

14 November 2023

FILE REF: SHA/26053

8th Floor
10 South Colonnade
Canary Wharf
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Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

DECISION MAKING BODY: Lancashire & South Cumbria
Integrated Care Board (“the
Commissioner”)

PHARMACIST: Accrington Late Night Pharmacy
 (“the Applicant”)

PREMISES: 188 – 190 Blackburn Road,
Accrington
BB5 0AQ

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL
SERVICES) REGULATIONS 2013 [“THE REGULATIONS”]**

**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

Outcome

- 1.1 Based on the information provided, I am not satisfied that the pharmaceutical services provision that would result from the Applicant’s proposed hours would maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises. I am satisfied that maintaining the current level of service is a realistically achievable outcome and therefore the Applicant cannot rely on paragraph 24(1)(b).
- 1.2 The action taken by Lancashire & South Cumbria Integrated Care Board to refuse the application is confirmed.

A copy of this decision is being sent to:

Accrington Late Night Pharmacy
Lancashire & South Cumbria Integrated Care Board

Advise / Resolve / Learn

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**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

1 Introduction

- 1.1 The Applicant has applied to the Commissioner to change the days and times at which it is obliged to provide pharmaceutical services at the above premises. The Applicant seeks to keep the total number of core opening hours the same while offering a different distribution of these hours during the week.
- 1.2 The Commissioner has refused the application. The Applicant seeks to appeal to NHS Resolution.

2. Consideration

Rights of appeal

- 2.1 Where the Commissioner has determined an application under paragraph 26 of Schedule 4 of the Regulations and has granted it in part only or has taken an action that has the effect of refusing it, paragraph 26(9) provides a right of appeal to the Secretary of State for Health and Social Care (“the Secretary of State”).
- 2.2 The Secretary of State has directed NHS Resolution to determine such appeals. As an authorised officer of NHS Resolution, I have considered the appeal and have determined it, in accordance with my delegated powers.

Opening hours

- 2.3 A pharmacy's opening hours may be categorised as:
 - 2.3.1 “core opening hours” (at the hours during which the pharmacy must be open by virtue of paragraph 23(1) of Schedule 4 of the Regulations), which may

incorporate a direction of the Commissioner requiring fewer or greater than 40 hours and at set times and days; or

- 2.3.2 “supplementary” opening hours (other hours during which the pharmacy premises are open which are in addition to the core hours), pursuant to paragraph 23(3) of Schedule 4 of the Regulations.

Alteration of core opening hours

- 2.4 In accordance with paragraphs 1(7)(c) and 1(7)(d) of Schedule 2 of the Regulations, the pharmacy must provide, as part of an application for entry in the pharmaceutical list:
- 2.4.1 the proposed core opening hours in respect of the premises; and
- 2.4.2 the total proposed opening hours for the premises (having regard to both the proposed core opening hours and any supplementary opening hours).
- 2.5 The Commissioner maintains pharmaceutical lists that include the days on which and times at which, at those premises, the listed person is to provide those services during the core opening hours and any supplementary opening hours of the premises.
- 2.6 The days on which or times at which a pharmacy is obliged to provide pharmaceutical services at the premises may only be altered by the pharmacy on application under paragraph 26(1) of Schedule 4 of the Regulations, so long as the effect of that application is to reduce the total number of hours for which a pharmacy is obliged to provide, or keep the total number of hours the same.

Alteration of supplementary opening hours

- 2.7 Supplementary opening hours may be altered by the pharmacy giving notice to the Commissioner, in accordance with paragraph 23(6)(a) of Schedule 4 of the Regulations, without the need to make an application to the Commissioner.
- 2.8 There is no specific right of appeal to NHS Resolution in respect of notices given under paragraph 23(6)(a).

Accrington Late Night Pharmacy proposals

- 2.9 The Applicant in its letter of appeal indicates that it currently has core opening hours totalling 100 hours per week.
- 2.10 The Applicant wishes to:
- 2.10.1 Open at 5am on a Monday, Tuesday and Wednesday rather than opening at 7:30am;
- 2.10.2 Open at 6am on a Thursday and Friday rather than opening at 7:30am;
- 2.10.3 Open from 6:30am to 5pm on a Saturday rather than opening from 7:30am to 10:30pm; and
- 2.10.4 Open from 4pm to 8pm on a Sunday rather than opening from 10am to 8pm.

Assessment

- 2.11 In this case, the Applicant provided the following information in its application form and supporting information dated 30 May 2023:

“This is an application to permanently change core opening hours.

Current opening hours for these premises:

Monday	07:30 – 22:30
Tuesday	07:30 – 22:30
Wednesday	07:30 – 22:30
Thursday	07:30 – 22:30
Friday	07:30 – 22:30
Saturday	07:30 – 22:30
Sunday	10:00 – 20:00

Proposed core opening hours for these premises:

Monday	05:00 – 22:30
Tuesday	05:00 – 22:30
Wednesday	05:00 – 22:30
Thursday	06:00 – 22:30
Friday	06:00 – 22:30
Saturday	06:30 – 17:00
Sunday	16:00 – 20:00

If this is a permanent change, please state below the date from which you would like the change to take effect: 1st August 2023 – if “stop the clock” is applied and therefore the decision takes longer than 60 days then I will commence the change two weeks after receiving the decision.

The Applicant provided the following additional information that demonstrates that the proposed core hours will:

- Either maintain as necessary the existing level of service provision for people in the area of the pharmacy, or other likely users of the pharmacy premises; or
- Maintain a sustainable level of adequate service provision for the people in the area of the pharmacy, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.

For the reasons stated below, it demonstrates that the proposed core opening hours will maintain as necessary the existing level of service provision for people in the area of the pharmacy, or other likely users of the pharmacy premises;

From my new proposed core hour changes, people using the pharmacy will be affected on Saturday evening from 17:00 to 22:30 and Sunday daytime from 10:00 to 16:00. As these are the hours the pharmacy will be closed when previously it was open.

Please note I am proposing to open on Sunday from 16:00 to 20:00 to maintain the current level of service in the area.

There are 3 other pharmacies nearby that will be accessible during the new proposed core opening hours:

- Asda Pharmacy is open on Saturday: 07:00-22:00 and on Sunday: 10:00-16:00
- Tesco Pharmacy is open on Saturday: 06:30-22:00 and on Sunday: 11:00-17:00
- Oswaldtwistle Pharmacy is open on Saturday: 07:30-22:30 & on Sunday: 12:00-22:30

Regarding Saturday:

From 17:00-20:00 hours we have a very small number of patients accessing pharmaceutical services - most come via car and some walk.

From 20:00-22:30 hours the number of people accessing pharmaceutical services is extremely small and most weeks we do not have anybody accessing pharmaceutical services between these hours those that do come in car only as mainly it is dark or getting dark. Information regarding people's method of accessing pharmaceutical services has been collected on Saturday 6th, 13th, 20th and 27th May. This data was gathered by asking all people who accessed pharmaceutical services including OTC purchases on how they travelled to the pharmacy.

