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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2019-001159

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242(f) of the South Carolina Appellate Court Rules, Appellant Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County ("MUHA") submit this Return opposing Respondent Trident Medical Center, LLC d/b/a Trident Medical Center's ("Trident") Petition for a Writ of Certiorari seeking review of the decision of the Court of Appeals in the above captioned matter: *Trident Med. Ctr., LLC v. S.C. Dep't of Health & Env't Control*, 438 S.C. 391, 882 S.E.2d 878 (Ct. App. 2022), *reh'g denied* (Feb. 10, 2023). For the reasons stated herein, the Court should deny the Petition and permit the well-reasoned decision of the Court of Appeals to stand.

Counter-Statement of the Questions Presented

1. Whether the Court of Appeals properly found that the Administrative Law Court lacked subject matter jurisdiction and exceeded its statutory authority by ruling upon the validity and constitutionality of MUSC Strategic Ventures and MUSC Health Cancer Care Network, LLC.

2. Whether the Court of Appeals properly found that issues related to the validity and constitutionality of MUSC Strategic Ventures and MUSC Health Cancer Care Network, LLC were not timely raised.

3. Whether the Court of Appeals properly declined to address the merits of the validity and constitutionality of MUSC Strategic Ventures and MUSC Health Cancer Care Network, LLC.

4. Whether the Court of Appeals properly declined to address the issue of whether MUHA is the proper licensee.

5. Whether the Court of Appeals is required to expressly remand the case to the Administrative Law Court after reversal.

Counter-Statement of the Case

This appeal does not present a novel question of law as suggested by Trident and instead presents straightforward applications of the Administrative Procedures Act ("APA") and the State Certification of Need and Health Facility Licensure Act (the "CON Act"), which plainly limit the South Carolina Administrative Law Court's ("ALC") authority and subject matter jurisdiction.

In May 2017, MUHA, which operates the hospitals affiliated with the Medical University of South Carolina ("MUSC"), filed an application with the South Carolina Department of Health and Environmental Control ("DHEC") to obtain a certificate of need ("CON") to expand its radiation therapy services by adding a sixth linear accelerator, which would be placed in a new facility in the Nexton development in southern Berkeley County.[1] (MUHA CON Application, R. 1595, 1606–07). In the CON application, MUHA was identified as the licensee, and the MUSC Health Cancer Care Network, LLC (the "Network"), which is a joint venture between MUSC Strategic Ventures ("MSV") and Alliance Oncology, LLC ("Alliance"), was identified as the management company. (*Id.*).

Trident challenged MUHA's CON application as an affected person under the CON Act. *See* (Trident Affected Person Letter, R. 57). On November 22, 2017, DHEC issued a staff decision approving MUHA's application for a CON. (Decision Granting CON for MUHA, R. 47–50). DHEC's findings indicate it considered the South Carolina Health Plan and the various regulations regarding community need, medically underserved groups, and financial feasibility. (*Id.*). DHEC did not consider the validity or the constitutionality of MSV or the Network in approving the application.

On December 15, 2017, Trident filed a request seeking review of this DHEC staff decision by the DHEC Board. (Trident's Request for Final Review, R. 68–72). The DHEC Board declined Trident's request. (Jan. 31, 2018 DHEC Letter, R. 54–55). Trident then filed a petition for administrative review and request for a contested case hearing with the ALC. (Petition for

[1] The parties generally referred to the CON applicant as "MUSC" during trial and in ALC briefing. Because MUHA is the actual applicant and it is necessary to differentiate between MUSC and MUHA based on the issues raised in this appeal, this brief refers to the applicant by the shorthand term "MUHA" as a proxy for its proper name, Medical University Hospital Authority.

Contested Case Hearing, R. 37–45). In the petition, Trident challenged the CON application as an affected person under the CON Act on several grounds: (1) DHEC failed to consider MUHA's application and another application submitted by Roper St. Francis Hospital – Berkeley, Inc.[2] as "competing applications";[3] (2) no community need for an additional linear accelerator existed in the service area; (3) the project was an unnecessary duplication of services and would not increase accessibility to services; (4) the project was not "financially feasible" because the lack of community need for additional radiation therapy services in the service area rendered MUHA's ability to meet required utilization projections "questionable"; and (5) the project would substantially adversely impact other area providers, particularly Trident. (Petition for Contested Case Hearing, R. 43–44). These were the same five grounds previously raised in Trident's request to the DHEC Board for final review. (Trident's Request for Final Review, R. 68–72).

In January 2019, the ALC held a five-day contested case hearing. *See generally* (Trial Tr., R. 90–1312). Trident focused its opening statements and case-in-chief primarily on the theory that the proposed project would not accomplish the goals of the CON Act "given what's already available in the service area." (Trial Tr. 20, R. 109). Trident made several specific assertions: lack of community need; the proposed project would duplicate services; the proposed project

[2] Around the time MUHA submitted its CON application, another entity filed a CON application to establish a linear accelerator in a new hospital in Berkeley County. Trident opposed the application, but the parties settled prior to the contested case hearing.

