STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARION COMMUNITY HOSPITAL, INC., d/b/a WEST MARION COMMUNITY HOSPITAL AND OCALA REGIONAL MEDICAL CENTER,

Petitioners,

vs. Case Nos. 18-0068CON
18-0075CON

AGENCY FOR HEALTH CARE ADMINISTRATION AND FLORIDA HOSPITAL WATERMAN, INC., d/b/a FLORIDA HOSPITAL WATERMAN,

Respondents.
_____/

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings conducted the final hearing in this cause on June 18 through 22 and 25, 2018, in Tallahassee, Florida.

APPEARANCES

For Petitioners Marion Community Hospital, Inc., d/b/a West Marion Community Hospital and Ocala Regional Medical Center

Craig D. Miller, Esquire
J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

For Respondent Agency for Health Care Administration

Richard Joseph Saliba, Esquire
Lindsey L. Miller-Hailey, Esquire
Agency for Health Care Administration
Mail Stop 7
2727 Mahan Drive
Tallahassee, Florida 32308

For Respondent Florida Hospital Waterman, Inc., d/b/a Florida Hospital Waterman

Stephen K. Boone, Esquire
Boone, Boone, Boone, and Koda, P.A.
1001 Avenida Del Circo
Post Office Box 1596
Venice, Florida 34284

Mia L. McKown, Esquire
Holland & Knight, LLP
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

A. Should the Agency for Health Care Administration (Agency) approve Certificate of Need (CON) Application No. 10499 of Marion Community Hospital, Inc. (Marion Community), d/b/a West Marion Community Hospital (West Marion), to add 12 comprehensive medical rehabilitation (CMR) beds to its facility?

B. Should the Agency approve CON Application No. 10496 of Florida Hospital Waterman, Inc. (Waterman), to add 12 CMR beds to its facility?

PRELIMINARY STATEMENT

West Marion and Waterman are acute care hospitals located in Agency Health Service Planning District 3. For the applicable

planning horizon, the Agency calculated a need for 12 new CMR beds in District 3. West Marion and Waterman each would like to add 12 CMR beds to their facility. They do not oppose each other adding beds. They agree that "not normal circumstances" establish a need for at least 24 new CMR beds in District 3. Each maintains that if only one may add CMR beds, it is the one. The Agency approved Waterman's application and denied West Marion's application. This proceeding followed.

At the hearing, West Marion presented the testimony of Chad Christianson, Carrie Garay-Quirantes, Jeff Nasman, Gene Nelson, and Katherine M. T. Platt. West Marion Exhibits 1 through 8, 12, 14, 17, 18, and 20 through 23 were accepted into evidence. After the hearing, West Marion submitted the deposition transcript of Cory Hewitt, which was admitted in lieu of live testimony as West Marion Exhibit 35. On August 27, 2018, West Marion filed the deposition transcript of James Duke, which was accepted as West Marion Exhibit 25. The record was closed at this point.

Waterman presented the testimony of Abel Biri, Julian Coomes, Tracey Estok, Mitchell Freed, David Levitt, and Michelle Maes. Waterman Exhibits 1, 3 through 9, and 11 were accepted into evidence.

The Agency presented the testimony of Marisol Fitch. Agency Exhibits 1 and 2 were admitted into evidence.

A Transcript of the hearing was filed. The parties obtained two extensions of the date for filing proposed recommended orders. West Marion and Waterman timely filed proposed recommended orders. Waterman also filed a Memorandum of Law. The Agency timely filed a Memorandum of Law. The undersigned has considered the parties' submissions in preparation of this Recommended Order.

FINDINGS OF FACT

Stipulations

1. There is a published need for 12 CMR beds in District 3.

2. Waterman is an existing licensed hospital that currently operates a 269-bed facility in Service District 3, Sub-District 7, Lake County.

3. Ocala Regional Medical Center (Ocala Regional) is an existing licensed hospital that operates a 222-bed acute care facility in Service District 3, Sub-District 4, Marion County.

4. West Marion is an existing licensed hospital that currently operates a 138-bed facility in District 3, Sub-District 4, Marion County.

5. Marion Community Hospital, Inc., d/b/a Ocala Regional Medical Center, is a verified Level II trauma center.

6. West Marion and Waterman satisfy the CON review criteria regarding 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. § 408.035(1)(h), Fla. Stat. (2018).[1/]

7. Schedules 1 through 10 of each hospital's application are reasonable.

8. West Marion and Waterman satisfy the CON application review criteria regarding the immediate and long-term financial feasibility of their proposals. § 408.035(1)(f), Fla. Stat.

Parties

The Agency

9. The Agency is the state agency charged with administering the CON program. Section 408.034(1), Florida Statutes authorizes the Agency to evaluate CON applications.

West Marion

10. Marion Community owns West Marion and Ocala Regional. Both are acute care hospitals. Marion Community proposes to establish a 12-bed CMR unit at its West Marion campus. This is a new service. West Marion and Ocala Regional operate using one tax ID number and one Medicare billing number. One medical executive committee governs the medical staff for both facilities. They have the same Chief Executive Officer and Chief Financial Officer. They have different physical facilities and locations. These facilities, along with Summerfield freestanding emergency department, operate as the Ocala Health System (Ocala Health).

11. Ocala Regional is located in Ocala, Marion County, Florida. West Marion is also located in Ocala. West Marion's primary service area is Marion County (Sub-District 4).

12. Ocala Health is a fast growing health system. It serves a large geriatric (65 and older) population. West Marion and Ocala Regional provide acute health care services to patients who need CMR services.

13. Ocala Regional treats a more acutely ill patient population. That population includes patients recovering from bilateral joint replacements (replacing both knees at once); patients recovering from trauma injuries, especially severe brain and spinal cord injuries; and patients recovering from strokes.

14. Marion Community plans to locate the CMR beds at West Marion. West Marion is located on 50 acres that provide plenty of space for the CMR unit and room for future growth. West Marion should complete its most recent expansion by March 2019, increasing its inventory of acute care beds to 174.

