BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

FAIRBANKS ULTRASOUND, LLC,	)	
	)	
Petitioner,	)	
v.	)	
	)	
FAIRBANKS MEDICAL IMAGING, INC., *d/b/a* NORTH STAR RADIOLOGY,	)	
	)	
Respondent.	)	OAH No. 14-0704-CTN
	)	

DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY ADJUDICATION

I. Introduction

Fairbanks Ultrasound LLC (FUL) filed an accusation against Fairbanks Medical Imaging, Inc., *d/b/a* North Star Radiology ("NSR"), appealing the grant of a certificate of need ("CON") to NSR for its MRI and CT scanning facility in Fairbanks and seeking revocation of the CON. The accusation asserted that "[t]he Commissioner of Health and Social Services violated Alaska law (AS 18.07.081) by granting a CON to NSR," and it set forth a variety of errors allegedly committed by the Commissioner in granting NSR's CON. After NSR answered the accusation, the parties each filed motions for summary adjudication.[1] After the motions became ripe for decision, in late-September 2015 the parties filed supplemental briefs regarding the impact in this case of the Alaska Supreme Court's decision in *Alaska Spine Institute v. State, Dept. of Health & Social Services*.[2]

After a careful review of the parties' filings and the factual record, summary adjudication is granted to NSR, and FUL's accusation in this matter is hereby dismissed.

II. Facts

NSR began operating its MRI (magnetic resonance imaging) and CT (computed tomography) scanning facility in Fairbanks in 2011.[3] It had previously acquired an existing MRI facility, Fairbanks Community Imaging ("FCI") in 2010, had completed a move into a newly-constructed facility, and had replaced FCI's mobile MRI machine with a new MRI

---

1 2 AAC 64.250 authorizes parties to submit motions for summary adjudication in matters before the Office of Administrative Hearings ("OAH"). Analysis of summary adjudication motions is governed by the same principles as motions for summary judgment under Alaska's civil rules.

2 266 P.3d 1043 (Alaska 2011).

3 *See* Agency Record ("AR") 000087.

unit at the time that it made the move.[4] It is undisputed that NSR did not apply for a CON prior to opening its new facility for business in 2011.[5] NSR's principals apparently opted not to apply for a CON based on their belief that NSR met the definition of the "offices of private physicians" exclusion from the definition of those "health care facilities" that are subject to Alaska's CON regulatory requirements.[6]

In early 2012, FUL became aware that NSR, prior to building and operating its facility in Fairbanks, had received neither a CON nor a determination that it was exempt from CON requirements.[7] At that time, FUL operated an ultrasound medical service in Fairbanks, and it apparently intended to obtain MRI and CT machines to "expand services."[8] FUL engaged in several rounds of correspondence with the Department of Health and Social Services ("Department") regarding the fact that NSR was operating without a CON. The Department raised the issue with NSR and, after a lengthy period of correspondence, the Department and NSR reached an agreement whereby NSR would apply for a CON, it would not be deemed to have waived its argument that it constitutes an exempt "office of private physicians," and it would be allowed to continue operating while its CON application was pending.[9] NSR eventually submitted its CON application. During this entire period, FUL never expanded into providing MRI or CT services, deeming it prudent to "not wade into the market by making expensive changes" until NSR was brought into legal compliance.[10]

In mid-October of 2013, NSR filed its CON application with the Department.[11] By that time NSR had been operating its facility in Fairbanks without a CON for more than two years. In its written filings, NSR maintained its position that it was exempt from CON requirements as an office of private physicians.[12] It was not disputed that the costs of NSR's facility exceeded the statutory threshold discussed in AS 18.07.031(a) ($1,450,000 as

---

4 AR 000086-87.

5 AR 000085, 000782.

6 *See* AS 18.07.031(a) (requiring a CON for construction of a new health care facility whenever the projected cost of construction exceeds a statutory threshold ($1,450,000 as of October 2013)); AS 18.07.111(8)(B) (excluding "offices of private physicians" from the definition of "health care facility"); AR 000083-85, 000783.

