

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Administrative Law Judge

Appellate Case No. 2012-213506

Case No. 09-ALJ-07-0332-CC

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

v.

South Carolina Department of Health and  
Environmental Control and Roper St. Francis  
Hospital-Berkeley d/b/a Roper St. Francis Hospital,

Of Whom South Carolina Department of Health and  
Environmental Control is the .....Respondent, and

Roper St. Francis is the .....Respondent/Appellant.

Case No. 09-ALJ-07-0333-CC

Trident Medical Center, LLC, d/b/a  
Berkeley Regional Medical Center, .....Appellant/Respondent,

v.

South Carolina Department of Health and  
Environmental Control, and Roper St. Francis  
Hospital-Berkeley, Inc. d/b/a Roper St. Francis  
Hospital Berkeley,

Of Whom South Carolina Department of Health and  
Environmental Control is the .....Respondent, and

Roper St. Francis is the .....Respondent/Appellant.

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Case No. 09-ALJ-07-0336-CC

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Care Alliance Health Services and Roper  
St. Francis Hospital-Berkeley,.....Respondents/Appellants,

v.

South Carolina Department of Health and  
Environmental Control and Trident Medical  
Center, LLC,  
Of whom South Carolina Department of Health  
And Environmental Control is the .....Respondents, and

Trident Medical Center, LLC is the .....Appellant/Respondent.

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**RESPONDENT SOUTH CAROLINA DEPARTMENT  
OF HEALTH AND ENVIRONMENTAL CONTROL'S  
INITIAL BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
FACTS.....	1
STANDARD OF REVIEW.....	2
ARGUMENT.....	3
I.    The Department properly interpreted the 2004-2005 <i>Plan</i> in approving Roper's CON application, and the ALC did not err in giving deference to the Department's interpretation. .....	3
II.   The Administrative Law Court properly determined both Trident's and Roper's CON applications could be approved without exceeding the need for hospital beds in Berkeley County, thus the applications are not competing. .....	10
CONCLUSION.....	14

## TABLE OF AUTHORITIES

### Cases

Brown v. Bi-Lo, Inc.,

354 S.C. 436, 581 S.E.2d 836 (2003) ..... 8

Brown v. S.C. Dep't of Health & Env'tl. Control,

348 S.C. 507, 560 S.E.2d 410 (2002) ..... 3, 8

City of Columbia v. Bd. of Health & Env'tl. Control,

292 S.C. 199, 355 S.E.2d 536 (1987) ..... 8

Converse Power Corp. v. S.C. Dep't of Health & Env'tl. Control,

350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002)..... 3, 9

Hodges v. Rainey,

341 S.C. 79, 533 S.E.2d 578 (2000) ..... 6

Kearse v. State Health and Human Servs. Finance Comm'n,

318 S.C. 198, 456 S.E.2d 892 (1995) ..... 3, 13

Murphy v. S.C. Dep't of Health & Env'tl. Control,

396 S.C. 633, 723 S.E.2d 191 (2012) ..... 2

S.C. Dep't of Mental Retardation v. Glenn,

291 S.C. 279, 353 S.E.2d 284 (1987) ..... 3

Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC,

387 S.C. 79, 690 S.E.2d 783 (2010) ..... 15

### Statutes

S.C. Code Ann. § 1-23-610(B) (Supp. 2012) ..... 2

S.C. Code Ann. § 44-7-120 (2002) ..... 4

S.C. Code Ann. § 44-7-130(5) (2002) .....	10
S.C. Code Ann. § 44-7-140 (2002) .....	3
S.C. Code Ann. § 44-7-180 (Supp. 2012) .....	4
S.C. Code Ann. § 44-7-180(A) (Supp. 2012) .....	4
S.C. Code Ann. § 44-7-180(B) (Supp. 2012) .....	4
S.C. Code Ann. § 44-7-180(C) (Supp. 2012) .....	5
S.C. Code Ann. § 44-7-210(B) (Supp. 2012) .....	5
S.C. Code Ann. §§ 1-23-310 et seq. (2005 & Supp. 2012) .....	2
S.C. Code Ann. §§ 44-7-110, et seq. (2002 & Supp. 2012) .....	3