15. West Marion plans to contract with Strive Physical Therapy Centers (Strive). Strive is the contracted physical therapy, occupational therapy, and speech therapy provider for the Ocala Health System, providing outpatient and inpatient services. It is a competent professional health care provider.

16. West Marion operates a very busy orthopedic joint replacement program that has become a destination center for total

joint replacement patients. The joint replacements conducted at West Marion include many of the most complex types, including bilateral replacements, revision replacements of joint replacements, surgeries for severely overweight patients, and surgeries for patients over the age of 85.

17. Many of these patients require intensive and prolonged rehabilitation. CMR services would benefit them greatly.

18. This category of West Marion's patients experiences problems accessing CMR services.

19. Ocala Regional recently began a $64 million expansion project. It includes the addition of 12 emergency department beds, 34 additional beds at the hospital, two additional operating rooms, and the infrastructure necessary for comprehensive stroke center certification.

20. Ocala Regional operates a Level II trauma center. Trauma service is a regional program. The sweep of a 40-mile radius around the hospital circumscribes Ocala Regional's trauma service area. The area includes Marion, Citrus, and Hernando Counties. It contains approximately one million people.

21. Ocala Regional's trauma center is the fourth busiest trauma center in Florida. Since opening in December 2012, the trauma center has experienced a yearly growth rate of 11 percent. This is greater growth than other Florida trauma centers, likely the result of growth in the size of the area's geriatric

population. Members of that population are more prone to serious injury in accidents. Ocala Regional's Trauma Center treats approximately 3,500 trauma patients a year.

22. Ocala Regional's high acuity trauma program cares for patients with traumatic brain and spinal cord injuries. Ocala Regional has a highly trained staff, including seven trauma critical care physicians and three neurosurgeons, specializing in treatment of traumatic brain injuries and severe spinal cord injuries.

23. Ocala Regional recently expanded its facility to include a state of the art intensive care unit that will increase the number of high acuity patients in need of CMR services.

24. Sixty-five percent of Ocala Regional's trauma patients come from Marion County. The rest come in roughly equal numbers from Lake, Sumter, and Citrus Counties. Ocala Regional is also a receiving facility for trauma patients from The Villages Regional Hospital in Sumter County, and for advanced trauma patients of another area hospital, Munroe HMA Hospital, LLC, d/b/a Munroe Regional Medical Center.[2/]

25. Need for CMR services correlates naturally with the provision of trauma services because trauma patients often require intensive and prolonged rehabilitation therapies to return to normal daily activities. These patients can benefit greatly from the intensive rehabilitation services offered through CMR units.

26. Ocala Regional also operates a certified primary stroke center. It currently provides all treatment modalities, with the exception of interventional neurology. Ocala Health serves a high volume of stroke patients, in part due to the large geriatric population that it serves. As with trauma services, the elderly are more likely to need CMR services than the general population.

27. Stroke patients are the biggest driver of CMR admissions because a stroke patient requires the intensive, multi-discipline therapies that CMR units provide. West Marion operates a primary stroke center. Patients of this center also experience problems accessing CMR services.

28. Ocala Regional is in the final stages of obtaining approval to operate as a comprehensive stroke center. This provides care for patients suffering large vessel strokes, the most serious sort.

29. When a stroke patient meets the criteria for large-vessel disease, a primary stroke center is not as good a treatment option as a comprehensive stroke center, which is able to provide necessary interventional neurology services.

30. Comprehensive stroke patients are a primary driver for the need for inpatient rehabilitation services. CMR services benefit these patients by addressing immediate post-stroke deficits such as aphasia, hemiparesis (weakness on one side of the

body), and cortical blindness. These patients will immediately require the largest amount of CMR services.

31. Certification of Ocala Regional as a comprehensive stroke program will enable Ocala Regional to serve as the comprehensive stroke program for Marion, Lake, Sumter, and Citrus Counties, an area with a population of approximately one million people. This will promptly drive an increased need for CMR services not accounted for by the Agency rule. The Emergency Medical Treatment and Labor Act requires that large vessel stroke patients be transported to a comprehensive stroke center.

32. The comprehensive stroke programs closest to Marion County are located in Tampa, Gainesville, and North Florida.[3/] Once certified, Ocala Health will be the first and only comprehensive stroke center in Ocala. The number of severe stroke patients treated at Ocala Regional will rise and correspondingly immediately increase the need for CMR beds in Marion County.

33. The geriatric population is growing in District 3, in general, and in Marion County specifically. This area also experiences a seasonal influx of elderly when "snowbirds" come to Florida during the winter. The geriatric population greatly benefits from access to CMR services. It also generates an increased need for CMR services.

34. Access to CMR beds is a consideration for certification as a trauma center and certification as a comprehensive stroke

program. This demonstrates a correlation between these programs and a more robust need for CMR services. Ocala Health's significant programs in these vital service areas are a strong consideration in favor of approving CMR services at West Marion. The new CMR beds will ensure access to needed health care services in the community.

35. Ocala Regional is also developing a graduate medical education (GME) program for various disciplines. A GME program typically increases the sub-specialties available at a hospital. This in turn facilitates treatment of more complex cases and patients more likely to need CMR services.

36. Establishment of the GME program is helping transform Ocala Regional into a tertiary facility serving the needs of Marion, Lake, Sumter, and Citrus Counties. The GME program will also improve services for trauma patients, complex cardiology cases, and advanced neurosurgical cases. The corresponding increase in patient acuity will bolster the need for CMR beds in a manner which the need rule cannot anticipate.

37. These patients will benefit greatly from sufficient and timely access to CMR beds and the continuity of care that accompanies location of a CMR unit in conjunction with an acute care hospital.

Waterman

38. Waterman is a not-for-profit 269-bed acute care hospital located in Tavares, Lake County, Florida, in the southeastern corner of District 3. It serves residents of north, central, and west Lake County. Waterman proposes to establish a 12-bed CMR unit at its Tavares facility. Waterman accepts all patients, regardless of their ability to pay.