7 Affidavit of Dr. J. Zuckerman, attached to Motion for Summary Judgment, at para. 7.

8 *Id.* at para. 5. FUL's parent company received a "letter of non-reviewability" from the Department in February 2012, finding that its planned expansion was exempt from CON requirements because its projected costs did not exceed the CON project cost threshold (at that time, $1,400,000). AR 000075.

9 AR 000051-52. The terms of the agreement were also conditioned on NSR applying for a CON within 60 days of reaching the agreement. *Id.*

10 Affidavit of Dr. J. Zuckerman, attached to Motion for Summary Judgment, at para. 5.

11 AR 000080-000185.

12 *See* AR 000083-85.

of October 2013). The focus of NSR's filings was on its arguments that the facility meets a need for MRI and CT services in the Fairbanks area.

FUL submitted testimony in opposition to NSR's application, both in writing and orally during a public hearing on the application held in Fairbanks in mid-December 2013.[13] Approximately 520 written statements were submitted in support of NSR's application, many of them by clients and employees of NSR, and most of them on form letters created by NSR and distributed to its clients in anticipation of the hearing.[14] The public hearing was held on December 17, 2013 and was conducted by Jared Kosin, executive director of the Department's Office of Rate Review, on behalf of the Commissioner.[15]

The Commissioner approved NSR's CON on March 13, 2014.[16] In the approval letter, the Commissioner commented that he was "troubled" by NSR's contention that it was exempt from CON requirements as an office of private physicians, and he confirmed that the Department considered NSR to be a health care facility "that is fully subject to CON review."[17] Notwithstanding that concern, the CON was approved. The Commissioner's letter cited a section of the CON regulations allowing him to consider, among other things, "special or extraordinary circumstances related to . . . community access to health care,"[18] and stated that he was "concerned that denying this CON would cause a reduction in the availability, quality and accessibility of services to consumers in the Fairbanks area."[19] The Commissioner also cited the strong support for NSR's application from attendees at the public hearing and in written comments provided to the Department.

FUL then filed its accusation initiating this matter on April 11, 2014. The matter was referred to OAH by the Commissioner in May 2014.

III. Procedural Background

FUL's accusation in this matter is couched entirely as an appeal of the Commissioner's March 13, 2014 decision, arguing that the Commissioner contravened CON statutes and regulations in granting the CON, and setting out over 30 specific allegations of

---

13 *See* AR 000078-79, 000548-000589, 000733-738.
14 AR 000186-547, 000610-611, 000615.
15 AR 000659-778 (the hearing was recorded and transcribed, and the transcript is part of the record of this matter).
16 AR 000779-000801.
17 AR 000779.
18 7 AAC 07.070(b)(7)(A).
19 AR 000779.

error by the Commissioner.[20] The accusation is labeled in its heading, however, as an "accusation seeking revocation of certificate of need . . ." and further that it is filed pursuant to AS 18.07.080. This statutory reference appears to be a typographical error, as the cited statute was repealed in 1976 – FUL likely intended the reference to be to AS 18.07.081, which provides authorization for "proceedings for modification, suspension and revocation" of CONs.[21]

Relatively early in the proceeding, in July 2014, NSR filed a motion to dismiss the accusation, arguing that FUL lacked standing to file and prosecute the accusation. FUL opposed the motion to dismiss and requested oral argument. The parties' briefing and arguments focused entirely on whether FUL was "a member of the public who is substantially affected by activities authorized by a certificate of need" and therefore had standing to pursue an appeal of the grant of NSR's CON, pursuant to 7 AAC 07.082 and 7 AAC 07.900(27). Neither party cited the *Alaska Spine* decision in its briefing or oral argument on the motion to dismiss.[22] Nor did the parties discuss at that time whether this proceeding was properly characterized as an appeal of the Commissioner's grant of NSR's CON, or as an action seeking revocation of the CON. After oral argument on September 23, 2014, the ALJ denied the motion to dismiss, finding in an order dated October 7, 2014 that FUL met the definition of "member of the public who is substantially affected" and therefore had standing to file and pursue its accusation in this matter.

