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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

APPELLATE CASE NO.: 2019-001159
ADMINISTRATIVE LAW COURT CASE NO.: 18-ALJ-07-0100-CC

Trident Medical Center, LLC, d/b/a Trident Medical Center .....Respondent,

v.

South Carolina Department of Health and Environmental Control
and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center
– Berkeley County .....Respondents,

Of Which Medical University Hospital Authority d/b/a MUSC Radiation
Therapy Center – Berkeley County is the.....Appellant.

RESPONDENT TRIDENT MEDICAL CENTER LLC'S
PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Pursuant to Rules 219(B) and 221, SCACR, and for the reasons set forth below, Trident Medical Center, LLC d/b/a Trident Medical Center ("Respondent") hereby petitions the Court for rehearing and suggests a rehearing *en banc* of the December 14, 2022 panel opinion reversing the decision of the Administrative Law Court ("ALC") in the above-captioned case.

ISSUES OVERLOOKED OR MISAPPREHENDED BY THE PANEL OPINION

1. IN REVERSING THE DECISION OF THE ALC ON PROCEDURAL GROUNDS, THE PANEL'S OPINION FAILS TO CONSIDER AND ADDRESS THAT THE CASE MUST BE REMANDED TO THE ALC, AS THE SOLE TRIER OF FACT *DE NOVO*, FOR A DETERMINATION ON THE MERITS OF THE CERTIFICATE OF NEED ISSUES PRESENTED IN THE CONTESTED CASE PROCEEDINGS BELOW.

2. IN REVERSING THE DECISION OF THE ALC ON PROCEDURAL GROUNDS, THE PANEL'S OPINION FAILS TO CONSIDER AND ADDRESS THE ALC'S ADDITIONAL SUSTAINING GROUND ON THE MERITS MADE BY THE ALC AS THE TRIER OF FACT *DE NOVO*, WHICH GROUND IS BASED ON THE SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE APPELLANT IS NOT THE PROPER LICENSEE UNDER THE LAW FOR THE PROJECT SET FORTH IN ITS APPLICATION.

3. IN HOLDING THAT THE ALC LACKED THE STATUTORY AUTHORITY TO CONSIDER THE UNCONSTITUTIONAL AND ILLEGAL NATURE OF THE PROJECT, THE PANEL OPINION OVERLOOKS THE ALC'S FINDINGS OF FACT, SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD, THAT THE STRUCTURE OF THE PROJECT IS A CRITICAL ISSUE IN DETERMINING WHETHER THE PROJECT COMPLIES WITH THE STATE HEALTH PLAN AND PROJECT REVIEW CRITERIA.

4. IN HOLDING THAT THE ALC IS BARRED BY S.C. CODE ANN. § 44-7-210(E) OF THE CERTIFICATE OF NEED ACT FROM CONSIDERING THE UNCONSTITUTIONAL AND ILLEGAL NATURE OF THE PROJECT, THE PANEL OPINION MISAPPREHENDS THE REQUIREMENTS OF THAT LAW AND THE HOLDING OF THE SUPREME COURT IN *MARLBORO PARK HOSPITAL* REGARDING THE PRESERVATION OF ISSUES AND IGNORES THE FINDINGS OF FACT MADE BY THE ALC CONCERNING THE DEPARTMENT'S CONSIDERATION OF THE VARIOUS CON CRITERIA ENCOMPASSING THE ISSUE OF OWNERSHIP OF THE PROJECT.

5. IN HOLDING THAT RESPONDENT WAS REQUIRED TO PRESENT AS AN ISSUE TO THE DEPARTMENT THE UNCONSTITUTIONAL AND ILLEGAL STRUCTURE OF APPELLANT'S PROJECT, THE PANEL OPINION FAILS TO CONSIDER (A) ITS OWN CONCLUSIONS THAT THE DEPARTMENT DID NOT HAVE THE ABILITY

TO ADDRESS SUCH ISSUES; (B) THE FINDINGS OF FACT MADE BY THE ALC THAT RESPONDENT DID NOT LEARN THE EXACT NATURE OF THE JOINT VENTURE ARRANGEMENT UNTIL AFTER DISCOVERY AND TESTIMONY GIVEN DURING THE HEARING; (C) THE DOCTRINE OF FUTILITY, WHICH EXCUSES THE FAILURE TO RAISE SUCH ISSUES BEFORE THE DEPARTMENT; AND (D) THE CASE LAW SUPPORTING THE AUTHORITY OF THE ALC TO DETERMINE SUCH ISSUES IN THE FIRST INSTANCE. [1]

BACKGROUND

On May 22, 2017, the Medical University Hospital Authority ("Appellant") applied to the Department of Health and Environmental Control ("Department") for a Certificate of Need ("CON") to establish a radiation therapy center in Berkeley County to house and operate a new linear accelerator ("Project") (**R. pp. 1595-1817**). In its CON application, Appellant identified itself as the proposed licensee of the Project and indicated that a joint venture entity known "MUSC Health Cancer Care Network, LLC" ("Network") would act as the manager of the Project.[2] (**R. pp. 1599-1600).**

On June 7, 2017, Respondent notified the Department of its status as an affected person and specifically stated that it opposed Appellant's Project.[3] (**R. p. 1818**). Thereafter, the

[1] In addition to the matters raised herein, Respondent incorporates the Brief of Respondent, including all issues (I through V) raised and all arguments made therein. To the extent the merits of Respondent's statutory and constitutional arguments are considered in this case, Respondent specifically incorporates Issue IV and all factual and legal arguments made on that issue.

