STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ENCOMPASS HEALTH REHABILITATION HOSPITAL OF ESCAMBIA COUNTY, LLC,

Petitioner,

vs. Case No. 18-0073CON

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

WEST FLORIDA REGIONAL MEDICAL CENTER; FORT WALTON BEACH MEDICAL CENTER ("NORTHWEST FLORIDA"); AND FORT WALTON BEACH MEDICAL CENTER ("FORT WALTON BEACH"),

Intervenors.
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RECOMMENDED ORDER

An administrative hearing was held in this case on July 16 through 18, 24, 26, 30, and 31, and August 1, 2018, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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For West Florida Regional Medical Center; Fort Walton Beach Medical Center ("Northwest Florida"); and Fort Walton Beach Medical Center ("Fort Walton Beach"):

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STATEMENT OF THE ISSUE

Whether, on balance, Certificate of Need (CON) Application No. 10945 submitted by Encompass Health Rehabilitation Hospital of Escambia County, LLC (Encompass or Petitioner) to establish a 50-bed comprehensive medical rehabilitation hospital in Service District 1 satisfies the applicable statutory and rule criteria and should be approved or denied.

PRELIMINARY STATEMENT

Encompass filed CON Application No. 10495 to establish a new 50-bed comprehensive medical rehabilitation (CMR) freestanding hospital in Pensacola, Florida, proposed to be located in Escambia County, Agency for Health Care Administration (AHCA or the Agency) Service District 1. The Agency preliminarily denied Encompass's CON application on December 4, 2017.

On December 21, 2017, Encompass timely filed a petition challenging the Agency's preliminary denial of Encompass's CMR hospital. Encompass's petition sought formal proceedings pursuant to the Health Facilities and Services Development Act, sections 408.031-408.035, Florida Statutes.[1/] The Agency referred Encompass's petition to the Division of Administrative Hearings on January 5, 2018.

On January 9, 2018, West Florida Regional Medical Center, Inc., d/b/a West Florida Hospital (West Florida); Fort Walton Beach Medical Center, Inc., d/b/a The Rehabilitation Institute of Northwest Florida; and Fort Walton Beach Medical Center (Fort Walton Beach) (collectively, the Intervenors) filed a motion to intervene, which was granted by Order entered January 10, 2018.

The final hearing was held on July 16 through 18, 24, 26, 30, and 31, and August 1, 2018. During the course of the proceeding, the court denied West Florida's Motion in Limine to

exclude documents related to a staffing analysis prepared by Mary Ellen Hatch. The court also denied AHCA's Amended Motion in Limine to exclude testimony and evidence derived from the Agency's discharge database for the year ending October 1, 2016.

At the final hearing, Encompass presented the testimony of Linda Wilder, who was accepted as an expert in healthcare administration and CMR hospital development; Lori Bedard, accepted as an expert in physical therapy and rehabilitation hospital administration; Cheryl Miller, accepted as an expert in occupational therapy and therapy management; Mary Ellen Hatch, accepted as an expert in healthcare administration; Fred C. Frederick, accepted as an expert in healthcare architecture; Phillip Loggins, accepted as an expert in quality assurance and risk management; Tom Davidson, accepted as an expert in healthcare finance; and Sharon Gordon-Girvin, accepted as an expert in healthcare planning. Encompass Exhibits P-1 through P-4, P-6 through P-9, P-11, P-12, P-14, P-15, P-17, P-20 through P-27, P-30, P-34, P-35, P-37 through P-41, P-42 (Bates Nos. 1977-1984 and 2042-2043 only), P-43, P-50, P-51, P-52, P-69, and P-75 were admitted into evidence.

The Agency presented the testimony of Marisol Fitch. The Agency's sole exhibit, Exhibit R-2, was admitted into evidence.

The Intervenors presented the testimony of Johnny Harrison, accepted as an expert in CMR administration; Carlton Ulmer,

accepted as an expert in hospital administration; Todd Jackson, accepted as an expert in healthcare administration; Rebecca Jones, accepted as an expert in CMR administration; Glennal Verbois, M.D., accepted as an expert in CMR; Daniel Sullivan, accepted as an expert in health planning and finance; and Darryl Weiner, accepted as an expert in healthcare finance. Intervenors' Exhibits I-1 (pages 4 through 35), I-2 through I-6, I-8, I-9, I-11, I-13, I-15, I-16, I-20, I-21, I-23, I-24 (pages 2058 through 2063), I-36, I-44 (Bates Nos. 1727 through 1770), I-45 (Bates Nos. 1570 through 1604), I-46 (Bates Nos. 1485 through 1569), I-47 (Dr. Verbois CV), and I-48 were admitted into evidence.

The parties jointly offered into evidence Exhibits numbered J-1 through J-3, which were admitted.

The proceedings were recorded, and a transcript was ordered. The Transcript, consisting of 10 volumes was filed on August 21, 2018. By agreement, the parties were given until October 5, 2018, to submit their proposed recommended orders. By Order Granting Extension of Time requested in a joint motion, the due date for submitting proposed recommended orders was extended until October 19, 2018. Thereafter, the parties timely submitted Proposed Recommended Orders, as well as a Joint Preliminary Statement and agreed outline, all of which have been considered and utilized in preparing this Recommended Order.

FINDINGS OF FACT

I. Overview

A. CMR Services

1. CMR Inpatient Services is defined as:

> An organized program of integrated intensive care services provided by a coordinated multidisciplinary team to patients with severe physical disabilities, such as stroke; spinal cord injury; congenital deformity, amputation, major multiple trauma, fracture of femur (hip fracture); brain injury, polyarthritis, including rheumatoid arthritis; neurological disorders, including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease; and burns.

See Fla. Admin. Code R. 59C-1.039(2)(d).

2. The Florida Legislature has also determined CMR to be a tertiary health service. A "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.

See § 408.032(17), Fla. Stat.

3. CMR services are a defined benefit of the Medicare program. Federal regulations define the type of patients that are appropriate for hospital-based rehabilitation, as opposed to rehabilitation offered in less intense settings, such as nursing homes.