39. Waterman is part of the Florida Hospital System, which has facilities on 23 campuses and serves communities throughout Florida. Waterman is also part of the Adventist Health System. The system owns a broad variety of health care facilities including 42 hospitals in ten states.

40. Waterman is opening a 60-bed skilled nursing facility on its campus. Waterman's new skilled nursing facility will provide some rehabilitation services to patients discharged from the hospital. The services, however, will not be an adequate substitute for the more intense CMR services. This is also true of home health services.

41. Waterman is a tertiary level hospital. It serves a large, fast-growing area. It is the busiest hospital in Lake County as measured by emergency visits and discharges. Waterman offers a wide array of high quality medical and surgical services. They include an accredited cancer institute, open-heart surgery, knee and hip replacements, extracorporeal membrane oxygenation,

and 24-hour advanced emergency services. Waterman is also a primary stroke center. It is not currently, and is not in the process of becoming, a certified comprehensive stroke center. Waterman is also not a designated trauma center.

42. Waterman operates a robust outpatient rehabilitation unit, the Florida Hospital Waterman Rehabilitation Institute (Institute). The Institute provides a wide variety of treatments and unique specialty care such as physical therapy, hand therapy, speech therapy, language therapy, pelvic rehabilitation, neurological therapy, amputee rehabilitation, orthopedics, and sports medicine. Waterman CMR patients will benefit from Waterman's use of the skills, caregivers, and experience of the Institute in operating its CMR unit. The Florida Hospital system operates several successful CMR programs. Waterman's CMR services will have the benefit of assistance from the administrators and clinicians from these sister facilities as it develops, implements, and operates its CMR unit. These resources require finding that Waterman will more quickly bring enhanced quality of care to the District.

43. Waterman also operates a Home Care Agency. The agency has provided home health care -- including physical, occupational, and speech therapy services -- to residents of Lake County and the surrounding areas since 1977.

44. Waterman has several expansion projects underway. A related organization is building a 120-bed nursing home on the Waterman campus. Waterman is also completing a $75 million capital improvement project that will increase the size of its emergency department and will add a patient tower for pediatrics and women's services. Waterman plans to house the proposed CMR unit in the tower.

45. West Marion and Waterman are well-staffed, high-quality hospitals, affiliated with high-quality health care systems. They each provide their patients good care and are fully capable of establishing and operating the CMR units for which they seek certificate of need approval.

CON Regulation and Need

46. Every six months the Agency publishes projected numeric need for CMR beds in each health care planning district. Florida Administrative Code Rule 59C-1.039 regulates establishment of new CMR services and the addition or construction of new CMR beds. The Agency's rule provides that a determination of need for CMR beds "shall not normally be made" unless the rule's numeric methodology calculates one.

47. The rule establishes a simple formula for calculating CMR bed need. The formula calculates the current utilization ratio for CMR services in the district by dividing the number of patient days reported for inpatient CMR beds and dividing it by

the district population for the same period. It then multiplies the ratio times the projected population for the planning horizon, five years into the future. The rule divides that product by 365 times 85 percent. The rule specifies that 85 percent "equals the desired average annual occupancy rate for [CMR] beds in the district."

48. This operation calculates the gross number of beds needed for the district. The rule subtracts the licensed and approved CMR beds in the district from that number. The resulting number is the net number of beds needed. The rule does not account for markets in which patients needing CMR services receive similar, but not equivalent, less intense services from providers such as home health agencies, skilled nursing homes, or acute care hospitals without designated CMR beds, due to limited access to CMR beds. It also looks back, not forward. The need methodology promotes competition and access when the use rate in a service area falls below the statewide average use rate.

49. The need rule also provides that, regardless of whether the formula shows need, "no additional [beds] shall normally be approved unless the average annual occupancy rate of the beds in the district was at least 80 percent for the 12 month period ending six months prior to the beginning date of the quarter of the publication of the Fixed Bed Need Pool." Fla. Admin. Code R. 59C-1.039(5)(d).

50. The Agency's rule calculated a need for 12 new CMR beds in District 3 for the January 2023 planning horizon. District 3 includes Alachua, Bradford, Citrus, Columbia, Dixie, Gilchrist, Hamilton, Hernando, Lafayette, Lake, Levy, Marion, Putnam, Sumter, Suwannee, and Union Counties. The Agency had not published a need for CMR beds in District 3 for many years. This is because changes in CON regulation allowed existing providers to add beds in ten-bed increments if they met a specific occupancy threshold. In Ocala, HealthSouth Rehabilitation Hospital (HealthSouth) did this assiduously, effectively stifling what would otherwise have been a natural progression of need pool determinations.

51. West Marion and Waterman agree that "not normal circumstances" establish a need for at least 12 CMR beds in addition to the 12 generated by the numeric need formula. This is an unusual CON case in this way. There is not a party arguing that either application should be denied or offering evidence to support denial. This includes the Agency, which offers only technical legal arguments against approving both applications. Effectively, the Agency implicitly concedes the need for both programs.

52. The Agency's tacit concession that circumstances are not normal in District 3 manifests in another way. The Agency, without comment or explanation, proposes approving a new 12-bed CMR unit. This is despite rule 59C-1.039(3)(c), which states, "A

general hospital providing Comprehensive Medical Rehabilitation Inpatient Services should normally have a minimum of 20 Comprehensive Medical Rehabilitation Inpatient beds." The Agency's proposed approval of a 12-bed CMR unit confirms that something is not normal in District 3 when it comes to CMR services.

53. Rule 59C-1.039(5)(f)3. grants priority consideration to an applicant that is a designated trauma center as defined in Florida Administrative Code Rule 64J-2.011. West Marion claims entitlement to a preference for trauma centers based upon the fact that all of the Ocala Health system facilities operate under the same license. The facts do not support the argument. Although Marion Community's hospital license is for all Marion Community facilities, the trauma designation is for the Ocala Regional facility, not the West Marion facility.

