

21 December 2023

FILE REF: SHA/26085

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DECISION MAKING BODY: NHS Cheshire and Merseyside
Integrated Care Board (“the
Commissioner”)

PHARMACIST: Micon Health Limited
 (“the Applicant”)

PREMISES: Watterson Pharmacy
79 High Street
Liverpool
L15 8HF

**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 the Commissioner to refuse the application is confirmed.

A copy of this decision is being sent to:

Brabners LLP on behalf of Micon Health Limited
NHS Cheshire and Merseyside ICB

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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).

Watterson Pharmacy proposals

- 2.9 The Applicant in its letter of appeal indicates that it currently has core opening hours totalling 40 hours per week.
- 2.10 The Applicant wishes to:
- 2.10.1 Open from 2pm to 6pm Monday to Friday rather than the current afternoon opening hours of 2:30pm to 6:30pm Monday to Friday.

Assessment

- 2.11 In this case, the Applicant provided the following information in its application form dated 12 July 2023:
- 2.11.1 “This is an application to permanently change core opening hours.
- 2.11.2 Current opening hours for these premises:

Monday	09:00 – 13:00
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	14:30 – 18:30
Tuesday	09:00 – 13:00 14:30 – 18:30
Wednesday	09:00 – 13:00 14:30 – 18:30
Thursday	09:00 – 13:00 14:30 – 18:30
Friday	09:00 – 13:00 14:30 – 18:30
Saturday	10:00 – 14:00
Sunday	Closed

2.11.3 Proposed core opening hours for these premises:

Monday	09:00 – 13:00 14:00 – 18:00
Tuesday	09:00 – 13:00 14:00 – 18:00
Wednesday	09:00 – 13:00 14:00 – 18:00
Thursday	09:00 – 13:00 14:00 – 18:00
Friday	09:00 – 13:00 14:00 – 18:00
Saturday	10:00 – 14:00
Sunday	Closed

2.11.4 If this is a permanent change, please state below the date from which you would like the change to take effect: Yes – Effective from 16th October 2023.

2.11.5 We have observed for a while that a lot of people knock at the door trying to come into the pharmacy during the current lunch period from 1 pm to 2:30 pm. On the other hand, the period between 6 pm and 6:30 pm is comparatively very quiet. We believe the change to the shorter lunch period will help us meet the needs of our customers better while retaining the same core hours.

2.11.6 Customer shopping pattern has also changed since Covid. Customers are shopping during the day than late. We believe reducing the lunch break and serving patients during the day will be more beneficial for them.

2.11.7 Currently, the hours we are open Monday to Friday is 40 hours, and when the change is made, we will still be open for 40 hours Monday to Friday. In addition, we open Saturdays from 10 am to 2 pm on Saturdays [sic] providing service to patients who cannot come in during the week because they are working Monday to Friday.

2.11.8 Our primary feeder surgery at Lance Lane Medical Centre (19 Lance Ln, Liverpool L15 6TS) finishes at 6 pm (apart from Tuesdays when they open till 8pm) so we are available for any queries the doctors may have until 6 pm. Even the Day Lewis Pharmacy inside that Medical Centre closes at 6pm, therefore we are not making an unusual request.

2.11.9 This is the third time we are making this application. 100-hour Pharmacies have been allowed to reduce their core hours to not less than 72 hours recently. We are, however, not changing the hours we open at all and only asking to close 30 minutes earlier (at a time when it is quiet) and give more 30 minutes to serving customers (at a time when they need our [sic] more). We trust that

our application will be favourably considered. We may have to consult our legal advisors if our application is rejected for the third time.”

2.12 In a letter to the Applicant dated 29 August 2023 the Commissioner stated:

2.12.1 “I am writing to inform you of the Pharmaceutical Services Regulations Committee’s decision with respect to your application to amend core opening hours for the above pharmacy.

2.12.2 The Committee considered the application in accordance with Schedule 4, Part 3, paragraph 26 of the NHS (Pharmaceutical Services & Local Pharmaceutical Services) Regulations 2013 (as amended).

