

December 14, 2017

Tristram J. Coffin
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Judy Henkin, Esq.
General Counsel
Green Mountain Care Board
3rd Floor City Center
89 Main Street
Montpelier, VT 05620-3601

Re: *Request for Non-Jurisdictional Determination*

Dear Ms. Henkin:

As the Green Mountain Care Board is aware, Mary Hitchcock Memorial Hospital (“MHMH”), through its Dartmouth-Hitchcock Advanced Response Team (“DHART”), has operated an air ambulance service in Vermont for approximately twenty years. A Certificate of Need (“CON”) for that operation was granted on June 16, 1998 in Docket #97-064-H, and the program has operated continuously since then, establishing and maintaining a reputation for excellence in service throughout that time.

Dartmouth-Hitchcock is in the process of expanding its existing DHART program, to enhance access to high quality, cost effective air ambulance services for residents of Vermont and particularly throughout the greater Burlington area. To this end, Dartmouth-Hitchcock intends to establish a helicopter base in the Burlington area at which a DHART helicopter will be located, and is in the process of entering into an agreement with The University of Vermont Medical Center (“UVMC”) under which Dartmouth-Hitchcock will contract with UVMC to support the program by making available the services of UVMC’s transport nurses and paramedics, as well as a UVMC physician to assist with medical oversight.¹ Dartmouth-Hitchcock will continue to provide all program management, bill and collect payment for all services provided, and be responsible for ensuring the aircraft is appropriately provisioned. DHART currently performs transports to and from UVMC, as well as other regional hospitals, but basing a helicopter in Burlington will provide greater access to care for patients who require this level of service, particularly patients in northwestern Vermont and northern New York.

¹ Under the arrangement, UVMC will lease its existing transport staff to Dartmouth-Hitchcock, as needed, to provide clinical services during the transports, and Dartmouth-Hitchcock will reimburse UVMC for the costs of providing the services. Given the proximity of UVMC to the base in Burlington, Dartmouth-Hitchcock determined that leasing existing staff from UVMC would be the most cost-effective option for staffing the air ambulance.

We believe that expanding the DHART program as described above does not require regulatory approval by the Board, because the 1998 CON has expired,² and the expansion of the DHART program does not constitute a “new health care project” under the CON law. *See* 18 V.S.A. § 9434. Dartmouth-Hitchcock does not expect to incur any capital expenses associated with the expansion of its existing program and fully anticipates that it will only incur its customary operating expenses for air ambulance services (e.g., lease of helicopter, hangar and office space leasing, costs associated with medications and supplies, employee lease payments to UVMMC, etc.) Accordingly, we do not believe that any CON thresholds are triggered by this proposal.³ We also understand that you have had initial conversations about the expanded DHART program with Steven Klein, Assistant General Counsel at UVMMC, regarding our understanding for why CON review is not triggered by this proposal.

Furthermore, based on conversations with the Board, we believe the Board may well recognize federal pre-emption as it relates to a state’s authority to require an air ambulance carrier to obtain a certificate of need. The federal Airline Deregulation Act has an express preemption provision that provides states “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation...”⁴ Based on this provision and current court precedent regarding the same, the Federal Aviation Administration within the U.S. Department of Transportation has taken the position that while states may have oversight over air ambulances’ medical standards of care including requirements for medical training and medically-related equipment standards⁵, states are prohibited from requiring air ambulances to obtain certificates of need to operate air ambulances within a state.⁶

For the reasons set forth above, we respectfully request a non-jurisdictional ruling from the Green Mountain Care Board.

Please feel free to contact me if you have any questions about this matter. Thank you for your assistance.

² Under the CON law, Certificates of Need “expire” on the date the Board accepts the final implementation report for the project, and actions or expenditures related to expired CONs do not constitute either a material or non-material change to the project. Such an action only requires CON review if it constitutes a “new health care project” on its own. 18 V.S.A. § 9443.

³ The only CON threshold potentially applicable to this proposal is the “new health care service threshold,” but that threshold is only triggered if the service was not offered during the previous three years. 18 V.S.A. § 9434. Since DHART has continuously provided services in Vermont since issuance of the 1998 CON, this threshold is not applicable to the proposal.

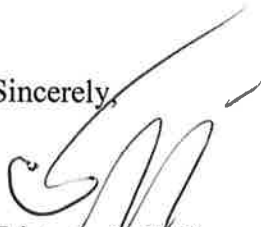
⁴ *See* United States Department of Transportation, *Guidelines for the Use and Availability of Helicopter Emergency Medical Transports (HEMS)* 9 (April 2015), available at https://www.ems.gov/pdf/advancing-ems-systems/Reports-and-Resources/Guidelines_For_Helicopter_Emergency_Medical_Transport.pdf; citing 49 U.S.C. § 41713(b)(1).

⁵ *Id.* at 13.

⁶ *Id.* at 11. The New York State Department of Health also recognizes federal preemption in this area and has informed us that no CON review will be required in New York State.

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Sincerely,

A handwritten signature in black ink, appearing to be 'T. Coffin', written over the word 'Sincerely,'.

Tristram V. Coffin

TJC:jpg

cc: Donna Jerry, Health Policy Analyst, GMCB
Steven Klein, Assistant General Counsel, UVMMC
Kimberly Troland, Deputy General Counsel, Dartmouth-Hitchcock

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