NCSL
NATIONAL CONFERENCE OF STATE LEGISLATURES

To: Special Committee Certificate of Need Task Force
Kentucky Legislature

From: Kevin Davenport
Policy Associate, Health Department
National Conference of State Legislatures

Re: Certificate of Need - Technical Assistance Follow-up

Robin Vos
Speaker
Wisconsin State Assembly
President, NCSL

Anne Sappenfield
Director
Wisconsin Legislative Council
Staff Chair, NCSL

Tim Storey
Chief Executive Officer
NCSL

Dear Special Committee Certificate of Need Task Force Members:

Thank you for reaching out to NCSL for technical assistance on certificate of need (CON) on June 19. During the presentation, we noted a few questions that required follow-up information. We noted questions regarding:

1) Geofencing in relation to CON and if states use geofencing during the CON review and approval process.
2) Total number of CON-regulated facilities and services in each state.
3) State CON legislation in response to the COVID-19 pandemic.
4) CON and access to health care in rural areas.

Below you will find a section addressing each of these questions. Do not hesitate to reach out if you have additional questions.

NCSL takes no position on state legislation or laws mentioned in linked material, nor does NCSL endorse any third-party publications; resources are cited for informational purposes only.

Geofencing and Certificate of Need

Geofencing is the use of global positioning systems or radio frequency identification to create a virtual boundary. Similarly, geographic information systems (GIS) is a computer system that analyzes and displays geographically referenced information.

We were unable to find any information regarding the usage of geofencing or GIS within the CON review and approval process. However, state CON oversight entities may consider the services area - the current and projected primary and secondary service areas to which the facility is, or will be, providing services, in the CON review and approval process. CON review typically includes a number of other criteria too. This may include the effects of a proposed project on health care costs, whether a facility has the staff capacity or financing for a proposed activity or the effects of a proposed project on specific populations. These criteria, in addition to service area, may be considered during CON review to determine whether the

proposed project should be approved.

CON programs apply various criteria or definitions to determine service areas. Below we have included state examples highlighting state definitions for service areas as well as relevant information regarding how service areas may factor into CON review:

- Alabama - defines their CON health service area as "a geographical area designated by the Governor, as being appropriate for effective planning and development of health services. Such geographical areas may vary according to the types of individual health services. In the absence of a designated geographical area for a particular service, the county in which the service is to be provided shall be deemed to be the health service area."
    - Part of Alabama's additional criteria for determining need of a new facility includes current and project utilization in the area. The current and projected utilization of like facilities or services within the proposed service area will be considered in determining the need for additional facilities or services. Unless clearly shown otherwise, data available from the SHPDA Division of Data Management shall be considered to be the most reliable data available.
    - Further, as part of the certificate of need application process in Alabama. The application includes the applicant providing their proposed medical service area by county (or counties) or city, if appropriate, for the facility of project.

- Georgia – defines target service area population for short-stay general hospital beds as "the total populations of all counties, which are in part of in whole, within a ten (10) mile radius of the planned location of a new, expanded or placement hospital."
    - As part of Georgia's specific review considerations for short-stay general hospital beds, Georgia uses a demand-based forecasting model to determine the numerical need for a new hospital. Some of the steps in the forecasting model include:
        - Calculate the use rate for current hospital services in the target service area population by dividing the patients' days for each age cohort by the population for each age cohort for same year as patient days were calculated.
        - Project the horizon year use rate for hospital services in the target service area population by multiplying the use rate for current hospital services by age cohort by the horizon year population.

- Ohio - defines service area as the "current and projected primary and secondary service areas to which the long-term care facility is, or will be, providing long-term care services."
    - Primary service area means "the geographic region, usually comprised of the Ohio zip code in which the long-term care facility is located and contiguous zip codes, from which approximately seventy-five to eighty per cent of the facility's residents currently

originate or are expected to originate."

- Secondary service area means "the geographic region, usually comprised of Ohio zip codes not included in the primary service area, excluding isolated exceptions, from which the facility's remaining residents currently originate or are expected to originate."
- Included in the general certificate of need review criteria are considerations relating to service areas. These include the applicant's current and proposed primary and secondary service areas with their corresponding populations as well as the travel times and accessibility of the project site and similar sites with their proposed service area population.

Number of Regulated Facilities and Activities by State

To best determine the total number of regulated facilities and activities per, we recommend using our Certificate of Need page. This page includes a link to each state's statute, outlining which facilities and activity require CON approval. To note, determining the average number of regulated facilities and activities may result in slight variation across sources. This is because of the variance in state statutes, e.g., how they define "facility" or "activity" and if they list all facilities and activities to which CON applies. For instance, Nevada's certificate of need statute defines health facilities (with one exception) as, "a facility in or through which health services are provided."

Certificate of Need State Action and COVID-19

The pandemic brought a wave of uncertainty regarding health care facility needs. During the pandemic, at least 23 states temporarily waived, expedited or modified their CON approval processes. A few examples are:

- Connecticut's governor signed an executive order authorizing the Office of Health Strategy to waive certificates of need and other requirements to ensure "adequate availability of health care resources and facilities."
- Massachusetts previously maintained a moratorium on increasing the number of long-term care beds, stating the Department will not accept Determination of Need applications for new long-term care beds at this time. In 2021, Massachusetts' Department of Public Health released a memorandum stating effective immediately, the department would be accepting determination of need applications for expanding long-term care beds under certain circumstances in response to COVID-19.
- Ohio enacted a bill that provided temporary changes regarding CON enforcement due to COVID-19 for any CON approved between March 9, 2020, to June 18, 2021. One of these temporary changes included a 24-month extension for CON holders to fulfill capital expenditure obligations.
- Tennessee's governor signed an executive order temporarily suspending certificate of need requirements for the number of licensed hospital beds and by allowing the establishment of

hospital and diagnostic services at any location, if necessary to treat COVID-19 patients.

CON and Access to Health Care in Rural Areas

Access to health care in rural areas has long been a concern among policymakers. Rural Americans face unique challenges to accessing necessary health care services compared to their urban counterparts. More than three-quarters of the nation's rural counties are designated as health professional shortage areas (HPSAs)—geographic areas, populations or facilities with insufficient access to health care providers and professionals in primary care, dental care or mental health.

Recognizing the unique challenges for rural health care delivery, some states have created certain exemptions or flexibility for rural health providers. Maine and Oregon exempted rural hospitals from their CON laws, and Georgia waived the requirement that rural hospitals pay a fee when applying for CON approval. Washington enacted legislation in 2020 removing rural health clinics from the list of facilities under CON purview. Further, Tennessee enacted legislation in 2021 which waived the certificate of need requirements for the re-opening of a closed rural hospital.

Additionally, to further study the effects of CON on rural health care access both Georgia and South Carolina are created studies to examine both the effects of CON on rural health care access and the effect of CON repeal on rural health care access, respectively.

If you have any further questions regarding certificate of need, please do not hesitate to reach out.