STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PROMISE HEALTHCARE, INC.,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
SELECT SPECIALTY HOSPITAL-ORLANDO, INC.,	)	
	)	
Intervenor,	)	
	)	
vs.	)	Case No. 07-3403RP
	)	
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
SELECT SPECIALTY HOSPITAL-ORLANDO, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-3404RP
	)	
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

SUMMARY FINAL ORDER

This case involves a challenge to a proposed rule and is resolved based upon consideration of motions for summary final order filed on behalf of Petitioners, Promise Healthcare, Inc. (Promise) and Select Specialty Hospital-Orlando, Inc. (Select) and the Agency for Health Care Administration (Agency or AHCA).

Petitioners contend that proposed rule 59C-1.002(41)(i) (proposed rule) is an invalid exercise of delegated legislative authority because the proposed rule enlarges and contravenes the specific provisions of the law implemented and the services provided by long-term care hospitals (LTCHs) are not the types of services which can be reasonably considered to be tertiary health services as defined in Section 408.032(17), Florida Statutes. The Agency contends that long-term care hospital services provided within long-term care hospitals are tertiary health services and, as a result, the proposed rule is valid.

The parties agree there are no genuine issues as to any material fact for resolution and that entry of a summary final order is appropriate. See § 120.57(1)(h), Fla. Stat.

APPEARANCES

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PRELIMINARY STATEMENT

The proposed rule was published in the June 8, 2007, edition of the Florida Administrative Weekly in Volume 33, Number 23. The proposed rule is numbered 59C-1.002(41)(i) and includes "Long-term care hospitals" within the definition of "tertiary health service."

On July 23, 2007, Promise filed a Petition to Determine Invalidity of Proposed Rule. On July 24, 2007, Select filed a Petition to Determine Invalidity of Proposed Rule.

On August 23, 2007, Select filed a Petition to Intervene in Case No. 07-3403RP, which was granted.

After an unopposed continuance was granted, the final hearing was scheduled for January 9-10, 2008, and then re-scheduled without objection for January 10-11, 2008. Thereafter, the matter was placed in abeyance by agreement of the parties until the parties advised that the matter should be re-scheduled for final hearing. The final hearing was re-scheduled to commence on November 5, 2008.

During a pre-hearing conference held on June 3, 2008, the parties suggested that the proposed rule should be read to mean long-term care hospital services within long-term care hospitals for the purpose of determining whether the proposed rule is invalid. The parties advised that they would be offering evidence during the final hearing on the issue of whether long-term care hospital services within long-term care hospitals are a tertiary health service.

By Order dated July 11, 2008, the parties were requested to respond in writing to the following issues: "In this proceeding involving a facial challenge to the proposed rule, are the parties and the undersigned restricted to consideration of the written language in the proposed rule or, as suggested, not so restricted? Is an evidentiary hearing required if consideration is limited to the proposed rule? If an evidentiary hearing is not required, can the issues raised in the petitions be determined on cross-motions for summary final order pursuant to Section 120.57(1)(h), Florida Statutes, see generally Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001)?"

On July 28, 2008, the Agency responded, advising in part, that an evidentiary hearing was not required given the Petitioners facial challenge to the proposed rule. The Agency requested leave to file a motion for summary final order.

On July 28, 2008, Petitioners filed a response to the July 11, 2008, Order; a Motion for Summary Final Order, with attachments; and a Notice of Filing, with a copy of the deposition of Jeffrey N. Gregg taken December 18, 2007, and an affidavit of Michael J. Kornblatt dated July 18, 2008. Petitioners also requested that judicial notice (official recognition) be taken of Chapter 2004-383, Laws of Florida, and a House of Representatives Staff Analysis, February 17, 2004.

On August 27, 1008, the parties filed a document entitled Joint Stipulated Facts setting forth stipulated undisputed facts. On September 2, 2008, the parties filed an Amended Joint Stipulation of Facts (AJSF), which included the party's positions. The stipulated facts have been incorporated in the Findings of Fact.