[2] As was eventually revealed during the course of this case, Network is a private, for profit joint venture entity, which is 51% owned and controlled by a private, for profit company known as Alliance Oncology, LLC and 49% owned by MUSC Strategic Ventures, a nonprofit entity formed and controlled by the Medical University of South Carolina, a South Carolina state agency. (**R. pp. 1509– 1563; 1599-1600).**

[3] In its letter, Respondent indicated that it opposed the Project because "among other reasons, the project does not comport with the purposes of the CON Act; the project does not comply with the standards set forth in the 2015 *South Carolina Health Plan*; the project is not needed; the project will have an adverse impact on Trident's radiation therapy program; the project does not increase accessibility to [services]; and the project will not contain costs." (**R. p. 1818**).

Department accepted Respondent's status as an affected person opposing the Project for purposes of S.C. Code Ann. Regs. 61-15 § 103(1).[4] **(R. p. 1970)**. Section 103.1 provides, in relevant part, that "A person may not file a request for final review in opposition to the staff decision on a Certificate of Need unless the person provided written notice to the Department during the staff review that he is an affected person and specifically states his opposition to the application under review." By appearing as an affected person and stating that it opposed the Project, Appellant satisfied the requirements necessary to appeal from the decision of the Department. *See also* S.C. Code Ann. § 44-7-210(C).

During the course of the Department staff review, Respondent continued to state its opposition to Appellant's Project by presenting arguments on some, but not all, of the issues pending before the Department. For example, at the in-person project review meeting, conducted on September 20, 2017, and, again, in follow up correspondence dated October 4, 2017, Respondent discussed the failure of Appellant's project to meet the requirements of the applicable State Health Plan standards and certain project review criteria set forth in the CON regulations, including need, community need documentation, adverse impact on other providers, and unnecessary duplication of services. **(R. pp. 63-66; 74-89).**

In addition to issues raised directly by Respondent, many other issues were before the Department in its review of Appellant's Project. For example, the issues of ownership and management of the Project and the identification of the proper licensee were presented to the

[4] The Department finds in its November 22, 2017 decision that Respondent is an affected person, pursuant to S.C. Code Ann. Regs. 61-15, Section 103(1), and that Trident opposed the Project. **(R. p. 1970)**.

Department by Appellant in the form of its answers to required questions in its CON application.[5] **(R. pp. 1599 - 1604; R. pp. 1607 – 1610).**

Other project review criteria found in the CON regulations also require examination and consideration of the ownership of a project and the identity of the licensee, including an applicant's ability to complete the project, the financial feasibility of the project, and the record of the applicant.[6] All of these review criteria were presented to the Department staff during the review process.[7] (*See generally* **R. pp. 1595-1817).**

Furthermore, as found by the ALC, the Department in fact considered ownership and management of the Project in making its decision to approve Appellant's CON application because S.C. Code Ann. § 44-7-210(C) requires the Department to determine whether a project complies with the State Health Plan and the project review criteria set forth in the CON regulations prior to approving it.[8] The Department had to consider the identity and structure of the ownership and management of the Project in this case as those issues are part of the regulatory project review

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[5] S.C. Code Ann. Regs. 61-15, § 202(8) requires an applicant to "provide the following ownership information" to include "(a) Proposed name of facility; (b) Name and address of licensee or prospective licensee; (c) Complete title of the licensee's governing body; (d) Name, title and mailing address of presiding officer of the governing body; [and] (e) Name and mailing address of all persons and/or legal entities having any ownership interest or owner's equity of the licensee to include a schedule of percent and type ownership claim of each." This section also specifies that the "licensee" must be "the legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or service; the owner of the business."

[6] *See* S.C. Code Ann. Regs. 61-15 § 802(14), (15), and (13), respectively.

[7] Project review criteria are adopted by the Department in regulations and "must be used in reviewing all projects under the Certificate of Need process." S.C. Code Ann. § 44-7-190. In total, there are thirty-three project review criteria. *See* S.C. Code Ann. Regs. 61-15 § 802.

[8] The Department may not issue a CON to an applicant "unless the application complies with the South Carolina Health Plan, Project Review Criteria, and other regulations." S.C. Code Ann. § 44-7-210 (B).

criteria. **(R. p. 18).** This finding by the ALC is supported by the substantial evidence in the record that the Department in fact did consider the entire CON application and all of the project review criteria..[9]

In response to the Department's November 22, 2017, decision to approve Appellant's CON application, Respondent continued opposing the Project by requesting a final review conference by the Board of the Department.[10] **(R. pp. 68-72)**. In its request for a review conference, Respondent reserved the right to raise any issue considered by or presented to the Department and requested denial of Appellant's CON application on the general grounds that the "Department staff's decision to approve MUSC's CON application must be overturned because the CON application fails to comply with the standards set forth in the State Health Plan, the goals and purposes of the CON Act, and the applicable project review criteria set forth in the CON regulations." **(R. pp. 68-69)**. On January 31, 2018, the Board exercised its option to decline final review, thus rendering the staff decision the final agency decision for purposes of contested case review by the ALC. (**R. pp. 54-55**).

