NHS Resolution

GUIDANCE NOTE

Hearing Appeals Together
Schedule 3 of the National Health Service
(Pharmaceutical and Local Pharmaceutical Services) Regulations 2013

1. Schedule 3 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (the "Regulations") sets out how appeals of decisions made by NHS England under the Regulations are to be conducted.

2. Paragraph 7 of Schedule 3 of the Regulations gives the Secretary of State (and therefore NHS Resolution, being the body that is directed to exercise the Secretary of States functions in relation to appeals) flexibility with regard to the manner of determining appeals.

3. In particular, paragraph 7(3) provides that, where appropriate and if NHS Resolution thinks it fit to do so, two or more appeals may be heard together and in relation to each other. Where this power is exercised, NHS Resolution must give notice of the intention to do so to NHS England, the appellants, and any other person(s) to be notified of the appeals.

4. This mirrors paragraph 22 of Schedule 2 of the Regulations, which provides that NHS England may, where appropriate and if it is thought fit to do so, consider two or more applications under the Regulations together and in relation to one another.

5. Apart from these general powers, the Regulations do not specify what factors should be taken into consideration when deciding whether or not it is "appropriate" or "fit" to hear applications or appeals together.

6. The majority of appeals received by NHS Resolution are submitted by a single organisation appealing NHS England's decision on a single matter. Such appeals might relate to:

   6.1 NHS England's decision to issue a breach or remedial notice;

   6.2 NHS England's decision to recover payments made where they were not due; or

   6.3 NHS England's decision on an application for inclusion on a pharmaceutical list.

7. Where NHS England has, pursuant to paragraph 22 of Schedule 2 of the Regulations, considered two or more applications together and in relation to each other, NHS Resolution may receive:

   7.1 an appeal from a single interested party that relates to more than one of the applications considered by NHS England; or

   7.2 multiple appeals from different interested parties each relating to more than one of the applications considered by NHS England.

8. This guidance note outlines certain issues that have previously arisen in relation to the types of appeals set out in paragraphs 7.1 and 7.2 above and other appeals

heard together.

9. This guidance note reflects NHS Resolution's approach as at 25 November 2019.

10. Appeals of applications are determined by committees established by NHS Resolution. References in this guidance note to "the Committee" is a reference to the committee established by NHS Resolution that determined the relevant appeal(s).

Overview of regulations relating to multiple applications

11. The possibility of there being more than one application for inclusion in a pharmaceutical list relating to the same area and on the same grounds is expressly provided for in Regulations 13 to 21 (inclusive) of the Regulations.

12. The above provisions include a requirement that, in determining the relevant application, NHS England must have regard to whether it is satisfied that:

    12.1 it would be desirable to consider applications from other persons offering to meet the relevant need or to secure the relevant improvements or better access (as the case may be). If so, NHS England may:

        12.1.1 defer determination of the application for up to 6 months;

        12.1.2 invite applications from other applicants to meet the relevant need or to secure the relevant improvements or better access; and

        12.1.3 consider, at the same time as the applicant's application, any other application it receives;

    12.2 another application offering to meet the relevant need or to secure the improvements or better access (as the case may be) has been submitted to it, and it would be desirable to consider both applications at the same time. If so, it may defer consideration of the application until it can be considered at the same time as the other application; and

    12.3 an appeal relating to another application offering to meet the relevant need or to secure the relevant improvements or better access (as the case may be) is pending, and it would be desirable to await the outcome of that appeal before considering the application. If so, it may defer consideration of the application until after the appeal has reached its conclusion.

13. Paragraphs 11.1 and 11.2 above clearly indicate that NHS England may decide it desirable to consider competing applications at the same time. A common outcome of NHS England considering competing applications together is the grant of one application and the refusal of the other(s). This is not the only outcome and NHS England may grant all, grant some and refuse others or refuse all.

14. Appeals of decisions of NHS England considering applications together can therefore be complex.

Circulating multiple appeals

15. NHS Resolution will usually consider multiple appeals relating to two or more competing applications together provided that it receives the appeals before the first appeal is determined. In SHA/19968, SHA/21021 and SHA/21058 (12 September 2019), NHS Resolution considered three appeals together and in relation to each

other. The receipt of the appeals was staggered across a number of months but each subsequent appeal was received prior to NHS Resolution determining the previous appeal(s).