Table showing transport method used by people accessing pharmaceutical services on Saturday 6 th May 2023 between the hours of 17:00 – 22:30				
	Walked	Car	Public transport	Total
17:00 – 18:00	1	2	0	3
18:00 – 19:00	2	2	0	4
19:00 – 20:00	0	1	0	1
20:00 – 21:00	0	1	0	1
21:00 – 22:00	0	0	0	0
22:00 – 22:30	0	0	0	0

Table showing transport method used by people accessing pharmaceutical services on Saturday 13 th May 2023 between the hours of 17:00 – 22:30				
	Walked	Car	Public transport	Total
17:00 – 18:00	1	5	0	6
18:00 – 19:00	2	3	0	5
19:00 – 20:00	0	2	0	2
20:00 – 21:00	0	1	0	1
21:00 – 22:00	0	0	0	0
22:00 – 22:30	0	0	0	0

Table showing transport method used by people accessing pharmaceutical services on Saturday 20 th May 2023 between the hours of 17:00 – 22:30				
	Walked	Car	Public transport	Total
17:00 – 18:00	1	4	0	5
18:00 – 19:00	0	2	0	2
19:00 – 20:00	0	2	0	2
20:00 – 21:00	0	0	0	0
21:00 – 22:00	0	0	0	0
22:00 – 22:30	0	0	0	0

Table showing transport method used by people accessing pharmaceutical services on Saturday 27 th May 2023 between the hours of 17:00 – 22:30				
	Walked	Car	Public transport	Total
17:00 – 18:00	1	1	0	2
18:00 – 19:00	1	2	0	3
19:00 – 20:00	0	2	0	2
20:00 – 21:00	0	1	0	1
21:00 – 22:00	0	0	0	0
22:00 – 22:30	0	0	0	0

From 17:00-22:00 all people accessing pharmaceutical services will be able to be serviced by Asda Pharmacy, Tesco Pharmacy or Oswaldtwistle pharmacy. Asda

Pharmacy and Tesco Pharmacy is accessible for people who have walk [sic] and for those who have driven.

From 22:00-22:30 hours people accessing pharmaceutical services only do so by car – they will be able to drive to Oswaldtwistle Pharmacy which is 5 minutes' drive away.

Regarding Sunday:

From 10:00-11:00 – Asda Pharmacy will be open to provide pharmaceutical services to those people wanting to access pharmaceutical services.

From 11:00-16:00 hours, both Asda and Tesco Pharmacy will be able to provide pharmaceutical services.

Information regarding people's method of accessing pharmaceutical services has been collected on Sunday 7th, 14th 21st and 28th May.

Table showing transport method used by people accessing pharmaceutical services on Sunday 7 th May 2023 between the hours of 10:00 – 16:00				
	Walked	Car	Public transport	Total
10:00 – 11:00	0	0	0	0
11:00 – 12:00	0	3	0	3
12:00 – 13:00	1	2	0	3
13:00 – 14:00	0	4	0	4
14:00 – 15:00	1	4	0	5
15:00 – 16:00	0	3	0	3

Table showing transport method used by people accessing pharmaceutical services on Sunday 14 th May 2023 between the hours of 10:00 – 16:00				
	Walked	Car	Public transport	Total
10:00 – 11:00	0	0	0	0
11:00 – 12:00	0	2	0	2
12:00 – 13:00	0	2	0	2
13:00 – 14:00	0	1	0	1
14:00 – 15:00	0	1	0	1
15:00 – 16:00	0	3	0	3

Table showing transport method used by people accessing pharmaceutical services on Sunday 21 st May 2023 between the hours of 10:00 – 16:00				
	Walked	Car	Public transport	Total
10:00 – 11:00	0	1	0	1
11:00 – 12:00	0	0	0	0
12:00 – 13:00	0	1	0	1
13:00 – 14:00	1	4	0	4
14:00 – 15:00	0	3	0	3
15:00 – 16:00	0	2	0	2

Table showing transport method used by people accessing pharmaceutical services on Sunday 8 th May 2023 [sic] between the hours of 10:00 – 16:00				
	Walked	Car	Public transport	Total
10:00 – 11:00	0	0	0	0
11:00 – 12:00	0	0	0	0
12:00 – 13:00	0	2	0	2
13:00 – 14:00	0	2	0	2
14:00 – 15:00	1	1	0	2

15:00 – 16:00	0	2	0	2
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More details regarding the nearby pharmacies.

1. Asda Pharmacy, which is located 0.25 miles away and take about 5 minutes to walk. The route to Asda Pharmacy, if walking would be along Blackburn Road (which is a straight road without any incline or decline, the road is well lit with dropped kerbs), then turn left into Oxford Street, (which has a very slight decline and is well lit with dropped kerbs). At end of Oxford Road, Asda is suited [sic] straight across and at the junction of Oxford Road and Hyndburn Road, there is pedestrian crossing with dropped kerb to help cross the main road. The route by car will take approximately two minutes, following the same route if walking with ample car parking space in Asda car park.

2. Tesco Pharmacy is located 0.4 miles away and take about 8 minutes to walk. The route to Tesco Pharmacy, if walking would be along Blackburn Road (which is a straight road without any incline or decline, the road is well lit with dropped kerbs), then turn right into Eagle Street, (which has a very slight incline and is well lit with dropped kerbs). Tesco Pharmacy is located on Eagle Street. The route by car, is the same as walking and will take approximately three minutes with ample car parking space in Tesco car park.

3. Oswaldtwistle Pharmacy is not within walking distance but is 5 minutes' drive. There will be no traffic issues as Saturday evening is off peak and the roads are quiet in the town of Accrington. There is ample parking on the side streets with a public free to use car park approximately 50 yards from Oswaldtwistle Pharmacy.

4. Asda Pharmacy, Tesco Pharmacy and Oswaldtwistle Pharmacy provide the same services as provided at Accrington Late Night Pharmacy.

Notice with details of all above three pharmacies will be put up outside the premises – so people are aware where they can go to access pharmaceutical services. Telephone answering machine will detail the new opening hours along with the three pharmacies contact details.”

2.12 In a letter to the Applicant dated 27 June 2023 the Commissioner stated:

“Further to your application to change the core opening hours at the above address, I am writing to confirm that it was considered at the Pharmaceutical Services Group on 21 June 2023 and it was determined that it has been refused.

The Group determined that there was not sufficient evidence provided to reflect a change in the needs of people in the area, or other likely users of the premises, for pharmaceutical services. Indeed, the Group considered that the submission gave examples of services being used in the hours which the application wished to change.

You have a right of appeal to the Secretary of State against the issuing of this direction. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 days of receiving this notice to nhsr.appeals@nhs.net or:

Primary Care Appeals
NHS Resolution
8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU”

2.13 In a letter to NHS Resolution dated 7 July 2023 the Applicant stated:

"I am appealing against the decision by Lancashire & South Cumbria Integrated Care Board to refuse my application to change core opening hours at Accrington Late Night Pharmacy, 188-190 Blackburn Road, Accrington, BB5 0AQ (ODS Code: FQE18).

I have attached the original application form, the reason for my change and the decision letter from the ICB.