In its Petition for Administrative Review and Request for Contested Case Hearing by the ALC, Respondent reserved the right to raise any issue presented to or considered by the Department and asserted that Appellant's Project fails to comply with the State Health Plan, the CON Act and CON Regulations. **(R. pp. 37-45)**. Similarly, in its Prehearing Statement filed with

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[9] Margaret Murdock, the Director of the CON Program, testified that, in reviewing this case, she read through the entire application from beginning to end, made mental notes of follow up questions, went through the State Health Plan and Regulation 61-15, considering in particular the project review criteria. **(R. p. 606, lines 5-15; p. 607, lines 1-19).**

[10] The effect of Respondent's Request for a Final Review Conference and its subsequent Petition for Administrative Review was to prevent the Department staff decision to approve Appellant's CON application from becoming final. *See* S.C. Code Ann. §§ 44-7-210(D) and 44-1-60(E)(2) and (F).

the ALC, Respondent reserved its right to address any issue presented to or considered by the Department or that arose during discovery, while setting forth its general and specific arguments concerning the Project's failure to meet the requirements of the State Health Plan, the CON Act and CON Regulations. **(R. p. 1979)**.

As found by the ALC and supported by the substantial evidence in the record, not until Respondent was allowed discovery and a chance to examine Appellant's witnesses under oath — which occurred for the first time before the ALC — did Respondent obtain "a complete picture of Network's structure and its integral role in the operation and financing of the Project. **(R. pp. 18-19)**. It is undisputed that Respondent had no access to organizational and operational documents, which fully described Network's ownership interests and responsibilities with regard to the Proposed Project, until Appellant was compelled to produce them in discovery. **(R. pp. 1509 – 1563).** Further, only in discovery and hearing before the ALC was Respondent able to obtain the testimony of Dr. Patrick Cawley, who elaborated on Network's role in the Proposed Project. **(R. p. 769, lines 6-12; 2015, lines 11-18).** Thus, while Respondent asserted before the Department numerous and specific facts regarding the Project's lack of compliance with project review criteria, as demonstrated by the substantial evidence in the record, Respondent did not have the complete facts needed to assert the invalidity and unconstitutionality of the Project. That knowledge was not attainable until the matter came before the ALC.

THE PANEL OPINION

On December 12, 2022, a panel of the Court of Appeals published an opinion reversing the order of the ALC and ruling that the ALC erred in finding Appellant's joint venture entity (Network) was unlawful and unconstitutional because the ALC lacked the statutory authority to address these issues and because the issues were not presented to or considered by the Department.

(*Trident Med. Ctr., LLC v. S.C. Dept. of Health & Envt'l Control*, No. 2019-001159, 2022 WL 17660233, at *1 (S.C. Ct. App. Dec. 14, 2022). In doing so, the panel made the following erroneous findings and conclusions:

First, in reciting background facts, the panel relies on the opening arguments of counsel for Respondent and the Department and on remarks made by Respondent's counsel to witnesses. (*Id.*, at *2). The apparent purpose of this discussion is to support the panel's finding that Respondent did not present the validity of Network to the Department and the Department did not consider it. Whatever the purpose, the reliance on the arguments and miscellaneous remarks of counsel is misplaced because the statements and arguments of counsel do not constitute evidence. *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003)("Arguments made by counsel are not evidence."); *see also McManus v. Bank of Greenwood,* 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Furthermore, no inference of waiver can be drawn because there is no requirement that parties before the ALC address every issue to be considered by the court in their opening statements. Finally, and most importantly, this discussion in the panel opinion ignores the factual findings of the ALC that the issue of ownership and management of the Project was raised in the Appellant's CON application and was in fact considered by the Department. (See **R. pp. 9-12**).

Second, the panel opinion holds that the ALC lacks the statutory authority in a Certificate of Need case to consider the validity and constitutionality of an entity identified by an applicant as the manager and operator of the project for which CON approval is sought. (*Trident,* 2022 WL 17660233, at *3). In its ruling, the panel opinion seriously misapprehends the nature and breadth of the CON review process, which requires the Department to consider not just the standards set

forth in State Health Plan but also the thirty-three project review criteria set forth in the CON regulations. *See MRI at Belfair LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008) (Compliance with State Health Plan standards and the project review criteria are independent requirements for approval of a CON.). In adopting its narrow reading of the Certificate of Need process, the panel also overlooks the numerous findings of fact and conclusions of the ALC, supported by the substantial evidence in the record, regarding the nexus between the ownership of the Project and the ability of the Project to meet the requirements of the State Health Plan and the project review criteria. (**R. pp. 9-13; 15-16**).