**Regulations**

S.C. Code Ann. Regs. 61-15 § 802.1 (Supp. 2012) .....	4, 5
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## STATEMENT OF ISSUES ON APPEAL

- I. The Department properly interpreted the 2004-2005 South Carolina Health Plan in approving Roper St. Francis – Berkeley’s Certificate of Need application, and the Administrative Law Court did not err in giving deference to the Department’s interpretation.
- II. The Administrative Law Court’s properly determined both Trident’s and Roper’s CON applications could be approved without exceeding the need for hospital beds in Berkeley County, thus the applications are not competing.

## FACTS

Berkeley County is experiencing one of the highest population growth rates in South Carolina, yet it is one of only five counties in South Carolina without a hospital within its borders. Resp. Ex. #75; ALC Final Order and Decision pp. 12-13. In 2008, Trident Medical Center, LLC (“Trident”), which operates hospitals in nearby Charleston and Dorchester Counties, and Roper St. Francis – Berkeley, part of the CareAlliance Health Services system (collectively “Roper”), each submitted a Certificate of Need (“CON”) application to the South Carolina Department of Health and Environmental Control to establish a fifty-bed hospital in Berkeley County. Trident submitted its CON application under the *2004-2005 South Carolina Health Plan* (“*2004-2005 Plan*”), using the need indicated for Trident’s existing hospital in Charleston County to establish a satellite hospital in Berkeley County. Roper, which operates several hospitals in nearby Charleston County, filed its application under the *2008-2009 South Carolina Health Plan* (“*2008-2009 Plan*”), utilizing the bed transfer methodology to relocate fifty (50) existing hospital beds from its hospital in downtown Charleston in order to establish a satellite hospital in Berkeley County.

During the Department’s review of the two applications, Trident took the position that the two applications were competing, and that the Department could only approve

one of the applications. The Department disagreed. By two separate decision letters dated June 26, 2009, the Department issued a formal determination that Roper's and Trident's CON applications were not competing. The Department concluded that both applications complied with the applicable South Carolina Health Plan, both established a need for their proposed hospitals, and approval of both would not exceed the need for hospital beds in Berkeley County.

A contested case hearing ensued at the Administrative Law Court ("ALC"). Trident maintained that the applications were competing and that Roper's application did not comply with the 2008-2009 Plan. Roper agreed with the Department's decision that the applications were not competing and requested that the Department's decision be upheld. By order filed September 26, 2012, the ALC also agreed, finding the applications were not competing and granting both applications. This appeal followed.

#### STANDARD OF REVIEW

This appeal is governed by the South Carolina Administrative Procedures Act (APA), S.C. Code Ann. §§ 1-23-310 *et seq.* (2005 & Supp. 2012). See *Murphy v. S.C. Dep't of Health & Env'tl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012). Pursuant to the APA, an appellate court may only reverse or modify a final decision of the ALC if the petitioner's substantive rights have been prejudiced because the ALC's decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2012).

The ALC is the sole finder of fact in contested cases pursuant to the APA, and this Court may not alter the ALC's findings or make new findings of fact on appeal. *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). Further, this Court may not substitute its judgment for that of the ALC as to the weight of the evidence on questions of fact. *Id.*

In reviewing a final decision of an administrative agency, "[t]he findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health and Human Servs. Finance Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *S.C. Dep't of Mental Retardation v. Glenn*, 291 S.C. 279, 281, 353 S.E.2d 284, 286 (1987). It "is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 46, 564 S.E.2d 341, 345 (Ct. App. 2002).

## ARGUMENT

**I. The Department properly interpreted the 2004-2005 Plan in approving Roper's CON application, and the ALC did not err in giving deference to the Department's interpretation.**

DHEC is the sole state agency charged with the administration of the State Certificate of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110, *et seq.* (2002 & Supp. 2012) ("CON Act"). S.C. Code Ann. § 44-7-140 (2002). The purpose of the CON Act is to promote cost containment, to prevent the unnecessary duplication of health care facilities and services in the state, to guide the establishment of

health facilities and services in such a way as will best serve public needs, and to ensure that high quality services are provided in health facilities in the state. S.C. Code Ann. § 44-7-120 (2002). “To achieve these purposes, [the CON Act] requires: (1) the issuance of a Certificate of Need before undertaking a project prescribed by this article; (2) adoption of procedures and criteria for submittal of an application and appropriate review before issuance of a Certificate of Need; (3) preparation and publication of a State Health Plan; and (4) the licensure of facilities rendering medical, nursing, and other health care.”

