

**STATE OF VERMONT  
GREEN MOUNTAIN CARE BOARD**

In re: University of Vermont Medical Center     )  
Development of an Outpatient                    )  
Surgery Center                                        )     Docket No. GMCB-004-23con  
\_\_\_\_\_)

**ORDER GRANTING INTERESTED PARTY STATUS  
TO AFT VERMONT, INC.**

AFT Vermont, Inc. has filed a motion with the Green Mountain Care Board requesting interested party or amicus curiae status in this Certificate of Need (CON) proceeding. For the reasons below, we grant AFT-Vermont, Inc.’s request for interested party status.

**I. CON Project Overview**

In this proceeding, the University of Vermont Medical Center (UVMMC) seeks a CON to develop a multi-specialty Outpatient Surgery Center (OSC) at 19 Tilley Drive in South Burlington. The project includes the purchase of a 13.5-acre parcel located 3.3 miles from UVMMC’s main campus and construction of a new 84,000 gross square foot facility with eight operating rooms (ORs), 12 prep rooms, and 36 recovery spaces, plus shelled space for the future addition of four ORs and 14 pre- and post-operative spaces. Application (February 10, 2023) (App.), 2. The project is expected to cost \$129,640,703. *Id.*, 32.

The project will replace the five ORs at UVMMC’s Fanny Allen campus and will require 166 FTEs, approximately half of whom will be transferred to the OSC from UVMMC’s existing facilities. *Id.*, 2. The project’s expected cost is greater than the cost of any project UVMMC has sought approval for since 2014, when the Board granted UVMMC a CON to construct a seven-story inpatient bed tower for a cost of over \$187,000,000. *See In re University of Vermont Medical Center Replacement of Inpatient Beds*, Docket No. GMCB-021-14con (hereafter “*Miller Building*”), Statement of Decision and Order (July 1, 2015), 1. This Order does not consider the merits of the pending CON application.

**II. Procedural History**

On February 10, 2023, UVMMC filed its application in the present docket. App., 1. The Board issued a public notice on February 14, 2023. On February 15, 2023, the Vermont Office of

the Health Care Advocate (HCA), representing the interests of Vermont health care consumers, intervened in the proceedings pursuant to 18 V.S.A. § 9440(c)(9) and GMCB Rule 4.000, § 4.406. HCA Notice of Intervention as Interested Party (IP). On March 3, 2023, AFT-VT, Inc. (AFT-VT or “the Union”) requested status in this docket as an IP or amicus curiae pursuant to GMCB Rule 4.000, § 4.406 and 18 V.S.A. § 9440(c)(7). AFT-VT Request. On March 13, 2023, UVMMC submitted a response to the Union’s request in which it objected to the Union’s participation as an IP but supported its participation as amicus curiae. UVMMC Response to Request. The Board sent questions to AFT-VT regarding its request, which AFT-VT responded to on March 27, 2023. AFT-VT Responses to Questions. UVMMC submitted comments on AFT-VT’s Responses on April 3, 2023, in which it reiterated its opposition to granting the Union IP status. UVMMC Comments on AFT-VT’s Responses to Questions, 2.

### **III. Standard of Review**

The Board will grant IP status “to persons or organizations representing the interests of persons who demonstrate that they will be substantially and directly affected by the new health care project under review.” 18 V.S.A. § 9440(c)(7); GMCB Rule 4.000, § 4.406(3). A substantial and direct impact includes, but is not limited to, “a direct financial or other business interest in the proposed project.” GMCB Rule 4.000, § 4.406(3). A general interest based on being in the subject service area or otherwise generally concerned with the health care system is not sufficient. *Id.*

As an alternative to IP status, the Board may allow persons or organizations to be admitted to the CON process in an amicus curiae capacity if the Board finds that the person or organization will be able to materially assist the Board by providing “nonduplicative evidence” relevant to the CON application decision. Amicus curiae are not considered parties to the action under review. 18 V.S.A. § 9440(c)(7); GMCB Rule 4.000, § 4.406(6).

### **IV. Filings**

AFT-VT is a union representing over 5,000 members in the health care industry. AFT-VT Request, 1. AFT-VT states that it has a direct and material interest in the project because its members work in existing UVMMC facilities, will perform work in the proposed OSC, and will be directly affected by the proposed project. *See id.* AFT-VT asserts that its members are “the best voices to weigh in on safe staffing levels ... and whether this project will serve the public good.”