Third, in its opinion, the panel found that the ALC lacks the authority to consider the constitutionality and validity of Network because the issue of ownership of the Project was not presented to or considered by the Department. (*Trident,* 2022 WL 17660233, at *4). In addition to being factually incorrect, this ruling misapprehends S.C. Code Ann. § 44-7-210(E), which limits the issues considered in a CON contested case proceeding to "those presented or considered during the staff review," and the case law interpreting this requirement. This ruling also overlooks the case law concerning the futility of raising an issue before a tribunal that cannot decide it.

Respondent respectfully submits that each of the panel opinion's holdings summarized above overlooks or misapprehends the facts, as supported by the substantial evidence in the record, and the applicable law and is erroneous for the reasons discussed more fully below. Further, for the reasons set forth below, the panel opinion omits to make findings and conclusions on two dispositive issues presented to the Court.

ARGUMENT

I. THE PANEL OPINION FAILS TO CONSIDER AND ADDRESS THAT THE CASE MUST BE REMANDED TO THE ALC, AS THE SOLE TRIER OF FACT *DE NOVO*, FOR A DETERMINATION ON THE MERITS OF THE CERTIFICATE OF NEED ISSUES PRESENTED IN THE CONTESTED CASE PROCEEDINGS.

At the conclusion of the contested case hearing before the ALC, Respondent moved for judgment as a matter of law on the grounds that Network, the manager/operator proposed by Appellant, is an unlawful joint ownership arrangement that violates Appellant's and the Medical University of South Carolina's (MUSC) enabling legislation and S.C. Const. art. X, § 11. Respondent argued that, as such, Appellant's Project, as presented to the Department, does not comply with CON standards and project review criteria and must be denied. **(R. pp. 1999-2030)**. Based on the testimony and evidence before it, the ALC granted Respondent's motion on the grounds stated therein and, as a further sustaining ground, found that Appellant was not the proper applicant or licensee of the Project under the law.

Because the issues raised in Respondent's motion and the additional sustaining ground were dispositive, by agreement of the parties, the ALC did not address the Project's compliance with the remaining Project Review Criteria and State Health Plan standards. As noted by the ALC in its Order, "The hearing was scheduled, and conducted, to resolve several other matters raised by [Respondent] with respect to the approval of the CON applications. However, because the assertion set forth in the Motion could be dispositive in either reversing DHEC or denying the CON or resolving the issue in favor of MUSC, which would then leave the Court to decide the remaining matters set forth during the hearing, the Court and the parties agreed post-hearing to initially address and brief only the issue set forth in the Motion in the interest of judicial economy." **(R. p. 1, n. 3)**.

In this case, the panel opinion reverses the ALC's Final Order on the legal procedural issues presented by Respondent's motion, but it fails to remand this matter back to the ALC for a determination of the remaining dispositive issues concerning whether Appellant's CON application is consistent with the 2015 State Health Plan and the Project Review Criteria such that a CON must be granted or denied, as appropriate. Under the required standard of review applicable to contested case decisions of the ALC, this Court cannot make independent findings of fact. *Todd's Ice Cream, Inc. v. S.C. Employment Sec. Comm'n.*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984)("The substantial evidence standard does not allow judicial fact-finding."). Without remand to the ALC for findings of fact and conclusions of law on the merits of Appellant's CON application and a decision based thereon, this case is in legal limbo. The panel opinion should be altered or amended to address the issue of remand.

II. THE PANEL OPINION FAILS TO CONSIDER AND ADDRESS THE ALC'S ADDITIONAL SUSTAINING GROUND ON THE MERITS, WHICH GROUND IS BASED ON THE SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE APPELLANT IS NOT THE PROPER LICENSEE FOR THE PROJECT SET FORTH IN ITS APPLICATION.

Although the panel opinion notes in its recitation of the facts that the ALC found that Appellant was not the proper licensee of the Project and, therefore, was not entitled to a CON under the law, the panel opinion makes no conclusions or rulings relevant to this issue. (*Trident,* 2022 WL 17660233, at *2). The holding of the ALC that Appellant was not the proper licensee was an additional sustaining ground based on facts supported by the substantial evidence in the record and the ALC's correct application of the law to those facts.[11] (**R. pp. 12 - 13** and **R. pp. 29**

[11] After discussing the relevant facts at length, the ALC made the following finding of fact: "[H]aving reviewed the information provided by MUSC in the CON Application and having considered all of the testimony along with the evidence presented in the Operating and Management agreements of The Network, the Court finds that MUHA is not the actual licensee of the proposed project as represented in the Application." (R. pp. 12-13).

- 33). This additional sustaining ground is dispositive of the merits of this matter and should have been addressed and treated as such in the panel opinion.