On September 5, 2008, the Agency filed a Motion for Summary Final Order, which included an affidavit of Jeffrey N. Gregg, the Bureau Chief of the Health Facility Regulation Bureau, Health Quality Assurance Division, of AHCA. Several exhibits are attached to the affidavit, which "summarize the research, the rationale, and the reasoning used by the Agency in promulgating" the proposed rule.

On September 12, 2008, the Agency filed a response to Petitioners' Motion for Summary Final Order and on September 18,

2008, Petitioners filed a response to the Agency's Motion for Summary Final Order.

Official recognition is taken of the two documents attached to Petitioners' motion. See §§ 120.569(2)(i) and 120.57(1)(f), Fla. Stat.

FINDINGS OF FACT

Parties

1. The Agency is statutorily responsible for administering the Certificate of Need (CON) program and the promulgation of rules pertaining to tertiary health services.

2. Promise Healthcare, Inc., is located at 999 Yamato Road, Third Floor, Boca Raton, Florida. Promise's wholly-owned subsidiary, Promise Healthcare of Florida III, Inc., has received approval to construct and operate an LTCH in AHCA Health Service Planning District (District) 3. See Promise Healthcare of Florida III, Inc. v. State of Florida, Agency for Health Care Administration, Case No. 06-0568CON (DOAH April 10, 2008; AHCA May 16, 2008).

3. Select owns and operates an LTCH in Orlando, Florida, within District 7.

4. Petitioners related corporations are currently and have been applicants in proceedings before the Division of Administrative Hearings (DOAH) seeking to establish LTCHs in the State of Florida. Id. See also Select Specialty Hospital -

Marion, Inc. v. State of Florida, Agency for Health Care Administration, Case No. 04-3150CON (DOAH July 11, 2006; AHCA Sept. 23, 2006); Select Specialty Hospital - Broward, Inc. v. Agency for Health Care Administration, Case No. 07-0597CON and Promise Healthcare of Florida X, Inc. v. Agency for Health Care Administration, Case No. 07-0598CON (Consolidated).

The Proposed Rule

5. In December 2005 and September 2006, the Agency published separate notices of proposed rule development proposing to include long-term care hospitals within the rule definition of tertiary health service.

6. On June 8, 2007, the Agency published a copy of the proposed rule at issue in this proceeding in the Florida Administrative Weekly. The proposed rule is one of several proposed changes to Florida Administrative Code Rule 59C-1.002, providing definitions. The stated purpose and effect of the entire proposed rule changes to Rule 59C-1.002 is "to amend the rule that defines terms in Chapter 59C-1, F.A.C. due to recent statutory changes "

7. On July 13, 2007, a public hearing was held.

8. Proposed rule 59C-1.002(41)(i) provides: "'Tertiary health service' means a health service. . . . .The types of tertiary services to be regulated under the Certificate of Need

Program in addition to those listed in Florida Statutes include: . . . (i) Long-term care hospitals.

9. The Agency relies on Sections 408.034(6) and 408.15(8), Florida Statutes, as the specific authority for all of the changes to Rule 59C-1.002, including subsection(41)(i). All of the proposed rule changes implement Sections 408.033(1)(a), 408.036(1)-(3), 408.037(1), 408.039(1) and (2), and 651.118, Florida Statutes. See also endnote 3. ("'Law implemented' means the language of the enabling statute being carried out or interpreted by an agency through rulemaking." Ch. 2008-104, § 2, Laws of Fla.)

10. Section 408.034(6) authorizes the Agency to adopt rules necessary to implement Sections 408.031-408.045, known as the "Health Facility and Services Development Act." See also § 408.15(8), Fla. Stat., providing similar authority.

11. Section 408.033(1)(a) pertains to Local Health Councils.

12. Section 408.036(1)-(3) include projects that are subject to CON review, including expedited review, and projects that are exempt from CON review. (The new construction or establishment of additional health care facilities, which includes long-term care hospitals by definition, see Section 408.032(8), Florida Statutes, are subject to CON review.)

