STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COLUMBIA HOSPITAL (PALM BEACHES) LIMITED PARTNERSHIP, d/b/a WEST PALM HOSPITAL, AND JUPITER MEDICAL CENTER, INC., d/b/a JUPITER MEDICAL CENTER,	)	
Petitioner,	)	
vs.	)	Case Nos. 12-0428CON 12-0496CON
FLORIDA REGIONAL MEDICAL CENTER, INC. AND AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Respondents.	)	

RECOMMENDED ORDER

An administrative hearing was held in this case on August 20-24, 27-31, and September 6, 2012, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Certificate of Need (CON) Application No. 10130, filed by Florida Regional Medical Center (FRMC) for an 80-bed acute-care hospital in Palm Beach County, Florida, Agency for Health Care Administration (AHCA) health planning district 9, sub-district 9-4, satisfies, on balance, the applicable statutory and rule criteria.

PRELIMINARY STATEMENT

On December 22, 2011, AHCA published notice of its preliminary approval of FRMC's CON Application No. 10130 to

establish a new 80-bed acute-care hospital in Palm Beach County, Florida, AHCA sub-district 9-4.

Columbia Hospital (Palm Beaches) Limited Partnership, d/b/a West Palm Hospital (West Palm) and Jupiter Medical Center, Inc., d/b/a Jupiter Medical Center (JMC) timely filed petitions challenging AHCA's preliminary approval of FRMC's CON application. West Palm and JMC's Petitions were referred to the Division of Administrative Hearings (DOAH) on January 28, 2012, and February 3, 2012, and assigned DOAH Case Nos. 12-0428CON and 12-0496CON, respectively. The cases were subsequently consolidated and scheduled for final hearing to begin on August 20, 2012.

On May 11, 2012, JMC filed a Motion in Limine seeking to exclude as irrelevant that evidence referring to the needs of research and educational facilities on the grounds that the needs of such facilities was stricken from statutory CON review criteria in 2004, and that parts of the application regarding plans for a future research and educational facility should not be considered. Upon consideration of the Motion in Limine and a Joint Response filed by FRMC and AHCA, the Motion in Limine was denied by an Order entered June 5, 2012. The Order denying the Motion in Limine, however, did not bar further consideration of the issue, which is addressed in the Conclusions of Law, below.[1/]

The final hearing commenced as scheduled and concluded on September 6, 2012. At the final hearing, FRMC presented the testimony of nine witnesses, accepted as experts as follows: Michael Cowling, CEO of FRMC's Florida Special Projects, an expert in hospital administration and healthcare finance; Natalie Crowley, an expert in zoning and land use planning; Michael Marletta, Ph.D., President and CEO of Scripps Research Institute, an expert in biochemistry and translational research; Baqir Syed, M.D., an expert in internal medicine; Michael Kuhse, P.E., an expert in Structural Engineering; Brendan Ellis, A.I.A., an expert in healthcare architectural and facility planning; Alan Prestigiacomo, A.I.A., an expert in healthcare architecture and design; Robert Green, an expert in healthcare planning; and Shannon LaRocque, Assistant County Administrator for Palm Beach County. In addition, FRMC offered deposition transcripts of David Bjorkman, M.D., Dean, FAU Schmidt College of Medicine; Thomas Burris, Ph.D.; Francis Chisari, M.D., Immunology and Microbial Science; Rohit Dandiya, M.D., Geriatrics/Internal Medicine; Ron Ferris; Robert Green, M.D., Oncologist; Paul Kenny, Ph.D., Molecular Therapeutics; Thomas Kodadek, Ph.D., Chemistry; Ravi Patel; Eugene Shieh, M.D.; Judy Stimson-Rusin, CFO, Palm Beach Gardens Medical Center; and James Williamson, Ph.D., Organic Chemistry, which were received into evidence subject only to rulings on any objections raised as to

admissibility.[2/] The depositions were among the 64 exhibits offered by FRMC and received into evidence as FRMC Exhibits 1 through 29, 29A, and 30 through 63.

AHCA presented the testimony of Jeffrey N. Gregg, who was accepted as an expert in healthcare planning and certificate of need review. AHCA offered 10 exhibits received into evidence as AHCA Exhibits 1 through 7, 8A, 8B, and 8C.

JMC presented the testimony of 11 witnesses accepted as experts as follows: John Couris, President and CEO of Jupiter Medical Center, expert in healthcare administration; Jeanine Secor, an expert in clinical research nursing and administration; Daniel Boss, M.D., Board Certified Internal Medicine; Jack Waterman, D.O., Board Certified in Nephrology and Internal Medicine, expert in internal medicine and nephrology; Donalson Hearing, expert in land use planning and development; Thomas Gormley, expert in healthcare facility construction and design, and hospital engineering; James Gregory, former Bureau Chief of AHCA Office of Plans & Construction, expert in healthcare architecture, codes and compliances; Steve Seeley, Vice President of Patient Care Services and Chief Nursing Officer, expert in nursing administration; David Tyler, expert in managed care; Mark Richardson, expert in health planning; and Armand Balsano, expert in healthcare finance. In addition, JMC offered the deposition transcripts of Jerry Fedele, CEO of Boca

Raton Regional Hospital; Thomas Bolton, M.D., Board Certified in Pathology; Istvan Krisko, M.D., Board Certified in Infectious Disease and Internal Medicine; Lawrence Tepper, D.O., specialist in Hematology and Oncology; Nicolas Chronos, Ph.D., expert in translational research; and Dan Hrabko, MAI, which were received into evidence as JMC Exhibits 74 through 78, and 80, respectively, subject only to rulings on any objections raised as to admissibility.[3/] In addition, JMC also introduced JMC Exhibits 2, 4, 6 through 10, 12 through 16, 19 through 29, 32 through 34, 37, 40 [same as FRMC 29A], 42, 44 through 46, 48, 53 through 65, 67 through 69, 79 [same as FRMC 53], and 88 through 92, which were received into evidence.

West Palm presented the testimony of four witnesses: Dana Oaks, an expert in hospital administration; Eugene Nelson, an expert in healthcare planning; Robert Dickler, an expert in academic medicine and graduate medical education; and Darryl Weiner, an expert in healthcare finance. West Palm also presented the deposition testimony of Gina Melby, which was received into evidence as West Palm Exhibit 5 [with the exception of pages 24 through 28, 39 through 45, and 54 through 56], subject only to rulings on any objections raised as to admissibility.[4/] West Palm also offered five other exhibits which were received into evidence as West Palm Exhibits 1 through 4, and West Palm Exhibit 13.

The proceedings were recorded and a Transcript was ordered. The Transcript, consisting of volumes 1 through 17, was filed on October 1, 2012. At the conclusion of the hearing and by agreement of the parties, the due date for proposed recommended orders was established as November 5, 2012. Pursuant to motions filed by Jupiter Medical Center, extensions of time were granted and the parties filed their proposed recommended orders on December 7, 2012.

