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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 2007-ALJ-07-0389-CC

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

Respondents

RECORD ON APPEAL

VOLUME III

John F Beach
John J Pringle, Jr
Ellis, Lawhorne & Sims, P A
1501 Main Street, 5th Floor (29201)
Post Office Box 2285
Columbia, SC 29202
(803) 343-1269
Attorneys for Appellant
MRI at Belfair, LLC

Travis Dayhuff
Holly G Gillespie
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000
Attorneys for Respondent
Coastal Carolina Medical Center

Ashley C Biggers
South Carolina Department of Health and
Environmental Control
2600 Bull Street, 3rd Floor
Columbia, SC 29201
(803) 898-3350
Attorneys for Respondent
South Carolina Department of Health and
Environmental Control

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The Board's decision to remove the utilization requirements from the Plan and to approve the CCMC Project without reference to existing MRI utilization in the service area is in violation of law and exceeds the Board's authority. This "public policy" decision cannot override the express requirements of Section 44-7-180(B). The Plan cannot automatically authorize approval of a hospital's CON application for an MRI without regard to utilization of other MRI service providers, be they other hospitals, free standing imaging centers such as Belfair, or physician's offices providing imaging services.

In granting partial summary judgment to CCMC and DHEC, the Order also found that there was no genuine issue of fact as to whether there was a need for a fixed hospital based MRI at CCMC because the Plan determines need, i.e., the Plan requires that **"each hospital should have an MRI unit available for emergency patients, inpatients and outpatients"** and granted partial summary judgment for Respondents (Board Order p. 4, R. p. ____)(emphasis added). There is neither express authority nor any necessary implication in the CON Act that authorizes the Plan to define need for a health service by the category of health care facility defining the service, i.e., need for MRI services is automatic at a hospital but there must be some other (unspecified in the Plan) need standard for other health care facilities or free standing imaging centers.

In contradiction to the Order's conclusion, in its CON Summary Sheet, the Department staff expressly found that "[t]he Plan does not project needs for MRIs in South Carolina, but does present three standards that must be satisfied prior to CON approval." (DHEC CON File Finding E, p. 410 Project Application DHEC Ex. 1 R.

_____) DHEC's staff findings constitute an admission by the Department that the Plan does not contain a projection of need for MRI as required by § 44-7-180(B)(2). The Plan's failure to contain a projection of need for MRI is an obvious violation of the clear and unambiguous requirement of Section 44-7-180(B)(1).

Simply put, the Administrative Law Judge interpreted the Plan Standard 1 to be a finding of need and the Board adopted this finding. This legal conclusion in the face of the Department's own finding when it made the initial determination that the Plan does not contain a need projection is arbitrary and capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion in the face of the DHEC testimony and the "Certificate of Need Summary Sheet" statements that the "2003 South Carolina Health Plan does not project needs for MRI in South Carolina." (R p ____)

II THE ORDER DOES NOT MAKE SUFFICIENT FINDINGS OF FACT REGARDING THE EFFICACY OF THE PLAN FOR THE COURT TO MAKE A MEANINGFUL REVIEW

In denying Belfair's Motion for Summary Judgment, the Order states "whether the ALC can question the efficacy of the 2003 Plan are questions that warrant inquiry into the facts of the case to clarify the application of the law." (ALC Order, p 4, R p ____). Assuming that this issue is one of fact and not of law as Belfair contends, the Order made no findings regarding whether the MRI Standards contained in the Plan comply with the requirements of Section 44-7-180(B). This issue was properly raised before both the ALC and the Board. The failure to make findings of fact sufficient for the Court to review is, on its face, reversible error as a matter of law. Brown v. Dep't. of Health and Envtl. Control, 348 S.C. 507, 560 S.E.2d

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410 (S C 2002) At a minimum the Court should remand this matter to the ALC to make findings of fact as to whether the MRI Standards contained in the Plan comply with the requirements of Section 44-7-180(B)

The Board should have granted summary judgment to Belfair on the Plan's failure to contain Standards for MRI that comply with the requirements of Section 44-7-180(B) and issuance of a staff decision under an invalid Plan. The Order is in violation of the requirements of the CON Act and exceeds the Board's statutory authority.

III THE ORDER SHOULD BE REVERSED BECAUSE THERE IS NO STATUTORY BASIS TO TREAT HOSPITALS DIFFERENTLY THAN OTHER HEALTH CARE FACILITIES

The Plan Standard 1 only addresses hospitals and no other health care facility or person that under the CON Act has the right to apply for a CON to provide MRI services. There is neither a provision nor any necessary implication that can be drawn therefrom under the CON Act that gives the Board through the Plan the ability to treat hospitals differently than other health care facilities or persons that have the statutory right to apply for a CON for MRI services. The Board's motion to deny Belfair's appeal and approve the Project CON states "[b]ased upon the fact that it is in the State Health Plan that every hospital should have an MRI I move that (sic) affirm ALJ decision and award this to CCMC " (Board Tr p 65 R p ____)

The CON Act defines "health care facility" as meaning

acute care hospitals psychiatric hospitals alcohol and substance abuse hospitals methadone treatment facilities tuberculosis hospitals nursing homes ambulatory surgical facilities hospice facilities, radiation therapy facilities rehabilitation facilities residential treatment facilities for children and adolescents habilitation centers for mentally retarded persons or persons with

related conditions and any other facility for which Certificate of Need review is required by federal law

S C Code Ann § 44-7-120(10) (2002) Clearly as a hospital CCMC falls within the definition of a health care facility

S C Code Ann § 44-7-160 (2002) requires a person⁸ or health care facility to obtain a CON before undertaking nine (9) enumerated actions three (3) of which are pertinent to this case First if a health care facility makes a capital expenditure in excess of \$2,000 000 the project requires a CON S C Code Ann § 44-7-160(3) (2002) 24A S C Code Ann Reg 61-15 § 102 1 c (Supp 2005) The Project is \$3 201 000 and CCMC is a health care facility Section 44-7-160(3) is applicable to the Project

Second if a health care facility makes a capital expenditure for the addition of a health service for which the Plan contains specific standards a CON is prerequisite to the expenditure S C Code Ann § 44-7-160(4) (2002) 24A S C Code Ann Reg 61-15 102 1 d (Supp 2005) CCMC proposes to add MRI services and there are standards contained in the Plan for MRI services Section 44-7-160(3) is applicable to the Project

Third, if a health care facility or person acquires medical equipment used for diagnosis and the capital cost is in excess of \$600,000 a CON is required S C Code Ann § 44-7-160(6) (2002) 24A S C Code Ann Reg 61-15 § 102 1 f and § 103(25) (Supp 2005) Certainly, Section 44-7-160(6) is applicable to the Project

⁸ "Person is defined as "an individual a trust or estate a partnership a corporation including an association joint stock company insurance company and a health maintenance organization a state a political subdivision or an instrumentality including a municipal corporation of a state or any legal entity recognized by the State " S C Code Ann § 44-7-130(15) (2002)

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None of these three (3) statutory provisions contain language that authorizes the Board through the South Carolina Health Plan or otherwise to make a public policy decision that each hospital "needs" an MRI available to it twenty-four/seven days a week. Certainly the Legislature could amend the CON Act and give the Board the authority through the South Carolina Health Plan or otherwise to make need determinations based upon the category or classification of a health care facility. It simply has not done so.

The Plan Standard provides in relevant part that "[e]ach hospital should have at least one MRI unit available for diagnosis of emergency patients inpatients and outpatients" (Plan, p. 66 R. p. ____). During the ALC hearing the Department took the position that the Plan provided that each hospital should have an MRI on site (either in the hospital or on the grounds) if the hospital could afford it. (ALC Order R. P. ____)

During argument before the Board at the May 11, 2006 hearing, counsel for CCMC argued that the ALC Order is saying that "[t]his Board has already given me a policy pronouncement in the form of the State Health Plan that every hospital should have [an MRI]." (Board Hearing Tr. p. 27 R. p. ____). DHEC's counsel argued that an MRI unit is so basic to hospital services that the Department, the State Health Planning Committee and the Board has made a public policy determining that each hospital needs an MRI on site if it can afford it. (Board hearing Tr. pp. 28, 31, 32 R. ____)

Based upon Standard 1, the Board found that "[h]ere the 2003 Plan sets forth that each hospital should have an MRI unit available for emergency patients inpatients and outpatients" (Board Order R. ____). However, throughout the case

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while CCMC the Department, the ALC and the Board relied on the public policy "finding" in the Plan no one cited to the statutory basis in the CON Act for a hospital to be treated differently vis-a-vis provision of MRI services from any other health care facility or from a person applying to provide MRI services

There is no provision in the CON Act that authorized the Board to make a policy decision to treat hospitals any different than other health care facilities for purposes of MRI Standards or for any other health care service enumerated in the Plan The clear and unambiguous language of the CON Act requires that all health care facilities are to be treated the same for purposes of the Act and Plan

In singling out hospitals and stating that only they "need" MRI services the Board acted in excess of its statutory authority The CON Act contains no power expressly or by reasonable necessary implication that authorizes the Board to treat hospitals differently than other health care facilities for purposes of obtaining a CON for the provision of MRI services

IV THE BOARD VIOLATED THE PROVISIONS OF S C CODE ANN § 44-7-210(C) AND EXCEEDED ITS STATUTORY AUTHORITY WHEN IT FOUND AS A MATTER OF LAW THAT THE PROJECT BE APPROVED WITHOUT REGARD TO COMPLIANCE WITH PROJECT REVIEW CRITERIA.

The Board found that "the MRI standards under the 2003 Plan do not require CCMC to establish (a) Community Need Documentation (b) Distribution (Accessibility) (c) Acceptability, and (d) Cost Containment"⁹ (Board Order, p 5 R p _____) In other words based upon the Plan MRI Standards the Board found as a matter of law that the Project does not have to comply with the Project Criteria

⁹ These Project Review Criteria are found in 24A S C Code Ann Reg 61-15 § 802

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contained in 24A S C Code Ann Reg 61-15 Part 8 Project Review Criteria (Supp 2005) This finding is directly contrary to the express mandate of S C Code Ann 44-7-210 (2002) Section 44-7-180(B) requires the Department to identify in the Plan for each health service those general Project Review Criteria important to each specific health service For MRI services the Plan identifies the following Project Review Criteria

- a Community Need Documentation
- b Distribution (Accessibility),
- c Acceptability and
- d Cost Containment.

(Plan p II-67 R p ____)

Section 44-7-210(A) requires that the Department identify for each project the Project Review Criteria ranked in order of importance that it will apply to the Project See also 24A S C Code Ann Reg 61-15 § 304 (Supp 2005) In the Department's November 19, 2004 letter to CCMC it identified the following Project Review Criteria that it would use to review the Project, ranked in order of importance (a) Need (compliance with the Plan) (b) Community Need Documentation and Distribution (Accessibility), (c) Acceptability and Cost Containment (R ____)

Section 44-7-210(C) of the CON Act provides in relevant part

The department may not issue a Certificate of Need unless an application complies with the State Health Plan, Project Review Criteria, and other regulations Based on project review criteria and other regulations which must be identified by the department the department may refuse to issue a Certificate of Need even if an application complies with the State Health Plan

(Emphasis added) See also 24A S C Code Ann Reg 61-15 § 307 1 (Supp 2005)

The language of the CON Act is clear that the Plan Standards and the Criteria are separate and distinct requirements and that an application has to meet both in order

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to be approved

In its CON Summary Sheet the Department staff identified each of the enumerated Project Review Criteria and found that the Project was consistent with each of the Criteria it had identified in its _____ letter (Finding M p 411 Project Application DHEC Ex 1 R ____). Clearly the Department determined that the Project had to be reviewed under and be consistent with the Project Review Criteria

Belfair contested the DHEC findings as to the Project's compliance with the enumerated Project Review Criteria (Belfair's Prehearing Statements R ____). As a result of the granting of the Respondents' Partial Summary Judgment Motion on the ground that the Plan established need and the MRI Standards in the Plan did not require CCMC to establish compliance with the applicable Project Review Criteria (nor give Belfair the opportunity to prove non-compliance) Belfair was prohibited from presenting any evidence, testimony or argument of CCMC's failure to comply with the identified Project Review Criteria and others identified by Belfair (ALC Tr pp 616 through 719 R p ____). The net effect of the Board's Order is a legal finding that the provisions of the Plan override the express statutory requirements of the CON Act.

The conclusion of law that MRI Standard 1 vitiates the need for a hospital to comply with the identified Project Review Criteria is obviously contrary to the express statutory requirement of S.C. Code Ann. § 44-7-210(C) (2002). Furthermore, this conclusion would render the Project Review Criteria superfluous in any case where a hospital applied for an MRI. In construing legislative intent, courts seek to give meaning to every provision of a statute and not to interpret a statute so as to render any part thereof meaningless. The Board's interpretation of the Plan renders the

express requirements of Section 44-7-210(C) meaningless

Further, Section 44-7-180(B)(4) requires that for each service or equipment covered by the Plan there be included a statement as to whether the benefits of improve accessibility outweigh the adverse affects caused by the duplication of the service of equipment. The Plan contains this requirement and states that the benefits of improved accessibility outweigh the adverse affects of duplication of MRI services or equipment (Plan p 67 R p ____). The Department's November 19, 2004 letter expressly listed 24A S.C. Code Ann. Reg. 61-15 § 802.3 a (Supp. 2005) as an applicable criterion. This criterion provides "Duplication and modernization of services must be justified. Unnecessary duplication of services and unnecessary modernization of services will not be approved." (24A S.C. Code Ann. Reg. 61-15 § 802.3 a (Supp. 2005)). By finding that the MRI standards in the Plan do not require CCMC to establish that it meets the Distribution (Accessibility) requirements of 24A S.C. Code Ann. Reg. 61-15 § 802.3 a, the Board violated both the requirements of Sections 44-7-180(B) and 44-7-210(C).

The case should be remanded to the ALC with instructions that an evidentiary hearing be held regarding CCMC's compliance with the Criteria established by the Department and those other Criteria raised by Belfair in its Prehearing Statements.

V THE BOARD ERRED IN DETERMINING THAT, FOR ACUTE HOSPITALS LIKE CCMC, "AVAILABLE" MEANS TWENTY-FOUR HOURS, SEVEN DAYS A WEEK

Regarding CCMC and other acute hospitals, the Board interpreted the word "available" as used in Standard 1 to mean "immediate access twenty-four hours

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seven days a week " (Board Order pp 10-11 R p ____) The Order found that

Not all hospitals are necessarily open twenty-four hours seven days a week or even treat individuals who would need an MRI Therefore available as used in the 2003 Plan does not mean that any hospital is entitled to at least one onsite MRI unit as long as it can afford the unit Rather the application of the above two standards [Standards 1 and 2] must be made based upon the facts of the case in light of the MRI needs of the hospital

(Board Order pp 11-12 R p ____) Hospitals are licensed in South Carolina pursuant to the requirements of 24A S C Code Ann Reg 61-16 (Supp 2005) ("Hospital Regs") The fact is that all hospitals as defined in 24A S C Code Ann 61-16 § 101 D are required to be open and providing services to their patients twenty-four/seven)

Standard 2 of the Plan provides "In order to promote cost-effectiveness the use of shared mobile MRI units should be considered " (Petitioner s Ex 5 p II-66, R ____) The word "available" is defined as "1 usable 2 accessible The Merriam-Webster Dictionary (1998) As noted above in interpreting statutes or regulations words are to be given their plain and ordinary meaning

Obviously the clear mandate of Standard 2 is for hospitals or any other health care facility or person that is open twenty-four/seven to consider the use of shared MRI services based upon the projected utilization of MRI services at the hospital ¹⁰ To interpret Plan Standard 1 to mean that every hospital that is open twenty-four hours seven days a week is entitled to an MRI if it can afford it is to render Standard 2 meaningless

¹⁰ As noted above by finding that each hospital should have a fixed MRI and the hospital applicant does not have to comply with the identified Project Review Criteria the Order voided the utilization considerations

It is uncontested that for services it does not provide or when patients are too ill to be treated at CCMC CCMC makes these services available to its patients through transfer agreements with other hospitals in South Carolina and Georgia CCMC has entered into transfer agreements with other area hospitals CCMC has transfer agreements with St Joseph's Hospital in Savannah Georgia (R ____) Beaufort Memorial Hospital in Beaufort South Carolina (R ____) with the Medical University Hospital (MUSC) in Charleston, South Carolina (R ____) and Colleton Medical Center (R ____) in Colleton County South Carolina (R ____) Certainly, it could transfer its patients for MRI services just as easily as it can transfer them for cardiac orthopedic or neurology services Clearly MRI services are available to hospitals through transfer agreements to other facilities

Furthermore, MRI services are made available to many smaller hospitals in South Carolina through mobile MRI services where the MRI unit comes to the hospital grounds several days per week. (R ____) Obviously the use of mobile services is clearly contemplated under the wording of Standard 2 of the Plan

While CCMC is required to be open twenty-four/seven there is no requirement that its physician staff be in the hospital or even the emergency department twenty-four/seven A physician only has to be "on call " that is available to go to the hospital if needed (S C Code Reg 61-16 § 308)

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VI THE ORDER'S FINDINGS THAT CCMC'S MRI SERVICE AVAILABILITY NEEDS CAN ONLY BE MET BY A TWENTY-FOUR/SEVEN ON SITE MRI ARE ARBITRARY AND CAPRICIOUS, CHARACTERIZED BY AN ABUSE OF DISCRETION OR AN UNWARRANTED EXERCISE OF DISCRETION AND ARE CLEARLY ERRONEOUS IN LIGHT OF THE EVIDENCE ON THE RECORD AS A WHOLE

The evidence is uncontested that orthopedists and neurologists/ neurosurgeons are among the heaviest users of MRI services for their patients (R ____). The fact is that CCMC testified that it did not even have a neurologist even on its staff and a patient in need of neurology services had to be transferred from CCMC to another hospital (Administrative Tr pp 360-361 R ____). Furthermore the orthopedic surgeons and general surgeons at CCMC are only on call twenty (20) days a month at CCMC but might be available on other days if they were called and decided to come in (Administrative Tr pp 260-261, R p ____).

More importantly for the definition of "available" reading Standards 1 and 2 as a whole, the radiology department at CCMC is not staffed by a physician twenty-four seven. The physician group staffing the CCMC radiology department is a Savannah Georgia based group (Tr pp 270-271, R p ____). On-site radiology coverage is only available at CCMC on an as needed basis for biopsy procedures or other hands on procedures and otherwise cover the hospital through tele-radiology from Savannah and after 10 00 pm by a group from a suburb of Atlanta (Tr p 272 282 R p ____). In order to provide the hands on services a radiologist has to drive from Savannah to CCMC in Hardeeville. Further there would not be a MRI technician available twenty-four/seven but they would be subject to an "on call" schedule like the radiologists (Tr p 298 R p ____). Finally Dr Vincent Mesh was not aware of any

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inpatients being transferred from CCMC to another facility for MRI services (Tr 293 R p ____)

Finally, Dr. Tonia Ethendge, a family practice physician and Chief of the Medical Staff at CCMC, testified that since the hospital opened, she was not aware of a single patient presenting to the hospital that needed an emergent MRI (Tr p 262 R p ____). Most of her patients that need MRI services are out-patients (Tr p 263 R p ____).

Further, it is uncontested that Belfair, only approximately twelve (12) miles from CCMC, specifically offered "on call" services to CCMC so that CCMC's patients had access to MRI services twenty-four/seven. CCMC never responded to that offer.

Additionally, approximately two-thirds (2/3) of the patients that CCMC projects it would provide MRI services to are out-patient and not hospital based. Obviously, out-patient services are provided during normal business hours when Belfair and the other nine (9) facilities providing MRI services in Beaufort and Jasper counties are open.

Clearly, there is no need to have a fixed MRI on site at CCMC when the physicians are only "available" after hours on an "on call" basis and the radiologists have to drive either from Savannah or possibly Atlanta. In light of the fact that physicians are "available" to the hospital when they are not on site and they do not have to be on site, the Board exceeded its authority in determining that for acute hospitals "available" means on site twenty-four/seven.

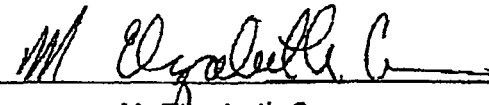
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CONCLUSION

For the foregoing reasons Appellant MRI at Belfair LLC respectfully requests that this Court reverse the Order of the South Carolina Board of Health and Environmental Control

Respectfully submitted

M Elizabeth Crum, SC Bar No 1486
A. Victor Rawl, Jr, SC Bar No 9261
Anail B Kirk SC Bar No 71101
McNAIR LAW FIRM P A.
Post Office Box 11390
Columbia South Carolina 29211
(803) 799-9800
lcrum@mcnair.net
vrawl@mcnair.net
akirk@mcnair.net

By 
M Elizabeth Crum

Attorneys for Appellant MRI at Belfair LLC

August 21 2006

Columbia South Carolina

MCNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

M. ELIZABETH CRUM
lcum@mcnair.net

www.mcnair.net

THE TOWER AT 1301 GERVAIS
1301 GERVAIS STREET 11 FLOOR
COLUMBIA SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA SOUTH CAROLINA 29211
TELEPHONE (803) 799-9800
FACSIMILE (803) 753-3219

August 28, 2006

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AUG 29 2006

Nancy S. Layman, Esquire
Ashley C. Biggers, Esquire
SC DHEC
Office of General Counsel
2600 Bull Street, 3rd Floor
Columbia, SC 29201

DHEC
OFFICE OF GENERAL COUNSEL

Re CCMC use of "Mobile" MRI 24/7 during pendency of appeal or while the CON issued to CCMC August 3, 2006 is implemented

Dear Nancy and Ashley

By way of follow-up to my e-mail¹ of Tuesday August 22, 2006 regarding the Coastal Carolina Medical Center ("CCMC") plan (announced in the *Island Packet*) to institute mobile MRI services at its facility, it is our opinion that this unilateral, unregulated action would be in violation of the CON Act

On August 3, 2006, pursuant to CCMC's request, DHEC issued a CON to CCMC for a fixed 1.5T GE magnetic resonance imaging unit ("MRI") and construction of an addition to the Hospital to house the MRI, for a total project cost of \$3,201,000 in Hardeeville, Jasper County, South Carolina ("August CON"). Previously, MRI at Belfair, LLC ("Belfair") had appealed the decision of the Board of Health and Environmental Control in MRI At Belfair, LLC, vs South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center, Docket No. 04-ALC-07-0399-CC to the South Carolina Court of Appeals. CCMC has filed a Motion to Dismiss which is pending before the Court. Belfair did not seek a stay of the Board's order.

Certainly, CCMC can go forward at its own risk² with the project as approved in the August CON. However, the August CON does not authorize CCMC to acquire and

¹ A copy of this e-mail is attached for your convenience.

² Mr. Tom Berry, DHEC spokesman, was quoted in the *Island Packet* as follows: "We have told Coastal Carolina that our interpretation of the law is that they may go ahead and proceed with the project, but do so with the full knowledge that at any time the state Court of Appeals may issue a stop-work order,

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ANDERSON CHARLESTON CHARLOTTE COLUMBIA GEORGETOWN GREENVILLE HILTON HEAD ISLAND MYRTLE BEACH RALEIGH

McNAIR LAW FIRM, P A

ATTORNEYS AND COUNSELORS AT LAW

operate a MRI unit not subject to the CON. The language of the CON Act is plain and unambiguous. Section 44-7-230(A) provides

The Certificate of Need, if issued, is valid only for the project described in the application including location, beds and services to be offered, physical plant, capital or operating costs, or other factors as set forth in the application, except as may be modified in accordance with regulations. The department shall require periodic reports and make inspections to determine compliance with the Certificate of Need. Implementation of the project or operation of the facility or medical equipment that is not in accordance with the Certificate of Need application or conditions subsequently agreed to by the applicant and the department may be considered a violation of this article.

(Emphasis added) The mobile project proposed by CCMC is NOT the same project described in the application resulting in the August CON. In fact, in the application, CCMC expressly rejected the use of a mobile MRI as an alternative.

In my August 22, 2006 e-mail, I asked for a copy of any non-applicability determination that might have been issued by the Department for CCMC's operation of the "mobile" MRI. Attached as Exhibit 2 for your convenience is a copy of a letter from David B. Summer, Jr., dated August 4, 2006 to Ms. Tori Tibshirany requesting authorization to utilize a "mobile MRI at Coastal Carolina Medical Center until construction and installation of its fixed MRI, granted in the above-referenced CON application, is completed." Attached to Exhibit 2 is the MRI Services Proposal/Agreement between Alliance Imaging and CCMC dated July 20, 2006 ("Agreement") that was attached to Mr. Summer's letter. By letter dated August 4, 2006, Ms. Tibshirany authorized and approved for CCMC "temporary full-time use of a mobile MRI unit during the interim period of the Fixed MRI construction and installation as outlined in [Mr. Summer's] August 4, 2006 letter." There is simply no statutory authority for DHEC to approve such a request without regulatory approval. To the extent that DHEC contends there is, we ask that we be advised of the statutory or regulatory provision.

CCMC appears to be trying to take advantage of the August CON to implement a completely separate project not addressed at all in the application. The Agreement is for one full time parked 1.5T "mobile" MRI unit. The Agreement does not state whether the MRI is a GE unit as in the August CON application. The Agreement states that the MRI is described in Schedule A. However, either DHEC was not provided with a copy of Schedule A or we did not receive it. The physical plant for the Agreement

Berry said: If they proceed, they are doing so at their own risk. The "project" is the August CON and nothing else.

MRI unit is different. The operating costs of the Agreement MRI unit are different. There is no discussion of the cost of the "truck" that will house the unit.

Furthermore, the term of the Agreement is for 36 months³ with the following caveat

provided, however, Client [CCMC] may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house, fixed MRI system upon ninety (90) days prior written notice, provided, further, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement.

Pursuant to 24A S.C. Code Ann. Reg. 61-15 § 601 (Supp. 2005), CCMC has six months from August 3, 2006 to implement the August CON, provided that for good cause shown, the Department can grant up to two six (6) month extensions. Had CCMC intended the Agreement to apply during the implementation of the August CON, the term would have been for 6 or perhaps 12 months. Instead, the term of the Agreement is for three (3) years. If, for the sake of argument only, CCMC is allowed to implement the Agreement without regulatory approval, then, it cannot be heard to argue that it needs an extension because there is an appeal pending and it does not want to be exposed to the risk of going forward with the application as approved only to have the Court of Appeals reverse the decision and void the August CON. Clearly, CCMC is attempting to limit risks of proceeding with the August CON (which could be revoked), by implementing a mobile service with minimal capital costs.

The Agreement contemplates the expenditure of funds by CCMC that are neither contemplated by (in fact rejected as an alternative) nor set forth in the Application. The two projects are not the same and CCMC has no regulatory approval to implement the "mobile" MRI.

The Section 44-7-160(6) requires that a health care facility get a CON prior to acquiring medical equipment to be used for diagnosis or treatment. Reg. 61-15 § 102.3 and 102.1f provide CCMC with the ability to seek a non-applicability determination ("NAD") to institute mobile MRI services. The Department has, in essence, issued a NAD to CCMC without requiring it prove that the Total Project Cost, as defined under Reg. 61-15 § 103(25) does not exceed \$600,000 capital cost. Belfair has repeatedly said, and nothing has changed, that it would not contest CCMC's application⁴ for a NAD for mobile services.

³ We find it curious that the term is 36 months given the short implementation time in the application.

⁴ This of course assumes that the NAD application is a valid application and contains all the requisite information DHEC requires to make an informed determination.

McNAIR LAW FIRM, P A
ATTORNEYS AND COUNSELORS AT LAW

However, Belfair does object to CCMC being able to circumvent the CON Act requirements by contending (apparently) that the August CON is authority for the MRI unit subject to the Agreement. If the letter approving the illegal request is not rescinded, we will have no choice but to contest the same. We respectfully request that in accordance with the requirements of the CON Act and regulations, DHEC require CCMC to obtain a NAD prior to implementing the Agreement and providing MRI services at CCMC.

Thank you for your time and attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,



M. Elizabeth Crum

Enclosures

Cc: A. Joseph Borelli, Jr., M.D.
A. Victor Rawl, Esquire
Anail B. Kirk, Esquire

Crum, Liz

From Crum Liz
Sent Tuesday August 22 2006 3 55 PM
To Nancy S Layman Esquire (laymanns@dhec.sc.gov) Ashley C Biggers (biggerac@dhec.sc.gov)
 Joel C Grice (gncejc@dhec.sc.gov) Victoria (Tori) Reich Tibshirany (tibshrvt@dhec.sc.gov)
 jborelli@mriatbelfair.net
Cc Kirk Anail Rawl Vic Jolley Kelly
Subject FW: islandpacket.com | Hospital gets green light for MRIs

Tracking	Recipient	Read
	Nancy S. Layman Esquire (laymanns@dhec.sc.gov)	
	Ashley C. Biggers (biggerac@dhec.sc.gov)	
	Joel C. Grice (gncejc@dhec.sc.gov)	
	Victoria (Tori) Reich Tibshirany (tibshrvt@dhec.sc.gov)	
	jborelli@mriatbelfair.net	
	Kirk, Anail	Read 8/22/2006 4 43 PM
	Rawl Vic	
	Jolley Kelly	Read 8/22/2006 4 09 PM
	A. Joseph Borelli, Jr. M.D.	

Subject islandpacket.com | Hospital gets green light for MRIs

Nancy Ashley Joel and Tori: Please review article below. I saw where the CON was issued to CCMC for the CON MRI project under appeal to the Court of Appeals. Obviously if CCMC wants to go forward with the Project as approved, we have not sought a stay. However, to our knowledge, CCMC has not obtained either a CON nor a NAD to put mobile MRI services in place. Clearly Sec. 44-7 230(A) authorized CCMC only to go forward with the project as approved. (The Certificate of Need, if issued, is valid only for the project described in the application.) The article states that the mobile services are to be initiated Sept. 1, 2006. If a NAD has been issued for this project, we expressly request pursuant to FOIA that we be provided a copy of the same. If one has not, please ask CCMC to cease and desist until it has regulatory approval to undertake mobile MRI services. Thank you for your prompt attention to this matter. Liz Crum

M. Elizabeth (Liz) Crum
 McNair Law Firm, P.A.
 1301 Gervais Street
 P.O. Box 11390 (29211)
 Columbia, South Carolina 29201
 (803) 799-9800
 (803) 753-3219 (fax)
 lcrum@mcnair.net
<http://www.mcnair.net>

Hospital gets green light for MRIs

Court appeal could affect construction

BY PETER FROST *The Island Packet*

000506

Published Wednesday August 9 2006

[Comments \(0\)](#) → [Add Comment](#)

The Coastal Carolina Medical Center is going forward with plans to install an MRI machine but the hospital's two-year legal battle with a provider may not be over

After receiving approval from the state Department of Health and Environmental Control late last week to begin installing the equipment hospital will begin offering mobile magnetic resonance imaging services Sept. 1 said CEO Eric Deaton

An estimated \$3 million construction project to install a permanent MRI unit is expected to begin shortly thereafter and be completed with That project would mean a separate room would be built to house the MRI unit.

However should the hospital begin construction, it could be halted at any point pending an appeal to the state Court of Appeals by MRI at Bluffton opposing the project said Thom Berry a DHEC spokesman

We have told Coastal Carolina that our interpretation of the law is that they may go ahead and proceed with the project, but do so with the time the state Court of Appeals may issue a stop-work order Berry said If they proceed they are doing so at their own risk.

MRI at Belfair in July notified DHEC of its plans to appeal the state issued permit for a fourth time The company could petition the state the project pending a hearing on the case

It's unclear however if the court would issue a stop-order or if MRI at Belfair will ask it to Dr. Joe Borelli the company's president and for comment

Since Coastal Carolina opened in November 2004 its efforts to add the imaging equipment have been blocked by a series of appeals by MRI continued to appeal the permits on claims that the area doesn't need another MRI provider and the hospital doesn't see enough patients to

But after MRI at Belfair lost each of the three appeal decisions — two by DHEC and another by the state Administrative Law Court — DH the go-ahead to install its long-awaited MRI unit.

It's been a long process but we're very pleased to have it in place soon Deaton said "To refuse the hospital the ability to provide this type of service is unthinkable

For its first 20 months of operation the hospital has been forced to take patients in need of MRI scans by ambulance to other hospitals or The process costs upward of \$400 per trip and wastes valuable time in patient diagnosis and treatment Deaton said

In many after-hours emergency cases, patients have been taken across the state line into Georgia for imaging

Obviously this has been reviewed three times now and the State Health Plan says every hospital should have immediate access to MRI said. It's an extremely important piece of diagnostic equipment that's essential to providing high-quality care to our patients

Contact Peter Frost at 706-8169 or pfrost@islandpacket.com. To comment on this story please go to islandpacket.com

000507

Crum, Liz

Subject: Brown Hogan
Multi-term contract

Hogan see attached Have a good weekend Liz

D Conditions for Use

(1) The maximum time for any multi-term contract is five (5) years unless otherwise approved in accordance with Section 11-35-2030 of the Code. A multi-term contract may be used when it is determined in writing by the Procurement Officer of the governmental body that

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000508

PARKER POE

PARKER POE ADAMS & BERNSTEIN LLP

Attorneys and Counselors at Law

David B Summer Jr

Partner

Telephone: 803.255.9910

Direct Fax: 803.255.6017

davidsummer@parkerpoe.com

1201 Main Street

Suite 1450

P.O. Box 1509

Columbia SC 29202 1509

Telephone 803.255.8000

Fax 803.255.8017

www.parkerpoe.com

August 4, 2006

Via Hand Delivery

Ms Victoria R. Tibshirany
Program Coordinator II
South Carolina DHEC
1777 St Julian Place, Suite 201
Columbia, SC 29204

Re SC-06-46

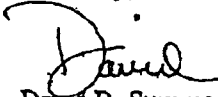
*Certificate of Need for the construction of an addition of one (1) fixed MRI
Coastal Carolina Medical Center*

Dear Ms. Tibshirany

On behalf of Coastal Carolina Medical Center, this is to request authorization to utilize a mobile MRI at Coastal Carolina Medical Center until construction and installation of its fixed MRI, granted in the above-referenced CON application, is completed. In that regard, attached please find a copy of the proposed MRI Services Proposal/Agreement between Alhance Imaging Inc and Coastal Carolina Medical Center for the utilization of a mobile MRI.

