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**RECEIVED**

**JUN 01 2006**

Office of the Commissioner  
DHSS - Juneau

June 1, 2006

**VIA DHL OVERNIGHT COURIER AND FAX (1-907-465-3068)**

Hon. Karleen Jackson, Commissioner  
Department of Health and Social Services  
State of Alaska  
350 Main Street, Room 204  
Juneau, AK 99801

Dear Commissioner Jackson:

Re: Mat-Su Regional Medical Center

Please consider this letter a request for reconsideration, pursuant to 7 AAC 07.033, of your letter dated May 4, 2006, to Mr. Norman Stephens of Mat-Su Regional Medical Center concerning the diagnostic imaging center being developed by Imaging Associates of Providence, LLC ("IAP"). This request for reconsideration is submitted by Inslee, Best on behalf of Mat-Su Regional Medical Center ("Mat-Su Regional").

As the owner/operator of two magnetic resonance imaging machines ("MRI") providing similar diagnostic imaging services to the Mat-Su Valley community, Mat-Su Regional is a "person substantially affected" under 7 AAC 07.900(15)(C)(i) and has standing to submit this request for reconsideration under 7 AAC 07.033(a). Mat-Su Regional Medical Center respectfully disputes your conclusion that IAP's new diagnostic imaging center is not considered a "health care facility" for purposes of the certificate of need program.

This request for reconsideration is timely as it has been mailed and faxed within 30 days after the date of public notice (May 4, 2006) issued pursuant to 7 AAC 07.032. See, 7 AAC 07.033(b).

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**A. CON Requirements.**

The current Alaska certificate of need ("CON") statutory scheme requires application for a CON for construction, alteration or addition of health services provided by a health care facility in an amount of \$1,050,000.00 or more. AS 18.07.031. As amended by the legislature in 2004, the term "health care facilities" includes "independent diagnostic testing facility" ("IDTF"). AS 18.07.111(8).

As an initial matter, there is no dispute that IAP's new MRI facility would exceed the monetary threshold requirements of the CON program. However, IAP argues that it is entitled to an exemption based on its representation that it constitutes a physician's office, per AS 18.07.111(8)(B). Mat-Su Regional respectfully submits that the determination that the IAP facility is exempt from the CON requirement because it constitutes a private physician's office is in error for several reasons, including the following:

1. The clear intent of the legislature was to require IAP (and other similarly situated diagnostic facilities) to be subject to the CON process in order to "level the playing field" as proponents of the amendment acknowledged;
2. IAP does not meet the essential criteria being physician owned, as contemplated by the statutory/regulatory scheme; and
3. In the alternative, although the CMS criteria should not be applicable, IAP fails to support its argument for CON exemption with any data that the IAP facility meets the CMS criteria used to distinguish an independent diagnostic testing facility from a physician's office.

**B. The Legislature clearly intended that the CON requirements would apply to Imaging Centers such as IAP regardless of ownership.**

AS Chapter 18.07 provides the statutory basis for Alaska's CON program. AS 18.07.031 requires approval of a CON by the Department of Health and Social Services prior to the expenditure of the requisite monetary threshold for construction of a "health care facility." In 2004 the legislature amended the definition of "health care facility" to include "an independent diagnostic testing facility" ("idtf"). AS 18.07.111(8). While the term "independent diagnostic testing facility" is undefined in AS 18.07.111, it bears no relationship to the term of art "independent diagnostic testing facility" for purposes of Medicare billing. Instead, the legislature clearly intended to level the playing field by requiring independent diagnostic testing

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facilities - the most prominent example of which is imaging centers such as IAP - to be subject to the same CON process that hospitals are subjected to.

Rob Betit, President of the Alaska State Hospital & Nursing Home Association, testified before the House HESS Finance Committee that:

In our view it is only fair that all new independent imaging center projects be required to undergo the same review as currently required of hospital based projects. HB 511 makes this small but critically important change to CON law.

See, 3/31/04 House Finance Committee Meeting Minutes. Providence Health System also represented to the Legislature that the new CON law would apply to Providence's operations. Ms. Lisa Wolf, the Director of Planning for Providence Health System, explained the purpose behind the CON provisions as follows:

The CON law was established to ensure that the state of Alaska and individual communities are not financially burdened with excess health care equipment and facilities. The premise is that having more than the community needs would increase the costs of care, as providers would need to increase charges to cover the additional expenses that would not be covered by adequate volume [of patients]. The CON law was designed to ensure a high quality of care by ensuring that there would be adequate volume so that the practitioners would be proficient in performing the procedure or exam.

See, 3/04/04 HESS Committee Meeting Minutes (#1219). Ms. Wolf, in supporting HB 511, testified that the CON process "levels the playing field for all providers." *Id.* She later acknowledged that Providence Imaging Center is an independent diagnostic testing facility that previously was exempt from the CON process, but would now be subject to the CON requirements pursuant to the provisions of HB 511. *Id.* at #2213.

Finally, Representative Ralph Samuels clearly explained that the intent behind HB 511 is to require *all groups* to do the Certificate of Need (CON). See, 3/31/04 House Finance Committee Meeting Minutes.

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As the proponents of HB 511 in the legislature acknowledged, the primary justification for adding the "independent diagnostic testing facility" language was that "there should be a level playing field for all" and that diagnostic imaging centers should not be able to cherry pick profitable imaging services, while hospitals were required to subsidize other unprofitable services, such as neonatal, emergent care, Medicare and mental health. In sum, there is no ambiguity with respect to the legislature's intent to require IAP (and other like imaging facilities) to submit to the same regulatory scheme as hospitals, including community and other non-profit hospitals.