[3] "Competing applicants" are defined as two or more persons "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). When DHEC receives multiple applications that qualify as "competing applications," it may grant only one application—the one that "most fully complies with the requirements, goals, and purposes of [the CON Act] and the State Health Plan, Project Review Criteria, and the regulations adopted by the department." S.C. Code Ann. § 44-7-210(B).

would not improve access to services; the proposed project would not benefit medically underserved groups; and the proposed project did not satisfy the criteria in the State Health Plan. (Trial Tr. 18–22, R. 107–11). Trident also presented evidence and argument attempting to show MUHA failed to prove that its linear accelerator utilization over the previous two years exceeded 80%, as required by Standard 7 of the State Health Plan. (Trial Tr. 23–29, R. 112–18; 2015 State Health Plan, Joint Tr. Ex. 5, R. 1335).

At the end of the contested case hearing, in a purported rebuttal to MUHA's case-in-chief, Trident recalled its expert witness. (Trial Tr. 1104, R. 1193). With the expert's testimony, Trident raised for the first time that MUHA was not the real owner of the proposed facility and therefore was not the proper CON applicant. (Trial Tr. 1158, R. 1247). At the close of all the evidence, Trident moved for judgment in its favor and argued—for the first time since MUHA filed its CON application—that MUHA's application should be denied because the Network was an unconstitutional joint venture. (Trial Tr. 1208–23, R. 1297–1312). Trident then filed a written motion raising the same argument. (Motion for Directed Verdict, R. 2005–10). Trident argued MUSC did not have authority to create "subsidiary or affiliated corporations" and neither MUSC nor MUHA may legally hold ownership interests "in a private, for-profit corporation (MUSC Network) that is majority owned and controlled by another private, for-profit company." (*Id.* at 8, 11, R. 2006, 2009). Trident claimed the Network is an unconstitutional joint venture and requested the ALC deny MUHA's CON application on that basis. (*Id.* at 11–12, R. 2009–10).

MUHA filed a memorandum in opposition to Trident's motion, arguing (1) the ALC does not have subject matter jurisdiction over Trident's claims that MSV and the Network are illegal; (2) Trident's claims that MSV and the Network are illegal were not as-applied constitutional claims arising from the application of the standards in the CON Act and CON Regulations; (3)

Trident failed to raise the issue during the DHEC review process; and (4) Trident's claim that MSV and the Network are illegal fails on the merits. *See generally* (MUHA's Memo in Opp. to Directed Verdict, R. 2031–48).

The ALC granted Trident's motion. *See generally* (ALC Or. of Judgment, R. 1–35). It rejected MUHA's arguments in opposition, (*Id.* at 14–19, R. 14–19), and held MSV and the Network were "illegal or *ultra vires*" because MUSC had no authority "to create subsidiary or affiliated entities" and neither MUSC nor MUHA have the authority to create a joint venture with a private, for-profit company or to hold an ownership interest in a private, for-profit company. (*Id.* at 22–24, R. 22–24) (citing S.C. CONST. art. X, § 11). Consequently, the ALC found MSV and the Network must be dissolved. (*Id.* at 26, R. 26). According to the ALC, the "ultimate dissolution" of the Network required a "second inquiry" into whether MUHA's CON application complied with the CON Act and CON Regulations. (*Id.* at 27, R. 27). The ALC found "that upon the necessary dissolution of The Network, the project's ability to satisfy the [requirement] of Financial Feasibility, as submitted to, reviewed, and approved by DHEC through the attestations in the CON Application, is no longer present." (*Id.* at 28, R. 28).

Finally, the ALC interpreted the applicable *de novo* review standard to allow it to consider another issue—not raised before DHEC or in Trident's motion—and found MUHA was "not the actual licensee of the proposed project as represented in the Application." (*Id.* at 29, R. 29). The ALC found that because the Network, as the management company, would control certain of the day-to-day administrative operations of the project, the Network was the owner of the project and, because Alliance owns 51% of the Network, *Alliance* is the actual "owner" of the proposed facility. (*Id.* at 33–34, R. 33–34). Based on these multi-layered findings on issues not timely raised, the ALC improperly concluded that MUHA did not hold the controlling interest in the project and was

not the "actual licensee." (*Id.* at 34, R. 34). On that basis, the ALC denied MUHA's application for a CON. (*Id.* at 35, R. 35).

MUHA filed a motion to reconsider, which the ALC denied. (MUHA Motion to Reconsider, R. 2070–74; ALC Order Denying Motion to Reconsider, R. 36). MUHA appealed the ALC's order granting judgment in favor of Trident and the order denying MUHA's motion to reconsider.