16. In that case, subsequent appeals were received after NHS Resolution circulated the previous appeals. NHS Resolution recirculated the previous appeals each time it received a subsequent related appeal to enable all parties to all the appeals to be provided with all relevant information received by NHS Resolution.

Judicial guidance

17. There is judicial guidance that makes reference to hearing appeals together. In R. (on the application of Rushport Advisory LLP) v NHS Litigation Authority[1] (the "Rushport Case"), the High Court considered a decision which involved two competing applications under regulation 18. The case involved the submission of a second application in an area where a previous application had already been granted, but before the pharmacy had opened. Although the Rushport Case focuses on successive applications, it contains references to hearing appeals together and outlines principles that impact on hearing appeals together.

18. The judgment in the Rushport Case stated:

> *"…the decision maker must look at the relevant evidence that is available, assess it and take it into account when reaching a decision. Any other process would be artificial and against the public interest in getting the service provision right. The case management provisions allowing applications to be deferred, consolidated, and so forth, also support this conclusion. They are plainly there to enable the relative merits of applications to be weighed against each other.*
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> *Successive applications determined sequentially in respect of the same services can be awkward, and are best avoided if they can be; but they are not impossible under the statutory scheme; and NHS England has to exercise case management judgment without full knowledge of what applications may or may not be made in the future, or how long in the future they will be made and, once made, will be ready for determination.*
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> *Next, however, in a case where there are two competing applications and one has already been granted, as in this case, it may well be perverse and irrational to grant the second one unless there are good reasons for forming the view that the service provision required under the first grant is considered undeliverable. Such reasons could include, for example, the insolvency of the first grantee, or a public statement that it has lost interest in the pharmaceutical business.*
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> *It is for the decision maker considering the second grant application to consider and weigh any evidence of that kind, casting doubt on the first grantee's ability to deliver on its undertakings. Contrary to [submissions made in the case], it is not impossible for the second grantee's application to meet the public benefit test in regulation 18(2)(b) by reason only of the first grant; but the decision maker must be very careful not to decide that it is met in a case where there is a real possibility of services under both grants coming on*

[1] [2016] EWHC 907 (Admin)

stream, leading to over-provision at the expense of the public purse (since providers are entitled to charge the NHS for the services).”[2]

19. There are several points that can be taken from this.

20. The Rushport Case makes it clear that all of the relevant evidence that is available must be considered, assessed and taken into account when considering an application.

21. The fact that there are multiple applications will be a relevant consideration that should be taken into account. This is supported by the provisions of the Regulations that allow the relative merits of applications to be weighed against one another.

22. The Rushport Case also makes it clear that care should be taken when granting more than one application where doing so would result in an over-provision of services in the relevant area given that such services are being paid from public funds.

23. While it is accepted in principle that it is permissible to grant a second application where there is already an extant grant of an application, if granting both applications would result in the over-provision of services in the relevant area, there must be good reason to determine that the service provision required under the first grant is considered undeliverable in order to grant the second application. The examples given in the Rushport Case (the insolvency of the prior grantee or a public statement that they have lost interest in providing the services) will be potentially relevant factors but are not the only ones that may need to be considered.

24. It therefore follows that, if an application has been granted and, before the pharmacy opens, a subsequent application is made under the same provision of the Regulations for the same area is received, the subsequent application should be considered in light of the fact that there is an extant grant in place. It will need to be considered whether the second application will still meet the criteria set out in regulation 18 bearing in mind the extant granted application. It will also need to be considered whether granting the second application would result in the over-provision of services in the relevant area. If this is the case, and both applications cannot be granted, it should be considered whether there are good reasons to consider the service provision to be provided under the first grant will be undeliverable.

25. NHS Resolution considers that the judgment in the Rushport Case supports the approach that, where NHS Resolution receives the types of appeals set out in paragraphs 7.1 and 7.2 of this guidance note, those applications/appeals should be considered together and in relation to each other where possible.