13. Section 408.037(1) pertains to CON application content.

14. Section 408.039(1) and (2) pertains to CON review cycles and letters of intent, respectively.

15. Section 651.118 pertains generally to the Agency's authority regarding nursing home beds and sheltered nursing home beds.

Statutory Definitions

16. "'Health services' means inpatient diagnostic, curative, or comprehensive medical rehabilitative services and includes mental health services. Obstetric services are not health services for purposes of ss. 408.031-408.045." § 408.032(9), Fla. Stat.

17. In 2004, the Legislature amended the definition of "health services" as follows: "'Health services' means inpatient diagnostic, curative, or comprehensive medical rehabilitative services and includes mental health services. Obstetrical services are not health services for purposes of ss. 408.031-408.045." Ch. 2004-383, § 2, Laws of Fla. (emphasis in original).

18. "'Health care facility' means a hospital, long-term care hospital. . . ." § 408.032(8), Fla. Stat.

19. "'Hospital' means a health care facility licensed under chapter 395." § 408.032(11), Fla. Stat.

20. "Hospital" is defined in Section 395.002(12), Florida Statutes. "'Hospital' means any establishment that" offers "services more intensive than those required for room, board, personal services, and general nursing care, and offers facilities and beds for use beyond 24 hours by individuals requiring diagnosis, treatment, or care for illness, injury, deformity, infirmity, abnormality, disease, or pregnancy. . . ." § 395.002(12)(a)-(b), Fla. Stat.

21. The parties stipulated that the Agency licenses LTCH facilities as Class 1 general hospitals.

22. Generally, a Class 1 general hospital is a "basic multipurpose hospital." Like Class 1 general hospitals, LTCHs are subject to CON review and approval prior to offering those services. Unlike a Class 1 general hospital, a Class I LTCH seeks exclusion from the acute care Medicare prospective payment system for inpatient services.

23. "'General hospital' means any facility which meets the provisions of subsection (12) and which regularly makes its facilities and service available to the general population." § 395.002(10), Fla. Stat. See also § 395.002(28), Fla. Stat. for a definition of "specialty hospital." For example, a freestanding children's hospital is classified as a Class 3 specialty hospital because it provides services to a specialized population related to gender or age. Comprehensive

rehabilitation hospitals are classified as Class 2 specialty hospitals. Gregg deposition at 35-39.

24. If a Class 1 general hospital desires to add a tertiary health service, such as pediatric cardiac catheterization, the hospital would need to obtain a CON.

25. Aside from LTCHs and perhaps some referral hospitals, the Agency believes a comprehensive inpatient rehabilitation facility is an example of a facility providing services that are high in intensity, complexity, or a specialized or limited application at a high cost associated with the Medicare program. Gregg deposition at 36-37.

26. The new construction or establishment of additional health care facilities, including an LTCH, is subject to CON review. § 408.036(1)(b), Fla. Stat.[1]

27. Conversions from one type of health care facility to another, including the conversion from a general hospital, a specialty hospital, or a long-term care hospital are also subject to CON review. § 408.036(1)(c), Fla. Stat. See endnote 5.

28. Also, unless exempt, all health care-related projects requesting "[t]he establishment of tertiary health services, including inpatient comprehensive rehabilitation services" are subject to CON review. § 408.036(1)(f), Fla. Stat.

29. An LTCH desiring to offer a tertiary health service is required to obtain a CON in order to provide the service.

30. LTCHs, like other general hospitals, can add additional beds without CON review by filing an appropriate notice with the Agency.

31. "'Long-term care hospital' means a hospital licensed under chapter 395 which meets the requirements of 42 C.F.R. s. 412.23(e)[2] and seeks exclusion from the acute care Medicare prospective payment system for inpatient hospital services." § 408.032(13), Fla. Stat. See also Fla. Admin. Code R. 59C-1.002(28), as amended, which mirrors the statutory definition.