On December 14, 2022, the Court of Appeals issued an opinion reversing the ALC's order granting judgment in favor of Trident for two primary reasons. *Trident Med. Ctr., LLC v. S.C. Dep't of Health & Env't Control*, 438 S.C. 391, 882 S.E.2d 878 (Ct. App. 2022), reh'g denied (Feb. 10, 2023). First, the Court of Appeals found that "the ALC did not have the statutory authority to rule on the constitutionality of MSV and the Network" because the CON Act does not authorize the ALC to do so. *Id.*, at 397–98, 882 S.E.2d at 881–82. Second, the Court of Appeals found that the "ALC erred in ruling on an issue not presented to or considered by DHEC," as the CON Act limits a contested case hearing to the issues presented or considered by DHEC, and the issue regarding the ownership structure and constitutionality of MSV or the Network were not presented to or considered by DHEC. *Id.*, at 398–400, 882 S.E.2d at 882–83.

Argument

I. The Court of Appeals properly found that the ALC lacked subject matter jurisdiction and exceeded its statutory authority by ruling upon the validity and constitutionality of MSV and the Network.

The Court of Appeals' opinion holding that the ALC lacked subject matter jurisdiction and exceed its statutory authority by ruling upon the validity and constitutionality of MSV and the Network is based on simple and straightforward applications of the APA and the CON Act.

A. The ALC is an executive branch court of limited jurisdiction.

The ALC is an executive branch department created by the General Assembly, and it operates as a court of limited jurisdiction. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013) (citing *Howard v. S.C. Dep't of Corrs.*, 399 S.C. 618, 733 S.E.2d 211 (2012)); S.C. Code Ann. § 1-23-500. It has only the authority granted to it by the General Assembly, and it cannot exceed that authority. *Id.*; *S.C. Dep't of Consumer Affs. v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 186, 700 S.E.2d 468, 470 (Ct. App. 2010). The APA authorizes the ALC to conduct contested case hearings regarding agency decisions and hear appeals of agency decisions. S.C. Code Ann. §§ 1-23-380, -505(3), & -600. The ALC's contested case jurisdiction allows it to conduct *de novo* hearings to determine whether parties should receive licenses, permits, and other approvals from state agencies. S.C. Code Ann. § 1-23-505(3); *Marlboro Park Hosp. v. S.C. Dep't of Health & Env't Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). Although the ALC conducts a *de novo* review, its review is confined to the issues raised to and considered by the agency. S.C. Code Ann. § 44-7-210(E) ("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 ALC does not have the power to rule on the constitutionality or validity of a law or regulation. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 38 (2011) (explaining the ALC cannot "decide facial challenges to a statute or regulation; those are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court"); *Drummond v. State*, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008) ("Although appellant is not challenging the constitutionality of the regulation, he is challenging its validity under state law. Because the Administrative Law Court is part of the

executive branch . . . it has no authority to rule on the facial validity of [a regulation].”). The ALC may determine only whether a statute or regulation, as applied to a particular party, violates that party’s constitutional rights. *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38 (“While it is true that AL[C]s cannot rule on a facial challenge to the constitutionality of a regulation or a statute, AL[C]s can rule on whether a law as applied violates constitutional rights.” (alterations in original) (quoting *Dorman v. Dep’t of Health & Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002))).

In a contested case hearing addressing DHEC’s approval or denial of a CON application, the ALC’s *de novo* review requires it to determine whether the CON application complies with the State Health Plan, the CON Act, and the project review criteria enumerated in the CON Regulations. *See* S.C. Code Ann. § 44-7-210(B) & (E). The ALC does not have authority to consider matters outside the criteria established by the General Assembly and DHEC (with the General Assembly’s express authorization) or outside the CON application and arguments raised by an affected person challenging the CON application. S.C. Code Ann. § 44-7-210(E). Moreover, the purpose of the CON Act—and the ALC’s role—is to ensure that health care facilities are needed, are financially viable, and avoid unnecessary cost and duplication. *See* S.C. Code Ann. § 44-7-120 (“The purpose of this article is to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State.”); *see also* S.C. Code Ann. Regs. 61-15 § 802 (providing project review criteria, including financial information). The ALC must review a CON application with that purpose in mind and make a decision that effectuates that purpose.