54. A review of the trauma center rule 64J-2.011, including an application that it incorporates by reference, makes clear that the trauma center designation is for a facility not a system. For instance, the Level II Trauma Center Application Manual (DH Form 2043-A, January 2010) requires the following facility-specific information: Recovery/Post-Anesthesia Care Unit; Trauma Resuscitation Area; helicopter landing site; an immediately available adequately staffed operating room for trauma patients 24 hours a day; a second adequately staffed operation room available

within 30 minutes after the primary operating room is occupied; a post-anesthesia recovery area; airway control and ventilation equipment in the operating room; invasive hemodynamic monitoring equipment; and a fracture table. It is inconceivable that a trauma center could satisfy these requirements by having some of the facilities, such as the primary operating room, in one location and other facilities, such as the backup operating room or helicopter landing site, in another.

55. This does not, however, mean that the presence of a trauma center in the district is not relevant to considering the need for CMR. Trauma center patients have a greater and more frequent need for CMR services than general acute care patients.

CON Applications

56. The Agency maintains that the applications did not present a "not normal circumstances" theory and that, therefore, the parties cannot advance the theory at this point. The applications, however, did.

57. The applications of West Marion and Waterman sought approval relying upon arguments specific to their service areas and facilities, as well as relying on the calculated need. The arguments amount to claims that their projects should be approved because of "not normal circumstances." In the context of the application review and of this proceeding, each applicant had to advance two theories. The first is why it should be selected to

satisfy the numeric need. The second is why, regardless of calculated need, "not normal circumstances" call for approval of the applicant's proposal. The facts and reasoning supporting each argument are congruent if not identical. Consequently, there was no need to label application assertions in the applications or evidence at hearing as applying to one theory or the other.

58. West Marion's CON application sought to fill the 12-bed numeric need. It also relied upon "not normal circumstances" for approval of its proposed 12-bed unit.

59. West Marion's application discusses the unavailability of CMR beds at HealthSouth, the county's only CMR provider. It reviews the fact that HealthSouth has operated at or near capacity since opening, despite two ten-bed additions. Then West Marion concludes, on page 18 of the application, "This chronic unavailability of inpatient beds at HealthSouth creates a severe accessibility problem for the growing population of Marion County, and constitutes a not normal circumstance." (WM Ex. 1, p. 22)[4/] (emphasis added).

60. Another part of West Marion's application discussing the unavailability of beds at HealthSouth makes a similar assertion. Page 52 of West Marion's application (WM Ex. 1, p. 55) states, "The chronic shortage of CMR beds in Marion County, especially given the location at ORMC of a Level II trauma center serving the

residents of TSA 6 (Marion, Citrus and Hernando counties), is a not normal circumstance." (emphasis added).

61. The same page of the application states that the consistently high utilization of HealthSouth creates significant difficulty obtaining suitable CMR services for patients discharged from Ocala Health's trauma program.

62. West Marion's application repeatedly notes that its approval will not adversely affect existing providers or the proposed Waterman CMR unit.

63. Waterman's CON application sought to fill the 12-bed need calculated by the Agency. It also relied upon "not normal circumstances" for approval of its proposed 12-bed unit. The statement on page 6 of the application (WH Ex. 1, p. 118) is explicit. "[Waterman's] proposal has been developed to respond to the published numerical need for additional CMR services in District 3, as well as health planning factors that exist even in the absence of numerical need. The need for a CMR unit at [Waterman] is based on a lack of accessible CMR services for residents of Lake County that is evidenced by the following facts." (emphasis added). A list of seven factors follows, including that the Lake County population aged 65 or older is increasing faster than the district's and the fact that approval of beds for Waterman would not adversely affect existing providers.

64. Page 30 of Waterman's application (WH Ex. 1, p. 142) repeats the assertion of "not normal circumstances." It states, "[Waterman] has developed this proposal in response to the published need for additional CMR beds in the District, as well as facility and market-specific factors that clearly show the beds should be located within Lake County and at [Waterman]." (emphasis added). Waterman's application continues the theme on page 37 (Waterman Ex. 1, p. 149) asserting, "there is a barrier to accessibility of inpatient rehabilitation services for residents of Lake County and those who are discharged from [Waterman]."

65. West Marion committed to a minimum of seven percent of its annual discharges being a combination of Medicaid, Medicaid HMO, and self-pay/other (including charity) patients. This commitment is consistent with its financial projections that show 8.89 percent of its first-year revenue/charges attributed to services for that population. It will enhance access to CMR services.

66. Waterman made no commitment to serve these populations. Waterman's first-year financial projections show 5.3 percent of revenue/charges attributed to services for that population.

CMR Services and District 3

67. CMR services are provided to patients discharged from an acute care hospital after treatment for an ailment or event that requires substantial rehabilitation before the patient resumes

normal daily activities. For example, patients with complex nursing or medical management needs or conditions such as spinal cord injury, amputation, multiple sclerosis, hip fracture, brain injury, and neurological disorders need CMR services. Fla. Admin. Code R. 59C-1.039(2)(d). Patients recovering from an acute episode such as a severe trauma injury or stroke and patients recovering from complex orthopedic joint replacement surgeries such as bilateral joint replacements and patients with a high body mass index (BMI) recovering from joint replacements also need CMR services.

68. The continuum of care for physical rehabilitation services comprises a range of levels, depending primarily on patient condition/goals, medical management requirements, and the ability to participate in therapy. Patients can receive physical rehabilitation in an acute rehabilitation unit inside a hospital or freestanding facility (a CMR unit), a skilled nursing facility, through a home health agency, or in an outpatient setting. CMR units, which are at issue in this case, provide the most intense level of rehabilitation.