26. In SHA/18448 and SHA/18449 (3 November 2016), NHS Resolution considered an appeal which involved two competing applications which had been considered together by NHS England; one of which had been granted (which was the first application received) and the other had been refused (which was the second application received). The appeal was made against the refusal of the appellant’s application and the grant of the other applicant’s application.

27. The decision in SHA/18448 and SHA/18449 refers to the Rushport Case and states:

[2] See paragraphs 40 to 43 of the judgment

"The Committee noted that in [the Rushport Case], the issue was the potential grant of an application where an extant grant was in place. The Committee, however, considered that the extract above inferred that in a situation where one grant was enough to secure improvements or better access, if it was possible that two grants might come on stream, this should be avoided if it raised the possibility of over-provision at the expense of the public purse. In that regard the Committee noted Kerr J's observation in the Rushport case that "successive applications determined sequentially in respect of the same services are awkward, and are best avoided if they can be..."*. Again the Committee considered that this was support for the view that where two applications to deliver the same benefits, ideally they will be considered together (as here) and granted only to the extent necessary to deliver the benefits identified. Where one application is superior to the other on relevant grounds, that application should be granted, and if the effect of granting that application is to occupy the field so that the less favoured application no longer meets the public benefit test, then the less favoured application should be refused even if considered in isolation it would have satisfied that test. In relation to the current applications, the Committee noted that one Applicant has provided a best estimate address and such that if both were granted, it would be possible that both grants could come on stream. The Committee considered that this could lead to over-provision as the better access would have been met by one, resulting in the other grant being unnecessary."*

28. This acknowledges the judgement in the Rushport Case in relation to avoiding a situation where granting more than one application would result in over-provision of services. It also refers to the Rushport Case to support the view that, where there are competing applications for the same area that deliver the same benefits, the applications should be considered together and weighed against one another. If one application is superior to the other, and the result of granting the superior application is that the other application no longer meets the public benefit test set out in regulation 18, the other application should be refused. This should be the case even if the refused application would have been granted had the other application not been submitted.

Consideration of multiple applications

29. When considering appeals of multiple competing applications, the Committee will often first determine whether each application would be granted had the other application(s) not been submitted. Only if the Committee is satisfied that more than one application would be granted does it then consider the applications in relation to each other.

30. The majority of appeals of multiple competing applications relate to applications made under Regulation 18. Consideration of the test that an application made under Regulation 18 needs to meet to be granted is outside the scope of this guidance note. It is worth noting, however, that there are a large number of appeals heard together where the Committee determined that none of the competing applications would have been granted even if the other application(s) had not been submitted. For example, see SHA/19946 and SHA 19955 (10 January 2019); SHA/19921 and SHA/19928 (12 November 2018); SHA/19876 and SHA/19877 (12 October 2018); SHA/19944 and SHA/19952 (18 October 2018).

Differentiating between multiple applications

31. Based on the applications and the submissions made on the appeal, the Committee was only able to substantially differentiate between the applications in SHA/18473 and SHA/18474 (15 December 2016) based on the number of core opening hours being offered by the competing applicants. Because it was considered impossible to distinguish between the services being offered by each applicant, and due to the lack of certainty around the premises that each applicant would provide the services from, the only way to distinguish between the applications was that one applicant was offering to provide 52 core opening hours whereas the other was offering to provide 40 core opening hours.

32. This demonstrates the fine margins upon which competing applications can be determined as ultimately the need to avoid the over-provision of services means that it may not be possible to grant all of the applications.

33. Although the number of opening hours being offered by applicants will be relevant, this is not the only consideration. As is made clear in the Rushport Case, all of the relevant evidence that is available must be considered, assessed and taken into account when determining the appeal.