*Id.*

The State Health Plan is developed by Department staff with the advice of the health planning committee. S.C. Code Ann. § 44-7-180(B) (Supp. 2012). The health planning committee is comprised of fourteen members, most of whom are appointed by the Governor. S.C. Code Ann. § 44-7-180(A) (Supp. 2012). The committee members represent a variety of groups with an interest in the CON program, including health care consumers health care financiers (including business and insurance), and health care providers. *Id.* The purpose of the State Health Plan is to outline the need for health facilities and services in the State. S.C. Code Ann. § 44-7-180 (Supp. 2012); S.C. Code Ann. Regs. 61-15 § 802.1 (Supp. 2012). It contains an inventory of existing health care facilities, beds, specified health services, and equipment; projections of need for additional health care facilities, beds, services, and equipment; standards for distribution of health care facilities, beds, specified health services, and equipment; and a general statement as to which project review criteria are considered most important for evaluating CON applications for each type of facility, bed, service, or equipment. S.C. Code Ann. § 44-7-180(B) (Supp. 2012). Once approved by the health planning committee, the State

Health Plan is submitted to the Board of Health and Environmental Control (“Board”) for final revision and adoption, which must occur at least once every two years. S.C. Code Ann. § 44-7-180(C) (Supp. 2012). The State Health Plan is the starting point for review of a CON application; no CON application can be approved unless it complies with the State Health Plan. S.C. Code Ann. § 44-7-210(B) (Supp. 2012); *see also* S.C. Code Ann. Regs. 61-15 § 802.1 (Supp. 2012) (“The proposal shall not be approved unless it is in compliance with the South Carolina Health Plan.”).

Trident maintains that Roper’s CON application cannot pass the starting point for review because it does not comply with the 2008-2009 Plan. In particular, Trident argues DHEC improperly interpreted the provision that allows for the transfer of hospital beds between facilities, and the ALC improperly deferred to DHEC’s interpretation. This provision, commonly referred to as the “bed transfer provision,” states:

Changes in the delivery system due to health care reform have resulted in the consolidation of facilities and the establishment of provider networks. These consolidations and agreements may lead to situations where affiliated hospitals may wish to transfer beds between themselves in order to serve their patients in a more efficient manner. A proposal to transfer or exchange hospital beds requires a Certificate of Need and must comply with the following criteria:

1. A transfer or exchange of beds may be approved only if there is no overall increase in the number of beds;
2. Such transfers may cross county lines; however, the applicants must document with patient origin data the historical utilization of the receiving facility by residents of the county giving up beds;
3. Should the response to Criterion 2. Fail to show a historical precedence of residents of the county transferring the beds utilizing the receiving facility, the applicants must document why it is in the best interest of these residents to transfer the beds to a facility with no historical affinity for them;

4. The applicants must explain the impact of transferring the beds on the health care delivery system of the county from which the beds are to be taken; any negative impacts must be detailed along with the perceived benefits of such an agreement;
5. The facility receiving the beds must demonstrate the need for the additional capacity based on both historical and projected utilization patterns;
6. The facility giving up the beds may not use the loss of these beds as justification for a subsequent request for the approval of additional beds;
7. A written contract or agreement between the governing bodies of the affected facilities approving the transfer or exchange of beds must be included in the Certificate of Need application;
8. Each facility giving up beds must acknowledge in writing that this exchange is permanent; any further transfers would be subject to this same process.

*2008-2009 Plan* at § II(G)(1)(A)(4)(j), pp. II-9 – II-10.