The reason for refusal was:

"The Group determined that there was not sufficient evidence provided to reflect a change in the needs of people in the area, or other likely users of the premises, for pharmaceutical services. Indeed, the Group considered that the submission gave examples of services being used in the hours which the application wished to change"

I am appealing because I strongly believe that the ICB have erred in their decision.

As NHS resolution appeal committee would be aware changes were made to The National Health Service (Pharmaceutical and local pharmaceutical services) regulation 2013 and became effective on 25th May 2023.

In the new version several amendments were made particularly to the Schedule 4, Part 3 Paragraph 24(1) - Matters to be considered when issuing directions in respect of pharmacy premises core opening hours and paragraph 26(2) - Determination of pharmacy premises core opening hours instigated by the NHS pharmacist.

For the purpose of this appeal the relevant parts of the legislation are:

Paragraph 24(1) (Matters to be considered when issuing directions in respect of pharmacy premises core opening hours)

Paragraph 26(2) (Determination of pharmacy premises core opening hours instigated by the NHS pharmacist)

Please see below the version pre and after 25th May 2023 of paragraph 24(1)

Before 25th May 2023

24.— (1) Where the NHSCB issues a direction setting any days or times for the opening hours of pharmacy premises under this Part, it must in doing so seek to ensure that the days and times at which pharmacy premises are open for the provision of pharmaceutical services are such as to ensure that pharmaceutical services are provided on such days and at such times as are necessary to meet the needs of people in its area or other likely users of the pharmacy premises.

After 25th May 2023.

24.— (1) Subject to paragraph 26(2A), where NHS England issues a direction for setting any days or times for opening hours under this Part, or determines them without issuing a direction, it must in doing so seek to ensure that the days and times at which pharmacy premises are open for the provision of pharmaceutical services in the area in which the premises that are the subject of the direction are located are such as—

(a) to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises;

Or

(b) to maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where

maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.

Please see below the version pre and after 25th May 2023 of paragraph 26(2)

Before 25th May 2023

26.—(2) where P makes an application under sub-paragraph (1), as part of that application P must provide the NHSCB with such information as the NHSCB may reasonably request in respect of any changes to the needs of the people in its area, or other likely users of the pharmacy, for pharmaceutical services that are material to the application.

After 25th May 2023

26.— (2) Except where sub-paragraph (2A) applies where P makes an application under subparagraph (1), as part of that application P must provide the NHSCB with such information as the NHSCB may reasonably request in respect of the matters that NHS England must seek to ensure pursuant to paragraph 24(1).

Under the new legislation the government has purposely removed from paragraph 26(2):

“any changes to the needs of the people in its area, or other likely users of the pharmacy, for pharmaceutical services that are material to the application.”

By removing the above paragraph, the government does not want the ICB's to consider the need of the people or likely users of the pharmacy for pharmaceutical services and replaced it with reference to amended paragraph 24(1) which is either to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises;

OR

to maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.

By asking to maintain as necessary the existing level of service in the area for the local and likely users of pharmaceutical services. The government has changed the requirement and by removing the phrase “any changes to the needs of the people in its area, or other likely users of the pharmacy, for pharmaceutical services that are material to the application” the government is explicitly saying that is no longer wants patient specifically using the said pharmacy to be taken in to account but the ICB has continued to take into account. [sic]

What the government is stating in the new legislation is that if by changing the core hours of a pharmacy:-

- How will the pharmaceutical services for the local and likely users be affected?
- Is there any other pharmacy nearby that can provide the services?
- If there is another pharmacy nearby to provide the service, is it accessible easily?
- Will the area be okay if the pharmacy changed the opening hours?

In my original application to the ICB shows that there is a handful of service users who do use my pharmacy to access pharmaceutical services in some of the time scale I am proposing to close that there is enough existing service providers which are easily accessible and these service providers would maintain the existing service level in the area for users and likely users of pharmaceutical services.

The ICB has not considered the mitigating factors with regards to impact to service on patient needs I have clearly demonstrated that there is sufficient provision to such an extent that there will no impact on the times I intend to restructure. [sic]

If pts [sic] needs are to be taken into account, in the process of my application I have demonstrated patient needs will be met because the services provided by Asda Pharmacy, Tesco Pharmacy, Oswaldtwistle Pharmacy and my pharmacy are matched and hence users and likely users can use any pharmacy to fulfil their pharmaceutical needs without any inconvenience as all the pharmacy listed match or exceed the services provided by my pharmacy.

What the ICB had to access [sic] is whether the existing service level would be maintained in the area if my pharmacy core hours were restructured as proposed – as per new legislation. The evidence I have provided, in my original application, clearly demonstrates that the service level of pharmaceutical services in Accrington for users and likely users of pharmaceutical services will be maintained for the hours I will be closed if the application is successful.

As I said in my original application, I will be keeping the pharmacy open on Sunday from 4-8pm because during these hours the only Tesco Pharmacy is open from 4-5pm and the only other close pharmacy open is Oswaldtwistle Pharmacy, I therefore assessed that even though from my data collection of the pharmaceutical service users of my pharmacy all had travelled via car and hence it would not be too difficult to travel via car to Oswaldtwistle Pharmacy, I assessed the service level in the area potentially would be affected and decided against closing all day Sunday and staying open from 4-8 to maintain service level.

An update from the time the application has been submitted. Asda Pharmacy has stated that they will close at 9pm on Saturday evenings but as the data shows there is no pharmaceutical service users for my pharmacy hence there is no one impacted by this decision but Tesco will still be open which is only a few minutes' drive away. Also, any 100-hour pharmacy can close after 9pm on weekdays and Saturday by giving the appropriate notice as defined under new legislation 26(2A).

Under the amended version of Paragraph 24(1) it clearly states that either option (a) or option (b) are met. My original application and mainly this appeal focuses on 24(1)(a) - "to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises"

but I want to take this opportunity and address 24(1)(b) –

"to maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome."

For recently I have struggled to find locums to cover the Saturday evenings and Sunday full day shift at an economically viable rate.

Just a comment to make about the starting date if my restructure of core hours is approved – as it might go over the original date of 1st August due to the appeal process, I will start it the second Monday after receiving a successful decision.

After taking the above and the original application into account, I respectfully request the appeal committee to overturn the ICB decision and allow my core hour restructure to go ahead.”

2.14 In a letter to NHS Resolution dated 9 August 2023, Lancashire & South Cumbria Integrated Care Board stated:

“Thank you for allowing NHS Lancashire and South Cumbria Integrated Care Board (“the ICB”) the opportunity to make representations on the above appeal.

I can confirm that the inclusion of Accrington Late Night Pharmacy Limited in the pharmaceutical list for the area of Lancashire Health and Wellbeing Board in respect of Accrington Late Night Pharmacy is subject to the 100 hours condition as defined in regulation 65(2) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended (the 2013 regulations).

As background, Accrington Late Night Pharmacy Limited (“the appellant”) applied to the ICB to change the days on which or times at which it is obliged to provide pharmaceutical services at Accrington Late Night Pharmacy (“the pharmacy”), 188 Blackburn Road, Accrington BB5 0AQ.