FUL filed its motion for summary adjudication in September 2014. After the parties engaged in extensive, unrelated motion practice regarding FUL's attempt to disqualify NSR's expert witness and legal representatives,[23] NSR filed an opposition and cross-motion for summary adjudication in March 2015. Both parties were granted leave to file reply briefs, which were filed by late May 2015. On September 2, 2015, the ALJ issued an order requesting that the parties submit supplemental briefs regarding the Alaska Supreme Court's decision in *Alaska Spine*.[24] The parties were asked to respond to the following questions:

---

[20] FUL's 4/11/14 Accusation, at pp. 2-13.

[21] The accusation's heading states that it seeks "revocation of certificate of need granted to . . . North Star Radiology," and FUL has clarified in subsequent filings that its intent was to file the accusation under the authority of AS 18.07.081. *See, e.g.,* FUL's 8/13/14 Opposition to Motion to Dismiss, at 2-3.

[22] The parties later briefly discussed the *Alaska Spine* decision in their summary adjudication filings. *See* NSR's 3/2/15 Memorandum in Support of Summary Adjudication at 38-41; FUL's 5/15/15 Reply at 48-49.

[23] FUL's motion to "strike NSR's amended witness list [and] disqualify Birch Horton Bittner & Cherot" was denied by order dated December 18, 2014.

[24] 266 P.3d 1043 (Alaska 2011).

1. In light of the *Alaska Spine* decision, is an appeal of the Commissioner's grant of a CON to NSR moot? If not, please identify any factual bases that exist in this case to support a finding that the Commissioner's decision to grant a CON to NSR is not moot.
2. What factual bases exist in this case to provide grounds for revocation of NSR's CON under the specific requirements of AS 18.07.081(d)?

The parties provided supplemental briefs in response to that order in late September, 2015.

Subsequently, NSR filed a motion to strike certain portions of FUL's September 2015 supplemental brief, arguing that most of the factual allegations discussed in the brief were not raised in FUL's original accusation in this matter. FUL opposed the motion in mid-October 2015. The motion to strike has been denied in a separate order issued contemporaneously with this order.

IV. Discussion

A. *Alaska Spine and the CON Regulations*

As a threshold matter, the impact of the *Alaska Spine* decision on FUL's accusation must be determined. As noted above, FUL filed its accusation in this case as a "member of the public who is substantially affected by activities authorized by the CON,"[25] mirroring the language of AS 18.07.081(a), which states that such a person "may initiate a hearing . . . to obtain modification, suspension, or revocation of an existing [CON]." However, although FUL's accusation was submitted under the authority of AS 18.07.081, its allegations are almost exclusively couched as challenges in the nature of an appeal of the Commissioner's issuance of NSR's CON.

Responding to the first question posed in the September 2, 2015 order for supplemental briefing, FUL argued primarily that *Alaska Spine* is inapplicable here because its facts differ so strongly from the facts of this case. In *Alaska Spine*, South Anchorage Ambulatory Surgery Center ("South Anchorage") had applied for and received a CON to construct a health care facility; Alaska Spine Institute Surgery Center ("ASISC"), a potential competitor, requested an administrative hearing to contest the issuance of the CON, but its request was denied.[26] ASISC appealed the denial to the superior court, which dismissed the appeal. ASISC then appealed to the Alaska Supreme Court, arguing that it had been wrongfully denied a hearing to contest the CON; while the litigation was pending, however, South Anchorage had completed construction and had begun operating the facility

[25] FUL 4/11/14 Accusation, at para. 1.
[26] *Id.* at 1044.