FINDINGS OF FACT

I. The Parties

A. The Applicant and affiliates

1. The applicant in this case, FRMC, is a Florida, for-profit, corporation formed for the purpose of filing CON Application No. 10130. FRMC is a wholly-owned subsidiary of Tenet Healthcare Corporation (Tenet).

2. Tenet is one of the largest, for-profit, hospital organizations in the nation. It operates 49 hospitals throughout the country. Tenet owns and operates five hospitals in Palm Beach County: Palm Beach Gardens Medical Center (PBGMC), St. Mary's Medical Center (St. Mary's), Good Samaritan Medical Center (Good Samaritan), West Boca Medical Center, and Delray Medical Center.

3. PBGMC, St. Mary's, and Good Samaritan are all located in AHCA sub-district 9-4, in the northern half of Palm Beach

County. The three hospitals have a combined total of 854 licensed, acute-care beds making up approximately 60% of the licensed, acute-care beds in the sub-district.

B. Jupiter Medical Center

4. JMC is a stand alone, not-for-profit, 163-bed, acute-care hospital in sub-district 9-4 located on a 30-acre campus at 1210 Old Dixie Highway, Jupiter, Florida 33458. JMC also owns and operates a 120-bed, skilled-nursing facility on that campus. JMC is approximately three miles from FRMC's proposed location.

C. West Palm and affiliates

5. West Palm is a 245-bed, acute care, for-profit hospital located at 2201 45th Street, West Palm Beach, Florida 33407, approximately 12 miles from FRMC's proposed location. Its 245 beds include 157 acute-care beds and 88 specialty psychiatric beds. West Palm is affiliated with Hospital Corporation of America (HCA) which operates 163 hospitals in 20 states and Great Britain. HCA's East Coast Division includes 14 hospitals in South Florida and the Treasure Coast, including two hospitals in addition to West Palm in Palm Beach County: Palms West Hospital (Palms West), located in Loxahatchee, AHCA sub-district 9-4; and JFK Medical Center (JFK), located in Atlantis, sub-district 9-5.

D. Agency for Health Care Administration

6. AHCA is the state health-planning agency responsible for administering the certificate of need (CON) program under the Health Facility and Services Development Act, sections 408.031-.0455, Florida Statutes, and related administrative rules found in chapters 59C-1 and 59C-2 of the Florida Administrative Code.[5/]

II. The Proposal

A. Overview

7. FRMC's CON Application No. 10130 (CON Application, Proposal, or proposed hospital) is for "the establishment of a new, general acute-care hospital of 80 licensed beds," to be composed of 64 general, medical-surgical beds and 16 intensive care unit (ICU) beds. The proposed hospital is to be located in Palm Beach Gardens, Palm Beach County, AHCA planning district 9, sub-district 9-4. The proposed service area is a ten zip code area with nine of the zip codes in northern Palm Beach County and one in southern Martin County.

8. The Proposal states that "FRMC's CON application represents the first phase of a multi-year development project that is anticipated to result in an academic teaching and research hospital of 200 beds to serve the long-term needs of residents of District 9 and potentially other parts of the State."

9. According to the Proposal, "[t]he first phase of the Hospital's development will be geared toward providing routine medical/surgical services to residents of the immediate area as well as a platform for its future role as an academic medical center and teaching hospital." The Proposal also states that "[n]on-Tertiary types of cases for adults [15 years old and older] are the focus of the proposed [FRMC] during its initial operation and the basis upon which this CON application is being submitted."

10. FRMC defines the "non-tertiary" acute-care services planned to be offered by excluding psychiatric, substance abuse, inpatient rehabilitation, open-heart surgery, major cardiovascular surgery procedures, therapeutic cardiac catheterization, neonatal intensive care, burn care, transplants, neurosurgical and selected spinal surgery procedures, and major significant trauma services. There is a list of diagnostic-related groups (DRGs) attached to the CON Application which further describes additional tertiary services, as well as non-tertiary obstetrical services, that are specifically excluded from the Proposal. In addition, the Proposal explains that no pediatric services will be offered because of the proximity of St. Marys, which offers pediatrics. There is no indication in the CON Application whether the excluded services will ever be offered.

11. The Proposal discusses a "20 Year Build-Out Plan," and maintains that it is appropriate to consider the vision of FRMC becoming a 200-bed, teaching hospital in cooperation with The Scripps Research Institute (Scripps) and Florida Atlantic University (FAU). The CON Application states, however, that "[e]stimation of the parameters of bed need 20 years into the future is speculative and . . . not specifically subject to CON review at this time . . . ."

B. The Proposed Site

12. The site for the proposed hospital is in zip code 33418, between I-95 and Military Trail, on the south side of Donald Ross Road. The proposed hospital would be located on a 70-acre parcel of land owned by Palm Beach County within an 863-acre tract of undeveloped land known as the Briger Tract, east of I-95 in Palm Beach County. The 70-acre parcel is located just south of Donald Ross Road in Palm Beach Gardens, directly across the road from Scripps, FAU Wilkes Honors College MacArthur campus, and the Max Planck Florida Institute. The proposed hospital would occupy approximately 30 acres of the 70-acre parcel.

13. Zoning for the site of the proposed hospital is not an issue in this proceeding.

14. Palm Beach County leases the 70-acre parcel to Scripps for an annual lease payment of $1. The ground lease expires in

2021, but Scripps has an option to purchase the 70-acre parcel for $1 prior to the end of the lease if it meets certain covenants relating to job growth based on operations. If FRMC is constructed on the site, jobs associated with that project will count toward Scripps' job creation goal.

15. On July 25, 2011, Scripps and Tenet entered into a letter of intent (Letter of Intent) regarding the proposed hospital which anticipates that Tenet will sublease the proposed hospital site from Scripps. Under the Letter of Intent, it is contemplated that Tenet will pay Scripps approximately $5,000,000 annually as a combined payment for the sublease, participatory interest distributions, and mission support payments. The commercial value of the sublease is between $560,000 to $680,000 annually.

C. Stated Goals for the Project

16. First, the CON Application states that FRMC is needed to decompress PBGMC and resolve access issues that patients and physicians currently experience there. FRMC proposes that all of its inpatients will be patients "redirected" from PBGMC, and states that, therefore, "[t]he impact of the new hospital will be limited solely to Palm Beach Gardens Medical Center." According to FRMC, the "decompression" will allow PBGMC to "modernize for the future by re-configuring the space vacated by

the non-tertiary patients who will use the new Florida Regional Medical Center."

17. Second, the CON Application states that the proposed hospital is designed to provide a unique blend of treatment, teaching, and research with the collaboration of Scripps, FAU, and FRMC. According to FRMC, the project will not only meet the needs of Scripps and FAU, but will also advance and improve health care in northern Palm Beach County.

III. AHCA's Preliminary Review and Approval

18. Tenet met with AHCA officials twice before the CON Application was filed. The first meeting included representatives from Tenet and Scripps and the chief of AHCA's CON unit, Jeff Gregg. During the first meeting, Scripps indicated that the proposed hospital would not be just "another community hospital in Palm Beach County," but rather a facility to further Scripps' "translational research"[6/] that would complement Scripps' existing resources. The CON Application, however, does not specify whether or how FRMC would further Scripps' translational research.

