April 20, 2013

Karen Lawfer, Certificate of Need Coordinator
Health Care Services
Department of Health and Social Services
P.O. Box 110660
Juneau, AK 99811-0660

Dear Karen:

Mat-Su Valley Surgery Center, LLC proposes to establish a much needed state-of-the art ASC to serve residents of the Mat-Su Valley. As indicated in our certificate of need application, and as confirmed by Providence Health System (Providence) in its concurrent application, there is a documented real and significant out-migration of patients to Anchorage for services that could and should be available locally. In reviewing the public record to date, we note the following:

1. The **only** opposition to our project is from the existing sole provider of services, Mat-Su Regional Medical Center (MSMC). To our knowledge, there has been absolutely no evidence provided by the Hospital in support of its statements regarding loss of jobs, revenue and Foundation giving. It is vitally important that the record accurately reflect that the patients that we propose to serve are, by and large, currently out-migrating to Anchorage for surgery—and, specifically to facilities owned jointly by local surgeons and Surgical Care Affiliates or by Providence. As such, the impact to MSMC is minimal at best. In fact, if we are successful, as we believe we will be, in recruiting new clinical the providers to the Mat-Su Valley as a result of our project, the hospital's inpatient volumes would increase. Additionally, the Hospital could experience an increase in ancillary services such as diagnostic imaging and laboratory services, etc.

2. MSMC appears to base its conclusion of no need solely on the OR methodology contained in Rule. This methodology contains no provision for addressing the high rate of outmigration and for that reason alone does not accurately estimate need for Mat-Su Valley residents. Courts in other states have found, over and over, that Health Departments may not rely exclusively on a mathematical need model in evaluating certificate of need applications.

3. MSMC wrongly argues that it has capacity to meet expected need through 2020. This is the case ONLY if current outmigration patterns continue. In order to reform healthcare and control costs in Alaska (and nationally) ASCs must be embraced, and appropriate care must increasingly be provided locally and in the least costly environment possible. MSMC's existing "ASC" is in reality a hospital outpatient department, and as noted by several testifiers has a very high cost structure. Our project will provide an alternative that meets need, reduces outmigration, and lowers healthcare costs for all—patients and payers, alike.

4. Once the Department confirms the need, it will need to decide if both of the proposals before it can be approved. If it finds that need exists for only one of the applications, our project is superior because of our lower cost structure, local ownership and exemplary and proven quality.

We have provided additional detail on each of these four points in the attached document. On behalf of the residents of the Mat-Su Valley, thank you for your time and important consideration.

Sincerely,

Matt A. Heilala, DPM

Public Comment
in
Support of the
Mat-Su Valley Surgery Center, LLC
Certificate of Need Proposal to Establish an ASC

April 2013

As far back as 2010, Mat-Su Valley Surgery Center, LLC (Mat-Su LLC) has been planning to establish an ASC in the Mat-Su Valley. On November 16, 2012, the Department issued a public notice that it had received a certificate of need application from Providence Health System (Providence) proposing to establish an ASC. In response to that notification, Mat-Su LLC elected to file its letter of intent and on February 6, 2013 filed its application. Both applications were screened and declared complete on March 21, 2013 and a public meeting was held on April 8, 2013. The public comment period is set to close on April 22, 2013.

Alaska's Certificate of Need Program (CN Program) is governed by AS Chapter 18.07. The Department of Health and Social Services (Department) has responsibility for overseeing the CN Program and, in making decisions, is required to evaluate factors including need, rational health planning, health-care quality, access to health care, impact on Medicaid expenditures and health-care cost containment.

After a thorough review of the record, Mat-Su LLC has identified four issues, summarized in the cover letter and summarized below that warrant additional comment.

1. **There is no evidence of harm to the Hospital. In fact, if we are successful, as we believe we will be in recruiting new clinical providers to the Valley as a result of our project, the hospital's inpatient and ancillary volumes and revenues would increase.**

The ***only*** opposition to our project is from the existing sole provider of services, MSMC, and its testimony appeared to be focused on scaring the community and employees, as opposed to supporting a full vetting of the benefits of the proposals. When we use the term "existing sole provider of services", we are also including the Mat-Su Health Foundation which owns a portion of the Hospital. To our knowledge, there has been absolutely no evidence provided by the Hospital or Foundation in support of their statements regarding loss of jobs, revenue and foundation distributions.

It is vitally important that the record accurately reflect that the patients that we propose to serve are, by and large, currently out-migrating to Anchorage for surgery—and specifically to either a facility owned jointly by local surgeons and Surgical Care Affiliates (the Anchorage Surgery Center) or to Providence. As such, the impact to MSMC is minimal at best. In fact, if we are successful, as we believe we will be, in recruiting new clinical providers to the Valley as a result of our project, the hospital's inpatient volumes would increase. Additionally, they may experience an increase in ancillary services such as diagnostic imaging and laboratory services, etc.