B. The ALC exceeded its statutory authority in this case.

The Court of Appeals correctly found that the ALC lacked statutory authority to find MSV or the Network unconstitutional. First, the ALC did not engage in an "as applied" constitutional analysis. *See Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38. The ALC did not determine—and Trident did not argue—that the CON Act, the State Health Plan, or the project review criteria were unconstitutionally applied to Trident. Therefore, the ALC did not consider whether the application of a particular law violated Trident's constitutional rights. Instead, the ALC determined the mere existence of MSV and the Network is illegal or unconstitutional as a matter of law. (ALC Or. of Judgment at 22, R. 22). The ALC, as part of the executive branch, did not have the power to rule on the legal question of whether either entity is constitutional or allowed by state law. *See* S.C. Code Ann. § 1-23-500 (stating that the Administrative Law Court "is an agency and a court of record within the executive branch of the government of this State"); *Breeland v. Henderson*, 2016 WL 6471907, at *2 (D.S.C. Oct. 3, 2016), *report and recommendation adopted*, 2016 WL 6433466 (D.S.C. Oct. 31, 2016) ("The Administrative Law Court is an executive branch court, not a judicial tribunal"). The ALC cannot make such a determination. *See Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38; *Drummond*, 378 S.C. at 370, 662 S.E.2d at 591.

Second, the ALC lacked statutory authority to consider issues not contemplated by the CON Act, the CON Regulations, or the State Health Plan. The ALC's review is limited to a narrow inquiry: whether the CON application meets the regulatory requirements. *See* S.C. Code Ann. § 44-7-210(B) & (E). The regulatory requirements focus on need, cost, duplication, and other issues relevant to a determination whether the proposed health care facility serves public healthcare needs. Determining the validity or constitutionality of the mere existence of the management company named in a CON application is outside the purview of the regulations. Nothing in the

CON Act, CON Regulations, or the State Health Plan empowers either DHEC or the ALC to evaluate whether an entity which is licensed to transact business in South Carolina—particularly a management company that is not the CON applicant and is not a party to the case—lawfully exists and operates. Moreover, no South Carolina authority empowers the ALC to find that a foreign LLC authorized to transact business in South Carolina—which is also not a party to the case—must be dissolved.

The State Health Plan identifies seven criteria as the most important in evaluating a CON application for radiation therapy services: (1) compliance with the need outlined by the State Health Plan, (2) community need documentation, (3) distribution and accessibility of services, (4) projected revenues, (5) projected expenses, (6) financial feasibility, and (7) cost containment. (2015 State Health Plan at p. IX-6, Joint Tr. Ex. 5, R. 1336). The purpose of the State Health Plan criteria is clear—to ensure that health care facilities are financially viable and effectively distributed to meet community needs. None of the criteria mandate or permit an inquiry into the legal existence or formation of any entity.

The ALC and Trident's attempts to fit its ruling into the project review criteria are unavailing. Its ruling is comprised only of hypotheticals: whether MUHA can still satisfy the project review criteria and State Health Plan *if* the Network is unconstitutional, the Network cannot serve as the management company, and the Network cannot invest in the project. The project review criteria and State Health Plan do not authorize the ALC to engage in such an inquiry in the first instance. The ALC is limited to considering whether the application as submitted to DHEC satisfies the regulatory criteria. It cannot expand its own statutory authority to rule on other potential legal questions.

South Carolina courts have previously approved of ALC decisions rejecting invitations to expand its inquiry beyond the applicable regulatory criteria. For example, in *SGM-Moonglo, Inc. v. South Carolina Department of Revenue*, this Court reviewed an ALC's decision to approve an off-premises beer and wine permit. 378 S.C. 293, 294–95, 662 S.E.2d 487, 488 (Ct. App. 2008). The ALC's statutory obligation in *SGM-Moonglo* was to determine whether the proposed location for the business was "proper and suitable prior to granting the permit." *Id.* at 295, 662 S.E.2d at 488. A party challenging the issuance of the permit argued the ALC erred in granting the permit because a restrictive covenant applicable to the property on which the business would be located prohibited the sale of alcoholic beverages on the property. *Id.* at 294, 662 S.E.2d at 488. The ALC held it did not have statutory authority to enforce the restrictive covenant; its statutory authority was limited to whether the proposed location meets the criteria established by statute and case law. *Id.* The Court of Appeals held the ALC properly confined its decision to its limited authority:

> *An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose*. Pursuant to section 61-4-520 of the South Carolina Code . . . , the ALC must determine whether a proposed location is proper and suitable prior to granting an off-premises beer and wine permit. *Restrictions in the chain of title of a proposed location, however, are not a legitimate concern of the ALC in determining whether the location is suitable. Accordingly, the ALC did not err in refusing to consider the existence of the restrictive covenant*.

Id. at 294–95, 662 S.E.2d at 488 (emphases added).