"Licensee" is defined in the CON regulations as the "legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or services; the owner of the business. The licensee must be the entity to whom the Certificate of Need is issued." S.C. Code Ann. Regs. 61-15, § 202(8)(b). In this case, the question of the proper licensee does not implicate any constitutional provisions and the issue was unequivocally presented to and considered by the Department when the Appellant identified itself as the licensee and offered its own information in response to criteria aimed at the licensee.[12] The issue of who is the proper licensee able to receive a CON is almost by definition part and parcel of the CON review process, and the ALC had the statutory authority to consider and rule on this issue.

In its Final Order, the ALC describes in detail the roles and functions of the entities named by Appellant as the owner and operator of the Project. For example, Appellant's CON application contains documentation, such as a Letter of Intent to Lease the space required to house the project (**R. pp. 1641 - 1642**) and various quotes from vendors for medical and office equipment. **(R. pp. 1647 – 1678; R. pp. 1679 - 1687).** Both the Intent to Lease letter and the quotes for medical and office equipment are addressed to Network or Alliance Oncology and not to Appellant.

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[12] At the hearing, Appellant presented the testimony of its CEO Dr. Cawley concerning each of the entities named in the CON application, describing each entity's respective role and responsibility regarding the Project. **(R. p. 765, line 4 – p. 776, line 9; R. p. 791, line 22 – p. 804, line 12).** Appellant also presented testimony from its expert witness, David Levitt, concerning the organization and responsibilities of the entities participating in the Project. **(R. p. 883, line 21 – p. 889, line 23).** In response, Respondent presented rebuttal testimony from its expert, Daniel Sullivan, that, based on the evidence presented during Appellant's case in chief, he did not believe that Appellant was the owner of the Project and that, based on its roles and responsibilities, Alliance Oncology would be the proper licensee. (**R. p. 1243, line 22 – p. 1247, line 24**). Neither Appellant nor the Department objected to this testimony. (***Id.***).

In response to the requirement that the applicant prove financial feasibility, Appellant submitted a letter from Alliance Oncology, as the managing member of Network, indicating that the Project would be financed by an affiliate of Network or by an external third party. **(R. p. 1754)**. As noted by the ALC, this documentation in the application is consistent with the obligations of Alliance Oncology under the Network Management Agreement, pursuant to which Alliance agrees to (a) assist Network in procuring and obtaining financing for all equipment and office space associated with a particular facility site; (b) employ all administrative and technical personnel for each site; (c) provide marketing services to each site; (d) provide billing and collection services to each site, if requested; and (e) provide, in its discretion, working capital advances (capped at $500,000 for each advance) to Network to be repaid with interest. **(R. pp. 1510-1511)**. Under the agreement, all personnel, to include physicists, dosimetrists, anyone operating equipment, and any necessary administrative staff will be employed by Alliance and all are to be selected by Alliance. **(R. p. 1510)**. As further found by the ALC, the Network Operating Agreement "fully spells out the company's intention to **own – not just manage – this and other radiation therapy centers** under the [MUSC] licensed name "Hollings Cancer Center." **(R. p. 31)**(emphasis in original).

The ALC's understanding and characterization of Alliance's role in the Project is further supported by the testimony of Dr. Cawley at the hearing. Dr. Cawley indicated that Appellant's relationship with Alliance began about six years prior to the 2019 hearing and that, "as part of the evolution of that relationship is when we had put Strategic Ventures together, we developed a joint venture with Alliance Oncology to operate other radiation therapy centers." **(R. p. 792, lines 10-19).** Dr. Cawley acknowledged that the joint venture with Alliance Oncology began because Appellant needed Alliance to finance MUSC's radiation therapy projects and to purchase "cutting edge" equipment. **(R. p. 794, lines 6 - 23).** Dr. Cawley confirmed that Alliance Oncology will be

the entity purchasing all of the equipment and other items going into the Project, with the result that neither the assets nor debt liabilities associated with those assets will appear on Appellant's balance sheets. **(R. p. 853, line 9 – p. 854, line 11)**.

In concluding that Alliance, and not Appellant, is the owner with the ultimate responsibility and authority for the conduct of the facility, the ALC also examined testimony and documentary evidence concerning Alliance's authority as the majority owner of the Network to control, rather than merely manage, the operations of the facility and found:

> If MUHA were the actual licensee/owner of the proposed project as stated in the Application, then it would be the MUHA board voting on the regular business and clinical matters of the facility. MUHA would decide on a relocation or a material change to the business, not the supermajority of [Network]. In essence, [Appellant's expert David] Levitt implied that a supermajority of [Network's] board could change the purpose or mission of the proposed project from the MUSC/MUHA mission to something else entirely. Thus, it is completely conceivable that even the basic mission of a cancer treatment center located in South Carolina, operating through a Certificate of Need issued to a public hospital in South Carolina, could be changed by the supermajority vote of the California-based board of a company registered in Delaware.