in question.[27] In light of that fact, the Supreme Court held that ASISC's appeal was moot, stating that "[a]s the building is already complete, revisiting the decision to issue the CON that authorized construction would serve no purpose."[28] The Court also held that the public interest exception to the mootness doctrine did not apply, thus the Court did not reach the merits of ASISC's appeal.[29]

FUL asserts that this case is easily distinguished from *Alaska Spine* because here, NSR built its health care facility and operated it for two years without even applying for a CON.[30] FUL argues that it "had no opportunity before construction to object to NSR's CON," whereas Alaska Spine had an opportunity to participate in South Anchorage's CON application process prior to construction and prior to filing its challenge to the CON.[31] FUL contends that, given these important factual distinctions, the holding of *Alaska Spine* "should be limited to its facts," and that to apply it to this case would be unfair and would result in the Department "ignoring its duty to enforce [the CON laws]."[32]

As a general proposition, FUL does make a valid point – the CON statutory and regulatory scheme clearly contemplates that developers of health care facilities will ask for permission before construction, rather than asking for approval and forgiveness after they build and initiate operations of a facility. Viewed in this manner, it would seem inappropriate to find the dispute regarding the issuance of NSR's CON to be moot under *Alaska Spine*. This perspective on *Alaska Spine*, however, misses a key element of the decision. The Court, in reaching its holding, noted that AS 18.07.081 "provides an alternative procedure" under which ASISC could seek revocation of the CON in question.[33] At the time that South Anchorage had applied for its CON, 7 AAC 07.080 granted to a person "substantially affected by activities authorized by a [CON], who is dissatisfied with a decision of the department . . . to grant . . . a [CON]" the right to a hearing on the CON issuance decision.[34] 7 AAC 07.080 was amended in 2010, however, in a manner that limited the right to a hearing

---

27 *Id.*

28 *Id.*

29 *Id.* at 1044-1045 (holding that "completion of construction has rendered the decision to issue the CON unchallengeable").

30 *See, e.g.*, FUL's 9/23/15 Supplemental Brief, at 1-2.

31 *Id.* at 2.

32 *Id.* at 4.

33 *Id.* at 1044.

34 Former 7 AAC 07.080 (2005).

only to "an applicant for a [CON] whose application was denied" by the Department.[35] The *Alaska Spine* decision noted this amendment in the context of discussing why the procedural posture of that particular case was unlikely to be repeated in the future, because a non-applicant (such as FUL) "would be unable to raise a challenge under the new regulation."[36] Thus, the decision to issue the CON was unchallengeable both under the mootness doctrine, and under the amended version of the regulation – the version that is in force today.[37]

FUL also contends that if the Commissioner's issuance of the CON to NSR is deemed to be moot, [38] the end result will be that other health care providers will be encouraged to do what NSR did here, i.e., build their facilities without a CON and then to apply for one only "if they are caught."[39] FUL argues that such a result would mean that "review will be non-existent" if in the future a CON is awarded after the fact of construction and operations; FUL in effect argues that similarly situated challengers will be left without an adequate remedy.

FUL's arguments, however, fail to take into account AS 18.07.091, which provides that injunctive relief may be obtained against violations of the CON laws and regulations "at the instance of . . . any member of the public substantially and adversely affected by the violation."[40] "[A]ny violation of Alaska's CON statutes or associated regulations" may be challenged under this statute, "not just violations of an existing CON."[41]

Under the CON statutory and regulatory scheme, there is no avenue available to an interested third-party, such as FUL, to <u>appeal</u> the Commissioner's issuance of a CON, regardless of whether the CON was issued before or after construction of the facility in question. Prior to issuance of the CON, FUL could have sought injunctive relief under AS 18.07.091. Now

---

35 7 AAC 07.080 (2010).

36 *Alaska Spine*, 266 P.3d at 1045.