In *Be Mi, Inc. v. South Carolina Department of Revenue*, this Court found the ALC properly declined to consider whether a restaurant and bar applying for a liquor-by-the-drink license had a right to use the space it identified as part of its seating space. 408 S.C. 290, 299–300, 758 S.E.2d 737, 742 (Ct. App. 2014). This Court held "[t]he proper court for the [party objecting to the liquor license] to litigate whether [the applicant] has a right to use the deck for the

seating of its restaurant is in the circuit court." *Id.* In each of those cases, the ALC properly acted within its limited role—to apply the regulatory criteria in light of the regulatory purpose and determine whether the application is compliant. Similarly, in this case, the ALC's statutory authority is limited to determining whether the CON application meets the statutory and regulatory criteria. Unlike the ALC in *SGM-Moonglo* and *Be-Mi*, however, the ALC in this case accepted an invitation to stray from its role and consider issues that defeat the underlying purpose of the CON Act, CON Regulations, and State Health Plan.

Because the ALC lacked statutory authority to deny MUHA's CON application on grounds related to the legal status of third parties, the judgment is a nullity and was properly reversed. *See Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity . . . .").[4]

Trident's argument in support of its petition for writ of certiorari does not present a novel question of law, a conflict with a prior decision of the Supreme Court, or a substantial constitutional issue. Instead, Trident merely argues that any topic which affects compliance with

[4] The ALC also cannot find MSV or the Network to be invalid after another executive branch department authorized both entities to transact business in South Carolina. The Network is a Delaware LLC authorized by the South Carolina Secretary of State to transact business in South Carolina. (MUHA CON Application at 10, R. 1604). MSV is an authorized non-membership South Carolina nonprofit corporation. (*Id.* at 9, R. 1603). Despite both entities' compliance with the requirements for formation in their respective states of incorporation and with the requirements to obtain authorization from the South Carolina Secretary of State to transact business in South Carolina, the ALC ruled that neither entity is valid and both must be dissolved. (*Id.* at 22, R. 22). Regardless of whether the ALC had jurisdiction to order the dissolution of a corporation or LLC in general, it could not order the dissolution of either entity under the United States Supreme Court's holding in *Raley v. Ohio*, 360 U.S. 423, 425–26 (1959) (finding state courts had engaged in "the most indefensible sort of entrapment by the State" by "convicting a citizen for exercising a privilege which the State clearly had told him was available to him"). Moreover, even if the Secretary of State's act in authorizing the Network to transact business in South Carolina does not, as a matter of law, prevent another executive branch agency from invalidating MUSC SV or the Network, the ALC does not have the power to make that determination. *See* S.C. Code Ann. § 33-1-300 cmt.

the CON requirements—such as any topic related to ownership or and control—may be considered by the ALC within its statutory authority because it is integral to the issuance of a CON. *See* (Trident Pet. 6–8). This argument fails.

First, the mere inclusion of "basic ownership information" in the CON application does not entitle the ALC to examine the validity or constitutionality of every entity involved in a proposed facility or to deny an application based on a purported issue in the formation of a management company. Trident's arguments would expand the ALC's authority beyond the CON Act, the CON Regulations, and the project review criteria, and would allow the ALC to deny a CON application based on circumstances impacting any person mentioned in the application, regardless of whether those circumstances relate to healthcare planning or public healthcare needs. Such an expansive view of the ALC's authority does not comport with the CON Act.

Trident also attempts to use the "Record of Applicant" criterion to establish the ALC's jurisdiction over the constitutionality or validity of MSV and the Network. (Trident Pet. 14); *see also* S.C. Code Ann. Regs. 61-15 § 802(13). The elements of the "Record of the Applicant" do not invite the ALC to examine the validity of a management company and its owners. Instead, the criterion lists four potential considerations related to the applicant (in this case, MUHA): (1) whether the applicant has record of "successful operation with adequate management experience"; (2) whether the applicant has a "demonstrated ability to obtain necessary capital financing"; (3) sources of assistance if the applicant has no prior experience; and (4) the applicant's "record of cooperation and compliance with State and Federal regulatory programs." S.C. Code Ann. Regs. 61-15 § 802(13). MUHA is the applicant, and its CON application addressed its record. *See generally* (CON App., R. 1595–1977). This section of the CON application does not empower the ALC to determine the constitutionality or validity of every entity mentioned in the application.

Trident's arguments are merely an effort to gain a jurisdictional footing for the ALC to declare MSV and Network illegal in order to support its argument that their removal from the project would cause other project review criteria not to be satisfied. *See* (Trident Pet. 9) (arguing the issue is the "ownership of the Proposed Project and its effect on the Project's ability to comply with CON criteria and standards"). CON cases require consideration of State Health Plan standards and project review criteria—not whether corporate entities involved in the project are "legal" under enabling statutes or the Constitution. *See* (MUHA App. Br. 18–21). The mere fact that Trident or the ALC can hypothesize ways the CON criteria could be impacted by deleting certain entities from the CON application does not create authority for the ALC to do so.

II. The Court of Appeals properly found that issues related to the constitutionality and validity of MSV and the Network were not timely raised.