(R. p. 32).[13]

The ALC's conclusion that Appellant is not the proper licensee of the Project and, therefore, under the law, Appellant cannot be issued a CON, is supported by the substantial evidence in the record and by the correct application of the law to that evidence. Therefore, the ALC's additional sustaining ground must be upheld under the applicable standard of review. Because this additional sustaining ground alone supports the ALC's reversal of the Department's

[13] The ALC also found that Appellant's CON application contains as evidence of the required corporate approvals for the Project the minutes of a 2017 meeting of the Network board evidencing the board's approval "to move forward" with the CON Application for the Project, which, in the ALC's words "simply does not follow logically that the management company hired only to run or operate the facility would be the entity to vote to move forward in the application process to establish the facility in the first place. **(R., p. 32)** (*See also* **R. pp. 1813 - 1817**).

denial of Appellant's CON application, the panel opinion should be altered or amended to address this issue and uphold the ALC's sustaining ground.

III. IN HOLDING THAT THE ALC LACKED THE STATUTORY AUTHORITY TO CONSIDER THE UNCONSTITUTIONAL AND ILLEGAL NATURE OF THE PROJECT, THE PANEL OPINION OVERLOOKS THE ALC'S FINDINGS, SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD, THAT THE OWNERSHIP AND STRUCTURE OF THE PROJECT IS A CRITICAL ISSUE IN DETERMINING WHETHER THE PROJECT COMPLIES WITH THE STATE HEALTH PLAN AND PROJECT REVIEW CRITERIA.

The panel opinion holds the ALC lacks the statutory authority to consider the constitutionality and validity of an entity named in a CON Application. Specifically, the panel opinion finds in this case that the ALC had no authority to determine that Network was an unconstitutional joint venture arrangement between a state agency and a private for profit company because such a determination is not related to whether the Project complies with the standards and criteria set forth in the State Health Plan and CON regulations. This holding by the panel overlooks and/or misapprehends the detailed findings of the ALC that the ownership and structure of a project is crucial to a decision whether to grant a CON. As explained by the ALC in its Order:

> [T]he determination of the legality of the project as presented to DHEC does arise from the application of the agency standards and regulations because such a determination would necessarily result in multiple changes to the Application. It could be reviewed under a different standard altogether or, at the very least, review of the project using the relevant [project review criteria] would be substantially redirected. Stated differently, MUSC submitted the Application for review with a constitutionally suspect joint venture company as the management entity and MUSC as the licensee. In doing so, the Application heavily, and inextricably, relies on the beneficial aspects of each entity as strategically presented to DHEC to render a more favorable application of the CON standards and criteria. For this reason, and in this case, a very meaningful nexus does, in fact, exist between the determination of [MUSC Network]'s constitutionality and the agency's application of the CON standards in the State Health Plan and the [project review criteria].
>
> Because the claim arises from the information provided by MUSC to facilitate the Department's application of the CON standards in the State Health Plan and the [project review criteria] in Regulation 61-15, the ALC does have subject matter jurisdiction. Further the remedy requested by Trident, to overturn DHEC's approval

of the Application and deny the CON, is a remedy authorized to be granted by the ALC as relief.

(R. p. 16.).

Respondent moved for judgment as a matter of law on the grounds that the Project as presented to the Department in Appellant's CON application did not comply with the standards and criteria established by CON law because Appellant identified as the facility's operator an entity which is unlawfully owned jointly by a state agency and a private for-profit corporation in violation of the agency's enabling statutes and the South Carolina Constitution. As relief, Respondent requested that the ALC reverse the Department's decision to approve Appellant's CON application **(R. p. 2010)**. Upon granting Respondent's motion, the ALC granted the relief requested by Respondent and ordered only that the decision of the Department to grant a CON for the Project be reversed and Appellant's CON application be denied. **(R. p. 35)**.

As discussed in detail in this Petition, information concerning the ownership and management of the Project was presented to the Department in Appellant's own CON application. **(R. pp. 1599 - 1604; R. pp. 1607 - 1610)**. As discussed by the ALC in its Final Order, project review criteria concerning the ability to complete the project, the financial feasibility of the project, and the extent to which the project will serve medically underserved groups are all dependent on the identity and nature of the ownership and management of the project. **(R. p. 16)**.

The substantial evidence in this case demonstrates that the issue of the ownership and administration of the Project and the ability of the designated operator and manager of the Project to meet all the requirements of CON law is a crucial determination. Because the inquiry into the legality of Network furthers the ALC's consideration of the applicable criteria and standards under CON law, the ALC has the statutory authority and, indeed, the obligation to address these issues in deciding the ultimate question of whether MUHA's CON application should be denied. The

panel opinion should be altered or amended to reflect that the ALC properly exercised its statutory authority in considering the issues presented to it in this case and the rder of the ALC should be affirmed.

IV. IN HOLDING THAT THE ALC IS BARRED BY S.C. CODE ANN. § 44-7-210(E) OF THE CERTIFICATE OF NEED ACT FROM CONSIDERING THE UNCONSTITUTIONAL AND ILLEGAL NATURE OF THE PROJECT, THE PANEL OPINION MISAPPREHENDS THE REQUIREMENTS OF THAT LAW AND THE HOLDING OF THE SUPREME COURT IN *MARLBORO PARK HOSPITAL* REGARDING THE PRESERVATION OF ISSUES AND IGNORES THE FINDINGS OF FACT MADE BY THE ALC CONCERNING THE DEPARTMENT'S CONSIDERATION OF THE VARIOUS CON CRITERIA ENCOMPASSING THE ISSUE OF OWNERSHIP OF THE PROJECT.