19. At the second meeting, representatives from Tenet and Scripps and the president of FAU met with Mr. Gregg and AHCA Secretary Elizabeth Dudek. The President of FAU suggested that the proposed hospital would become a "facility of regional impact" that would "offer services that [are comparable to or]

even differ from those that are available at academic medical centers in Miami-Dade County." Neither the CON Application nor the evidence, however, supports a finding that FRMC would offer services comparable to those that are available at academic medical centers in Miami-Dade County.

20. After the CON Application was filed, AHCA undertook its review and made its preliminary determination, which are detailed in the State Agency Action Report (SAAR). The SAAR was primarily authored by AHCA CON unit manager, James McLemore, and edited by Mr. Gregg. Although draft SAARs often contain a recommendation whether to approve or deny an application, the draft SAAR for the Proposal did not contain such recommendation. Mr. Gregg felt that whether the CON should be granted was a close call. He discussed the Proposal and draft SAAR with Secretary Dudek and then, at Secretary Dudek's suggestion, Mr. Gregg drafted the following language which was incorporated into the final version of the SAAR:

> . . . . However, the most important factor in project approval is FRMC's commitment to develop a world-class research and teaching hospital that has the potential to become a regional rather than a local community resource. The coalition of organizations associated with the proposed facility must work together on an ongoing basis to ensure that the population gains access to services that it would otherwise not have. There is no need for an additional small community hospital that offers basic services.

21. Contrary to the language in the SAAR, there is no "commitment to develop a world-class research and teaching hospital" in the CON Application, and the evidence does not support such a finding. Rather, the evidence only supports a finding that FRMC, Scripps, and FAU had a vision of collaboration in the future. The Letter of Intent between FRMC and Scripps regarding the proposed hospital, by its terms, is not binding, and the parties to the letter of intent "acknowledge that it would be imprudent and unreasonable to rely on the expectation of entering into a contract regarding the subject matter of this letter."

22. At the final hearing, Mr. Greg reiterated AHCA's preliminary determination that there "is no need for an additional small community hospital that offers basic services." He confirmed that such determination was based upon AHCA's consideration of the applicable statutory and regulatory criteria in view of the proposal for an 80-bed, acute-care hospital serving the ten zip code service area.

IV. Statutory and Rule Review Criteria

23. The statutory criteria for reviewing CON applications for new hospitals are found in section 408.035, Florida Statutes.

24. Before 2004, section 408.035 review criteria included:

> The needs of research and educational facilities, including, but not limited to, facilities with institutional training programs and community training programs for health care practitioners and for doctors of osteopathic medicine and medicine at the student, internship, and residency training levels.

§ 408.035(5), Fla. Stat. (2003). In 2004, however, the quoted provision was deleted from the CON review criteria. See ch. 2004-383, § 5, Laws of Fla.

25. The 2004 changes also removed the requirement that existing facilities undergo CON review for increasing the number of their acute-care beds, so that now, after notifying AHCA, existing acute-care hospitals can generally add acute-care beds without CON review. Id., § 6 (amending § 406.036).

26. In 2008, the Florida Legislature further modified section 408.035 by limiting the criteria applied to CON applications for general hospitals to "only the criteria specified in paragraph (1)(a), paragraph (1)(b), except for quality of care in paragraph (1)(b), and paragraphs (1)(e),(g), and (i) [of section 408.035(1)]." See ch. 2008-29, § 1, Laws of Fla.

27. As a result of the 2008 amendments, the statutory review criteria found in section 408.035(1), which are no longer applicable to CON applications for general hospitals, are:

> (c) The ability of the applicant to provide quality of care and the applicant's record of providing quality of care.
>
> (d) The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation.
>
> (f) The immediate and long-term financial feasibility of the proposal.
>
> (h) 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.

28. The statutory CON review criteria in section 408.035 that remain applicable to general hospital applications since the 2008 amendments are subsections 408.035(1):

> (a) The need for the health care facilities and health services being proposed.
>
> (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.
>
> (e) The extent to which the proposed services will enhance access to health care for residents of the service district.
>
> (g) The extent to which the proposal will foster competition that promotes quality and cost-effectiveness.
>
> (i) The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent.

29. Each of the applicable review criterion under section 408.035(1)(a), (b), (e), (g), and (i), as related to the facts of this case is discussed under separate headings, below.

A. Section 408.035(1)(a): The need for the health care facilities and health services being proposed.

AND

B. 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.

30. The analyses under subsections 408.035(1)(a) and (1)(b) are generally combined. For instance, in applying the statutory review criteria to the CON Application, the SAAR cites subsections 408.035(1)(a) and (1)(b) in framing the issue as: "Is need for the project evidenced by the availability, accessibility, and extent of utilization of existing healthcare facilities and health services in the applicant's service area?"

31. Following the 2004 changes in the CON law, AHCA repealed its rule relating to the need for acute-care beds.[7/] As a result, AHCA does not presently have a need methodology for acute-care hospitals or acute-care beds.

32. Florida Administrative Code Rule 59C-1.008(2)(e)2. provides, in pertinent part:

> . . . . If an agency need methodology does not exist for the proposed project:
>
> 1. The agency will provide to the applicant, if one exists, any policy upon

> which to determine need for the proposed beds or service. The applicant is not precluded from using other methodologies to compare and contrast with the agency policy.
>
> 2. If no agency policy exists, the applicant will be responsible for demonstrating need through a needs assessment methodology which must include, at a minimum, consideration of the following topics, except where they are inconsistent with the applicable statutory or rule criteria:
>
> a. Population demographics and dynamics;
>
> b. Availability, utilization and quality of like services in the district, subdistrict or both;
>
> c. Medical treatment trends; and
>
> d. Market conditions.

33. While there is no evidence that AHCA has a written policy apart from statutory and rule criteria, Mr. Gregg has summarized AHCA's "policy" regarding criteria for approval of a new hospital as requiring:

> One, a primary service area with a large and rapidly growing population base. Two, an expanding market in the applicant's service area, especially the primary service area, which minimizes the impact on existing providers. And three, the benefit of enhanced access outweighs the adverse impact on existing hospitals.

34. AHCA's unwritten policy as expressed by Mr. Gregg is consistent with existing statutory and rule criteria.

35. The required topics listed in rule 59C-1.008(2)(e)2.a.-d., quoted above, are compatible with a combined analysis of the review criteria under subsections 408.035(1)(a) and (1)(b), and a discussion of each in view of the facts is organized under subheadings 1 through 4, below.

1. Population demographics and dynamics

36. FRMC's proposed primary service area is made up of the five zip codes immediately surrounding the proposed hospital, and its proposed secondary service area is derived from five adjacent zip codes.[8/]

37. Population growth in the proposed service area and sub-district 9-4 is estimated to be at an annual rate of approximately 1.4% throughout the five-year planning horizon from 2011 through 2016. While some evidence was presented indicating that the population growth in the proposed primary service area is greater than 1.4%, the evidence was insufficient to establish that the proposed primary service area has a large and rapidly growing population base.