The data provided by both applicants during the course of review demonstrated that there are at least 2,000 outpatient cases on Valley residents currently occurring at either Providence Hospital or at the Alaska Surgery Center in Anchorage. By year three of our application, we are only proposing to perform about 1,400 cases, which means that we could achieve 100% of our volumes ***without having any*** impact on the Hospital. In addition, the CN Program must remember that the population growth in the Valley is both strong and unabated.

The Borough's population is expected to increase nearly 3% annually and the population 65+ is projected to grow by more than double this rate.

Finally, the record should also reflect that the statement made by Mr. Lee at the hearing regarding Mat-Su ASC not contacting the hospital about the possibility of working together on a project is inaccurate. We made at least two contacts and spoke directly to Mr. Lee about jointly addressing the out-migration and community need through the establishment of an ASC.

2. Courts in Other States Have Found Health Departments May Not Rely Exclusively On A Mathematical Need Model.

MSMC bases its conclusion of no need solely on the OR methodology contained in Rule. This methodology contains no provision for addressing outmigration and for that reason alone is faulty and cannot accurately estimate need for Mat-Su Valley residents. Courts in many states have concluded that a mathematical need model cannot be the sole basis for denying a certificate of need application. "In deciding whether to grant a certificate of need, [the Agency] may not, as it did here, rely solely on bed need statistics." *Irvington Gen. Hosp. v. Dep't of Health*, 374 A.2d 49, 53 (N.J. Super. Ct. App. Div. 1977). "This formula is to be used as a guideline and not as the determinative factor in the CON process." *Oak Park Manor v. State Certificate of Need Review Bd.*, 500 N.E.2d 895, 898 (Ohio Ct. App. 1985). "Other jurisdictions have addressed this question and have concluded that the state plan may not be used as the sole determinant of the need for a proposal, even though consistency with the plan was one of the statutory review criteria." *Lenior Mem. Hosp. v. N. Carolina Dep't of Human Res.*, 390 S.E.2d 448, 452 (N.C. Ct. App. 1990).[1]

The New York Court's reasoning in *Fairfield Nursing Home v. Whalen* provided additional insight into why mathematical need models cannot be the sole determinant of denial. "The petitioner's application was denied not on the basis of the commissioner's review of the facts and merits of her application, but on the basis of applying to the petitioner's application a preset, rigid numerical policy (not contained in the statute) which foredoomed the application. That procedure precluded a fair review and resulted in an arbitrary determination." *407 N.Y.S.2d 923, 924 (1978) (quoting Sturman, 383 N.Y.S.2d at 885).*

3. MSMC does not have capacity to meet need, if current outmigration patterns are reversed. And, these patterns must be reversed if Alaska is to achieve the promise of health care reform.

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[1] [13]Citing cases from other states: *Balsam v. Dep't of Health & Rehab. Servs.*, 486 So.2d 1341 (Fla. Dist. Ct. App. 1986); *Am. Med. Int'l v. Charter Lake Hosp.*, 366 S.E.2d 795 (Ga. Ct. App. 1988); *Charter Med. Of Cook County v. HCA Health Servs. Of Midwest*, 542 N.E.2d 82 (Ill. App. Ct. 1989); *Irvington Gen. Hosp. v. Dep't of Health*, 374 A.2d 49 (N.J. Super. Ct. App. Div. 1977); *Sturman v. Ingraham*, 383 N.Y.S.2d 60 (N.Y. App. Div. 1976); *Roanoke Mem. Hosps. V. Kenley*, 352 S.E.2d 525 (Va. Ct. App. 1987).

MSMC and its employees made repeated statements about their capacity, including:

a) that their ORs are only at 64% of capacity,
b) that they already operate an ASC, and
c) the CN issued to them to relocate the hospital granted them shelled OR capacity.

Based on data provided during the course of review of our application, Mat-Su LLC can confirm that the existing hospital ORs are operating at about 65% occupancy. We can also confirm that the Hospital does indeed have two operating rooms in its adjacent medical office building, but we believe them to be operated as part of the hospital (a hospital outpatient department) and not an ASC. Per 42CFR 416.2 an ASC is defined as "*any distinct entity that operates exclusively for the purpose of providing surgical services to patients not requiring hospitalization*". CMS' interpretative guidelines note explicitly that in order for an ASC to be a "*distinct entity" it cannot also be something else, (such as a hospital).* As such, the ORs located within MSMC's medical office building is a hospital facility, and not an ASC, which is likely why several community members at the public hearing testified that the facility's charges were excessive and that they opted to leave the area for surgery as a result or that they were confident that competition would drive down pricing. (*See, for example, the testimony of Sterling Grover, Mark Palmer and Scott Bailey.)*

As both Providence and we testified to during the public hearing, there is a real difference in Medicare reimbursement rates for freestanding ASCs (as we propose) and for the hospital outpatient surgery department. Medicare's 2013 ASC reimbursement is only 56.1% of that reimbursed to a hospital outpatient department for the same case. Under health care reform, the federal government—and the State of Alaska—are actively seeking lower cost options. Encouraging more cases to occur locally by creating access to what would be the Valley's only Class C operating rooms and a procedure room is far superior to continuing the current monopoly and the large outmigration that is occurring in the marketplace.