If you have any questions or need further information or clarification, please do not hesitate to contact me. With best regards, I am

Sincerely,


David B Summer, Jr

DBSjr/ccq

Enclosure

CHARLESTON SC
CHARLOTTE, NC
RALEIGH, NC
SPARTANBURG SC

000509

COL 62367v1



MRI Services Proposal/Agreement

**Coastal Carolina Medical Center
1000 Medical Drive
Hardeeville, South Carolina 29927**

***Prepared for: Eric Deaton, C.E.O.
Hollis Tessmer, Director of Imaging***

***Prepared by Kevin Smith, Area Sales Manager, Southeast Region
office number 1-800-743-4729 / mobile number 1-704-905-5131***

000510

PROPOSAL

Date July 20, 2006

Unit Description

1 5T Mobile MRI Unit.

Service Schedule

Full time parked.

Term.

Thirty-six (36) months provided, however, Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house, fixed MRI system upon ninety (90) days prior written notice, provided, further, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement.

Personnel

Option 1) Alliance shall be responsible for staffing the MRI system with appropriately trained technologist(s) based on Client's exam volume. Option 2) Client shall be responsible for staffing the MRI system with appropriately trained technologist(s) based on Client's exam volume.

Medical Supplies

Client shall be responsible for all film, film processing data storage supplies, contrast, contrast supplies, utilities, suitable pad and power, permits, state and local taxes, etc.

Fees

Option A - staffed by Alliance.
Flat monthly fee of \$65,000.00
Option B - staffed by Client.
Flat monthly fee of \$55,000.00

Commitment and Acceptance.

This proposal is subject to execution of a mutually acceptable agreement. This proposal is for informational purposes only and is not a binding legal obligation. This proposal is good for 30 days from receipt. Terms and conditions are subject to change after this 30-day timeframe.

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MRI SERVICES AGREEMENT

THIS MRI SERVICES AGREEMENT (the "Agreement") is made as of the first date written below between ALLIANCE IMAGING, INC., a Delaware corporation ("Alliance"), and

Coastal Carolina Medical Center
1000 Medical Drive
Hardeeville, South Carolina 29927

a South Carolina not for profit corporation (the "Client")

1 EQUIPMENT AND SERVICES

1.1 The Unit Alliance shall provide a Magnetic Resonance Imaging ("MRI") system described in Schedule A of this Agreement (the "Unit").

1.2 Personnel. If Fee Option A is selected, Alliance shall provide the services of one (1) technical personnel to operate the Unit as appropriate for Client's exam volume. Client agrees not to hire or contract with any Alliance employee during the term of this Agreement, including renewals, and for a period of one (1) year after MRI services cease (collectively, the "Non-Solicitation Period"), without Alliance's prior written consent. Alliance and Client hereby agree that in the event of a breach of this provision damages shall be difficult to calculate and therefore agree Alliance shall be entitled to receive \$50,000.00. Alliance and Client agree that the aforementioned amounts are reasonable and shall constitute liquidated damages and not a penalty. Alliance shall ensure that all services provided by Alliance's technical personnel (including, but not limited to, any patient coordinator) shall be within the scope of his/her duties as technical personnel. Client agrees, for as long as Alliance remains a JCAHO-accredited organization, that Client shall not need to independently verify and shall not require any written documentation concerning the credentialing, education, training, evaluation, and competencies related to Alliance's technical personnel (including, but not limited to, any patient coordinator). In the event of a JCAHO survey of Client, Alliance shall have the personnel file of Alliance's technical personnel accessible upon request.

If Fee Option B is selected, Client shall provide the services of technical personnel to operate the Unit as appropriate for Client's procedure volume. Client's personnel shall be fully certified in the field of radiography by an institution recognized by the American Medical Association. Other conditions are as follows:

1. Client shall be responsible for any repairs of the Unit and ancillary equipment on the trailer that arise out of the actions or omissions of Client's employees or subcontractors.
2. Client shall be responsible for monitoring the Unit's cryogen level, and Client shall be responsible for any damage to the Unit arising from failure to maintain adequate cryogen levels.
3. Client shall comply with all checklists supplied to Client by Alliance personnel to operate the Unit, and Client shall be responsible for any damage to the Unit arising from failure to do so.
4. Client shall consult with Alliance's operations personnel no less than once per week concerning the operating condition of the Unit.

1.3 Maintenance. Alliance shall use reasonable efforts to cause the Unit to be maintained in good operating condition. Alliance may do so through the purchase of a maintenance contract from the MRI Unit manufacturer or otherwise, in its discretion. Alliance shall provide cryogens.

2 SCANNING ACTIVITIES

2.1 Unit. Client shall prepare and maintain a safe and suitable site for the Unit which complies with the manufacturer's specifications (which shall be provided by Alliance) and all applicable laws and regulations. All site costs (for example, costs of tractor/trailer access and egress, power and telephone expenses) shall be Client's responsibility. The Unit shall be located at the address first above listed (the "Unit Location"). Client represents and warrants to Alliance that it currently owns or has authorization to site the Unit at the Unit Location. Further, Client further warrants and agrees that, at all times during the term of this Agreement, Client shall maintain the authorization or ownership to site the Unit at the Unit Location. Client shall indemnify and hold Alliance harmless from any damages or liability arising out of breach of the representations and warranties in this Section 2.1. Client may request in writing to Alliance that the Unit Location be moved, in which case any such move shall be subject to Alliance's prior approval, all of the obligations under this Section 2.1 shall apply to the new Unit Location.

2.2 Power. Client shall provide electrical power, including a dedicated power line with 200 amps and 480 volts of three-phase power. Client shall promptly report any problems with power (for example, sags or surges) to Alliance. Client shall provide the power line, a lockable disconnect box and receptacle within twenty-five (25) feet of the electrical receptacle on the Unit. Client is responsible for damage to the Unit due to power that does not meet specification. Client is responsible for maintaining the power plug and keeping it in good operating condition with quarterly inspection.

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2.3 Phone and Connectivity Client shall provide the Unit with a voice telephone line, a dedicated fax compatible telephone line and a RJ-45 ethernet broadband line with an automatic IP address assignment using Dynamic Host Control Protocol ("DHCP") and a proxy-less connection to the internet.

2.4 Operation The Unit shall be operated only by employees or subcontractors of Alliance or Client

2.5 Medical Director Client shall appoint a qualified and licensed physician to act as Medical Director hereunder, along with another such physician to act in his absence (the "Medical Director"). Client shall be solely responsible for all activities which constitute the practice of medicine (for example, providing medical advice to patients in connection with MRI scans and the injection of contrast agents). Client shall obtain any written consents from patients that are required by the USFDA, state or local law or prudent medical practice. Client shall have full responsibility for all medical care and advice provided to patients. All medical care shall be provided under the ultimate supervision of the Medical Director.

2.6 Medical Supplies; Emergency Care Client shall provide all medical supplies which may be required (including film and film processing, gowns, medications and contrast agents) and shall ensure the immediate availability at all times of equipment and personnel to treat patients who require emergency or other medical care (including a cardiac monitor, a fresh oxygen supply, an aspirator and a defibrillator).

2.7 Patient Handling Client shall be responsible for the prompt and orderly pick up and delivery of patients to and from their designated areas.

2.8 Patient Log If Fee Option A is selected, Alliance shall maintain a log of all scans performed on the Unit. Client shall be provided with copies of the log upon request. If Fee Option B is selected, Client shall maintain a log of all scans performed on the Unit. Client shall be provided with copies of the log upon request.

2.9 Modifications. Client shall not modify or alter the Unit without Alliance's prior written consent. Client shall not allow any portion of the Unit to become permanently attached to real property. Client agrees to execute any documents evidencing a first priority security interest or mortgage or assignment in favor of any party providing financing for the Unit.

2.10 Scheduling Client shall use all reasonable efforts to schedule its patients consecutively from the beginning of each service day to minimize unutilized scanning time and to prescreen patients for conditions unsuitable for MRI examination.

2.11 Notification of Physicians, Use of Service Client shall notify its staff of physicians of the availability of the Unit and shall use all reasonable efforts to encourage physicians to utilize the Unit for their patients' needs.

2.12 Exclusivity Client agrees to use Alliance solely for all of its MRI needs except for an emergency where the use of Alliance's service is impractical. Client on behalf of itself, its subsidiaries and/or corporate affiliates (including but not limited to any entity in which Client has an ownership interest) agree during the term of this Agreement, not to own, permit, lease, manage or invest in any MRI system or engage any entity besides Alliance to provide Client with MRI services.

2.13 Document Retention Alliance and Client agree to retain books, documents and records required under the Omnibus Reconciliation Act of 1980 and other applicable laws and regulations governing governmental reimbursement of medical care expense, in all cases, for the periods specified in such laws and regulations.

2.14 Licenses Client shall obtain and maintain all required licenses and regulatory approvals necessary to operate the Unit at Client's premises. Alliance shall reasonably cooperate to assist Client to obtain such licenses and approvals.

2.15 Taxes All taxes, if any (for example, sales, use or similar taxes), on the services hereunder shall be the responsibility of Client.

2.16 Professional Interpretations. Client shall engage a radiologist to provide interpretations of MRI exams for Client's patients. Alliance shall not be responsible for providing any such interpretations.

3 FEES AND BILLING

Client shall pay Alliance fees in accordance with Schedule A. All fees for a billing period shall be due and payable within fifteen (15) days of the last day of such period. Alliance shall invoice Client twice each month. Client shall pay a late fee of one and one-quarter percent (1-1/4%) or the maximum legal rate, whichever is less, on all balances outstanding more than fifteen (15) days beyond the due date. Fees may be adjusted on each anniversary of the commencement Date by the percentage increase for the Medical Care Services component of the Consumer Price Index for all Urban Consumers (CPI-U) as recorded by the Department of Labor Index for the then most recently available twelve month period. Client shall be responsible for all billings to Client Patients and/or third party payors for MRI.

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exams performed on the Unit. Client's obligation to pay Alliance compensation in accordance with the provisions of Schedule A shall not be dependent upon Client's billing and collection of patient and/or third party payor accounts receivable. Alliance shall not bill, and Alliance shall not cause bills to be submitted to, any patient or third party payor for MRI exams performed on the Unit. Both parties agree that Alliance is providing its services set forth on this agreement "under arrangement" with Client, such that upon Client's receipt of payment from the Medicare program for MRI exams performed in the Unit, the liability of the beneficiary or any other person to pay for such services shall be fully discharged.

4 TERM

The term of this Agreement shall be as specified on Schedule A.

5 SCHEDULING

Alliance shall make the Unit available to Client according to the schedule specified in Schedule A.

6 INSURANCE, INDEMNITY

6.1 Insurance

a) Alliance. Alliance shall maintain insurance covering all risks of physical loss or damage to the Unit, comprehensive general liability and professional liability covering the conduct of its employees, all in amounts and subject to deductibles that are customary in the industry.

b) Client. Client shall maintain comprehensive general and professional liability insurance covering the Client, its employees, staff and physicians and shall require the Medical Director and other physicians who interpret or report on procedures performed on the Unit to maintain professional liability insurance. All such insurance shall be in amounts and with deductibles that are customary in the industry. Client shall bear the risk of loss or damage to the Unit from Client's negligent actions or omissions.

6.2 Indemnities. Each party hereto shall indemnify and hold the other party harmless from and against any and all liability, loss, damage, cause of action, cost or expense (including reasonable attorney's fees) arising out of or in any way connected with, any negligent or intentional act or failure to act or any other wrongful conduct by the respective party, its members, agents, employees or subcontractors in the performance of its duties under this Agreement.

7 GENERAL

7.1 Independence. Alliance is an independent contractor of Client, and this Agreement is a contract for services, not a lease. No agency, employment, partnership or joint venture is intended to be created by this Agreement. Neither Alliance nor Client shall take any action or position which is inconsistent with those descriptions of the relationship.

7.2 Remedies. Alliance shall not be responsible for failure to provide services as a result of conditions caused by Client. Alliance shall not be liable for consequential or special damages under any circumstances or any damages caused by conditions not within Alliance's reasonable control.

7.3 Waiver. Waiver of any breach shall not be deemed a waiver of the same provision in the future or the waiver of any other provision.

7.4 Notices. All notices and other communications shall be in writing and shall be given in person by registered or certified mail, by overnight delivery, or by telecopy (in the case of telecopy, if written confirmation of sending is retained). The initial addresses and telecopy numbers of the parties are listed next to their signatures below. Notices to Alliance shall be sent to the attention of General Counsel. Either party may change its address or telecopy number for notice by notifying the other by a permitted method of giving notice. No objection may be made to a permitted method of giving notice. Under no circumstances shall any notice or communication be considered valid notice unless such notice or communication fully complies with the requirements of this Section 7.4.

7.5 Governing Law. This Agreement shall be governed by the law of the state where services are performed.

7.6 Entire Agreement, Amendment. This Agreement is the parties' entire understanding and supersedes all prior agreements, oral and written with respect to the subject matter of this Agreement. This Agreement may not be amended except by written agreement of the parties. No handwritten changes to this Agreement shall be enforceable unless such changes are initialed by both parties to this Agreement.

7.7 Successors and Assigns. Alliance may assign this Agreement. Client may not assign this Agreement without the prior written consent of Alliance. This Agreement shall be binding on and inure to the benefit of the parties and their respective successors and assigns. Client agrees that this Agreement may be performed in whole or part, by a subsidiary of Alliance and further consent shall not be required. Alliance may also assign the proceeds of this Agreement. Client shall require any successor (whether direct or indirect, by purchase, merger, reorganization,

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consolidation, sale of property or stock, liquidation, or otherwise) to all or a substantial portion of its assets by agreement in form and substance reasonably satisfactory to Alliance to expressly assume and agree to perform this Agreement

7.8 Third Parties This Agreement does not convey any rights to any third parties

7.9 Attorney Fees. In any dispute arising out of this Agreement (whether litigation is involved or not) or in the event that either party must take action to collect fees or enforce rights, the prevailing party shall be entitled to reimbursement of its expenses, including court expenses and lawyers' fees

7.10 Certain Events Neither party shall be deemed in breach if its failure to perform under this Agreement is caused by conditions beyond its reasonable control (for example, fire, natural disaster, labor strikes, and so on)

7.11 Confidentiality Client acknowledges and agrees that this Agreement is highly confidential and proprietary to Alliance and Client agrees that neither it nor any of its employees, physicians or representatives, shall disclose in any manner the terms, provisions, pricing or any other information contained in this Agreement (or any related proposal) to any third party

7.12 Accreditation Alliance and Client agree to set standards of care and quality that comply with the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) and the American College of Radiology (ACR). Alliance and Client mutually shall cooperate in all phases of applying, scheduling, preparing and executing surveys or inspections by the JCAHO and ACR, as needed. Both parties agree to work cooperatively to implement changes, correct deficiencies or establish policies required and/or recommended by the inspecting agencies

7.13 Policies and Procedures Client agrees that Client shall comply with all of Client's Policies and Procedures, and Client agrees to indemnify and hold Alliance harmless from and against any and all liability loss, damage, cause of action, cost or expense (including reasonable attorney's fees) arising out of or in any way connected with, Client's failure to fully comply with Client's Policies and Procedures

7.14 Change in Reimbursement. In the event that health care reform causes a significant decline in Client's MRI reimbursement to a level that Client can demonstrate that it is impossible for Client to break even on the total MRI service utilizing the direct costs of the MRI service, Client may provide written notice to Alliance of such circumstance. Client and Alliance agree to then meet to decide upon a solution that shall be fair and equitable to Client and Alliance.

7.15 Severability If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws, that provision shall be fully severable and this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision never comprised a part of this Agreement. The remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance. Furthermore, a provision as similar in its terms to the illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable shall be added to this Agreement automatically to replace the illegal, invalid, or unenforceable provision

8 TERMINATION

8.1 Termination

a) **Default.** Alliance or Client may terminate this Agreement if the other materially defaults in the performance of any covenant, term or provision of this Agreement and the default is not cured within sixty (60) days following provision of notice to the defaulting party

8.2 Termination, Alliance. Alliance may terminate this Agreement or suspend service if

a) **Payment Default.** Client fails to make any payment to Alliance when due and such failure continues for ten (10) days following notice to Client. In the case of any payment default, Alliance may without notice cease providing services hereunder after three (3) days following a payment due date should it feel insecure with respect to Client's ability or willingness to make payment.

b) **Profitability.** Alliance is unable to realize a profit on the services provided hereunder, provided that the parties have negotiated in good faith to modify the terms of this Agreement to eliminate such condition and a period of sixty (60) days has elapsed since Alliance originally notified Client of such condition. In lieu of termination, Alliance may reduce the number of days of service provided.

c) **Bankruptcy.** Client commits or suffers (voluntarily or involuntarily) an act of bankruptcy, receivership, liquidation or similar event.

8.3 Termination, Client. Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house, fixed MRI system upon ninety (90) days prior written notice provided, however, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement. Client agrees to give Alliance first right of refusal to provide such fixed services.

C00516

8.4 Client's Default Upon Client's default, Alliance may (i) declare the entire balance of all fees and other amounts due including the sum of all fees and other amounts payable during the balance of the term of this Agreement or (ii) take any action at law or in equity to collect payments then due and to become due, or to enforce performance of specific obligations. Alliance and Client hereby agree that, in the event of Client's default of this Agreement and Alliance's subsequent termination of this Agreement, damages shall be calculated by using the greater of (i) the average monthly scan volumes by Client over the twelve-month period (or such lesser period if Alliance did not provide at least 12 months of service to Client prior to termination) immediately prior to termination of this Agreement or (ii) the scan volume benchmarks set forth in Schedule A.

The foregoing remedies are in addition to any provided by law. Neither party shall have obligation to exercise any remedy and the exercise of the remedy shall not release the parties for any obligation hereunder. All remedies shall be cumulative, and action on one shall not constitute an election or waiver of any other right to which either party may be entitled. In addition, the defaulting party shall pay the other parties reasonable attorney's fees together with an amount equal to all expenses paid or incurred in the enforcement of any rights or privileges hereunder.

9 COMPLIANCE WITH LAWS

9.1 Compliance with Current Laws. The parties expressly agree that it is their understanding and intent that this Agreement, including any Exhibits or other attachments, complies as of the effective date hereof with applicable federal and state statutes and regulations, including the Stark Law, 42 U.S.C. Section 1395nn, and the Anti Kickback Statute (collectively referred to as "Laws").

9.2 No Inducement. This Agreement has been negotiated in good faith through arms length negotiations. Nothing contained in this Agreement, including any compensation paid or payable, is intended or shall be construed (i) to require, influence or otherwise induce or solicit either party regarding referrals of business, or recommending the ordering of any items or services, of any kind whatsoever to the other party or any of its affiliates, or to any other person, or otherwise generate business between the parties, or (ii) to interfere with a patient's right to choose his or her own health care provider or with a physician's medical judgment regarding the ordering of any items or services.

9.3 Change in Law. Neither party shall make or receive any payment or take any other action required or permitted hereunder, if any judicial decision, legislative action, regulatory or other administrative interpretation, whether federal or state, would render unlawful the conduct of either party hereunder ("Change in Law"). In the event of such a Change in Law, the parties shall be required to act in good faith to restructure the business arrangement between the parties to conform with then existing Laws. If the parties have not reached an agreement regarding the material terms of the restructured business arrangement within thirty (30) days following the date both parties are on

9.4 No Federal Health Care Program Exclusion. Each party represents and warrants to the other party that: (i) the representing party is not currently excluded, debarred, or otherwise ineligible to participate in the Federal health care programs as defined in 42 U.S.C. Section 1320a-7b(f) (the "Federal health care programs"), and (ii) the representing party is not aware of any circumstances which may result in the representing party being excluded from participation in the Federal health care programs. This shall be an ongoing representation and warranty during the term of this Agreement, and each party shall immediately notify the other party of any change in status of the representation and warranty set forth in this Section. In the event a party becomes excluded, debarred, or otherwise ineligible to participate in the Federal health care programs, that party shall be considered in default of this Agreement, and the other party may immediately terminate this Agreement for cause.

000517

SCHEDULE A**1 UNIT DESCRIPTION**

5T mobile MRI system.

If the Unit described above is deemed to be unavailable, in Alliance's sole discretion a reasonably comparable Unit may be substituted.

2 FEES

Option A - staffed by Alliance - six (6) days per week, Monday through Friday 8 00am to 5 00pm and Saturday 8 00am to 12 00pm (noon) Initial.

Flat monthly fee of \$65 000 00

Option B - staffed by Client. Initial.

Flat monthly fee of \$55,000 00

3 SCHEDULING

Alliance shall make the Unit available to the Client and Client agrees to accept the Unit the following number of day(s) of each week. full time parked

4 TERM

The initial term of this Agreement shall be for thirty-six (36) months commencing on the date on which services begin (the "Commencement Date") expected to be on or about September 2006, provided, however, Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house fixed MRI system upon ninety (90) days prior written notice, provided, further, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement. If delivery of the Unit is delayed notwithstanding Alliance using all reasonable efforts to prevent the delay the Commencement Date shall be extended coterminously with the delay. The term of the Agreement shall also be extended coterminously with any period(s) services are suspended pursuant to Section 8.2. After each term, this Agreement shall automatically renew for successive terms, each of which shall be equal to the initial term, unless either party notifies the other to the contrary in writing at least 180 days prior to scheduled expiration. In the event this Agreement terminates and Client continues to accept services, the terms and conditions of this Agreement shall apply to the provision of services.

THIS AGREEMENT IS CONTINGENT UPON ALLIANCE'S BOARD OF DIRECTORS APPROVAL AND SUBJECT TO UNIT AVAILABILITY

Alliance and Client have duly executed this Agreement as of date and year written below

ALLIANCE IMAGING, INC.
a Delaware corporation

COASTAL CAROLINA MEDICAL CENTER
a South Carolina not for profit corporation

Signature: _____
Printed Name Christopher J. Joyce
Title Senior V.P., General Counsel & Secretary
Date _____
Address
1900 South State College Boulevard, Suite 600
Anaheim, California 92806
Telephone No (714) 688-7100
Facsimile No (714) 688-7111

Signature: _____
Printed Name _____
Title _____
Date _____
Address
1000 Medical Drive
Hardeeville, South Carolina 29927
Telephone No _____
Facsimile No _____

Return Executed Agreement to: Contracts Administration, Alliance Imaging, Inc. 15 Mastaglio Drive, Suite 202, Berlin, Connecticut 06037

000518

BOARD:
Elizabeth M. Hagood
Chairman

Mark B. Kent
Vice Chairman

L. Michael Blackmon
Secretary



C. Ed Hunter, Commissioner

Promoting and protecting the health of the public and the environment

Edwin H. Cooper, Jr.

Carl L. Bazz

Steven G. Kiser

Coleman F. Burkhouse, M.D.

August 4, 2006

Re SC-06-46
Construction for the addition of a 1.5 Tesla Magnetic Resonance Imaging (MRI)
unit
Coastal Carolina Medical Center
Hardeeville, South Carolina

David B. Summer, Jr.
Parker Poe Adams & Bernstein, LLP
1201 Main Street, Suite 1450
Columbia, SC 29202-1509

Dear Mr. Summer:

I am in receipt of your letter dated August 4, 2006 regarding the above-referenced project. According to this correspondence, Coastal Carolina Medical Center requests full-time use of a mobile MRI unit for the interim period in which the fixed MRI construction and installation will occur. This letter represents approval for temporary full-time use of a mobile MRI unit during the interim period of the fixed MRI construction and installation as outlined in your August 4, 2006 letter.

Should you have any questions, please contact me at (803) 545-4200.

Sincerely,

Victoria R. Tibshirany

Victoria R. Tibshirany
Bureau of Health Facilities and Services Development

000519

BOARD
Elizabeth M. Hagood
Chairman

H. Cooper III
Chairman

Stevie G. Kiser
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD
Henry C. Scott
Paul C. Aughry III
Glenn A. McCall
Coleman F. Buckhouse, MD

August 31, 2006

M. Elizabeth Crum, Esquire
McNair Law Firm, PA
Post Office Box 11390
Columbia, South Carolina 29211

Re SC-06-46
Use of mobile MRI unit for the interim period of the fixed MRI construction and installation

Dear Liz:

Thank you for your letter of August 28, 2006. After reviewing this matter again, the Department feels it acted appropriately and in the best interest of the health and welfare of the citizens of South Carolina by using its discretion to approve CCMC's request for the utilization of a mobile MRI unit during the interim period of the fixed MRI construction and installation.

Should you have any further questions, please do not hesitate to contact me.

Very truly yours

Ashley C. Biggers
Staff Attorney for Health Regulation

cc Victoria R. Tibshirany
Bureau of Health Facilities and Services Development

000520

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Office of General Counsel

Columbia Office • 2600 Bull Street, Columbia, SC 29201 Phone: (803) 896-8970 Fax: (803) 896-8971

Coastal Carolina
Medical Center
Compassion Care Community

September 6, 2006

Mr. Joel Grice, Director
Bureau of Health Facilities & Services Development
South Carolina Department of Health & Environmental Control
2600 Bull Street
Columbia, SC 29201

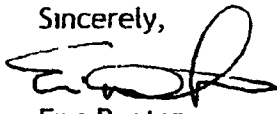
Dear Mr. Grice:

I want to update you on our progress regarding the MRI at Coastal Carolina Medical Center.

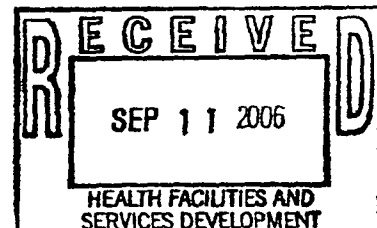
- 1 Effective September 6, 2006 we will begin providing mobile service available to our patients 24 hours per day, 7 days per week
- 2 We are negotiating with vendors to obtain the best price available for equipment
- 3 We will be working with architects to complete drawings for our fixed unit

Please let me know if you have any questions. You can reach me at 843-784-8182 or eric.deaton@lpnt.net

Sincerely,



Eric Deaton
Chief Executive Officer



1000 Medical Center Drive
Hardeeville, South Carolina 29927
Main Phone (843) 784-8000 Main Fax: (843) 784-8001
www.coastalcarolinamedical.com

000521

MCNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

M. ELIZABETH CRUM
ecrum@mcnair.net

www.mcnair.net

THE TOWER AT 1301 GERVAIS
1301 GERVAIS STREET 11TH FLOOR
COLUMBIA, SOUTH CAROLINA 29201

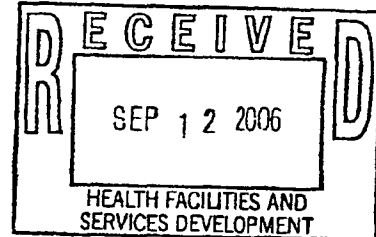
POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 799-9800
FACSIMILE (803) 753-3219

cc J Grice
OGC # 20026

September 8, 2006

HAND DELIVERED

The Honorable Jana Shealy
Clerk
Administrative Law Court
1205 Pendleton Street
Edgar Brown Building
Columbia, SC 29211



Re Request by MRI at Belfair, LLC for Contested Case Review of the August 4, 2006 decision of the Department of Health and Environmental Control to permit Coastal Carolina Medical Center to use a mobile MRI 24/7 during pendency of appeal before the S C Court of Appeals (MRI At Belfair, LLC, vs South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center—Docket No 04-ALC-07-0399-CC) and during the implementation of the CON issued to Coastal Carolina Medical Center on August 3, 2006 and the construction of building to house the fixed MRI—(MRI at Belfair, LLC v Department of Health and Environmental Control and Coastal Carolina Medical Center)

Dear Ms Shealy

On behalf of our client, MRI at Belfair, LLC ("Belfair"), we request a contested case hearing on the above referenced Department of Health and Environmental Control ("DHEC" or "Department") staff decision ("Final Agency Decision") pursuant to the S C Administrative Procedures Act as amended by Act 387 (effective July 1, 2006) and Rule 11, RPALC.

On July 3, 2006, Belfair appealed the decision of the Board of Health and Environmental Control ("Board") to affirm the Administrative Law Court ("ALC") Order and Decision. That appeal is pending before the South Carolina Court of Appeals. Belfair did not seek a stay of the Board's Order. On July 20, 2006 Coastal Carolina Medical Center ("CCMC") requested that DHEC issue the CON to construct an addition to CCMC to house a fixed 1.5 Tesla MRI unit and to purchase the unit for a total project cost in excess of \$3,201,000 ("Fixed MRI CON"). On August 3, 2006 DHEC issued the Fixed MRI CON.

000522

On August 9, 2006 a news article in the *Island Packet* announced that CCMC would begin providing mobile MRI services at CCMC. Upon his return to the State, Dr. Borelli, CEO and President of Belfair saw the newspaper article. On August 22, Belfair's counsel e-mailed¹ DHEC CON staff to determine what, if any, regulatory approval DHEC has issued to CCMC for the institution of mobile MRI services. Approval of a mobile MRI was not covered by the Fixed MRI CON issued on August 3, 2006 and was expressly rejected in CCMC's CON application for the Fixed MRI.

After a follow-up call to the DHEC CON staff on August 24, 2006, DHEC sent a facsimile copy of the August 4, 2006 request from CCMC, with attached mobile MRI lease agreement, to DHEC for permission to install and utilize a mobile MRI unit twenty-four hours a day seven days a week, during the implementation and construction of the Fixed MRI CON. See Exhibit 1, Letter dated August 4, 2006 from David B. Summer, Jr., Esquire to Victoria R. Tibshirany. On that same day, without notice to Belfair (despite the pending appeal and Belfair's status as an affected person in that appeal), DHEC issued its letter which approved CCMC for the "temporary full-time use of a mobile MRI unit during the interim period of the Fixed MRI construction and installation as outlined in [Mr. Summer's] August 4, 2006 letter." See Exhibit 2, Letter dated August 4, 2006 from Victoria R. Tibshirany to David B. Summer, Jr., Esquire ("Final Agency Decision").

CCMC can only acquire and utilize MRI equipment in accordance with the provisions of the State Certificate of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110, et seq. (Rev. 2002). Certainly, CCMC can go forward at its own risk² with the project as approved in the August CON. However, the Fixed MRI CON does not authorize CCMC to acquire and operate a MRI unit not subject to the CON. The language of the CON Act is plain and unambiguous. Section 44-7-230(A) provides:

The Certificate of Need, if issued, is valid only for the project described in the application including location, beds and services to be offered, physical plant, capital or operating costs, or other factors as set forth in the application, except as may be modified in accordance with regulations. The department shall require periodic reports and make inspections to determine compliance with the Certificate of Need. Implementation of the project or operation of the facility or medical equipment that is not in accordance with the Certificate of Need application or conditions subsequently agreed to by the applicant and the department may be considered a violation of this article.

¹ A copy of this e-mail is attached for your convenience.

² Mr. Tom Berry, DHEC spokesman, was quoted in the *Island Packet* as follows: "We have told Coastal Carolina that our interpretation of the law is that they may go ahead and proceed with the project, but do so with the full knowledge that at any time the state Court of Appeals may issue a stop-work order," Berry said. "If they proceed, they are doing so at their own risk." The "project" is the Fixed MRI CON and nothing else.

(Emphasis added) The mobile project proposed by CCMC is NOT the same project described in the application resulting in the August CON. In fact, in the application, CCMC expressly rejected the use of a mobile MRI as an alternative.

The effect of the Final Agency Decision is to grant a non-applicability determination or to take "other action" which may give rise to a contested case in order to approve CCMC's use of the mobile MRI. See § 48(A), Act 387, effective July 1, 2006. The Final Agency Decision is a final agency determination pursuant to § 48(E), Act 387 and is subject to contested case review pursuant to § 4(B), Act 387 (§ 1-23-600(B)). Certainly, by approving CCMC's request to institute a different MRI service than that approved in the Fixed MRI unit without notice, DHEC's staff acted in violation of the CON Act in several regards, not the least of which is that the total project cost of the mobile MRI exceeds the \$600,000 capital cost threshold.