2. Availability, [and] utilization ~~and quality~~[9/] of like services in the district, subdistrict or both

38. In July 2011, there were 1,423 licensed, acute-care beds among seven hospitals located in AHCA district 9, sub-district 9-4, plus approvals for 14 more acute-care beds based upon notifications from JMC and West Palm to add 12 beds and two

beds, respectively. Those notifications were voided in favor of subsequent notifications from JMC and West Palm in October, 2011, to add 45 and 29 acute-care beds, respectively. JMC's intended addition of 45 new-licensed, acute-care beds includes renovation of existing space and the addition of an 80,000-square foot wing scheduled to open in the fall of 2015.[10/]

39. During calendar year 2010, sub-district 9-4's overall acute-care bed occupancy averaged 54.22%. That number declined to 53.8% in 2011, leaving an average daily census of 657 empty, acute-care beds within the sub-district.

40. Projected need in the proposed service area is not sufficient to support a new 80-bed, acute-care hospital. Rather, with population growth projected to be less than 1.5% and flat or declining utilization rates, the projected need for acute-care beds for the proposed hospital's five-year planning horizon is only 21 to 27 beds.

3. Medical treatment trends

41. There is a general trend in the hospital industry away from inpatient utilization in favor of outpatient services. The trend is attributable to advances in medical care and technologies, as well as the move toward managed care and changes in reimbursement under Medicaid, Medicare, and the Affordable Care Act that focus on cost savings and efficiencies.

42. In fiscal year 2011, 37.04% of the weighted revenue average for all acute-care hospitals in Florida came from outpatient services. The trend away from inpatient utilization is expected to continue.

4. Market conditions

43. Discharge data for basic, non-tertiary, acute-care services within FRMC's proposed service area for fiscal years 2009 through 2010, show that JMC has the largest percentage of the market, with a total market share of approximately 39.6%, including 41.7% of FRMC's proposed primary service area (PSA) and 35.2% of FRMC's proposed secondary service area (SSA). PBGMC follows with approximately 29.7% of the market (36% of the PSA and 17.1% of SSA); then St. Mary's with 5.6% (5.3% PSA and 6.1% SSA); Good Samaritan with 4.3% (4.7% PSA and 3.4% SSA); West Palm with 2.4% (2.2% PSA and 2.6% SSA); JFK with 2% (1.7% PSA and 2.5% SSA); Palms West with 1.8% (0.6% PSA and 2.5% SSA); and the remaining 14.8% of the market divided among all other hospitals. Market share figures derived from updated data presented at the final hearing were not appreciably different.

44. FRMC's proposed PSA completely overlaps JMC's PSA and all of the zip codes making up FRMC's proposed PSA are within JMC's existing PSA. Despite the overlap, FRMC contends that the proposed hospital will not affect JMC's market share, nor other hospitals within the subdistrict except PBGMC, because all of

FRMC's inpatient admissions will come from a "redirection" of 70% of PBGMC's non-tertiary inpatients.

45. It is unlikely that FRMC will be successful in filling its beds with patients "redirected" from PBGMC without otherwise affecting the market. The greatest factors driving inpatient admissions are patient preference and emergency admissions, not redirection from existing hospitals. There is a substantial overlap between medical staffs at PBGMC and JMC, and it is likely that many of those physicians would obtain staff privilages at FRMC. PBGMC does not control where physicians with privilages at PBGMC admit patients. For instance, PBGMC's largest admitter of patients, Dr. Baqir Murtaza Syed, while in favor of the proposed hospital, has no intention of redirecting patients from PBGMC to the proposed hospital except in cases where there is an access problem or where complex services not available at PBGMC are offered at FRMC.

46. While sharing some administrative functions through common ownership by Tenet, FRMC is not a satellite to PBGMC. Rather, it is designed to be a stand-alone hospital offering basic, non-tertiary services duplicative and not more complex than those general acute-care services available at both PBGMC and JMC.

C. Section 408.035(1)(e): The Extent to Which the Proposed Services Will Enhance Access[11/] to Health Care for Residents of the Service District

47. According to the CON Application, FRMC will enhance programmatic access for patients at PBGMC by decompressing PBGMC, enhance geographic and programmatic access to emergency care and basic hospital services, and enhance access to programs and resources of a teaching and research hospital affiliated with FAU and Scripps. Each of these assertions is addressed under separate headings below.

1. Programmatic Access by Decompressing PBGMC

48. The CON Application states that approval will "[e]nhance programmatic access to inpatient and outpatient [sic] at [PBGMC] by decompressing its patient census and allowing it to re-configure the facility's existing space for modernization projects." It also states that decompression will "ease the capacity constraints and crowding that routinely occurs during the peak season months of January — April . . . ." According to FRMC, PBGMC is landlocked and cannot grow horizontally or expand vertically, has no outpatient surgery rooms, and needs to expand seven of its nine operating rooms. In addition, the CON Application complains that the current 1,291-square feet per bed at PBGMC[12/] is less than half of the average 2,814-square feet per bed for new, general acute-care hospitals.

49. As previously discussed, however, "decompression" by "redirection" is unlikely. In addition, while seasonal fluxuations may increase average occupancy levels at PBGMC during peak season, total inpatient days at PBGMC have been declining, and the evidence does not otherwise show that present utilization has interfered with recent renovations.

50. First built in 1963, PBGMC has been renovated over time to meet its needs. In addition to its 199 licensed, acute-care beds, PBGMC has three observation beds and leases 11 of its acute-care beds to an unrelated hospice provider. Sixteen of PBGMC's 199 acute-care beds can be converted into semi-private rooms, which would give PBGMC a 218-bed capacity, not including the 11 hospice beds.

51. In contrast to the CON Application's assertion that PBGMC cannot be expanded, in 2009, the City of Palm Beach Gardens approved a site plan ("Site Plan") authorizing PBGMC to expand its emergency department by 10,000-square feet; expand its surgical suite by 3,800-square feet; add 5,000-square feet of storage; add 300 additional acute-care beds; increase its parking; and construct a new 50,000-square-foot medical office building up to 46-feet in height. PBGMC completed the 10,000-square-foot emergency department expansion in 2010, but has not pursued the other authorized Site Plan expansions.

52. PBGMC is currently undergoing renovations to accommodate a nuclear camera and combine two operating rooms. There is no evidence that those renovations, or the 10,000-square-foot emergency department expansion, were hindered by current utilization. In addition, PBGC has not utilized potential additional excess capacity by, for instance, converting the 16 beds that can be converted to semi-private rooms.

53. PBGMC, like JMC, experiences higher occupancy levels during "peak season" each year from January through March. Evidence indicates that, during peak season, PBGMC's overall occupancy levels approach 80%, with even higher utilization in some specialty units such as surgical and cardio intensive care units.[13/] As all beds at PBGMC are private, however, this seasonal influx does not present gender or clinical conflicts.