4. CMR services are designed to take care of patients recovering from acute episodes such as a severe illness, spinal cord injury, trauma injury, brain injury (both traumatic and non-traumatic), stroke, amputation, and the like, all of which limit certain of the patient's functions for normal life.

5. A CMR facility is required to provide intensive therapy on a consistent basis. A physician is on call 24 hours a day, seven days a week, coupled with 24-hour nursing coverage. The patient must be seen three times a week by a physician.

6. The types of patients eligible to receive CMR services are heavily regulated. The federal Center for Medicare and Medicaid Services (CMS) establishes the admission requirements for CMR facilities and patients. CMS maintains 13 diagnoses to determine which patients are appropriate for receiving CMR Services (the CMS 13). The CMS 13 includes a determination that the patient is able to participate in a minimum of three hours

of therapy a day, five days a week. The therapy includes a combination of physical, occupational, and/or speech therapies. The CMS 13 criteria for admission have become much more stringent over time.

7. Whether a patient meets the CMS 13 is a decision within the professional judgment of the medical director of the CMR facility. A CMR facility is required to attest to CMS that 60 percent of the CMR facility's patients fall within the 13 diagnoses for CMS.

B. Encompass's Proposal – The CON Application

8. Encompass's CON application proposes the construction and operation of a 50-bed freestanding rehabilitation hospital in Escambia County, conditioned on the provision of service to Medicaid and indigent populations, and on providing the latest state-of-the-art rehabilitation equipment. Escambia County is in AHCA Service District 1, which includes Escambia, Okaloosa, Santa Rosa and Walton Counties. See § 408.032(5), Fla. Stat.

9. There is no published need for additional CMR beds in District 1. Therefore, in an attempt to justify its proposal in the absence of a published numeric need, Encompass argues that "not normal" circumstances indicate a need for a CMR hospital consisting of 50 beds. Encompass's determination of need is premised upon its own, and its consultants', examination of the elderly population, total population, utilization of existing

providers, and available CMR beds, as well as upon Encompass's experience in other markets.

10. Presently, within District 1, there are two existing CMR facilities, West Florida, located in Pensacola, Escambia County; and Fort Walton Beach, located in Destin, Okaloosa County. Between the two providers, there are 78 licensed CMR beds available: West Florida has 58 licensed beds and Fort Walton Beach has 20 licensed beds. An additional 10 beds are in the process of opening at Fort Walton Beach.

11. Both West Florida and Fort Walton Beach submitted written statements of opposition to the requested CON and presented testimony at the public hearing in opposition to the project. Following review and analysis of Encompass's CON Application, AHCA preliminarily denied the application and determined that, "[b]ased on the application, not normal circumstances were not established to outweigh the absence of published numeric need." AHCA recommended denial of the Encompass's CON Application in its State Agency Action Report (SAAR).

II. The Parties

A. Encompass Health Rehabilitation Hospital of Escambia County, LLC

12. Encompass, the applicant, is a limited liability company formed solely for purposes of applying for a CON.

Encompass is a wholly owned subsidiary of Encompass Health Corporation.

13. Encompass's parent corporation, Encompass Health Corporation was formerly known as HealthSouth Corporation, a CMR provider with facilities in Florida. In the CON Application and in the course of this proceeding, Encompass, as the applicant for the CON, utilizes and relies on data from its parent corporation Encompass Health, f/k/a HealthSouth. During the course of the proceedings, the parties tended to refer to the applicant interchangeably as Encompass and HealthSouth. For identification purposes in this Recommended Order, "Encompass" shall refer to the LLC applicant, and the parent corporation shall be referred to as "Encompass Health Corporation."

14. Encompass Health Corporation is a leading CMR provider that operates 127 CMR hospitals throughout the United States and Puerto Rico. Encompass Health Corporation has significant experience in developing and opening new CMR hospitals and has opened or expanded several hospitals in Florida and other states in recent years.

B. AHCA

15. AHCA is the state agency charged with administering the CON program. AHCA's determination of "no need" in District 1 was made using a rule-based formula to determine when new CMR beds are needed. AHCA's rule also recognizes that

"special circumstances" may justify approval of additional CMR hospitals, even in the absence of numeric need.

C. West Florida and Fort Walton Beach

16. West Florida and Fort Walton Beach both operate existing CMR units within District 1. Both are also part of the Hospital Corporation of America's (HCA) North Florida Division. HCA is the second largest provider of hospital-based acute rehabilitation services in the United States.

17. West Florida operates a 58-bed CMR unit within its acute care hospital in Pensacola located in northeast Escambia County. West Florida's acute care hospital has expanded its services to include a freestanding emergency room in Perdido Bay and expanded pediatric services.

18. West Florida accepts patients from a number of different hospitals in District 1 including facilities affiliated with the Sacred Heart and Baptist Hospital systems in the greater Pensacola area, as well as other hospitals. The facilities associated with Sacred Heart and Baptist Hospital are also trauma centers, which serve as a significant referral course for West Florida. West Florida also receives acute care patients discharged from West Florida in need of CMR services.

19. West Florida currently has approximately 19 full-time nurses. Ten of those RNs are Certified Rehabilitation Nurses, and nine are working to become certified.

20. Fort Walton Beach operates a 20-bed freestanding CMR unit in Destin, Okaloosa County, within District 1. Pursuant to AHCA's rules, since Fort Walton operated at 80-percent occupancy for more than 12 consecutive months, it applied to AHCA for approval of 10 additional beds. AHCA granted approval for the additional beds, which were set to open in August 2018. The Fort Walton Beach CMR facility is affiliated with Fort Walton Beach Medical Center (Medical Center) located in Fort Walton Beach.

21. The Medical Center has 237 licensed beds and operates a Level II Trauma Center. For calendar year 2017, the Medical Center had approximately 13,600 inpatient admissions; 55,000 outpatient visits; and about 66,000 ER visits. At the same time, Fort Walton Beach CMR Facility had 402 admissions. The Medical Center provides a diverse range of service lines, including cardiovascular; ortho-neuro services, which include orthopedics and spine procedures; stroke; neurological interventions and emergency services. The Medical Center provides both administrative and capital support to Fort Walton Beach.