37 FUL also argues, with some persuasiveness, that NSR gained a "market advantage" by building and operating its facility <u>before</u> applying for a CON, such that it was able to tap into an already-established constituency of patients, health-care providers, and employees to support its CON application. As attractive as this argument is, it cannot save FUL from the simple fact that the CON statutory and regulatory scheme does not allow it to appeal the decision to issue the CON to NSR.

38 FUL suggests that "the ALJ may be sympathetic to NSR," and urges that any such sympathy should not play a role in determining whether mootness bars its ability to appeal the CON issuance decision. FUL's 9/23/15 Supplemental Brief, at 12. The ALJ has no particular sympathy for NSR.

39 FUL's 9/23/15 Supplemental Brief, at 5-6.

40 AS 18.07.091(a). *See Mat-Su Valley Medical Center, Inc. v. Advanced Pain Centers of Alaska, Inc.*, 218 P.3d 698 (Alaska 2009) (applying AS 18.07.091, finding that competitor had standing to pursue injunction against already-operating health care facility, and describing injunctive relief as "the legislature's chosen enforcement mechanism").

41 *Mat-Su Valley*, 218 P.3d at 702.

that the CON has been issued, the only avenue available for FUL to challenge NSR's CON is through an action for revocation of the CON, under AS 18.07.081.[42]

B. *FUL's Arguments for Revocation of NSR's CON*

As noted above, FUL set forth in excess of 30 allegations of error by the Commissioner in granting NSR's CON. Because FUL cannot appeal the Commissioner's decision, however, its accusation will be interpreted as seeking revocation under AS 18.07.081.[43] The grounds on which FUL can achieve revocation of the CON are limited by the terms of AS 18.07.081(d), which provides:

> A certificate of need may be revoked if
>
> (1) the sponsor has not shown continuing progress toward commencement of the activities authorized under AS 18.07.041 or 18.07.043 after six months of issuance;
>
> (2) the applicant fails, without good cause, to complete activities authorized by the certificate;
>
> (3) the sponsor fails to comply with the provisions of this chapter or regulations adopted under this chapter;
>
> (4) the sponsor knowingly misrepresents a material fact in obtaining the certificate;
>
> (5) the facts charged in an accusation filed under (c) of this section are established; or
>
> (6) the sponsor fails to provide services authorized by the terms of the certificate.[44]

In response to the second question posed in the September 2, 2015 order for supplemental briefing, FUL argues that grounds for revocation exist under categories (3) and (4) above.[45]

---

[42] It is worth noting that the record reflects that, early in the history of this dispute, the Commissioner cautioned FUL on these very issues. In response to a letter written by FUL's counsel, seeking a hearing on the Department's agreement to allow NSR to continue operating while its CON application was in process, the Commissioner wrote back on September 26, 2013, noting that no CON had been issued yet, and stating that "[u]nder current regulations, even if an application for a CON had been approved, your client would not have an appeal right to seek administrative review of that approval." AR 000062-63.

[43] The order denying FUL's motion to strike, issued contemporaneously with this Decision and Order, includes a finding that "FUL's accusation and all of its subsequent filings in this case have more than adequately put NSR on notice that the issues discussed in FUL's supplemental brief form the basis for FUL's contention that the Department should revoke NSR's [CON]."

[44] AS 18.07.081(d).

[45] FUL also briefly argues that NSR's CON should be revoked under AS 18.07.081(c), which provides that a CON "shall be suspended if an accusation is filed before the commencement of activities authorized" by the CON, and under AS 18.07.081(d)(5), which allows revocation if "the facts charged in an accusation filed under (c) are established." FUL argues that since NSR "did not receive its CON until after the facility was constructed," FUL was prevented from filing an accusation before commencement of operations, and therefore it "should be able to avail itself" of AS 18.07.081(d)(5). This reasoning, however, is still predicated on FUL's argument that NSR

1. Failure to Comply with CON Laws and Regulations

Regarding category (3) of AS 18.07.081(d), FUL argues that NSR has "fail[ed] to comply with the provisions" of the CON statutes and regulations in two ways. FUL argues that FUL is in continuing violation of CON laws as it "is still illegally operating," because it operates under the name "North Star Radiology," even though its business license is in the name of "North Star Radiology, Fairbanks."[46] It is unclear whether this discrepancy even qualifies as a violation of CON statutes or regulations.[47] Whether it does or not, however, the discrepancy amounts to, at worst, a *de minimis* legal violation that simply does not rise to the level of providing grounds for revocation of NSR's CON.

