LTCHs are reimbursed by Medicare at approximately twice the rate that a CMR is reimbursed, demonstrates the higher acuity level of LTCH services when compared to a CMR.

42. HealthSouth is a facility which consistently operates at high occupancy levels and even if it were capable of providing the services typical of an LTCH, it would not have sufficient capacity to provide for the need.

43. A CMR is a facility to which persons who make progress in an LTCH might repair so that they can return to the activities of daily living.

44. SNFs are not substitutes for LTCHs although there could be some limited overlap. SNFs are generally not appropriate for patients otherwise eligible for the type of care provided by an LTCH. They do not provide the range of services typically provided by an LTCH and do not maintain the registered nurse staffing levels required for delivering the types of services needed for patients appropriate for an LTCH.

45. LTCHs are a stage in the continuum of care. Short-term acute care hospitals take in very sick or injured patients and treat them. Thereafter, the survivors are discharged to home, or to a CMR, or to a SNF, or, if the patients are still acutely ill but stable, and if an LTCH is available, to an LTCH.

As noted above, currently in northern Pinellas County and in Pasco County, there is no reasonable access to an LTCH.

46. An intensive care unit (ICU) is, ideally, a treatment phase that is short. If treatment has been provided in an ICU and the patient remains acutely ill but stable, and is required to remain in the ICU because there is no alternative, greater than necessary costs are incurred.

47. Staff in an ICU are not trained or disposed to provide the extensive therapy and nursing required by patients suitable for an LTCH and are not trained to provide support and training to members of the patient's family in preparation for the patient's return home.

48. The majority of patients suitable for an LTCH have some potential for recovery. This potential is not realized in an ICU, which is often counterproductive for patients who are stabilized but who require specialized long-term acute care. Patients who remain in an ICU beyond five to seven days have an increased morbidity/mortality rate.

49. Maintaining patients suitable for an LTCH in an ICU also results in over-utilization of ICU services and can cause congestion when ICU beds are fully occupied.

50. UCH in Pasco County, and to a lesser extent BayCare in northern Pinellas County, will bring to the northern part of District 5 services which heretofore have not been available in

the district, or, at least, have not been readily available. Persons in Pasco County and northern Pinellas County, who would benefit from a stay in an LTCH, have often had to settle for some less appropriate care situation.

Medical Treatment Trends

51. LTCHs are relatively new cogs in the continuum of care and the evidence indicates that they will play an important role in that continuum in the future.

52. The evidence of record demonstrates that the current trend in medical treatment is to find appropriate post acute placements in an LTCH setting for those patients in need of long-term acute care beyond the stay normally experienced in a short-term acute care hospital.

Market conditions

53. The federal government's development of the distinctive PPS for LTCHs has created a market condition which is favorable for the development of LTCH facilities.

54. Although the Agency has not formally adopted by rule a need methodology specifically for LTCHs, by final order it has recently relied upon the "geometric mean length of stay + 7" (GMLOS +7) need methodology. The GMLOS +7 is a statistical calculation used by CMS in administering the PPS reimbursement system in determining an appropriate reimbursement for a particular "diagnostic related group" (DRG).

55. Other need methodologies have been found to be unsatisfactory because they do not accurately reflect the need for LTCH services in areas where LTCH services are not available, or where the market for LTCH services is not competitive. GMLOS +7 is the best analysis the Agency has at this point. Because the population for whom an LTCH might be appropriate is unique, and because it overlaps with other populations, finding an algebraic need expression is difficult. An acuity measure would be the best marker of patient appropriateness, but insufficient data are available to calculate that.

56. BayCare's proposal will provide beneficial competition for LTCH services in District 5 for the first time and will promote geographic, financial, and programmatic access to LTCH services.

57. BayCare, in conducting its need calculations used a data pool from Morton Plant Hospital, Mease Dunedin Hospital, Mease Countryside Hospital, Morton Plant North Bay Hospital, and St. Anthony's Hospital for the 12 months ending September 2003. The hospitals included in the establishment of the pool are hospitals that would be important referral sources for BayCare.

58. BayCare then identified 160 specific DRGs historically served by existing Florida LTCHs, or which could have been served by Florida LTCHs, and lengths of stay greater than the

GMLOS for acute care patients, and compared them to the data pool. This resulted in a pool of 871 potential patients. The calculation did not factor in the certain growth in the population of the geographic area, and therefore the growth of potential LTCH patients.

59. BayCare then applied assumptions based on the proximity of the referring hospitals to the proposed LTCH to project how many of the patients eligible for LTCH services would actually be referred and admitted to the proposed LTCH. That exercise resulted in a projected potential volume of 20,265 LTCH patient days originating just from the three District 5 BayCare hospitals and the two Mease hospitals.

60. BayCare assumes, and the assumption is found to be reasonable, that 25 percent of their LTCH volume will originate from facilities other than BayCare or Mease hospitals. Adding this factor resulted in a total of 27,020 patient days for a total net need of 82 beds at 90 percent occupancy.

61. BayCare's GMLOS +7 bed need methodology reasonably projects a bed need of 82 beds based on BayCare's analysis of the demand arising from the three District 5 BayCare hospitals and the two Mease hospitals.

62. UCH provided both a GMLOS +7 and a use rate analysis. The use rate analysis is suspect in a noncompetitive environment and, obviously, in an environment where LTCHs do not exist.