Finally, we point out that pursuant to § 4(G)(2), this request for contested case review stays all actions for which the approval is a prerequisite (i.e., the installation and operation of the MRI). Section 4(G)(2), Act 387.³ Visual observation shows that there is an MRI truck parked on site at CCMC. On information and belief, CCMC will not start using the MRI to diagnose patients until Monday, September 11, 2006.⁴

We request that the Court reverse the Department's Final Agency Decision and require that CCMC cease and desist providing MRI services with the mobile MRI unit until such time as it has either a valid NAD or CON to acquire and operate the same and that the mobile unit be removed from the CCMC campus. I have enclosed our check in the sum of \$250 for the filing fee for the Court. I would appreciate your clocking in a copy of this letter and returning it to our courier. Thank you for your attention to this matter.

Should you have any questions with respect to these filings, please do not hesitate to contact me at my direct line number 753-3240.

Thank you for your time and attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,



M. Elizabeth Crum

³ Section (G)(2) provides, in pertinent part: "A request for a contested case hearing for a decision to issue a new license stays all actions for which the license is a prerequisite, matters not affected by the request may not be stayed by the filing of the request."

⁴ On information and belief, volunteers were having test scans performed during the week ending today.

McNAIR LAW FIRM, P.A.

ATTORNEYS AND COUNSELORS AT LAW

Endlosures

Cc A. Joseph Borelli, Jr , M D
A Victor Rawl, Esquire
Kelley M Jolley, Esquire
Nancy S Layman, Esquire
Ashley C Biggers, Esquire
David B Summer, Esquire
Susan B Lipscomb, Esquire
(all VIA HAND DELIVERY and e-mail)

Crum, Liz

From Crum Liz
Sent Tuesday August 22 2006 3 55 PM
To Nancy S Layman Esquire (laymanns@dhec.sc.gov); Ashley C Biggers (biggerac@dhec.sc.gov)
 Joel C Grice (gricejc@dhec.sc.gov) Victoria (Ton) Reich Tibshirany (tibshrvt@dhec.sc.gov)
 jborelli@mnatbelfair.net
Cc Kirk Ariall Rawl Vic; Jolley Kelly
Subject: FW: Islandpacket.com | Hospital gets green light for MRIs

Tracking	Recipient	Read
	Nancy S. Layman Esquire (laymanns@dhec.sc.gov)	
	Ashley C. Biggers (biggerac@dhec.sc.gov)	
	Joel C. Grice (gricejc@dhec.sc.gov)	
	Victoria (Ton) Reich Tibshirany (tibshrvt@dhec.sc.gov)	
	jborelli@mnatbelfair.net	
	Kirk, Ariall	Read 8/22/2006 4 43 PM
	Rawl Vic	
	Jolley, Kelly	Read 8/22/2006 4 09 PM
	A. Joseph Borelli, Jr M D	

Subject: islandpacket.com | Hospital gets green light for MRIs

Nancy Ashley Joel and Ton Please review article below I saw where the CON was issued to CCMC for the CON MRI project under appeal to the Court of Appeals Obviously If CCMC wants to go forward with the Project as approved we have not sought a stay However to our knowledge CCMC has not obtained either a CON nor a NAD to put mobile MRI services in place Clearly Sec 44 7 230(A) authorized CCMC only to go forward with the project as approved ("The Certificate of Need, if issued is valid only for the project described in the application ") The article states that the mobile services are to be initiated Sept 1 2006 If a NAD has been issued for this project we expressly request pursuant to FOIA that we be provided a copy of the same If one has not please ask CCMC to cease and desist until it has regulatory approval to undertake mobile MRI services Thank you for your prompt attention to this matter Liz Crum

M Elizabeth (Liz) Crum
 McNair Law Firm, P.A.
 1301 Gervais Street
 P O Box 11390 (29211)
 Columbia, South Carolina 29201
 (803) 799-9800
 (803) 753-3219 (fax)
 lcrum@mcnair.net
<http://www.mcnair.net>

Hospital gets green light for MRIs

Court appeal could affect construction

BY PETER FROST *The Island Packet*

000526

8/29/2006

Published Wednesday August 9 2006

[Comments \(0\)](#) [Add Comment](#)

The Coastal Carolina Medical Center is going forward with plans to install an MRI machine, but the hospital's two-year legal battle with a provider may not be over.

After receiving approval from the state Department of Health and Environmental Control late last week to begin installing the equipment, hospital will begin offering mobile magnetic resonance imaging services Sept. 1, said CEO Eric Deaton.

An estimated \$3 million construction project to install a permanent MRI unit is expected to begin shortly thereafter and be completed with that project would mean a separate room would be built to house the MRI unit.

However, should the hospital begin construction, it could be halted at any point pending an appeal to the state Court of Appeals by MRI at Bluffton opposing the project, said Thom Berry, a DHEC spokesman.

"We have told Coastal Carolina that our interpretation of the law is that they may go ahead and proceed with the project, but do so with the time the state Court of Appeals may issue a stop-work order," Berry said. "If they proceed, they are doing so at their own risk."

MRI at Belfair in July notified DHEC of its plans to appeal the state-issued permit for a fourth time. The company could petition the state the project pending a hearing on the case.

It's unclear, however, if the court would issue a stop-order, or if MRI at Belfair will ask it to. Dr. Joe Borelli, the company's president and for comment.

Since Coastal Carolina opened in November 2004, its efforts to add the imaging equipment have been blocked by a series of appeals by MRI, continued to appeal the permits on claims that the area doesn't need another MRI provider and the hospital doesn't see enough patients to

But after MRI at Belfair lost each of the three appeal decisions -- two by DHEC and another by the state Administrative Law Court -- DHEC the go-ahead to install its long-awaited MRI unit.

"It's been a long process, but we're very pleased to have it in place soon," Deaton said. "To refuse the hospital the ability to provide this type of service is unthinkable."

For its first 20 months of operation, the hospital has been forced to take patients in need of MRI scans by ambulance to other hospitals or The process costs upward of \$400 per trip and wastes valuable time in patient diagnosis and treatment, Deaton said.

In many after-hours emergency cases, patients have been taken across the state line into Georgia for imaging.

"Obviously, this has been reviewed three times now, and the State Health Plan says every hospital should have immediate access to MRI," said. "It's an extremely important piece of diagnostic equipment that's essential to providing high-quality care to our patients."

Contact Peter Frost at 706-8169 or pfrost@islandpacket.com. To comment on this story, please go to islandpacket.com.

000527

8/29/2006

PARKER POE

PARKER POE ADAMS & BORNSTEIN LLP

Attorneys and Counselors at Law

David B. Summer, Jr.

Partner

Telephone: 803.255.8910

Direct Fax: 803.255.8017

davidsummer@parkerpoe.com

1201 Main Street
Suite 1450
P.O. Box 1509
Columbia, SC 29202-1509
Telephone: 803.255.8000
Fax: 803.255.8017
www.parkerpoe.com

August 4, 2006

Via Hand Delivery

Ms. Victoria R. Tibshirany
Program Coordinator II
South Carolina DHEC
1777 St. Julian Place, Suite 201
Columbia, SC 29204

Re: SC-06-46

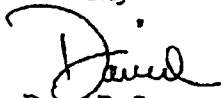
***Certificate of Need for the construction of an addition of one (1) fixed MRI
Coastal Carolina Medical Center***

Dear Ms. Tibshirany:

On behalf of Coastal Carolina Medical Center, this is to request authorization to utilize a mobile MRI at Coastal Carolina Medical Center until construction and installation of its fixed MRI, granted in the above-referenced CON application, is completed. In that regard, attached please find a copy of the proposed MRI Services Proposal/Agreement between Alliance Imaging Inc. and Coastal Carolina Medical Center for the utilization of a mobile MRI.

If you have any questions or need further information or clarification, please do not hesitate to contact me. With best regards, I am,

Sincerely,


David B. Summer, Jr.

DBSjr/ccq
Enclosure

000528

CHARLESTON SC
CHARLOTTE NC
RALEIGH NC
SPARTANBURG SC

EXHIBIT

COL 62367v1



MRI Services Proposal/Agreement

**Coastal Carolina Medical Center
1000 Medical Drive
Hardeeville, South Carolina 29927**

***Prepared for: Eric Deaton, C.E.O.
Hollis Tessmer, Director of Imaging***

***Prepared by Kevin Smith, Area Sales Manager, Southeast Region
office number 1-800-743-4729 / mobile number 1-704-905-5131***

000529

PROPOSAL

Date July 20, 2006

Unit Description

1 5T Mobile MRI Unit.

Service Schedule

Full time parked.

Term.

Thirty-six (36) months, provided, however, Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house, fixed MRI system upon ninety (90) days prior written notice, provided, further, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement.

Personnel

Option 1) Alliance shall be responsible for staffing the MRI system with appropriately trained technologist(s) based on Client's exam volume. Option 2) Client shall be responsible for staffing the MRI system with appropriately trained technologist(s) based on Client's exam volume.

Medical Supplies

Client shall be responsible for all film, film processing, data storage supplies, contrast, contrast supplies, utilities, suitable pad and power, permits, state and local taxes, etc.

Fees

Option A - staffed by Alliance
Flat monthly fee of \$65,000.00
Option B - staffed by Client.
Flat monthly fee of \$55,000.00

Commitment and Acceptance.

This proposal is subject to execution of a mutually acceptable agreement. This proposal is for informational purposes only and is not a binding legal obligation. This proposal is good for 30 days from receipt. Terms and conditions are subject to change after this 30-day timeframe.

000520

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	1	Unit Description
	2	Fees
	3	Scheduling
	4	Term

000531

MRI SERVICES AGREEMENT

THIS MRI SERVICES AGREEMENT (the "Agreement") is made as of the first date written below between ALLIANCE IMAGING, INC a Delaware corporation ("Alliance"), and

Coastal Carolina Medical Center
1000 Medical Drive
Hardeeville South Carolina 29927

a South Carolina not for profit corporation (the "Client")

1 EQUIPMENT AND SERVICES

1.1 The Unit. Alliance shall provide a Magnetic Resonance Imaging ("MRI") system described in Schedule A of this Agreement (the "Unit")

1.2 Personnel If Fee Option A is selected, Alliance shall provide the services of one (1) technical personnel to operate the Unit as appropriate for Client's exam volume. Client agrees not to hire or contract with any Alliance employee during the term of this Agreement, including renewals, and for a period of one (1) year after MRI services cease (collectively the "Non-Solicitation Period") without Alliance's prior written consent. Alliance and Client hereby agree that in the event of a breach of this provision damages shall be difficult to calculate and therefore agree Alliance shall be entitled to receive \$50,000.00. Alliance and Client agree that the aforementioned amounts are reasonable and shall constitute liquidated damages and not a penalty. Alliance shall ensure that all services provided by Alliance's technical personnel (including, but not limited to, any patient coordinator) shall be within the scope of his/her duties as technical personnel. Client agrees, for as long as Alliance remains a JCAHO-accredited organization, that Client shall not need to independently verify and shall not require any written documentation concerning the credentialing, education, training, evaluation and competencies related to Alliance's technical personnel (including, but not limited to, any patient coordinator). In the event of a JCAHO survey of Client, Alliance shall have the personnel file of Alliance's technical personnel accessible upon request.

If Fee Option B is selected, Client shall provide the services of technical personnel to operate the Unit as appropriate for Client's procedure volume. Client's personnel shall be fully certified in the field of radiography by an institution recognized by the American Medical Association. Other conditions are as follows:

- 1 Client shall be responsible for any repairs of the Unit and ancillary equipment or the trailer that arise out of the actions or omissions of Client's employees or subcontractors.
- 2 Client shall be responsible for monitoring the Unit's cryogen level, and Client shall be responsible for any damage to the Unit arising from failure to maintain adequate cryogen levels.
- 3 Client shall comply with all checklists supplied to Client by Alliance personnel to operate the Unit and Client shall be responsible for any damage to the Unit arising from failure to do so.
- 4 Client shall consult with Alliance's operations personnel no less than once per week concerning the operating condition of the Unit.

1.3 Maintenance. Alliance shall use reasonable efforts to cause the Unit to be maintained in good operating condition. Alliance may do so through the purchase of a maintenance contract from the MRI Unit manufacturer or otherwise, in its discretion. Alliance shall provide cryogens.

2 SCANNING ACTIVITIES

2.1 Unit. Client shall prepare and maintain a safe and suitable site for the Unit which complies with the manufacturer's specifications (which shall be provided by Alliance) and all applicable laws and regulations. All site costs (for example, costs of tractor/trailer access and egress, power and telephone expenses) shall be Client's responsibility. The Unit shall be located at the address first-above listed (the "Unit Location"). Client represents and warrants to Alliance that it currently owns or has authorization to site the Unit at the Unit Location. Further, Client further warrants and agrees that, at all times during the term of this Agreement, Client shall maintain the authorization or ownership to site the Unit at the Unit Location. Client shall indemnify and hold Alliance harmless from any damages or liability arising out of breach of the representations and warranties in this Section 2.1. Client may request in writing to Alliance that the Unit Location be moved, in which case any such move shall be subject to Alliance's prior approval, all of the obligations under this Section 2.1 shall apply to the new Unit Location.

2.2 Power. Client shall provide electrical power, including a dedicated power line with 200 amps and 480 volts of three-phase power. Client shall promptly report any problems with power (for example, sags or surges) to Alliance. Client shall provide the power line, a lockable disconnect box and receptacle within twenty-five (25) feet of the electrical receptacle on the Unit. Client is responsible for damage to the Unit due to power that does not meet specification. Client is responsible for maintaining the power plug and keeping it in good operating condition with quarterly inspection.

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2.3 Phone and Connectivity Client shall provide the Unit with a voice telephone line, a dedicated fax compatible telephone line and a RJ-45 ethernet broadband line with an automatic IP address assignment using Dynamic Host Control Protocol ("DHCP") and a proxy-less connection to the internet.

2.4 Operation The Unit shall be operated only by employees or subcontractors of Alliance or Client.

2.5 Medical Director Client shall appoint a qualified and licensed physician to act as Medical Director hereunder, along with another such physician to act in his absence (the "Medical Director"). Client shall be solely responsible for all activities which constitute the practice of medicine (for example, providing medical advice to patients in connection with MRI scans and the injection of contrast agents). Client shall obtain any written consents from patients that are required by the USFDA, state or local law or prudent medical practice. Client shall have full responsibility for all medical care and advice provided to patients. All medical care shall be provided under the ultimate supervision of the Medical Director.

2.6 Medical Supplies, Emergency Care: Client shall provide all medical supplies which may be required (including film and film processing, gowns, medications and contrast agents) and shall ensure the immediate availability at all times of equipment and personnel to treat patients who require emergency or other medical care (including a cardiac monitor, a fresh oxygen supply, an aspirator and a defibrillator).

2.7 Patient Handling Client shall be responsible for the prompt and orderly pick up and delivery of patients to and from their designated areas.

2.8 Patient Log If Fee Option A is selected, Alliance shall maintain a log of all scans performed on the Unit. Client shall be provided with copies of the log upon request. If Fee Option B is selected, Client shall maintain a log of all scans performed on the Unit. Client shall be provided with copies of the log upon request.

2.9 Modifications Client shall not modify or alter the Unit without Alliance's prior written consent. Client shall not allow any portion of the Unit to become permanently attached to real property. Client agrees to execute any documents evidencing a first priority security interest or mortgage or assignment in favor of any party providing financing for the Unit.

2.10 Scheduling Client shall use all reasonable efforts to schedule its patients consecutively from the beginning of each service day to minimize unutilized scanning time and to prescreen patients for conditions unsuitable for MRI examination.

2.11 Notification of Physicians, Use of Service Client shall notify its staff of physicians of the availability of the Unit and shall use all reasonable efforts to encourage physicians to utilize the Unit for their patients' needs.

2.12 Exclusivity Client agrees to use Alliance solely for all of its MRI needs except for an emergency where the use of Alliance's service is impractical. Client on behalf of itself, its subsidiaries and/or corporate affiliates (including but not limited to any entity in which Client has an ownership interest) agree during the term of this Agreement, not to own, permit, lease, manage or invest in any MRI system or engage any entity besides Alliance to provide Client with MRI services.

2.13 Document Retention Alliance and Client agree to retain books, documents and records required under the Omnibus Reconciliation Act of 1980 and other applicable laws and regulations governing governmental reimbursement of medical care expense in all cases for the periods specified in such laws and regulations.

2.14 Licenses Client shall obtain and maintain all required licenses and regulatory approvals necessary to operate the Unit at Client's premises. Alliance shall reasonably cooperate to assist Client to obtain such licenses and approvals.

2.15 Taxes. All taxes, if any (for example, sales, use or similar taxes), on the services hereunder shall be the responsibility of Client.

2.16 Professional Interpretations. Client shall engage a radiologist to provide interpretations of MRI exams for Client's patients. Alliance shall not be responsible for providing any such interpretations.

3 FEES AND BILLING

Client shall pay Alliance fees in accordance with Schedule A. All fees for a billing period shall be due and payable within fifteen (15) days of the last day of such period. Alliance shall invoice Client twice each month. Client shall pay a late fee of one and one-quarter percent (1-1/4%) or the maximum legal rate, whichever is less, on all balances outstanding more than fifteen (15) days beyond the due date. Fees may be adjusted on each anniversary of the commencement date by the percentage increase for the Medical Care Services component of the Consumer Price Index or all Urban Consumers (CPI-U) as recorded by the Department of Labor Index for the then most recently available twelve month period. Client shall be responsible for all billings to Client Patients and/or third party payors for MRI.

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exams performed on the Unit. Client's obligation to pay Alliance compensation in accordance with the provisions of Schedule A shall not be dependent upon Client's billing and collection of patient and/or third party payor accounts receivable. Alliance shall not bill, and Alliance shall not cause bills to be submitted to, any patient or third party payor for MRI exams performed on the Unit. Both parties agree that Alliance is providing its services set forth on this agreement "under arrangement" with Client, such that upon Client's receipt of payment from the Medicare program for MRI exams performed in the Unit, the liability of the beneficiary or any other person to pay for such services shall be fully discharged.

4 TERM

The term of this Agreement shall be as specified on Schedule A.

5 SCHEDULING

Alliance shall make the Unit available to Client according to the schedule specified in Schedule A.

6 INSURANCE, INDEMNITY.

6.1 Insurance.

a) Alliance. Alliance shall maintain insurance covering all risks of physical loss or damage to the Unit, comprehensive general liability and professional liability covering the conduct of its employees, all in amounts and subject to deductibles that are customary in the industry.

b) Client. Client shall maintain comprehensive general and professional liability insurance covering the Client, its employees, staff and physicians and shall require the Medical Director and other physicians who interpret or report on procedures performed on the Unit to maintain professional liability insurance. All such insurance shall be in amounts and with deductibles that are customary in the industry. Client shall bear the risk of loss or damage to the Unit from Client's negligent actions or omissions.

6.2 Indemnities. Each party hereto shall indemnify and hold the other party harmless from and against any and all liability, loss, damage, cause of action, cost or expense (including reasonable attorney's fees) arising out of or in any way connected with, any negligent or intentional act or failure to act or any other wrongful conduct by the respective party, its members, agents, employees or subcontractors in the performance of its duties under this Agreement.

7 GENERAL

7.1 Independence. Alliance is an independent contractor of Client, and this Agreement is a contract for services, not a lease. No agency, employment, partnership or joint venture is intended to be created by this Agreement. Neither Alliance nor Client shall take any action or position which is inconsistent with those descriptions of the relationship.

7.2 Remedies. Alliance shall not be responsible for failure to provide services as a result of conditions caused by Client. Alliance shall not be liable for consequential or special damages under any circumstances or any damages caused by conditions not within Alliance's reasonable control.

7.3 Waiver. Waiver of any breach shall not be deemed a waiver of the same provision in the future or the waiver of any other provision.

7.4 Notices. All notices and other communications shall be in writing and shall be given in person, by registered or certified mail, by overnight delivery, or by telecopy (in the case of telecopy, if written confirmation of sending is retained). The initial addresses and telecopy numbers of the parties are listed next to their signatures below. Notices to Alliance shall be sent to the attention of General Counsel. Either party may change its address or telecopy number for notice by notifying the other by a permitted method of giving notice. No objection may be made to a permitted method of giving notice. Under no circumstances shall any notice or communication be considered valid notice unless such notice or communication fully complies with the requirements of this Section 7.4.

7.5 Governing Law. This Agreement shall be governed by the law of the state where services are performed.

7.6 Entire Agreement; Amendment. This Agreement is the parties' entire understanding and supersedes all prior agreements, oral and written with respect to the subject matter of this Agreement. This Agreement may not be amended except by written agreement of the parties. No handwritten changes to this Agreement shall be enforceable unless such changes are initialed by both parties to this Agreement.

7.7 Successors and Assigns. Alliance may assign this Agreement. Client may not assign this Agreement without the prior written consent of Alliance. This Agreement shall be binding on and inure to the benefit of the parties and their respective successors and assigns. Client agrees that this Agreement may be performed in whole or part by a subsidiary of Alliance and further consent shall not be required. Alliance may also assign the proceeds of this Agreement. Client shall require any successor (whether direct or indirect, by purchase, merger, reorganization,

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consolidation, sale of property or stock, liquidation, or otherwise) to all or a substantial portion of its assets by agreement in form and substance reasonably satisfactory to Alliance, to expressly assume and agree to perform this Agreement.

7.8 Third Parties This Agreement does not convey any rights to any third parties

7.9 Attorney Fees. In any dispute arising out of this Agreement (whether litigation is involved or not) or in the event that either party must take action to collect fees or enforce rights, the prevailing party shall be entitled to reimbursement of its expenses, including court expenses and lawyers' fees.

7.10 Certain Events Neither party shall be deemed in breach if its failure to perform under this Agreement is caused by conditions beyond its reasonable control (for example, fire, natural disaster, labor strikes, and so on)

7.11 Confidentiality Client acknowledges and agrees that this Agreement is highly confidential and proprietary to Alliance and Client agrees that neither it nor any of its employees, physicians or representatives, shall disclose in any manner the terms, provisions, pricing or any other information contained in this Agreement (or any related proposal) to any third party

7.12 Accreditation Alliance and Client agree to set standards of care and quality that comply with the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) and the American College of Radiology (ACR). Alliance and Client mutually shall cooperate in all phases of applying, scheduling, preparing and executing surveys or inspections by the JCAHO and ACR, as needed. Both parties agree to work cooperatively to implement changes, correct deficiencies or establish policies required and/or recommended by the inspecting agencies.

7.13 Policies and Procedures. Client agrees that Client shall comply with all of Client's Policies and Procedures, and Client agrees to indemnify and hold Alliance harmless from and against any and all liability, loss, damage, cause of action, cost or expense (including reasonable attorney's fees) arising out of or in any way connected with, Client's failure to fully comply with Client's Policies and Procedures

7.14 Change in Reimbursement. In the event that health care reform causes a significant decline in Client's MRI reimbursement to a level that Client can demonstrate that it is impossible for Client to break even on the total MRI service utilizing the direct costs of the MRI service, Client may provide written notice to Alliance of such circumstance. Client and Alliance agree to then meet to decide upon a solution that shall be fair and equitable to Client and Alliance

7.15 Severability If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws, that provision shall be fully severable and this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision never comprised a part of this Agreement. The remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance. Furthermore, a provision as similar in its terms to the illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable shall be added to this Agreement automatically to replace the illegal, invalid, or unenforceable provision

8 TERMINATION

8.1 Termination

a) **Default.** Alliance or Client may terminate this Agreement if the other materially defaults in the performance of any covenant, term or provision of this Agreement and the default is not cured within sixty (60) days following provision of notice to the defaulting party

8.2 Termination, Alliance. Alliance may terminate this Agreement or suspend service if

a) **Payment Default.** Client fails to make any payment to Alliance when due and such failure continues for ten (10) days following notice to Client. In the case of any payment default, Alliance may, without notice, cease providing services hereunder after three (3) days following a payment due date should it feel insecure with respect to Client's ability or willingness to make payment.

b) **Profitability** Alliance is unable to realize a profit on the services provided hereunder, provided that the parties have negotiated in good faith to modify the terms of this Agreement to eliminate such condition and a period of sixty (60) days has elapsed since Alliance originally notified Client of such condition. In lieu of termination, Alliance may reduce the number of days of service provided

c) **Bankruptcy** Client commits or suffers (voluntarily or involuntarily) an act of bankruptcy, receivership, liquidation or similar event.

8.3 Termination, Client. Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house, fixed MRI system upon ninety (90) days prior written notice, provided, however, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement. Client agrees to give Alliance first right of refusal to provide such fixed services

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8.4 Client's Default. Upon Client's default, Alliance may (i) declare the entire balance of all fees and other amounts due including the sum of all fees and other amounts payable during the balance of the term of this Agreement, or (ii) take any action at law or in equity to collect payments then due and to become due or to enforce performance of specific obligations. Alliance and Client hereby agree that, in the event of Client's default of this Agreement and Alliance's subsequent termination of this Agreement, damages shall be calculated by using the greater of (i) the average monthly scan volumes by Client over the twelve-month period (or such lesser period if Alliance did not provide at least 12 months of service to Client prior to termination) immediately prior to termination of this Agreement, or (ii) the scan volume benchmarks set forth in Schedule A.

The foregoing remedies are in addition to any provided by law. Neither party shall have obligation to exercise any remedy and the exercise of the remedy shall not release the parties for any obligation hereunder. All remedies shall be cumulative, and action on one shall not constitute an election or waiver of any other right to which either party may be entitled. In addition, the defaulting party shall pay the other parties reasonable attorney's fees together with an amount equal to all expenses paid or incurred in the enforcement of any rights or privileges hereunder.

9 COMPLIANCE WITH LAWS

9.1 Compliance with Current Laws. The parties expressly agree that it is their understanding and intent that this Agreement, including any Exhibits or other attachments, complies as of the effective date hereof with applicable federal and state statutes and regulations including the Stark Law 42 U.S.C. Section 1395nn and the Anti Kickback Statute (collectively referred to as "Laws").

9.2 No Inducement. This Agreement has been negotiated in good faith through arms length negotiations. Nothing contained in this Agreement, including any compensation paid or payable, is intended or shall be construed (i) to require influence or otherwise induce or solicit either party regarding referrals of business, or recommending the ordering of any items or services of any kind whatsoever to the other party or any of its affiliates or to any other person, or otherwise generate business between the parties, or (ii) to interfere with a patient's right to choose his or her own health care provider, or with a physician's medical judgment regarding the ordering of any items or services.

9.3 Change in Law. Neither party shall make or receive any payment or take any other action required or permitted hereunder, if any judicial decision, legislative action, regulatory or other administrative interpretation, whether federal or state, would render unlawful the conduct of either party hereunder ("Change in Law"). In the event of such a Change in Law, the parties shall be required to act in good faith to restructure the business arrangement between the parties to conform with then existing Laws. If the parties have not reached an agreement regarding the material terms of the restructured business arrangement within thirty (30) days following the date both parties are on

9.4 No Federal Health Care Program Exclusion. Each party represents and warrants to the other party that (i) the representing party is not currently excluded, debarred, or otherwise ineligible to participate in the Federal health care programs as defined in 42 U.S.C. Section 1320a-7b(f) (the "Federal health care programs"), and (ii) the representing party is not aware of any circumstances which may result in the representing party being excluded from participation in the Federal health care programs. This shall be an ongoing representation and warranty during the term of this Agreement, and each party shall immediately notify the other party of any change in status of the representation and warranty set forth in this Section. In the event a party becomes excluded, debarred, or otherwise ineligible to participate in the Federal health care programs, that party shall be considered in default of this Agreement, and the other party may immediately terminate this Agreement for cause.

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SCHEDULE A**1 UNIT DESCRIPTION**

5T mobile MRI system.

If the Unit described above is deemed to be unavailable, in Alliance's sole discretion a reasonably comparable Unit may be substituted.

2 FEES

Option A - staffed by Alliance - six (6) days per week, Monday through Friday 8:00am to 5:00pm and Saturday 8:00am to 12:00pm (noon) _____ Initial

Flat monthly fee of \$65,000.00

Option B - staffed by Client. _____ Initial

Flat monthly fee of \$55,000.00

3 SCHEDULING

Alliance shall make the Unit available to the Client and Client agrees to accept the Unit the following number of day(s) of each week full time parked

4 TERM

The initial term of this Agreement shall be for thirty-six (36) months commencing on the date on which services begin (the "Commencement Date") expected to be on or about September 2006 provided, however, Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house fixed MRI system upon ninety (90) days prior written notice provided, further, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement. If delivery of the Unit is delayed notwithstanding Alliance using all reasonable efforts to prevent the delay, the Commencement Date shall be extended coterminously with the delay. The term of the Agreement shall also be extended coterminously with any period(s) services are suspended pursuant to Section 8.2. After each term, this Agreement shall automatically renew for successive terms, each of which shall be equal to the initial term, unless either party notifies the other to the contrary in writing at least 180 days prior to scheduled expiration. In the event this Agreement terminates and Client continues to accept services, the terms and conditions of this Agreement shall apply to the provision of services.

THIS AGREEMENT IS CONTINGENT UPON ALLIANCE'S BOARD OF DIRECTORS APPROVAL AND
SUBJECT TO UNIT AVAILABILITY

Alliance and Client have duly executed this Agreement as of date and year written below

ALLIANCE IMAGING, INC
a Delaware corporation

COASTAL CAROLINA MEDICAL CENTER
a South Carolina not for profit corporation

Signature _____
Printed Name Christopher J. Joyce
Title Senior V.P., General Counsel & Secretary
Date _____
Address
1900 South State College Boulevard Suite 600
Anaheim, California 92806
Telephone No (714) 688-7100
Facsimile No (714) 688-7111

Signature _____
Printed Name _____
Title _____
Date _____
Address
1000 Medical Drive
Hardeeville South Carolina 29927
Telephone No _____
Facsimile No _____

Return Executed Agreement to: Contracts Administration, Alliance Imaging Inc. 15 Massiro Drive Suite 202, Berlin Connecticut 06037

000537

Aug-24-2006 03:58pm From: SC DHEC

803 545 4579

T-828 P 012/012 F-492

BOARD:
Elizabeth M. Hagood
Chairman

Mark B. Kent
Vice Chairman

Richard Blackmon
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

Edwin H. Cooper, III

Carl L. Bazzell

Steven G. Knecht

Coleman F. Buckhouse, MD

August 4, 2006

Re SC-06-46
Construction for the addition of a 1.5 Tesla Magnetic Resonance Imaging (MRI)
unit
Coastal Carolina Medical Center
Hardeeville, South Carolina

David B. Summer, Jr.
Parker Poe Adams & Bernstein, LLP
1201 Main Street, Suite 1450
Columbia, SC 29202-1509

Dear Mr. Summer:

I am in receipt of your letter dated August 4, 2006 regarding the above-referenced project. According to this correspondence, Coastal Carolina Medical Center requests full-time use of a mobile MRI unit for the interim period in which the fixed MRI construction and installation will occur. This letter represents approval for temporary full-time use of a mobile MRI unit during the interim period of the fixed MRI construction and installation as outlined in your August 4, 2006 letter.

Should you have any questions, please contact me at (803) 545-4200.

Sincerely,

Victoria R. Tibshirany
Victoria R. Tibshirany
Bureau of Health Facilities and Services Development

000528

BOARD:
Elizabeth M. Hagood
Chairman

Mark B. Kent
Vice Chairman

L. Michael Blackmon
Secretary



- C. Fred Hunter, Commissioner

Promoting and protecting the health of the public and the environment

Edwan H. Coof

Carl L.

Steven G.

Coleman F. Buckhorn

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Should you have any questions, please contact me at (803) 545-4200.

Sincerely,

Victoria R. Tibshirany

Victoria R. Tibshirany
Bureau of Health Facilities and Services Development

EXHIBIT

2

000539

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

M. ELIZABETH CRUM
lcrum@mcnair.net

www.mcnair.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803)799-9800
FACSIMILE (803)378-2219

RECEIVED

September 15, 2006

SEP 20 2006

HAND DELIVERY

DHEC
OFFICE OF GENERAL COUNSEL

The Honorable Ralph King Anderson, III
Administrative Law Judge
1205 Pendleton Street
Columbia, South Carolina 29201

Re MRI at Belfair, LLC v SCDHEC and Coastal Carolina Medical Center
(Docket No 06-ALC-07-0714-CC)

Dear Judge Anderson

On Friday, September 8, 2006, MRI at Belfair, LLC ("Belfair") filed a request for the above contested case, requesting review of DHEC's decision to authorize Coastal Carolina Medical Center ("CCMC") to acquire a mobile MIR and begin providing mobile MRI services on its campus without obtaining a CON. Certainly, pursuant to Article I, sec 22 of the South Carolina Constitution and S C Code Ann § 1-23-600(B) (Act 387 § 4(B) effective July 1, 2006) the Administrative Law Court has jurisdiction to hear this case and the case was timely filed.

In our request for a contested case hearing, we pointed out that § 1-23-600(G)(2) provides for an automatic stay. Section 1-23-600(G)(2) provides, in pertinent part: "A request for a contested case hearing for a decision to issue a new license stays all actions for which the license is a prerequisite, matters not affected by the request may not be stayed by the filing of the request." The mobile MRI truck is still parked on the CCMC campus. As of this morning, on information and belief, CCMC is still scheduling patients for MRI services and providing MRI services.

CCMC cannot continue to ignore the automatic stay provision of § 1-23-600(G)(2). We request that this Court require CCMC to cease and desist providing mobile MRI services.

Thank you for your attention to this matter.