32. In 2004, the Legislature amended the definition of long-term care hospital in Section 408.032(13), adding the terms "acute care" before "Medicare." Ch. 2004-383, § 2, Laws of Fla.[3]

33. "'Tertiary health service' means a health service which, due to its high level of intensity, complexity, specialized or limited applicability, and cost, should be limited to, and concentrated in, a limited number of hospitals to ensure the quality, availability, and cost-effectiveness of such service. Examples of such service include, but are not limited to, pediatric cardiac catheterization, pediatric open-heart surgery, organ transplantation, neonatal intensive care units, comprehensive rehabilitation, and medical or surgical services which are experimental or developmental in nature to

the extent that the provision of such services is not yet contemplated within the commonly accepted course of diagnosis or treatment for the condition addressed by a given service. The agency shall establish by rule a list of all tertiary health services. § 408.032(17), Fla. Stat.(emphasis added).[4]

34. In 2004, the Legislature added "pediatric cardiac catheterization" and "pediatric open-heart surgery" to the statutory list of tertiary health services and deleted "specialty burn units". Ch. 2004-383, § 2, Laws of Fla.(emphasis in original).[5]

35. By its terms, the statutory list of tertiary health services is not exhaustive. The Agency reviews this list periodically.

36. To accomplish the legislative purpose stated in the statutory definition of tertiary health service, the Agency includes a list of tertiary health services in Florida Administrative Code Rule 59C-1.002(41)(a)-(j).

37. Like its statutory counterpart, Section 408.032(17), Florida Statutes, all of the items listed in Rule 59C-1.002(41(a)-(j) are health services, which, by definition, "should be limited to, and concentrated in, a limited number of hospitals to ensure the quality, availability, and cost-effectiveness of such service." Fla. Admin. Code R. 59C-1.002(41).

38. Over time, the Agency has added several tertiary health services, such as heart, kidney, liver, bone marrow, lung, pancreas, islet cells, and heart/lung transplantation, and adult open heart surgery. The Agency proposes to delete neonatal and pediatric cardiac and vascular surgery, and pediatric oncology and hematology, from the list and add pediatric cardiac catheterization and pediatric open-heart surgery to the list, the latter reflecting the 2004 statutory amendments. See proposed rule 59C-1.002(41)(a)-(j).

The Agency's Rationale for the Proposed Rule

39. According to the Agency, Section 408.032(17) provides a broad definition of tertiary health services and the Agency has the authority to decide if certain services, due to their complexity and cost, should be added to or deleted from the list of tertiary health services.

40. Notwithstanding the stated purpose and effect of the proposed rule, see Finding of Fact 6, "[t]he Agency has proposed to include long term care hospital (LTCH) services as a tertiary service in the [CON] program because the services are intense, complex, specialized and costly." See AHCA's Motion for Summary Final Order, "Rationale for Proposing Long Term Care Hospital Services as a Tertiary Service in the CON Program" at 1.

41. In attachments to its Motion for Final Summary Order, the Agency provided information that the Agency believes

demonstrates that LTCH services are tertiary health services. The Agency contends that "[t]he undisputed evidence shows that a long term care hospital is a tertiary health service" and further asserts "[t]here are no genuine issues of material fact present in this case." AHCA's Motion at 2, ¶¶ 2 and 3.

42. For the Agency, "[t]here is really no such thing as a tertiary hospital. Tertiary has to do with the services that are provided." Within the Agency's framework, tertiary health services are "a combination of specialized, complicated, complex services that are a high cost." Further, "[t]hey are somewhat unique. They are high-end services that are the most complex, the most technologically advanced, the most difficult to provide, the most resource intensive, and inherently limited as a result." According to the Agency, LTCHs are health services that provide a high level of intensity, treat complex patients, and have a high cost associated with the services provided. Gregg deposition at 30-33, 48-53.

43. By the proposed rule, the Agency proposes to make services that are provided in an LTCH a tertiary health service. But, if those same services are provided in some other type of facility, they are not LTCH services. Gregg deposition at 48-49.[6]

44. The Agency's approach is based in part on several reports published by, for example, MedPAC, which characterize

the role of the LTCH to provide post-acute care to a small number of medically complex patients at a high cost and for relatively extended periods. Id. at 21-29, 67-68. (The MedPAC reports relied on by the Agency do not define tertiary services. Id. at 58.)