The Court of Appeals also properly concluded that the ALC erred in ruling on an issue not timely presented to or considered by DHEC. Despite having knowledge of the ownership structure of the Network and its role as a contracted manager of the proposed project upon MUHA's original filing of the CON Application, Trident did not raise the purported invalidity or unconstitutionality of the Network or MSV to DHEC during the staff review, to DHEC in its request for final review, to the ALC in its petition for a contested case hearing, to the ALC in its prehearing brief, or to the ALC in its opening statement describing the issues for trial. Instead, Trident waited to raise the issue until the close of the contested case hearing, when it made an oral post-trial motion—and subsequent written motion—arguing the ALC should deny the CON based on purported issues with the validity of MSV and the Network. (Trial Tr. 1208–23, R. 1297–1312). Trident also never raised the issue of whether MUHA was the proper applicant or licensee until it recalled its expert witness to testify in "rebuttal" after the close of MUHA's evidence. (Trial Tr. 1156, R. 1245).

Although the ALC conducts a *de novo* review of the CON application during the contested case hearing, "[t]he issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during the staff review and decision process." S.C. Code Ann. § 44-7-210(E); *see also Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 345, 755 S.E.2d 444, 450 (2014). In *EAGLE*, the Supreme Court considered a regulation allowing DHEC "to consider additional factors" in determining whether to issue a landfill permit. 407 S.C. at 345, 755 S.E.2d at 450. Although the ALC denied the permit on a ground other than those expressly cited by DHEC, the Supreme Court affirmed the ALC's decision "because *it was a matter at issue that had been litigated from the time the Landfill Permit was first contested*" and the ALC therefore "did not conceive a new factor, *nor did it consider evidence outside of the existing record*." *Id.* (emphases added). "Instead, in determining the Landfill was not needed, the ALC considered and utilized in its decision *a factor that was discussed during the public comment period* and tried at the ALC hearing." *Id.* (emphasis added). Unlike the ALC in *EAGLE*, the ALC in this case considered additional grounds not litigated before DHEC.

The ALC incorrectly interpreted the *de novo* standard as allowing it to consider matters not raised until the end of the contested case hearing. (ALC Or. of Judgment at 16, R. 16). The ALC not only considered issues never raised to DHEC, it considered issues not even encompassed by MUHA's CON application. In fact, the ALC even acknowledged that it considered whether MUHA was the actual licensee *sua sponte* based on its interpretation of the *de novo* standard. (ALC Or. of Judgment at 13, R. 13). The ALC's erroneous interpretation of the *de novo* standard is an error of law was properly reversed by the Court of Appeals. *See also Marlboro Park Hosp.*, 358 S.C. at 579, 595 S.E.2d at 854 (noting an ALC applying a *de novo* standard may receive new

evidence, but repeating the statutory limitation that "the *issues* considered at the contested case hearing are limited to those presented or considered during the staff review and decision process" (emphasis added) (citing S.C. Code Ann. § 44-7-210(E))). The *issues* of whether MSV and the Network are invalid and whether MUHA is the actual licensee were not presented to DHEC. Therefore, those *issues* do not fall within the ALC's *de novo* review of the CON application.

In its petition, Trident attempts to sidestep the timeliness issue and claims the Court of Appeals disregarded the controlling law by arguing that the ALC merely considered later-discovered *evidence* related to an *issue* that was considered by DHEC. This argument ignores both the facts and the law. (Trident Pet. 9).

Factually, throughout the CON process prior to the contested case hearing, Trident raised slight variations of the same five grounds in support of its claim that the application must be denied: (1) DHEC failed to consider MUHA's application as a "competing application"; (2) "there is no community need for an additional linear accelerator in the service area;" (3) the project "is an unnecessary duplication of services which does nothing to increase accessibility to services"; (4) the project "is not financially feasible" because the lack of community need for additional radiation therapy services in the service area renders MUHA's ability to meet its utilization projections "questionable"; and (5) the project "will substantially adversely impact other area providers, including Trident." *See generally* (Trident Affected Person Status Letter, R. 57; Trident Letter Responding After Public Review Meeting, R. 63–66; Trident's Request for Final Review, R. 68–72; Petition for Contested Case Hearing, R. 37–45; Trident's Prehearing Brief, R. 1978–87). Trident never argued MSV or the Network were invalid or unconstitutional, nor did it ever argue that MUHA was not the correct applicant or that any legal barrier existed to any of the entities applying for a CON.

As a legal matter, S.C. Code Ann. § 1-23-320(B) requires a party requesting a contested case hearing to give notice including a "short and plain statement of the matters asserted" and providing, "If the agency or other party is unable to state the matters in detail at the time the notice is served, *the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished*." (emphasis added). Trident neither identified these issues in its petition or prehearing brief nor made any "more definite and detailed statement" after "discovering" the issues.