000540

McNAIR LAW FIRM, P A.
ATTORNEYS AND COUNSELORS AT LAW

Yours very truly,



M Elizabeth Crum

Enclosure

cc Nancy S Layman, Esquire
Ashley C Biggers, Esquire
David B Summer, Jr, Esquire
Susan B Lipscomb, Esquire

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51... TORI
OSC 20355
File

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair LLC,

Petitioner,

vs

South Carolina Department of Health and
Environmental Control and Coastal
Carolina Medical Center,

Respondents

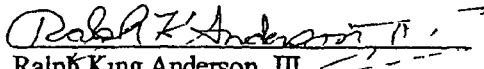
Docket No 06-ALJ-07-0714-CC

NOTICE OF MOTION
HEARING

IT IS HEREBY ORDERED that a motion hearing for the above-captioned case is scheduled for 9 30 a.m. on Thursday, September 28, 2006, at the South Carolina Administrative Law Court, 1205 Pendleton Street, Edgar A. Brown Building, Second Floor, Suite 224, Columbia, South Carolina.

This hearing will be conducted in accordance with the Rules of Procedure for the Administrative Law Court, a copy of which is available from the Clerk of the Court

AND IT IS SO ORDERED


Ralph King Anderson, III
Administrative Law Judge

September 20, 2006
Columbia, South Carolina

RECEIVED

SEP 22 2006

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CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s)

This 20th day of September, 2006
By Annanda M. Scott
Judicial Law Clerk

DHEC
OFFICE OF GENERAL COUNSEL

FILED

SEP 20 2006

SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC,

Petitioner,

vs

South Carolina Department of Health and
Environmental Control and Coastal
Carolina Medical Center,

Respondent.

Docket No 06-ALJ-07-0714-CC

ORDER FOR
PREHEARING STATEMENTS

IT IS HEREBY ORDERED that each party who intends to appear at the hearing must file with the undersigned's office a Prehearing Statement stating the following

- 1 The nature of this proceeding;
- 2 Statutory provisions(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations,
- 3 The issues presented for determination,
- 4 The action requested of the Court, if any,
- 5 A brief summary of the facts to be presented at the hearing,
- 6 A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion,
- 7 A list of proposed witnesses and exhibits,
- 8 A statement regarding the necessity for discovery, if any,
- 9 The estimated length of the hearing; and
- 10 Any dates in the next one-hundred twenty (120) days when you will not be available for a hearing

The Prehearing Statement must be filed with the Court and served on all parties within fifteen (15) days of the date of this Order. The parties have a continuing obligation to update the information during the course of the proceedings.

September 19, 2006
Columbia, South Carolina

Ralph K. Anderson, III
Ralph K. Anderson, III
Administrative Law Judge
This is to certify that the undersigned has this date served this order in the above-captioned case on all parties to this cause by depositing a copy hereof, in the United States mail postage paid or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 19th day of September, 2006

000543

FILED

SEP 19 2006

BOARD-
Elizabeth M. Hagood
Chairman

Edwin H. Cooper III
Vice Chairman

En G. Kusner
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD
Henry C. Scott

Paul C. Aughtery III

Glenn A. McCall

Coleman F. Buckhouse, MD

OFFICE OF GENERAL COUNSEL

October 9, 2006

VIA HAND DELIVERY

The Honorable Ralph King Anderson
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29211

RE *MRI at Belfair, Petitioner v. South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center Respondents*
Docket No. 06-ALJ-07-0714-CC
OGC File No. 20352

Dear Judge Anderson:

As requested, please find enclosed for your review the original and one copy of DHEC's proposed *Order of Remand* in the above-referenced matter. Kindly return a clocked via our courier.

By copy of this letter and as evidenced by the Certificate of Service, we are serving counsel of record with a copy of the same.

Very truly yours,

Connie S. Horger
Paralegal to Ashley C. Biggers

/csh

Enclosures

cc (w/Enclosures)
M. Elizabeth Crum, Esquire
McNair Law Firm
Post Office Box 11390
Columbia, South Carolina 29211

0005^4

The Honorable Ralph King Anderson
October 9 2006
Page 2

David B Summer, Jr , Esquire
Susan B Lipscomb, Esquire
Parker Poe Adams & Bernstein LLP
Post Office Box 1509
Columbia, South Carolina 29202

Joel Grice, DHEC

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000545

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,

Petitioner,

vs

South Carolina Department of Health and
Environmental Control and Coastal
Carolina Medical Center,

Respondents

Docket No 06-ALJ-07-0714-CC

ORDER OF REMAND

This matter is before me pursuant to the September 15, 2006 motion filed by Petitioner MRI at Belfair, LLC ("Belfair") requesting that the Administrative Law Court ("ALC") require Respondent Coastal Carolina Medical Center (CCMC) to cease and desist providing mobile magnetic resonance imaging ("MRI") services. The basis for Belfair's motion is the automatic stay provision set forth in S C Code Ann § 1-23-600(G)(2) (as amended by 2006 Act No 387, effective July 1, 2006). Because I conclude that this matter should be remanded to the Board of Health and Environmental Control for the following reasons, I deny Petitioner's motion.

BACKGROUND

CCMC previously applied for and received a Certificate of Need ("CON") from the South Carolina Department of Health and Environmental Control ("DHEC" or "Department") for the purchase and installation of an MRI unit to be housed in its hospital in Jasper County, South Carolina, pursuant to the State Certification of Need and Health Facility Licensure Act ("CON Act"), S C Code Ann §§ 44-7-110 et seq (2002). Belfair challenged the grant of the CON. Following a contested case hearing at the ALC, held August 23-25, 2005, the ALC issued a November 10, 2005 Final Order and Decision upholding the grant of the CON.

Belfair appealed the Final Order and Decision of the ALC to the Board of Health and Environmental Control ("Board"). The Board upheld the Final Order and Decision by Order dated May 25, 2006. Belfair appealed the Board's Order to the Court of Appeals on July 3, 2006, where the action is currently pending.

Pursuant to S.C. Code Ann. § 1-23-600(G)(5) (as amended by 2006 Act No. 387, effective July 1, 2006), a final decision of the ALC may not be stayed except by order of the ALC, the Court of Appeals, or in cases when Section 1-23-610(A) applies, the appropriate board or commission. After the issuance of the Final Order and Decision filed November 10, 2005, and subsequent appeal to the Court of Appeals, CCMC requested that the Department issue the CON granted to it by the November 10, 2005 Order. Belfair chose not to file a motion to stay the November 10, 2005 Order. Therefore, on August 3, 2006, the Department issued a Certificate of Need to CCMC for the construction and addition of a 1.5 Tesla MRI unit.

By letter to the Department dated August 4, 2006, CCMC requested that it be allowed to use a mobile MRI unit during the interim period until construction is complete for its permanent unit. By letter dated the same date, the Department authorized the request. On September 8, 2006, Belfair filed a request for contested case hearing with the ALC regarding the authorization of the interim use of the mobile MRI unit by CCMC.

Belfair states it received no actual notice of the August 4, 2006 letter from the Department to CCMC authorizing the interim use of the mobile MRI unit. Albert Joseph Borelli, Jr., M.D., the sole member of Belfair, submitted an affidavit stating that he read a newspaper article in the *Island Packet* stating that CCMC would institute mobile MRI services in September 2006. On September 8, 2006, Belfair filed a request for contested case hearing with the ALC regarding the August 4, 2006 letter.

DISCUSSION

In response to Belfair's motion to cease and desist Respondents DHEC and CCMC contend that this matter is improperly before the ALC, on several grounds DHEC and CCMC contend (I) Belfair improperly failed to file a request for final review conference with the Board prior to filing its request for a contested case hearing with the ALC, (II) Belfair's appeal is untimely, and (III) this matter is part and parcel of the CON previously issued and currently pending before the Court of Appeals For the following reasons, I find that a remand to the Board is in order

I Failure to file for a final review conference with the DHEC Board

DHEC and CCMC argue that this matter is not properly before the ALC because Belfair failed to first file a request for final review with the Board Belfair contends that S C Code Ann. § 44-7-60 (2006 Act No 387 § 48, effective July 1, 2006) provides two avenues for appeal, and that it may bypass the Board and proceed directly to the ALC under the Act

Section 44-7-60 of the South Carolina Code of Laws, added by Section 48 of Act 387, effective July 1, 2006, sets forth the procedure for appealing decisions of DHEC That Section provides in pertinent part as follows

(E) Notice of the department decision must be sent to the applicant, permittee, licensee and affected persons who have asked to be notified by certified mail, return receipt requested The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee licensee, or affected person

(F) No later than sixty days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the

deadline for the final review conference. The department shall set the place, date, and time for the conference, give the applicant and affected persons at least ten days' written notice of the conference, and advise the applicant that evidence may be presented at the conference. The final review conference must be held as follows:

(2) After the administrative review, the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented. [T]he written decision must be mailed to the parties no later than thirty days after the date of the administrative review. Within thirty days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. The court shall give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge.

The first step in the procedure for appealing a DHEC decision as set forth in Section 44-7-60 clearly is to file a request for a final conference with the Board. Pursuant to Section 44-7-60(F)(2), it is only after the Board has had an opportunity to hold a final review conference and issue a final agency decision that a permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the ALC. Nowhere in Section 44-7-60 does it state that the first step in the administrative appeal process of requesting a final conference with the Board is optional.

I find that Belfair failed to follow the procedure set forth in Section 44-7-60 in that it failed to file an initial request for final review with the DHEC Board before proceeding to the ALC.

II Timeliness issue

Respondents DHEC and CCMC contend that Belfair failed to timely file its challenge of the August 4, 2006 departmental letter. Respondents cite S.C. Code Ann. § 44-7-60(E) (2006 Act No. 387 § 48, effective July 1, 2006), which states:

(E) Notice of the department decision must be sent to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail, return receipt requested. The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person.

Respondents argue that, pursuant to Section 44-7-60(E), Belfair should have filed an appeal 15 days from when notice was mailed to CCMC. Notice of the challenged Department action was mailed to the CCMC on August 4, 2006. Belfair did not file its request for a contested case hearing with the ALC until September 8, 2006. Under Respondents' argument, Belfair's appeal is time-barred.

For purposes of this issue, I accept Belfair's representation that it did not receive actual notice of the August 4, 2006 letter. The statute states that the time for filing a request for final review with the Board is fifteen days from the date notice of the decision is mailed to the applicant. S.C. Code Ann. § 44-7-60(E) (2006 Act No. 387 § 48, effective July 1, 2006). I find that a plain reading of this language would lead to the absurd result that individuals might not receive notice of a decision and therein never have a right to a due process hearing. "However clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature." Hamm v. S.C. Public Service Commission, 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985).

In Hamm v. S.C. Public Service Commission, 287 S.C. 180, 336 S.E.2d 470 (1985), the Court examined a statute which, on its face, suggested that the time for appeal began to run from the time the decision was made. Although the statute contained no notice requirement, the Court held that the statute must be read to allow a party thirty days after *notice* of a decision to bring an appeal. Hamm, 287 S.C. at 181-82, 336 S.E.2d at 471. Similarly, in order to avoid an absurd result in this case, I find that the provision regarding time to request a final review

conference to the Board contains an implied constructive notice element. I find that the time for Belfair to file a request for a final review conference with the Board pursuant to Section 44-7-60 is fifteen days from the date Belfair received constructive notice of the decision. I make no finding as to whether or not Belfair's filing was timely; however, as I make no finding as to the date Belfair received constructive notice.

For the foregoing reasons, I have decided to remand this matter to the Board, in order for the Board to determine the issue of timeliness and, if it finds the appeal to be timely, have the opportunity to hold a final review conference to review regarding the August 4, 2006 letter. For purposes of determining whether Belfair timely filed its appeal, the date on which Belfair filed its contested case request with the ALC shall be deemed to be the date on which it filed a request for final review conference with the Board.

III Same project or different projects

Because I find that this matter should finish the administrative process as explained above, I make no finding as to whether the August 4, 2006 letter from DHEC to CCMC is part and parcel of the CON case pending before the Court of Appeals or whether it constitutes a new and distinct matter.

ORDER

For the foregoing reasons,

IT IS HEREBY ORDERED that Petitioner's motion for a cease and desist order is denied,

IT IS FURTHER ORDERED that this matter is remanded to the Board of Health and Environmental Control for a determination as to the timeliness of the appeal and, if found to be timely, the opportunity for a final review conference regarding the August 4, 2006 letter.

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IT IS FURTHER ORDERED that for purposes of determining whether Belfair's appeal is timely, the Board shall deem the date upon which Belfair filed its request for a contested case hearing with the ALC to be the date upon which Belfair filed a request for final review conference with the Board,

IT IS FURTHER ORDERED that for purposes of determining whether Belfair's appeal is timely, the Board shall interpret S C Code Ann § 44-7-60(E) (2006 Act No 387 § 48, effective July 1 2006) as having an implied constructive notice requirement,

IT IS FURTHER ORDERED that the fifteen-day time period for Belfair to have filed a request for final review with the Board in this matter shall be based upon the date Belfair received constructive notice of the August 4, 2006 Department letter;

AND IT IS SO ORDERED

Ralph King Anderson, III
Administrative Law Judge

Columbia South Carolina
October ____ 2006

000552

MRI at Belfair LLC,
Petitioner,
vs
South Carolina Department of Health and
Environmental Control and Coastal Carolina
Medical Center,
Respondents

DOCKET NO 06-ALJ-07-0714-CC

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Connie S Horger

1016



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1011 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

October 17, 2006

David B. Summer, Jr., Esquire
Susan B. Lipscomb, Esquire
Parker, Poe, Adams & Bernstein, LLP
P.O. Box 1509
Columbia, SC 29202

Re: MRI v. SCDHEC

Dear Counsel,

The following Order has been endorsed on your Respondent Coastal Carolina Medical Center's Motion to Dismiss and Memorandum in Support in the above entitled case on appeal:

"MOTION TO DISMISS IS DENIED. THE PARTIES MAY RAISE THE ISSUE IN THEIR BRIEFS TO THIS COURT."

s/ Jasper M. Cureton A.J.

October 17, 2006

Please be advised that the Respondent's Initial Brief and Designation of Matter are due to be served and filed on or before November 16, 2006.

Very truly yours,

Kenneth A. Richstad
CLERK

KAR/et

cc: M. Elizabeth Crum, Esquire
A. Victor Rawl, Jr., Esquire
Anail B. Kirk, Esquire
Nancy S. Layman, Esquire
Ashley C. Biggers, Esquire

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1 appealed to the Board of Health and Environmental Control. On May 25, 2006, the Board issued
(an order affirming the Court's Final Order and Decision.

On July 3, 2006, Belfair appealed the Board's decision to the Court of Appeals following the procedures established in 2006 by Act No. 387, which became effective on July 1, 2006. CCMC then filed a Motion to Dismiss Belfair's appeal to the Court of Appeals challenging the applicability of the Act to Belfair's case. The Court is advised by the parties that the Court of Appeals has ordered Belfair's appeal held in abeyance until the Court of Appeals rules on the CCMC's Motion to Dismiss.

Nevertheless, after its appeal Belfair did not seek a stay of the Board's decision approving CCMC's application to add a fixed 1.5 Tesla MRI unit. Therefore, CCMC requested the Department issue the MRI CON and on August 3, 2006, the Department granted that request and issued the MRI CON authorizing CCMC to acquire and install the fixed unit. On August 4, 2006, CCMC further requested "authorization to utilize a mobile MRI at Coastal Carolina Medical Center until construction and installation of its fixed MRI, granted in the above-referenced CON application, is completed." (emphasis added).¹ The Department, without notice to Belfair, issued a letter approving "temporary full time use of a mobile MRI unit during the interim period of the fixed MRI construction and installation for temporary full-time use of a mobile MRI unit during the interim period of the fixed MRI construction and installation" of the Fixed MRI Project that same day.

On August 9, 2006, an article appeared in the local newspaper, The Island Packet, announcing CCMC's intent to provide mobile MRI services pending establishment of permanent services. In response to that article, Belfair's counsel e-mailed the Department on August 22, 2006, to determine what regulatory approval, if any, DHEC had issued to CCMC for it to initiate mobile MRI services. On August 24, 2006, Ms. Toni Tibshirany replied with a facsimile copy of the CCMC Mobile MRI Request, the Alliance Imaging MRI Services Proposal, and the DHEC Staff Decision to Belfair's counsel. Belfair then filed its request for contested case review of this matter with the Administrative Law Court on September 8, 2006.

On September 15, 2006, Belfair by letter moved that the Court apply the automatic stay provisions of Act 387 to the Department's approval of CCMC's mobile MRI services and

¹ Attached to the request was copy of a proposed MRI Services Proposal/Agreement between Alliance Imaging, Inc. and Coastal Carolina Medical Center for the utilization of a mobile MRI.

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requested that the Court "require CCMC to cease and desist providing mobile MRI services" CCMC and the Department responded to Belfair's motion contending, in the alternative that (1) the Court lacks subject matter jurisdiction over this matter because the provision of mobile MRI services by CCMC is subsumed in the hospital's Certificate of Need for the fixed MRI unit and that matter is on appeal to the Court of Appeals, or that (2) the Court lacks authority² to hear this matter because Belfair failed to follow the procedures set forth in S C Code Ann. § 44-1-60 (as added by 2006 Act No 387), which provides for Board review of Department staff actions prior to contested case review by the Administrative Law Court.

DISCUSSION

Act No 387 amended numerous statutes pertaining to agency proceedings to harmonize those laws with the new contested case and appeals procedures created in the Act Of particular relevance to this matter, Act 387 established new procedures for requesting review of decisions by the Department of Health and Environmental Control. Section 48 of the Act added S C Code Ann § 44-1-60 to the existing law in relevant part as follows

(A) All department decisions involving the issuance, denial, renewal, suspension, or revocations of permits, license or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section.

*

*

*

(C) The initial decision involving the issuance, denial, renewal, suspension, or revocations of permits, license or other action of the department shall be a staff decision.

*

*

*

(E) Notice of the department decision must be sent to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail, return receipt

² In Eagle Container v County of Newberry, 366 S.C. 611 622 S.E.2d 735 (Ct. App. 2005) the Court of Appeals discussed the distinction between lack of jurisdiction and a litigant's failure to perfect its appeal. The Court held that:

[T]he concepts of subject matter jurisdiction and ripeness are separate and distinct. "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235 237 442 S.E.2d 598, 600 (1994) (citations omitted). In comparison, "[t]he basic rationale of the doctrine of ripeness is to prevent courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties." 2 Am. Jur. 2d Administrative Law § 485 (citations omitted). The concepts of subject matter jurisdiction and ripeness are often discussed simultaneously as they both involve threshold requirements; however, we find the concepts are distinguishable and should be considered separate and distinct issues.

622 S.E.2d at 744 745

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requested The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person

(F) No later than sixty days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference

* * *

(2) After the administrative review, the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented

The written decision must be mailed to the parties no later than thirty days after the date of the administrative review Within thirty days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act

(Emphasis added)

South Carolina Constitution Article I, § 22

It is undisputed that Belfair did not seek a "final review conference" before the Board prior to filing this contested case with the ALC. The Department and CCMC argue that a request for a "final review conference" is a prerequisite for contested case review by this Court and thus the Court lacks the authority to hear Belfair's case.³ Belfair contends that it did not have to seek Board review in this case because Section 44-1-60 by its terms applies only to Department decisions "which may give rise to a contested case." In other words, Belfair argues that since it was not given notice of the Department's decision as required by Section 44-1-60(E), its right of review in this matter is grounded in Article I, § 22 of the South Carolina Constitution rather than as a "contested case" under the Department's statutes.

The South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard." S.C. Const. art. I, § 22. However, "[o]ne cannot complain of a due process violation if he has recourse to a constitutionally sufficient

³ Obviously, if the ALC lacks the authority to hear Belfair's case, the automatic stay provisions do not apply.

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administrative procedure but merely declines or fails to take advantage of it.” Zaman v. S.C. State Bd. of Medical Examiners, 305 S.C. 281, 408 S.E.2d 213, 215 (1991). Therefore, assuming that Belfair’s case does arise under Article I, § 22, it is not entitled to seek review of the Department’s decision pursuant to Section 22 if a sufficient procedure is afforded by the statutes and regulations. Here, the CON Act provides an affected person a constitutionally sufficient procedure to pursue their due process rights in a hearing. In other words, though Belfair seeks to present its claim pursuant to Section 22, it nonetheless must follow the hearing procedure set forth in the statute and regulations unless declared unconstitutional by a court of law. S.C. Tax Comm’n v. S.C. Tax Bd. of Review, 278 S.C. 556, 299 S.E.2d 489 (1983).

Moreover, this case should not be viewed as a Section 22 case simply because the Department failed to give Belfair proper notice. Rather, Section 44-1-60 (A) provides that: “All other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section.” (Emphasis added). Belfair’s request for review in this matter concerns an “action of the department which may give rise to a contested case.” Thus, since Belfair had an avenue of review as an “affected person” in this case, there is no need to seek review by the ALC under the general principle of Article I, § 22. It therefore appears that in this case, even if Belfair failed to receive notice under Section 44-1-60 (E), it must follow the proper procedures upon receiving notice.⁴

Appeal to the ALC

Belfair’s argues that even if this case is reviewed under the procedures set forth in Section 44-1-60, Board review is not a prerequisite to contested case review by this Court. Belfair contends that Section 44-1-60(E), which provides that “the department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to

⁴ Though I find that Belfair should have first sought review of this case before the Board, I find that the day that Belfair filed with the ALC should be construed as the date it filed with the Department. Accordingly I find for purposes of remand, that Belfair is deemed to have filed its request for review conference with the Board on the date its request for contested review was filed with this Court, that is, on September 8, 2006. To hold otherwise would preclude the Department’s review of this matter. In this instance, that result would be excessively harsh. As noted above, Act 387 recently substantially amended the review procedures in cases involving the Department. Furthermore, neither the ALC nor any other court has interpreted the time frame for filing under Section 44-1-60 (E) or the implication of the language of Section 1-23-600 (B) providing for review of cases before the ALC under Article I, § 22. Thus, I find that in this instance Belfair should be given greater latitude in filing its claim before the Department. See Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct.App. 1998) (“Due process is flexible and calls for such procedural protections as the particular situation demands.”) quoting Stono River Envtl. Protection Ass’n v. S.C. Dep’t of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991).

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the applicant, unless a written request for final review is filed with the department," must be interpreted to mean that, once fifteen days passes with no request for Board review, the staff decision becomes the final agency decision upon which ALC contested case review can be had

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature Charleston County School Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). Furthermore, "[i]n construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase." S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (Citations omitted). Here, Section 44-1-60 (F) provides that when a request for a "final review conference" is filed, the Board must act on the request within sixty days or the department decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within thirty days after the deadline for the final review conference" (Emphasis added). Subparagraph (F)(2) also provides that, if the Board actually conducts a review, then "the written decision must be mailed to the parties no later than thirty days after the date of the administrative review" and "within thirty days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act." The only use of the term "contested case hearing" in Section 44-1-60 occurs in reference to the above filings made after a request for Board review. Since there is no language in Section 44-1-60 that provides for the ALC to review cases in which no request for final review has been filed, presuming that the legislature held such an intention would be errant. See, e.g., Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative' ") In that light, a reasonable interpretation of the language that "the staff decision becomes the final agency decision" is that if the decision is not challenged, it becomes the final decision. However, if challenged the

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decision will not be final until the ALC reaches a decision or the Board's decision is unchallenged for the requisite period of time ⁵

Therefore, because I find that Board review is a mandatory prerequisite to any review by this Court, I hold that this matter must be remanded to the Board of Health and Environmental Control for its consideration of Belfair's request in accordance with Section 44-1-60

Timeliness of Filing

The parties briefed and argued the issue of whether Belfair timely filed its request for review of this decision ⁶ Section 44-1-60 (E) sets forth that a request for review must be filed within fifteen days of the date the staff decision was mailed to the applicant. In this case the Department does not question that it failed to mail Belfair notice of its August 4, 2006 decision. The Department nevertheless contends that even though Belfair failed to receive contemporaneous notice, the statutory mailing deadline should be enforced against it because the law must be followed as written.

In Hamm v. S.C. Public Service Comm'n, 287 S.C. 180, 336 S.E.2d 470 (1985), the Supreme Court interpreted a similar notice provision of the APA codified at S.C. Code Ann. Section 1-23-380 (b) (Supp. 1984). At that time, Section 1-23-380 (b) provided that

Proceedings for review are instituted by filing a petition in the circuit court within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

The Court held "[w]hile a literal reading of Section 1-23-380 (b) suggests the thirty days to appeal runs from the time the decision is made, we believe the statute must be read to allow a party thirty days after notice of a decision to bring an appeal." 336 S.E.2d at 471. Any other interpretation could lead to an absurd result that "an agency could preclude judicial review in all cases simply by concealing its decision until the thirty days had run." *Id.* Moreover, "there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."

⁵ In most states the function of the administrative law judge and the agency's decision are diametric from South Carolina. In those states the administrative law judge makes an initial decision as a hearing officer for the agency. The agency then conducts the contested case hearing. The decision of the agency is not final until the agency issues a decision after the contested case hearing. In South Carolina, the ALC conducts the contested case hearing. Therefore a decision of an agency that is challenged by a party is not final until the ALC issues its determination.

⁶ It appears that this issue will be a threshold issue on remand. I have therefore addressed the issue

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Whitner v. State, 328 S C 1, 6, 492 S E 2d 777, 779 (1997) Accordingly, the legislature is presumed to be aware of the Courts interpretation in Hamm in enacting this related statute

Here, a literal reading could equally lead to an absurd result. For instance, under a literal reading of Section 44-1-60 (E) an affected person who asked to be notified but who never received notice of the Department's determination would not have a right to contest the Department's decision if that person did not file a request for final review 15 days after notice of the department decision was mailed to the applicant Likewise, Belfair contends that its interest in the provision of MRI services at CCMC was known to both the Department and CCMC through Belfair's participation in the underlying Certificate of Need process for the fixed MRI unit and that, as an affected person, Belfair should have been given contemporaneous notice of the decision to allow temporary mobile MRI services during the CON implementation process

Therefore, I find that in instances in which a person participated in the review process, a request for final review must be received by the Department 15 days after notice to the applicant, permittee, licensee, or affected person receives notice Furthermore, in instances as in this case where the Department makes a determination without any formal review process and with no notice to an "affected person," I find that the affected person has fifteen days from the date it received actual or constructive notice of the decision See also, ALC Rule 11 (C) ⁷ Thus, Belfair had fifteen days from the date it received actual or constructive notice of the August 4, 2006 decision of the Department to file its request for review Nevertheless, as there is no record developing the facts upon this issue, I make no finding as to whether or not Belfair's filing was timely or as to the date Belfair received constructive notice

Conclusion

All other issues raised by Belfair in its motion for a cease and desist order and in the Department and CCMC's responses thereto are moot in light of remand of this matter to the Board Therefore, Belfair's motion for application of the automatic stay and for a cease and desist order is denied

⁷ In permitting cases, there nevertheless needs to be some point in which an applicant for a permit can presume that the permitting process has concluded. For instance ALC Rule 11 (C) further provides that "However no request shall be filed more than ninety (90) days after the date of the issuance of the order or determination unless the administrative law judge assigned to the case finds that substantial cause exists for allowing the filing beyond the ninety (90) day period. That issue however is not before me in this instance

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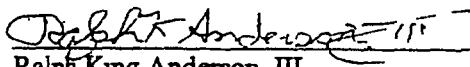
ORDER

IT IS THEREFORE ORDERED that Belfair's September 15, 2006 motion for cease and desist order is denied and this matter is remanded to the Board of Health and Environmental Control for a determination of all issues raised by the parties

IT IS ALSO ORDERED that, for purposes of remand, Belfair is deemed to have filed its request for Board review under § 44-1-60(E) on September 8, 2006

IT IS FURTHER ORDERED that, for purposes of determining whether Belfair's request for review was timely the Board shall utilize a deadline of fifteen days from the date Belfair received actual or constructive notice of the August 4, 2006 decision of the Board, such deadline to be determined by the Board based on the evidence presented to it.

AND IT IS SO ORDERED


Ralph King Anderson, III
Administrative Law Judge

October 18, 2006
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 18th day of October, 2006
By Amanda M. Scott
Judicial Law Clerk

000563

Coastal Carolina
Medical Center
Compassion Care Community

October 19 2006

Mr Joel C Grice Director
Bureau of Health Facilities
and Services Development
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201-1708

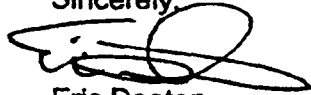
Dear Mr Grice

I wanted to update you regarding the existing Certificate of Need No SC-06-46 for MRI services at Coastal Carolina Medical Center We have completed the following to date

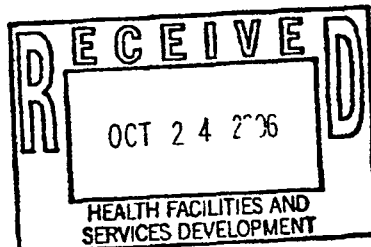
- 1 Met with Med Builders to provide a firm price to build out the area to house the MRI fixed unit We are currently awaiting pricing
- 2 Requested bids for a new 1.5 Tesla MRI from General Electric and Siemens We are currently awaiting final pricing
- 3 Per approval from DHEC we have installed and are currently performing MRIs with our mobile service

We anticipate having the new fixed service in place within the next six months
Please let me know if you have any questions

Sincerely,



Eric Deaton
Chief Executive Officer



000564

1000 Medical Center Drive
Hardeeville South Carolina 29927
Main Phone (843) 784-8000 Main Fax: (843) 784 8001
www.coastalcarolinamedicalcenter.com

cc J Gric
Toshre
CC# 20352

PARKER POE

PARKER POE ADAMS & BERNSTEIN LLP

Attorneys and Counselors at Law

David B. Summer, Jr.

Partner

Telephone: 803.253.8910

Direct Fax: 803.255.8017

davidsummer@parkerpoe.com

1201 Main Street

Suite 1450

P.O. Box 1509

Columbia, SC 29202-1509

Telephone: 803.255.8000

Fax: 803.255.8017

www.parkerpoe.com

October 27, 2006

Via Regular Mail and Email to ascott@scal.net

The Honorable Ralph King Anderson, III

Administrative Law Judge Division

Edgar A. Brown Building, Suite 224

1205 Pendleton Street

Columbia, South Carolina 29201

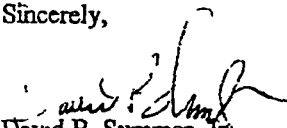
Re MRI at Belfair, LLC v South Carolina Department of Health and Environmental
Control and Coastal Carolina Medical Center
Docket No 06-ALC-07-0714-CC

Dear Judge Anderson

We are in receipt of MRI at Belfair's Motion to Reconsider and Alter or Amend Order on Remand filed with the Court late yesterday afternoon. Coastal Carolina Medical Center vigorously opposes this motion. Because I will be in trial before Judge McLeod all of next week, we respectfully request that CCMC be allowed the ten (10) days provided by Rule 19(A) RPALC in which to respond to this motion.

With best regards I am

Sincerely,


David B. Summer Jr.

DBS cs

cc M. Elizabeth Crum, Esq. - Via Regular Mail and Email

Ashley C. Biggers, Esq. - Via Regular Mail and Email

000565

CHARLESTON SC
CHARLOTTE, NC
RALEIGH, NC
SPARTANBURG SC

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

www.mcnairlaw.net

Arlall B. Kirk
akirk@mcnairlaw.net
Direct Facsimile (803) 933-1484

THE TOWER AT 1301 GERVAIS
1301 GERVAIS STREET 11TH FLOOR
COLUMBIA, SOUTH CAROLINA 29201

cc J Grice
v Tibshirany
OGC 20352

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 799-9800
FACSIMILE (803) 753-3210

November 7, 2006

HAND DELIVERY

RECEIVED

NOV 07 2006

The Honorable Ralph King Anderson, III
Administrative Law Judge
1205 Pendleton Street
Columbia, South Carolina 29201

DHEC
OFFICE OF GENERAL COUNSEL

Re MRI at Belfair, LLC v. SCDHEC and Coastal Carolina Medical Center
(Docket No. 06-ALC-07-0714-CC)

Dear Judge Anderson

I am in receipt of both the South Carolina Department of Health and Environmental Control ("DHEC") and Coastal Carolina Medical Center's ("CCMC") Response to MRI at Belfair, LLC's Motion to Reconsider and Alter or Amend Order and would like to address two issues with respect to those documents. Please consider this our reply to DHEC and CCMC's responses.

First, DHEC stated that "this matter is subsumed within the subject matter over which the Court of Appeals now has jurisdiction" and that CCMC "is authorized to use the MRI at issue pursuant to the CON already issued." Both these statements contravene your honor's ruling in this matter. It is clear that this mobile MRI is a materially different project than the fixed MRI that was the subject of Docket No. 04-ALJ-07-0399-CC that is currently pending before the South Carolina Court of Appeals. As stated by your Honor, "I can see the difference between pretty clearly between construction of a unit within the hospital and a mobile MRI unit outside of a hospital as there being a difference there. I don't see that." (Sept. 28, 2006 Motions Hearing Transcript, p. 29, ll. 13-17)

Second, it is plain on the face of the order that your Honor did not address the issue of whether CCMC can operate the mobile MRI without a final agency decision on the mobile MRI and whether CCMC is required to cease and desist operations until the receipt of any such final agency decision.