22. Fort Walton Beach's nursing staff consists of 25 RNs, two of which are certified rehabilitation nurses, and three of which are certified nursing assistants.

III. Fixed Need Pool

23. In accordance with Florida Administrative Code Rule 59C-1.039(5), twice a year AHCA calculates and publishes a

numeric need for additional CMR beds in each of Florida's eleven districts. In determining fixed need for each district, the formula in the rule considers, among other factors, the number of current CMR beds, historical utilization of CMR services and population growth. Rather than setting a target or using statewide use rates, the formula carries local CMR use rates forward in its calculations. Unique factors in each district, such as demographics, cultural influences, and physician referral patterns, result in a wide variation in CMR service utilization between the districts, which influences the results of AHCA's calculations.

24. For the 2017 batching cycle, application of the Agency's formula determined that District 1 had an excess capacity of CMR beds, and that no additional beds were needed in District 1 for the January 2023 planning horizon. AHCA published the results, but no challenge was filed to the published fixed need pool.

IV. Statutory and Rule Review Criteria

25. Section 408.036(1)(f) designates CMR services as a tertiary healthcare service subject to the requirements of CON review.

26. The CON review criteria applicable to this case are found in sections 408.035(1)(a)-(i), 408.037, 408.039, and in rules 59C-1.008, 59C-1.030, and 59C-1.039.

A. Statutory Criteria

1. Section 408.035(1)(a) – The need for the healthcare facilities and health services proposed.

27. In calculating a zero need under applicable rule methodology, AHCA projected a total need for 56 CMR beds for District 1's year 2023 horizon. The overall utilization rate for CMR services in District 1 at the time Encompass submitted its CON Application was 57.3 percent. Currently, there are 88 licensed beds in District 1, 58 at West Florida, and 20 at Fort Walton Beach, with an additional 10 beds approved at Fort Walton Beach. On a percentage basis, there are approximately 40 percent more CMR beds in District 1 than the projected need for year 2023.

28. Instead of challenging AHCA's published need of zero, Encompass submitted its CON Application for the construction of a 50-bed CMR hospital in District 1 by asserting that the presence of "not normal" circumstances established need for its proposed hospital.

29. In support of its argument that "not normal" circumstances demonstrate need, Encompass's CON application asserts a) lack of access, and b) lack of choice, for CMR services in District 1. Regarding lack of access, Encompass contends that a) lower CMR bed supply inhibits access; b) when CMR bed supply expands, CMR admissions increase; and c) referral

patterns demonstrate limited access to existing CMR beds. At hearing, all parties presented evidence and testimony of their respective health planners to address whether the above-listed factors claimed by Encompass support a finding of "not normal" circumstances. Each of the above-listed factors is addressed under separate headings, below.

a. Lack of Access

i. Whether Lower CMR Bed Supply Inhibits Access

30. Encompass argues that District 1 has less access to CMR care because, when compared to other districts, District 1 has fewer CMR beds per capita. This argument, however, fails to take into account the differences in CMR services demanded and utilized among districts. Demand is often unique to each district. When the data regarding beds per capita is considered, with the understanding that demand and utilization vary from district to district, the data demonstrates that District 1 is not out of the ordinary.

31. The data for District 1, whether for the population as a whole, or for the population of 65 or older, which uses more CMR services, reflects that the ratio in District 1 is higher than some districts and lower than others. When looking at the 65+ age bracket, District 1 has a ratio of 0.66 CMR beds to every 1,000 persons, compared to the state average of 0.70. Moreover,

the average for Florida is inflated due to high ratios in some counties around the state, such as Broward County.

32. Although the need for CMR services is reviewed on a district-wide basis, Encompass proposes to operate its facility in Escambia County. Escambia County has a ratio of 1.12 CMR beds to every 1,000 persons age 65 years and older. Adding the 50 CMR beds requested by Encompass to the existing beds in Escambia County would result in a ratio of two beds for every thousand in population, which is 2.4 times higher than the state average. These ratios do not support a finding that there is inadequate access for CMR services in District 1, and do not demonstrate need.

ii) Whether When CMR Bed Supply Expands, CMR Admissions Increase

a) HealthSouth's examples

33. Encompass urges that increasing the number of available CMR beds will increase CMR utilization in District 1. In support, Encompass presented the testimony of its healthcare planning expert, Ms. Gordon-Girvin, who presented evidence of HealthSouth's experience in other areas of Florida, such as Ocala and Altamonte Springs.

34. On the other hand, the Intervenors' expert in health planning and finance, Mr. Sullivan, opined that the answer to low utilization is not to add additional beds. He explained that,

while new healthcare facilities may result in additional utilization, that increase can often be explained by aggressive marketing. Mr. Sullivan also noted that the resulting increased utilization of CMR beds over SNF beds does not necessarily mean that those patients are receiving the most appropriate care for their needs. Mr. Sullivan also noted possible detrimental effects to the healthcare delivery system posed by unnecessary utilization of the more expensive CMR services when lower cost SNF services would be more appropriate. Mr. Sullivan's opinions on this issue are credited.

35. With respect to Ms. Gordon-Girvin's calculations regarding the increases in usage experienced at HealthSouth's facilities in Ocala and Altamonte Springs, Mr. Sullivan explained, and Ms. Gordon-Girvin acknowledged, that while that may be true for those facilities, those projects were significantly different than Encompass's proposal for District 1. In Ocala and Altamonte Springs, HealthSouth placed a facility in a market where there was relatively high utilization of existing providers, or an absence of available beds. In contrast, District 1's utilization of CMR services is relatively low.

b) Stagnant Use in District 1

36. The 78 existing beds in District 1, with a current overall utilization rate of 57.3 percent, have not been highly utilized for quite some time. Encompass argues that the

utilization rate is artificially low because West Florida denies admission for CMR services to otherwise eligible patients because of medical complexity, physician shortages, and nurse shortages. Encompass argues that the denied admissions to West Florida are "not normal" circumstances that justify Encompass's proposed project.