The panel opinion held that the ALC lacks the authority to consider the constitutionality and validity of Network because the issue of ownership of the Project was not presented to or considered by the Department. (*Trident,* 2022 WL 17660233, at *4). This holding is based on the panel's interpretation of S.C. Code Ann. § 44-7-210(E), which provides that, "The issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during the staff review." The panel opinion, however, misapprehends the nature of the ALC's *de novo* review authority as articulated in § 44-7-210(E) and misapplies *Marlboro Park Hospital v. S.C. Department of Health and Environmental Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct.App. 2004), which held that the law limits a contested case hearing to the *issues* presented or considered by DHEC staff but does not limit *evidence* concerning those issues.

In its opinion, the panel treats the later-discovered *evidence* of the true roles and structure of Network as an *issue* separate and distinct from the issue of ownership of the Project. As found by the ALC , however, the later-discovered evidence was a fundamental and omitted component of the ownership issue.

As the ALC determined, Appellant was required to, and did, address in its CON application the ownership of the Project to include a discussion of roles to be played by Appellant, MUSC,

and Network, as the designated manager and operator of the facility. Further, Appellant provided information about itself and/or Network in responding to criteria concerning the record of the applicant, including the record of both the owner and the manager of the facility, the ability of the applicant to complete the Project, and the financial feasibility of the Project. **(R. pp. 9-13)**. *See* S.C. Code Ann. Regs. 61-15 § 202 and § 802. The ALC also found that, under the State Health Plan, standard 7 concerns the expansion of an existing service while standard 6 applies to applicants who are proposing to establish new services. In order to determine which standard applies, DHEC necessarily had to consider the identity of the owner of the Project in this case. **(R. pp. 15-16)**. When the later-discovered evidence called into question Appellant's claims of ownership, the ALC was required as part of its *de novo* review to consider that evidence and apply the CON criteria accordingly.

Under the *Marlboro Park* doctrine, the ALC has the authority to consider evidence on the issues even when such evidence is first revealed after the completion of the DHEC staff review. *Marlboro Park*, 358 S.C. at 578, n. 2, 595 S.E.2d at 853, n.2. In this case, Respondent asked the ALC to consider the later-discovered evidence of Network's unconstitutional ownership contained in the Network Operating Agreement and the Management Agreement and in the testimony of Dr. Cawley, presented in deposition and the Appellant's case-in-chief. All of this evidence, though produced after Department staff review, pertained to the ownership and management of the Project, and the ALC's consideration of it is consistent with S.C. Code Ann. § 44-7-210(E) and the law as interpreted by the Court in *Marlboro Park*. The panel opinion should be altered or amended to reflect that the issue of ownership of the project was presented to and considered by the Department and the ALC had the authority to consider the later-discovered evidence pertaining to this issue.

V. IN HOLDING THAT RESPONDENT WAS REQUIRED TO PRESENT AS AN ISSUE TO THE DEPARTMENT THE UNCONSTITUTIONAL AND ILLEGAL STRUCTURE OF APPELLANT'S PROJECT, THE PANEL OPINION FAILS TO CONSIDER (A) ITS OWN CONCLUSIONS THAT THE DEPARTMENT DID NOT HAVE THE ABILITY TO ADDRESS SUCH ISSUES; (B) THE FINDINGS OF FACT MADE BY THE ALC THAT RESPONDENT DID NOT LEARN THE ACTUAL STRUCTURE OF THE JOINT VENTURE ARRANGEMENT UNTIL AFTER DISCOVERY AND TESTIMONY GIVEN DURING THE HEARING; (C) THE DOCTRINE OF FUTILITY, WHICH EXCUSES THE FAILURE TO RAISE SUCH ISSUES BEFORE THE DEPARTMENT; AND (D) THE CASE LAW SUPPORTING THE AUTHORITY OF THE ALC TO DETERMINE SUCH ISSUES IN THE FIRST INSTANCE.

As discussed above, the panel opinion holds that the ALC lacked the authority under S.C. Code Ann. § 44-7-210(E) to consider the unconstitutional and illegal structure of the entity with the ultimate responsibility and authority for the conduct of the Project because Respondent failed to present evidence on this issue to the Department. In making this conclusion, the panel opinion overlooks its other conclusions that "DHEC acknowledges in its brief that nothing in the CON Act, Regulations, or South Carolina Health Plan authorizes it to rule on the constitutionality of a legal entity listed in a CON application." [14] (*Trident,* 2022 WL 17660233, at *4, n. 3 & n. 4).