Trident alleges DHEC erred in interpreting the bed transfer provision, and that the ALC erred in giving deference to DHEC's interpretation, based upon the plain language of the statute. Trident's arguments lack credibility.

Trident contends that the plain language of the bed transfer provision prohibits the transfer of hospital beds from an existing facility in order to establish a new satellite hospital, because there is no existing bricks-and-mortar facility on the receiving end of the transfer. The plain language argument Trident urges is nonsensical. Trident insists that the references to facility in the bed transfer section mean an "existing" facility, yet the word "existing" does not appear in the bed transfer provision. To accept Trident's position, the court would have to suppose that the State Health Plan meant to limit the use of the bed transfer provision to facilities already in existence, thus excluding new facilities going through the CON review process. Such a meaning is not plain on the face of the Plan. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where

the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

Further, the ALC found Trident's positions on interpreting the Plan language to be "inconsistent" in this case. ALC Final Order p. 30. Trident urged the ALC to find that the "plain language" of the bed transfer section in the *2008-2009 Plan* prohibited the transfer of beds to a facility that has not yet been built, yet Trident argues there is no error in the interpretation of the bed need section in the *2004-2005 Plan* to allow Trident to transfer its facility-specific bed need for Trident Medical Center in Charleston County to a facility in Berkeley County that has not yet been built, and therefore does not "exist."

Having rejected Trident's argument that the plain language of the bed transfer provision restricted the transfer to already-existing facilities, the ALC properly sought to determine the intent of the agency responsible for drafting and adopting the language in question.

Les Shelton, who has been extensively involved in the drafting of the State Health Plan for over two decades, testified as to the intent in drafting the bed transfer provision:

Our intent was it, was to make it as broad as possible because, at the time, there was this whole discussion of new service delivery systems, new models, mergers, acquisitions, and so we wrote it as broadly as we could, and hopefully as flexible as you could, with that our goal was to prevent the Plan from prohibiting what otherwise might be a good idea.

Tr. p. 1154, lines 11-19.

The Board of DHEC issued a ruling in a separate CON matter on its interpretation of the bed transfer provision. In a written Order on Remand dated May 8, 2009, the Board held that the receiving facility need not be an existing facility in order to receive

beds under the bed transfer provision on its interpretation of the bed transfer provision.<sup>1</sup> The ALC affirmed the Board's Order on Remand, and its interpretation of the bed transfer provision, in a contested case hearing.

DHEC's interpretation of the bed transfer position has been consistent over time. DHEC has routinely and consistently interpreted the bed transfer standard to authorize the transfer of licensed beds from an existing hospital to create a new system hospital, or "satellite" hospital. The Department has issued CON decisions allowing hospitals with excess capacity to establish new satellite hospitals. Examples of such previous CON decisions include Waccamaw Neck Hospital in Georgetown County, Anderson Area Women and Children's Hospital in Anderson County, Village Health Care Center in Spartanburg County, and Palmetto Health Parkridge in Richland County." Affidavit of Leslie W. Shelton, III, paragraph 6.

An agency's interpretation of its own regulations deserves considerable deference, and the court will not set it aside unless it is an abuse of discretion or otherwise not in accordance with the law. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003); *Brown v. S.C. Dep't of Health and Env'tl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). "The delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public." *City of Columbia v. Bd. of Health & Env'tl. Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987). As the agency charged by statute with developing and adopting the State Health Plan for use in the administration of the CON program, DHEC is in the best

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<sup>1</sup> The Order on Remand examined the bed transfer provision in the *2004-2005 Plan*. The language in the bed transfer provision in the *2004-2005 Plan* is identical to the language in the *2008-2009 Plan*, but the section was renumbered. The bed transfer provision in the *2004-2005 Plan* is located at § II(G)(1)(A)(4)(h); in the *2008-2009 Plan* it is located at § II(G)(1)(A)(4)(j).

position to interpret the State Health Plan, and is entitled to considerable deference in its interpretation.

Substantial evidence in the record establishes: (1) staff's intent in drafting the bed transfer language, to make it as flexible as possible so that as health care systems change and develop over time the Plan will not prohibit what would otherwise be a good idea; (2) staff's long history of approving CON applications for the establishment of a new satellite hospital within a health system by transferring beds from an existing hospital; and (3) the Board's written ruling interpreting the bed transfer provision to allow the transfer of beds to create a new satellite hospital.