The application was made under paragraph 26(1)(b), Schedule 4 of the 2013 regulations, as the appellant is seeking to keep the total number of core opening hours the same, but to change the timing of them.

The application was made to the ICB on 30 May 2023 and in it the appellant is seeking to:

- reduce the total number of core opening hours on Saturdays from 15 to 10.5,
- reduce the total number of core opening hours on Sundays from ten to four, and
- make these hours up by opening 2.5 hours earlier on Monday to Wednesday, and 1.5 hours earlier on Thursday and Friday.

The appellant provided information to support its claim “that the proposed core opening hours will maintain as necessary the existing level of service provision for people in the area of the pharmacy, or other likely users of the pharmacy premises”. The crux of this information is that the appellant claims that very few people access pharmaceutical services between 17.00 and 22.30 on Saturdays but acknowledges that there is still a level of demand for services between those times. However, those people could, in the appellant’s opinion, access another pharmacy at those times.

The appellant undertook a survey on how people travelled to the pharmacy on four Saturdays in May 2023. No information was provided on how the survey was undertaken, or whether those four Saturdays are representative of the usual demand for services on that day. The ICB has noted two of those Saturdays were during bank holiday weekends and therefore demand may be atypical. For these reasons it questions the robustness of the survey and the validity of the findings.

Based on its findings, the appellant then went on to state that people seeking pharmaceutical services would be able to access the other pharmacies in the area.

The survey was also undertaken on the Sundays of those same four weekends and the appellant came to the same conclusions.

The appellant stated that a notice with details of the specified pharmacies would be put up outside the premises (this is a term of service – paragraph 23(4), Schedule 4 of the 2013 regulations) and the answering machine would detail both the new opening hours and the contact details of other pharmacies.

The ICB noted that if the application was granted, then the appellant would, in due course, be able to apply under paragraph 26(1)(a), Schedule 4 of the 2013 regulations to reduce the total number of core opening hours to not less 72 per week. As part of that application, the appellant would only be required to maintain the four core opening hours on Sunday, whereas if an application to reduce the total number of core opening hours had been submitted instead of this application, then the appellant would have been required to maintain the current ten core opening hours and remain open on Saturdays until 21.00.

In its email dated 7 July 2023 the appellant claims that the ICB erred in its decision. Whilst the decision letter did not reference the current wording of paragraph 24(1), Schedule 4 of the 2013 regulations following the amendments made to it which took effect from 25 May 2023, I would like to assure both the appellant and NHS Resolution that it had regard to the current wording.

In hindsight the letter should have made that clearer. In any event the ICB has now been afforded the opportunity to make representations on the grounds of the appeal and can therefore correct this oversight.

In its grounds for the appeal the appellant reiterates that there are enough service providers which are easily accessible and that these service providers would maintain the existing service level in the area for users and likely users of pharmaceutical services. What the appellant has failed to do is explain how opening at 05.00 Monday to Wednesday, 06.00 on Thursdays and Fridays, and 06.30 on Saturday (currently the pharmacy opens at 07.30) would maintain as necessary the existing level of service provision for people in the area of the pharmacy or other likely users. No evidence has been provided to demonstrate that there is any existing level of service at those times. Nor has the appellant demonstrated any need for pharmaceutical services at those times, whereas evidence has been provided of demand for pharmaceutical services at the times the appellant is proposing to close.

However, the appellant now introduces new information in order to address paragraph 24(1)(b), Schedule 4 of the 2013 regulations which was not available to the ICB when it determined the application. The appellant states that they have recently “struggled to find locums to cover the Saturday evenings and Sunday full day shift at an economically viable rate.”

The ICB has noted that the appellant is now claiming that the proposed core opening hours are such as to maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.

It was therefore somewhat of a surprise to the ICB, having read the grounds for the appeal, to receive a copy of a letter dated 5 July 2023 (copy enclosed) which it has been advised has been sent by the appellant to GP practices in the area of the pharmacy. Despite claiming that it has struggled to source locums to cover the pharmacy’s Saturday evening hours and all of the Sunday hours, the appellant is offering to provide “private consultations for a number of prescriptions only medications, including antibiotics and ear wax removal via microsuction” to people who are referred to the pharmacy by GP practices. Whilst there is nothing surprising in pharmacies providing private services, what is surprising is that the appellant is offering to provide the service at times when it claims to struggle to source locums at an economically viable rate, namely 17.00 to 22.30 on Saturdays and 10.00 to 16.00 on Sundays.

The waters are further muddled by the statement in the letter that practices are to refer people for this service by completing “a GP CPCS [community pharmacist consultation service] Referral” and advise the person to attend the pharmacy for a consultation. The

pharmacy will then conduct an assessment “and, where possible, make a private supply of medications to the person for a small fee”.

Whilst the appellant may claim it is the fact it can charge for this private service that makes it viable to open at these times despite having to pay an uneconomically viable locum rate, the ICB cannot understand how charging a small fee for the private supply of medications would cover the appellant’s alleged economically unviable expenditure. In addition, the times at which the service is to be provided do not match GP practice core hours as can be seen from the following.

- GP practice core hours are 08.00 to 18.30 Monday to Friday, excluding public and bank holidays.
- Times at which private consultations will be held by the pharmacy 10.00 to 22.00 Monday to Friday, 10.00 to 19.00 Saturdays and Sundays.

It is unclear how referrals are to be made at times when practices are closed but the pharmacy is providing the service – phone calls made to the practices outside of their core hours are dealt with by NHS111 who would refer them to a pharmacy that is providing the CPCS where that is appropriate. Referral under CPCS would also ensure that those people who are exempt from prescription charges would not need to pay for any required prescription drugs, as opposed to having to pay for them under the appellant’s private service.

In addition, why are practices required to complete “a GP CPCS Referral” by which we assume the appellant means a secure, electronic referral that complies with the standards laid out in the NHS CPCS Technical Toolkit and the referral is to be made to the appellant’s chosen CPCS IT system and/or via NHSmail to the pharmacy’s premises specific NHSmail shared mailbox as defined in the CPCS service specification¹? As NHS Resolution will be aware the CPCS is an advanced service that is funded by the ICB.

The ICB is very concerned that the appellant appears to be trying to brand an NHS funded service as a private service, will be investigating this further with the appellant, and taking action accordingly. The ICB has other concerns regarding the service, but these are not for this appeal.

Setting aside the ICB’s concerns about the service described in the letter of 5 July 2023, and how it will be provided, it is clear that the information provided in the appellant’s appeal in relation to paragraph 24(2)(b) [sic], Schedule 4 of the 2013 regulations is a deliberate attempt to mislead both the ICB and NHS Resolution in order to secure the grant of the application.

In relation to the matters set out in paragraph 24(1)(b), Schedule 4 of the 2013 regulations, the ICB invites NHS Resolution to determine that it is not necessary to grant the application as there is no evidence to demonstrate that the appellant’s proposed core opening hours are required in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome. The appellant’s own information shows that service provision is required at the times it is proposing to close, and if the pharmacy can be opened to provide a private service for which only a small fee will be charged for any drugs that may be provided, then it would be a realistically achievable outcome to provide essential services and the advanced services that the appellant currently provides.

