

STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

IN RE:)
)
PROPOSED AMBULATORY SURGERY) **GMCB-010-15CON**
CENTER)

**POST-HEARING MEMORANDUM IN OPPOSITION TO THE GREEN MOUNTAIN
SURGERY CENTER CERTIFICATE OF NEED APPLICATION
ON BEHALF OF
THE VERMONT ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS**

The Vermont Association of Hospitals and Health Systems (“VAHHS”), on behalf of its sixteen member hospitals, submits the following supplemental post-hearing memorandum in opposition to the application filed by ACTD, LLC d/b/a Green Mountain Surgery Center (“GMSC” or the “Applicant”) for a Certificate of Need (“CON”). Our intent is to clarify our arguments and evidence addressing the application and testimony by the Applicant to further demonstrate that this CON application does not meet four of the seven criteria required under 18 V.S.A. § 9437.¹

There Is No Need for Additional Surgery and Procedure Room Capacity in Northwestern Vermont

The Applicant must demonstrate that there is an “identifiable, existing or reasonably anticipated need for the proposed project.” 18 V.S.A. § 9437(3). VAHHS has provided the Board with capacity data from five hospitals demonstrating available and effectively useable outpatient surgical capacity in Northwestern Vermont. *Vermont Association of Hospitals and Health Systems Data Request Response* (May 6, 2016). The clinical leaders responsible for the

¹ To receive a CON, the Applicant must satisfy the criteria set forth in 18 V.S.A. § 9437. Green Mountain Care Board Rule 4.402(1) (“The Board shall not grant a Certificate of Need unless the proposed project is consistent with the policy and purposes set forth in Chapter 221 of Title 18, the statutory purposes set forth in 18 V.S.A. § 9372, and the criteria set forth in 18 V.S.A. § 9437.”).

operating and procedure rooms at Northwestern Medical Center and the University of Vermont Medical Center, who work daily to manage these community resources, presented sworn testimony to the Green Mountain Care Board (the “Board”) regarding the efficiency, efficacy, quality, availability, administration, procedures and actual use of operating and procedure room facilities at their respective hospitals.² KaufmanHall, a national expert in health care system capacity with expertise in ambulatory surgical centers, through the testimony of James Medendorp and Dr. Walter Morrissey, provided evidence that there is sufficient outpatient operating and procedure room capacity in Northwestern Vermont to meet demand until 2050. *Transcript of April 13, 2017 Hearing*, page 72-75 (April 13, 2017) and *Memorandum in Opposition to the Green Mountain Surgery Center Certificate of Need Application on Behalf of the Vermont Association of Hospitals and Health System*, Exhibit 1, “The Green Mountain Surgery Center (GMSC): Need Assessment”, slide 28 (March 3, 2017).

The Applicant has attempted to counter this evidence of capacity through inaccurate, secondhand anecdotes about a lack of intake rooms creating backlogs in the endoscopy suites. *Transcript of April 19, 2017 Hearing*, page 38-39 (April 19, 2017). Amy Cooper, on behalf of the Applicant, provided anecdotal evidence from a survey that was conducted three years ago by a third party as support for many of her allegations that there is a lack of outpatient operating room capacity.³ Christina Oliver, who oversees the management of the operating, procedure and endoscopy rooms at University of Vermont (“UVM”) Medical Center, testified under oath that there were no such backlogs or anyone “waiting to get access.” *Transcript of April 13, 2017 Hearing*, at 77, see also *Letter from Steven Klein, Director of Legal Affairs and Assistant*

² See Testimony of Jane Catton, RN, BScN, MSOL, NE-BC, Senior Vice President, Chief Operating Officer, Chief Nursing Officer, Northwestern Medical Center, *Transcript of April 13, 2017 Hearing*, pages 107-111 (April 13, 2017) and Testimony of Christina Oliver, MHA, Vice President, Clinical Services, University of Vermont Medical Center, *Transcript of April 13, 2017 Hearing*, at 75-80.