The panel opinion also overlooks the ALC's findings of fact, supported by the substantial evidence in the record, that Respondent did not learn the critical details of Network's structure and its integral role in the operation and financing of the Project until after the Department's review

[14] Respondent asserted before the ALC and in its brief on appeal and reasserts in this Petition its argument that S.C. Code Ann. § 44-7-210(E) is not jurisdictional but rather is an exhaustion of administrative remedies requirement which can be waived. **(R. p. 2064, n. 5).** *See Capital City Ins. Co. v. BP Staff, Inc.,* 382 S.C. 92, 100, 674 S.E.2d 524, 528-529 (2009) ([Subject matter jurisdiction] is distinct from the doctrine of exhaustion of administrative remedies, which is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional."(internal quotations and citations omitted)). Thus, a party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body. *Id.* at 102, 674 S.E.2d at 529. To the extent that the panel opinion holds otherwise, it should be altered or amended to reflect that Respondent was not required to present an issue to an agency that had no authority to rule on it.

was complete and its decision was issued.[15] **(R. pp. 18-19).** Thus the panel concludes that Respondent was required to raise an issue to the Department when the Department lacked the authority to consider and rule on it and when the Respondent itself lacked the means to discover the existence of the issue until after the Department's review process had concluded.

This conclusion by the panel in its opinion is contrary to the established law. As found by the ALC in its order, even if Respondent had the knowledge to call the Department's attention to the evidence of Network's unconstitutional role in the Project, asking the Department to consider the constitutionality and/or illegality of the ownership of the manager/operator of the Project would have been futile. **(R. p. 16)** *See, e.g., Moore v. Sumter Cnty. Council,* 300 S.C. 270, 273-274, 387 S.E.2d 455, 458 (1990) ("A general exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that a pursuit of them would be a vain or futile act.")

Further, as noted by the ALC, Respondent has to raise the constitutionality of Network before the ALC or its arguments thereon would be considered waived under general preservation of issues rules. **(R. p. 19).** *See also Travelscape, LLC v. S.C. Dep't of Revenue,* 391 S.C. at 109, 705 S.E.2d at 39 (2011) (Preservation and exhaustion of remedies rules apply before the ALC and other administrative tribunals with respect to an as applied constitutional challenge.). Thus, the ALC is the only entity that could have made the required factual findings in this case because most of the evidence on the constitutionality of the Project was not available until after the DHEC review and because this Court is not the fact-finder under the law. Consequently, the ALC correctly concluded that procedural requirements and judicial economy favored the ALC's exercise of its

[15] Respondent became aware of the critical detail of Network's structure after receiving Network's organizational and operational documents during discovery and after obtaining the testimony of Dr. Patrick Cawley in deposition and at the hearing before the ALC. **(R., pp. 18-19).**

authority under *Marlboro Park* to consider the evidence and issues concerning the validity of Network.

To the extent that the panel opinion holds that Respondent was required to raise an issue to the Department when the Department lacked the authority to consider and rule on it and when the Respondent itself lacked the means to discover the existence of the issue until after the Department's review process had concluded, the opinion should be altered or amended to apply the doctrine of futility as set forth in the applicable case law.

CONCLUSION

The panel's opinion in this case is affected by numerous errors as discussed above. Respondent respectfully submits that rehearing, and in particular rehearing *en banc*, is necessary to maintain consistency in this Court's decisions regarding the authority of the ALC to determine statutory and constitutional issues and to avoid uncertainty in this fundamental area of the law. Furthermore, rehearing will afford the parties basic due process insofar as the necessity of the Court's addressing and determining whether remand or affirmation of the additional sustaining ground is appropriate in this case. Finally, Respondent requests that, in the event the Court reconsiders the panel opinion and finds that either the ALC or this Court can address the merits of Respondent's arguments, the panel opinion should be altered or amended to affirm the findings of fact and conclusions of law of the ALC that (a) MUSC Strategic Ventures is an *ultra vires* corporation created by MUSC in violation of its enabling statute found at S.C. Code Ann. § 59-123-60 (2020); and (b) Network, which has MUSC Strategic Ventures as a minority owner, is an illegal and unconstitutional joint venture formed in violation of S.C. Const. art. X, § 11.

Respectfully submitted,

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December 29, 2022
Columbia, South Carolina

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Dec 29 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

APPELLATE CASE NO.: 2019-001159
ADMINISTRATIVE LAW COURT CASE NO.: 18-ALJ-07-0100-CC

Trident Medical Center, LLC d/b/a Trident Medical Center ..... Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control
and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center
– Berkeley County ..... Respondents,

Of Which Medical University Hospital Authority d/b/a MUSC Radiation
Therapy Center – Berkeley County is the ..... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on December 29, 2022, he caused a copy of **RESPONDENT TRIDENT MEDICAL CENTER LLC'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC** to be served upon all parties of record by email and U.S. Mail addressed as follows:

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December 29, 2022

VIA HAND DELIVERY AND
EMAIL – CTAPPFILINGS@SCCOURTS.ORG
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Trident Medical Center, LLC, d/b/a Trident Medical Center vs. South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County***
Appellate Case No. 2019-001159

Dear Ms. Kitchings:

In connection with the above-referenced appeal, enclosed for filing please find Respondent Trident Medical Center LLC's Petition for Rehearing and Suggestion for Rehearing En Banc. We are hand delivering the original and the $50 filing fee to the Court today.

With best regards, I am

Sincerely,

William R. Thomas

Enclosures
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