UCH's GMLOS +7 analyses resulted in the identification of a need for 159 additional LTCH beds in District 5. This was broken down into a need of 60 beds in Pasco County and 99 additional beds in Pinellas County.

63. There is no not-for-profit LTCH provider in District 5. The addition of BayCare and UCH LTCHs to the district will meet a need in the case of Medicaid, indigent, and underinsured patients. Both BayCare and UCH have agreed in their applications to address the needs of patients who depend on Medicaid, or who are indigent, or who have private insurance that is inadequate to cover the cost of their treatment.

64. The statistical analyses provided by both applicants support the proposed projects of both applicants.

65. Testimony from doctors who treat patients of the type who might benefit from an LTCH testified that those types of facilities would be utilized. Numerous letters from physicians, nurses, and case managers support the need for these facilities.

Adverse impacts

66. HealthSouth and Kindred failed to persuade that BayCare's proposal will adversely impact them. HealthSouth provides little of the type of care normally provided at an LTCH. Moreover, HealthSouth is currently operating near capacity.

67. Kindred is geographically remote from BayCare's proposed facility, and, more importantly, remote in terms of travel time, which is a major consideration for the families of patients. Kindred did not demonstrate that it was currently receiving a large number of patients from the geographic vicinity of the proposed BayCare facility, although it did receive some patients from BayCare Systems facilities and would likely lose some admissions if BayCare's application is approved. The evidence did not establish that Kindred would suffer a material adverse impact should BayCare establish an LTCH in Mease Dunedin Hospital. HealthSouth and Kindred conceded that UCH's program would not adversely impact them.

The Agency's Position

68. The Agency denied the applications of BayCare and UCH in the SAARs. At the time of the hearing the Agency continued to maintain that granting the proposals was inappropriate.

69. The Agency's basic concern with these proposals, and in fact, the establishments of LTCHs throughout the state, according to the Agency's representative Jeffrey N. Gregg, is the oversupply of beds. The Agency believes it will be a long time before it can see any measure of clinical efficiency and whether the LTCH route is the appropriate way to go. The Agency

has approved a number of LTCHs in recent years and is studying them in order to get a better understanding of what the future might hold.

70. The Agency noted that the establishment of an LTCH by ongoing providers, BayCare Systems and UCH, where there are extant built-in referring facilities, were more likely to be successful than an out-of-state provider having no prior relationships with short-term acute care hospitals in the geographic vicinity of the LTCH.

71. The Agency noted that both a referring hospital and an LTCH could benefit financially by decompressing its intensive care unit, and thus maximizing their efficiency.

72. The Agency did not explain how, if these LTCHs are established, a subsequent failure would negatively affect the delivery of health services in District 5.

73. The Agency, when it issued its SAAR, did not have the additional information which became available during the hearing process.

CONCLUSIONS OF LAW

74. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) and 408.039(5), Fla. Stat.

75. The applicants have the burden of proving entitlement to a CON. Boca Raton Artificial Kidney Ctr., Inc. vs. Dept. of

Health and Rehabilitative Services, 475 So. 2d 260 (Fla. 1st DCA 1985). The award of a CON must be based on a balanced consideration of all applicable statutory and rule criteria. Humana, Inc. vs. Department of Health and Rehabilitative Services, 469 So. 2d 889 (Fla. 1st DCA 1985). The weight to be given each criterion is not fixed, but depends on the facts and circumstances of each case. Collier Medical Center, Inc. vs. Dept. of Health and Rehabilitative Services, 462 So. 2d 83 (Fla. 1st DCA 1985).

76. The CON criteria set forth in Section 408.035, with the exception of Section (10) are applicable to the proposed LTCHs. The parties stipulated to all of the subsections except (1), (2), and the portion of (6) that addresses the long-term feasibility issue of whether BayCare's proposal is consistent with federal reimbursement requirements. Therefore the only real issue presented for final determination is whether the applicants demonstrated need for their proposals in the absence of a published numeric need, and whether approval of their proposals will enhance access and foster competition that promotes quality and cost effectiveness.

77. The requirements set forth in Florida Administrative Code Rules 59C-1.002(28), 59C-1.030, and 59C-1.008 are applicable, as previously discussed, and no fixed need pool is provided by the Agency for LTCH beds.

78. As previously discussed, the criteria for deciding this issue are provided in Section 408.035 as illuminated by Florida Administrative Code Rule 59C-1.008(2)(e)2. The criteria were satisfied by both applicants.

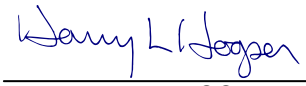
79. The applicants utilized bed need methodologies that have been accepted as reasonable in Select Specialty Hospital-Marion, Inc. vs. AHCA, et al., Case No. 03-2483CON (DOAH July 14, 2005),(AHCA Final Order, September 17, 2004) and Select Specialty Hospital-Escambia, Inc. vs. AHCA, Case No. 05-0319CON (DOAH June 17, 2005), (AHCA Final Order, July 11, 2005).

RECOMMENDATION

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

RECOMMENDED that UCH Certificate of Need Application No. 9754 and BayCare Certificate of Need Application No. 9753 satisfy the applicable criteria and both applications should be approved.

DONE AND ENTERED this 29th day of November, 2005, in Tallahassee, Leon County, Florida.



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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.