³ Notably, no surgeons with complaints or identified as planning to provide services at the GMSC testified under oath about these allegations, and ACTD, LLC presented no witness with actual clinical or operational experience in an ambulatory surgical center for the Board to question.

General Counsel to UVM Medical Center (April 24, 2017) (Statement that there is ample preparatory space at UVM Medical Center, submitted in response to incorrect statements made by Ms. Cooper.). Ms. Oliver also testified that there are open blocks available in the endoscopy suites at UVM Medical Center from 7:30AM until noon every Monday and Wednesday and every other Tuesday and Thursday. *Transcript of April 13, 2017 Hearing*, at 77. This sworn testimony from witnesses with firsthand experience and national experts clearly demonstrates that there is actual, not theoretical, outpatient surgical capacity in Northwestern Vermont and no need for the ambulatory surgical center. Where the Board takes the unprecedented step to permit the Applicant to shield from both Interested Parties and the general public the identities of the surgeons who have or intend to invest in the GMSC, the Applicant's unverified anecdotes of experiences and desires of the anonymous providers should not outweigh the testimony of witnesses presented by VAHHS and NMC.

The Applicant also argues that the GMSC is needed because it will improve the patient experience. *Applicant's Response to the Green Mountain Care Board's Request for Additional Information, Q006*, Response to Question 5, page 5 (January 25, 2017). Chris Oliver testified that UVM Medical Center has overall patient satisfaction scores of 94% and patient satisfaction scores of 95% for its endoscopy suites. *Transcript of April 13, 2017 Hearing*, at 76. Jane Catton, who oversees the management of operating and procedure room facilities at Northwestern Medical Center, provided comparable testimony to Ms. Oliver's that NMC's overall patient satisfaction scores are 94%. *Id.* at 109. These scores are based on surveys collected from patients and have resulted in grades that are tough to improve upon. ACTD, LLC also asserts that the GMSC is needed because it will assist in recruiting new providers to Vermont but it has not provided any evidence that it will undertake efforts or invest resources in recruiting physicians to Vermont.

ACTD, LLC relies on the Department of Banking, Insurance, Securities, and Health Care Administration's ("BISHCA") decision to grant the Vermont Eye Laser and Surgery Center ("Eye Surgery Center") a certificate of need in 2007 to justify an alternative definition of "need" under the CON laws as a need for choice, a better patient experience, and lower cost, more convenient care. *Applicant's Response, Q006*, at 5. The BISHCA Eye Surgery Center decision was issued ten years ago under very different circumstances than the current Application. Significantly, however, BISHCA considered demand and capacity in its decision to grant the Eye Surgery Center a CON. In particular, BISHCA found in its decision that there would be an imminent increase in demand for eye surgeries. *See In re: Application of Eye Surgery and Laser Center of Vermont, Docket No. 05-058-H, Statement of Decision, Findings and Observations*, ¶ 4 (May 10, 2007) ("Demographic projections point to a significant increase in demand for eye surgery in the coming decade. Massachusetts Institute for Social and Economic Research estimates the 65 and over population in the applicant's proposed service area will increase by 44% from 2005-2015. This demographic cohort is the primary consumer of outpatient eye surgery, suggesting that there will be a significant increase in demand for outpatient eye surgery in the coming decade...this proposed facility [the Eye Surgery Center] would likely accommodate this anticipated surge in demand."). ACTD, LLC has not demonstrated that there will be any increase in demand for outpatient surgery beyond the level that existing facilities are capable of accommodating.⁴

The Eye Surgery Center applicant provided evidence that new technologies and techniques would make its facility a unique offering in Vermont health care rather than duplicative of hospital efforts. *Id.* at ¶¶ 26 and 31. ACTD, LLC makes no argument that new techniques or technologies will be used at the GMSC, and it provides no evidence that the

⁴ The Applicant based its speculation that there would be increased demand for outpatient surgeries on outdated population data that overestimated the population growth by 3 times.