34. In SHA/19860 and SHA/19865 (24 August 2018), although there was a difference in opening hours between the two applications, the Committee considered that premises was a significant factor. The determination states:

> "*[The first applicant] had submitted that their application should be preferred as it offered better opening hours whereas [the second applicant] had provided evidence that they had secured premises from which to operate.*
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> *The Committee noted the consideration of the opening hours contained in the NHS England decision letter and agreed that the [first applicant's] application had a slight advantage in this respect but that it was not significant.*
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> *The Committee were impressed by the evidence as to available premises presented by [the second applicant]. Not only had a lease of suitable premises been concluded, but evidence had been given at the hearing explaining the significance of the tenant's break clause and the manager of the Community Complex had confirmed why he preferred this applicant.*
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> *The Committee also concluded from the evidence that no other suitable premises were available from which [the first applicant] could operate and that it was likely that if the [second applicant's] application was rejected, the rooms within the Community Complex would not be available to [the first applicant] for use as a pharmacy.*
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> *The Committee accordingly decided for the reasons given above to prefer the application made by [the second applicant]*."

35. The above extract makes clear that the Committee will not automatically prefer the application that provides the most core hours.

36. Similarly, in the determination in SHA/18516 and SHA/18519 (3 May 2017), one applicant was offering to provide more core opening hours than the other applicant but the Committee determined that the benefit of this was outweighed by a range of other factors including premises. The determination states:

"The opening hours offered by both applicants were similar and both had offered to match the opening hours of the surgery but the Committee noted that the core hours offered by [the second applicant] were 13 hours more that those specified by [the first applicant].

The services to be offered by the applicants were also similar and the Committee noted that both applicants had accepted that the extent of services would depend upon discussions with the surgery as many services were offered there. The Committee also noted that few services were now commissioned by NHS England. [The second applicant] had also indicated that he would supply stoma appliances and catheters unlike [the first applicant] but the Committee were not convinced that there would be a demand for this service.

Taking all the applicants' submissions into account the Committee preferred the application submitted by [the first applicant].

[The first applicant] had provided clear evidence of the ability to open a pharmacy in suitable premises whereas the Committee considered that the negotiations referred to by [the second applicant] were fraught with potential difficulties, involving the purchase and operation of a convenience store and post office.

With regards to opening hours the Committee concluded that the number of core hours offered by [the first applicant] was appropriate to the benefits from having a pharmacy in the village and it was not convinced that the additional core hours offered by [the second applicant] would bring significant additional benefits to the patients served.

In the particular circumstances of this case, the Committee also gave some limited weight in reaching a conclusion to the fact that [the first applicant] was a large company that would be able to subsidise a pharmacy until such time as it was self-supporting, that the company had never closed a pharmacy, that it operated several other village pharmacies including a hybrid pharmacy and that it had been made clear during the hearing that the [surgery] preferred this applicant and were more likely to work with them for the benefit of their patients."

37. This is a good demonstration of the application of the requirement to consider, assess and take into account all of the relevant evidence that is available. It shows a range of factors that may need to be taken into account when weighing applications against one another, including:

    37.1 the availability and suitability of premises being proposed by each applicant;

    37.2 the applicants' respective ability to deliver services;

    37.3 the extent of the services being offered (including opening hours); and

    37.4 potentially any views of other interested persons that may impact the ability to deliver services.

Multiple applications and extant grants

38. In SHA/18450 and SHA/18451 (3 November 2016), four applications were granted

by NHS England in relation to the same area. Two of these applications were made by the same applicant. This applicant appealed against the grant of the other two applications. The Committee had to consider whether the fact that the four applications were granted at the same time should affect whether the two unappealed granted applications should be considered extant grants. The decision states:

> *"The Committee noted that it could be seen as unfair that, where four applications were granted but only two were appealed, the unappealed two applications could be considered extant grants if this then affected the appeal of these appealed applications. The Committee noted, however, that consideration of the appealed applications must necessarily occur after the date the unappealed determinations were granted such that it is a fact that there are two already granted applications when the appealed applications are considered. This would not be the case if all four applications had been appealed.*
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> *The Committee was mindful of the [Rushport Case] which was concerned with an application relating to the same area as a previous granted application. It was clear in the [Rushport Case] that the decision-maker could not ignore the already granted applications when considering the appealed applications – to do so would mean the Committee was closing its eyes to reality (to use a phrase used in the [Rushport Case]). The Committee determined that it was therefore required to consider that the unappealed applications were extant grants.*
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> *The Committee considers in detail the effect of the extant grants on the appealed applications later in this determination but, firstly as a preliminary point, the Committee was satisfied that, in light of wording in the [Rushport Case], it was not required to automatically refuse either Applicant's applications as a result of the extant grants. The Committee went on to consider the detail of the applications."*

39. There are a couple of points of note here. Firstly, although there had been four applications, each of which had been granted, only two of these were appealed. Because the other two successful applications had not been appealed, these applications had to be treated as extant grants that were relevant to the appeal.