37. According to data compiled by Ms. Gordon-Girvin from admission logs for West Florida, in year 2015, West Florida denied admission to 199 potential CMR patients. Of those 199 denials, the logs indicate that 116 were denied because of lack of staff, 76 because of medical complexity, seven for lack of bed availability, and one because the admission would have violated the 60/40 rule which requires that at least 60 percent of patients fall into particular diagnosis categories.

38. For year 2016, the West Florida logs indicate that 216 patients were denied CMR admission; 48 due to lack of staff, 144 because of medical complexity, and 24 for physician choice.

39. At hearing, West Florida adequately addressed its historical admission denials to overcome the implication that there is lack of access or "not normal" circumstances in District 1. It was shown that, even though there may have been a logged "denial" of admission for one day, there were instances of other admissions at West Florida that same day. In addition, the data was insufficient to demonstrate that any of the denied

patients did not receive CMR services in District 1 or elsewhere. The evidence does not otherwise support a finding that West Florida artificially capped admissions at its CMR facility.

40. In 2015 and 2016, HCA's data collection system utilized by West Florida to document admission denials was not as accurate as its current system, and had limited documenting options. As a result, some of the referrals documented as denied admissions were actually postponed admissions for a day or two. HCA has recently developed a much more robust reporting system, which is used by West Florida and Fort Walton Beach. The new reporting system shows that in 2017, only approximately 50 patients were denied because of staffing.

41. While there were a number of admissions denied by West Florida in 2015 and 2016 because of lack of staff, those numbers, when compared to the overall daily census for those years, were not significant enough to demonstrate "not normal" circumstances. Even if they were, the evidence did not show that such constraints exist today.

42. West Florida is now appropriately staffed with physicians and nurses. West Florida employs an inpatient rehabilitation administrator, a director of therapy, a director of nursing, and a director of therapists who manage therapy for inpatient rehabilitation, acute care, and outpatient therapy. Mr. Ulmer as the CEO for West Florida also makes rounds on the

CMR unit. West Florida currently staffs two physicians including its medical director, Dr. Verbois and a mid-level provider to assist Dr. Verbois.

43. At the time of the hearing, West Florida was in the process of recruiting another physician. West Florida also expects to begin a graduate medical education program in the summer of 2019, and it is expected that the program director for that program and its residents would also be located at West Florida. It is expected that the program director would spend approximately 50 percent of his or her time in clinical work.

44. West Florida, as typical in the industry, is staffed to meet the expected average daily census. It has developed a float pool of approximately 18 full-time nurses who have been trained to be able to cover for other nurses who may be out for whatever reason. The float nurses assist at West Florida when there is a need for additional coverage. West Florida has also brought in additional travel nurses. In addition, West Florida has an internal escalation process in place to review the cases and ensure the patients get the best care possible.

45. With respect to denied admissions at West Florida based on medical complexity, the evidence was insufficient to show that the denials support a finding of "not normal" circumstances. The evidence was also inadequate to support a finding that

Encompass's program, if approved, would be able to accept the denied patients or would increase access for those patients.

46. Medicare has stringent guidelines for CMR admissions. Accordingly, West Florida does not admit patients that require certain services due to the medical complexity of the patient, especially when the facility does not offer additional services necessitated by the medical complexity of the patient.

47. Whether a patient is appropriate for care in a particular CMR facility is based on the independent professional judgment of the evaluating physician. If a patient's condition is too medically complex such that the patient requires a level of care not provided at the CMR facility, that CMR facility would not be able to admit the patient.

48. There is nothing "not normal" about a rehabilitation facility, at one time or another, denying admission to patients who are too medically complex.

49. Dr. Verbois, a physiatrist with years of CMR experience, who has been the medical director for West Florida for 18 years, credibly explained her role in reviewing referrals against the CMS criteria for admission. At West Florida, Dr. Verbois uses her professional medical judgment to determine the medical complexity of the patient.

50. Examples of patients that may be denied admission due to the patient's medical complexity include patients that are not

stable and not able to withstand the intense therapy, such as severe burn patients; patients who are being monitored by telemetry; ventilator dependent patients; patients who are hooked to a wall suction; patients with tracheotomy size of 8 or greater; as well as patients who are newly placed on a parenteral nutrition through a central line (total parenteral nutrition or TPN). In addition, patients with a "total assist" functional independence measure are potentially too medically complex, depending on their specific circumstances.

51. Encompass asserts that HealthSouth has a history of accepting medically complex patients as evidence that its proposed facility in Pensacola would be able to accept the patients denied by West Florida due to their medical complexity. Ms. Lori Bedard, regional vice president of operations for Encompass Health for the southeast region, testified as to the experience with HealthSouth accepting high acuity patients including TPN patients, tracheotomy patients, as well as total assist patients. As an example of a measure of the high acuity patients accepted by HealthSouth, Ms. Bedard cited that the HealthSouth Spring Hill facility has a case mix index (CMI) of 1.3. The higher the CMI value, the higher the complexity accepted.

52. While a CMI of 1.3 for HealthSouth's Spring Hill facility is high, the CMI for West Florida is higher at 1.6.

Further, although Ms. Bedard testified generally that HealthSouth takes TPN, tracheotomy patients, and total assist patients, with the exception of the tracheotomy patients, Ms. Bedard did not testify or otherwise address whether HealthSouth accepts all of those types of patients, and she did not testify that Encompass would be able to take all of those types of patients. Encompass did not otherwise explain how it intends to accept the type of patients deemed by West Florida as medically too complex.

53. According to Dr. Verbois, West Florida accepts certain types of TPN patients as well as certain types of total assist patients. In Dr. Verbois's opinion, which is credited, Encompass would not be able to take the type of patients West Florida denies as too medically complex because those patients simply do not meet the CMS criteria for admission.