proposed ambulatory surgery center will offer anything different from or more innovative than what the hospitals currently offer. In fact, Northwestern Medical Center has demonstrated to the Board that it is capable of providing the same level of efficiency and aptitude as ambulatory surgical centers nationwide. *Transcript of April 13, 2017 Hearing*, at 107-109 and *Northwestern Medical Center Submission of Information in Opposition to Application*, pages 2-4 (March 3, 2017). ACTD, LLC seeks to offer a duplicative service, which is contrary to the intent of the CON law and regulations.⁵

Finally, BISHCA limited the CON it granted to the Eye Surgery Center to permit the applicant to offer and provide only eye surgery and related procedures of the “type and nature described in the Application” for which need had been demonstrated. *In re: Application of Eye Surgery and Laser Center of Vermont*, at 16. In the current CON application, the Applicant is asking the Board to approve a CON for a multi-specialty center for which need has not been demonstrated.

Given the factual testimony presented by hospitals about actual, effectively usable, available capacity and a failure of the GMSC to demonstrate that there is an imminent increase in demand, the Applicant has not met the criterion that there is need for the GMSC.

The Proposed ASC Has Not Met The Criterion Requiring that Cost Be Reasonable

The burden is on the Applicant to demonstrate that the cost of the Green Mountain Surgery Center is reasonable by showing that its negative impact on services, expenditures and

⁵ 18 V.S.A. § 9431(a) (“It is declared to be the public policy of this state that the general welfare and protection of the lives, health, and property of the people of this state require that all new health care projects be offered or developed in a manner *which avoids unnecessary duplication* and contains or reduces increases in the cost of delivering services, while at the same time maintaining and improving the quality of and access to health care services, and promoting rational allocation of health care resources in the state; and that the need, cost, type, level, quality, and feasibility of providing any new health care project be subject to review and assessment prior to any offering or development.”) (Emphasis added.)

charges of other providers is outweighed by the benefit of the project to the public. 18 V.S.A. § 9437(2)(b).

Though the Applicant has repeatedly attempted to minimize its impact on surrounding hospitals and Vermont's health care system, both VAHHS and NMC have demonstrated that an unlimited multi-specialty ambulatory surgical center will divert significant resources from the hospitals which help to pay for fixed infrastructure costs and services that are not adequately paid for by reimbursements for those services. Yet, the surgery center cannot exist without this same infrastructure and these services being available at hospitals to provide 24/7 care for its patients when needed. The GMSC will cherry pick low-complexity cases and will likely select patients with higher reimbursement private insurance while continuing to rely on hospitals to provide care for those patients with governmental insurance and more complex cases.

ACTD, LLC has not established that this impact on the hospitals and the Vermont health care system is outweighed by the benefits of the project to the public, including lower costs. The Applicant has speculated in its submissions to the Board that commercial payer fees at the GMSC will be 50% of the rates at hospitals and has based this speculation on a "couple of costs studies" conducted ten years ago by self-funded auto-employers in metropolitan markets. *Transcript of April 13, 2017 Hearing*, at 17 and 56. When asked for Medicare and Medicaid rates for the CPT codes the GMSC plans to offer, the Applicant provided general, aggregated data. *Applicant's Response to Board Member Lunge's Request for Supplemental Information* (4/24/17). To assess Medicaid savings, ACTD, LLC simply applied the same Medicare rates. The Applicant has failed to provide any actual evidence that the GMSC will produce any savings for or benefit Vermont's health care system.

The Proposed ASC Will Not Improve Quality Or Provide Greater Access To Health Care

In Vermont

The ASC has provided national statistics about the quality of care offered by ASCs generally. The national safety and quality ratings of Vermont health care system,⁶ however, is so high that the Applicant is unable to provide any evidence that it will improve upon the quality of care available. The GMSC, as described, also will not provide greater access to health care for Vermonters. The proposed ASC will be located in a well-served area and only provide services to select patients with uncomplicated cases. Although the Applicant promises that it will provide charity care and accept Medicaid patients, it made clear during the hearings that it is not required to provide charity care⁷ and would not obligate the participating providers to accept Medicaid cases. *Transcript of April 13, 2017 Hearing*, at 41. While the ASC has stated it will accept 12% Medicaid cases – a percentage much lower than the rate accepted by hospitals – this rate is meaningless if the surgeons providing care at the facility choose not to accept patients with Medicaid. No providers testified or provided any evidence that the GMSC would provide greater access to Vermonters. The proposed multispecialty ASC will not meet the criteria set forth in 18 V.S.A. § 9437(4).