000566

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

By copy of this letter, I am providing a copy to all counsel of record

Sincerely,



Anail B Kirk

cc Ashley C Biggers, Esquire
David B Summer, Jr, Esquire
(all via hand delivery)

000567

BOARD
Elizabeth M. Hagood
Chairman

H. Cooper III
Chairman

Steph
Kisner
Secy



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

OFFICE OF GENERAL COUNSEL

November 6, 2006

BOARD
Henry C. Scott

Paul C. Aughtery III

Glenn A. McCall

Coleman F. Buckhouse, MD

VIA HAND DELIVERY

The Honorable Ralph King Anderson
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29211

RE *MRI at Belfair, Petitioner, v. South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center Respondents*
Docket No. 06-ALJ-07-0714-CC
OGC File No. 20352

Dear Judge Anderson:

Enclosed for your review is the original and one copy of *DHEC's Memorandum in Response to Petitioner's Motion to Reconsider and Alter or Amend Order on Remand* in the above-referenced matter. Kindly return a clocked copy via our courier.

By copy of this letter and as evidenced by the Certificate of Service, we are serving counsel of record with a copy of the same.

Very truly yours,

Connie S. Horger
Paralegal to Ashley C. Biggers

/csh

Enclosures

cc (w/Enclosures)
M. Elizabeth Crum, Esquire
McNair Law Firm
Post Office Box 11390
Columbia, South Carolina 29211

000508

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Office of General Counsel

The Honorable Ralph King Anderson

November 6, 2006

Page 2

David B Summer, Jr , Esquire
Susan B Lipscomb, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

Joel Grice, DHEC

V Tibshirany DHEC

S:\Stare\LEGAL\ALLMATTERS\20352 MRI @ Belfair INLTR filing Motion & COS 11 06 06 doc

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,

Petitioner,

vs

South Carolina Department of Health and
Environmental Control and Coastal
Carolina Medical Center,

Respondents

Docket No 06-ALJ-07-0714-CC

**DHEC'S MEMORANDUM IN
RESPONSE TO PETITIONER'S
MOTION TO RECONSIDER AND
ALTER OR AMEND ORDER ON
REMAND**

Pursuant to Rule 19(A) SCRALC Respondent South Carolina Department of Health and Environmental Control ('DHEC' or Department') hereby submits this Memorandum in Response to Petitioner MRI at Belfair, LLC's ('Belfair') Motion to Reconsider and Alter or Amend Order on Remand

1 Status of Court of Appeals Action

The Department stipulates that the South Carolina Court of Appeals issued an Order dated October 17, 2006 denying Coastal Carolina Medical Center's ('CCMC') Motion to Dismiss Belfair's appeal of the Final Order and Decision in Docket No 04-ALJ-07-0399-CC. In its Order, the Court of Appeals advised that Respondents' Initial Briefs and Designations of Matter are due to be served and filed on or before November 16, 2006. However, the Department feels it is unnecessary for the Court to issue an amended order with regard to this point, for the following reasons. First, the Court's statement in its October 18, 2006 Order of Remand that it had been "advised by the parties that the Court of Appeals has ordered Belfair's appeal held in abeyance until the Court of Appeals rules on the CCMC's Motion to Dismiss" is

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an accurate statement. Second, the fact that the Court of Appeals ultimately denied CCMC's Motion to Dismiss has no bearing on the Court's decision to remand this matter.

2 Board's Authority to Determine Timeliness of Request

As a creature of statute, the Department is possessed of those powers "expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). Generally, administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted." 2 Am. Jur. 2d Administrative Law § 57 (2006). Further, "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 232, 612 S.E.2d 719, 724 (Ct. App. 2005) (citing Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000), Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994)).

South Carolina Code Section 44-1-60, added by Section 48 of 2006 Act 387, grants the Board of Health and Environmental Control the power to hold a final review conference on a Department decision. Section 44-1-60(E) specifically provides that "The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person." In order for the Board to determine whether it has the power granted to it in Section 44-1-60 to hold a final review conference regarding a department decision, it must by necessary implication determine whether or not the request for final review conference was made within the statutory fifteen-day time period. To

000571

interpret the statute in such a way that the Board is only authorized to hold a final review conference if the request was made within the fifteen-day time period but that the Board is not authorized to review the relevant dates and filings and make a determination thereon as to whether or not the fifteen-day time period was met would end in an absurd result

3 Cease and Desist Provision

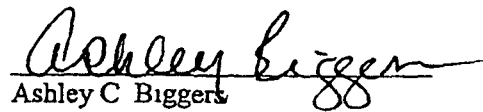
The Department's August 4, 2006 letter regarding the interim use of a mobile MRI unit does not grant CCMC a second MRI unit rather, it merely acknowledges that during the brief period of time it will take between the date of authorization of MRI services and the date of completion of construction, the hospital may use a mobile unit on-site to provide the services for which it is authorized, the services which the State Health Plan states every hospital should have available to it. The Department and CCMC both argued to this Court that the interim use of the mobile MRI unit is authorized under the CON issued on August 3, 2003, that it is part and parcel of the August 3, 2003 CON and cannot be separated from it. Therefore, Respondents argued, this matter is subsumed within the subject matter over which the Court of Appeals now has jurisdiction. In its October 18, 2006 Order on Remand, the Court ruled that this issue was moot in light of the remand of this matter to the Board. Therefore, the Court did not make a ruling on the merits of the Department's and CCMC's argument. However, for the same reasons previously argued to the Court, CCMC is authorized to use the MRI unit at issue pursuant to the CON already issued to it. Since it is already authorized to use the MRI unit pursuant to a previously issued CON the Court should deny Belfair's request that it order CCMC to cease and desist use of the MRI unit pending final Board review of the current matter.

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CONCLUSION

For the foregoing reasons, Belfair's Motion for reconsideration and to alter or amend should be denied on all grounds

Respectfully Submitted,



Ashley C. Biggers
Staff Attorney for Health Regulation
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201-1708
(803)898-3350

November 6 2006
Columbia South Carolina

000573

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC

Petitioner,

vs

South Carolina Department of Health and
Environmental Control and Coastal Carolina
Medical Center

Respondents

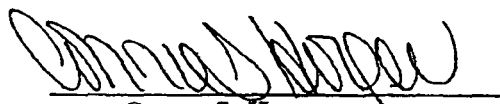
CERTIFICATE OF SERVICE

DOCKET NO 06-ALJ-07-0714-CC

I, Connie S Horger, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this 6th day of November 2006, served a copy of the *DHEC's Memorandum in Response to Petitioner's Motion to Reconsider and Alter or Amend Order on Remand* upon all parties of record in the above-captioned case, via USPS, addressed as follows

M Elizabeth Crum, Esquire
McNair Law Firm
Post Office Box 11390
Columbia, South Carolina 29211

David B Summer, Jr., Esquire
Susan B Lipscomb, Esquire
Parker Poe Adams & Bernstein LLP
Post Office Box 1509
Columbia, South Carolina 29202



Connie S Horger

November 6 2006
Columbia, South Carolina

000574

PARKER POE

PARKER POE ADAMS & BERNSTEIN LLP

Attorneys and Counselors at Law

David B. Summer, Jr.
Partner
Telephone: 803.253.8910
Direct Fax: 803.255.8017
davidsummer@parkerpoe.com

1201 Main Street
Suite 1450
P.O. Box 1509
Columbia, SC 29202-1509
Telephone: 803.255.8000
Fax: 803.255.8017
www.parkerpoe.com

November 13, 2006

Via Hand Delivery
The Honorable Kenneth A. Richstad
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
NOV 13 2006
SC Court of Appeals

*Re MRI at Belfair, LLC vs. South Carolina Department of Health and Environmental
Control and Coastal Carolina Medical Center
Docket # 04-ALJ-07-0399-CC*

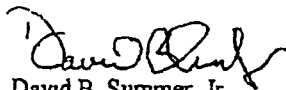
Dear Mr. Richstad:

Enclosed please find an original and seven copies of Respondent Coastal Carolina Medical Center's Motion for Extension of Time to File Initial Brief and Designation of Matter to Be Included in the Record, along with a Proof of Service in the above referenced matter. Also enclosed is this firm's check in the amount of \$25 to cover your filing fee. Kindly file the enclosed and return one filed-stamped copy of each to me via our courier.

By copy of this letter, I am serving all counsel of record with a copy of this motion. Should you have any questions regarding this matter, please do not hesitate to contact my office.

With best regards, I am

Sincerely,


David B. Summer, Jr.

DBS:cs
Enclosures
cc (w/enc)

M. Elizabeth Crum, Esq.
A. Victor Rawl, Jr. Esq.
Ariail B. Kirk, Esq.

000575

CHARLESTON, SC
CHARLOTTE, NC
RALEIGH, NC
SPARTANBURG, SC

COL 64815v1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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NOV 13 2006

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 04-ALJ-07-0399-CC

MRI at Belfair LLC

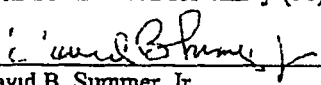
Appellant,

v

South Carolina Department of Health and Environmental Control and Coastal Carolina Medical
Center Respondents

MOTION FOR EXTENSION OF TIME
TO FILE INITIAL BRIEF
AND DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD

The Respondent Coastal Carolina Medical Center hereby moves the Court for a thirty (30) day extension of time to file its initial brief and designation of matter to be included in record. In support of its motion, the Respondent refers to the Court's Order of October 17, 2006 setting Respondent's Initial Brief and Designation Of Matter as due on Thursday, November 16, 2006. Because of trial and vacation schedules of its counsel, Appellant respectfully requests that the deadline for filing the initial brief and designation be extended for thirty (30) days until Monday, December 18, 2006.


David B. Summer, Jr.

Faye A. Flowers

Parker Poe Adams & Bernstein, LLP

Post Office Box 1509

Columbia, South Carolina 29202

803-255 8000

Attorneys for Appellant

November 10, 2006

COL 64813v1

000576

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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NOV 13 2006

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson III Administrative Law Judge

Case No 04-ALJ-07-0399-CC

MRI at Belfair LLC

Appellant,

v

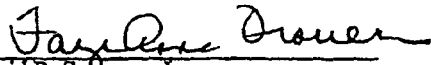
South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center

Respondents

PROOF OF SERVICE

I certify that on November 13 2006, I have served the foregoing Motion for Extension of Time to File Initial Brief and Designation of Matter to Be Included in Record on the following parties of record by depositing a copy of it in a United States Mail, postage prepaid, addressed to counsel as follows

M. Elizabeth Crum
A. Victor Rawl, Jr
Ariel B. Kirk
The McNair Law Firm
1301 Gervais Street, 11th Floor
Columbia, South Carolina 29201


David B. Sumner Jr
Faye A. Flowers
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202
803-255-8000
Attorneys for Appellant

BOARD
Elizabeth M. Hagood
Chairman

vin H. Cooper III
Chairman

G. Kiser
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD
Henry C. Scott

Paul C. Aughry III

Glenn A. McCall

Coleman F. Buckhouse, MD

OFFICE OF GENERAL COUNSEL

November 15, 2006

VIA HAND DELIVERY

The Honorable Kenneth A. Richstad, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

Re *MRI at Belfair LLC v South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center*
Docket No. 04-ALJ-07-0399-CC
Our File Number 20026

Dear Mr. Richstad:

Enclosed please find the original and seven (7) copies of Respondent South Carolina Department of Health and Environmental Control's *Motion for Extension of Time to File Initial Brief and Designation of Matter To Be Included in the Record and Certificate of Counsel* in the above-referenced matter. Kindly file the enclosed and return a file-stamped copy to me via my courier.

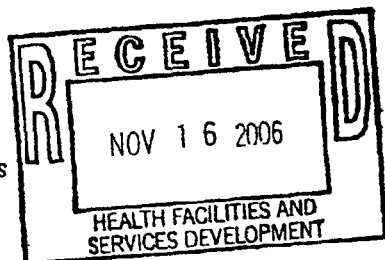
By copy of this letter, under separate cover I am serving the same on all counsel of record.

With kind regards,

Very truly yours,

Conne S. Horger
Paralegal to Ashley C. Biggers

/csh
Enclosures



000578

The Honorable Kenneth A. Richstad, Clerk
November 15, 2006
Page 2

cc (w/Enclosures)
M. Elizabeth Crum, Esquire
Arnall B. Kirk, Esquire
A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
Post Office Box 11390
Columbia, South Carolina 29211

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Parker Poe Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202

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000579

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

Elizabeth M. Hagood, Chairman

Administrative Law Court Case No. 04-ALJ-07-03990CC

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

Respondents

MOTION FOR EXTENSION OF TIME TO FILE INITIAL BRIEF
AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD

Respondent South Carolina Department of Health and Environmental Control hereby moves for a thirty (30) day extension of time to file its Initial Brief and Designation of Matter to be Included in the Record. Pursuant to the Court's Order of October 17, 2006, Respondent's Initial Brief and Designation of Matter are due Thursday, November 16, 2006.

On Monday, November 13, 2006, Respondent Coastal Carolina Medical Center filed a Motion to extend the time for filing its Initial Brief and Designation of Matter for thirty (30) days, until Monday, December 18, 2006. In order to keep all future filing deadlines prescribed by the South Carolina Appellate Court Rules consistent as to all

000580

parties involved in this case, the Department respectfully requests that the deadline for filing its Initial Brief and Designation of Matter also be extended for thirty (30) days until Monday December 18, 2006

Respectfully submitted,


Ashley C. Biggers
Nancy S. Layman
2600 Bull Street
Columbia, South Carolina 29205
(803) 898-3350

Attorneys for Respondent South Carolina
Department of Health and Environmental Control

November 15, 2006

000581

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

Elizabeth M Hagood, Chairman

Administrative Law Court Case No 04-ALJ-07-0399-CC

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

Respondents

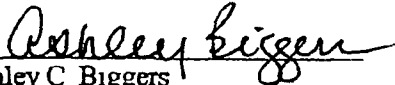
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 15, 2006, a true copy of the Respondent South Carolina Department of Health and Environmental Control s *Motion for Extension of Time to File Initial Brief and Designation of Matter To Be Included in the Record* in the above-referenced matter has been served upon all parties and counsel of record in the above-captioned case, via hand delivery as follows

M. Elizabeth Crum, Esquire
Anail B Kirk, Esquire
A Victor Rawl, Jr, Esquire
McNair Law Firm, PA
Post Office Box 11390
Columbia, South Carolina 29211

000582

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Parker, Poe, Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202


Ashley C. Biggers
Nancy S. Layman
2600 Bull Street
Columbia, South Carolina 29205
(803) 898-3350

*Attorneys for Respondent South Carolina
Department of Health and Environmental
Control*

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000583

The South Carolina Court of Appeals

MRI at Belfair LLC,

Appellant,

v

South Carolina Department of Health
and Environmental Control and Coastal -
Carolina Medical Center

Respondents

Chairman Elizabeth M Hagood
Unknown County
Trial Court Case No 2004-AL-07-00399

ORDER

For good cause having been shown, the time for serving and filing the Respondent's Initial Brief and Designation of Matter on behalf of South Carolina Department of Health and Environmental Control in the above entitled matter is hereby extended until December 18, 2006

IT IS SO ORDERED

KAYE G HEARN CHIEF JUDGE
For the Court

BY Kenneth A. Ricketts /dep
CLERK

Columbia, South Carolina
11/16/2006

cc M. Elizabeth Crum Esquire
A. Victor Rawl, Jr, Esquire
Anail B Kirk, Esquire
David B Summer, Jr Esquire
Susan B Lipscomb, Esquire
Nancy S Layman, Esquire
Ashley C Biggers, Esquire

RECEIVED

NOV 17 2006

000584

DHEC
OFFICE OF GENERAL COUNSEL

cc Tibenigay
08/20026



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29701
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 16, 2006

David B. Summer, Jr., Esquire
Susan B. Lipscomb, Esquire
Parker, Poe, Adams & Bernstein, LLP
P.O. Box 1509
Columbia, SC 29202

Re MRI v. SCDHEC

Dear Counsel:

This office is in receipt of your Motion for Extension of Time to file Initial Brief and Designation of Matter on behalf of Respondent, Coastal Carolina Medical Center, to be included in the Record in the above case on appeal.

We are herewith returning your check (#4347) in the amount of twenty-five (\$25.00) dollars and the original to your motion as this motion has been granted by the Court pursuant to the extension order dated November 15, 2006.

Very truly yours,

Kenneth A. Richstad
CLERK

KAR/et

cc M. Elizabeth Crum, Esquire
A. Victor Rawl, Jr., Esquire
Anail B. Kirk, Esquire
Nancy S. Layman, Esquire
Ashley C. Biggers, Esquire

RECEIVED

NOV 17 2006

000585

DHEC
OFFICE OF GENERAL COUNSEL

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

M. ELIZABETH CRUM
forum@mcnair.net

www.mcnair.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803)799-9800
FACSIMILE (803)376-2219

November 15, 2006

VIA HAND DELIVERY

RECEIVED

NOV 17 2006

The Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

DHEC
OFFICE OF GENERAL COUNSEL

Re MRI at Belfair, LLC v. SCDHEC and Coastal Carolina Medical Center
(Docket No. 04-ALC-0399-CC)

Dear Mr. Richstad

This letter is in response to Respondent Coastal Carolina Medical Center's ("CCMC") for Motion for Extension of Time to File Initial Brief and Designation of Matter to be included in the Record ("Motion"), which Motion was filed on November 13, 2006 and the amended Motion filed today serving the Department. We also understand that Respondent Department of Health and Environmental ("DHEC") is today filing a similar motion with the Court. While Petitioner MRI at Belfair would like this matter resolved by the Court in an expeditious manner since CCMC already has a mobile MRI in operation on its campus, after consulting with counsel for CCMC, we offered not to object to the Motion provided they did not object to the Motion to Expedite Hearing¹ that we will file. Since CCMC has agreed to take no position on Belfair's Motion to Expedite when it is filed and DHEC, in consultation, has agreed not to oppose Belfair's Motion, Belfair does not oppose either CCMC's or DHEC's Motion for Extension of Time to File Initial Brief and Designation of Matter to be included in the Record.

By copy of this letter, I am serving all counsel of record. Should you have any questions with respect to this filing, please do not hesitate to contact me.

Very truly yours,



M. Elizabeth Crum

¹ Of course, we certainly realize that it is up to the Court as to whether the Motion to Expedite would be granted and make no presumption about the same.

000586

ANDERSON CHARLESTON CHARLOTTE COLUMBIA GEORGETOWN GREENVILLE HILTON HEAD ISLAND MYRTLE BEACH RALEIGH

CC MR 0773

)
(cc David B Summer, Jr , Esquire (via USPS and email)
Susan B Lipscomb, Esquire (via USPS and email)
Faye Flowers (via USPS and email)
Nancy S Layman, Esquire (via USPS and email)
Ashley C Biggers, Esquire (via USPS and email)

MCNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

M. ELIZABETH CRUM
lcum@mcnair.net

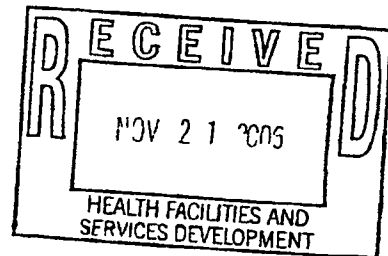
www.mcnair.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803)799-8800
FACSIMILE (803)378-2219

November 15, 2006

VIA HAND DELIVERY



The Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re MRI at Belfair, LLC v. SCDHEC and Coastal Carolina Medical Center
(Docket No. 04-ALC-0399-CC)

Dear Mr. Richstad

This letter is in response to Respondent Coastal Carolina Medical Center's ("CCMC") for Motion for Extension of Time to File Initial Brief and Designation of Matter to be included in the Record ("Motion"), which Motion was filed on November 13, 2006 and the amended Motion filed today serving the Department. We also understand that Respondent Department of Health and Environmental ("DHEC") is today filing a similar motion with the Court. While Petitioner MRI at Belfair would like this matter resolved by the Court in an expeditious manner since CCMC already has a mobile MRI in operation on its campus, after consulting with counsel for CCMC, we offered not to object to the Motion provided they did not object to the Motion to Expedite Hearing¹ that we will file. Since CCMC has agreed to take no position on Belfair's Motion to Expedite when it is filed and DHEC, in consultation, has agreed not to oppose Belfair's Motion, Belfair does not oppose either CCMC's or DHEC's Motion for Extension of Time to File Initial Brief and Designation of Matter to be included in the Record.

By copy of this letter, I am serving all counsel of record. Should you have any questions with respect to this filing, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. Elizabeth Crum".
M. Elizabeth Crum

¹ Of course, we certainly realize that it is up to the Court as to whether the Motion to Expedite would be granted and make no presumption about the same.

000588

McNAIR LAW FIRM, P.A.

ATTORNEYS AND COUNSELORS AT LAW

cc David B Summer, Jr , Esquire (via USPS and email)
Susan B Lipscomb, Esquire (via USPS and email)
Faye Flowers (via USPS and email)
Nancy S Layman, Esquire (via USPS and email)
Ashley C Biggers, Esquire (via USPS and email)

000589

Coastal Carolina
Medical Center
Compassion Care Community

November 21 2006

Mr Joel C Grice Director
Bureau of Health Facilities
and Services Development
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia SC 29201-1708

Dear Mr Grice

I wanted to update you regarding the existing Certificate of Need No SC-06-46 for MRI services at Coastal Carolina Medical Center We have completed the following to date

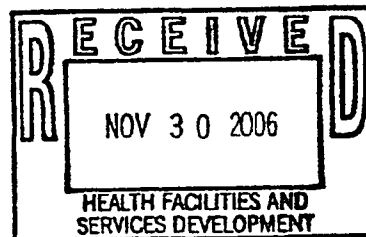
- 1 Received pricing for construction of area to house MRI unit The estimated cost is \$840 204 however this price does not include electrical work We are in the process of obtaining a quote for the electrical needs of the project
- 2 Requested bids for a new 1.5 Tesla MRI from General Electric and Siemens We are currently awaiting final pricing
- 3 Per approval from DHEC, we have installed and are currently performing MRIs with our mobile service

We anticipate having the new fixed service in place by mid 2007 Please let me know if you have any questions

Sincerely,



Enc Deaton
Chief Executive Officer



1000 Medical Center Drive
Hardeeville South Carolina 29927
Main Phone (843) 784-8000 Main Fax (843) 784-8001
www.coastalcarolinamedicalcenter.com

000590

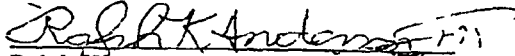
People v Fremont Energy Corp, 651 P 2d 802 (Wyo 1982) The authority to issue the order also derives from statutory authorization granting an agency that power¹ Nevertheless "a cease and desist order is of the nature of an injunction and its affirmative provisions analogous to those of one that is mandatory" N.L.R.B. v Colten, 105 F 2d 179 (6th Cir 1939) Thus, in ordering an action enjoined by a cease and desist order, an agency should exercise its authority in accordance with equitable principles N.L.R.B. v Norfolk Shipbuilding & Drydock Corp, 172 F 2d 813 (4th Cir 1949) Such an order is warranted when a party commits statutory misconduct that is "likely to persist in the contumacy in the future, unless restrained" Precious Metals Assoc., Inc v Commodity Futures Trading Comm'n, 620 F 2d 900 (1st Cir 1980) Usually, however, a solitary infraction is not sufficient to support a cease and desist order Id Furthermore, cease and desist orders "should go no further than reasonably necessary to correct the evil complained of and preserve the rights of competitors and the public" Ford Motor Co v Federal Trade Comm'n, 120 F 2d 175 (6th Cir 1941)

Here, the Department and Respondent CCMC contend that the use of a mobile MRI at CCMC is justified pursuant to the Certificate of Need (CON) approval of CCMC's providing MRI services at its hospital Whether that CON was improvidently issued is before the Court of Appeals in which no stay has been issued for the provision of approved MRI services Whether the provision of mobile MRI services by CCMC is subsumed in the hospital's CON for the fixed MRI unit is questionable As the Petitioner contends, granting a mobile MRI unit is distinct from an authorization for the addition of a fixed 1.5 Tesla MRI unit That question is, nevertheless, now properly before the Board Furthermore, MRI at Belfair did not establish that there was any serious harm warranting a cease and desist order To the contrary, the existence of the MRI unit at CCMC appears to offer greater potential benefit to the public than harm Therefore, I find that a cease and desist order is not warranted in this case

¹ E.g. Brown v Bi Lo, Inc., 354 S.C. 436, 581 S.E.2d 836 (2003), Duke Power Co. v Public Service Comm'n of S.C., 343 S.C. 554, 541 S.E.2d 250 (2001); Condor, Inc. v Bd. of Zoning Appeals, City of North Charleston, 328 S.C. 173, 493 S.E.2d 342 (1997); S.C. Dept. of Health and Envtl. Control v Armstrong, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987); Ins. Comm'n v New South Life Ins. Co., 270 S.C. 612, 244 S.E.2d 289 (1978); Price v Derrick, 262 S.C. 341, 204 S.E.2d 389 (1974); City of Orangeburg v Moss, 262 S.C. 299, 204 S.E.2d 377 (1974); S.C. Public Service Auth. v Carolina Power & Light Co., 137 S.E.2d 507 (1964); Black River Elec. Co-op, Inc. v. Public Service Comm'n, 120 S.E.2d 6 (1961); Tri-County Elec. Co-op v. Snow, 120 S.E.2d 14 (S.C. 1961); Jacoby v S.C. State Bd. of Naturopathic Examiners, 219 S.C. 66, 64 S.E.2d 138 (1951)

IT IS THEREFORE ORDERED that the Petitioner's Motion for Reconsideration is
DENIED

AND IT IS SO ORDERED


Ralph King Anderson, III
Administrative Law Judge

November 30, 2006
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date
served this order in the above entitled action upon all
parties to this cause by depositing a copy hereof
in the United States mail, postage paid, or in the Interagency
Mail Service addressed to the party(ies) or their attorney(s)

This 30th day of November, 2006
By Travis M. Scott
Judicial Law Clerk

due to new - Jan 17

cc: [illegible]
[illegible]

PARKER POE

PARKER FORADAMS & BERNSTEIN LLP

Attorneys and Counselors at Law

David B. Summer, Jr.

Partner

Telephone: 803.253.8910

Direct Fax: 803.255.8017

davidsummer@parkerpoe.com

1201 Main Street

Suite 1450

P.O. Box 1509

Columbia, SC 29202-1509

Telephone: 803.255.8000

Fax: 803.255.8017

www.parkerpoe.com

December 18, 2006

RECEIVED

DEC 18 2006

SC Court of Appeals

Via Hand Delivery

The Honorable Kenneth A. Richstad

The South Carolina Court of Appeals

1015 Sumter Street

Columbia, SC 29201

*Re MRI at Belfair, LLC vs. South Carolina Department of Health and Environmental
Control and Coastal Carolina Medical Center
Docket # 04-ALJ-07-0399-CC*

Dear Mr. Richstad:

Enclosed please find an original and one copy of Respondent Coastal Carolina Medical Center's Initial Brief and Designation of Matter to Be Included in the Record, along with Proofs of Service in the above referenced matter. Kindly file the enclosed and return one filed-stamped copy of each to me via our courier.

By copy of this letter, I am serving all counsel of record with a copy of this motion via regular and electronic mail. Should you have any questions regarding this matter, please do not hesitate to contact my office.

With best regards, I am

Sincerely,



David B. Summer, Jr.

DBS:cs

Enclosure

cc (w/encl.) M. Elizabeth Crum, Esq./A. Victor Rawl, Jr., Esq./Ariana B. Kirk, Esq.
Nancy S. Layman, Esq./Ashley C. Biggers, Esq.

000594

CHARLESTON, SC
CHARLOTTE, NC
RALEIGH, NC

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF
HEALTH AND ENVIRONMENTAL CONTROL

DOCKET # 04-ALJ-0399-CC

RECEIVED

DEC 18 2006

SC Court of Appeals

MRI at Belfair, LLC

Appellant,

VS

South Carolina Department of Health and Environmental Control and
Coastal Carolina Medical Center,

Respondents

**INITIAL BRIEF OF RESPONDENT
COASTAL CAROLINA MEDICAL CENTER**

David B Summer, Jr
Faye A Flowers
PARKER POE ADAMS & BERNSTEIN, LLP
1201 Main Street, Suite 1450 (29201)
PO Box 1509
Columbia, SC 29202-1509
(803) 255-8000
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

December 18, 2006
Columbia, South Carolina

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STATEMENT OF ISSUES

I DOES THE 2003 *STATE HEALTH PLAN* CONTAIN ADEQUATE STANDARDS FOR REVIEW OF MAGNETIC RESONANCE IMAGING SERVICES IN COMPLIANCE WITH THE REQUIREMENTS OF S C CODE ANN § 44-7-180(B)?

II IS THE BOARD S ORDER SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD SUCH THAT IT IS FREE FROM ANY ABUSE OF DISCRETION OR ARBITRARINESS OR CAPRICIOUSNESS?

III DOES THE COURT LACK JURISDICTION OF THIS ADMINISTRATIVE APPEAL UNDER S C CODE ANN § 44-7-180(B)?

000539

STATEMENT OF THE CASE

On May 7, 2004, the Respondent Coastal Carolina Medical Center (the "Hospital") submitted to the Respondent South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") an Application for a Certificate of Need ("CON") to provide Magnetic Resonance Imaging ("MRI") services to its inpatients, outpatients and emergency patients at the Hospital's forty-one (41) bed acute care facility located in southern Hardeeville, Jasper County. The Hospital is the only hospital in Jasper County and currently there are no providers of MRI services in Jasper County. The Appellant MRI at Belfair, LLC ("Belfair"), which is owned and operated by a physician, Dr. Joseph Borelli, is a private provider of MRI services located in Beaufort County.

On November 22, 2004, the Department approved the Hospital's application to provide MRI services to its inpatients, outpatients and emergency patients. Thereafter, Belfair requested contested case proceedings before the Administrative Law Court.

On August 2, 2005, the Hospital filed a motion for summary judgment before the Administrative Law Court on the grounds that the applicable *2003 State Health Plan* contains a finding of need that hospitals, whenever possible, should have at least one MRI unit available for the diagnosis of their emergency patients, inpatients and outpatients and, that, as a matter of law, the Hospital met this standard. Belfair filed essentially a cross motion for summary judgment on the grounds that the *2003 State Health Plan* standard for hospital MRI services violates S.C. Code Ann. §44-7-180(B)(2)(2002), which provides that the *State Health Plan* contain at a minimum "projections of need for additional health care facilities, beds, health services, and equipment."

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The Administrative Law Judge, the Honorable Ralph King Anderson, III, orally denied Belfair's motion for summary judgment, holding that the *State Health Plan's* standard that each hospital should have at least one MRI unit available for diagnosis of emergency patients, inpatients, and outpatients is a sufficient projection of need under the statute. Judge Anderson found that the other issues raised by Belfair required inquiry into the facts of the case and denied summary judgment on that basis as to those issues. Consistently, Judge Anderson granted the Hospital's motion for summary judgment as to the sufficiency of the *2003 State Health Plan's* MRI standard for hospitals and further found that such standard encompassed other standards, such as community need documentation, distribution (accessibility), acceptability and cost containment. Judge Anderson denied the Hospital's motion for summary judgment insofar as he determined that a question of material fact existed as to what constitutes "availability" under the standard for purposes of the Hospital's application.¹

A hearing on these issues was held before the Administrative Law Court on August 23, 2005 through August 25, 2005. The court issued its Final Order and Decision on November 10, 2005, upholding the decision of the Department to grant the Hospital's application to provide MRI services to its patients. The Final Order and Decision also memorialized the court's prior oral rulings on the parties' respective summary judgment motions.

On December 9, 2005, Belfair requested that the Board of Health and Environmental Control review and reverse Judge Anderson's decision to approve the Hospital's Certificate of Need application. On May 25, 2006, the Board issued its order rejecting Belfair's appeal and affirming the Administrative Law Court's Final Order and Decision.

¹ For example, the Hospital argued that the standard's requirement that MRI services be "available" for emergency patients supported the Hospital's application for a fixed MRI on site at the Hospital in Jasper County operating twenty-four hours per day, seven days per week. Belfair, on the other hand, argued that the existence of MRI service providers in Beaufort County satisfied the standard that MRI services be "available" to the Hospital's patients.