Trident has presented no compelling reason to overturn DHEC's interpretation. The record contains ample evidence of the Department's intent when drafting the bed transfer provision, the Board's ruling on its interpretation, and a history of consistent application of that interpretation. In fact, Trident has used the Department's similar interpretation of the hospital bed need provision in the 2004-2005 Plan to transfer the bed need indicated in the Plan for its North Charleston hospital to Berkeley County to create a new satellite hospital where none currently exists. The Department's interpretation and application of the bed transfer provision is consistent with the Department's interpretation and application of the bed need provision, and equally benefits both Roper and Trident. No compelling reasons exist to overturn DHEC's interpretation. See *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) ("The construction of a regulation by the agency charged with executing the regulations is entitled to the most respectful consideration and

should not be overruled without cogent reasons”). The ALC properly gave deference to the Department’s interpretation, and no legal reason exists to overturn that interpretation.

**II. The Administrative Law Court properly determined both Trident’s and Roper’s CON applications could be approved without exceeding the need for hospital beds in Berkeley County, thus the applications are not competing.**

Trident argues the ALC erred as a matter of law in concluding that both Trident’s and Roper’s CON applications for fifty-bed hospitals in Berkeley County could be approved without exceeding the need in the State Health Plan. There is no error.

“Competing applicants” is defined as “two or more persons or health care facilities ... who apply for certificates of need to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities.” S.C. Code Ann. § 44-7-130(5) (2002). Trident argues approving both applications would exceed the need for hospital beds indicated in the State Health Plan. Since Trident is adding new beds to the existing inventory of general hospital beds, and Roper is transferring existing beds from one location to another without adding to the bed inventory, Trident’s and Roper’s CON applications will not exceed the State Health Plan’s projections of need for general hospital beds in the service area, and Trident and Roper do not meet the statutory definition of “competing applicants.”

Trident applied pursuant to the *2004-2005 Plan* to **add** new beds in Moncks Corner, based upon the Plan’s facility-specific projection of need for an additional forty-two (42) general hospital beds. *See 2004-2005 Plan*, at p. II-17. The *2004-2005 Plan* allowed Trident to apply for up to fifty (50) hospital beds, even though the Plan specified a need for Trident of only forty-two (42) beds. *Id.* at § II(G)(1)(A)(4)(d), p. II-7 (“Should

there be a need shown for additional beds for a hospital, then an increase may be approved. In order to provide for a cost-effective addition, up to the greater of 50 beds or the actual projected number of additional beds may be approved, provided the hospital can document and demonstrate the need for additional beds.”). According to the methodology utilized by Trident in its CON application for a Berkeley County hospital – that is, the **addition** of new beds to the area – the *2004-2005 Plan* only required Trident to show that it had a positive bed need in order for it to comply with the State Health Plan’s bed need projections. *Id.* Because the *2004-2005 Plan* showed a positive bed need for Trident for forty-two **additional** beds, Trident’s CON application complies with the need projections of the *2004-2005 Plan*. Granting Trident’s CON application will not exceed the State Health Plan’s need projections for general hospital beds in Berkeley County.

Roper applied under the *2008-2009 Plan* for a **transfer** of fifty (50) of its existing general hospital beds from its downtown Charleston facility to Goose Creek. The *2008-2009 Plan* allowed Roper to **transfer** existing hospital beds across the county line from Charleston to Berkeley County, providing that the transfer would not increase Roper’s overall number of hospital beds. *See 2008-2009 Plan* at § II(G)(1)(A)(4)(j), pp. II-9 – II-10. According to the methodology utilized by Roper in its CON application for a Berkeley County hospital – that is, the **transfer** of existing beds – the *2008-2009 Plan* required Roper to show that it had existing beds in Charleston County that could be transferred, that the beds would be transferred within Roper’s own healthcare system, and that the transfer would not increase Roper’s overall bed count. *Id.* Because Roper met

these requirements, its CON application complies with the bed **transfer** provisions of the *2008-2009 Plan*.