45. The Agency's approach is also based on the experience of the Agency in reviewing LTCH CON applications and developing an understanding of the complex patient population treated at LTCHs. Id. at 29, 68. See also AHCA's Motion at Gregg affidavit and supporting information.

46. The Agency's rationale for the proposed rule is informative and thoughtful, but not material to the disposition of this rule challenge in light of the facial challenge to the proposed rule as written. See endnotes 7 and 13.

47. If the case was resolved on the current record, none of the parties would be entitled to entry of a final order as a matter of law if the issue was whether LTCH services within an LTCH are tertiary health services because whether LTCH services provided within an LTCH are tertiary health services requires the resolution of genuine issues of material fact. Compare, e.g., Petitioners' Motion for Summary Final Order, Exhibit 9 (Kornblatt affidavit) with AHCA's Motion for Summary Final Order, Gregg affidavit and supporting information. Rather, the challenge is resolved based on an evaluation of the proposed

rule in light of the plain meaning of several statutory provisions.

CONCLUSIONS OF LAW

Jurisdiction

48. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.56(1) and (2), 120.569(1), and 120.57(1), Fla. Stat.

Standing

49. No issue is raised regarding the standing of Promise and Select. Nevertheless, Promise and Select have standing to participate as parties in this proceeding.

Invalid Exercise of Delegated Legislative Authority

50. Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the Division of Administrative Hearings within the time set forth in Section 120.56(2)(a), Florida Statutes. In this proceeding, Promise and Select have the burden of going forward and the Agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat. The proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.[7]

51. "'Invalid exercise of delegated legislative authority' means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if," material here, the rule "enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1,"[8] or is "arbitrary or capricious." § 120.52(8)(c) and (e), Fla. Stat., as amended, see Ch. 2008-104, § 2, Laws of Fla. "A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational." § 120.52(8)(e), Fla. Stat.

52. Pursuant to Section 120.536(1), Florida Statutes, "[a]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." See also Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001) (agency may adopt rules "only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties").

53. "Tertiary health service" is defined by statute and several tertiary health services are listed.[9] By its terms, the statutory definition is not exhaustive.[10] The Legislature

granted the Agency the express authority and discretion to add, by rule, tertiary health services to the statutory list and thereby implement this specific statutory power and duty.

54. The issue is whether the Agency exceeded its authority by proposing to include "long-term care hospitals" as a "tertiary health service" in light of the statutory definition and other statutes implemented by the proposed rule?[11] Stated otherwise, does the inclusion of "long-term care hospitals" within the rule definition of "tertiary health service" enlarge, modify, or contravene the specific laws implemented, citation to which is required by Section 120.54(3)(a)1., Florida Statutes?[12]

Statutory Interpretation

55. The guiding purpose in construing a statute is to give effect to the Legislature's intent. State v. J.M., 824 So. 2d 105, 109 (Fla. 2002). A determination of legislative intent "is derived primarily from the language of the statute." State v. Bodden, 877 So. 2d 680, 685 (Fla. 2004), cert. denied, 125 S. Ct. 628 (2004). Further, when construing a statute, courts "look first at the statute's plain meaning." Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996). If the intent is unclear from the plain language of the statute, only then are rules of statutory construction and legislative history used to determine legislative intent. BellSouth

Telecommunications, Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003).

56. Where the Legislature uses particular words to define a term, a court does not have the authority to redefine it. Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376, 377-378 (Fla. 5th DCA 1998). Also, courts are extremely reluctant to add words to a statute. Armstrong v. City of Edgewater, 157 So. 2d 422, 425 (Fla. 1963).

57. Here, the term "tertiary health service" is defined, but the list is not exhaustive by the plain terms of the definition and the Agency has the authority to establish by rule a list of tertiary health services in addition to those listed in Section 408.032(17), Florida Statutes.