The Proposed Multispecialty ASC Will Not Serve the Public Good

Under the Green Mountain Care Board Rules, the Board may consider varying factors when deciding whether a proposed project is in the public good, as required by 18 V.S.A. § 9437(6), including whether the project will meet the needs of the medically underserved, whether it will help meet the goals of universal health care, whether the project will further the

⁶ See *Transcript of April 13, 2017 Hearing*, at 69, and *Commonwealth Fund Scorecard on State Health System Performance, 2017 Edition*, <http://www.commonwealthfund.org/interactives/2017/mar/state-scorecard> (last visited April 27, 2017).

⁷ Counsel for the Applicant responded to the Office of the Health Care Advocate's question regarding the charity care policy by stating that ACTD, LLC, as a for-profit entity, was not required to have a charity care policy in line with that offered by the hospitals, but was choosing to offer such a policy.

effective integration and coordination of the Vermont health care system, and whether the project is consistent with current health reform initiatives. Green Mountain Care Board Rule 4.402(3). Although the Applicant has offered that it will work to meet these considerations, there is no state authority that has ongoing jurisdiction over the GMSC to ensure that it does so. The Applicant has acknowledged the voluntary nature of its many offers and has declined to guarantee that its promises will be fulfilled.⁸

One of the Applicant's main arguments is that the GMSC will provide choice and competition, thereby driving down prices. Whether competition is a "good or bad phenomena is irrelevant to the Certificate of Need proceeding." *Application of Eye Surgery and Laser Center of Vermont, Statement of Decision*, Conclusions of Law, pages 12-13. If competition is to be effective, however, it must be fair. Allowing a multi-specialty ASC to operate unfettered by licenses or any of the State regulations or conditions that govern hospital operations actually sets a precedent that it is OK to avoid State regulation. Fundamentally, for the proposed ambulatory surgery center to "further the effective integration and coordination of the Vermont health care system", and to be "consistent with the current health reform initiatives", it has to be subject to the same regulations as the hospitals are. *See* Green Mountain Care Board Rule 4.402(3)(c) and (d).

The GMSC will not be licensed and the Vermont Department of Health will have no jurisdiction over its operations. It will not be subject to the rigorous hospital budget review process that requires and reinforces the nonprofit hospitals' considerable efforts and expenditures in supporting health reform and bending the cost curve. When asked, ACTD, LLC has promised that it will participate in any budget review that the Accountable Care Organization in which it chooses to participate undergoes. *Transcript of April 13, 2017 Hearing*, at 62 and *Transcript of*

⁸ Nonprofit hospitals, as noted by counsel to the Applicant, are subject to charity care requirements as "501(c)(3) entities, which the Applicant obviously won't be..." *Id.*

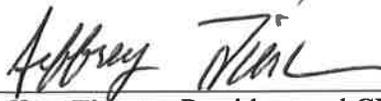
April 19, 2017 Hearing, page 35 (April 19, 2017). This is not even comparing apples and oranges and would not entail anything like a financial review of its entire operations comparable to the hospital budget review process that has been in place for decades under 18 V.S.A. § 9456. Hospitals are specifically limited in the amount of net patient revenue growth allowed each year. It is not in the public good to allow another organization to offer the same services as provided in hospital operating and procedure rooms without any financial restriction, especially when all profits will be returned to individual investors. Vermont has focused its efforts to contain health care costs and to bend the health care cost curve on controlling hospital budgets. To allow a new facility to spend without oversight and to divert from the State's regulated health care system revenue that supports Vermont's medical assistance programs is completely contrary to the concept of public good.