*Id.* AFT-VT also states that it is best situated to help the Board determine “whether ... and to what extent, the project will have an adverse impact on the ability of existing facilities to provide medically necessary services to all in need, regardless of ability to pay or location of residence.” (*quoting* GMCB Rule 4.000, § 4.402(3)(f)). AFT-VT Request, 1. AFT-VT sets forth several concerns about the project. These concerns include UVMMC’s existing operating room capacity; its staffing practices, including an inability to fill vacancies and an “overreliance” on travel agencies; and the impact of the project on quality of care for patients and working conditions for union members. *Id.* at 1-2.

UVMMC supports granting AFT-VT amicus curiae status but opposes the Union’s request for IP status. UVMMC Response to Request, 1. UVMMC asserts that the request does not establish sufficient grounds to meet the criteria set forth in GMCB Rule 4.000, § 4.406(3) and points to the Board’s decision denying the Union’s request for IP status in the Miller Building proceeding on the grounds that the Union’s concerns were too generalized and not sufficiently related to the relevant CON criteria. *Id.* at 1-2; *see Miller Building*, Order Granting Amicus Curiae Status to the Vermont Federation of Nurses & Health Professionals, Local 5221 (Feb. 5, 2015), 3.<sup>1</sup> UVMMC also asserts that its collective bargaining agreement with the Union is the “appropriate, indeed mandatory forum” for the Union to address staffing concerns because they impact Union members’ terms and conditions of employment. UVMMC Comments on AFT-VT’s Responses to Questions, 1-2.

## **V. Analysis**

A request for IP status should provide a detailed statement regarding the requestor’s interest in the proceeding; illustrate how relevant CON criteria, including applicable health policy goals, relate to the request to intervene; and explain how the requestor’s interests relate to the specific application under review. *See* 18 V.S.A. § 9440(c)(7); GMCB Rule 4.000, § 4.406(2)-(4).

AFT-VT represents the interests of 5,000 members, many of whom work in UVMMC’s existing facilities. AFT-VT Request, 1. The proposed project will require 166 FTEs, approximately

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<sup>1</sup> VFNHP is part of AFT-VT, as are the nurses at the Porter Medical Center (a University of Vermont Health Network facility). AFT-VT Letter (March 27, 2023) at 1. Because VFNHP and AFT-VT are affiliated in this manner, we will treat them as the same union for the purpose of this Order.

half of whom will transfer from UVMMC's main campus and Fanny Allen campus. App., 2. The Union's members (i.e., nurses and health care professionals) have an interest in how the proposed project will impact staffing levels, which may in turn affect quality of care. In its request, the Union expresses concern that "the new facility will exacerbate the ongoing difficulties experienced by [its] members in providing safe medical care amidst worker shortages." AFT-VT Request, 1.

The Union's interest is directly related to the project and is substantial. According to the Union, there are over 300 vacant bargaining unit positions within UVMMC. AFT-VT Request, 2. The resources required to run the OSC will directly affect staffing throughout UVMMC's existing facilities. *See* App., 2. The Union asserts that inadequate staffing levels increase the risk of medical errors, which may have an impact on its members' state-issued licenses. AFT-VT Request, 2. The Union's interests transcend collective bargaining concerns and implicate CON criteria and health policy goals related to quality of care. *See* GMCB Rule 4.000, § 4.402(3)(c) (applicant has demonstrated it has analyzed project's impact on health care system; project furthers integration and coordination of health care services); 18 V.S.A. § 9437 (4) (project will improve quality of care or and access to care, or both), (5) (no undue impact on applicant's other existing services).

Hospitals across Vermont are currently experiencing staffing and recruiting challenges; the seriousness of the staffing shortage is well known, ongoing, and being addressed in multiple ways. For example, in Act 85 (2022), the Vermont Legislature directed the Board to consider Vermont hospitals' extraordinary labor costs and investments in any proceeding to establish or enforce a hospital's FY2022 or FY2023 budget. *See also* Act 4 (2023), § 5. The Agency of Human Services presented a Health Care Workforce Development Strategic Plan in October and November 2021 that focused first on strategies to improve the availability of nurses and other licensed health professionals and planned to conduct additional investigation into the barriers for non-licensed personnel. *See* State of Vermont Agency of Human Services Director of Health Care Reform, *Health Care Workforce Development Strategic Plan* (Oct. 15, 2021), 1;<sup>2</sup> Green Mountain Care Board Meeting Minutes (Nov. 12, 2021) at 1. Even prior to the onset of the COVID-19 pandemic, in January 2020, the Rural Health Services Task Force, describing a health care workforce "crisis"