58. An agency is accorded broad discretion and deference in the interpretation of the statutes which it administers. See Bd. of Podiatric Med. v. Fla. Med. Ass'n, 779 So. 2d 658, 660 (Fla. 1st DCA 2001) (citing Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987 (Fla. 1985)). Also, an agency's interpretation "should be upheld when it is within the range of permissible interpretations." Id. (citing Bd. of Trustees of Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359 (Fla. 1st DCA 1995)). See also Fla. Dep't of Educ. v. Cooper, 858 So. 2d 394, 396 (Fla. 1st DCA 2003)("If the agency's interpretation is within the range of possible and

reasonable interpretations, it is not clearly erroneous and should be affirmed."(citations omitted)).

59. The court has recognized and supported the principle that rules may clarify and flesh out the details of an enabling statute. Agencies utilize their expertise by creating rules to effectuate specific duties. "The Legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise." Avatar Dev. Corp. v. State, 723 So. 2d 199, 204 (Fla. 1998).

60. However, "judicial adherence to the agency's view is not demanded when it is contrary to the statute's plain meaning." Sullivan v. Dep't of Envtl. Prot., 890 So. 2d 417, 420 (Fla. 1st DCA 2004)(citations omitted). See also Willette v. Air Products, 700 So. 2d 397, 399 (Fla. 1st DCA 1997) (statute takes precedence over a rule); Cortes v. State Bd. of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995)(explaining that the legislature may authorize administrative agencies to interpret, but never to alter statutes). Also, "an administrative agency may not adopt a rule which conflicts with or modifies an existing statute." State, Dep't of Transp. v. Pan Am. Constr. Co., 338 So. 2d 1291, 1293 (Fla. 1st DCA 1976)(citations omitted), appeal dismissed, 345 So. 2d 427 (Fla. 1977).

61. There is no dispute that a health care facility such as an LTCH provides services inside the facility. As defined by statute, all general or specialty hospitals, including LTCHs, are facilities that offer services, including health services. If CON approved, any of these facilities may offer tertiary health services.

62. It may be that an LTCH is a tertiary facility that should be limited in number because of the nature of the patient population, e.g., acuity levels, complex nature of the patient care provided, and the cost of the services rendered. But the Legislature has the prerogative to make this decision and has not done so.

63. The Legislature defines an LTCH and includes an LTCH in the definition of health care facility. No health care facilities are included in the definition of health services. The definition of tertiary health service, a sub-set of health services, and the examples which follow the statutory definition, do not include any health care facilities. As a matter of law, an LTCH is not a tertiary health service. See endnote 13.

64. Given the plain meaning of the relevant statutes referenced herein and those relied on by the Agency, the proposed rule enlarges the statutory definitions of health services and tertiary health service, Subsections 408.032(9) and

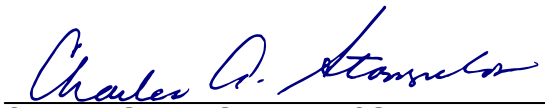
(17), Florida Statutes, and, accordingly, the proposed rule is an invalid exercise of delegated legislative authority.[13]

CONCLUSION

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

ORDERED that the Motion for Summary Final Order filed by Promise and Select is granted; the proposed rule 59C-1.002(41)(i) is determined to be an invalid exercise of delegated legislative authority; and the Agency's Motion for Summary Final Order is denied. The final hearing scheduled for November 5-7, 2008, is canceled.

DONE AND ORDERED this 23rd day of September, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of September, 2008.

ENDNOTES

[1]/ In its motion, the Agency states in part: "Additionally, including Long Term Care Hospital on the list of tertiary services is to allow the [CON] review process to take place prior to approval of this type of establishment. This rationale is consistent with the letter of the law and the overall legislative intent of Section 408.032(17), Florida Statutes." AHCA's Motion at 8, ¶ 32. See also AJSF at 13, ¶ 56. By statute, new LTCHs are required to undergo CON review and approval. While the proposed rule may add a new criterion for the Agency's consideration when LTCHs are reviewed, the proposed rule does not establish a requirement for CON review for new LTCHs.