The Applicant also argues that, as a for-profit entity, it will be required to pay property and income taxes that the hospitals are not required to pay. These taxes pale in comparison to the 6% provider tax rate on all net patient revenue paid by hospitals and matched with federal funds to provide critical support Vermont's Health Care Resources Fund.

Conclusion

ACTD, LLC has invested a lot of time in winning over businesses, the media and various individuals with a proposal that is wholly inconsistent with Vermont's priorities in maintaining a highly regulated and accountable health care system. Because the Applicant has failed to provide evidence that it meets every single criterion required by Section 9437 of Title 18 of Vermont's CON law, this application must be denied.

Dated in Montpelier, Vermont this 2 day of May, 2017.

By: 

Jeffrey Tieman, President and CEO
Vermont Association of Hospitals and Health Systems
148 Main Street
Montpelier, Vermont 05602

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

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CENTER)

VERIFICATION UNDER OATH

Jeffrey Tieman, being duly sworn, states on oath as follows:

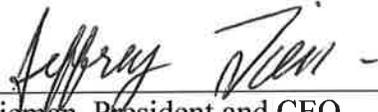
1. My name is Jeffrey Tieman. I am the President and Chief Executive Officer of the Vermont Association of Hospitals and Health Systems (“VAHHS”). I have reviewed the Post-Hearing Memorandum in Opposition to the Green Mountain Surgery Center Certificate of Need Application on Behalf of the Vermont Association of Hospitals and Health Systems (the “Submission”), submitted herewith.
2. Based on my personal knowledge and after diligent inquiry, I attest that the information contained in the Submission is true, accurate and complete, does not contain any untrue statement of a material fact, and does not omit to state a material fact.
3. My personal knowledge of the truth, accuracy and completeness of the information contained in the Submission is based upon either my actual knowledge of the subject information or upon information reasonably believed by me to be true and reliable and provided to me by the individuals identified below in paragraph 4. Each of these individuals has also certified that the information they have provided is true, accurate and complete, does not contain any untrue statement of a material fact and does not omit to state a material fact.
4. The following individuals have provided information or documents to me in connection with the Submission and each individual has certified, based either upon his or her actual knowledge of the subject information or, where specifically identified in such certification, based on information reasonably believed by the individual to be reliable, that the information or documents provided are true, accurate and complete, do not contain any untrue statement of a material fact, and do not omit to state a material fact:

Michael Del Trecco, *Senior Vice President, Finance and Operations, VAHHS*
Max Timm, *Assistant Vice President, Kaufman Hall and Associates*
Walter Morrissey, M.D. *Managing Director, Kaufman Hall and Associates*
James Medendorp, *Vice President, Kaufman Hall and Associates*
Christina Oliver, *Vice President, Clinical Services, UVM Medical Center*
Jill Berry Bowen, *Chief Executive Officer, Northwestern Medical Center*
Christopher Hickey, *Senior Vice President and Chief Financial Officer,*
Northwestern Medical Center

Jane Catton, *Senior Vice President, Chief Operating Officer and Chief Nursing Officer,*
Northwestern Medical Center

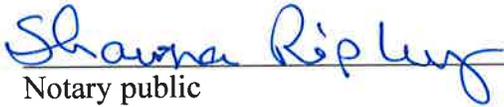
5. In the event that the information contained in the Submission becomes untrue, inaccurate or incomplete in any material respect, I acknowledge my obligation to notify the Green Mountain Care Board and to supplement the Submission as soon as I know, or reasonably should know, that the information or document has become untrue, inaccurate or incomplete in any material respect.

Dated this 2 day of May, 2017.



Jeffrey Tieman, President and CEO
Vermont Association of Hospitals and Health Systems

On May 2, 2017, Jeffrey Tieman appeared before me and swore to the truth, accuracy and completeness of the foregoing.



Notary public

My commission expires: 2-10-19