54. The CON Application asserts an even higher utilization for PBGMC during peak season using a formula to derive what FRMC describes as PBGMC's "functional occupancy." FRMC's formula for "functional occupancy," however, is not reliable. It only considers PBGMC's licensed beds and observation beds, without considering emergency room bays or other available areas. In addition, the data utilized in the formula was defective because it does not reflect the number of outpatients and observation

patients on any given day, but rather only reflects the day of the month on which hospital services were billed.

55. While maintaining that renovations are cost prohibitive, PBGMC has yet to develop a formal plan of renovation that would "modernize" PBGMC in the manner suggested by the CON Application. In fact, Tenet has not engaged architects or planners to come up with conceptual documents for such a project, and such renovations have not been discussed between Tenet and PBGMC's board of directors.

56. On the other hand, in addition to evidence of unused, excess-bed capacity and the previously approved Site Plan, evidence at the final hearing reasonably suggested that the Site Plan could be modified to permit additional expansion and improvements. PBGMC has been designated as a Planned Unit Development and, as such, has greater planning and renovation flexibility. The evidence showed that the City of Palm Beach Gardens has been supportive of renovations at PBGMC in the past and would likely continue that support in the future.

57. Further, at the final hearing, FRMC's statement that vertical expansion of PBGMC would be cost prohibitive was shown to be premised on a misinterpretation of the Florida Building Code. The misinterpretation erroneously concluded that provisions of the Florida Building Code, Existing would require the entire hospital to be brought up to new code standards if

certain vertical and lateral load thresholds were exceeded. Those provisions, however, do not apply to hospitals and other state-licensed facilities, as clarified by the scoping provisions found at section 419 of the Florida Building Code/Building.

2. Geographic and Programmatic Access to Emergency & Basic Hospital Services

58. According to FRMC, the project will make emergency department services more convenient to residents of the area and enhance geographic access to basic hospital services within the immediate vicinity of the proposed hospital. The proposed hospital, however, is only six miles from PBGMC's recently expanded emergency department and less than four miles from JMC. The emergency department at JMC includes 26 treatment bays with an adjacent 10-bed, clinical-decision unit available to handle any temporary emergency department overflow. These factors, together with evidence of existing available acute-care beds and services available within the proposed service area, do not support a finding that the proposed hospital will appreciably enhance access to emergency department or basic hospital services.

3. Access to Programs and Resources of a Teaching and Research Hospital

59. The CON Application states that "[t]he vision for FRMC is to expand the opportunities for clinical research, graduate

medical education and medical surgical services while providing even better access to state-of-the-art medical care." It further states:

> The location of a medical center next to the Scripps Florida Research Institute and FAU's MacArthur campus will foster the positive relationship between science and medicine. Academic medical centers play a pivotal role in the effort to expand access to undergraduate and graduate medical education in the state that benefits students, faculty, and patients. Florida Regional Medical Center will be one of the clinical training sites for FAU's medical students and residents. Thus, programmatic access will be further enhanced by the opportunities to improve the health of the area's residents as well as to train the next generation of physicians and scientists.

60. The CON Application further observes that "District 9 is one of the five districts in Florida without a statutory teaching hospital."

61. Aside from the fact that the need for research and educational facilities has been removed from CON review criteria, and notwithstanding FRMC's acknowledgement that consideration of bed need beyond its immediate plans for an 80-bed, general acute-care hospital is "speculative," the evidence was insufficient to show that FRMC could reach its suggested goals with regard to research and education.

62. Although the CON Application discusses Florida's nine statutory teaching hospitals, FRMC is not envisioned as a

statutory teaching hospital. Rather, discussion of the statutory teaching hospitals was included in the application because data from those facilities were used as "parameters" in evaluating the need for FRMC's 20-year vision of a 200-bed facility.

63. With regard to clinical research, the Proposal states that it will establish a clinical research program that will provide a crucial link to Scripps' research efforts. There is an apparent discrepancy, however, between FRMC's concept of the proposed program and Scripps' expectations.

64. The Proposal only commits to the hiring of one full-time equivalent employee as a "research program coordinator." According to Tenet's chief executive officer over Florida Special Projects, the coordinator would be responsible for "setting up the programs" and assisting with the "enrollment of patients, collection of data, completion of reports and compliance with regulations pertaining to clinical research." In contrast, Scripps envisions the proposed research program coordinator as one who would serve a more general role geared toward learning about Scripps "and to know what the hospital is doing and to connect researchers for potential research topics."

65. Scripps believes, and the evidence shows, that clinical studies are complex activities with multiple phases that require a number of staff to coordinate enrollment,

interaction with institutional review boards, and protocol compliance.[14/] Tenet hospitals in Palm Beach County, however, have no special expertise in enrolling patients and managing clinical research activities. FRMC did not otherwise provide evidence detailing the clinical research program or programs contemplated by the Proposal. In sum, evidence of FRMC's commitment to provide a crucial link to Scripps' research efforts is lacking.

66. Evidence adduced at the final hearing casts doubt on FRMC's ability to become, in the foreseeable future, "one of the clinical training sites for FAU's medical students and residents." While FRMC and FAU have entered into a memorandum of understanding (MOU) which recites FAU's intention to sponsor graduate medical education (GME) and FRMC's intention to accept FAU medical students, FRMC's ability to do so is dependent upon it joining or affiliating with other entities under the FAU College of Medicine GME Consortium Agreement that exists to coordinate and promote the development and implementation of GME in South Florida (the GME Consortium Agreement). FAU is a party to the GME Consortium Agreement, along with Bethesda Memorial Hospital, Boca Raton Regional Hospital, and three Tenet hospitals, which include Delray Medical Center, West Boca Medical Center, and St. Mary's Medical Center.

67. Paragraph B.2. of the MOU provides:

> GME: Pursuant to the agreement governing the GME Consortium, the admission of additional member institutions to the GME Consortium, as well as the addition of other hospitals and participating sites that may affiliate with the GME Consortium, is subject to the unanimous vote of all members of the GME Consortium, in each member's sole and absolute discretion. FRMC will submit a request to join the GME Consortium and obtain full consideration by the GME Consortium before offering any GME program(s) independently or in concert with any other entity. FRMC will also submit a request to the GME Consortium to be a rotational or participating site for FAU's Residents, as further described in subsequent master affiliation agreements or program letters of agreement as required by the ACGME [Accreditation Council for Graduate Medical Education].

68. At least one party to the GME Consortium Agreement, Boca Raton Regional Hospital, would not vote in favor of admitting FRMC as a member or participant under the GME Consortium Agreement.[15/]

69. The GME Consortium Agreement has a five-year term ending December 1, 2016, with automatic one-year renewals thereafter.

70. The American Association of Medical Colleges (AAMC) is a national association representing medical schools and major teaching hospitals in the United States. Although not defined under Florida Law, the term "academic medical center" is understood by AAMC to refer to large hospitals, generally

offering tertiary and more complex services, which are affiliated with and often on the same campus as a medical school. The size of the proposed hospital and complexity of the medical services proposed to be offered by FRMC are less than typical for an academic medical center as recognized by AAMC. FRMC does not even have a target date as to when it may offer services other than the general, non-tertiary hospital services that form the basis of the CON application.