000601

On July 1, 2006, Act No 387, 2006 S C Acts ____ became law That Act, among other things, provided for the appeal of certain administrative cases to the Court of Appeals Two days later, on July 3, 2006, Belfair filed its Notice of Appeal of the Board's decision to the Court of Appeals under Act No 387

On July 24, 2006, the Hospital filed its Motion to Dismiss Belfair's appeal to the Court of Appeals for lack of jurisdiction on the grounds that, under S C Code Ann. § 44-7-220 (2002), which law was neither expressly or impliedly repealed by Act No 387, an appeal of a final decision of the Board sitting in review of a decision of the Administrative Law Court in a certificate of need case is to the circuit court upon the posting of a bond On October 17, 2006, this Court denied the Hospital's motion to dismiss and directed the parties to further brief the issue of jurisdiction in their briefs on the merits (*See*, Argument III, herein)

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ARGUMENT

I THE 2003 STATE HEALTH PLAN CONTAINS ADEQUATE STANDARDS FOR REVIEW OF MAGNETIC RESONANCE IMAGING SERVICES IN COMPLIANCE WITH THE REQUIREMENTS OF S C CODE ANN § 44-7-180(B)

In its brief, Belfair articulates three challenges to the validity of the standards for MRI services set forth in the 2003 *State Health Plan*. First, Belfair argues that the Hospital's CON award violates § 44-7-180(B) because the *Plan's* standards for MRI services allegedly do not contain projections or statistics or other expressions of need. Section 44-7-180 establishes the State Health Planning Committee and outlines its and the Department's duties including the duty to issue a *State Health Plan* for regulated health equipment and services. Paragraph (B) provides

With the advice of the health planning committee, the department shall prepare a State Health Plan for use in the administration of the Certificate of Need Program provided in this article. The plan at a minimum must include

- (1) an inventory of existing health care facilities, beds, specified health services, and equipment,
- (2) projections of need for additional health care facilities, beds, health services, and equipment,
- (3) standards for distribution of health care facilities, beds, specified health services, and equipment including scope of services to be provided, utilization, and occupancy rates, travel time, regionalization, other factors relating to proper placement of services, and proper planning of health care facilities, and
- (4) a general statement as to the project review criteria considered most important in evaluating certificate of need applications for each type of facility, service, and equipment, including a finding as to whether the benefits of improved accessibility to each such type of facility, service and equipment may outweigh the adverse affects caused by the duplication of any existing facility, service, or equipment

000603

The State Health Plan must address and include projections and standards for specified health services and equipment which have a potential to substantially impact health care cost and accessibility. Nothing in this provision shall be construed as requiring the department to approve any project which is inconsistent with the State Health Plan.

Belfair asserts that the 2003 State Health Plan standards for MRI services do not comply with paragraph (B)2's directive that the Plan contain at a minimum "projections of need for additional health care facilities beds, health services, and equipment"

In fact, the 2003 State Health Plan standards for MRI contain the following specific projection of need for MRI services or equipment for applicants such as the Hospital "Each hospital should have at least one MRI unit available for diagnosis of emergency patients, inpatients and outpatients" (Pet. Ex. 5 pp II-66) Mr Dan Sullivan, Belfair's own health planning expert, explained that the directive to make MRI services "available" encompasses many health planning concepts, including the concept of "need"

I think availability has different levels of meaning I think from health planning the first way I think about it is on the broadest level and that is looking at a geographic area and looking at what is available within that geographic area to meet the needs of patients in the area for a particular service Another analysis then would be the availability to an individual institution, which has been the subject of some discussion here, and whether or not that particular institution has ready availability to it. There's another sense of availability, and that is while there may be a number of facilities in a particular geographic region, do they have capacity, because that's another aspect. You can have fifty MRI centers but if they're fully utilized, then they wouldn't technically be available to serve the public So, another aspect of availability is capacity Another facet of it would be the technology Is there a type of technology that's been proposed or that's absent if you will from a particular area. [I]n that case, you would be talking about, you know, more of a clinical or maybe even a quality aspect to availability And then I think another way that you would look at availability would be from a financial standpoint. Is there a financial barrier to services such that while MRI services might be available, they're not available to certain classes of patients [T]he other aspect of it as it relates to this particular standard is for each of these three types of groups of patients that are enumerated in the standard, emergency, inpatients and outpatients, is there a way of making the service available to each of those groups

000604

(Tr , p 139, line 14 – p 8) At the hearing on this matter, the Administrative Law Judge heard testimony from numerous physicians, administrators, and health planners, including Mr Sullivan, on all aspects of the directive to make MRI services “available” to hospital outpatients inpatients, and emergency patients That testimony included expert opinions from physicians concerning the Hospital’s operation of its emergency room on a twenty-four hours per day, seven days per week basis and the “need” to have on-site MRI services available to those patients

As supported by the substantial evidence in the record, the determination by the State Health Planning Committee and the Department in the *2003 State Health Plan* that every hospital should have one MRI unit “available” for diagnosis of its inpatients, outpatients, and emergency patients is, in fact, a statement of the “need” for MRI services for hospital patients² Thus, as was determined by Judge Anderson and upheld by the Board, for purposes of review of the Hospital’s application the *2003 State Health Plan* standards for MRI services do contain projections of the need for MRI services and, thus, are in compliance with the requirements of § 44-7-180(B)

As its second challenge to the validity of the MRI standards, Belfair argues that the order of the Administrative Law Judge fails to make sufficient findings of fact to support the court’s legal conclusion that the *Plan*’s standards are consistent with the Board’s statutory mandate to project need To the contrary, Judge Anderson’s order, which was affirmed and adopted by the Board, contains numerous findings of fact based on the substantial evidence in the record regarding the Hospital’s hours of operation (twenty-four hours per day/seven days per week), the

² Albert Whiteside the Department official responsible for overseeing development of the State Health Plan testified that “available” in the *2003 State Health Plan* standards for MRI services, means ‘available for use when it s needed.” (Tr p 61 lines 16 – 23) Mr Whiteside also testified regarding the evolving changes to the MRI standards across the 1999 2001 and 2003 plans as follows “well, one of the things about the standard is we did move from the 2001 Plan the thing about each hospital should have at least one MRI We moved it from number five to number one We deleted a number of other things that were in the 2001 Plan with the idea that MRI services should be available at hospitals at all whenever possible (Tr p 65 lines 15- 22)

000605

Hospital's location adjacent to Interstate 95, the effect that the Hospital's location has on the nature and volume of its emergency patient load (i.e., a substantial number of wreck or other trauma victims needing immediate diagnosis through the use of MRI, among other modalities), the lack of any MRI facilities in Jasper County the lack of 24/7 coverage if the Hospital had to depend on mobile services or on the private facilities located in Beaufort County, which facilities are open during business hours but not at night, and the costs and difficulty and dangers of transporting hospital patients to other MRI facilities (Order of Judge Anderson, pp 6 - 8) Thus, Judge Anderson made numerous findings of fact, all based on the substantial evidence in the record, concerning the meaning and application of the *Plan's* standard for a hospital's need for MRI services

Finally, Belfair argues that Judge Anderson and the Board should be reversed because the Department and the State Health Planning Committee allegedly have no statutory authority to treat hospitals differently from other potential providers of MRI services Belfair contends that because the *2003 State Health Plan's* standards do not specifically state a need for MRI services by providers other than hospitals, the *Plan* violates the Board's statutory authority with regard to promulgation of a state health plan.

First, whether the *2003 State Health Plan* states standards for providers other than hospitals is irrelevant to the case in controversy before this Court. The applicant in this case is, in fact, a hospital, and the Administrative Law Court appropriately heard two days of testimony and received voluminous other documentary evidence with regard to the standards for *hospital* MRI services The existence or adequacy of standards for other MRI providers was not before the Administrative Law Judge or the Board and, thus, is not before this Court

000606

Further, if the issue of whether hospitals can be treated differently in terms of standards for MRI services were before the Court, it is undisputed that the Certificate of Need Act itself differentiates between different types of providers. For example, under § 44-7-170 physician providers are exempt from certificate of need review except for the acquisition of medical equipment costing over \$600,000. As was testified to by the Department's expert health planning witness, this statutory differentiation between types of providers was actually the impetus behind eliminating a number of previous MRI service standards³. Thus far from lacking the authority to treat providers differently for certificate of need purposes, the Department actually is required by its statutory authority to do so. See *City of Columbia v Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987) (By necessity, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged)⁴.

Finally, as noted above the Administrative Law Court heard testimony from numerous expert witnesses concerning the differences between hospital providers of MRI services and other providers of MRI services with regard to a hospital's unique need to have MRI services

³ Mr. Whiteside testified that former requirements that applicants document capacity and utilization of MRI equipment were eliminated from the 2003 State Health Plan because "MRI's are a very common diagnostic tool. We have a lot of MRI's that are in place that never went through a certificate of need review. They cost under \$600,000. They didn't have to document that they could do one thing except that their price was below \$600,000." (Tr. p. 581, line 22 - p. 582, line 3). As explained by Mr. Whiteside, "[I]t's inequitable because some people have to go through the certificate of need program and can certainly be challenged by existing providers who possibly were even exempted because they didn't have to [go] through a certificate of need because they got a cheap piece of equipment." (Tr., p. 583, lines 6 - 12).

⁴ Section 44-7-140 establishes the Department as the sole agency responsible for control and administration of the certificate of need program. Section 44-7-150 confers upon the Department the broad authority to adopt "substantive and procedural regulations considered necessary by the department and approved by the board to carry out the department's licensure and Certificate of Need duties under this article" (Emphasis added). Finally, the Department is authorized by § 44-7-190 to issue project review criteria covering various broad categories of health planning considerations, including any relevant special considerations as may be appropriate. The Department is not required to treat all providers and all services identically. To the contrary, the Department is clearly authorized by its enabling legislation to make reasonable distinctions among providers and services as the Department determines is necessary to exercise the police power conferred on it to regulate the healthcare industry to insure the health, safety and welfare of the community.

immediately available to its inpatients and emergency patients. The substantial evidence before the court was that, unlike non-hospital MRI providers such as Belfair, hospitals (a) operate twenty-four hours a day, seven days per week, (b) have emergency rooms which attract critically ill patients at all hours of the day and night, and (c) have inpatients who often are not ambulatory and who cannot be easily transported off the hospital campus for this basic diagnostic service. This evidence more than supports as rationally and reasonably related to a legitimate government purpose the Department's adoption of a standard in the *2003 State Health Plan* that hospitals should have at least one MRI unit available for the use of its inpatients, emergency patients and outpatients.⁵

⁵ See, generally *Bibco Corp v City of Sumter* 332 S.C. 45, 504 S.E.2d 112 (1998) ("There are three steps in determining whether an ordinance survives rational basis scrutiny under the Equal Protection Clause: (1) whether plaintiff was treated differently than others similarly situated; (2) whether defendant intentionally discriminated against plaintiff and had a rational basis for doing so; and (3) whether the discrimination/classification bears a rational relationship to a legitimate government purpose or goal.")

000608

II THE BOARD'S ORDER IS SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD AND IS NOT ARBITRARY OR CAPRICIOUS OR OTHERWISE AFFECTED BY AN ABUSE OF DISCRETION

In its remaining three issues, Belfair contests the findings of the Administrative Law Court, as affirmed by the Board, as follows. First, Belfair contends that the Board exceeded its statutory authority in determining that the Hospital's application for MRI services should be approved without regard to compliance with project review criteria. In framing this issue, Belfair misstates the actual finding of the Administrative Law Judge and the Board's affirmation thereof.

In his Final Order and Decision, Judge Anderson memorialized his earlier oral ruling on the parties' motions for summary judgment, finding that because the MRI standards under the *2003 State Health Plan* do not require hospitals to establish community need documentation, distribution (accessibility), acceptability and cost containment, no genuine issue of material fact existed as to those project review criteria. Judge Anderson did not hold that the Hospital's application should be approved without regard to any project review criteria.

To the contrary, Judge Anderson found, based on the testimony of Department officials that the Department had legitimately determined as a policy matter that hospitals need to have MRI services "available" for their patients and that the appropriate review of the Hospital's application in this case required inquiry into how MRI services could be made "available" to the Hospital's inpatients, outpatients and emergency patients. The court's decision on the applicable standard are supported by a plain reading of the *2003 State Health Plan* and the testimony of witnesses such as Albert Whiteside, the Department official responsible for development of the State Health Plan, that based on a number of factors, the Department had eliminated prior criteria

in favor of the determination that MRI services need to be available to all hospital patients, including emergency patients (*See*, footnotes 2 and 3 above)

Therefore, Judge Anderson conducted a two-day hearing, including the receipt of testimony from expert health planners and physicians, on the issue of what MRI services were "available" for use by the Hospital's patients, including inpatients and emergency room patients, which type of patients non-hospital providers such as Belfair do not have. As illustrated by the quoted portion of Belfair's own expert, Dan Sullivan, set forth above, the issue of availability encompasses concepts of need, accessibility, existing capacity, geographic barriers, the existence of technological diversity in the service area, and the existence of financial barriers to accessibility (*See*, Tr., p. 139, line 14 – p. 8).

Thus, far from Belfair's implications, neither the Administrative Law Judge nor the Department gave automatic approval to the Hospital's application without regard to any project review criteria. Rather, both applied the criteria duly established for the service through the state health planning process and published in the *State Health Plan*.

Belfair also alleges that the Board erred in determining that "for acute care hospitals like CCMC", MRI services must be "available" twenty-four hours a day, seven days a week.⁶ Belfair claims that interpretation of this standard 1 of the *Plan* renders standard 2 (that hospitals consider using shared mobile MRI units) meaningless. In support of its allegations, Belfair quotes from the order of the Administrative Law Judge, as affirmed by the Board, that

Not all hospitals are necessarily open twenty-four hours, seven days a week or even treat individuals who would need an MRI. Therefore, 'available' does not

⁶ Of course, under the applicable standard of review set forth by this Court in *Marlboro Park Hospital v. South Carolina Department of Health and Environmental Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct.App. 2004), the Board cannot make its own findings of fact but must apply the substantial evidence standard on review and can reverse only when the order is not supported by the substantial evidence in the record or is affected by error of law. The Board's one-page order in this case correctly applies the standard of review and upholds the order of the Administrative Law Court as being unaffected by error.

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mean that any hospital is entitled to at least one onsite MRI unit as long as it can afford the unit. Rather the application of the above two standards must be based upon the facts of the case in light of the MRI needs of the hospital

(Order of the Administrative Law Court, pp 11-12) The above quote obviously does not support Belfair's allegation but rather illustrates that the Administrative Law Court made its determination to approve the Hospital's application in the context of the substantial evidence in the case before the court and did not make any broad findings or determinations applicable to "hospitals like CCMC" The court continues its discussion above as follows

Construing "standard 1" as mandatory, without specific language requiring that reading would render "standard 2" meaningless in all hospital applications, no matter what the circumstances

Nevertheless, CCMC is open twenty-four hours a day, seven days a week Moreover, CCMC not only treats individuals who would need MRI scans, but treats individuals who urgently need MRI scans There are times when patients are too unstable to be transported off site Therefore, although "standard 2" may be a consideration, *the facts of this case* clearly establish that to be sufficiently "available" to CCMC, it needs a fixed, in-house MRI unit.

(Italicized emphasis added)(Order of the Administrative Law Court, p 12) The determination of the court is case-specific and based on the substantial evidence in the record

The Hospital presented the testimony of (a) Dr Tricia Etheridge, the Hospital's Chief of Staff, concerning the difficulties and negative medical implications of having to transport critically ill hospital patients and the medical insufficiencies of part-time mobile technology (Tr, p 247, line 16 - p 253, line 17, and p 256, lines 1 - 21), (b) Dr Dean Mesh, a radiologist practicing at the Hospital, concerning the need for immediate access to MRI services in emergency cases which requires availability on a 24/7 basis and the medical insufficiencies of part-time mobile technology (Tr, p 277, line 16 - p 278, line 7, and p 280, line 21 - p 282, line 1, and p 277 lines 5 - 15 and p 280, lines 16-20) (c) Mr Eric Deaton, President and Chief Executive Officer of the Hospital, concerning the Hospital's continuous hours of operation the

location of the Hospital near Interstate 95 and in a resort/retirement community and the resulting high percentage of emergency trauma and stroke patients needing MRI services, the unavailability to Hospital patients of many of the alternate MRI service providers, the difficulties and costs of transporting the Hospital's patients for diagnostic MRI services when alternate providers are available, the insufficiency of part-time mobile service, the prohibitive costs of acquiring full-time mobile services and the (Tr p 321, line 16 – p 322, line 25, p 325, line 3 – p 326, line 16, p 300, line 19 – p 332, line 18, p 335, lines 6 – 22, p 344, lines 5 - 14, and p 346, lines 9 – 14) , and (d) Mr Mark Richardson, expert health care planner, opining that the best way for the Hospital in this case to meet the needs of its patients, including its emergency room patients, is to have MRI services available on a 24/7 basis (Tr , p 451, lines 2-5, p 458, line 9 – p 459, line 18, and p 467, line 1 – p 468, line 7)

The Administrative Law Judge as the finder of fact in this case was well within his authority to accept the testimony outlined above, and this testimony is more than substantial evidence for the findings made by the court concerning the Hospital's need for an on-site MRI unit. *See, Welch Moving and Storage Co Inc. v Public Service Commission*, 301 S C 259, 391 S.E 2d 556 (1990), *Palmetto Alliance, Inc v Public Service Commission*, 282 S C 430 319 S.E 2d 556 (1984), *Lark v Bi-Lo Inc* , 276 S C 130, 276 S.E 2d 304 (1981), *Leventis v South Carolina Dept of Health and Environmental Control*, 530 S.E 2d 642 (Ct.App 2000) (“Substantial evidence” sufficient to support reversal of the Judge’s decision is not a mere scintilla of evidence against the judge’s conclusions Nor is it evidence viewed blindly from one side “Substantial evidence” to support a decision exists “unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based” Even the possibility of drawing two inconsistent conclusions from the evidence

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does not warrant reversal or modification of the decision. If there is evidence in the record as a whole which would allow reasonable minds to reach or support the trier of fact's conclusions, the decision must be upheld)

Finally, along the same lines as its second challenge to the court's findings, Belfair argues that the court's findings that the Hospital's need for MRI services can only be met by a 24/7 on site MRI are "arbitrary and capricious, characterized by an abuse of discretion or an unwarranted exercise of discretion and are clearly erroneous in light of the evidence in the record as a whole." The "arbitrary, capricious, or characterized by abuse of discretion" standard is rigorous and difficult to meet. In order to overturn Judge Anderson's decision, and the Board's affirmance thereof, under this standard the Court must find that the decision was "without rational basis", was "based alone on [the Judge's] will and not upon any course of reasoning and exercise of judgment" was made "at [the Judge's] pleasure, without adequate determining principles" or was "governed by no fixed rules or standards." *Deese v South Carolina State Board of Dentistry* 286 S C 182, 184-185, 332 S E 2d 539, 541 (Ct App 1985). Based on the overwhelming evidence in the record, Judge Anderson's decision that the Hospital proved the need for on site MRI services cannot be deemed arbitrary or capricious or an abuse of discretion.

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III THE COURT LACKS JURISDICTION OVER THIS MATTER IN THAT SECTION 44-7-220 REQUIRES THAT AN APPEAL FROM A FINAL DECISION OF THE BOARD SITTING IN REVIEW OF THE ADMINISTRATIVE LAW COURT IN A CERTIFICATE OF NEED CASE MUST BE MADE TO THE CIRCUIT COURT UPON POSTING OF A BOND

On July 24, 2006, the Hospital moved this Court for an order dismissing the Appellant MRI at Belfair's appeal on the grounds that the Court lacks jurisdiction in this matter. On October 17, 2006, the Court issued its order denying the Hospital's Motion to Dismiss but directing the parties to brief the issue of jurisdiction in their respective briefs on the merits.

The Hospital contended in its Motion to Dismiss and reiterates those grounds herein that this Court lacks jurisdiction to hear Belfair's appeal from the decision of the Board of Health and Environmental Control on review of a decision of the Administrative Law Court because Act No. 387, 2006 S.C. Acts ____ is not applicable to this type of case and did not repeal S.C. Code Ann. § 44-7-220 (2002), which establishes appeal from the Board to be with the circuit court upon posting of a bond.

The following timeline is uncontested. Belfair filed its request for contested case before the Administrative Law Court on November 24, 2004. The contested case hearing was conducted by Judge Anderson on August 23-25, 2005. The Administrative Law Court issued its decision on November 10, 2005. Belfair appealed that decision to the Board of the Department of Health and Environmental Control on December 9, 2005. The case was argued before the Board on May 11, 2006. On May 25, 2006, the Board issued its order affirming the decision of the Administrative Law Court. On July 1, 2006, Act No. 387 became effective. On Monday, July 3, Belfair filed its appeal with this Court.

The basis of the Hospital's contention that this Court lacks jurisdiction is that Act 387, which confers jurisdiction on this Court to hear appeals from the Administrative Law Court ("ALC"), is not applicable to Appellant's appeal from the Board of Health and Environmental

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Control (the "Board") As stated in Section 53 of Act 387, the purpose of the Act is to "provide a uniform procedure for contested cases and appeals from administrative agencies " To that end, Sections 2 through 6 of the Act substantially amend portions of the Administrative Procedures Act ('APA') relating to appeals from contested case decisions Section 2 of Act 387 amends S C Code Ann § 1-23-380(A)(2005) to provide as follows

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1, and Article 5 This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy Except as otherwise provided by law, an appeal is to the court of appeals

(Emphasis added) Prior to the amendment of this section of the APA, appeals of final administrative decisions were generally to the circuit court.

Later sections of Act 387 address appeals from specific agencies⁷ Section 5 of the Act concerns appeals from final decisions of the ALC and amends S C Code Ann § 1-23-610 (2005) to provide

(A) For quasi-judicial review of any final decision of an administrative law judge of cases involving departments governed by a board or commission authorized to exercise the sovereignty of the State, except the Department of Natural Resources and the Department of Health and Environmental Control, a petition by an aggrieved party must be filed with the appropriate board or commission and served on the opposing party not more than thirty days after the party receives the final decision and order of the administrative law judge Appeal in these matters is by right. A party aggrieved by a final decision of a board in such a case is entitled to judicial review of that decision by the court of appeals under the provisions of (A) of this section

(B) For judicial review of a final decision of an administrative law judge of cases in which review is not governed by subsection (A), including cases

⁷ For example Act 387 specifically amends laws relating to appeals from the State Ethics Commission, the Procurement Review Panel, the Human Affairs Commission, the Commission for the Blind, the Mining Council, the State Crop Pest Commission, and the Livestock Poultry Health Department of Clemson University among others The Act does not address the type of appeal from the Board that is before the Court in this case

involving the Department of Natural Resources and the Department of Health and Environmental Control, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

(Emphasis added)

Prior to the amendment of § 1-23-610, a party was required to appeal a final decision of the ALC in a certificate of need contested case to the Board within thirty days of notice of the ALC decision and then to the circuit court within thirty days of notice of the Board's decision. *See, e g , Marlboro Park Hospital v South Carolina Department of Health and Environmental Control*, 358 S C 573, 595 S E 2d 851 (Ct.App 2004) After passage of Act 387, for cases covered by the Act, appeal of an ALC final decision in a certificate of need case is directly to this Court and must be made within thirty days of notice of the ALC's decision

It is undisputed that, until two days prior to filing of its Notice of Appeal with this Court, Belfair's appeal was proceeding under the law in effect at the time Thus, when the Administrative Law Judge rendered his decision to approve Respondent s certificate of need application on November 10, 2005 Belfair initiated its appeal to the Board of Health and Environmental Control under former § 1-23-610(A), not directly to the Court of Appeals as is now required under Act 387

The Board heard arguments in the case and rendered its decision affirming the ALC's decision on May 25, 2006 Under S C Code Ann. § 44-7-220 (2002), appeal of a final decision of the Board on review of a decision of the ALC in a certificate of need case is to the circuit court upon posting of a bond

Act 387 does not expressly or impliedly amend or repeal § 44-7-220 Act 387 does not even address appeals from Board decisions reviewing ALC decisions in certificate of need cases

understandably because, on a "going forward" basis, Act 387 eliminates Board review of ALC decisions in certificate of need cases. Thus, on a "going forward" basis, eventually there will be few, if any, cases that fall under § 44-7-220. However, for existing Board decisions reviewing ALC orders in certificate of need cases, § 44-7-220 still applies and it provides for appeal to the circuit court and posting of the required bond.

The following provisions of Act 387 address the intended effect of the Act on existing cases:

SECTION 53 This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.

SECTION 55 The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 57 This act takes effect on July 1, 2006, and applies to any actions pending on or after the effective date of the act. No pending or vested right, civil action, special proceeding, or appeal of a final administrative decision exists under the former law as of the effective date of this act, except for appeals of Department of Health and Environmental Control Ocean and Coastal Resource Management and Environmental Quality Control permits that are before the Administrative Law Court on the effective date of this act and petitions for judicial review that are pending before the circuit court. For those actions only, the department shall hear appeals from the administrative law judges and the circuit court shall hear pending petitions for judicial review in accordance with the former law. Thereafter, any appeal of those actions shall proceed as provided in this act for review. For all other actions pending on the effective date of this act, the action proceeds as provided in this act for review.

(Emphasis added)

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Section 53 of the Act, quoted above, is an intent and conflicts clause. This section makes clear that, when a conflict exists between the Act and an existing provision of law, the Act controls. In this case, there is no conflict between the Act and an existing law and, therefore, Section 53 does not come into play.

Act 387 does not specifically address appeals from the Board of Health and Environmental Control in certificate of need contested cases originally decided by the ALC, because, under the Act, as of July 1, 2006, the Board does not hear those cases.⁸ Thus, the Appellant Belfair cannot rely on Section 5 of Act 387 (which amended § 1-23-610) to support its appeal of a decision of the Board in this case.

The only section of Act 387 which could apply to Belfair's appeal is Section 2, which does not specifically address appeals from the Board of Health and Environmental Control, but does concern appeals from administrative agencies in general. As quoted above, Section 2 amends § 1-23-380(A) to provide, "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1, and Article 5. Except as otherwise provided by law, an appeal is to the court of appeals" (Emphasis added).

In this case, § 44-7-220, which specifically addresses appeals from decisions of the Board of Health and Environmental Control, provides "otherwise." Section 44-7-220 directs that appeals from Board decisions in certificate of need administrative reviews are effectuated by posting a bond and filing a petition for judicial review with the circuit court. This specific statute, which has not been impliedly or expressly amended or repealed by Act 387, controls in

⁸ The Act does establish a scheme whereby the Board holds a final "review conference" of Department staff decisions in certificate of need cases. Appeal from Board decisions affirming or overturning staff decisions is to the Administrative Law Court, which provides contested case review. See Section 48 of 2006 Act 387 (codified as § 44-1-60). Appeal from the final decision of the ALC is to the Court of Appeals under Section 5 of Act 387. This scheme affords no relief to the Appellant Belfair in this case as it concerns Board review of staff decisions not the Board review of an ALC decision, which is at issue here.

this case See *Capco of Summerville Inc v JH Gayle Const Co Inc* 368 S C 137, 628 S E 2d 38 (2006) (“Repeal by implication is disfavored and is found only when two statutes are incapable of any reasonable reconciliation Mims v Alston, 312 S C 311, 440 S E 2d 357 (1994) Moreover the repugnancy must be plain, and if the two provisions can be construed so that both can stand a court shall so construe them City of Rock Hill v South Carolina DHEC, 302 S C 161, 167, 394 S E 2d 327, 331 (1990) Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of the general statute and given such effect Wilder v South Carolina Hwy Dep’t, 228 S C 448, 90 S E 2d 635 (1955) See also Wooten ex rel Wooten v S C Dep’t of Transp., 333 S C 464, 468, 511 S E 2d 355, 357 (1999) (a specific statutory provision prevails over a more general one) Atlas Food Sys & Servs, Inc v Crane Nat’l Vendors Div of Unidynamics Corp., 319 S C 556, 558, 462 S E 2d 858, 859 (1995) (general rule of statutory construction is that a specific statute prevails over a more general one) ”)

Section 55 of Act 387 is a savings clause which provides that the repeal or amendment of a law by the Act does not affect pending actions or rights founded on the existing law unless the repealed or amended provision shall so expressly provide As noted above, Act 387 does not expressly or by implication repeal or amend the existing law as it relates to appeals from Board decisions reviewing ALC decisions in certificate of need cases Thus, under Section 55 of the Act, appeals in pending cases involving those Board decisions fall under existing law

Finally, Section 57 of the Act indicates that the Act applies to ‘ any actions pending ’ on or after July 1, 2006 Under Section 57 “no appeal of a final administrative decision exists

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under the former law as of the effective date", except in very limited specified cases⁹ and "for all other actions pending on the effective date the action proceeds as provided for in this act for review" As noted, the Act does not specifically address appeals of Board decisions reviewing Administrative Law Court decisions but does provide that appeals of final administrative decisions are to the Court of Appeals unless otherwise provided by law Thus, applying the literal language of Section 57 that, after July 1, 2006, reviews of pending cases proceed as directed by the Act, an appeal of a final decision of the Board on review of an ALC decision in a certificate of need case is to the circuit court on posting of a bond as required by § 44-7-220 (See, *In the Interest of Shaw* 274 S C 534, 539 265 S E.2d 522, 524 (1980)("If the provisions of two statutes can be construed so that both can stand, this Court will so construe them")

Therefore, Belfair's Notice of Appeal to this Court is contrary to applicable law and without effect, and the Court lacks the jurisdiction to consider it.

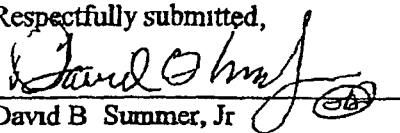
⁹ The specified cases are appeals from the Department of Health and Environmental Control's Ocean and Coastal Resource Management and Environmental Quality Control divisions pending before the Administrative Law Court. Belfair's appeal does not fall into either of these two categories.

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CONCLUSION

For all of the reasons stated, the Court should dismiss Appellant's appeal because this Court lacks jurisdiction, or alternatively, affirm the Board's order upholding the decision of the Administrative Law Court to grant the Respondent Coastal Carolina Medical Center's application for a Certificate of Need to provide Magnetic Resonance Imaging services to its patients.

Respectfully submitted,



David B. Summer, Jr.

Faye A. Flowers

Parker Poe Adams & Bernstein, LLP

1201 Main Street, Suite 1450

Columbia, South Carolina 29201

803-255-8000

Attorneys for the Respondent Coastal Carolina
Medical Center

December 18, 2006
Columbia, South Carolina

000621

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 04-ALJ-07-0399-CC

RECEIVED

DEC 18 2006

SC Court of Appeals

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

Respondents

PROOF OF SERVICE

I certify that on December 18, 2006, I have served the foregoing Respondent, Coastal Carolina Medical Center's Initial Brief on the following parties of record by depositing a copy of it in a United States Mail, postage prepaid, addressed to counsel as follows

M. Elizabeth Crum, Esquire
A. Victor Rawl, Jr, Esquire
Ariel B Kirk, Esquire
The McNair Law Firm
1301 Gervais Street, 11th Floor
Columbia, South Carolina 29201

Nancy S Layman, Esquire
Ashley B Biggers, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29205


David B Summer, Jr, S C Bar No 7974
Faye A. Flowers, S C Bar No 2043
Parker Poe Adams & Bernstein LLP
Post Office Box 1509
Columbia, South Carolina 29202
803-255-8000
Attorneys for Appellant

Columbia, South Carolina

000022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 04-ALJ-07-0399-CC

RECEIVED

DEC 18 2006

SC Court of Appeals

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

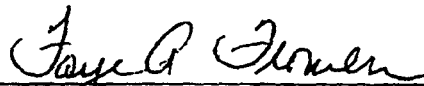
Respondents

PROOF OF SERVICE

I certify that on December 18, 2006, I have served the foregoing Respondent, Coastal Carolina Medical Center's Designation of Matter to be Included in the Record on Appeal on the following parties of record by depositing a copy of it in a United States Mail, postage prepaid, addressed to counsel as follows

M Elizabeth Crum, Esquire
A Victor Rawl, Jr , Esquire
Ariel B Kirk, Esquire
The McNair Law Firm
1301 Gervais Street, 11th Floor
Columbia, South Carolina 29201

Nancy S Layman, Esquire
Ashley B Biggers, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29205



David R Summer, Jr , S C Bar No 7974
Faye A Flowers, S C Bar No 2043
Parker Poe Adams & Bernstein LLP
Post Office Box 1509
Columbia, South Carolina 29202
803-255-8000
Attorneys for Appellant

Columbia, South Carolina

000623

McNair Law Firm, P A
ATTORNEYS AND COUNSELORS AT LAW

www.mcnair.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803)799-8800
FACSIMILE (803)376-2219

December 27, 2006

Hand Delivered

RECEIVED

DEC 28 2006

The Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

DHEC
OFFICE OF GENERAL COUNSEL

Re *MRI at Belfair, LLC v. SCDHEC and Coastal Carolina Medical Center*
(Docket No. 04-ALC-0399-CC)

Dear Mr. Richstad

I am counsel of record for Appellant MRI at Belfair, LLC in the above referenced appeal. I am writing to request an extension of time from December 28, 2006 to January 3, 2007 in which to file Appellant's Reply Briefs to Respondents' Coastal Carolina Medical Center and the South Carolina Department of Health and Environmental Control. Counsel for Respondents has consented to this extension request as evidenced by the attached e-mail correspondence.

Therefore, I respectfully request an extension of time until Wednesday January 3, 2006 to file the Reply Briefs. I am enclosing a check for \$25 to satisfy the filing fee requirement for this request.

Should you have any questions with respect to this matter, please do not hesitate to contact me.

Very truly yours,



M. Elizabeth Crum

Enclosure

cc Faye Flowers, Jr., Esquire (via USPS)
Ashley C. Biggers, Esquire (via USPS)

000624

Crum, Liz

From Elizabeth F Potter [POTTEREF@dhec.sc.gov]
Sent Wednesday, December 27, 2006 12:17 PM
To Crum, Liz
Cc Biggers, Ashley
Subject Re: FW: MRI Belfair Appellant v. Coastal Carolina Medical Center/Department of Health and Environmental Control

Liz, pursuant to your phone conversations with Connie Horger and me, and on behalf of Ashley Biggers for the Department, DHEC consents to the extension to January 3 as included in these emails.