40. Secondly, it confirms the position that the fact that there are extant grants does not preclude the granting of further applications for the same area.

41. It was concluded in SHA/18450 and SHA/18451 that there is no good reason for forming the view that provision of services under either of the two extant grants would be undeliverable. Further, if either or both of the appealed grants were upheld, the Committee concluded from the submissions on the appeal that there would be a real possibility of services under one or both of the extant grants and one or both of the appealed applications coming on stream to deliver services in the area. It was therefore determined that it was reasonable to conclude that, in such a scenario, granting the appealed applications would not confer significant benefits as granting the application would lead to over-provision at the expense of the public purse. Both of the appealed applications were refused by the Committee.

NHS Resolution's approach to multiple applications to meet current needs

42. In SHA/18402 and SHA/18403 (20 October 2016), the rationale behind the Rushport Case was applied in relation to competing applications to meet a current need under Regulation 13 of the Regulations. The determination states:

> *"Both applicants in the present matter have provided best estimates such that if both were granted, both grants could come on stream. The Committee considered that this could lead to over provision as the current need identified in the PNA would have been met by one, resulting in the other grant being unnecessary.*
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> *The Committee therefore considered the applications in relation to each other to see whether it was possible to differentiate the applications such that it was possible to determine which application was more likely to meet the need.*
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> *The Committee had regard to the slight differences in the applications with regard to opening hours but considered that it was necessary to focus its consideration on the current need as this is what each application was offering to meet. The Committee considered that both applications met the current need to the same degree with regard to hours.*
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> *The Committee then considered the easily accessible element of the current need."*

43. This confirms that the comments in the Rushport Case regarding the concern that granting more than one application would result in an over-provision of services will be relevant to Regulation 13 applications as well as Regulation 18 applications.

44. The decision in SHA/18402 and SHA/18403 was ultimately made on the basis that the current need that was identified in the relevant Pharmaceutical Needs Assessment was for *"easily accessible local community pharmaceutical services"* in a specific area and at certain times. Although both applications would meet this requirement, the need to avoid the over-provision of services in the area required a decision to be made as to which applicant would best meet the identified current need. The Committee's decision was therefore made on the basis of, considering the applications together, which application would be more likely to meet the identified current need. This will require a detailed consideration of what the identified current need is, along with the evidence from the applicants as to how they will meet this.

45. SHA/18402 and SHA/18403 are also interesting because, alongside the appeals of decisions made in relation to Regulation 13 applications, there were also related appeals of decisions made in relation to Regulation 18 applications (SHA/18400, SHA/18404 and SHA/18405). This is acknowledged in the determinations, which states that:

> *"The Committee noted that different statutory tests existed for regulations 18 and 13. The Committee considered that it was appropriate to consider the regulation 18 appeals separately from the regulation 13 appeals but if, after considering all the applications, it was likely that:*
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> > *one or more regulation 18 applications might be granted on appeal or one or more regulation 13 applications might be granted on appeal; and*

any of the application might be refused on the basis that one or more of the other applications might be granted,

then the Committee would need to give further consideration to which applications were granted and which were refused."

46. Ultimately this was not an issue as each of the regulation 18 applications was refused. The decision illustrates that it is possible that there may be competing applications made under different provisions of the Regulations.

47. In such a case, the rationale behind the Rushport Case will still apply. All of the relevant evidence that is available must be considered, assessed and taken into account, which will include the fact that multiple applications have been made and these should be considered together where possible. It will also need to be considered the extent to which there is a need for pharmacy services to be provided in the area, and care should be taken to ensure that granting one or more of the applications will not result in the over-provision of services in the area.

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