In relation to the matters set out in paragraph 24(1)(a), Schedule 4 of the 2013 regulations, in light of the attempt by the appellant to mislead NHS Resolution regarding its claim that locum rates at certain times on Saturdays and Sundays are economically unviable, the ICB has to question the reliability of the other information provided by the appellant in its original application and the subsequent appeal. The ICB therefore invites NHS Resolution to conclude that it is not necessary to grant the application as there is no reliable evidence to support the conclusion that the proposed core opening

hours are such as to maintain as necessary the existing level of service provision for the people in the area of the pharmacy or other likely users of the pharmacy premises.

Should NHS Resolution not be persuaded to refuse the application, the ICB makes the following comments in relation to the matter in paragraph 24(1)(a), Schedule 4 of the 2013 regulations.

The ICB and now NHS Resolution must be satisfied that the proposed core opening hours are such as to maintain as necessary the existing level of service provision. The changes that the appellant is proposing are as follows.

- to open at 05.00 on Monday to Wednesday instead of 07.30,
- to open at 06.00 on Thursday and Friday instead of 07.30,
- to open at 06.30 on Saturdays instead of 07.30, and close at 17.00 instead of 22.30, and
- to open at 16.00 on Sundays instead of 10.00.

The only information that the appellant has provided to support the application is that demand for pharmaceutical services between 17.00 and 22.30 on Saturdays and 10.00 to 16.00 is lower than they would like, and that people who currently use the pharmacy at these times could go to another pharmacy instead. The latter is based on a limited survey, the methodology for which has not been provided, nor has any rationale as to why those four weekends were chosen.

No information has been provided to demonstrate that opening at 05.00, 06.00 or 06.30 on various days is such as to maintain as necessary the existing level of service provision. The appellant has provided no information to demonstrate that it could engage locums to cover those hours, and the ICB would imagine that the rates charged by locums to work at those hours of the morning would be similar to working Saturday evenings and Sundays between 10.00 and 16.00 which is when most pharmacies would have opening hours if they opened on that day and is therefore more likely to be seen as being “in-hours”.

The ICB notes that the NHS (Pharmaceutical and Local Pharmaceutical Services) (Amendment) Regulations 2013 were laid in Parliament on Thursday 27 April 2023. The appellant then started to survey people who attended the pharmacy that weekend and submitted the application on 30 May 2023. The appellant has not previously applied under paragraph 26(1)(b), Schedule 4 of the 2013 regulations to redistribute the core opening hours of the pharmacy.

It is of note that the appellant has not chosen to seek to reduce the core opening hours of the pharmacy which would have gone some way to reducing the reliance on locums and the costs associated with that. Indeed the appellant will continue to open the pharmacy outside of the proposed core opening hours in order to provide a private service. Should the application be granted the ICB is of the opinion that, having got rid of the pharmacy’s core opening hours after 17.00 on Saturday and reduced the core opening hours on Sundays, the appellant could then seek to reduce the pharmacy’s opening hours on Monday to Friday. Based upon the misleading claims regarding economically unviable locum costs yet introducing a service that it claims is a private service but requires an NHS referral, the ICB has little doubt that an application to reduce the pharmacy’s core opening hours would be submitted.

The ICB invites NHS Resolution to dismiss the appeal and uphold the decision to refuse the application.

Enc

- Minutes from 21st June Pharmaceutical Services Group
- Pharmaceutical Services Group Decision Letter

- Accrington Late Night GP Letter”

2.15 In a letter to NHS Resolution dated 29 August 2023 the Applicant stated:

“Thank you for giving me the opportunity to reply to the submission by the ICB

Having read and re-read the response by the NHS Lancashire and South Cumbria Integrated Care Board (ICB). I feel the majority of there response is irrelevant to the original application. [sic]

Firstly, it must be also noted from the ICB response that they do not disagree from the information I provided in my original application that on Saturday from 17:00 till 22:30 and Sunday between the hours of 10:00 till 16:00 that the level of service will be maintained to the existing level of service provision for the people in that area or other likely users of the pharmacy premises.

The survey mentioned were fact finding by asking all pharmaceutical service users who requested pharmaceutical service during the stated time how they had come to the pharmacy, walking, car or public transport. After details of the legislation was released, I realised the change in wording meant that if I applied for change in opening hours, under the new legislation, I would have a greater chance of success hence I came up with the methodology of doing a simple survey to find out pharmaceutical users’ method of transport in gaining access to the pharmacy in the hours that I was proposing to be closed. I felt that under the new legislation I only needed to know what method of transport was used to establish if it would be difficult for pharmaceutical users to access nearby pharmacies or not.

In the ICB response, the fourth full paragraph on page 2, the ICB has stated:

“The ICB noted that if the application was granted, then the appellant would, in due course, be able to apply under paragraph 26(1)(a), Schedule 4 of the 2013 regulations to reduce the total number of core opening hours to not less 72 per week. As part of that application, the appellant would only be required to maintain the four core opening hours on Sunday, whereas if an application to reduce the total number of core opening hours had been submitted instead of this application, then the appellant would have been required to maintain the current ten core opening hours and remain open on Saturdays until 21.00.”

Here the ICB see [sic] to be confirming the main reason why they refused the application. It was not because it did not meet the criteria of the current legislations in force but are speculating what future possible potential application could be submitted. The legislation do not allow speculation of future application to be considered and this application should be considered on its own merit with the evidence provided for it, under the relevant legislation i.e. paragraph 24(1) and paragraph 26(1)(b)&(2), of Schedule 4 of the 2013 Regulations revised edition which came into force on the 25th May 2023 and not decide this application on what possibly may/may not could happen in the future.

The ICB further claim that another reason for rejection was due to the failure to explain:

“how opening at 05.00 Monday to Wednesday, 06.00 on Thursdays and Fridays, and 06.30 on Saturday (currently the pharmacy opens at 07.30) would maintain as necessary the existing level of service provision for people in the area of the pharmacy or other likely users.”

The legislation is concerned with service level diminishing during the new proposed closed hours when the pharmacy would have been open and not justifying pharmaceutical provision during new proposed opening hours when the pharmacy is currently closed as it is obvious that the service level is not diminished but enhanced during the new open hours when the pharmacy was previously closed.

Also, as the ICB will be aware, Asda Pharmacy and Tesco Pharmacy have reduced their hours under the new 72 hours regulation paragraph 26 (2A) and both now open at 9am [sic]. This has left a gap in the morning pharmaceutical services in Accrington as I am the only pharmacy open and currently open at 07:30, as stated above. Asda Pharmacy and Tesco Pharmacy use [sic] to open their pharmacy at 6am on weekdays and 7am on Saturdays. I have already had a marked increase in footfall in the morning and by opening at the stated time above I will be maintaining as necessary the existing level of service provision for people in the area of the pharmacy or other likely users caused by the gap in pharmaceutical services by Asda Pharmacy and Tesco Pharmacy changing their opening times to 9am.