Elizabeth F. Potter
 Chief Counsel for Administration
 SCDHEC
 2600 Bull Street
 Columbia, SC 29201
 803-898-3350
 803-898-3367 (fax)

 The information in this email is confidential and may be legally privileged. It is intended solely for the addressee. Access to this email by anyone else is unauthorized. If you are not the intended recipient, any disclosure, copying, distribution or any action taken or omitted in reliance on it is prohibited and may be unlawful.

>>> Crum, Liz" <LCrum@MCNAIR.NET> 12/27/2006 12:04 PM >>>

Elizabeth, as per my conversation with Connie Horger, below is Coastal Carolina Medical Center's consent to an extension to January 3. Would certainly appreciate DHEC's consent also. Thx, Liz

CIRCULAR 230 DISCLOSURE

TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (I) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE OR (II) PROMOTING MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN. THIS ADVICE MAY NOT BE FORWARDED (OTHER THAN WITHIN THE TAXPAYER TO WHICH IT HAS BEEN SENT) WITHOUT OUR EXPRESS WRITTEN CONSENT. TO READ MORE ABOUT THIS DISCLOSURE, PLEASE SEE <http://www.mcnair.net/230.pdf>

-----Original Message-----

From Flowers, Faye A [mailto:fayeflowers@parkerpoe.com]
Sent: Wednesday, December 27, 2006 10:04 AM
To Crum, Liz, Ashley Biggers
Subject: MRI Belfair, Appellant v. Coastal Carolina Medical Center/Department of Health and Environmental Control, respondents

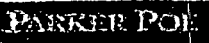
000625

PARKER POE

PARKER POE ADAMS & BERNSTEIN LLP

HOME | ATTORNEYS | PRACTICE AREAS

This will confirm our conversation of this morning wherein we agreed on behalf of Coastal Carolina Medical Center to an extension of Belfair's deadline to file its initial reply brief and further designation to Wednesday January 3 2007

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1201 Main Street, Suite 1450 Post Office Box 1509 Columbia, SC USA 29202 1509		
PHOTO: STEVE ADAMS & BERNSTEIN LLP		
Faye A. Flowers <i>Special Counsel</i>	Direct: 803-253-8912 Fax: 803-253-8017 Cell: 803-586-1755 faye@flowers@parkerpoe.com www.parkerpoe.com	

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MCNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

www.mcnairlaw.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 789-9800
FACSIMILE (803) 376-2219

January 5, 2007

Hand Delivered

The Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re *MRI at Belfair LLC v SCDHEC and Coastal Carolina Medical Center*
(Docket No 04-ALC-0399-CC)

Dear Mr Richstad

Enclosed herewith for filing with the Court please find the original and six (6) copies of the Motion of Appellant MRI at Belfair, LLC for Clarification of Respondents' Designations of Matter to be Included in Record on Appeal in the above-captioned case I am also enclosing a check for \$25 to satisfy the filing fee requirement for the Motion.

By copy of this letter and by Certificate of Service accompanying the Motion, I am serving all counsel of record Should you have any questions with respect to this filing, please do not hesitate to contact me

Very truly yours,

M Elizabeth Crum by
M. Elizabeth Crum *Elizabeth A. Blitch*
w/permission

Enclosure

cc David B Summer, Jr Esquire (via hand delivery)
Susan B Lipscomb, Esquire (via hand delivery)
Nancy S Layman, Esquire (via hand delivery)
Ashley C Biggers, Esquire (via hand delivery)

RECEIVED

JAN 5 2007

DHEC
OFFICE OF GENERAL COUNSEL

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

The Honorable Ralph King Anderson, III,
Administrative Law Judge

Docket No 04-ALC-0399-CC

MRI at Belfair, LLC

Appellant

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

Respondents

**MOTION OF APPELLANT MRI AT BELFAIR, LLC
FOR CLARIFICATION OF RESPONDENTS' DESIGNATIONS
OF MATTER TO BE INCLUDED IN RECORD ON APPEAL**

Appellant MRI at Belfair, LLC ("Belfair") hereby moves this Court for an order directing Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") and Respondent Coastal Carolina Medical Center ("CCMC") to clearly identify the portions of the transcript of the hearing before the Administrative Law Court on August 23-25, 2005, pursuant to Rule 209(b), SCACR which Respondents would like included in the Record on Appeal. Respondents filed their

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respective Designations of Matter to Be Included in the Record on Appeal ("Designations") on December 18, 2006 DHEC designated pages 27-639 of the hearing transcript and CCMC designated pages 28-639, effectively the entire hearing transcript except for opening arguments and the discussion of submittal of proposed orders

Appellant Belfair believes that Respondents Designations to the administrative hearing transcript include matter which is not relevant to the appeal and the Designations do not satisfy the requirements of Rule 209(b) in that the Designations do not "clearly" identify what the party desires to have included in the Record on Appeal and the Designation may only propose to include portions of the transcript, which may be properly included in the Record on Appeal " Rule 209(b) SCACR (emphasis added) As an example, Appellant's counsel notes that pages 541-558 of the hearing transcript are a discussion among the Administrative Law Judge and counsel with respect to deposition testimony and the South Carolina Rules of Civil Procedure and the Rules of Procedure of the Administrative Law Court pertaining to the submission of deposition testimony Clearly, these eighteen (18) pages of discussion are not pertinent to the issues on appeal

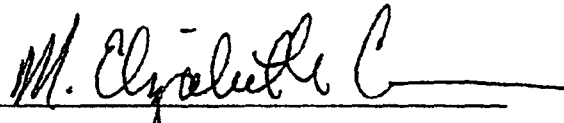
Another example is that there were numerous objections to evidentiary matters and considerable discussion regarding a number of those objections None of those objections are the subject of the appeal herein and are clearly not pertinent to the issues before this Court.

For the foregoing reasons, Appellant Belfair moves this Court for an order directing Respondents to designate with some specificity the portions of the

administrative hearing transcript they would like included in the Record on Appeal and for the filing of the Record on Appeal to be thirty (30) days from the date the Court so determines that the amended Designations should be filed

Respectfully submitted

M Elizabeth Crum SC Bar No 1486
A Victor Rawl, Jr, SC Bar No 9261
Anail B Kirk, SC Bar No 71101
McNAIR LAW FIRM, P A
Post Office Box 11390
Columbia South Carolina 29211
(803) 799-9800
lcrum@mcnair net
vrawl@mcnair net
akirk@mcnair net

By 
M Elizabeth Crum

Attorneys for Appellant MRI at Belfair, LLC

January 5 2007

Columbia South Carolina

000630

cc Fishman y
03-20026

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

ARIAD B. KIRK
akirk@mcnair.net

www.mcnair.net

THE TOWER AT 1301 GERVAIS
1301 GERVAIS STREET 11TH FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 799-8800
FACSIMILE (803) 753-3219

January 9, 2007

HAND DELIVERED

The Honorable Jana Shealy
Clerk
Administrative Law Court
1205 Pendleton Street
Edgar Brown Building
Columbia, SC 29211

Re Request by MRI at Belfair, LLC for Contested Case Review of the December 14, 2006 decision of the Department of Health and Environmental Control to permit Coastal Carolina Medical Center to use a mobile MRI 24/7 during pendency of appeal before the S.C. Court of Appeals (MRI At Belfair, LLC, vs. South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center—Docket No. 04-ALC-07-0399-CC) and during the implementation of the CON issued to Coastal Carolina Medical Center on August 3, 2006 and the construction of building to house the fixed MRI—(MRI at Belfair, LLC v Department of Health and Environmental Control and Coastal Carolina Medical Center)

Dear Ms. Shealy

On behalf of our client, MRI at Belfair, LLC ("Belfair"), we request a contested case hearing on the above referenced Department of Health and Environmental Control ("DHEC" or "Department") final Board decision ("Final Agency Decision") pursuant to the S.C. Administrative Procedures Act as amended by Act 387 (effective July 1, 2006) and Rule 11, RPALC.

On July 3, 2006, Belfair appealed the decision of the Board of Health and Environmental Control ("Board") to affirm the Administrative Law Court ("ALC") Order and Decision. That appeal is pending before the South Carolina Court of Appeals. Belfair did not seek a stay of the Board's Order. On July 20, 2006 pursuant to § 4 of Act 387, Coastal Carolina Medical Center ("CCMC") requested that DHEC issue the CON to construct an addition to CCMC to house a fixed 1.5 Tesla MRI unit and to purchase the unit for a total project cost in excess of \$3,201,000 ("Fixed MRI CON"). On August 3, 2006 DHEC issued the Fixed MRI CON.

ANDERSON CHARLESTON CHARLOTTE COLUMBIA GEORGETOWN GREENVILLE HILTON HEAD ISLAND MYRTLE BEACH RALEIGH

COLUMBIA 877283v1

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On August 9, 2006 a news article in the *Island Packet* announced that CCMC would begin providing mobile MRI services at CCMC. Upon his return from testifying out of state as an expert witness, Dr. Borelli, CEO and President of Belfair saw the newspaper article. On August 22, Belfair's counsel e-mailed¹ DHEC CON staff to determine what, if any, regulatory approval DHEC has issued to CCMC for the institution of mobile MRI services. Approval of a mobile MRI was not covered by the Fixed MRI CON issued on August 3, 2006 and was expressly rejected as an alternative in CCMC's CON application for the Fixed MRI. A copy of CCMC's CON Application rejection is attached as Exhibit 2.

After a follow-up call to the DHEC CON staff on August 24, 2006, on August 24, 2006 DHEC sent a facsimile copy of the August 4, 2006 request from CCMC, with attached mobile MRI lease agreement, to DHEC for permission to install and utilize a mobile MRI unit twenty-four hours a day seven days a week, during the implementation and construction of the Fixed MRI CON. See Exhibit 3, Letter dated August 4, 2006 with attachments from David B. Summer, Jr., Esquire to Victoria R. Tibshirany. On that same day, without notice to Belfair (despite the pending appeal and Belfair's status as an affected person in that appeal), DHEC issued its letter which approved CCMC for the "temporary full-time use of a mobile MRI unit during the interim period of the Fixed MRI construction and installation as outlined in [Mr. Summer's] August 4, 2006 letter." See Exhibit 4, Letter dated August 4, 2006 from Victoria R. Tibshirany to David B. Summer, Jr., Esquire ("Final Agency Decision"). There is neither statutory nor regulatory authority for DHEC to issue such approval.

On September 8, 2006, Belfair timely filed its initial request for a contested case hearing on the August 8, 2006 DHEC CON staff decision. On September 15, 2006, Belfair had a letter hand-delivered to the Court pointing out that § 1-23-600(G)(2) provided for an automatic stay of a final agency determination upon the filing of a contested case. The Court declined to enforce the statutory automatic stay and, following a hearing, issued an Order of Remand to the DHEC Board on October 18, 2006. Belfair filed a motion for reconsideration of the Order of Remand on October 26, 2006. After a hearing on the Motion on November 17, 2006, Judge Anderson's order denying Belfair's motion for reconsideration was filed on November 30, 2006.

As stated in the Order of Remand, Judge Anderson remanded the contested case to the DHEC Board "for its consideration of Belfair's request in accordance with Section 44-1-60." Nonetheless, the DHEC Board determined on December 14, 2006 – without any notice to Belfair – not to hear Belfair's request. No written or oral notice was given to Belfair that the DHEC Board would be considering whether to hear its request on December 14, 2006. Upon DHEC's issuance of the January 11, 2006 DHEC Board Meeting Agenda on December 29, 2006, counsel for Belfair e-mailed DHEC to ask whether Belfair's request for final agency review would be heard on that date.

¹ A copy of this e-mail is attached as Exhibit 1.

On August 9, 2006 a news article in the *Island Packet* announced that CCMC would begin providing mobile MRI services at CCMC. Upon his return from testifying out of state as an expert witness, Dr. Borelli, CEO and President of Belfair saw the newspaper article. On August 22, Belfair's counsel e-mailed¹ DHEC CON staff to determine what, if any, regulatory approval DHEC has issued to CCMC for the institution of mobile MRI services. Approval of a mobile MRI was not covered by the Fixed MRI CON issued on August 3, 2006 and was expressly rejected as an alternative in CCMC's CON application for the Fixed MRI. A copy of CCMC's CON Application rejection is attached as Exhibit 2.

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¹ A copy of this e-mail is attached as Exhibit 1.

McNAIR LAW FIRM, P A.

ATTORNEYS AND COUNSELORS AT LAW

However, due to DHEC Board's Clerk's vacation schedule, Belfair's counsel received no response. On January 2, 2007, through discussion with counsel for DHEC, Belfair's counsel learned that the DHEC Board had already decided not to hear Belfair's request on December 14, 2006. On January 8, 2007, Belfair's attorneys received the Board's decision not to hear the request for final agency conference, Belfair herewith files its request for a contested case. A copy of the Board's decision is attached as Exhibit 5.

CCMC can only acquire and utilize MRI equipment in accordance with the provisions of the State Certificate of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110, et seq. (Rev. 2002) ("CON Act"). Certainly, CCMC can go forward at its own risk² with the project as approved in the August CON. However, the Fixed MRI CON does not authorize CCMC to acquire and operate a MRI unit not subject to the CON. The language of the CON Act is plain and unambiguous. Section 44-7-230(A) provides:

The Certificate of Need, if issued, is valid only for the project described in the application including location, beds and services to be offered, physical plant, capital or operating costs, or other factors as set forth in the application, except as may be modified in accordance with regulations. The department shall require periodic reports and make inspections to determine compliance with the Certificate of Need. Implementation of the project or operation of the facility or medical equipment that is not in accordance with the Certificate of Need application or conditions subsequently agreed to by the applicant and the department may be considered a violation of this article.

(Emphasis added) As this Court has noted previously, "[w]hether the provision of mobile MRI services by CCMC is subsumed in the hospital's CON for the fixed MRI unit is questionable." Order denying motion for reconsideration dated November 30, 2006, p. 2. In fact, the mobile project proposed by CCMC is NOT the same project described in the application resulting in the August CON. In its CON application, CCMC expressly rejected the use of a mobile MRI as an alternative.

The effect of DHEC's Final Agency Decision in this case is to grant a non-applicability determination or to take "other action" which may give rise to a contested case in order to approve CCMC's use of the mobile MRI. See § 48(A), Act 387, effective July 1, 2006. The Final Agency Decision is a final agency determination pursuant to § 48(E), Act 387 and is subject to contested case review pursuant to § 4(B), Act 387 (§ 1-23-600(B)). Certainly, by approving CCMC's request to institute a different MRI service

² Mr. Tom Berry, DHEC spokesman, was quoted in the *Island Packet* as follows: "We have told Coastal Carolina that our interpretation of the law is that they may go ahead and proceed with the project, but do so with the full knowledge that at any time the state Court of Appeals may issue a stop-work order," Berry said. "If they proceed, they are doing so at their own risk." The 'project' is the Fixed MRI CON and nothing else.

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than that approved in the Fixed MRI Application without notice to an admittedly affected person, DHEC's staff acted in violation of the CON Act and due process

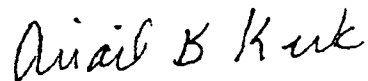
We point out that pursuant to § 4(G)(2) of Act 387 (§1-23-600(G)(2)), this request for contest case review stays all actions for which the approval is a prerequisite (including the operation of the MRI). Visual observation shows that there is an MRI truck parked on site at CCMC. On information and belief, CCMC has been using the mobile MRI to diagnose patients since Monday, September 11, 2006.

We request that the Court reverse the Department's Final Agency Decision and require that CCMC cease and desist providing MRI services with the mobile MRI unit until such time as it has either a valid NAD or CON to acquire and operate the same and that the mobile unit be removed from the CCMC campus. While we believe that our initial filing fee prior to remand is sufficient, in an abundance of caution I have enclosed our check in the sum of \$250 for the filing fee for the Court. I would appreciate your clocking in a copy of this letter and returning it to our courier. Thank you for your attention to this matter.

Should you have any questions with respect to these filings, please do not hesitate to contact me at my direct line number 753-3298.

Thank you for your time and attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,



Anail B. Kirk

Enclosures

cc A. Joseph Borelli, Jr., M.D.
Kelly M. Jolley, Esquire
Ashley C. Biggers, Esquire
Nancy S. Layman, Esquire
David B. Summer, Esquire
Susan B. Lipscomb, Esquire
(all VIA HAND DELIVERY and e-mail)

Crum, Liz

From: Crum, Liz
Sent: Tuesday, August 22, 2006 3:55 PM
To: Nancy S. Layman Esquire (laymanns@dhec.sc.gov); Ashley C. Biggers (biggerac@dhec.sc.gov); Joel C. Gnce (gricejc@dhec.sc.gov); Victoria (Tori) Reich Tibshirany (tibshrvt@dhec.sc.gov); jborell@mriatbelfair.net
Cc: Kirk, Anail; Rawl, Vic; Jolley, Kelly
Subject: FW: islandpacket.com | Hospital gets green light for MRIs

Tracking	Recipient	Read
	Nancy S. Layman Esquire (laymanns@dhec.sc.gov)	
	Ashley C. Biggers (biggerac@dhec.sc.gov)	
	Joel C. Gnce (gricejc@dhec.sc.gov)	
	Victoria (Tori) Reich Tibshirany (tibshrvt@dhec.sc.gov)	
	jborell@mriatbelfair.net	
	Kirk, Anail	Read: 8/22/2006 4:43 PM
	Rawl, Vic	
	Jolley, Kelly	Read: 8/22/2006 4:09 PM
	A. Joseph Borelli, Jr., M.D.	

Subject: islandpacket.com | Hospital gets green light for MRIs

Nancy, Ashley, Joel, and Tori: Please review article below. I saw where the CON was issued to CCMC for the CON MRI project under appeal to the Court of Appeals. Obviously, if CCMC wants to go forward with the Project as approved, we have not sought a stay. However, to our knowledge, CCMC has not obtained either a CON nor a NAD to put mobile MRI services in place. Clearly, Sec. 44-7-230(A) authorized CCMC only to go forward with the project as approved ("The Certificate of Need, if issued, is valid only for the project described in the application."). The article states that the mobile services are to be initiated Sept. 1, 2006. If a NAD has been issued for this project, we expressly request pursuant to FOIA that we be provided a copy of the same. If one has not, please ask CCMC to cease and desist until it has regulatory approval to undertake mobile MRI services. Thank you for your prompt attention to this matter. Liz Crum

M. Elizabeth (Liz) Crum
 McNair Law Firm, P.A.
 1301 Gervais Street
 P.O. Box 11390 (29211)
 Columbia, South Carolina 29201
 (803) 799-9800
 (803) 753-3219 (fax)
 lcrum@mcnair.net
<http://www.mcnair.net>

Hospital gets green light for MRIs

Court appeal could affect construction

BY PETER FROST *The Island Packet*

8/29/2006

000637



Published Wednesday August 9 2006

[Comments \(0\)](#) [Add Comment](#)

The Coastal Carolina Medical Center is going forward with plans to install an MRI machine, but the hospital's two-year legal battle with a provider may not be over.

After receiving approval from the state Department of Health and Environmental Control late last week to begin installing the equipment, hospital will begin offering mobile magnetic resonance imaging services Sept. 1, said CEO Eric Deaton.

An estimated \$3 million construction project to install a permanent MRI unit is expected to begin shortly thereafter and be completed with that project would mean a separate room would be built to house the MRI unit.

However, should the hospital begin construction, it could be halted at any point pending an appeal to the state Court of Appeals by MRI at Bluffton opposing the project, said Thom Berry, a DHEC spokesman.

"We have told Coastal Carolina that our interpretation of the law is that they may go ahead and proceed with the project, but do so with the understanding the state Court of Appeals may issue a stop-work order," Berry said. "If they proceed, they are doing so at their own risk."

MRI at Belfair in July notified DHEC of its plans to appeal the state-issued permit for a fourth time. The company could petition the state the project pending a hearing on the case.

It's unclear, however, if the court would issue a stop-order or if MRI at Belfair will ask it to. Dr. Joe Borelli, the company's president and for comment.

Since Coastal Carolina opened in November 2004, its efforts to add the imaging equipment have been blocked by a series of appeals by MRI at Bluffton to appeal the permits on claims that the area doesn't need another MRI provider and the hospital doesn't see enough patients to justify the cost.

But after MRI at Belfair lost each of the three appeal decisions — two by DHEC and another by the state Administrative Law Court — DHEC has now given the go-ahead to install its long-awaited MRI unit.

"It's been a long process, but we're very pleased to have it in place soon," Deaton said. "To refuse the hospital the ability to provide this type of service is unthinkable."

For its first 20 months of operation, the hospital has been forced to take patients in need of MRI scans by ambulance to other hospitals or to the nearest MRI unit. The process costs upward of \$400 per trip and wastes valuable time in patient diagnosis and treatment, Deaton said.

In many after-hours emergency cases, patients have been taken across the state line into Georgia for imaging.

"Obviously, this has been reviewed three times now, and the State Health Plan says every hospital should have immediate access to MRI," said Berry. "It's an extremely important piece of diagnostic equipment that's essential to providing high-quality care to our patients."

Contact Peter Frost at 706-8169 or pfrost@islandpacket.com. To comment on this story, please go to islandpacket.com.

8/29/2006

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- (12) Discuss alternative facilities and/or services considered including the advantages and disadvantages of each alternative Include a statement as to why this project alternative was adopted.

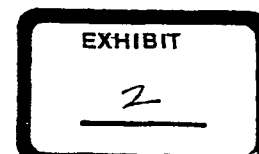
ALTERNATIVE NO 1 *Do not construct an addition for a fixed in-house MRI and utilize mobile services*

DISPOSITION NO 1 *REJECT Without an in-house MRI Coastal Carolina's acutely ill and emergent patients would need to be transported to an outside MRI provider which is costly risky and stressful All patients would incur delays in diagnosis and treatment as well*

ALTERNATIVE NO 2 *Construct an addition to the facility to house one fixed MRI*

~~DISPOSITION NO 2 *ACCEPT This is the most cost-efficient convenient, and safest option for the patients of Coastal Carolina. Not having to transport the acutely ill and emergent patients of Coastal Carolina to an off-site MRI scanner will provide these patients with the highest standard of care, in the most safe and cost-effective manner In-house MRI services at Coastal Carolina will avoid the inconvenience of traveling to an outside provider and avoid delays in diagnosis decision-making and treatment*~~

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- (13) Discuss any serious problems, such as costs, availability, or accessibility in obtaining care of the type proposed, experienced by patients in the absence of this project.

As previously discussed, an in-house fixed MRI is the most cost-effective and safest manner to meet the need for MRI services at Coastal Carolina.

**Absent of an onsite MRI at Coastal Carolina s will require its acutely ill and emergent patients to be transported by ambulance to outside providers for their MRI scans which will result in additional expenses for these patients as well as third party providers*

**Absent of an onsite MRI at Coastal Carolina can result in situations whereby more invasive diagnostic tests may be performed to achieve a diagnosis in a more timely fashion than would be more appropriately obtained by an MRI scan in a non-invasive manner*

~~Patient privacy is also an issue as Mobile MRI units do not offer dressing rooms for patients, making it necessary for those patients to change in another location, then be transported to the MRI unit, or transported to the MRI unit in hospital clothing~~

Have the availability of an in-house MRI will afford all patients at Coastal Carolina with the convenience of having their scans done at one location, thereby reducing any delay in diagnosis, decision making, and treatment in the safest, most cost-effective manner

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- (24) Discuss the availability of health manpower resources for the provision of the proposed services, including the contemplated program and plan for recruiting and training personnel.

Because Jasper County and the community of Ridgeland operated an acute care hospital for many years, Coastal Carolina will draw first on any local personnel who are qualified as hospital employees who may want to work for the new facility. Labor resources in or near Jasper County will always receive priority. Efforts to fill staff positions will be launched in nearby areas through active and early recruitment/advertising programs. Province Healthcare is completely geared up to recruit healthcare professionals and all needed support staff. A management team will be selected and onsite several months prior to the completion of the hospital and MOB. All Province Healthcare hospitals have salary/wage scales that are regionally competitive.

000641



February 6, 2004

Mr. Eric Deaton, CEO
Coastal Carolina Medical Center
108 Traders Cross, Suite 100
Bluffton SC 29910

Re. MRI Addition
Coastal Carolina Medical Center
Hardeeville, South Carolina
GTG Project No. 22066.6

Dear Eric:

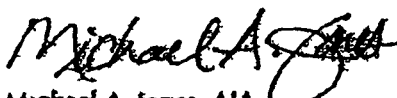
The square footages for the individual rooms, which comprise the MRI addition, are as follows

MRI Room	440 s.f.
Control Room	130 s.f.
Equipment Room	213 s.f.
Circulation/Exterior Walls	687 s.f.
TOTAL	1 470 square feet

Should you have any questions, please call me.

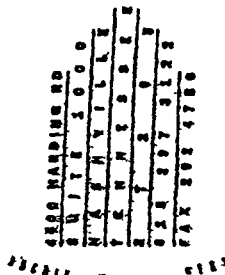
Sincerely,

GOULD TURNER GROUP, INC


Michael A. Jones, AIA
Principal

jcn

xc: File 22066.6/Owner



000642

Hardeeville SC
MRI Projection

	Forecasted 1st 12 months	Forecasted 2nd 12 months	Forecasted 3rd 12 months
Procedures			
Inpatient	275	303	333
Outpatient	825	808	898
Total	1 100	1,210	1 331
Average Charge per Proc	\$2,200	\$2,310	\$2 426
Revenues			
Inpatient	\$605 000	\$898 775	\$807 085
Outpatient	\$1,815 000	\$2,096,325	\$2,421,255
Total Gross Revenue	\$2,420,000	\$2,795,100	\$3,228,341
Revenue Deductions			
Charity Care	\$1,089 000	\$1,257 795	\$1,452,753
	\$24,200	\$27,951	\$32,283
Total Rev Deducts	\$1 089,000	\$1,257 795	\$1,452,753
Net Patient Revenue	\$1,331 000	\$1,537,305	\$1,775,587
Salaries & wages	\$141,856	\$146 112	\$150 495
Benefits	\$27,882	\$28,482	\$29 347
Contract Labor	\$0	\$0	\$0
Professional Fees	\$0	\$1	\$2
Supplies	\$166 375	\$182,163	\$221 948
Purchased Svcs	\$0	\$0	\$0
Utilities	\$8 643	\$9,075	\$9,529
Insurance	\$826	\$857	\$890
Rent/Lease	\$0	\$0	\$0
Repairs & Maint	\$0	\$120,400	\$120,400
Property Taxes	\$73,689	\$73 689	\$73,689
Bad Debt	\$121,000	\$138,755	\$181,417
Total Oper Exp's	\$539,858	\$710,344	\$797,817
EBITDA	\$791,150	\$826,961	\$1,008,071
Depreciation	\$138 333	\$278,887	\$278,887
Pre Tax Income	\$652,817	\$550,294	\$731,494
Income Taxes	\$281,127	\$220 118	\$282,881
Net Income	\$391,690	\$330,177	\$438,642

Assumptions:

Salaries - 3 1 FTEs @ \$22.00 per hour (3% increase per year)
 Benefits - 18.5% of Salaries - Pric Ytd @ 6/30/03 is 18.5%
 Contract Labor - none
 Physician Fees - none
 Supplies - 12.5% of net revenue
 Purchased Svcs - none
 Utilities - \$5.88 per square foot @ 1 470 square feet with 5% increase
 Insurance - \$2.35 per square foot @ 1,470 square feet with 5% increase
 Rent/ Lease - none
 Repairs & Maint - under contract year 1 / cost years 2 and 3
 Property Tax - 1st yr based on Tax Dept. estimates
 Bad Debts - 5% of gross revenue
 Depreciation - 1 800,000 / 7 5 = 240 000 + 1 100 000 / 30 = 36 666 Total: \$276 667 per year (half year in 1st year)
 Interest - none
 Income Taxes - 40%

000643

- More costly than fixed-site arrangement
- Compromises patient privacy as mobile units do not have private dressing rooms for patients
- Based upon projected utilization, use of a mobile unit would be impractical

Use of Mobile Unit

Area physicians and community leaders lend their support citing the following

- MRI unit is a standard of care for the only hospital within the primary service area supporting both a growing and aging population
- MRI unit is needed for the evaluation of patients with strokes, spinal abscesses, spinal cord injuries, and herniated disks.
- MRI unit serves acutely ill patients more efficiently and effectively
- MRI unit onsite reduces the inconveniences surrounding transportation issues facing local patient populations

Acceptability

Certificate of Need Summary Sheet

I. Project Description

Facility Name. Coastal Carolina Medical Center

Location of Facility Hardeeville, South Carolina

Project Description: Coastal Carolina Medical Center proposes to provide on-site MRI services by construction of an addition to the hospital to house one (1) fixed MRI system, a 1.5T, GE Signa. PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, is a new inpatient bed hospital currently under construction, located in Jasper County, South Carolina, along the extension of Highway 278 (CON No SC-02-29), in the vicinity of the intersection of Highway 278 extension and I-95. The project will be developed under the "Certificate of Need Standards for Magnetic Resonance Imaging (MRI)" in the 2003 South Carolina Health Plan.

Ownership. The proposed project will be owned by PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center

Profit or Non-profit status. The facility is for-profit.

II. Staff findings

A. The estimated total project cost is \$3 201 000 and is itemized as follows

Real Estate	\$ 0
Construction	\$ 1,000,000
Equipment	\$ 1,800,000
Architect's Fee	\$ 100,000
Other costs	\$ 301,000
Total project cost	\$ 3,201,000.

Total square footage 1,470

*Construction (\$1,000,000) Equipment Cost (\$1,800,000) \$2,800,000
per square foot \$1,905

*Note See Additional Information. Part A-11,B & D

000645

PARKER POE

PARKER POE ADAMS & BERNSTEIN LLP

Attorneys and Counselors at Law

David B. Summer, Jr.
Partner
Telephone: 803.253.8910
Direct: 803.253.8017
davidsummer@parkerpoe.com

1201 Main Street
Suite 1450
P.O. Box 1509
Columbia, SC 29202-1509
Telephone: 803.253.8000
Fax: 803.253.8017
www.parkerpoe.com

August 4, 2006

Via Hand Delivery
Ms. Victoria R. Tibshirany
Program Coordinator II
South Carolina DHEC
1777 St. Julian Place, Suite 201
Columbia, SC 29204

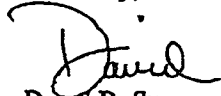
Re: SC-06-46
*Certificate of Need for the construction of an addition of one (1) fixed MRI
Coastal Carolina Medical Center*

Dear Ms. Tibshirany:

On behalf of Coastal Carolina Medical Center, this is to request authorization to utilize a mobile MRI at Coastal Carolina Medical Center until construction and installation of its fixed MRI, granted in the above-referenced CON application, is completed. In that regard, attached please find a copy of the proposed MRI Services Proposal/Agreement between Alliance Imaging Inc. and Coastal Carolina Medical Center for the utilization of a mobile MRI.

If you have any questions or need further information or clarification, please do not hesitate to contact me. With best regards, I am,

Sincerely,


David B. Summer, Jr.

DBSjr/ccq
Enclosure

COL 62367v1

EXHIBIT

3

CHARLESTON, SC
CHARLOTTE, NC
RALEIGH, NC
SPARTANBURG, SC

000646



MRI Services Proposal/Agreement

**Coastal Carolina Medical Center
1000 Medical Drive
Hardeeville, South Carolina 29927**

*Prepared for: Eric Deaton, C.E.O.
Hollis Tessmer, Director of Imaging*

*Prepared by Kevin Smith, Area Sales Manager, Southeast Region
office number 1-800-743-4729 mobile number 1-704-905-5131*

000647

PROPOSAL

Date July 20, 2006

Unit Description

1.5T Mobile MRI Unit

Service Schedule

Full time parked.

Term

Thirty-six (36) months, provided, however, Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house, fixed MRI system upon ninety (90) days prior written notice provided, further, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement.

Personnel

Option 1) Alliance shall be responsible for staffing the MRI system with appropriately trained technologist(s) based on Client's exam volume. Option 2) Client shall be responsible for staffing the MRI system with appropriately trained technologist(s) based on Client's exam volume

Medical Supplies

Client shall be responsible for all film, film processing, data storage supplies, contrast, contrast supplies, utilities, suitable pad and power, permits, state and local taxes, etc

Fees

Option A - staffed by Alliance
Flat monthly fee of \$65,000.00

Option B - staffed by Client.
Flat monthly fee of \$55,000.00

Commitment and Acceptance.

This proposal is subject to execution of a mutually acceptable agreement. This proposal is for informational purposes only and is not a binding legal obligation. This proposal is good for 30 days from receipt. Terms and conditions are subject to change after this 30-day timeframe.