2.12.3 NHS Cheshire and Merseyside considered the application with reference to the local Pharmaceutical Needs Assessment and any supplementary statements issued since publication.

2.12.4 The Committee noted the alternative pharmaceutical provision in the wider locality, however it was considered that the application has failed to meet the following criteria stated in the NHS (Pharmaceutical Services & Local Pharmaceutical Services) Regulations:

24.—[F1(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

2.12.5 From the information available to the committee, either as part of the application or from any other sources available, the Committee were unable to approve your application.

2.12.6 Therefore, your application was refused and you now have 30 days from the date this letter is received (Schedule 4, Part 3, paragraph 26(9) to submit an appeal in writing to NHS Resolution (formerly FHSAU)

NHS Litigation Authority (formerly FHSAU) Arena Point Merrion Way Leeds LS2 8PA”	Tel: 0113 866 5500 Fax: 020 7821 0029 Email: appeals@resolution.nhs.uk
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2.13 Extract from the NHS Cheshire and Merseyside Pharmaceutical Services Regulations Committee – August 2023

2.13.1 “Proposal to make a permanent change to core hours to take effect 3 months from the date of approval.

2.13.2 Current core hours:

2.13.2.1Monday – Friday

2.13.2.209:00 – 13:00 & 14:30 – 18:30

2.13.2.3Saturday

- 2.13.2.4 No core hours
- 2.13.2.5 Sunday
- 2.13.2.6 No core hours
- 2.13.3 Proposed core hours:
 - 2.13.3.1 Monday – Friday
 - 2.13.3.2 09:00 – 13:00 & 14:00 – 18:00
 - 2.13.3.3 Saturday
 - 2.13.3.4 No core hours
 - 2.13.3.5 Sunday
 - 2.13.3.6 No core hours
- 2.13.4 Determination of pharmacy premises core opening hours instigated by the NHS Pharmacist [Regulations quoted in full]
- 2.13.5 Additional information
- 2.13.6 Current core hours [as above]. These hours have been agreed with NHS Cheshire & Merseyside.
- 2.13.7 Proposed core hours [as above]. This change would mean the pharmacy closed 30 minutes earlier Mon – Friday but opened for an extra 30 minutes at lunchtime.
- 2.13.8 The pharmacy has no supplementary hours Mon – Fri but does have supplementary hours on Saturday 10:00 – 14:00.
- 2.13.9 Services offered by FHN18:
- 2.13.10 The following services are provided at these premises and as such should be available during all core hours:
 - 2.13.10.1 CPCS, NMS, Flu Vaccination
- 2.13.11 Whether the premises are subject to a condition set out in regulation 65 of the 2013 Regulations
 - 2.13.11.1 With regard regulation 65(1)
 - 2.13.11.2 FHN18 is not a 100-hour contract with regard regulation 65(4) and (5):
 - 2.13.11.3 FHN18 has no current direction issued regarding opening hours, other than directed rota hours for Bank Holiday opening.
- 2.13.12 The applicant has provided the following information and rationale for the proposed change to core opening hours:
- 2.13.13 [as set out in the application form at paragraphs 2.11.5 – 2.11.9]

2.13.14 NHS Cheshire & Merseyside is obliged to ensure appropriate provision of pharmaceutical services are available at all times according to the needs of the local population as identified in the local Pharmacy Needs Assessment.

2.13.15 When considering an application from a contractor who wishes to change the days on which or times at which they are obliged to provide pharmaceutical services during core opening hours, integrated care boards will need to establish the current level of pharmaceutical service provision in the area in which the contractor's premises are located. This will include identifying:

- The location of the pharmacy premises in the area noting that such premises may be in the area of neighbouring integrated care boards,
- The provision of pharmaceutical services to those in the area of the contractor's premises by contractors who are not located in that area, for example distance selling premises, pharmacies elsewhere in the country, and dispensing appliance contractors,
- Any local hours plans that may be in place for the area,
- The level of temporary suspensions in the provision of pharmaceutical services in the area, and
- The findings of the pharmaceutical needs assessment for the area in which the contractor's premises are located, noting that pharmacy opening times may have changed since it was published.