[2]/ 42 C.F.R. § 412.23(e)(1) and (2)(i) provides in part that long-term care hospitals must have provider agreements and "an average Medicare inpatient length of stay of greater than 25 days (which includes all covered and noncovered days of stay of Medicare patients) as calculated under paragraph (e)(3) of this section" or an alternative average length of stay as provided under subsection (e)(2)(ii).

[3]/ In proposing the proposed rule, the Agency also relies in part on the 2004 amendment to Section 408.032(13). It is the only provision of Chapter 2004-383, Laws of Florida, relied on by the Agency as statutory support for the proposed rule. The Agency also relies on Section 408.032(17) as statutory support for the proposed rule. Gregg deposition at 14-16. See also endnotes 11 and 12.

[4]/ No party suggests that LTCHs are experimental or developmental in nature.

[5]/ Also, in 2004, the Legislature amended Section 408.036(1)(c), Florida Statutes, to require CON review when a general, specialty, or long-term care hospital is converted. Ch. 2004-383, § 6, Laws of Fla.

[6]/ Stated otherwise, according to the Agency, the proposed rule captures the services provided in an LTCH, not the LTCH building per se. "A hospital is a licensed provider of hospital services; it's not the building" that is the subject of the proposed rule. Id. at 64-65.

[7]/ This proceeding involves a facial challenge to the proposed rule and not a challenge to this subsection as applied. See generally Beverly Health and Rehabilitative Services, Inc. v.

Agency for Health Care Admin., 708 So. 2d 616 (Fla. 1st DCA 1998); Fairfield Communities v. Florida Land and Water Adjudicatory Comm'n, 522 So. 2d 1012 (Fla. 1st DCA 1988).

[8]/ See, e.g., Fla. Petroleum Marketers and Convenience Store Ass'n v. Dep't of Envtl. Prot., DOAH Case No. 05-0529RP (DOAH June 16, 2005), and cases cited therein at Conclusion of Law 39.

[9]/ "Under the doctrine of noscitur a sociis, the meaning of statutory terms, and the legislative intent behind them, may be discovered by referring to words associated with them in the statute." Turnberry Isle Resort and Club v. Fernandez, 666 So. 2d 254, 256 (Fla. 3d DCA 1996)(citation omitted). All of the services listed are health services, not health care facilities. Even "neonatal intensive care units" is classified as a health service ("[e]xamples of such service include"), not a facility. § 408.032(8),(9),(11),(13), and (17), Fla. Stat.

[10]/ The words "include, but are not limited to," see Section 408.032(17), Florida Statutes, appear to be words of enlargement, not of limitation and therefore convey the conclusion that there are other terms includable, though not specifically enumerated by the statute. See generally Argosy Limited v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968); Miami Country Day School v. Bakst, 641 So. 2d 467, 469 (Fla. 3d DCA 1994), rev. denied, 651 So. 2d 1195 (Fla. 1995); Yon v. Fleming, 595 So. 2d 573, 577 (Fla. 4th DCA 1992), rev. denied, 599 So. 2d 1281 (Fla. 1992); Op. Att'y Gen. Fla. 081-40 (1981). This general statement is buttressed by the express terms of the definition of tertiary health service as explained herein.

[11]/ The implementing statutes referred to in proposed rule 59C-1.002 do not support proposed rule 59C-1.002(41)(i). See Findings of Fact 9-15 and endnote 3.

[12]/ Section 408.032(17) provides express authority for the Agency to adopt a rule pertaining to tertiary health services and Section 408.032(17) is implemented by Florida Administrative Code Rule 59C-1.002(41) and by the proposed rule, subsection (41)(i). Nevertheless, Section 408.032(17) was not cited as an implementing statute by the Agency in the published version of the proposed rule, see Section 120.54(3)(a)1., Florida Statutes. "The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been

impaired." § 120.56(1)(c), Fla. Stat. Here, no interests have been impaired.

[13]/ Given the disposition herein, it is unnecessary to resolve whether long-term care services provided in an LTCH is a tertiary health service.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.