The ICB are wrong in their assumption that the rates on early hours of weekdays and Saturday morning rates are comparable to Saturday evening and Sunday for the reasons explained below.

The ICB have failed to understand how the locum market works. I am able to find locums during week days and Saturday day to open early but having difficulty finding locums to work Saturday evening and Sundays. Locums tell me they don't mind starting working earlier on weekdays because that generally means that they finish earlier. As one locum put it to me, he likes early starts because with the early finishes he is able to collect his child from school. Locums, tell me they don't want to work on Saturday evening and Sunday as these days they are family/socialising days with friends and families and hence I am unable to find locum at a sustainable/economically viable rate as there are fewer locums willing to work and those that are they are expecting a rate which is not sustainable. As you can see from the data in the survey the number of people using the pharmaceutical service is minimal and hence in the small pool of locums that are prepared to work on Saturday evening and Sunday day time are asking for a rate that is not sustainable/economically viable.

From my enquiries, the locum rates for weekday early morning are very similar to the Weekday day (09:00 onwards) rate. This is because it allows locums to spend time with family more in the afternoon/evening.

My proposal to open for four hours on Sunday instead of ten hours is because the proposed hours will maintain as necessary the existing level of service provision or other likely users of the pharmacy premises for the people in that area with people being able to access Asda Pharmacy and Tesco Pharmacy between 10:00 and 16:00 and I am able to find locums that are able to work for four hours on Sunday evening, as it is more sustainable to pay higher for four hours rather than ten hours. This proposal makes providing of pharmaceutical services a realistic outcome.

Regarding the letter sent to three of the local GP's, the time stated on there was the time the service was available and the current opening times at the date of the letter.

The times stated in the letter are the times, I am able to provide the service based on the current opening times on the date of the letter. My current open times on the weekend are: Saturday 07:30-22:30 and Sunday 10:00-20:00.

I have written an updated letter to the three GP surgeries clarifying the position in the letter, A copy of which is attached. [sic]

I respectfully ask, NHS Resolution to look at the full facts and work under the amended legislation and the amended legislation guidelines, i.e. what the legislation want to achieve then I am certain that NHS Resolution will come to the conclusion that my application/appeal should be accepted."

- 2.16 In a letter of 1 September 2023, Lancashire and South Cumbria Integrated Care Board stated:

“Thank you for your letter dated 1 September in which you shared a copy of Accrington Late Night Pharmacy Ltd’s final observations on the above and confirming that NHS Resolution will not proceed to determine the appeal. [sic]

The ICB would like to make the following comments on Accrington Late Night Pharmacy Ltd’s final observations which it believes are misleading.

In the penultimate paragraph the appellant states “I have written an updated letter to the three GP surgeries clarifying the position in the letter, A [sic] copy of which is attached.”.

Having read the letter the ICB notes that it is substantially different to the letter dated 5 July 2023 that the appellant sent to a number of local GP practices.

In the letter dated 5 July 2023 the appellant was clearly promoting private consultations that rather unusually required a GP CPCS referral. Reference was then made to making private supplies of medications for a small fee. A list of things that referrals could be made for was included in the letter.

Having read the appellant’s final observations it appears a further letter was sent on 19 July 2023 which claimed to provide clarity on the 5 July letter, and then a third letter appears to have been sent on 15 August which contained changes to the 19 July letter (shown as tracked changes). The letters dated 19 July and 15 August appear to be to advise the local GP practices that the pharmacy is now providing the GP CPCS with effect from one of those dates with reference made to a range of private consultations that can be provided in the penultimate paragraph.

It is hard to see how the letters dated 19 July and 15 August clarify what the appellant said in the letter dated 5 July. The 5 July letter promotes a private service. The two subsequent letters promote an NHS-funded service. The appellant states that the 5 July letter said the private service was available 10.00 to 22.00 Monday to Friday and 10.00 to 19.00 on Saturday and Sunday because those were the pharmacy’s opening times at that time. It seems strange that the appellant would launch a private service and advise the local GP practices of both it and the times at which it would be provided, and then 25 days later apply to the ICB to change the pharmacy’s core opening hours and, should their application be successful, not then be providing the service at those times. It again seems strange that the appellant would then write to the same practices promoting the GP CPCS at times they are seeking to be closed.

The ICB remains of the opinion that the appellant is trying to mislead both it and NHS Resolution.

The ICB invites NHS Resolution to dismiss the appeal and uphold the decision to refuse the application.”

2.17 I note the following:

2.17.1 The Applicant's core opening hours total 100 hours and the Applicant proposes to redistribute those 100 core opening hours pursuant to paragraph 26 of Schedule 4. The Applicant seeks to provide services as per its proposed changes in the table at 2.11 above.

2.18 The Applicant proposes to:

2.18.1 Open earlier on a Monday, Tuesday and Wednesday morning at 5am rather than 7:30am;

2.18.2 Open earlier on a Thursday and Friday morning at 6am rather than at 7:30am;

2.18.3 Open earlier on a Saturday morning at 6:30am rather than at 7:30am;

- 2.18.4 Close earlier on a Saturday afternoon at 5pm rather than at 10:30pm; and
- 2.18.5 Open on a Sunday from 4pm to 8pm rather than opening from 10am to 8pm.
- 2.19 The Regulations, which came into force on 1 April 2013, have been amended a number of times. Certain amendments, relating to pharmacy premises opening hours, came into force with effect from 25 May 2023.
- 2.20 The application to change the hours was made by the Applicant on 30 May 2023 and a decision was made by the Commissioner on 27 June 2023. The decision was appealed to NHS Resolution by email of 7 July 2023. I am of the view that the application and subsequent appeal should be considered against the Regulations as amended with effect from 25 May 2023.
- 2.21 The Applicant has sought to change the days and times at which it is obliged to provide pharmaceutical services under paragraph 26 of Schedule 4, Part 3, "Hours of opening".
- 2.22 Paragraph 26(1) states:
- "26.— (1) An NHS pharmacist (P) may apply to the NHSCB for it to change the days on which or times at which P is obliged to provide pharmaceutical services during core opening hours at P's pharmacy premises in a way that—*
- (a) reduces the total number of hours for which P is obliged to provide pharmaceutical services at those premises each week ...; or*
- (b) keeps that total number of hours the same."*
- 2.23 I have first considered paragraph 26(2) of Schedule 4 of the Regulations, which reads as follows:
- "Except where sub-paragraph (2A) applies, where P makes an application under sub-paragraph (1), as part of that application P must provide the NHSCB with such information as the NHSCB may reasonably request in respect of the matters that NHS England must seek to ensure pursuant to paragraph 24(1).*
- 2.24 Paragraph 26(2A) is for an application for a direction in respect of a pharmacy that was included on the list as an excepted application that was going to provide 100 hours a week. The Applicant is currently included on the pharmaceutical list to provide pharmaceutical services for 100 hours a week, therefore paragraph 26(2A) may apply in this instance and I have first considered this.
- 2.25 Paragraph 26(2A) states:
- "In the case of an application for a direction under sub-paragraph (4) that has the effect of reducing, in the case of any premises in respect of which a 100 hours condition applies or has ever applied, or in respect of which a direction that replaced (at any distance in succession) a 100 hours condition applies, the total number of core opening hours to 72 or above, but without changing any or all of the following—*
- (a) the core opening hours on a Monday to Saturday at times between 5pm and 9pm;*
- (b) the core opening hours on a Sunday at times between 11am and 4pm, other than by way of the inclusion of, or a change to, a rest break which—*
- (i) is no longer than one hour, and*

(ii) starts at least 3 hours after the start of the pharmacy's opening hours and ends at least 3 hours before the end of the pharmacy's opening hours; and

(c) the total number of core opening hours on a Sunday,

NHS England must grant that application, and paragraph 24(1) does not apply to such an application."