2.13.16 NHS UK lists 10 pharmacies within 1 mile of FHN18.

2.13.17 Of these pharmacies only 2 have core opening hours later than 18:00 Mon – Friday. One of which is FHN18.

2.13.18 NHS UK details those pharmacies close to L15 8HF

[Pharmacies near L15 8HF - NHS \(www.nhs.uk\)](http://www.nhs.uk)

2.13.19 NHS UK details the closest GP practices to L15 8HF

[GP surgeries near L15 8HF - NHS \(www.nhs.uk\)](http://www.nhs.uk)

2.13.20 There are no local hours plans in operation in this locality and the number of temporary suspensions is minimal.

2.13.21 The Liverpool PNA states:

“Almost all respondents (97%) stated that it was easy or quite easy getting to their usual pharmacy. More than half (56%) walked to the pharmacy, whilst 48% drove by car. A further 3% travelled using public transport. For people with a condition affecting their mobility, just over a quarter (27%) stated that they were not able to park close enough to their pharmacy. The most important factors to residents about the location of the pharmacy is that it is close to their home (76%), close to the GP surgery (43%), and that it is easy to park nearby (29%).”

The Liverpool PNA lists FHN18 as being in the Liverpool Wavertree ward. It lists 22 pharmacies within this ward with 6 of those being open between 6pm – 8pm. However, it should be noted that the PNA does not distinguish between core and supplementary hours. Pharmacies with supplementary opening hours could choose to remove these hours with 5 weeks notice and as such should not be considered when determining core hours applications.”

2.13.22 Recommendation:

2.13.23 The recommendation would be to refuse this application, as it would leave the ward of Liverpool Wavertree without adequate core hour pharmaceutical services after 6pm Mon – Fri, thus failing to maintain the existing level of service provision for the people in that area.

24.—[F1(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

2.13.24 Whilst Liverpool PNA shows the Liverpool Wavertree ward to have seen a decline in population since 2000, it also states that proposed developments will see the population in this ward increase by approx. 1,480; therefore we can surmise that the current level of adequate provision is necessary.

(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.”

2.14 In a letter to NHS Resolution dated 28 September 2023 Brabners LLP on behalf of the Applicant stated:

2.14.1 “We are instructed on behalf of Micon Health Limited (the “Applicant”), the proprietor of the Pharmacy, to submit an appeal in respect of its application to amend the core opening hours at the Pharmacy (the “Application”), which has been refused by the Pharmaceutical Services Regulations Committee (the “Committee”).

2.14.2 The Committee asserts in its decision letter (dated 29th August 2023) that the Application failed to meet the following criteria set out in the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (the “Regulations”):

“24. [F(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 they 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 such as –

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

2.14.3 For completeness, a copy of the Application and the Committee’s decision letter are attached at the Annex to this letter. [see Appendix A].

Appeal Grounds

Relevant Regulations

2.14.4 On behalf of the Applicant, we are instructed to submit an appeal of the Committee’s decision on the following grounds:

- 2.14.4.1 the decision fails to provide sufficient explanation or consideration of Paragraph 24(1)(b) Part 3 of Schedule 4 of the Regulations; and
- 2.14.4.2 the decision fails to provide any consideration of Paragraph 24(2) Part 3 of Schedule 4 of the Regulations.
- 2.14.5 The decision letter sets out that the Committee has determined the refusal on the basis that it would *“leave the ward of Liverpool Wavertree without adequate core hour pharmaceutical services after 6pm Mon – Fri, thus failing to maintain the existing level of service provision for people in that area...”* in accordance with Part 3 of Schedule 4 Paragraph 24(1)(a) of the Regulations.
- 2.14.6 The decision letter further refers to the Liverpool Pharmaceutical Needs Assessment (“PNA”) showing a decline in population across the Liverpool Wavertree ward since 2020 but that proposed developments may potentially see it rise by approximately 1,480 residents. The Committee surmises therefore that the *“the current level of adequate provision [of pharmaceutical services] is necessary”*.
- 2.14.7 We note that the Committee seeks in its decision letter to use the above observation as its justification for how the Application fails to meet Part 3 of Schedule 4 Paragraph 24(1)(a) of the Regulations. However, whilst it is acknowledged that the decision letter also sets out Part 3 of Schedule 4 Paragraph 24(1)(b) of the Regulations, it is clear that that the Committee has failed to give adequate consideration or explanation as to how the Application has failed to meet the requirements of Paragraph 24(1)(b), which states that when determining an application, NHS England must give consideration to whether the changes are such as:
- “to maintain a suitable 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.”*
- 2.14.8 The relevant legislative test is a disjunctive one, not a conjunctive one, and as such the Committee must give full consideration as to whether the Application satisfies either Paragraph 24(1)(a) or Paragraph 24(1)(b). We consider that the Committee has failed to give adequate consideration to Paragraph 24(1)(b).
- 2.14.9 Furthermore, while the Committee’s minutes note that the relevant Regulations include Paragraph 24(2), the decision letter fails to provide any explanation or consideration of whether in its decision making the Committee has adequately considered the requirements of this Paragraph, which states:
- “Paragraph 24(2) In considering the matters mentioned in sub-paragraph (1), the NHSCB –*
- (a) must treat any local pharmaceutical services being provided in its areas 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.”*

Application details

- 2.14.10 For ease of reference, the Applicant’s existing core hours are:

2.14.10.1 Monday – Friday: 09:00 – 13:00 & 14:30 – 18:30

2.14.10.2 Saturday and Sunday: Closed

2.14.11 The Applicant's proposed core hours are:

2.14.11.1 Monday – Friday: 09:00 – 13:00 & 14:00 – 18:00.

2.14.11.2 Saturday and Sunday: Closed.

2.14.12 We note that the Applicant's proposed core hours will not reduce the total number of core hours during which the Pharmacy remains open. The Pharmacy is merely seeking to close half an hour earlier on Monday to Friday with the additional counter-balancing benefit of opening half an hour earlier in the afternoon on those days.

Analysis of decision

2.14.13 The decision states that the Committee “*noted the alternative pharmaceutical provision in the wider locality*” but of the pharmacies that the Committee has identified within 1 mile of the Pharmacy, “*only 2 have core opening hours later than 18:00 Mon – Friday. One of which is [the Pharmacy]*”.

2.14.14 We submit that the Committee's inference is that if the Pharmacy reduced its core opening hours in accordance with the Application, that would leave just one pharmacy in the locality that would remain open after 1800 Monday to Friday, thereby leaving inadequate choice of pharmaceutical services for residents of the locality after such time.

2.14.15 We consider that the Committee is incorrect in its analysis of the pharmaceutical services offering within the local area.

2.14.16 From a simple search of the “NHS Search a Pharmacy” service using the Pharmacy's postcode as a starting point, it is clear that (excluding the Pharmacy) there are in fact three other pharmacies which are located within 1 mile of the Pharmacy which are open after 1800. Those pharmacies are:

2.14.16.1 Asda Pharmacy – Asda Stores Ltd, Smithdown Road, Liverpool L15 3JR (0.8 miles away) – 0900 to 2000;

2.14.16.2 Sefton Park Pharmacy – Optichem House, Smithdown Road, Liverpool L15 3JR (0.8 miles away) – 0830 to 1830;

2.14.16.3 Tesco Instore Pharmacy – Tesco Superstore, St Oswalds Street, Liverpool L13 2BY (1 mile away) – 0900 to 2100

2.14.17 For completeness and widening the search a little further, Tesco Instore Pharmacy, Mather Ave, Liverpool L18 6HF, which is only 1.7 miles from the Pharmacy, is also open until 2000.