69. Determinations of whether a CMR admission is necessary depend on whether the medical record demonstrates a reasonable expectation that certain criteria are met at the time of admission to a CMR unit. The criteria include: (1) requiring active and continuing intervention of multiple therapy disciplines (Physical

Therapy, Occupational Therapy, Speech-Language Pathology, or prosthetics/orthotics), at least one of which must be PT or OT; (2) requiring an intensive rehabilitation therapy program of three hours of therapy per day at least five days per week; (3) having an ability to actively participate in, and benefit significantly from, an intensive rehabilitation therapy program; (4) requiring supervision by a rehabilitation physician, with face-to-face evaluations at least three days per week; and (5) requiring an intensive and coordinated interdisciplinary team approach to the delivery of rehabilitative care.

70. Family support and involvement play a vital part in the rehabilitation process. Family members are also part of the care-giver team. Additionally, positive attitudes and reinforcement from family members can inspire the patient and help her adapt to new physical challenges or limits. Finally, family members are able to assist staff in motivating the patient and maintaining communication between the patient and the rehabilitation team.

71. Travel distance plays a significant role in an eligible CMR patient's decision to enter a CMR unit. Elderly patients and/or their families often do not choose to travel far from their home even though the patient needs the CMR services, because travel places an unreasonable burden on patients and their families.

72. CMR facilities focus on speech, physical, and occupational therapies. A CMR facility provides intensive therapy on a frequent, consistent basis. This helps patients recover more quickly than they would in another setting.

73. The Federal Center for Medicare and Medicaid Services ("CMS") establishes the requirements for CMR facilities, which are designated by CMS as "inpatient rehabilitation facilities." CMR facilities are also sometimes referred to as acute rehabilitation facilities.

74. HealthSouth is the only CMR provider in Marion County in District 3. Lake County does not have a CMR provider. There was a CMR unit located at Leesburg Regional Hospital North in Lake County until July 1, 2016. That facility closed. The CMR beds from the Leesburg facility were transferred to The Villages, which is located in Sumter County. The evidence is insufficient to establish the reason for this.

75. HealthSouth is the closest CMR provider to West Marion and Ocala Health. It is a stand-alone CMR facility in Ocala. The facility has been authorized to add ten more beds. The record is silent on when the beds will be added. HealthSouth opened in 2011 with 40 beds and has grown to 60 beds in ten-bed increments. Since 2012, HealthSouth has maintained an occupancy rate of 90 percent or higher. Despite its incremental growth, HealthSouth has not had sufficient available beds to meet the needs of

patients from Ocala Health and West Marion or the district in general.

76. District 3's CMR occupancy rate is 86.5 percent. This is the highest rate for any district and is above the 85 percent that Agency rule establishes as the desired occupancy rate.

77. All clinicians and experts in this case agree that rehabilitation services at skilled nursing facilities, long-term acute care hospitals, and home with home health care are not acceptable alternatives to CMR. They also agree that patient outcomes in those settings are not as good, since those settings simply do not provide the same level of care as a CMR unit.

Access Problems

78. There is no legal mandate requiring a licensed facility to accept CMR patients. A CMR facility may refuse any patient that it wishes. This means that HealthSouth can cherry-pick patients based on the most desirable payor source, leaving patients with less desirable payment providers, such as Medicaid, without access to CMR services. HealthSouth has demonstrated a preference for certain payors (including Medicare-eligible patients, patients with commercial insurance including some Blue Cross policies). It typically does not accept Medicaid or charity care patients. Ocala Health providers often do not even try to refer a Medicaid or charity care patient to HealthSouth because,

based on experience, staff expects that HealthSouth will not admit those patients.

79. HealthSouth frequently refuses to accept patients discharged from Ocala Health who qualify for CMR services under the CMS guidelines, including trauma, stroke, and complex orthopedic joint replacement patients. A large number of the patients that Ocala Health refers to HealthSouth each month are not accepted and are not able to receive CMR services that would improve their outcomes.

80. HealthSouth's admissions practices leave many Ocala Health patients needing CMR services without access to them. This vitiates consideration of HealthSouth as a reason to not add CMR beds in Marion County and District 3.

81. There is a large unmet need for additional CMR beds to serve Ocala Health patients and other district residents.

82. Some patients rejected by HealthSouth are admitted to skilled nursing facilities in Marion County. For patients needing CMR services, those facilities, although they provide some rehabilitative care, are not the correct solution. For example, treatment of the large vessel stroke patients, which Ocala Health's comprehensive stroke center will serve, at a skilled nursing facility is not appropriate. Similarly, a skilled nursing facility would not meet the CMR needs other higher acuity

patients, like bilateral transplant patients, the multidiscipline, intensive three hours a day therapy that a CMR facility provides.

83. A skilled nursing facility provides rehabilitation services for approximately one to one and a half hours daily. This can result in a longer recovery time for high acuity patients. A skilled nursing facility is geared more toward patients with a simple hip fracture. Patients with more complex issues like bilateral joint replacements and spinal cord injuries need more.

84. In a CMR facility, the patient sees a physician every day. In a skilled nursing facility, a patient usually sees a physician once a month. A skilled nursing facility is not optimal for higher acuity acute patients. However, due to the utilization and admission practices of HealthSouth, patients who need CMR services are often treated in skilled nursing facilities. This unusual circumstance causes the CMR need formula to under-calculate District 3's need for CMR beds since these skilled nursing patients are not taken into consideration, whereas they would be if they were being treated in a CMR unit, as they should be.

85. HealthSouth admission practices, consistently high occupancy rates, and delays in responding to referrals result in many patients who are ready for discharge with a physician order for CMR services, languishing in acute care beds at Ocala Regional

or West Marion for longer lengths of stay or force the patients to travel to a CMR facility further from the patient's home and support system.

86. These problems can negatively affect patient outcomes because the sooner patients start ambulating and leave an acute care facility, the less chance they have of suffering complications.

87. When a patient cannot gain admission into a CMR facility and remains in an acute care bed, the patient is not receiving the needed CMR services ordered by the physician. This can cause a decline in their ability to benefit from therapy or an avoidably prolonged recovery.