Therefore, despite now claiming that the ownership information was additional *evidence* related to a considered *issue*, Trident itself failed to identify the ownership structure as an issue throughout the entirety of the administrative process. Therefore, the Court of Appeals properly determined that the ALC lacked statutory authority to consider the issues. *See* S.C. Code Ann. § 1-23-320(I) ("Findings of fact must be based exclusively on the evidence *and on matters officially noticed*." (emphasis added)); *Solomon v. W.B. Easton, Inc.*, 307 S.C. 518, 522, 415 S.E.2d 841, 844 (Ct. App. 1992) ("A petition for review of [an agency's] rulings pursuant to the Administrative Procedures Act *must direct the court's attention to the abuse allegedly committed below including a distinct and specific statement of the rulings of which the appellant complains*. The circuit court lacks jurisdiction of the appeal if the notice is insufficient.").

III. The Court of Appeals properly declined to address the merits of the legality of MSV and/or the constitutionality of the Network.

Trident spills much ink in its petition arguing why MSV and/or the Network are unlawful or unconstitutional entities. *See* (Trident Pet. 11–17). While this assertion is incorrect on the merits, more importantly, Trident fails to explain how the Court of Appeals erred in failing to address the merits of this argument. Having found that the ALC exceeded its statutory authority in deciding these issues *and* improperly considered the issue as it was not properly preserved, it

was unnecessary for the Court of Appeals to consider the underlying merits of the issue. The Court of Appeals' finding that the ALC exceeded its jurisdiction and considered an unpreserved issue were dispositive to the appeal, and "[a]n appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 215, 723 S.E.2d 597, 609 (Ct. App. 2012) (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)).

Notably, it is this very issue that Trident attempts to use to justify the grant of certiorari in this case, as Trident claims that this "appeal presents a novel question of whether an agency of the State of South Carolina can create and use a subsidiary corporation to indirectly co-own a for-profit company with a private entity." (Trident Pet. 1). However, as shown above, it was unnecessary for the Court of Appeals to reach this alleged "novel question," as the decision by the ALC was erroneous and reversible based on simple applications of the APA and CON Act. By dispelling Trident's argument that this case presents a novel question of law regarding the ownership structure, Trident's primary justification for the issuance of a writ of certiorari falls away.

The Court of Appeals also correctly avoided ruling on this "constitutional" issue when another ground existed for its opinion. *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (recognizing the "firm policy to decline to rule on constitutional issues unless such a ruling is required" (citations omitted)). Because the ALC exceeded its authority, the Court of Appeals (and this Court) need not reach the remaining issues concerning constitutionality.

Finally, for the reasons argued by MUHA before the Court of Appeals, Trident's argument regarding the legality of MSV and/or the constitutionality of the Network also fails on the merits. *See generally* (MUHA App. Br.; MUHA Reply Br.). Briefly, the ownership structure of the

Network was valid and constitutional because no state funds were at risk. The Constitution of the State of South Carolina provides that "neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation." S.C. Const. art. X, § 11. The purpose of this provision is to protect public funds from risky investments. *O'Brien v. ORBIT*, 380 S.C. 38, 42–43, 668 S.E.2d 396, 398–99 (2008). Using corporate affiliates, such as the Network, is permitted and eliminates the risk of loss of public funds. *Brashier v. SCDOT*, 327 S.C. 179, 490 S.E.2d 8 (1997) (using a corporate affiliate to finance and operate a toll road did not transform the DOT into an unconstitutional joint owner or stockholder of the affiliate) , *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). In fact, this Court has, on multiple occasions, affirmed the constitutionality of transactions in which a governmental entity contributes funds to build a hospital but contracts with a private company to operate the hospital, even where the private entity has the right to all revenues generated by its operation of the hospital. *Taylor v. Richland Mem'l Hosp.*, 329 S.C. 47, 50, 495 S.E.2d 431, 433 (1998); *see also Gilbert v. Bath*, 267 S.C. 171, 176–77, 227 S.E.2d 177, 179–80 (1976) (finding such an arrangement is not prohibited by article X, section 6 of the South Carolina Constitution, which has since been renumbered as article X, section 11).

In *Taylor*, a political subdivision of Richland County entered into an agreement with a private, nonprofit hospital corporation to create a new nonprofit corporation—referred to as "the System"—to "take over and operate the hospital facilities of both parties." 329 S.C. at 48–49, 495 S.E.2d at 432. The parties transferred substantially all assets of their hospital systems to the System. *Id.* The Supreme Court rejected an argument that the arrangement was an unconstitutional joint venture under article X, section 11 of the South Carolina Constitution, finding "because Richland County will not be liable for the System's obligations and the System

will not have the powers to tax and to pledge the full faith and credit of any political entity, this alliance does not create a risk that any losses will be shifted to the public." *Id.* at 50, 495 S.E.2d at 433. The court noted "[t]he intent of Article X, § [11] was to 'prevent the state from entering into business hazards which might involve obligations upon the public,'" and found "no evidence the proposed alliance will run afoul of this constitutional provision." *Id.* (quoting *Chapman v. Greenville Chamber of Commerce*, 127 S.C. 173, 120 S.E. 584, 588 (1923)). Like the alleged joint venture in *Taylor*, there is no evidence that the Network's management of the proposed facility would impose obligations on the public.