2.14.18 We therefore consider that, in accordance with Paragraph 24(1)(b), the Application to amend the core hours of the Pharmacy should be granted on the basis that the pharmaceutical service offering in the area will be maintained to a sustainable level of adequate service provision for residents of the area.

2.14.19 Notwithstanding the above evidence of an adequate service provision after 18:00, we note that when the Committee has reviewed the pharmaceutical services offering in accordance with Paragraph 24(2) of the Regulations, it appears to have limited its considerations only to the core opening hours of local pharmacies. This is apparent in the Committee notes stating, “*of these pharmacies only 2 have core opening hours later than 18:00...*”.

- 2.14.20 We note that the Committee has the discretion under Paragraph 24(2)(b) of the Regulations to consider any pharmaceutical services that are being provided in its area during supplementary opening hours.
- 2.14.21 We submit that, while it is acknowledged that this legislative test is discretionary, in the circumstances it is clearly a relevant factor for the Committee to have considered when making its decision. We submit that by failing to exercise its discretion to consider the provision of pharmaceutical services in the locality during supplementary hours in its decision making (and limiting its considerations to pharmaceutical service provision during core hours only), the Committee has unfairly prejudiced the interests of the Applicant.
- 2.14.22 We submit that it is unreasonable, unfair and prejudicial to our client's interests that the Committee has neither considered the extent and effect of the provision of pharmaceutical services during such supplementary hours nor provided the Applicant with an explanation as to whether it has adequately considered the requirements of Paragraph 24(2)(b).
- 2.14.23 For the reasons set out above, we consider that the Committee has failed to appropriately consider the Application in accordance with the relevant Regulations and all the relevant information which is available in respect of pharmaceutical services provision in the locality. Therefore, we respectfully request that this appeal is granted."
- 2.15 In a letter to NHS Resolution dated 1 November 2023 the Commissioner stated:
- 2.15.1 "Thank you for your letter dated 3rd October notifying us of the appeal submitted by Micon Health Limited - FHN18.
- 2.15.2 NHS Cheshire & Merseyside ICB maintains its decision to refuse this amendment to core hours application under Regulation 24(1)(a) and b):
- 24.—[F1(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.*
- 2.15.3 The original application upon which NHS Cheshire & Merseyside ICB's Pharmaceutical Services Regulations Committee (PSRC) based its decision states: [as quoted at paragraphs 2.11.5 to 2.11.9 above]
- 2.15.4 The PSRC determined that the applicant had failed to provide any evidence that patient need is greater during the current lunch break of 1pm – 2.30pm, they also failed to explain why opening for 30 minutes during a 1hr30 period where they claim people knock on the door trying to access the pharmacy would benefit patients. If users of the pharmacy were trying to access services during their own lunch break, then it's unlikely that opening from 2pm is the required solution.