D. Section 408.035(1)(g): The Extent to Which the Proposal Will Foster Competition that Promotes Quality and Cost-Effectiveness

71. Tenet is currently the dominant provider in the proposed service area, with five hospitals in Palm Beach County, including three hospitals located in AHCA sub-district 9-4 with 854 acute-care beds between them, including PBGMC, St. Mary's, and Good Samaritan. Rather than increasing competition, the addition of FRMC would likely further Tenet's dominance, thereby decreasing competition.

72. As a large hospital system, Tenet has an advantage over non-affiliated hospitals, such as JMC, in negotiating favorable reimbursement rates with commercial insurers, including managed-care plans. The ability to negotiate favorable rates translates into a better "payor mix" with richer reimbursement from private insurance and less from fixed rate, non-negotiable, governmental programs such as Medicaid and

Medicare. Rather than showing that approval of FRMC would promote cost effectiveness, the evidence indicates that another Tenet facility within sub-district 9-4 could further boost Tenet's negotiating leverage, resulting in a higher payment structure[16/] within the area for FRMC's services reimbursed by private insurance.

73. These factors, together with the fact that the CON Application was submitted for approval of a facility with a focus on non-tertiary acute-care services amply available in the area, do not support a finding that the proposed hospital will foster competition that promotes quality and cost-effectiveness.

74. Moreover, as further discussed under the heading "Adverse Impact," below, approval of the proposed hospital would have a negative impact on both JMC and West Palm.

E. Section 408.035(1)(i): The Applicant's Past and Proposed Provision of Health Care Services to Medicaid Patients and the Medically Indigent

75. As noted in the CON Application, "[FRMC] is newly incorporated and not an existing healthcare provider with a historical track record of utilization."

76. As a Proposed CON Condition, FRMC states that it "will provide a minimum of 4% of its total annual patient days to a combination of Medicaid, Medicaid HMO, and Charity patients."

77. In 2010, 6.3% of the total combined patient days in the proposed service area for non-tertiary, non-OB, adult services were Medicaid, Medicaid HMO, and charity patient days.

78. As FRMC's proposed 4% condition is less than the 6.3% actually served in the proposed service area in 2010, based on patient days, the evidence does not support a finding that the proposed hospital will enhance access for the medically indigent or underserved.

V. Adverse Impact

79. FRMC contends that there will be no adverse impact from the proposed hospital because its patients will come from a 70% "redirection" of PBGMC's patients. As previously discussed, however, PBGMC does not have the ability to direct where patients are admitted for hospital care. As FRMC's success in redirection without affecting the market is unlikely, its assumption that neither JMC nor West Palm will lose patients to FRMC is unreasonable.[17/]

A. JMC

80. JMC has a good reputation in its community and enjoys strong patient satisfaction and loyalty. As part of its mission to care for the health and welfare of its community, some of the needed services which JMC offers are not profitable for JMC, including obstetric services. No other hospital in north Palm Beach County provides obstetric services.

81. JMC also provides benefits beyond the direct provision of hospital services. In 2011, JMC provided $3 million in charity care, $3.5 million in Medicaid underfunding, plus uncompensated services valued at $1.3 million through the operation of specialty healthcare clinics, including a diabetes clinic and oncology services clinics. JMC also expends approximately $300,000 each year for health education programs and community health screenings.

82. In addition, JMC provides support to the Jupiter Volunteer Health Clinic, a free clinic established through collaboration with the Town of Jupiter, local physicians, Palm Beach County, and the community volunteer organization known as "El Sol." Despite the affluence in northern Palm Beach County, there is also a substantial population of poor without health insurance. The clinic is particularly important because there are no primary care doctors in northern Palm Beach County who accept Medicaid patients in their practice. Patients are often lined up outside the clinic before it opens. Clinic patients that require hospital admission are admitted to JMC.

83. Even though JMC has a reputation for community service and patient loyalty, the establishment of FRMC would have a material effect on JMC's operations. Proximity of a proposed facility to an existing hospital significantly affects the

potential for adverse impact. JMC is the closest hospital to FRMC's proposed site.

84. The likelihood that JMC will lose patients to FRMC is increased by the fact that FRMC proposes to offer the same services, with the exception of obstetrics, as currently offered by JMC.

85. In addition, there is currently substantial overlap between the medical staffs of JMC and PBGMC. FRMC anticipates that it will be staffed primarily by physicians who now practice both at JMC and PBGMC. The overlap of the medical staffs is yet another factor demonstrating the potential adverse impact on JMC, as many physicians who currently practice at PBGMC and JMC are likely to obtain medical staff privileges and admit a substantial number of their patients to FRMC, including patients they would otherwise admit to JMC.

86. As an independent, not-for-profit, community provider, JMC's operating margins are very thin at 1.5% to 2% annually. JMC would lose a substantial number of inpatient admissions if the proposed hospital is approved. JMC reasonably anticipates the loss of 1,533 cases to FRMC in the first year of operation of the new hospital. There is insufficient population growth in FRMC's proposed service area to offset this adverse impact.

87. Applying JMC's current contribution margin to JMC's projected lost patient volume results in a projected adverse

impact to JMC of $11,254,000 in combined inpatient and outpatient lost contribution margin, including a projected loss of up to $5,000,000 of inpatient contribution margin, in the first year of operation of FRMC.

88. While the ability to negotiate favorable payment rates is critical to the financial viability of all hospitals, it is particularly crucial for small, stand-alone, community hospitals like JMC. As the only hospital in its primary service area, JMC presently enjoys some leverage in negotiating terms with private insurers and managed care companies. The establishment of FRMC will eliminate JMC's geographic advantage and erode JMC's ability to achieve favorable payment rates.

89. The anticipated adverse financial impact on JMC will interfere with JMC's ability to invest in technology and human resources, and will threaten the viability of the Jupiter Volunteer Health Clinic.

90. The evidence is insufficient to show that approval of FRMC will bring countervailing benefits to the community that would offset the adverse impacts on JMC.

B. WEST PALM

91. Although West Palm stands to lose fewer cases than JMC if FRMC is approved, the adverse impact on West Palm is substantial, especially considering its current financial condition. West Palm incurred a bottom line net loss of

$7,502,651 in 2011, with a negative operating margin of $14,002,922. If FRMC is approved, a reasonable estimate of lost cases shows that West Palm will lose 118 discharges to FRMC in 2014, 120 discharges in 2015, and 122 in 2016. The 122 lost cases in 2016 amount to 466 patient days. For 466 lost patient days, West Palm's combined lost contribution margin is estimated at $886,377.[18/]

CONCLUSIONS OF LAW

Jurisdiction

92. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 120.569, 120.57(1), and 408.039(5), Fla. Stat.

Standing

93. In order for an existing healthcare facility to have standing to intervene in a CON proceeding, it must show that it will be "substantially affected" by approval of the certificate of need application at issue. § 408.039(5), Fla. Stat. In order to be substantially affected by the outcome of a proceeding, a party must show: (1) injury in fact of sufficient immediacy, and (2) that the person's substantial injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. Dep't of Envtl. Reg., 406 So. 2d 478 (Fla. 2nd DCA 1981).