54. In sum, Encompass's reliance on 2015 and 2016 data reflecting a relatively small number of patients not admitted to West Florida does not demonstrate "not normal" circumstances, does not represent the experience at West Florida's CMR unit today, and does not demonstrate need in District 1 for additional CMR beds. Rather, the evidence shows, and it is found, that there is no need to increase the number of beds. The addition of 10 new beds at Fort Walton Beach further supports this finding.

c) <u>Ratio between CMR beds and SNF beds</u>

55. SNFs, commonly known as nursing homes, serve post-acute patients but do not offer the same intensive rehabilitation offered in a CMR facility. SNFs typically serve a lower acuity patient population than CMRs. Stays in SNF facilities are typically longer than in a CMR facility. Not every patient that benefits from a SNF would be appropriate for treatment in a CMR facility.

56. Encompass asserts that there is an institutional bias for placing patients in nursing homes versus CMR facilities within District 1. According to a ratio analysis presented in the application and explained at the hearing by Ms. Gorden-Girvin, when the ratio of the number of CMR beds as compared to SNF beds increases, the number of hospital discharges to CMS increases.

57. Ms. Gordon-Girvin determined that in District 1 there is a ratio of seven discharges to SNFs for every one discharge to a CMR, as compared to a five-to-one statewide average. According to Ms. Gorden-Girvin, this ratio indicates a demand in District 1 for more CMR services. The methodology utilized for Ms. Gorden-Girvin's ratio analysis is not a standard health-planning tool for calculating or otherwise demonstrating need for CMR services.

58. Looking at the utilization numbers for SNF facilities versus CMR facilities in District 1 does not demonstrate need or

"not normal" circumstances for additional CMR beds or the presence of any barriers to access. The data utilized by Ms. Gordon-Girvin to derive the ratio only showed the recommended discharge and did not indicate why the patient may have been recommended for a SNF instead of a CMR. The evidence was otherwise insufficient to show a causal link between the number of SNF beds and CMR beds and a lack of access to CMR beds. There are several plausible explanations for the larger utilization of SNF facilities, including that there may simply be a greater need for SNF facilities in District 1.

59. As SNFs and CMRs generally serve different populations, the relevance of a comparative ratio between the two in an attempt to justify need is minimal. Instead of looking at the ratio of discharges to the two different types of facilities, the proper ratio to be examined relative to need is District 1's population to the number of CMR beds, and the proposed location for the requested project. As previously noted, while the need for CMR services is reviewed on a district-wide basis, Escambia County, where Encompass proposes to locate the project, has a ratio of 1.12 CMR beds to every 1,000 persons age 65 years and older. Adding another 50 CMR beds proposed by Encompass would result an inventory of two beds for every thousand in population, which is 2.4 times higher than the state average. Existing ratios indicate adequate access for CMR services in District 1.

iii) Whether Referral Patterns Demonstrate Limited Access to Existing CMR Beds

60. In addition to other arguments raised by Encompass regarding access, a chart contained in Encompass's CON application indicates that only five patients were transferred from West Florida's acute care unit; virtually no patients were transferred from other acute care hospitals in District 1; and 8,155 patients were transferred from clinics and physician's offices. The information contained in the CON Application on this point is in error and is, therefore, unpersuasive on the issue of access. Rather, a significant majority of CMR patient referrals in District 1 come from acute care hospitals, other than the facilities affiliated with the CMR units themselves. The three main referral centers for West Florida are the large health providers in Escambia County including Baptist Hospital, Sacred Heart, and West Florida. Fort Walton Beach receives a significant number of referrals from Sacred Heart of the Emerald Coast, an acute care hospital, other facilities in Bay and Escambia counties, and the Fort Walton Beach Medical Center. In 2017, Fort Walton Beach received 50 referrals from the Pensacola area and accepted approximately 20 to 23 of the referred patients.

61. The evidence does not support a finding that there is lack of access for CMR services in District 1.

b. Lack of Choice

62. In support of its claim that there is a lack of choice, Encompass maintains that low numbers of CMR beds relative to SNF beds, coupled with HCA's two facilities having all of the CMR beds in District 1, limits choice, and suppresses market entry. Encompass asserts that additional CMR beds are needed to increase competition and provide choice. However, unlike some other types of healthcare services, CMR services are tertiary services, which, by definition, should be concentrated in a limited number of facilities to ensure quality, availability, and cost-effectiveness. See § 408.032(17), Fla. Stat. (quoted above). Lack of competition for CMR services in District 1 does not support a finding of "not normal" circumstances or otherwise demonstrate need for Encompass's proposal.

2. Section 408.035(1)(b) – The availability, quality of care, accessibility, and extent of utilization of existing healthcare facilities and health services in the service district of the applicant.

63. Consistent with the finding that there is no need for the 50-bed facility in Escambia County proposed by Encompass, the existing CMR services provided by West Florida and Fort Walton Beach in District 1 are accessible and available. The evidence did not otherwise demonstrate that an award of a CON to

Encompass would improve availability or accessibility to quality CMR services in District 1.

64. Of further note, Encompass includes in its application utilization projections based on a hypothetical, which reduces the ratio of SNF to CMR cases from 7:1 to 6:1, rather than directly projecting future CMR demand. Based on this hypothetical ratio, Encompass projects that CMR cases in District 1 will increase from 977 in 2016 to 2,541 in 2023 for a total increase of 160 percent, even though the population growth in this area is only 1.3 percent annually. These are projections that do not accurately reflect utilization and are unrealistically overstated.

3. Section 408.035(1)(c) – The ability of the applicant to provide quality of care and the applicant's record of providing quality care.

65. Encompass's CON application accurately describes quality measures that would be utilized by Encompass if its CON application was approved, including quality metric reports that would track lengths of stay, discharges, and patient improvements. The reports would also track accreditation and regulatory compliance.

66. Regarding accreditation, the evidence indicates that, while one of Encompass Health's facilities in Florida is accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF), Encompass Health has focused on obtaining

accreditation for its facilities from the Joint Commission on Accreditation of Health Care Organizations (the Joint Commission).