- 2.15.5 They stated that the period between 6pm – 6.30pm is comparatively very quiet; however this would suggest that people do still access the pharmacy during this time and as such there is still a requirement for the pharmacy to be open.
- 2.15.6 The applicant states that their primary feeder surgery at Lance Lane Medical Centre closes at 6pm, as does the pharmacy located at this site. The PSRC felt this to be more of a reason to maintain services after 6pm, as it allows any patients seen at the end of the day by a GP to be able to collect an acute prescription from a nearby pharmacy.
- 2.15.7 In their appeal letter the appellant states that the committee is incorrect in its analysis of the pharmaceutical services within the local area that are open after 6pm. We do not dispute that there are other pharmacies open after 6pm; however as stated in the committee report only one of the pharmacies listed by the appellant has core opening hours after 6pm, Monday - Friday. I have provided the core and supplementary hours (Monday – Friday only) for each of these pharmacies below
- 2.15.8 Asda Pharmacy – Asda Stores Ltd, Smithdown Road, Liverpool L15 3JR (0.8 miles away):
- 2.15.8.1 Core opening hours: 09:00 – 12:30, 14:30 – 18:00
- 2.15.8.2 Supplementary opening hours: 12:30 – 13:00, 14:00 – 14:30, 18:00 – 20:00
- 2.15.9 Sefton Park Pharmacy – Optichem House, Smithdown Road, Liverpool L15 3JR (0.8 miles away):
- 2.15.9.1 Core opening hours: 09:00 – 13:00, 14:30 – 18:00
- 2.15.9.2 Supplementary opening hours: 08:30 – 09:00, 13:00 – 14:30, 18:00 – 18:30
- 2.15.10 Tesco Instore Pharmacy – Tesco Superstore, St Oswalds Street, Liverpool L13 2BY (1 mile away):
- 2.15.10.1 Core opening hours: 09:00 to 21:00
- 2.15.11 Tesco Instore Pharmacy - Mather Ave, Liverpool L18 6HF, which is only 1.7 miles from the Pharmacy:
- 2.15.11.1 Core opening hours: 09:00 – 13:00, 14:00 – 18:00
- 2.15.11.2 Supplementary opening hours: 08:30 – 09:00, 13:00 – 14:00, 18:00 – 20:00
- 2.15.12 Both Asda Pharmacy and Sefton Park Pharmacy have supplementary opening hours only from 6pm Monday – Friday. The committee considered the opening hours of these pharmacies when determining this application and concluded that, as they can remove these opening hours with only 5 weeks' notice, they cannot be relied upon when considering access to pharmaceutical services in the locality.
- 2.15.13 The applicant also references a Tesco pharmacy that is 1.7 miles away. Again, although open until 8pm, 6pm – 8pm are supplementary hours and therefore could be amended with only 5 weeks' notice, again making a stronger case for Micon Health Limited to maintain core hours from 6pm – 6.30pm.

- 2.15.14 The appellant believes that the committee failed to adequately consider paragraph 24(1)(b); however it is clearly stated in the decision report and the minutes that were included with the decision letter, that the committee considered that although the Liverpool Pharmaceutical Needs Assessment (PNA) indicates a decline in population across parts of the Wavertree ward, it also states that proposed developments may potentially see it rise again by approximately 1480 residents. Therefore, the committee determined that it is necessary to maintain the existing level of pharmaceutical service provision. The appellant has provided no evidence to suggest that this is not a realistically achievable outcome. We would ask that the decision to refuse this application is upheld as the appellant has provided no evidence in either in their original application or subsequent appeal letter to suggest the needs of people accessing services at their pharmacy is greater between 2pm – 2.30pm than it is between 6pm – 6.30pm. The appellant has a responsibility to provide evidence that their application satisfies the requirements of Regulation 24(1)(a) and (b) and they have failed to do so.”
- 2.16 No observations in response to the representations were received.
- 2.17 The application form, as submitted by the Applicant, on 12 July 2023 in the table under “please insert below the current core opening hours for these premises” states that the pharmacy has core hours on a Saturday from 10am to 2pm. This would mean that the core hours, as declared on the application form total 44 hours.
- 2.18 Further, I note that in the table under “Please insert below the proposed core opening hours for these premises” the Applicant has again shown the Saturday hours of 10am to 2pm.
- 2.19 In the information to support the change of hours, I note that the Applicant has stated “... the hours we are open Monday to Friday is 40 hours. ... In addition, we open Saturday from 10am to 2pm ...”
- 2.20 In the PSRC minutes, as included by the Applicant’s representative and by the Commissioner with their representations I note that it is stated that the “core hours” of the pharmacy are Monday to Friday with the hours offered on a Saturday being supplementary hours. I further note that this is confirmed by the Applicant’s representative in their appeal letter as set out at paragraph 2.13.10 above.
- 2.21 Given that there is no dispute between the parties with regard to the current core opening hours, I am of the view that the hours included in the application form for Saturdays are a typographical error and that the pharmacy does not currently have any core hours on a Saturday.
- 2.22 I am of the view that the Applicant’s core opening hours total 40 hours and the Applicant proposes to redistribute those 40 core opening hours pursuant to paragraph 26 of Schedule 4. The Applicant seeks to provide services as per its proposed changes as set out in its letter of appeal at 2.13.11 above.
- 2.23 The Applicant proposes to:
- 2.23.1 Open between 2pm and 2:30pm Monday to Friday rather than being closed; and
- 2.23.2 Close early at 6pm Monday to Friday rather than at 6:30pm.
- 2.24 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.