More significantly, the primary violation of law cited by FUL is, of course, NSR's failure to apply for a CON prior to constructing and then operating its facility for approximately two years in Fairbanks. It is clear that, assuming NSR does not qualify as an "office of private physicians," its failure to apply for a CON was indeed a violation of the CON statutes and regulations. NSR continues to argue in its summary adjudication filings that it should be found to meet the definition of "office of private physicians" as a matter of law. Because it is not necessary to decide that question, however, this decision assumes, without deciding, that the Department was correct in finding that NSR does not meet that definition, and therefore that NSR's failure to apply for a CON was a violation of the CON laws. One could view that presumed violation as one that went against the grain of the CON regulatory scheme and allowed NSR to gain the "market advantage" discussed above.

Assuming that to be the case, does the violation mandate the conclusion that NSR's CON should be revoked? FUL essentially presents policy arguments in favor of revocation, contending that if the CON is not revoked, the result would be to encourage others to violate the CON laws and undermine the entire system of health care facility regulation in Alaska. To accept FUL's argument for revocation, however, one must accept the ultimate proposition that

---

"failed to provide accurate information during its CON application process;" thus FUL appears to be attempting to bootstrap a new CON review of NSR's facility, which it is foreclosed from doing under the analysis in this Decision of *Alaska Spine* and 7 AAC 07.080.

[46] FUL's 9/23/15 Supplemental Brief, at 7. The ALJ takes official notice that the business name "North Star Radiology" is registered to an entity called Sahn Investments 1, LLC, that a business license in the name "North Star Radiology" is held by Sahn Investments 1, LLC, and that Sahn Investments 1, LLC is 100% owned by Jeffrey Zuckerman, who is presumably the same person as the Dr. Jeffrey Zuckerman who is a principal of FUL.

[47] FUL cites 7 AAC 07.001 as the CON regulation NSR violates by not having a business license under the name "North Star Radiology," but it is not clear that this regulation actually governs NSR's operations; the regulation lists a valid business license as one of four requirements for a facility to qualify as an office of private physicians.

once an entity has violated the CON laws in this manner, that entity can never thereafter qualify for a CON; or stated differently, that the law violation disqualifies the applicant from ever receiving a CON. Any CON granted by the Department under similar circumstances, i.e., after the fact of construction, would be worthless, since it would be subject to revocation at any time, based on events or arguments that arose prior to the application and issuance process. FUL cites no authority for this proposition, nor for the narrower proposition that in this particular situation, NSR's violation of the CON laws requires that its CON be revoked.

NSR argues in its summary adjudication filings[48] that, assuming *arguendo* that it operated in violation of the CON statutes and regulations prior to applying for its CON, that fact does not mandate revocation. NSR points out that the operative statute, AS 18.07.081(d), states only that a CON "**may** be revoked" if the holder of the CON fails to comply with the pertinent laws.[49] NSR further argues that to revoke its CON now, "for conduct which occurred *prior* to the remedying superseding CON application that brought it into compliance is illogical."[50]

NSR's argument makes sense. The logical time to raise an objection that an after-the-fact CON should not be granted is in a challenge during the consideration of that CON (or in a parallel injunctive proceeding). Approaching it in the manner undertaken by FUL – objecting to issuance of the CON on certain grounds, then raising those same objections as grounds for revocation - injects uncertainty into the system that may never get resolved despite the passage of time. This is a reason to interpret 18.07.081(d)(3) to be a reference to failing to comply with the CON laws after the CON was issued, not failing to comply procedurally during the issuance process.