2.26 The Applicant is seeking to keep the pharmacy open for 100 hours but redistribute those hours during the week. Given that the Applicant is not proposing to reduce the total number of core opening hours to 72 or above but wishes to maintain opening hours of 100 core hours a week, this application does not fall to be considered under paragraph 26(2A).

2.27 As paragraph 26(2A) does not apply in this instance, I am of the view that paragraph 24(1) does apply to this application and it is on this basis that the Applicant applied to the Commissioner to amend its core opening hours. I have therefore proceeded to consider the application before me in accordance with paragraph 24(1).

2.28 Paragraph 24(1) reads as follows:

"24 (1) Subject to paragraph 26(2A), where NHS England issues a direction for setting any days or times for opening hours under this Part, or determines them without issuing a direction, it must in doing so seek to ensure that the days and times as which pharmacy premises are open for the provision of pharmaceutical services in the area in which the premises that are the subject of the direction are located are such as –

- (a) to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises; or*
- (b) to maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.*

2.29 Paragraph 24(2) states:

(2) In considering the matters mentioned in sub-paragraph (1), the NHSCB –

(a) must treat any local pharmaceutical services being provided in its area as if they were pharmaceutical services being so provided, and

(b) may have regard to any pharmaceutical services that are being provided in its area during supplementary opening hours.

2.30 Firstly, I note that the Applicant sets-out in its original application to change core opening hours the following reasoning for its application:

"that the proposed core opening hours will maintain as necessary the existing level of service provision for people in the area of the pharmacy, or other likely users of the pharmacy premises;"

2.31 I consider that this clarifies the initial application as being made under the grounds contained in paragraph 24(1)(a). I note however that in its appeal the Applicant then raised additional reasons that it expressly states fall under paragraph 24(1)(b). I will start by considering the application of paragraph 24(1)(a) and whether the proposed hours are such as to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises. I will then consider the application of 24(1)(b) if that is required.

- 2.32 To properly assess the application against paragraph 24(1)(a), I need to determine the existing level of service provision. I then need to consider whether it is necessary to maintain the existing level of service provision. If it is necessary to maintain the existing level of service provision, I need to consider whether, despite the proposed change of hours, the existing level of service provision to people in the area or other likely users would be maintained, e.g. by nearby pharmacies being open and providing the same level of service provision.
- 2.33 If I consider it unnecessary to maintain the existing level of service provision or that it is necessary to maintain the existing level of service provision but doing so is not a realistically achievable outcome, then I need to consider paragraph 24(1)(b) and determine whether the proposed change of hours are such that a sustainable level of adequate service provision would be maintained.
- 2.34 I therefore need to be provided with sufficient information to understand a range of matters, starting with the existing level of service provision. The references to days and times in paragraph 24(1) leads me to consider that the reference to "level" of service provision in paragraph 24(1)(a) is mainly focused on the days and times services are provided. I would point out that "level" of service provision could also refer to other characteristics of the service, such as types and range of services provided, geographical access to services provided, other aspects of physical access aside from location, and the quality of services provided.
- 2.35 The existing level of service provision has been outlined by the Applicant, in its own core hours provision, and by an indication of the hours that pharmacies in the local area are open.
- 2.36 I have next considered whether it is necessary to maintain the existing level of service provision. It could be argued that as the Applicant is not looking to reduce the number of hours each week that services are provided, then from a pure "number of hours of service provision each week" perspective, the existing level of service provision is maintained such that consideration of whether it is necessary to maintain the level of service provision is not needed.
- 2.37 However, the Applicant is applying to change the days and times that services are provided. Taking Saturdays as an example, the level of service provision at the Applicant's premises on a Saturday is not being maintained. I consider it appropriate to determine if it is necessary to maintain the existing level of service provision and then, if deemed necessary, consider if the opening hours of other pharmacies mean that level is maintained.
- 2.38 To determine whether it is necessary to maintain the existing level of service provision, I have had regard to the comments by the Applicant of those using the pharmacy. If I am satisfied that there is reliable evidence indicating no users of the pharmacy on/at the relevant days/times that the pharmacy wishes to close, this might support an argument that maintaining the existing level of service provision is not necessary.
- 2.39 The Applicant provided to the Commissioner, with its application, the results of a survey which it carried out during May 2023 to establish how those accessing pharmaceutical services, at the times that the Applicant proposes to close, arrive at the pharmacy.
- 2.40 The survey was conducted during the month of May 2023 and showed a low number of people using the pharmacy at the relevant times. I note the comments of the Commissioner on the survey information – that the survey only takes into account four Saturdays and four Sundays in May with two of those being bank holiday weekends which might mean the survey does not capture usual activity of the pharmacy. I place some weight with these comments. A sample size that only takes into account two non-bank holiday weekends, when the vast majority of weekends in a year are not bank holiday weekends, does not provide me with confidence that the survey results are representative of the use of the pharmacy.