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<sup>2</sup>The Workforce Development Strategic Plan presented to the Board can be found at <https://gmcboard.vermont.gov/sites/gmcb/files/documents/VT%20Health%20Care%20Workforce%20Development%20Strategic%20Plan%2010-15-21%20Final%20GMCB.pdf>

driven by factors including provider burnout and aging demographics, designated workforce as a priority area. Rural Health Services Task Force, *Act 26 of 2019 Report and Recommendations* (Jan. 10, 2020), 26; Green Mountain Care Board Meeting Minutes (Jan. 8, 2021) at 1-2.<sup>3</sup> The staffing shortage was also a subject of significant attention in the University of Vermont Health Network's most recent budget submission. *See* University of Vermont Health Network Fiscal Year 2023 Budget Narrative, 13 (describing how workforce challenges continue to create access issues across multiple service lines), 46 (describing how a national workforce shortage is impacting health care organizations across the country, including Vermont), 44 (providing vacancy rates for RN, Nursing Support, and other job categories).

While UVMMC asserts that we should deny the Union's request for IP status because the collective bargaining agreement requires the Union to bargain with UVMMC regarding the impact of future facilities on bargaining unit employees, this argument is inapposite. UVMMC quotes a portion of the collective bargaining agreement that appears to place obligations on UVMMC, not on the Union, and that does not on its face prohibit, or even address, Union participation in regulatory proceedings.

We have reviewed the decision denying the Union IP status in the Miller Building CON proceeding. Contrary to UVMMC's assertions, the interest asserted by the Union in this case is not the same "generalized financial and employment risk" that was cited in the Miller Building proceeding. In that IP request, the Union stated that "the capital costs of the project... will have a substantial and direct impact on [the hospital's] ability to meet its contractual obligations to our members in the form of wages, benefits and other forms of support." *Miller Building*, VFNHP Request for IP Status (Oct. 13, 2014) at 2. The Union emphasized that it would soon begin bargaining a new contract with the hospital and "the cost of this project will directly impact discussions at the bargaining table and have a financial impact on the ultimate agreement reached between the parties" because "[m]oney spent on capital investments ... impacts [the hospital's] ability to invest in frontline health care workers...[.]" *Id.* at 4.

In the prior request, the Union asserted only generally that the facility would "impact the working conditions of the nurses and other health care professionals." *Id.* While the Union cited

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<sup>3</sup> The Rural Health Services Task Force Act 26 of 2019 Report and Recommendations can be found at <[Rural Health Services Task Force- Act 26 of 2019 – Report & Recommendations.pdf \(vermont.gov\)](https://www.vermont.gov/files/health/act26of2019-report-recommendations.pdf)>.

appropriate staffing as a “working condition” in which it had an interest, and expressed concern about its members’ ability to “provide[] safe and effective patient care,” the Union’s asserted interests were much broader. *Id.* at 2. Because the Union’s 2014 request emphasized financial impacts and contract negotiations, the Board determined that the Union had demonstrated only a generalized financial and employment risk, which was too generalized and did not sufficiently relate to the relevant CON criteria, including applicable health care policy goals. *Miller Building, Order Granting Amicus Curiae Status to the Vermont Federation of Nurses & Health Professionals, Local 5221 (Feb. 5, 2015), 3 (citing GMCB Rule 4.000, § 4.406(3))*. The Union’s specific demonstration of its interests in the project’s potential impacts on staffing and quality of care, and the dramatically different factual circumstances that Vermont hospitals, including UVMHC, now face with respect to staffing and recruitment, warrant our granting the Union’s request for IP status in this proceeding.

**V. Order**

Based on the above, it is ORDERED that AFT-VT is granted Interested Party status in this docket. AFT-VT shall be copied by all parties on all materials entered into the record and materials submitted by AFT-VT shall be admitted into the record and copied to all parties. All AFT-VT submissions shall be on letterhead, dated, addressed to the Board, and signed by an authorized representative of the Union. Finally, if AFT-VT intends to submit any proposed questions for the Board to consider posing to the applicant, it must do so on or before May 1, 2023.

Dated: April 17, 2023 at Montpelier, Vermont

<u>s/ Owen Foster, Chair</u>	)	
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<u>s/ Jessica Holmes</u>	)	
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<u>s/ Robin Lunge</u>	)	
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<u>s/ David Murman</u>	)	
	)	
<u>s/ Thom Walsh</u>	)	

GREEN MOUNTAIN  
CARE BOARD OF  
VERMONT

Filed: April 17, 2023

Attest: s/ Jean Stetter, Administrative Services Director, Green Mountain Care Board

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