88. Because many of District 3 patients are elderly, their stay in a CMR facility, if and when they are admitted, ends up being longer than it would have been if they were more promptly placed.

89. Younger patients also suffer from the lack of timely access to CMR. For example, a younger patient suffering from paralysis who has to remain in the hospital would benefit from approval of both applications because the patient will receive more therapy and opportunities for family support. While the hospital provides rehabilitative therapies in the acute care hospital setting, those services are provided at bedside and are

limited in time and intensity compared to what a patient would receive in a CMR unit.

90. The difficulty and delays in transferring patients to appropriate rehabilitation facilities cause Ocala Health hospitals to have a length of stay that is greater by a day or a day and a half than other trauma centers.

91. The lack of availability of access to CMR services and the lack of timely access to CMR services negatively affects the Marion Community hospitals and their patients' access to necessary services. When a patient is ready for discharge but has to remain in an acute care bed due to lack of availability of CMR beds, the availability of an acute care bed for a new acute care patient is reduced. This can result in the hospital going on "bypass," meaning no new patients are taken in through the emergency room.

92. In District 3 during the 12-month period ending December 31, 2016, six facilities with 202 licensed CMR beds served the entire district. The facilities are UF Health Shands Rehab Hospital, Seven Rivers Regional Medical Center (now closed), HealthSouth Rehabilitation Hospital of Spring Hill, Leesburg Rehabilitation Hospital, The Villages Regional Hospital (The Villages), and the HealthSouth facility. The District 3 beds are located in Marion, Sumter, Hernando, and Alachua Counties. None are in Lake County.

93. These facilities experienced an 84.15 percent utilization rate. This is only .85 percent less than the Agency's desired annual occupancy rate and is nearly five percent greater than the 80-percent occupancy rate the Agency's rule sets as a trigger for approving additional beds. Fla. Admin. Code R. 59C-1.039(5)(d). This was the highest CMR occupancy rate in the state. The statewide average CMR occupancy rate was 69.61 percent. These circumstances are not normal.

94. The portion of CMR discharges covered under traditional Medicare or managed Medicare in District 3 is also significantly higher than the state average. This is reasonable since 27.2 percent of District 3's population is 65 and older, while just 20.1 percent of the statewide population is 65 or older.

95. In 2016, 74.1 percent of the statewide CMR discharges were covered under traditional or managed Medicare. For District 3, the number was nearly 81 percent.

96. Lake County has no CMR services, even though it is the second largest population center in the district.

97. Waterman is located a significant distance from the CMR providers in District 3. The closure and transfer of beds from Leesburg Regional Medical Center's CMR unit to The Villages in Sumter County increased the travel time to CMR services for residents of the area. The Villages is still the closest CMR provider to Waterman, but travel from Waterman to The Villages can

take 38 minutes to over an hour depending upon traffic and time of year. All other CMR providers are over an hour away, limiting access to CMR services.

98. "Conversion rate" is the percentage of acute care patients that are discharged to a CMR provider. Analysis of the conversion rate of acute care patients discharged to CMR for both Lake County and Waterman also indicates that the population's access to CMR services is limited. The district and state conversion rate to CMR is approximately two percent. The 2016 rate for Hernando County was 4.1 percent. The rate for Marion County of 2.6 percent was just over the district average. Lake County's rate is 1.5 percent, and Waterman's is .4 percent. This analysis demonstrates limited access to CMR services for Lake County residents and residents of Waterman's service area. The record offers no other explanation.

99. The analysis of discharges to CMR beds confirms the analysis. So does physician experience.

100. Like Marion County, Lake County has a rapidly aging and growing population. As a result, there are many Waterman service area and Lake County residents who are appropriate for and could benefit from CMR, but are not accessing these services due to travel and distance constraints.

101. The demographic and utilization data presented in this case demonstrate that there is a lack of accessible CMR services

for residents in District 3 generally, and in Marion County and Lake County specifically. During the most recent reporting period (12 months ending on December 31, 2016), the average annual District 3 occupancy rate for the 202 CMR beds was 84.15 percent. Existing CMR services are clustered in just a few areas of this 16-county district.

102. Patients of both applicants suffer from limitations on access to CMR services.

CONCLUSIONS OF LAW

103. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of these consolidated cases. §§ 120.569, 120.57(1), and 408.039, Fla. Stat.

104. Each applicant has standing to participate in this proceeding. § 408.039(5)(c), Fla. Stat.

105. Sections 408.035, 408.037, and 408.039 and Florida Administrative Code Rules 59C-1.008, 59C-1.030, and 59C-1.039 establish the governing review criteria and procedures. The award of a CON must be based on a balanced consideration of the applicable statutory and rule criteria. Balsam v. Dep't of Health and Rehab. Servs., 486 So. 2d 1341 (Fla. 1st DCA 1986). The appropriate weight to give each criterion is not fixed. It varies based upon the facts of the case. See, e.g., Morton F. Plant Hosp. Ass'n, Inc. v. Dep't of Health and Rehab. Servs., 491 So. 2d

586, 589 (Fla. 1st DCA 1986) (quoting North Ridge Gen. Hosp., Inc. v. NME Hosp., Inc., 478 So. 2d 1138, 1139 (Fla. 1st DCA 1985)); Collier Med. Ctr., Inc. v. Dep't of Health and Rehab. Servs., 462 So. 2d 83, 84 (Fla. 1st DCA 1986).

106. A CON applicant must prove by a preponderance of the evidence that its CON application should be approved. See, e.g., Boca Raton Artificial Kidney Ctr., Inc. v. Dep't of Health and Rehab. Servs., 475 So. 2d 260, 263 (Fla. 1st DCA 1985); § 120.57(1)(j), Fla. Stat.

107. An administrative hearing involving disputed issues of material fact is a de novo proceeding in which the Administrative Law Judge independently evaluates the evidence presented. 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. The Agency's preliminary decision and its findings in the State Agency Action Report (SAAR) are not entitled to a presumption of correctness.