94. Both JMC and West Palm proved by a preponderance of the evidence that they have standing to participate as a party in this proceeding. Both hospitals are located in the same sub-district 9-4 as the proposed hospital. The adverse impacts on these two hospitals, as outlined in the Findings of Fact, above, are of the type or nature of injury which this proceeding is designed to protect against and they are substantial enough to establish standing.

Burden of Proof

95. The petitions in this case commenced a de novo proceeding intended to formulate final agency action, "not to review action taken earlier and preliminarily." Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981)(citing McDonald v. Dep't of Banking & Fin., 346 So. 2d 569 (Fla. 1st DCA 1977)); § 120.57(1), Fla. Stat. Therefore, the Agency's preliminary decisions on CON applications, including findings in a SAAR, are not entitled to a presumption of correctness. Id.

96. An applicant for a CON has the burden of demonstrating that its application should be granted. Boca Raton Artificial Kidney Ctr. v. Dep't of HRS, 475 So. 2d 250 (Fla. 1st DCA 1985). The award of a CON must be based on a balanced consideration of applicable statutory and rule criteria. Dep't of HRS v. Johnson and Johnson Home Healthcare Inc., 447 So. 2d 361 (Fla. 1st DCA

1984); Balsam v. Dep't of HRS, 486 So. 2d 1314 (Fla. 1st DCA 1988). The weight to be given each criterion is not fixed but varies depending on the facts of each case. Collier Medical Ctr., Inc. v. Dep't of HRS, 462 So. 2d 83 (Fla. 1st DCA 1985).

97. As previously discussed, the statutory review criteria applicable to FRMC's application are found in section 408.035, Florida Statutes, which underwent significant amendments in 2004 and 2008. Despite specific removal of the "needs of research and educational facilities" from statutory review criteria in 2004, AHCA, through the testimony of Mr. Gregg at the final hearing, took the position that the research and teaching components of the proposed hospital and FRMC's relationship with Scripps and FAU should be considered in reviewing the CON Application. Mr. Gregg explained that the applicable statutory and rule review criteria should be interpreted broadly to allow applicants to advance virtually any arguments regarding need.

98. Here, as in AHCA's recent Final Order in Memorial Healthcare Group, Inc. v. Agency for Health Care Administration and Shands Jacksonville Medical Center, DOAH Case No. 12-0429CON (Fla. DOAH Dec. 7, 2012, ¶ 138; Fla. AHCA Apr. 10, 2013)(Shands Final Order), rejecting AHCA's Second Exception and Shands' Tenth Exception, and adopting Judge Watkins' Conclusions of Law, it is concluded:

> [AHCA's] deferential attitude toward applications for new hospitals, as articulated by Mr. Gregg, is not supported by the current statutory review scheme. An applicant for a new hospital must still prove that, on balance, approval of the application is consistent with the statutory and rule review criteria . . . .

99. Consideration of the needs of research and educational facilities is inconsistent with the elimination of those needs from the statutory review criteria in 2004, and cannot be squared with AHCA's Final Order in BayCare of Southeast Pasco, Inc. v. Agency for Health Care Administration, DOAH Case No. 07-3482CON (Fla. DOAH Oct. 29, 2008, ¶¶ 166-167; Fla. AHCA Jan. 6, 2009), adopting Judge Maloney's Conclusions of Law 166 and 167, which concluded that since deletion of section 408.035(5), Florida Statutes (2003), "[t]here is no longer any CON criterion that provides for consideration of USF's need for a teaching hospital or need for a hospital that would serve GME and teaching needs."

100. Even if the needs of research and educational facilities or the need for research and educational facilities could be considered, the CON Application itself concedes that "[e]stimation of the parameters of bed need 20 years into the future is speculative and . . . not specifically subject to CON review at this time . . . ."

101. Moreover, FRMC's 20-year vision for a research and teaching facility was unsubstantiated. The letter of intent between Scripps and Tenet is not binding, Scripps and FRMC have differing expectations regarding the proposal, and there was insufficient project description. Tenet was not shown to have any particular expertise in translational research, and the evidence did not reveal a target date for FRMC to offer services beyond "[n]on-Tertiary types of cases for adults . . . during [FRMC's] initial operation [which was] the basis upon which [the] CON application [was] submitted."

102. FRMC further failed to establish, by a preponderance of the evidence, that there is a large and rapidly growing population base in its proposed primary service area, that there is an expanding market which would minimize the impact on existing providers, or that the benefit of enhanced access of the proposed hospital outweighs the adverse impact on existing hospitals.

103. In sum, the needs of research and educational facilities are no longer considered in CON review, and even if they were, it was not shown that the proposed hospital would meet those needs.

104. As observed in conclusion of law 137 of the Recommended Order adopted by the Shands Final Order, which is equally applicable here:

> Just as the desires of local government or citizens may not dictate the approval of a new hospital, neither should the motivations of a particular health system, no matter how noble, trump the statutory requirement that "need" for the proposal be demonstrated.

105. The competent substantial evidence of record in this proceeding failed to establish need for the proposed hospital. Moreover, a balanced consideration of all applicable statutory criteria compels the conclusion that the CON Application should be denied.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Agency for Health Care Administration issue a Final Order denying CON Application No. 10130.

DONE AND ENTERED this 30th day of April, 2013, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2013.

ENDNOTES

[1/] On the first day of the final hearing, the undersigned announced that denial of the Motion in Limine was for practical reasons and not a definitive ruling on whether the evidence was relevant. Transcript (T), p. 85.

[2/] In accordance with agreed procedure and schedule, West Palm filed post-hearing written objections to FRMC's deposition transcripts of: Thomas Burris, M.D. (FRMC Exh. 44); Francis Chisari, M.D. (FRMC Exh. 45); Paul Kenny, Ph.D. (FRMC Exh. 49); Thomas Kodalek, Ph.D. (FRMC Exh. 50); and James Williamson (FRMC Exh. 54). West Palm objected to consideration of those depositions and attachments on the ground that they are irrelevant because "their deposition testimon[ies] [relate to] the alleged need of Scripps for the acute care hospital proposed by FRMC . . . . [and the] 'needs of research and educational facilities' [have been removed] from the criteria to be reviewed in determining whether to grant or deny a CON application." Considering West Palm's objections and FRMC's responses thereto, and consistent with the Findings of Fact and Conclusions of Law in this Recommended Order, West Palm's objections to those depositions are sustained. In addition, considering the objections and responses, West Palm's post-hearing written objections to individual segments of those depositions are also sustained.

West Palm's post-hearing written objections also raised objections, and FRMC responded to those objections, to portions of the deposition testimony and exhibits of Ravi Patel (FRMC Exh. 51) and Eugene Shieh, M.D. (FRMC Exh. 52). West Palm's written objection to testimony from page 10, line 11 through page 11, line 10 of Ravi Patel's deposition is overruled. West Palm's objections to testimony from page 11, line 22, through page 12, line 12, and from page 13 from line 8 through line 24, of Ravi Patel's deposition are sustained. West Palm's objections to testimony from page 10, line 14 through page 12, line 5, of Eugene Shieh, M.D.'s deposition are sustained.