- 2.25 The application to change the hours was made by the Applicant on 12 July 2023 and a decision was made by the Commissioner on 29 August 2023. The decision was appealed to NHS Resolution by letter dated 28 September 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.
- 2.26 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".
- 2.27 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."*
- 2.28 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).*
- 2.29 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.*
- 2.30 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.*
- 2.31 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 times that services are provided. Taking Monday as an example, the level of service provision at the Applicant's premises on a Monday 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 states that *"we have observed for a while that a lot of people knock at the door trying to come into the pharmacy during the current lunch period from 1pm to 2:30pm..."* and further *"the period between 6pm and 6:30pm is comparatively very quiet"*. However, apart from these statements, I have not been provided with any information by the Applicant as to the level of use of the pharmacy either at the times that they are seeking to close or the times that they are seeking to open.
- 2.40 The Applicant has stated that the GP practice that is their *"primary feeder surgery ... finishes at 6pm (apart from Tuesdays when they open until 8pm) so we are available for any queries the doctors may have until 6pm."* Be that as it may, pharmaceutical services provided up to 6pm are not a factor in this case. It is more relevant to understand the number of patients of this GP practice and other practices who require dispensing and other essential services past 6pm. I note the comment from the

Applicant that the pharmacy co-located within the surgery closes at 6pm, however, operating decisions of another pharmacy do not assist me .

- 2.41 I have no information as to whether people are using the pharmacy at the times that the Applicant wishes to close. I consider that it is relevant to have information as to why persons are using the pharmacy at the times in question. 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.
- 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. I note the 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, Sefton Park Pharmacy and Tesco St Oswalds Street.
- 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 no information, except for distance, regarding access to those pharmacies for those who currently access its own pharmacy and how they might travel to find alternative pharmaceutical services. Further,) the Applicant has provided no information as to the services that these pharmacies offer and if the level of service provision will be maintained for people in the local area.
- 2.46 In addition, whilst the nearest pharmacies may be open until 8pm (Asda) and 6:30pm (Sefton Park Pharmacy) the core opening hours for the nearest pharmacies have been confirmed as 9am to 12:30pm and 2:30pm to 6pm (Asda); 9am to 1pm and 2:30pm to 6pm (Sefton Park Pharmacy) and 9am to 9pm (Tesco, St Oswalds Street). The core and supplementary hours as stated by the Commissioner have not been disputed by the Applicant. I am mindful that supplementary hours can be amended by the individual contractor by giving the relevant notice to the Commissioner as set out in paragraph 23(6)(a) of Schedule 4. On this basis, I have not placed weight on the provision of pharmaceutical services outside of the core hours offered by other contractors in the area.
- 2.47 I am therefore unable to be satisfied that the existing level of service provision would be maintained by virtue of the existence of other local pharmacies.
- 2.48 I have decided that it is necessary to maintain the current service provision but, due to the cumulative effect of:
- 2.48.1 a lack of information about the services being provided during the hours the Applicant is proposing to close; and
- 2.48.2 a lack of information, except for distance, regarding other pharmacies in the area being alternative options during 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 open during the lunchtime period.

- 2.49 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”.

- 2.50 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.

- 2.51 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 in respect of this criteria.

- 2.52 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. 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).

- 2.53 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.

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 the Commissioner to refuse the application is confirmed.

**Head of Appeals
NHS Resolution**