Even with its purported shelled OR, MSMC staff wrongly argues that it has capacity to meet expected need through 2020. This is the case ***if and only if*** current outmigration patterns continue. Table 1 calculates the current capacity of the Mat-Su Valley.

Table 1
Mat-Su Valley
OR- Inpatient and Outpatient Capacity per CN Methodology

Mat-Su Valley Capacity	# of ORs	Capacity/Room per December 2005 CN Surgery Methodology	Total Capacity
Combo[2]	5	900	4,500
Outpatient[3]	3	1,200	3,600
Total			**8,100**

Source: Certificate of Need Program, 2008-2011 utilization data

[2] Includes Mat-Su Medical Center
[3] Includes Mat-Su Medical Center and Surgery Center of Wasilla. Surgery Center of Wasilla is not a Class C operating room.

Table 2 uses the actual 2011 utilization of the Mat-Su area providers and then adds back only the outpatient cases being performed at Providence and Alaska Surgery Center and assumes that these cases could be performed locally. This number of out-migrating cases is conservative because it excludes any count of outpatient cases being performed at other Anchorage hospitals and ASCs.

Table 2
Impact of Adding Documented Outmigration to Current MSMC OR Occupancy Rates.

	Actual 2011 Utilization		
	Inpatient	**Outpatient**	**Total**
Mat-Su Medical Center	3588	889	4,477
Pioneer Peak		1,446	1,446
Providence (outmigrating to Anchorage)		700	700
Anchorage Surgery Center		1,300	1,300
Total Surgical Cases Available to Be Calculated (excludes Alaska Regional, Native, etc)			**7,923**
Available Capacity for Future Growth			177
Estimated Current 'occupancy'			**97.8%**

Source: Applicant

This analysis demonstrates unequivocally that MSMC would be in excess of 100% in the next several years, *if the high outmigration were reversed*—and this analysis is conservative because it does not assume any new volumes resulting from the strong population growth in the Valley. As the testimony of Mark Palmer noted, "*can the hospital really be meeting the need when one-third of area residents leave the Valley for surgery?*

In addition, during public comment, the Hospital repeatedly noted that it was awarded "future OR shell capacity". We do not believe this to be accurate. According to the Department's 2003 CN Annual Program log:

> *November 19 2003 – Mat– Su Valley Medical Center submitted a certificate of need application on May 1 to build an $87.8 million 76– bed replacement facility, 52– bed shelled– in space for future expansion, and shelled space for future Cardiac Catheterization Lab. The project was approved with the following conditions: 1) The facility may build a 162,595 sq. ft., 74– bed acute care hospital overlooking the Parks and Glenn Highway; 2) the 35,095 sq. ft, 52– bed shelled– in third floor is approved with the condition that the shelled– in space shall only be used for additional medical surgical beds (any other use must be approved through the certificate of need process); and 3) the shelled– in cardiac catheterization lab is approved with the condition that laboratory services meet state utilization standards. The approved project cost is $83,682,000; a reduction of $4,118,000 for contingency fees. Contingency fees do not need to be considered in the total estimate of the project since approved projects may exceed the*

approved amount by 15% plus inflation. The completion date for the project is December 31, 2008.

Based on this, it appears that the Hospital has approval to add beds—but not additional ORs. The analysis outlined in Table 2 details that the hospital has insufficient capacity to meet even current demand. For this reason alone, our project should be approved.

4. The Mat-Su LLC application is superior to both the current situation and to that of the competing applicant.

As the Department affirms the need, it will need to decide if both of the proposals—Providence and Mat-Su LLC—are approvable. If it finds that need exists for only one of the applications, our project is superior for numerous reasons, and therefore the Mat-Su LLC proposal should be granted approval first. First, the record is ambiguous about whether Providence proposes to operate its proposed ASC as freestanding ASC or as a hospital outpatient department; and the cost differences, as noted above, are significant. Of the two applications, the Department can only be assured that we propose a freestanding ASC, and that only Mat-Su LLC will bring a much needed lower cost option to the Valley.

In addition, Providence noted at the public meeting that it may, at some time in the future, seek local physician ownership. We believe that there are numerous benefits to local physician involvement because they have the opportunity to influence the day to day operations to the direct benefit of their patients and because they can hold the facility's manager accountable for the success and clinical excellence of the facility. Only our application proposes a joint undertaking with local, highly-regarded clinicians and proposes a general manager—Surgical Care Affiliates—that has an exemplary and fully transparent record of quality, lower cost and high patient satisfaction.

In conclusion, the Mat-Su Valley ASC proposal is needed and will greatly advance care, improve access and reduce costs. Local providers will drive the quality and a known, high quality operator will direct the day-to-day business. The project should be approved.

Finally, we remind the Department that a similar level of opposition was raised several years back in Fairbanks. The actual experience in Fairbanks, we understand has been nothing but positive: the community has benefited by increased access and choice, and local providers have realized increasing (not decreasing) volumes. The same will hold true for the Mat-Su Valley.