Application Content

108. West Marion and Watermark satisfy the application content requirements of section 408.037 and rule 59C-1.039.

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

109. Both applicants proved that there is a lack of accessibility to CMR beds for patients from their respective

service area due to "not normal circumstances," including the extremely high utilization rate of CMR beds in District 3 which results in patients needing CMR services receiving some rehabilitation services in skilled nursing units or at home with the assistance of home health providers. Both, in fact, presented persuasive evidence that discharges from each hospital alone would generate most of the projected utilization for each applicant's proposed unit.

Section 408.035(1)(e) - The extent to which the proposed services will enhance access to health care for residents of the service district.

110. Rule 59C-1.039(6) says that CMR services should be available within a maximum ground travel time of two hours under average travel conditions for at least 90 percent of the district's population. Existing facilities satisfy this minimum standard. The evidence proved, however, that existing CMR facilities are not as a practical matter providing full accessibility due to abnormally high utilization, selective admission criteria, patient resistance to travel, and travel limitations on friends and family. West Marion and Waterman will both enhance access to residents in their respective service areas. There will be no adverse effect to either facility if both CON applications are approved. There is also no persuasive evidence that approval of both applications would have an adverse impact on existing providers in the district.

Section 408.035(1)(i) - The applicant's past and proposed provisions of health care services to Medicaid patients and the medically indigent.

111. Both applicants demonstrated that they provide services to Medicaid patients and the medically indigent. West Marion, however, offers to condition its CON on a requirement that "a minimum of 7% of the patients in the CMR Unit would be some combination of Medicaid, as well as self-pay." It also projects serving more Medicaid and self-pay/charity patients than Waterman. Thus, West Marion demonstrates a stronger commitment to serving the Medicaid/charity care population. Approval of its application will substantially improve access to CMR services for Medicaid, indigent, and self-pay patients.

Summary Comparison

112. The Findings of Fact establish that West Marion and Waterman satisfy the criteria of the governing statutes and rules. Either could be approved for the 12 CMR beds for which the Agency published a need. Waterman and West Marion both present sound proposals.

113. The persuasive and essentially unrebutted evidence also proves "not normal circumstances" supporting approval of at least 12 CMR beds in addition to the 12 for which the Agency calculated a need. The applicants serve different markets. Approval of two programs will not adversely affect either applicant. However, a comparative review of the two proposals requires a conclusion

that, for two reasons, Waterman is the better choice to fill the calculated need.

114. First, the access limitations faced by the patients that Waterman serves are more severe than those faced by West Marion's patients. Consequently, Waterman will enhance health care access to a greater extent than West Marion. § 408.035(1)(e), Fla. Stat.

115. Second, the resources available to Waterman due to its outpatient rehabilitation unit, the Florida Hospital Waterman Rehabilitation Institute, buttressed by the resources offered by the Florida Hospital System are superior to those available to West Marion. § 408.035(1)(d), Fla. Stat. This is in no way, however, a conclusion that West Marion does not have adequate resources to successfully open and operate its proposed CMR unit.

Approval of Two CONs

116. The Agency opposes approving either application on "not normal circumstances" grounds. It is worth noting again that the Agency did not present a factual case to support its argument, only legal theories. The Agency offers three arguments to support its position. The first is that the applicants did not seek approval based upon "not normal circumstances." The second is that the applications did not comply with the requirements of rule 59C-1.008(2)(d). The third is that seeking approval on a "not normal circumstances" theory in this proceeding amounts to an

impermissible amendment to the application. This argument subsumes the first argument.

117. The record and the findings based upon it show that both applicants incorporated a "not normal circumstances" theory into their applications. For this reason, the impermissible amendment argument fails. The Agency cites Community Hospice of Northeast Florida, Inc. v. Agency for Health Care Administration, Case No. 10-1865CON (Fla. DOAH March 22, 2011; Fla. AHCA May 1, 2011) to support its argument. The facts of that case differ from the facts of this case. In Community Hospice, one of the applicants, United Hospice of Florida, Inc., raised a new theory for approval of its application. It argued that a second hospice program should be approved, in addition to the one for which the Agency had calculated a need, because of low utilization by minorities and because the need projections showed a very large number of new admissions to hospice programs.

118. The Order explained why this was a new theory, a new proposal, and, therefore, an impermissible amendment.

> This change is so material that it amounts to an impermissible amendment under Manor Care, Inc. v. Department of Health and Rehabilitative Services. The theory requires a different analysis of all the information provided in the applications, an analysis that neither the applicants nor the Agency conducted during the initial review. The applications only provided information about how to best fill the projected need for one program. The applications contain no

> information or analysis about what the effect of approving two new programs would be on existing providers. The applications contain no information about what utilization each program could expect if two programs are approved or what the effect of that utilization would be on the existing provider and the other applicant. In short the new theory materially changes the United proposal.

119. This case is different. There are no material differences between the information and arguments that West Marion and Waterman made in their applications and those presented in the hearing. The applications provided information specific to each facility and to its patient population and service area to support approval. The applications specifically said that approval of programs at either or both facilities would not affect utilization of the other proposed program or existing providers. Comments in the SAAR reveal that the Agency gleaned that the applicants relied upon their institution-specific and market-specific need as well as the calculated need.

120. Page 20 of the SAAR notes that Waterman's application "discusses institution-specific need for CMR beds." Page 51 of the SAAR observes that West Marion "anticipates additional bed need to address availability and accessibility problems due to overutilization." On the same page, the SAAR recognizes the institution-specific and market-specific nature of West Marion's proposal: "WMCH contends that the general shortage of CMR beds in

District 3, specifically Marion County, justifies approval of the proposed program."

121. The same distinction applies to North Broward Hospital District, d/b/a Broward Health Medical Center v. Agency for Health Care Administration, Case No. 15-5549CON (Fla. DOAH May 4, 2016; Fla. AHCA June 2, 2016), also relied upon by the Agency. The applicant there proposed one kidney transplant program in its application and two at the hearing.