The fact that Roper's overall existing hospital bed inventory results in a showing in the State Health Plan that Roper has six excess beds in the general Berkeley/Charleston/Dorchester Tri-County area, *see* 2008-2009 Plan at p. II-19, does not preclude Roper from transferring some of its existing beds from Charleston to Berkeley County. The *2008-2009 Plan* contemplates that a hospital may not show a need, but that transfer of licensed hospital beds may be justified as to more efficiently allocate health care resources. As stated in the Department's June 26, 2009 decision letter granting Roper's CON application, Roper's project, which is "basically a re-positioning of currently licensed acute care beds from an area of limited growth to an area of strong growth, ... will have no impact on the Tri-County's bed count or bed need." *See* Roper Decision Letter. The Department has approved similar hospital bed transfers from one location to another in the past, even though the State Health Plan indicated that the applying hospital system had an excess of hospital beds. *See* Affidavit of Leslie W. Shelton, III, at ¶ 6. The Department affirmed in its answers to Trident's interrogatories in this matter that it "does not consider the two approved CON applications 'competing' because the beds used for the Roper St. Francis Hospital – Berkeley project will be a permanent bed transfer, not a bed increase." *See* DHEC's Answer to Trident's Interrogatory No. 6. While Trident "utilized the projected bed need in the 2004-2005 State Health Plan to create a satellite hospital in Berkeley County, ... propos[ing] to add fifty (50) new beds to the service area," Roper "was relocating beds, rather than adding more beds to the service area, [and] it was not impacted by the bed

need projection in the 2008-2009 State Health Plan.” *Id.* Since Roper is not adding any new hospital beds, granting Roper’s CON application will not exceed the State Health Plan’s need projections for general hospital beds in Berkeley County.<sup>2</sup>

Furthermore, substantial evidence in the record supports the need for the transfer of beds from Roper’s downtown Charleston hospital to the Carnes Crossroad site in Berkeley County. Roper presented reliable, credible evidence to support the ALC’s finding that the transfer of Roper’s beds to Berkeley County, along with the addition of Trident’s beds in Berkeley County, could both be approved without exceeding the need for beds in Berkeley County. In *Spartanburg Reg’l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 90, 690 S.E.2d 783, 789 (2010), the Supreme Court affirmed the ALC’s determination that two CON applications for linear accelerators in the same service area were not competing, finding that “[f]rom a factual perspective, there is abundant evidence in the record to support” that both applications would not exceed the need. Similarly, the ALC concluded that an abundance of evidence in the record, including from both parties’ experts in healthcare planning, established that there was a need for both fifty-bed hospitals in Berkeley County. ALC Final Order pp. 47-48.

Granting both Trident’s and Roper’s CON applications, filed under two different State Health Plans using two different methodologies, will not result in exceeding the State Health Plan’s projections of need for additional hospital beds in Berkeley County.

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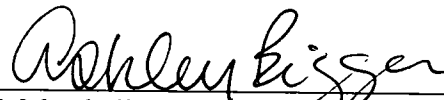
<sup>2</sup> Additionally, Roper had to satisfy the requirements of Section II(G)(1)(A)(4)(f) of the 2008-2009 Plan, which requires any new hospital to provide certain services, including: (1) a 24-hour emergency department; (2) inpatient services to both surgical and non-surgical patients; and (3) medical and surgical services within at least 6 of the major diagnostic categories recognized by the Centers for Medicare and Medicaid Services (“CMS”). See 2008-2009 Plan at pp. II-8 through II-9. The 2004-2005 Plan, pursuant to which Trident’s CON application was filed, had no similar requirements. See also Exhibit E, Affidavit of Leslie W. Shelton, III, at ¶ 7.

Further, substantial evidence in the record supports the ALC's conclusion that both applications can be approved without exceeding the need in Berkeley County. Thus, Trident and Roper are not "competing applications."

### CONCLUSION

For the foregoing reasons, the Department respectfully requests that the September 26, 2012 Final Order and Decision of the ALC be affirmed.

Respectfully submitted,



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