In 2013, the Department learned that NSR's operation of its facility was potentially in violation of the law, and it insisted that NSR subject itself to the CON application and review process. At the conclusion of that process, the Department determined that it was appropriate to grant a CON to NSR, albeit after the fact of NSR's construction of its facility. Ultimately, in granting NSR's CON, the Department as the agency administering this complex statutory scheme has construed it to permit the granting of after-the-fact CONs in appropriate

---

48 *See* NSR's 3/2/15 Memorandum in Support of Summary Adjudication at 37-38.
49 AS 18.07.081(d)(3) (emphasis added).
50 NSR's 3/2/15 Memorandum in Support of Summary Adjudication at 38.

circumstances. That seems to be a reasonable interpretation of a statute that neither expressly allows nor prohibits this practice.

During the review process, the Department had before it all the pertinent facts concerning NSR's presumably illegal operation in violation of the CON statutes and regulations, and knowing of those facts, it granted the CON. It is illogical to now argue that those same facts require that the CON be revoked. A more logical view is that NSR cured the illegality of its facility by obtaining the CON. As already mentioned, FUL presents no persuasive authority mandating a contrary conclusion. In the absence of any such authority, this decision finds that NSR's violation of the law by constructing and operating its facility without a CON does not require revocation of the CON.

2. Knowing Misrepresentation of a Material Fact In Obtaining the CON

Regarding category (4) of AS 18.07.081(d),[51] FUL asserts that NSR misrepresented a variety of facts in connection with its CON application. First, FUL argues that NSR misrepresented "that it had a valid business license under the name 'North Star Radiology.'"[52] This issue has already been addressed above in the context of discussing whether NSR has violated CON statutes and regulations. This is at worst a *de minimis* discrepancy and certainly does not rise to the level of a "material" misrepresentation made in obtaining the CON, if it is a misrepresentation at all.

FUL also asserts that NSR misrepresented the "total cost of the project and other financial information on its CON application."[53] FUL cites an alleged underestimate of $22,000 in clinic rent by NSR, as well as a failure to include architectural costs in its project costs disclosures in the CON application. FUL, however, does not explain how these discrepancies are "material" to the CON application, given that it was undisputed that NSR's facility exceeded the applicable cost threshold, which at the time was set at $1,450,000. Under these circumstances, this type of discrepancy simply does not amount to a material misrepresentation.

FUL next argues that NSR "knowingly misrepresented need statistics in its CON application," by omitting need information for MRIs.[54] This argument requires some

---

51 It should be noted that the term "knowing misrepresentation of a material fact" incorporates the key elements of fraud. *See* Black's Law Dictionary 731 (Deluxe Ninth Ed., 2009).

52 FUL's 9/23/15 Supplemental Brief, at 8.

53 *Id.*

54 *Id.* at 8-9.

explanation here. The Commissioner, in reaching the decision to grant NSR's CON, agreed with NSR's assertion that its replacement of its MRI machine amounted to a "routine replacement." The Department then determined that it did not need to analyze the MRI component of NSR's project, because under the CON statutes, "expenditure" for purposes of CON applications and analysis does not include "routine replacements" of equipment.[55] An applicant is not required to present need information in connection with routine replacements of MRIs and similar equipment.

Regarding routine replacement, the Department's regulations state:

"routine replacement of equipment"

> (A) means the regular, customary, ordinary, or usual replacement of worn out, broken, or obsolete equipment;
>
> (B) does not include replacement of medical equipment that increases the technological capacity of the equipment or facility so long as the increase does not result in a change in the scope of services that are being provided[.][56]

When NSR acquired the Fairbanks Community Imaging ("FCI") facility in 2010, the acquisition included an MRI machine that was a "mobile unit in a trailer"[57] that FCI had already been operating since 2008. When NSR moved to its new facility in 2011, it made the determination that dismantling the older machine and moving it would not be cost effective and "would not be able to be placed into the [new] building."[58]