In formulating its public policy to level the playing field, the Legislature well understood the potentially serious, even catastrophic, consequences to the state's health care delivery system of exempting IAP (and other like diagnostic facilities) from the CON process with respect to MRIs and other expensive diagnostic equipment. Taking IAP situation as illustrative, it is apparent that IAP is now in a position to add diagnostic equipment without regard to any existing formula or other criteria that would apply to a CON application. By adding such equipment as it sees fit, and in its own profit interest, IAP can foreclose even the possibility that a competing hospital would be able to successfully apply for a CON for an MRI or other expensive diagnostic equipment in the future. It could even employ the tactic of anticipating an application by Mat-Su Regional in the future by purchasing additional diagnostic equipment; indeed, there would be no barrier to it purchasing such equipment while an application was pending, and successfully arguing the application no longer met the criteria.

Likewise, when the Legislature enacted the IDTF amendment, it well understood that its purpose was more than just to create a level playing field between two or more for-profit competitors. It understood the critical need to protect the viability of community-based hospitals like Mat-Su Regional, which provide a broad range of critical health care services — such a neonatal, Medicare, emergent and mental health — that are frequently expensive and generally unprofitable. Mat-Su Regional and other like hospitals cannot cherry pick profitable services, such as MRI tests. IAP, on the other hand, can cherry pick in a manner that maximizes its profits.

The inevitable consequence of exempting IAP from the CON process will be increased costs to both the state's health care consumers and the state itself. For IAP to achieve profit maximization on the capital-intensive new machinery it must maximize utilization of the machinery, and optimize price structure. It will no doubt achieve this objective, in part, by marketing directly to health care consumers, and by aggressively seeking referrals from chiropractors and physicians. Inevitably, Medicare and Medicaid reimbursement will escalate, and both government and health care consumers will pay

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more. The primary goal of the CON scheme - to regulate major capital expenditures in order to assure an appropriate supply of health services while controlling costs - will be undermined. In short, the Legislature's purpose in enacting the IDTF amendment was to strengthen, not weaken, Alaska's CON system. The Department's interpretation of this legislation has completely vitiated the legislative intent.

**C. IAP Does Not Qualify for the Physician Office Exemption.**

The Commissioner's decision goes beyond the physician office exemption authorized by AS 18.07.111. IAP does not qualify as a physician office as contemplated by AS 18.07.111 and the entire statutory scheme. Rather, it is a joint venture between Providence Health Systems and a group of radiologists. Providence Health System admits that it has an investment in IAP. See, April 7, 2006, letter from E. L. Parrish. However, the Department failed completely to inquire as to the nature of this investment.

The hospital's investment in the proposed imaging center removes it from the physician office exemption. The purpose of the physician office exemption is to exempt from CON requirements only those services provided by physicians to their own patients in their own offices. This purpose is not met or furthered by allowing a hospital to circumvent the CON process by merely including a few physicians in its scheme. While the form of the project may involve a separate entity, in substance it is still part of the hospital's (Providence Health System) overall operations.

**CONCLUSION**

The legislative intent is clear that IAP is an independent diagnostic testing facility and is subject to the CON process. IAP's attempt to substitute the Medicare billing rules for the legislative intent is inappropriate and would completely vitiate the legislation. Further, IAP does not meet the exemption for physician offices as its majority investor is a hospital, Providence Health System.

Every day that IAP is allowed to continue operating its MRI is a violation of the law and financially penalizes Mat-Su Regional. Mat-Su Regional respectfully requests that the Department take immediate effective action to stop IAP from operating its MRI without a certificate of need.

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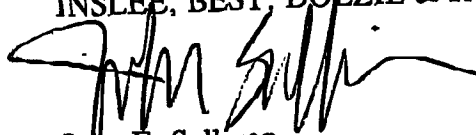


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Please let me know if you have any questions or need any further information relating to this matter.

Very truly yours,

INSLEE, BEST, DOEZIE & RYDER, P.S.



John F. Sullivan

JFS:ljh

cc: Mr. Norman Stephens  
Mr. John Abreu  
Bill Priest, Esq.  
Ms. Sharon Anderson  
Mr. David Pierce

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1st day of June, 2006, I caused to be served a true and correct copy of the following document(s):

1. Request for Reconsideration dated June 1, 2006

to the individual(s) named below in the specific manner indicated:

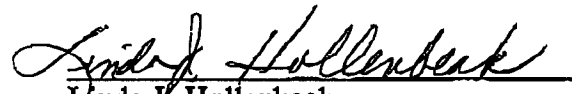
Hon. Karleen Jackson, Commissioner  
Department of Health and Social  
Services  
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350 Main Street, Room 204  
Juneau, AK 99801

- Personal Service (ABC Legal Messenger)
- U.S. Mail
- Certified Mail
- Hand Delivered
- Overnight Mail
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Mr. David Pierce  
CON Coordinator, DHSS  
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Juneau, Alaska 99811-0601

- Personal Service (ABC Legal Messenger)
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- Certified Mail
- Hand Delivered
- Overnight Mail
- Fax #

DATED this 1<sup>ST</sup> day of June, 2006, at Bellevue, Washington.

  
Linda J. Hollenbeak



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**FAX COVER SHEET**

CLIENT #: 360605-2

DATE: JUNE 1, 2006 11:52 AM

TO:

Karleen Jackson, Commissioner  
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FROM:

John F. Sullivan  
INSLEE, BEST, DOEZIE & RYDER, P.S.  
Bellevue, Washington

RE:

Mat-Su Regional Medical Center

NOTE: We are transmitting 7 page(s) including this cover sheet. If you do not receive the entire fax or if there is a quality problem, please contact Linda J. Hollenbeak at (425) 450-4213.

COMMENTS:

Original Documents to Follow Via: Overnight Delivery

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