122. West Marion and Waterman have done nothing similar in this proceeding. Both seek to fill the calculated need. Both also argue that institution-specific and county-specific factors support granting them CMR beds. The same facts support both theories. Neither applicant has amended its proposal.

123. The Agency maintains that rule 59C-1.008(2)(d) prohibits seeking approval of beds on "not normal circumstances" grounds for a project seeking the same number of beds as the number projected by the Agency. The rule does not say that. It states:

> (d) The Agency will follow these procedures when awarding beds or services identified in a Fixed Need Pool:
>
> 1. Beds or services will be awarded based on the availability of a qualified applicant and proposed project which meets statutory review criteria.
>
> 2. In the absence of a qualified applicant and a project which meets statutory review

> criteria, the Agency may elect not to approve any applications for beds or services.
>
> 3. If a qualified applicant exists but the proposed project exceeds the beds or services identified in the Fixed Need Pool, the Agency may award beds or services in excess of the pool when warranted by special circumstances as defined in the applicable section of Chapter 59C-1, F.A.C., for the particular type of bed or service.

124. The Agency's theory is that it does not have authority to approve the two applications here on the basis of "not normal circumstances," because neither application is in excess of the fixed need pool. The theory fails first because of the lack of a factual premise. As discussed above, both applicants sought approval on grounds other than the fixed need pool. This necessarily means their proposed projects exceeded the fixed need pool.

125. The theory fails second because under the theory if either applicant sought 13 beds the Agency could approve the application, but it cannot since each applicant sought 12. The theory violates the common sense interpretation principle. Cf. Sch. Bd. v. Survivors Charter Schs., Inc., 3 So. 3d 1220, 1235 (Fla. 2009) ("We are not required to abandon either our common sense or principles of logic in statutory interpretation.").

126. Third, the theory is contrary to previous Agency decisions where the Agency has awarded multiple CONS based on not normal circumstances, even though there was no publication of

need. See HealthSouth Rehab. Hosp. of Seminole Cty. LLC v. Agency for Health Care Admin., Case No. 12-0425CON (Fla. AHCA May 11, 2012)(adopting settlement agreement permitting a 50-bed CMR hospital based on not normal circumstances)[5/]; Osceola Reg'l Hosp. Inc., d/b/a Osceola Reg'l Med. Ctr. v. Ag. for Health Care Admin., Case No. 15-3831CON (Fla. DOAH Mar. 22, 2016, Fla. AHCA Apr. 14, 2016)(approving through settlement agreement two CONs for CMR beds based on a showing of not normal circumstances)[6/]; see also Fla. Admin. Code R. 59C-1.008(2)(d)3.

127. The Agency does not identify a final order or court opinion establishing the interpretation that it advocates. The Agency does cite a number of cases expressing the principle of deference to Agency interpretations. The adoption of Article XI, section 5(e) to the Florida Constitution casts doubt on the persuasiveness of that argument. In any event, the Agency's interpretation of the rule is not reasonable or consistent with other parts of the same rule.

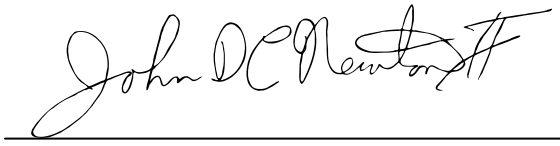
RECOMMENDATION

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

A. The Agency for Health Care Administration render a final order granting Florida Hospital Waterman, Inc., d/b/a Florida Hospital Waterman, a Certificate of Need to establish 12 Comprehensive Medical Rehabilitation Beds.

B. The Agency for Health Care Administration render a final order granting Marion Community Hospital, Inc., d/b/a West Marion Community Hospital and Ocala Regional Medical Center, a Certificate of Need to establish 12 Comprehensive Medical Rehabilitation Beds.

DONE AND ENTERED this 6th day of February, 2019, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of February, 2019.

ENDNOTES

[1/] All citations to Florida Statutes are to the 2018 codification unless otherwise noted.

[2/] Munroe HMA Hospital applied for the 12 CMR beds also and challenged its denial. But it has been dismissed from this proceeding.

[3/] This is a reference to a geographic area not a specific location or facility although the record leaves the impression that the reference is to Jacksonville, Florida.

[4/] "WM" refers to West Marion Exhibits. "WH" refers to Waterman Hospital exhibits.

[5/] See Case No. 12-0425CON, Petition for Formal Administrative Hearing, filed January 12, 2012.

[6/] See Case No. 15-3831CON, Petition for Formal Administrative Hearing, filed July 2, 2015.

COPIES FURNISHED:

Mia L. McKown, Esquire
Holland & Knight LLP
Suite 600
315 South Calhoun Street
Tallahassee, Florida 32301
(eServed)

Kevin Michael Marker, Esquire
Agency for Health Care Administration
Mail Stop 7
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Lindsey L. Miller-Hailey, Esquire
Agency for Health Care Administration
Mail Stop 7
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Richard Joseph Saliba, Esquire
Agency for Health Care Administration
Fort Knox Building III, Mail Stop 7
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Stephen A. Ecenia, Esquire
Rutledge Ecenia, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32301
(eServed)

David Mark Maloney, Esquire
Rutledge Ecenia P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32301
(eServed)

Craig D. Miller, Esquire
Rutledge Ecenia, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32301
(eServed)

J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32301
(eServed)

Stephen K. Boone, Esquire
Boone, Boone, Boone, and Koda, P.A.
1001 Avenida Del Circo
Post Office Box 1596
Venice, Florida 34284
(eServed)

Tiffany A. Roddenberry, Esquire
Holland & Knight, LLP
Suite 600
315 South Calhoun Street
Tallahassee, Florida 32301
(eServed)

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Mary C. Mayhew, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

Stefan Grow, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

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.