Accordingly, the Court of Appeals' decision not to address the merits of the legality of MSV and/or the constitutionality of the Network is not grounds for the issuance of a writ of certiorari.[5]

IV. The Court of Appeals' ruling did necessarily address the procedural issues regarding the ALC's finding that MUHA is not the proper licensee and did not err in failing to explicitly address this duplicative issue.

The Court of Appeals explicitly found that the "ALC's jurisdiction was limited to whether the application met the criteria established by the governing law." Under the governing law, "the project review criteria included compliance with the need standards, community need documentation, accessibility, projected revenues, projected expenses, financial feasibility, and cost containment." Based on this reasoning, the Court of Appeals held that the ALC exceed its statutory authority in ruling on the legality and/or constitutionality of the legal entities associated with a CON application. Likewise, and as argued by MUHA before the Court of Appeals, the ALC's finding that the entity charged with performing these ancillary business functions should be the

[5] For the reasons argued by MUHA before the Court of Appeals, Trident's argument regarding the legality of MSV and/or the constitutionality of the Network also fails on the merits. *See generally* (MUHA App. Br.; MUHA Reply Br.).

"actual licensee," rather than the entity responsible for the healthcare functions specified by the CON Act, exceeded the ALC's authority and was an error of law. *See* (MUHA Reply Br. 2–5).

Rather than being an independent sustaining ground as posited by Trident, the ALC's erroneous finding that MUHA is not the proper licensee was just another example of the ALC exceeding is statutory authority as determined by the Court of Appeals.[6] It was simply unnecessary for the Court of Appeals to decide this duplicative, and meritless issue. *See* S.C. Code Ann. § 14-8-250 (the Court of Appeals "need not address a point which is manifestly without merit").

Further, by statute, MUHA is the only entity that can be listed as the licensee given that it is the statutorily created body which operates the hospitals affiliated with the Medical University of South Carolina. S.C. Code Ann 59-123-60 (E)(5) (the General Assembly created MUHA to "construct, operate, and maintain the hospital and related premises, buildings and facilities, and infrastructure"); *see also* S.C. Code Ann. Regs. 61-15 § 202(b)(8) (defining "licensee" as 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"). Hence, by law it is the only licensee on any CON application.

Accordingly, this Court should deny certiorari because the Court of Appeals did not disregard controlling law in failing to explicitly address the ALC's finding that MUHA was not the actual licensee.[7]

[6] This finding by the ALC is also another example of the ALC improperly deciding an issue that was not properly persevered as it was no presented to the DHEC. *See* (MUHA Reply Br. 2–5).

[7] For the reasons argued by MUHA before the Court of Appeals, Trident's argument regarding whether MUHA is the proper licensee also fails on the merits. *See generally* (MUHA App. Br.; MUHA Reply Br.).

V. The Court of Appeals is not required to expressly remand the case to the Administrative Law Court after reversal.

As a final matter, Trident seeks a writ of certiorari because a remand to the ALC is required, and the Court of Appeals did not expressly and explicitly remand the matter to the ALC. *See* (Trident Pet. 20–21). While MUHA agrees that a remand to the ALC is appropriate, this is not a proper ground for the issuance of a writ of certiorari, as a remand is implicit following the reversal by the Court of Appeals.

S.C. Code Ann. § 18-9-270 provides that the "Court of Appeals may reverse, affirm, or modify the judgment, decree, or order appealed from in whole or in part and as to any or all of the parties, and the judgment shall be remitted to the court below to be enforced according to law." The statutory section does not explicitly reference a remand and instead requires the judgment to be remitted to the "court below" following a reversal. Here, the "court below" is the ALC. Accordingly, because the Court of Appeals reversed the decision of the ALC, the matter must be remitted back to the ALC. *See Hamm v. S. Bell Tel. & Tel. Co.*, 305 S.C. 1, 5, 406 S.E.2d 157, 160 (1991) ("Although we did not explicitly remand the case, and used only the word 'reversed,' in view of our prior case law and opinion in this case, it was implicit as well as our intention" that a remand occur to execute our decision.).

The Court of Appeals reversed the decision of the ALC, and the case was remitted to the ALC by operation of law. Therefore, the Court of Appeals' failure to specifically indicate that the case be remanded to the ALC was not in error, and this Court should deny certiorari.

Conclusion

Based on the foregoing, this Court should deny Trident's petition for a writ of certiorari.

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