- 2.41 It is clear that there are people using the pharmacy at the times the Applicant wishes to close. I consider that it is relevant to have information as to why persons are using the pharmacy at these times. It is difficult to draw conclusions about the necessity of maintaining the existing level of service provision if there is no information on what specific services, if any, are being provided at those times. The survey only shows the number that attended the pharmacy and does not differentiate between those who were coming to collect a prescription, for example, and those that were coming to seek advice or access a further pharmaceutical service or a non-pharmaceutical service.
- 2.42 Without this information it is difficult to make an assessment of whether it is necessary to maintain the existing level of service provision and this in turn makes it difficult to apply paragraph 24(1)(a). I consider it reasonable to take the position that unless I am provided with evidence to the contrary, I should consider that it is necessary to maintain the existing level of service provision.
- 2.43 Having determined that it is reasonable to assume that maintaining the existing level of service provision is necessary, I now need to consider if, despite the changes to hours, there is maintenance of the existing level of service provision. The Applicant cannot maintain this as it is changing its hours but I note the undisputed information from the Applicant with regard to other pharmacies in the area that, between them, have opening hours during the times that the Applicant is proposing to close, namely Asda, Tesco and Oswaldtwistle Pharmacy.
- 2.44 If I consider that the characteristics of other pharmacies, e.g. where they are located, their access, the services provided and the times they are open, means that the level of service provision is maintained for people in the local area or other likely users of the pharmacy, then I am able to grant the application under paragraph 24(1)(a).
- 2.45 The Applicant has provided information regarding access to those pharmacies for those who currently access its own pharmacy and how they might travel to find alternative pharmaceutical services. There are a mix of people who drive to the Applicant's pharmacy and those who walk. The Applicant has described the pharmacies in the area indicating how far away certain pharmacies are and whether there is parking available.
- 2.46 It is worth noting that characteristics of the persons using the pharmacy might be relevant here as well as from where they start their journey to the pharmacy. If they live close by, walk a few minutes to the pharmacy and walk back home, then even an additional 10 minute walk to the next nearest pharmacy might be considered as not maintaining the level of service provision to users of the pharmacy. I do not consider that every single individual need should be considered at length in this regard but it would be helpful to have this information to be certain that the existing level of service provision would be maintained via local pharmacies.
- 2.47 I note that the distance to the Oswaldtwistle Pharmacy has only been described as a "5 minutes drive" with no details regarding the nature of the route provided. It is unclear what a 5 minute drive might entail for a user or what the starting point of this 5 minute drive is, although I assume it is from the Applicant's pharmacy.
- 2.48 I note that on a Saturday from 22:00-22:30 there will only be Oswaldtwistle Pharmacy open if the Applicant's proposed hours are implemented. Oswaldtwistle Pharmacy is indicated to be "*not within walking distance*". Although the survey results have shown no users at this time, I have already commented on my concerns about the survey with regard to accurate representation of activity.
- 2.49 I am therefore struggling to be satisfied that the existing level of service provision would be maintained by virtue of the existence of other local pharmacies.
- 2.50 The Commissioner states that there is no information from the Applicant with regard to the earlier opening times that they are proposing Monday to Friday and how this will "*maintain as necessary the existing level of service provision for the people in that area*".

or other likely users of the pharmacy premises". I note the comments from the Applicant that there is a marked increase in footfall early in the morning and, therefore, by opening earlier they will maintain the existing level of service provision for those in Accrington.

- 2.51 Firstly, I note that there is no supporting information for the statement referring to marked footfall. The Applicant has not carried out any similar survey as it has done for the hours during which it now proposes to be closed. There is no detailed information indicating how "*marked*" this increase has been, or if it would correlate to service users needing earlier access to the pharmacy.
- 2.52 Secondly, I consider that it is not credible to state that additional hours in the morning mean the existing level of service provision is maintained. There is clearly a "time of opening" aspect when considering the level of service provision and one time cannot automatically be considered equivalent in service provision terms than any other time, whether day or night.
- 2.53 Thirdly, I note that the Applicant has indicated that both Asda and Tesco previously opened at 6am. The Applicant's application indicates its intent to open at 5am on Monday, Tuesday, and Wednesday. I consider that there has been no service available at 5am on those days which makes it difficult to agree that now providing services at that time means the existing level of service provision is maintained.
- 2.54 I have decided that it is necessary to maintain the current service provision but, due to the cumulative effect of:
- 2.54.1 the survey not assuring me that it is representative of the use of the pharmacy;
 - 2.54.2 a lack of information about the services being provided during the hours the Applicant is proposing to close; and
 - 2.54.3 that a pharmacy of unspecified distance is the only option during a part of the hours proposed to be closed
- I am not satisfied that there will be maintenance of the existing level of service provision, whether by virtue of other pharmacies in the area or by the Applicant swapping hours to earlier in the morning.
- 2.55 I therefore next consider if I need to have regard to paragraph 24(1)(b) which states that I must seek to ensure that the changed hours are such as to:
- "maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome"*
- 2.56 I have already determined that it is necessary to maintain the existing level of service provision so reference in paragraph 24(1)(b) to "*in circumstances where maintaining the existing level of service provision is ... unnecessary*" is not relevant.
- 2.57 I note that the Applicant has stated it has "*struggled to find locums to cover the Saturday evenings and Sunday full day shift at an economically viable rate.*" I consider that the Applicant is effectively relying on the second part of paragraph 24(1)(b), that maintaining the existing level of service provision is not a realistically achievable outcome. I consider that I need to determine if it is or is not a realistically achievable outcome and if I determine that it is, then I need to consider if the amended hours are such as to maintain a sustainable level of service provision.
- 2.58 On the point of whether maintaining the existing level of service provision is not a realistically achievable outcome, I consider that no evidence has been put forward to

support the Applicant's statement that it is difficult to find locums at an economically viable rate. No evidence of costs for locums at different times has been provided. No evidence of what efforts have been undertaken to source locums has been provided. There is no explanation as to why locums rather than employees have to be used. I also note that the pharmacy has not provided any suggestion that the pharmacy has been closed due to a failure to secure viable locum cover which might suggest maintaining service provision at the relevant hours is not realistically achievable. The Applicant appears to be saying it is not sustainable to keep paying locums to cover these hours but it has not presented evidence that suggests these fees are compromising the economic viability of its operations at the weekend or otherwise.

- 2.59 I note comments from the Commissioner with regard to the flyer that the Applicant had sent to various GP practices in the area in which the Applicant was offering services at times which, if the instant application was to be granted, the Applicant would no longer be open. I note there is a fair amount of conjecture by the Commissioner here as to the motives or reasons and what this should mean for the application. While I have considered these comments and responses, I consider that they do not materially add to my consideration of the application of the Regulations in this case.
- 2.60 The wording of paragraph 24(1)(b) is such that maintaining existing service levels must not be realistically achievable before considering a sustainable level of adequate provision. I consider that this sets a fairly high bar as to the level of difficulty that the Applicant must find themselves in. I do not consider that sufficient evidence has been provided to indicate that the economic and practical viability of the current opening hours has been compromised. The use of the word "*struggled*" by the Applicant suggests that it has been achievable, but difficult. I therefore consider that maintaining the existing level of service is a realistically achievable outcome and therefore the Applicant cannot rely on paragraph 24(1)(b).
- 2.61 I am mindful that the provision of pharmaceutical services is greater than the dispensing of prescriptions and that maintaining a level of service provision includes all services that the pharmacy may offer, including additional enhanced and advanced services that may be commissioned. I am of the view that I have not been provided with sufficient information to demonstrate how the proposed change of hours would maintain, as necessary, the existing levels of service provision.
- 2.62 I note the comments from the Commissioner as to what they think the Applicant may do in the future and that this application is potentially a step for the Applicant to further amend and potentially reduce their hours under the provisions of the Regulations. I am mindful that there is nothing provided in the information before me to demonstrate that this is what the Applicant is planning on doing. I am of the view that I need to consider the application before me based on the information contained in the application and considered in accordance with the relevant Regulations which are currently in force. I consequently take no view on what the Applicant may or may not choose to do in the future.

3. **Determination**

- 3.1 Based on the information provided, I am not satisfied that the pharmaceutical services provision that would result from the Applicant's proposed hours would maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises. I am satisfied that maintaining the current level of service is a realistically achievable outcome and therefore the Applicant cannot rely on paragraph 24(1)(b).
- 3.2 The action taken by Lancashire & South Cumbria Integrated Care Board to refuse the application is confirmed.

Head of Appeals
NHS Resolution