FUL argues that NSR's characterization of the acquisition of the MRI machine as a routine replacement constituted a misrepresentation of a material fact, for purposes of analyzing whether NSR's CON should be revoked.[59] Although the above-quoted definition of "routine replacement" in the Department's regulations is not a model of clarity, there can be no dispute that a replacement of "obsolete" equipment meets the definition. The term "obsolete" can be interpreted to include equipment that no longer meets the needs of its operator or the constraints of the facility wherein it is to be operated. In this case, NSR determined that it was neither feasible nor cost effective to move the mobile MRI machine

---

55 AS 18.07.031(e).
56 7 AAC 07.900(34).
57 AR 000087.
58 *Id.*
59 FUL's only substantive argument on this point is that the useful life of an MRI is five years, according to a publication entitled "Estimated Useful Lives of Depreciable Hospital Assets," and that at the time the mobile unit was replaced it was only about three years old. FUL, however, never provides any authority for the proposition that a depreciation schedule sets the standard for "routine replacement." *See, e.g.*, FUL's 9/23/15 Supplemental Brief, at 9.

to its new facility; thus, the mobile MRI could be considered "obsolete" for NSR's operational purposes. Viewed from this perspective, NSR's characterization of the MRI as a routine replacement[60] was a defensible characterization within the context of a regulatory definition that is open to interpretation. As such, it was not a "material misrepresentation." Therefore, FUL's arguments flowing from the routine replacement issue do not provide grounds for the revocation of NSR's CON.

FUL next argues that NSR misrepresented "that it was a continuation of [FCI]," whereas NSR actually just acquired certain assets of FCI.[61] NSR's CON application, however, explicitly states that it "entered into an agreement to acquire certain assets and liabilities" of FCI.[62] FUL's allegation here does not set forth a material misrepresentation by NSR.

FUL asserts that NSR misrepresented its project as a lease of an operational facility, rather than of a new facility under construction.[63] This allegation relates to the issue discussed above regarding routine replacement of NSR's MRI machine. FUL argues that NSR was not an existing health care facility, because it only acquired assets of FCI, including the lease at the new facility that was already under construction; therefore, FUL argues, NSR should not have been allowed to take advantage of the "routine replacement" exclusion under AS 18.07.031(e). As already discussed above, however, the routine replacement issue involved terminology and requirements that are subject to interpretation. In addition, the underlying facts regarding NSR's acquisition of FCI's assets and liabilities were disclosed by NSR to the Department, and FUL does not allege that NSR "lied" about any of those facts or withheld any critical information relevant to this issue, in connection with obtaining its CON. Therefore, FUL's allegations regarding NSR's characterization of its project as an operational facility do not set forth a material misrepresentation by NSR.

None of FUL's allegations of misrepresentation by NSR rise to a level of a "knowing misrepresentation of a material fact" that could lead to a revocation of NSR's CON. All of FUL's allegations involve issues that are open to interpretation, where NSR's representations were defensible. None of them involve anything remotely resembling a

---

60 *See* AR 000783-784.
61 FUL's 9/23/15 Supplemental Brief, at 9-10.
62 AR 00086.
63 FUL's 9/23/15 Supplemental Brief, at 10

fraud perpetrated on the Department by NSR in the process of obtaining its CON. FUL, therefore, has not set forth grounds requiring revocation of NSR's CON.

V. Conclusion

FUL cannot appeal the Department's decision to grant NSR's CON, and it has failed to raise a genuine issue as to any material fact to provide grounds for revocation of NSR's CON. Accordingly, FUL's motion for summary adjudication is denied, and NSR's motion for summary adjudication is granted. FUL's accusation in this matter is hereby dismissed.

Dated this 26th day of January, 2016.

Signed
Andrew M. Lebo
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 10th day of March, 2016.

By: *Signed*
Name: Deborah L. Erickson
Title: Project Coordinator
Agency: Office of the Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication.]