67. On the other hand, both West Florida and Fort Walton Beach have accreditation from CARF, described by the Intervenors' expert in CMR administration as intensive and specific to the operations of rehabilitation hospitals and programs related to rehabilitative care. There is no indication that Encompass would seek CARF certification if its program were approved. In fact, Encompass makes no commitment to seek any particular accreditation in its application. However, all of Encompass Health's Florida facilities are accredited by the Joint Commission, with some holding Joint Commission certifications for various specialty treatment programs.

68. An actual commitment by Encompass to seek accreditation from the Joint Commission or pursue certifications from CARF would have made a stronger showing. Nevertheless, the strength of Encompass Health's programs and systems available to Encompass, together with Encompass Health's history of quality care, was sufficient to support a finding that, if approved, Encompass would have the ability to provide quality CMR services.

4. <u>Section 408.035(1)(d) - The availability of resources, including health and management personnel, for project accomplishment and operation.</u>

69. The parties stipulated that Encompass has the funds necessary for capital and operating expenditures for its proposed hospital. Currently, however, Encompass does not have any employees dedicated to staff the proposed facility. While Encompass has a track record of recruiting and retaining rehabilitation liaisons, therapists, nurses, and doctors of physical medicine (physiatry), existing providers in District 1 have experienced difficulty in recruiting physicians and nurses to staff their CMR facilities. If approved, Encompass would face the same challenges in recruiting professional staff.

70. In addition to West Florida and Fort Walton Beach, District 1 currently has at least two major health systems, Sacred Heart and Baptist, along with numerous SNF facilities. Recently, a new SNF facility opened near West Florida, resulting in two nurses leaving West Florida to work at the new facility.

71. The ability to recruit professional staff is negatively impacted by the fact that the area is not a major destination with large airports. In addition, District 1 has a large population of military families that tend to move frequently, leading to more frequent turnover of professional staff than in areas not as affected by military transfers.

72. Although Encompass's application has a plan outlining recruiting, the plan does not specifically address recruiting difficulties in the Pensacola area. Approval of the application would place further demand on an already limited supply of healthcare staff.

5. Section 408.035(1)(e) – The extent to which the proposed services will enhance access to healthcare for residents of the service district.

73. In addition to the access issues related to need already addressed, rule 59C-1.039(6) provides that geographical access for CMR services "should be available within a maximum ground travel time of 2 hours under average travel conditions for at least 90 percent of the district's total population." Current access to existing providers under this standard is sufficient.

74. Moreover, an award of the CON to Encompass will not improve clinical or programmatic access since Encompass does not propose services that are not currently offered in the District at West Florida and Fort Walton Beach. Encompass did not identify any specific subgroup of services that patients are otherwise not able to access from a clinical standpoint.

75. Furthermore, based on the condition in Encompass's application to serve only 2.25 percent of Medicaid, charity care, and self-pay, coupled with the fact that Encompass's facilities (or HealthSouth as a whole) do not serve a high

percentage of Medicaid or self-pay patients, Encompass will not enhance access to care for indigent or Medicaid patients as it will focus on serving the better paying patients (i.e., Medicare and commercially insured patients).

76. In sum, the evidence did not show that approval of Encompass's application would improve CMR service access for residents in District 1.

6. Section 408.035(1)(f) – The long-term financial feasibility of the proposal.

77. The parties stipulated that Encompass has the funds necessary to fund the construction and opening of its proposed facility, but did not stipulate to the long-term financial feasibility of the project. Long-term financial feasibility is demonstrated by showing a profit during the projection period, based on reasonable and defensible assumptions and data sources. For this project, Encompass used a three-year time period for its projections.

78. In criticizing Encompass's projections as unreasonable, the Intervenors' healthcare finance expert pointed out that Encompass's projections were based on Encompass Health's Ocala facility, which is a different operation than the proposal; were not reviewed with Encompass to match its expectations for the facility; used a full first-year example instead of a start-up year; and did not coordinate staffing

requirements with Encompass's expectations for staffing the proposed operations. These criticisms are legitimate.

79. The lack of communication between the experts hired to prepare the application and those who would be responsible for Encompass's operations was apparent. While all agreed that Encompass Health's facilities in Florida all experience profitability in their second year of operation, that is not sufficient to show long-term financial feasibility of the proposed facility.

80. In addition, while, because of inflated cost projections, it appears that funds would be available to pay for staffing expected by those who would actually run the facility, even though much different from staffing proposed in the application, the changes between the application and what is expected cannot be ignored. Considering the disconnects between the application and actual expectations, it is concluded that the application financial projections are not based on reasonable and defensible assumptions and data sources so as to provide a reliable basis for determining long-term financial feasibility of the project.

7. <u>Section 408.035(1)(g) – The extent to which the proposal will foster competition that promotes quality and cost-effectiveness.</u>

81. Under this statutory criterion, the consideration is whether there is a need for greater competition to stimulate and

promote quality and cost-effectiveness. Considering the fact that District 1's utilization of existing CMR beds is relatively low at 57.3 percent, it is apparent that the Encompass project will not promote cost-effectiveness, but rather would promote unnecessary duplication of services.

82. Instead of promoting or enhancing quality, approval of the project would add additional pressures on limited staffing resources in District 1 necessary to maintain current staffing and quality. The evidence was otherwise insufficient to show that additional competition would stimulate quality or cost-efficiency.

8. 408.035(1)(h) - 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.

83. Encompass has not chosen a location for its proposed facility within Escambia County nor does it have a letter of intent in place to purchase a particular parcel. However, the architect that designed the proposed facility and testified regarding estimates of project costs, Fred Frederick, provided undisputed, credible testimony that Encompass can construct its proposed facility up to code and at the costs estimated in the CON application.

84. The number of square feet for the proposed project reflected in the application is consistent with the floor plan

Encompass submitted with the application. The estimated cost of $284 per square foot is adequate even if construction does not begin for approximately one year. A 7.9-acre lot is large enough to accommodate the 50-bed design Mr. Frederick created and Encompass's estimated purchase price of $3 million for 7.9 acres is reasonable.