JMC filed post-hearing written objections, and FRMC filed responses to those objections, to portions of deposition transcripts offered by FRMC relating to the issue of "outmigration," including: page 9, lines 12-25, and page 10, lines 1-4, and 17-24, of the deposition of Eugene Shieh, M.D. (FRMC 52); page 8, lines 2-24, page 53, lines 13-24, and page 54, lines 1-3 of the deposition of Ravi Patel (FRMC Exh. 51); page 9, lines 4-15, of the deposition of Robert Green, M.D. (FRMC 48); and page 8, lines 17-25, page 9, lines 21-25, and page 10, lines 1-5, of the deposition of Rohit Dandiya, M.D.

(FRMC Exh. 46). Considering the objections and responses, those objections are sustained.

JMC also filed post-hearing written objections, and FRMC filed responses, to deposition testimony relating to the needs for or needs of an academic medical center or medical research facility, including: page 11, lines 6-25 and page 12, line 1, of the deposition of Eugene Shieh, M.D. (FRMC Exh. 52); page 11, line 5, page 12, lines 1-7, and page 13, lines 8-24, of the deposition of Ravi Patel, and page 12, lines 16-25, page 13, lines 1-25, page 14, lines 1-25, page 15, lines 1-8, page 32, lines 18-25, page 33, lines 1-25, page 34, lines 1-25, page 35, lines 14-25, page 36, lines 1-25, and page 37, lines 1-25 of the deposition of Robert Green, M.D. Considering the objections and responses, and consistent with the Findings of Fact and Conclusions of Law in this Recommended Order, JMC's objections to those portions of the depositions are sustained.

JMC also filed written objections to portions of the deposition of Ravi Patel (FRMC Exh. 51), including page 10, lines 13-20, and page 11, lines 2-10. Considering the objections and FRMC's response, those objections to portions of Ravi Pate's deposition testimony are overruled.

[3/] FRMC filed post-hearing written objections to portions of the following depositions: page 10, line 23 through page 11, line 13 of the deposition of Jerry Fedele (JMC Exh. 74); and page 42, line 16 through page 44, line 11, and page 46, line 25 through page 47, line 4, of the deposition of Nicolas Chronos, Ph.D. (JMC Exh. 80). Considering the objections, and JMC and West Palm responses to the objections, FRMC's objections are overruled.

[4/] FRMC filed a post-hearing written objection to page 23, lines 19 through 25 of the deposition of Gina Melby (West Palm Exh. 5) on the ground of hearsay. Considering FRMC's objection and responses filed by West Palm and JMC, the objection is overruled.

[5/] Unless otherwise noted, all citations herein are to the 2012 Florida Statutes and current versions of the Florida Administrative Code.

[6/] Michael Marletta, Ph.D., President and CEO of Scripps, testified that the type of research commonly done by scientists at Scripps is known as "basic research," which is unfettered discovery designed to provide a foundation of understanding. According to Dr. Marletta, "translational research" starts out with basic research but with an applied outcome in mind; for instance, a therapeutic.

[7/] See Florida Administrative Code Rule 59C-1.038 (history note)(acute-care bed need, repealed effective 4/21/05).

[8/] Designation of service areas by zip code is required by section 408.037(2), Florida Statutes, added in 2008, which provides in pertinent part:

> (2) An application for a certificate of need for a general hospital must contain a detailed description of the proposed general hospital project and a statement of its purpose and the needs it will meet. The proposed project's location, as well as its primary and secondary service areas, must be identified by zip code. Primary service area is defined as the zip codes from which the applicant projects that it will draw 75 percent of its discharges. Secondary service area is defined as the zip codes from which the applicant projects that it will draw its remaining discharges . . . .

[9/] "Quality" is stricken from the topic heading derived from the rule for consistency with statutory changes in 2008 which removed "quality of care" from section 408.035(1)(b) review criteria for general hospital applications.

[10/] Although JMC notified AHCA of its plans after Tenet submitted its Letter of Intent to establish FRMC, the evidence shows that JMC's plans to expand its physical plant and add 45 new-licensed acute-care beds were underway prior to Tenet's Letter of Intent.

[11/] In addressing "health care access criteria," Florida Administrative Code Rule 59C-1.030, applicable to CON applications for new general hospitals, focuses on the extent that a proposal will serve the medically underserved. Those factors have been considered. As noted in the findings under this Recommended Order's heading E., entitled "408.035(1)(i): The Applicant's Past and Proposed Provision of Health Care Services to Medicaid Patients and the Medically Indigent," the evidence does not support a finding that FRMC will enhance access for the medically indigent or underserved.

[12/] 1,291-square feet per bed is derived by dividing PBGMC's existing 256,813-gross-square feet by its 199 licensed acute-care beds.

[13/] Higher utilization for these types of specialty units is not unusual, regardless of a given hospital's overall occupancy.

[14/] For instance, in the clinical research department established by JMC approximately 10 years ago, JMC has 3.2 FTEs dedicated to administration of its clinical research program. In the past two years, JMC has had 50 clinical trials, with 19 or 20 currently open. JMC's clinical research manager has organized a clinical research-networking meeting on a quarterly basis for Palm Beach County and Martin County. Tenet has declined to participate in these networking meetings.

[15/] Voting authority for the consortium is vested in a board of directors made up of four members representing the interests of FAU, Bethesda Memorial Hospital, Boca Raton Regional Hospital, and the three Tenet facilities, respectively. The member representing Boca Raton Regional Hospital would not vote in favor of FRMC's participation in the consortium or any GME program under the GME Consortium Agreement.

[16/] Depending on the health care plan, the higher payment structure could be reflected in higher health care costs to patients such as higher coinsurance or copayments.

[17/] In an apparent acknowledgment that its 70% "redirection" assumption is not attainable, at the final hearing, FRMC introduced an "Impact and Sensitivity Analysis" with two alternative scenarios in which 50% and 40%, respectively, of PBGMC's non-tertiary discharges in the service area would be "redirected" to FRMC. Given the fact that PBGMC does not have the ability to direct its patients to FRMC, even the more conservative "redirection" figures from the "Impact and Sensitivity Analysis" are suspect.

[18/] An alternative adverse impact analysis which assumes that the entirety of FRMC's inpatient utilization will in fact come from a 70% "redirection" from PBGMC, but further assumes that PBGMC will "recapture" 55% of that utilization, shows an adverse financial impact to West Palm of approximately $737,000 in combined lost contribution margin. As PBGMC does not intend to de-license beds or otherwise reduce the capacity of its facility, this alternative negative impact analysis, although lower than the $886,377 estimate because it utilizes FRMC's unreasonable assumption that 70% of PBGMC's patients will be "redirected" to FRMC, reasonably assumes that PBGMC will recapture 55% of lost utilization.

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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.