85. The cost estimates for environmental impact, site survey, site preparation, water, sewer, utility, landscaping, sidewalks and roads, materials, and testing are reasonable and in line with other Encompass Health projects. The architectural fee of $1.3 million, construction supervision of $300,000, other contingencies of $1.15 million, and $3.45 million for equipment reflected on Schedule 1 are reasonable.

86. In sum, all of Encompass's project costs were reasonably estimated and accurate.

9. <u>Section 408.035(1)(i) – The Applicant's past and proposed provisions of healthcare services to Medicaid patients and the medically indigent.</u>

87. Encompass's application includes a condition that states: "Medicaid, Medicaid Managed Care, Charity Care and Self Pay patients will represent a minimum of 2.25 percent of patient days." Provision of CMR services to only 2.25 percent of services to the self-pay, charity care, and Medicaid population falls well below the other existing providers in the area. For example, Fort Walton Beach provides 16 percent and West Florida

provides 12.4 percent of its services to self-pay, charity care, and Medicaid patients.

88. In addition, for the past four years, Encompass Health's hospitals in Florida combined have provided only 2.8 percent of services to self-pay, charity care, and Medicaid. This is on the low end of the average for the state.

89. These service levels are not favorable to the application.

B. Rule Review Criteria

90. Rules 59C-1.008, 59C-1.030, and 59C-1.039 govern review of CMR CON applications. The provisions of the rules are generally addressed above as to each of the statutory criteria.

91. In addition, Encompass asserts entitlement to the application of the rule preference in rule 59C-1.039(5)(f)2., relative to the provision of service to Medicaid-eligible persons. The CON application proposes to minimally serve Medicaid patients, although, as previously indicated, Encompass's proposed service levels to self-pay, charity care, and Medicaid patients are low when compared to the levels of those populations currently served by the Intervenors.

V. Adverse Impact

92. In addition to the adverse impact upon recruiting previously discussed, West Florida and Fort Walton Beach provided expert testimony credibly demonstrating the material

adverse financial impact that approval of Encompass's CON application would have on existing providers.

93. Given current CMR utilization levels, the addition of another 50 CMR beds in Escambia County would create an oversupply, negatively impacting the existing providers by reducing the number of referrals. As previously noted, Encompass's application contains utilization projections that assume dramatic growth in CMR utilization, which are unreasonably overstated. CMR utilization in District 1 is likely to be far slower, and Encompass's patients would likely come primarily from existing providers.

94. The Intervenors' expert in health planning and finance, Daniel Sullivan, calculated the number of patients that West Florida and Fort Walton Beach would lose to Encompass should the application be approved under three different scenarios. The calculations were on a District-wide basis, as were the Encompass utilization projections. If Encompass had done their projections on a county basis, the impact on West Florida would be much greater.

95. If Encompass's projection to serve 1,095 patients in 2023 were accurate, Encompass would need to capture 102 percent of the current market of CMR patients in District 1. Scenario one assumes that 100 percent of these 1,095 cases come from existing providers; scenario two assumes 75 percent of the

1,095; and scenario three assumes that only 50 percent of the 1,095 cases come from existing providers. Even under the most conservative 50-percent estimate, West Florida would lose 322 discharges and Fort Walton Beach would lose 174 discharges. This represents half of each facility's current volumes and would cause a significant adverse impact on both West Florida and Fort Walton Beach.

96. Any of the three scenarios represents a substantial adverse impact on West Florida and Fort Walton Beach's programs. The most conservative 50-percent loss under scenario three results in a contribution margin loss of $4.9 million for West Florida and of $2.0 million for Fort Walton Beach. Such losses would be significant and material, both financially and operationally, to the survival of the West Florida and Fort Walton Beach programs.

97. Moreover, if the Encompass application is approved, West Florida and Fort Walton Beach will be forced to bear a disproportionate share of the lower-paying patient population (i.e., Medicaid, self-pay). Encompass's proposal to serve 2.25 percent of the Medicaid population does not increase financial accessibility and would have a negative effect on financial access to CMR services by prohibiting the existing providers from operating at the same level as they have

historically, further discouraging the facilities from adding new services and equipment.

98. Encompass's CON application should not be approved.

CONCLUSIONS OF LAW

99. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. See §§ 120.569, 120.57(1) and 408.039(5), Fla. Stat.

100. For an existing healthcare facility to have standing to intervene in a CON proceeding, it must show that it will be "substantially affected" by approval of the CON application at issue. See § 408.039(5)(c), Fla. Stat. In order for a party to be substantially affected by the outcome of a proceeding, a party must show: (1) injury in fact of sufficient immediacy, and (2) that the person's substantial injury is of a type or nature, which the proceeding is designed to protest. Agrico Chem. Co. v. Dep't of Envtl. Reg., 406 So. 2d 478 (Fla. 2d DCA 1981).

101. The Intervenors established that if Encompass's CON Application were approved, there would be adverse impact in the form of significant income losses to both West Florida and Fort Walton Beach. Additionally, West Florida demonstrated that approval of a new 50-bed CMR unit in Pensacola would have an adverse effect on West Florida's ability to retain and attract

staff necessary to continue operating and growing its facility in an already difficult recruiting market.

102. The adverse impacts to the Intervenors, as discussed in the Findings of Fact, above, is of the type or nature of injury against which this proceeding is designed to protect, and is clearly substantial enough to establish West Florida and Fort Walton Beach's standing in this proceeding.

103. As the applicant for a CON, Petitioner bears the burden of proving, by the preponderance of the evidence, entitlement to the CON. See Boca Raton Kidney Ctr., Inc. v. Dep't of HRS, 475 So. 2d 260 (Fla. 1st DCA 1985); § 120.57(1), Fla. Stat.

104. The standard of review is de novo. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); § 120.57(1), Fla. Stat. AHCA's preliminary determinations on the CON Applications, including its findings in the SAAR, are not entitled to a presumption of correctness. Id.

105. The award of a CON must be based on a balanced consideration of all applicable statutory and rule criteria. Balsam v. Dep't of HRS, 486 So. 2d 1341 (Fla. 1st DCA 1986). "[T]he appropriate weight to be given to each individual criterion is not fixed, but rather, must vary on a case-by-case basis, depending on the facts of each case." See Collier Med.

Ctr., Inc. v. Dep't of HRS, 462 So. 2d 83, 84 (Fla. 1st DCA 1986); see, e.g., Morton F. Plant Hosp. Ass'n, Inc. v. Dep't of HRS, 491 So. 2d 586, 589 (Fla. 1st DCA 1986)(quoting North Ridge Gen'l Hosp., Inc. v. NME Hosp., Inc., 478 So. 2d 1138, 1139 (Fla. 1st DCA 1985)).

106. The applicable CON review criteria are found in sections 408.035(1)(a)-(1)(i), 408.037, and 408.039; and rules 59C-1.008, 59C-1.030, and 59C-1.039.

107. Pursuant to the rule methodology set forth in rule 59C-1.039(5), AHCA published a fixed need pool of zero for CMR beds in District 1. AHCA's published need of zero creates a rebuttable presumption. See, e.g., Humhosco, Inc. v. Dep't of HRS, 476 So. 2d 258, 261 (Fla. 1st DCA 1985); Humana, Inc. v. Dep't of HRS, 469 So. 2d 889, 891 (Fla. 1st DCA 1985) ("[S]hould the formula methodology in Rule 10-5.11(15) result in an underestimation of the need for additional services in an area, the applicant has the opportunity to demonstrate need by . . . providing other information to illustrate that the situation is not "normal" in the service area."); see Fla. Admin. Code R. 59C-1.039(5)(d).

108. Encompass bore the burden to rebut the presumption of zero need by demonstrating the existence of "not normal" circumstances. The greater weight of the evidence demonstrates that District 1 as a whole has a relatively low utilization rate

and that the two existing facilities, West Florida and Fort Walton Beach, do not operate at full capacity. Although Encompass presented arguments that West Florida and Fort Walton Beach have denied admission to some patients for various reasons, Encompass failed to demonstrate that notwithstanding those denied admissions, West Florida and Fort Walton Beach would have operated at a substantially higher capacity. Instead, the evidence demonstrates that for the past several years, West Florida and Fort Walton Beach have a relatively low utilization rate.

109. At hearing, Encompass demonstrated that West Florida denied admissions to some patients based on staffing levels, as well as the complexity of the patient; and, based on that, argued this resulted in skewing AHCA's need calculation. Encompass, however, did not challenge the published fixed need pool. Encompass's argument on this point was an attempt to demonstrate "not normal" circumstances to support need despite its failure to challenge the fixed need pool calculation. By not challenging the fixed need pool calculation, Encompass waived its right to argue that AHCA's determination of zero need was flawed.

110. For all of the reasons set forth in the Findings of Fact, Encompass failed to rebut the presumption of zero need.

111. Rule 59C-1.039(5)(f)2. provides for a preference to be given to a CON Application for proposing to serve the Medicaid population. The rule states:

> Priority Consideration for Comprehensive Medical Rehabilitation Impatient Services Applicants. In weighing and balancing statutory and rule review criteria, the Agency will give priority consideration to:
>
> * * *
>
> 2. An applicant proposing to serve Medicaid-eligible persons.

In light of the fact that the percentage of patients to be served by Encompass is well below the range of the current providers, coupled with the fact that such a low percentage allows Encompass to choose higher paying patients, which would lead to a negative impact on the Medicaid patient population, there is no compelling evidence to support according additional weight regarding this factor. Moreover, because the applicant failed to demonstrate need, the application of this preference is moot.

112. The parties stipulated that Encompass has sufficient funds for capital and operating expenditures in compliance with section 408.035(1)(d) and that Encompass's application is financially feasible in the short term.

113. However, the revised staffing plan prepared and submitted by Encompass constitutes an improper amendment to

Encompass's CON Application. Staffing resources are a critical component of a CON application. See § 408.035(1)(d), Fla. Stat. (including in the CON review criteria the "availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation"). The introduction of evidence related to revisions to the staffing resource information submitted in the CON Application and reviewed by AHCA constitutes a substantial change to Encompass's CON Application. The revised staffing plan is not simply a correction of typographical errors or correction of mathematical calculations, but instead constitutes a substantial revision to the proposed staffing structure and number of each type of staff members. The revisions substantially change the nature and scope of the staffing plan originally proposed in the CON Application such that the revised staffing plan constitutes an improper amendment to Encompass's CON Application. It is well settled that substantial changes to a CON application are not permitted during the course of the administrative hearing, as any such change constitutes an impermissible amendment to the CON application. See Manor Care, Inc. v. Dep't of HRS, 558 So. 2d 26, 28-29 (Fla. 1st DCA 1989); Gulf Court Nursing Ctr. v. Dep't of HRS, 483 So. 2d 700, 707 (Fla. 1st DCA 1986); see also All Eighth Fla. Living Options, LLC v. Ag. for Health Care Admin.,

Case No. 15-1897CON (Fla. DOAH Feb. 22, 2016; Fla. AHCA Apr. 13, 2016); NME Hosp., Inc., d/b/a West Boca Med. Ctr. v. Dep't of HRS, Case No. 90-7037 (Fla. DOAH Feb. 25, 1992; Fla. DHRS April 8, 1992); Fla. Admin. Code R. 59C-1.010(3)(b) ("[s]ubsequent to an application being deemed complete or withdrawn by the Agency, no further application information or amendment will be accepted by the Agency.").

114. Considering all of the evidence, review of criteria, and applicable law, Encompass did not prove that its CON Application meets the applicable statutory and rule criteria.

115. In view of the evidence, a balanced consideration of all applicable statutory and rule criteria compels the conclusion that Encompass's CON Application should be denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is, RECOMMENDED that the Agency for Health Care Administration enter a final order denying CON Application Number 10495 filed by Encompass.

DONE AND ENTERED this 31st day of January, 2019, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
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this 31st day of January, 2019.

ENDNOTE

[1/] Unless otherwise noted, all citations to the Florida Statutes and Florida Administrative Code are to current versions.

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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.