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MRI SERVICES AGREEMENT

THIS MRI SERVICES AGREEMENT (the "Agreement") is made as of the first date written below between ALLIANCE IMAGING, INC., a Delaware corporation ("Alliance"), and

Coastal Carolina Medical Center
1000 Medical Drive
Hardeeville South Carolina 29927

a South Carolina not for profit corporation (the "Client")

1 EQUIPMENT AND SERVICES

1.1 The Unit. Alliance shall provide a Magnetic Resonance Imaging ("MRI") system described in Schedule A of this Agreement (the "Unit")

1.2 Personnel. If Fee Option A is selected, Alliance shall provide the services of one (1) technical personnel to operate the Unit as appropriate for Client's exam volume. Client agrees not to hire or contract with any Alliance employee during the term of this Agreement, including renewals, and for a period of one (1) year after MRI services cease (collectively the "Non-Solicitation Period"), without Alliance's prior written consent. Alliance and Client hereby agree that in the event of a breach of this provision damages shall be difficult to calculate and therefore agree Alliance shall be entitled to receive \$50,000.00. Alliance and Client agree that the aforementioned amounts are reasonable and shall constitute liquidated damages and not a penalty. Alliance shall ensure that all services provided by Alliance's technical personnel (including, but not limited to, any patient coordinator) shall be within the scope of his/her duties as technical personnel. Client agrees for as long as Alliance remains a JCAHO-accredited organization that Client shall not need to independently verify and shall not require any written documentation concerning the credentialing, education, training, evaluation, and competencies related to Alliance's technical personnel (including, but not limited to, any patient coordinator). In the event of a JCAHO survey of Client, Alliance shall have the personnel file of Alliance's technical personnel accessible upon request.

If Fee Option B is selected, Client shall provide the services of technical personnel to operate the Unit as appropriate for Client's procedure volume. Client's personnel shall be fully certified in the field of radiography by an institution recognized by the American Medical Association. Other conditions are as follows:

1. Client shall be responsible for any repairs of the Unit and ancillary equipment on the trailer that arise out of the actions or omissions of Client's employees or subcontractors.
2. Client shall be responsible for monitoring the Unit's cryogen level, and Client shall be responsible for any damage to the Unit arising from failure to maintain adequate cryogen levels.
3. Client shall comply with all checklists supplied to Client by Alliance personnel to operate the Unit, and Client shall be responsible for any damage to the Unit arising from failure to do so.
4. Client shall consult with Alliance's operations personnel no less than once per week concerning the operating condition of the Unit.

1.3 Maintenance. Alliance shall use reasonable efforts to cause the Unit to be maintained in good operating condition. Alliance may do so through the purchase of a maintenance contract from the MRI Unit manufacturer or otherwise, in its discretion. Alliance shall provide cryogens.

2 SCANNING ACTIVITIES

2.1 Unit. Client shall prepare and maintain a safe and suitable site for the Unit which complies with the manufacturer's specifications (which shall be provided by Alliance) and all applicable laws and regulations. All site costs (for example, costs of tractor/trailer access and egress, power and telephone expenses) shall be Client's responsibility. The Unit shall be located at the address first-above listed (the "Unit Location"). Client represents and warrants to Alliance that it currently owns or has authorization to site the Unit at the Unit Location. Further, Client further warrants and agrees that, at all times during the term of this Agreement, Client shall maintain the authorization or ownership to site the Unit at the Unit Location. Client shall indemnify and hold Alliance harmless from any damages or liability arising out of breach of the representations and warranties in this Section 2.1. Client may request in writing to Alliance that the Unit Location be moved, in which case any such move shall be subject to Alliance's prior approval, all of the obligations under this Section 2.1 shall apply to the new Unit Location.

2.2 Power. Client shall provide electrical power including a dedicated power line with 200 amps and 480 volts of three-phase power. Client shall promptly report any problems with power (for example, sags or surges) to Alliance. Client shall provide the power line, a lockable disconnect box and receptacle within twenty-five (25) feet of the electrical receptacle on the Unit. Client is responsible for damage to the Unit due to power that does not meet specification. Client is responsible for maintaining the power plug and keeping it in good operating condition with quarterly inspection.

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2.3 Phone and Connectivity Client shall provide the Unit with a voice telephone line, a dedicated fax compatible telephone line and a RJ-45 ethernet broadband line with an automatic IP address assignment using Dynamic Host Control Protocol ("DHCP") and a proxy-less connection to the internet.

2.4 Operation The Unit shall be operated only by employees or subcontractors of Alliance or Client.

2.5 Medical Director Client shall appoint a qualified and licensed physician to act as Medical Director hereunder along with another such physician to act in his absence (the "Medical Director"). Client shall be solely responsible for all activities which constitute the practice of medicine (for example, providing medical advice to patients in connection with MRI scans and the injection of contrast agents). Client shall obtain any written consents from patients that are required by the USFDA, state or local law or prudent medical practice. Client shall have full responsibility for all medical care and advice provided to patients. All medical care shall be provided under the ultimate supervision of the Medical Director.

2.6 Medical Supplies, Emergency Care Client shall provide all medical supplies which may be required (including film and film processing, gowns, medications and contrast agents) and shall ensure the immediate availability at all times of equipment and personnel to treat patients who require emergency or other medical care (including a cardiac monitor, a fresh oxygen supply, an aspirator and a defibrillator).

2.7 Patient Handling. Client shall be responsible for the prompt and orderly pick up and delivery of patients to and from their designated areas.

2.8 Patient Log If Fee Option A is selected, Alliance shall maintain a log of all scans performed on the Unit. Client shall be provided with copies of the log upon request. If Fee Option B is selected, Client shall maintain a log of all scans performed on the Unit. Client shall be provided with copies of the log upon request.

2.9 Modifications Client shall not modify or alter the Unit without Alliance's prior written consent. Client shall not allow any portion of the Unit to become permanently attached to real property. Client agrees to execute any documents evidencing a first priority security interest or mortgage or assignment in favor of any party providing financing for the Unit.

2.10 Scheduling Client shall use all reasonable efforts to schedule its patients consecutively from the beginning of each service day to minimize unutilized scanning time and to prescreen patients for conditions unsuitable for MRI examination.

2.11 Notification of Physicians, Use of Service Client shall notify its staff of physicians of the availability of the Unit and shall use all reasonable efforts to encourage physicians to utilize the Unit for their patients' needs.

2.12 Exclusivity Client agrees to use Alliance solely for all of its MRI needs except for an emergency where the use of Alliance's service is impractical. Client on behalf of itself, its subsidiaries and/or corporate affiliates (including but not limited to any entity in which Client has an ownership interest) agree during the term of this Agreement, not to own, permit, lease, manage or invest in any MRI system or engage any entity besides Alliance to provide Client with MRI services.

2.13 Document Retention Alliance and Client agree to retain books, documents and records required under the Omnibus Reconciliation Act of 1989 and other applicable laws and regulations governing governmental reimbursement of medical care expense, in all cases, for the periods specified in such laws and regulations.

2.14 Licenses Client shall obtain and maintain all required licenses and regulatory approvals necessary to operate the Unit at Client's premises. Alliance shall reasonably cooperate to assist Client to obtain such licenses and approvals.

2.15 Taxes. All taxes, if any (for example, sales use or similar taxes), on the services hereunder shall be the responsibility of Client.

2.16 Professional Interpretations. Client shall engage a radiologist to provide interpretations of MRI exams for Client's patients. Alliance shall not be responsible for providing any such interpretations.

3 FEES AND BILLING

Client shall pay Alliance fees in accordance with Schedule A. All fees for a billing period shall be due and payable within fifteen (15) days of the last day of such period. Alliance shall invoice Client twice each month. Client shall pay a late fee of one and one-quarter percent (1-1/4%) or the maximum legal rate, whichever is less, on all balances outstanding more than fifteen (15) days beyond the due date. Fees may be adjusted on each anniversary of the commencement date by the percentage increase for the Medical Care Services component of the Consumer Price Index for all Urban Consumers (CPI-U) as recorded by the Department of Labor Index for the then most recently available twelve month period. Client shall be responsible for all billings to Client Patients and/or third party payors for MRI.

exams performed on the Unit. Client's obligation to pay Alliance compensation in accordance with the provisions of Schedule A shall not be dependent upon Client's billing and collection of patient and/or third party payor accounts receivable. Alliance shall not bill, and Alliance shall not cause bills to be submitted to any patient or third party payor for MRI exams performed on the Unit. Both parties agree that Alliance is providing its services set forth on this agreement "under arrangement" with Client, such that upon Client's receipt of payment from the Medicare program for MRI exams performed in the Unit, the liability of the beneficiary or any other person to pay for such services shall be fully discharged.

4 TERM

The term of this Agreement shall be as specified on Schedule A.

5 SCHEDULING

Alliance shall make the Unit available to Client according to the schedule specified in Schedule A.

6 INSURANCE, INDEMNITY

6.1 Insurance

a) Alliance. Alliance shall maintain insurance covering all risks of physical loss or damage to the Unit, comprehensive general liability and professional liability covering the conduct of its employees, all in amounts and subject to deductibles that are customary in the industry.

b) Client. Client shall maintain comprehensive general and professional liability insurance covering the Client, its employees, staff and physicians and shall require the Medical Director and other physicians who interpret or report on procedures performed on the Unit to maintain professional liability insurance. All such insurance shall be in amounts and with deductibles that are customary in the industry. Client shall bear the risk of loss or damage to the Unit from Client's negligent actions or omissions.

6.2 Indemnities. Each party hereto shall indemnify and hold the other party harmless from and against any and all liability, loss, damage, cause of action, cost or expense (including reasonable attorney's fees) arising out of or in any way connected with, any negligent or intentional act or failure to act or any other wrongful conduct by the respective party, its members, agents, employees or subcontractors in the performance of its duties under this Agreement.

7 GENERAL

7.1 Independence. Alliance is an independent contractor of Client, and this Agreement is a contract for services, not a lease. No agency, employment, partnership or joint venture is intended to be created by this Agreement. Neither Alliance nor Client shall take any action or position which is inconsistent with those descriptions of the relationship.

7.2 Remedies. Alliance shall not be responsible for failure to provide services as a result of conditions caused by Client. Alliance shall not be liable for consequential or special damages under any circumstances or any damages caused by conditions not within Alliance's reasonable control.

7.3 Waiver. Waiver of any breach shall not be deemed a waiver of the same provision in the future or the waiver of any other provision.

7.4 Notices. All notices and other communications shall be in writing and shall be given in person, by registered or certified mail, by overnight delivery, or by telecopy (in the case of telecopy, if written confirmation of sending is retained). The initial addresses and telecopy numbers of the parties are listed next to their signatures below. Notices to Alliance shall be sent to the attention of General Counsel. Either party may change its address or telecopy number for notice by notifying the other by a permitted method of giving notice. No objection may be made to a permitted method of giving notice. Under no circumstances shall any notice or communication be considered valid notice unless such notice or communication fully complies with the requirements of this Section 7.4.

7.5 Governing Law. This Agreement shall be governed by the law of the state where services are performed.

7.6 Entire Agreement; Amendment. This Agreement is the parties' entire understanding and supersedes all prior agreements, oral and written with respect to the subject matter of this Agreement. This Agreement may not be amended except by written agreement of the parties. No handwritten changes to this Agreement shall be enforceable unless such changes are initialed by both parties to this Agreement.

7.7 Successors and Assigns. Alliance may assign this Agreement. Client may not assign this Agreement without the prior written consent of Alliance. This Agreement shall be binding on and inure to the benefit of the parties and their respective successors and assigns. Client agrees that this Agreement may be performed in whole or part, by a subsidiary of Alliance and further consent shall not be required. Alliance may also assign the proceeds of this Agreement. Client shall require any successor (whether direct or indirect by purchase, merger, reorganization,

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consolidation, sale of property or stock, liquidation, or otherwise) to all or a substantial portion of its assets, by agreement in form and substance reasonably satisfactory to Alliance to expressly assume and agree to perform this Agreement.

7.8 Third Parties This Agreement does not convey any rights to any third parties.

7.9 Attorney Fees In any dispute arising out of this Agreement (whether litigation is involved or not) or in the event that either party must take action to collect fees or enforce rights, the prevailing party shall be entitled to reimbursement of its expenses, including court expenses and lawyers' fees.

7.10 Certain Events Neither party shall be deemed in breach if its failure to perform under this Agreement is caused by conditions beyond its reasonable control (for example, fire, natural disaster, labor strikes, and so on).

7.11 Confidentiality Client acknowledges and agrees that this Agreement is highly confidential and proprietary to Alliance and Client agrees that neither it, nor any of its employees, physicians or representatives, shall disclose in any manner the terms, provisions, pricing or any other information contained in this Agreement (or any related proposal) to any third party.

7.12 Accreditation Alliance and Client agree to set standards of care and quality that comply with the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) and the American College of Radiology (ACR). Alliance and Client mutually shall cooperate in all phases of applying, scheduling, preparing and executing surveys or inspections by the JCAHO and ACR, as needed. Both parties agree to work cooperatively to implement changes, correct deficiencies or establish policies required and/or recommended by the inspecting agencies.

7.13 Policies and Procedures. Client agrees that Client shall comply with all of Client's Policies and Procedures, and Client agrees to indemnify and hold Alliance harmless from and against any and all liability, loss, damage, cause of action, cost or expense (including reasonable attorney's fees) arising out of, or in any way connected with Client's failure to fully comply with Client's Policies and Procedures.

7.14 Change in Reimbursement. In the event that health care reform causes a significant decline in Client's MRI reimbursement to a level that Client can demonstrate that it is impossible for Client to break even on the total MRI service utilizing the direct costs of the MRI service, Client may provide written notice to Alliance of such circumstance. Client and Alliance agree to then meet to decide upon a solution that shall be fair and equitable to Client and Alliance.

7.15 Severability If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws, that provision shall be fully severable and this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision never comprised a part of this Agreement. The remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance. Furthermore, a provision as similar in its terms to the illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable shall be added to this Agreement automatically to replace the illegal, invalid or unenforceable provision.

8 TERMINATION

8.1 Termination

a) **Default.** Alliance or Client may terminate this Agreement if the other materially defaults in the performance of any covenant, term or provision of this Agreement and the default is not cured within sixty (60) days following provision of notice to the defaulting party.

8.2 Termination, Alliance. Alliance may terminate this Agreement or suspend service if:

a) **Payment Default.** Client fails to make any payment to Alliance when due and such failure continues for ten (10) days following notice to Client. In the case of any payment default, Alliance may, without notice, cease providing services hereunder after three (3) days following a payment due date should it feel insecure with respect to Client's ability or willingness to make payment.

b) **Profitability.** Alliance is unable to realize a profit on the services provided hereunder, provided that the parties have negotiated in good faith to modify the terms of this Agreement to eliminate such condition and a period of sixty (60) days has elapsed since Alliance originally notified Client of such condition. In lieu of termination, Alliance may reduce the number of days of service provided.

c) **Bankruptcy.** Client commits or suffers (voluntarily or involuntarily) an act of bankruptcy, receivership, liquidation or similar event.

8.3 Termination, Client. Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house, fixed MRI system upon ninety (90) days prior written notice, provided, however, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement. Client agrees to give Alliance first right of refusal to provide such fixed services.

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8.4 Client's Default. Upon Client's default, Alliance may (i) declare the entire balance of all fees and other amounts due including the sum of all fees and other amounts payable during the balance of the term of this Agreement, or (ii) take any action at law or in equity to collect payments then due and to become due, or to enforce performance of specific obligations. Alliance and Client hereby agree that, in the event of Client's default of this Agreement and Alliance's subsequent termination of this Agreement, damages shall be calculated by using the greater of (i) the average monthly scan volumes by Client over the twelve-month period (or such lesser period if Alliance did not provide at least 12 months of service to Client prior to termination) immediately prior to termination of this Agreement or (ii) the scan volume benchmarks set forth in Schedule A.

The foregoing remedies are in addition to any provided by law. Neither party shall have obligation to exercise any remedy and the exercise of the remedy shall not release the parties for any obligation hereunder. All remedies shall be cumulative, and action on one shall not constitute an election or waiver of any other right to which either party may be entitled. In addition, the defaulting party shall pay the other parties reasonable attorney's fees together with an amount equal to all expenses paid or incurred in the enforcement of any rights or privileges hereunder.

9 COMPLIANCE WITH LAWS

9.1 Compliance with Current Laws. The parties expressly agree that it is their understanding and intent that this Agreement, including any Exhibits or other attachments, complies as of the effective date hereof with applicable federal and state statutes and regulations including the Stark Law 42 U.S.C. Section 1395nn and the Anti-Kickback Statute (collectively referred to as "Laws").

9.2 No Inducement. This Agreement has been negotiated in good faith through arms length negotiations. Nothing contained in this Agreement, including any compensation paid or payable is intended or shall be construed (i) to require, influence or otherwise induce or solicit either party regarding referrals of business, or recommending the ordering of any items or services of any kind whatsoever to the other party or any of its affiliates, or to any other person, or otherwise generate business between the parties or (ii) to interfere with a patient's right to choose his or her own health care provider or with a physician's medical judgment regarding the ordering of any items or services.

9.3 Change in Law. Neither party shall make or receive any payment or take any other action required or permitted hereunder, if any judicial decision, legislative action, regulatory or other administrative interpretation, whether federal or state, would render unlawful the conduct of either party hereunder ("Change in Law"). In the event of such a Change in Law, the parties shall be required to act in good faith to restructure the business arrangement between the parties to conform with then existing Laws. If the parties have not reached an agreement regarding the material terms of the restructured business arrangement within thirty (30) days following the date both parties are on

9.4 No Federal Health Care Program Exclusion. Each party represents and warrants to the other party that: (i) the representing party is not currently excluded, debarred, or otherwise ineligible to participate in the Federal health care programs as defined in 42 U.S.C. Section 1320a-7b(f) (the "Federal health care programs"), and (ii) the representing party is not aware of any circumstances which may result in the representing party being excluded from participation in the Federal health care programs. This shall be an ongoing representation and warranty during the term of this Agreement, and each party shall immediately notify the other party of any change in status of the representation and warranty set forth in this Section. In the event a party becomes excluded, debarred or otherwise ineligible to participate in the Federal health care programs, that party shall be considered in default of this Agreement, and the other party may immediately terminate this Agreement for cause.

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SCHEDULE A**1 UNIT DESCRIPTION**

5T mobile MRI system.

If the Unit described above is deemed to be unavailable, in Alliance's sole discretion a reasonably comparable Unit may be substituted

2 FEES

Option A - staffed by Alliance - six (6) days per week, Monday through Friday 8 00am to 5 00pm and Saturday 8 00am to 12 00pm (noon) Initial

Flat monthly fee of \$65,000 00

Option B - staffed by Client. Initial

Flat monthly fee of \$55,000 00

3 SCHEDULING

Alliance shall make the Unit available to the Client and Client agrees to accept the Unit the following number of day(s) of each week full time parked

4 TERM

The initial term of this Agreement shall be for thirty-six (36) months commencing on the date on which services begin (the "Commencement Date") expected to be on or about September 2006, provided, however, Client may elect to terminate this Agreement upon commencement of services with a Client solely owned, in house, fixed MRI system upon ninety (90) days prior written notice, provided, further, that such notice may be delivered no earlier than the sixth (6th) month following Commencement of this Agreement. If delivery of the Unit is delayed notwithstanding Alliance using all reasonable efforts to prevent the delay the Commencement Date shall be extended coterminously with the delay. The term of the Agreement shall also be extended coterminously with any period(s) services are suspended pursuant to section 8.2. After each term, this Agreement shall automatically renew for successive terms, each of which shall be equal to the initial term unless either party notifies the other to the contrary in writing at least 180 days prior to scheduled expiration. In the event this Agreement terminates and Client continues to accept services the terms and conditions of this Agreement shall apply to the provision of services

THIS AGREEMENT IS CONTINGENT UPON ALLIANCE'S BOARD OF DIRECTORS APPROVAL AND
SUBJECT TO UNIT AVAILABILITY

Alliance and Client have duly executed this Agreement as of date and year written below

ALLIANCE IMAGING, INC.
a Delaware corporation

Signature _____
Printed Name Christopher J Joyce
Title Senior V.P., General Counsel & Secretary
Date _____
Address _____
1900 South State College Boulevard, Suite 600
Anaheim California 92806
Telephone No (714) 688-7100
Facsimile No (714) 688-7111

COASTAL CAROLINA MEDICAL CENTER
a South Carolina not for profit corporation

Signature _____
Printed Name _____
Title _____
Date _____
Address _____
1000 Medical Drive
Hardeeville, South Carolina 29927
Telephone No _____
Facsimile No _____

Return Executed Agreement to Contracts Administration, Alliance Imaging Inc. 15 Massiria Drive Suite 202 Berlin, Connecticut 06037

000655

Aug-24-2006 03:58pm From: SC DHEC

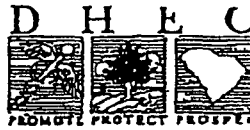
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Mark B. Kent
Vice Chairman

L. Michael Blackmon
Secretary



C. Ed Hunter, Commissioner

Promoting and protecting the health of the public and the environment

Edwin H. Cooper, III

Carl L. Bezel

Steven G. Kiser

Coleman F. Buckhouse, MD

August 4 2006

Re: SC-06-46
Construction for the addition of a 1.5 Tesla Magnetic Resonance Imaging (MRI)
unit
Coastal Carolina Medical Center
Hardeeville, South Carolina

David B. Summer, Jr.
Parker Poe Adams & Bernstein, LLP
1201 Main Street, Suite 1450
Columbia, SC 29202-1509

Dear Mr. Summer:

I am in receipt of your letter dated August 4, 2006 regarding the above-referenced project. According to this correspondence, Coastal Carolina Medical Center requests full-time use of a mobile MRI unit for the interim period in which the fixed MRI construction and installation will occur. This letter represents approval for temporary full-time use of a mobile MRI unit during the interim period of the fixed MRI construction and installation as outlined in your August 4 2006 letter.

Should you have any questions, please contact me at (803) 545-4200.

Sincerely,

Victoria R. Tibshirany

Victoria R. Tibshirany
Bureau of Health Facilities and Services Development

000656

Aug-24-2006 03:58pm From-SC 1

803 545 4

1-828 P 012/012 1-496

BOARD
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Vice Chairman

L. Michael Blackman
Secretary



- L. Ed Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

Edwin H. Co

Carl I

Steven G

Coleman E. Bodino

August 4, 2006

Re. SC-06-46

Construction for the addition of a 1.5 Tesla Magnetic Resonance Imaging (MRI)
unit

Coastal Carolina Medical Center
Hardeeville, South Carolina

David B. Summer, Jr.
Parker Poe Adams & Bernstein, LLP
1201 Main Street, Suite 1450
Columbia, SC 29202-1509

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Should you have any questions, please contact me at (803) 545-4200.

Sincerely,

Victoria R. Tibshirany

Victoria R. Tibshirany
Bureau of Health Facilities and Services Development

EXHIBIT

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SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street - Columbia, SC 29201 Phone: (803) 898-3432 - www.scdhec.gov

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BOARD:
Elizabeth M. Haggard
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kluwer
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:
Henry C. Scott
Paul C. Aughry III
Glenn A. McCall
Coleman F. Buckhouse, MD

S.C. Board of Health and Environmental Control - Phone: (803) 898-3309 Fax: (803) 898-3393

January 8, 2007

Via U.S. Mail Certified and Electronic Mail

M. Elizabeth Crum, Esq
Attorney for MRI at Belfair
McNair Law Firm P.A.
Post Office Box 11390
Columbia, SC 29211

David B. Summer, Jr., Esq
Faye A. Flowers, Esq
Attorneys for Coastal Carolina Medical Center
Parker Poe Adams & Bernstein LLP
Post Office Box 1509
Columbia, SC 29202

Via Inter-agency Mail Service

Ashley C. Biggers, Esq
Nancy S. Layman, Esq
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE. Order of Remand - MRI at Belfair, Petitioner, v South Carolina
Department of Health and Environmental Control and Coastal Carolina
Medical Center, Respondents, Docket No. 06-ALJ-07-0714-CC

Dear Counsel:

The S.C. Board of Health and Environmental Control appreciates the remand of this case to the Board by the Administrative Law Court. However, the Board will not be able to conduct a final review conference in this case because of the 60-day time limit provided in S.C. Code Section 44-1-60.

The Order of Remand provides, "for purposes of remand, Belfair is deemed to have filed its request for Board review under § 44-1-60(E) on September 8, 2006." Section 44-1-60(F) gives the Board only 60 days from the date of receipt of the request for final review to conduct a final review conference. Sixty days from September 8 is November 7. The Order of Remand was issued on October 18, and the next Board

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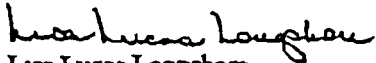
EXHIBIT

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meeting was November 9 which was after the deadline for holding a final review conference in this case.

The Board conducted a meeting via conference call on November 17, 2006, to decide on the handling of pending cases. The Board decided at that meeting not to conduct a final review conference on the above-referenced matter. The minutes of the conference call meeting of November 17, 2006, are attached.

Sincerely


Lisa Lucas Longshore
Clerk

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BOARD:
Elizabeth M. Hagood
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kisner
Secretary



C. Earl Hines, Commissioner

Promoting and protecting the health of the public and the environment.

BOARD
Henry C. Scott
Paul C. Augberry, II
Glenn A. McCall
Coleman F. Buckhouse, MD

S.C. Board of Health and Environmental Control Conference Call

November 17, 2006

The Board of Health and Environmental Control met on Friday, November 17, at 10 00 a.m. in the S C Department of Health and Environmental Control Boardroom, 2600 Bull Street, Columbia, S C, via conference call. (Attachment 0-1)

The following members were in attendance via conference call.

Elizabeth M. Hagood, Chair
Charleston

Edwin H. Cooper, III, Vice-Chair
Charleston

Steven G. Kisner, Secretary
Aiken

Henry C. Scott
Allendale

Glenn A. McCall
Rock Hill

Coleman F. Buckhouse, MD
Florence

Also in attendance were Mr. Carl Roberts, General Counsel, Ms. Lisa Longshore, Clerk, and Ms. Pamela G. Hawley, Executive Assistant to the Commissioner, and guests.

Mr. Roberts stated notice of this meeting has been provided to all persons, organizations and news media, which have requested notification, as required by section 30-4-80(e) of the South Carolina Code of Laws.

Item 1: Requests for Final Review by DHEC Board – 2006 Act No. 387

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SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
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Ms Hagood stated that the Board members had reviewed the requests for review before the Board and that her recommendation would be for the Board to conduct Final Review Conferences in the following matters.

Docket No. 06-RFR-55, BB&L Landfill, and,
Docket No. 06-RFR-58, Friends of Congaree Swamp, SC Wildlife Federation and
Audubon South Carolina v SC Department of Health and Environmental Control
and S C. Department of Transportation.

Mr Cooper recused himself in Docket No 06-RFR-55

After discussion, *Dr. Buckhouse moved, seconded by Mr McCall, to adopt the Chair's recommendation to hold a Final Review Conference on Board Docket Nos. 06-RFR-55 and 06-RFR-58 on December 14 at the monthly Board meeting and not to hold a Final Review Conference on Board Docket Nos. 06-RFR-56, -57, -59, -60, -61, -63, -64 and not to hold a review conference on the Order on Remand from the ALC in MRI at Belfair vs. SCDHEC and Coastal Carolina Medical Center. Approved.*

Mr. Scott moved, seconded by Mr Cooper, to adjourn. Approved.

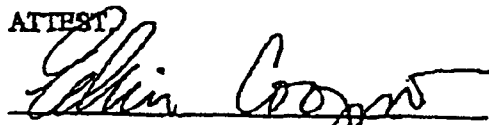
All referenced attachments are made a permanent part of these minutes.

Respectfully submitted,


Steven G. Kisner, Secretary of the Board

Minutes approved this 14th day of December 2006

ATTEST


Edwin H. Cooper, III, Vice Chairman

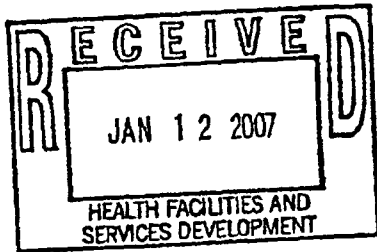
Attachments

- 0-1 Agenda
- 1-1 Requests for Review – Docket Nos 06-RFR-55 -56, -57, -58, -59, -60 -61, -63, -64 and Order on Remand, MRI at Belfair vs. SCDHEC and Coastal Carolina Medical Center

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL



The Honorable Ralph King Anderson, III,
Administrative Law Judge

Docket No 04-ALC-0399-CC

MRI at Belfair LLC

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

Respondents

**MOTION OF APPELLANT MRI AT BELFAIR, LLC
FOR CLARIFICATION OF RESPONDENTS' DESIGNATIONS
OF MATTER TO BE INCLUDED IN RECORD ON APPEAL**

Appellant MRI at Belfair, LLC ("Belfair") hereby moves this Court for an order directing Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") and Respondent Coastal Carolina Medical Center ("CCMC") to clearly identify the portions of the transcript of the hearing before the Administrative Law Court on August 23-25, 2005 pursuant to Rule 209(b), SCACR which Respondents would like included in the Record on Appeal Respondents filed their

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respective Designations of Matter to Be Included in the Record on Appeal ("Designations") on December 18, 2006. DHEC designated pages 27-639 of the hearing transcript and CCMC designated pages 28-639, effectively the entire hearing transcript except for opening arguments and the discussion of submittal of proposed orders.

Appellant Belfair believes that Respondents' Designations to the administrative hearing transcript include matter which is not relevant to the appeal and the Designations do not satisfy the requirements of Rule 209(b) in that the Designations do not "clearly" identify what the party desires to have included in the Record on Appeal and the Designation may only propose to include portions of the transcript which may be properly included in the Record on Appeal. Rule 209(b), SCACR (emphasis added). As an example, Appellant's counsel notes that pages 541-558 of the hearing transcript are a discussion among the Administrative Law Judge and counsel with respect to deposition testimony and the South Carolina Rules of Civil Procedure and the Rules of Procedure of the Administrative Law Court pertaining to the submission of deposition testimony. Clearly, these eighteen (18) pages of discussion are not pertinent to the issues on appeal.

Another example is that there were numerous objections to evidentiary matters and considerable discussion regarding a number of those objections. None of those objections are the subject of the appeal herein and are clearly not pertinent to the issues before this Court.

For the foregoing reasons, Appellant Belfair moves this Court for an order directing Respondents to designate with some specificity the portions of the

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administrative hearing transcript they would like included in the Record on Appeal and for the filing of the Record on Appeal to be thirty (30) days from the date the Court so determines that the amended Designations should be filed

Respectfully submitted,

M Elizabeth Crum, SC Bar No 1486
A Victor Rawl Jr SC Bar No 9261
Anail B Kirk SC Bar No 71101
McNAIR LAW FIRM, P.A
Post Office Box 11390
Columbia South Carolina 29211
(803) 799-9800
lcum@mcnair net
vrawl@mcnair net
akirk@mcnair net

By 
M Elizabeth Crum

Attorneys for Appellant MRI at Belfair, LLC

January 5 2007

Columbia South Carolina

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

Docket No 04-ALC-0399-CC

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

Respondents

CERTIFICATE OF SERVICE

I, Stephen E Taylor, do hereby certify that I have this date served one (1) copy of the Motion of Appellant MRI at Belfair LLC for Clarification of Respondents' Designations of Matter to Be Included in Record on Appeal upon the following counsel of record by hand delivering said copy to the following address

Nancy S Layman, Esquire
Ashley C Biggers, Esquire
SCDHEC
Office of General Counsel
2600 Bull Street, 3rd Floor
Columbia, South Carolina 29201

David B Summer, Jr, Esquire
Susan B Lipscomb, Esquire
Parker Poe Adams & Bernstein
1201 Main Street, Suite 1450
Columbia, South Carolina 29201


Stephen E Taylor, Courier
McNair Law Firm, P.A
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

January 5, 2007

Columbia South Carolina

COLUMBIA 877550v1

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MCNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

www.mcnaire.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803)799-9800
FACSIMILE (803)376-2219

January 3, 2007

Hand Delivered

RECEIVED

JAN 9 '2007

DHEC
OFFICE OF GENERAL COUNSEL

The Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

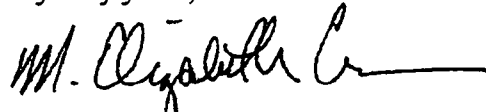
Re *MRI at Belfair LLC v SCDHEC and Coastal Carolina Medical Center*
(Docket No 04-ALC-0399-CC)

Dear Mr Richstad.

Enclosed herewith for filing with the Court please find the original Initial Reply Brief of Appellant MRI at Belfair, LLC in the above-captioned case

By copy of this letter and by Certificate of Service accompanying the Reply Brief, I am serving all counsel of record. Should you have any questions with respect to this filing, please do not hesitate to contact me.

Very truly yours,



M Elizabeth Crum

Enclosure

cc David B Summer, Jr., Esquire (via hand delivery)
Susan B Lipscomb, Esquire (via hand delivery)
Nancy S Layman, Esquire (via hand delivery)
Ashley C Biggers, Esquire (via hand delivery)

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

Docket No 04-ALC-0399-CC

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

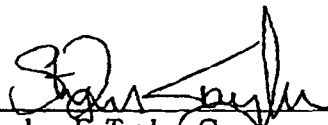
Respondents

CERTIFICATE OF SERVICE

I Stephen E Taylor, do hereby certify that I have this date served one (1) copy of the
Initial Reply Brief of Appellant MRI at Belfair LLC upon the following counsel of record by
hand delivering said copy to the following address

Nancy S Layman, Esquire
Ashley C Biggers Esquire
SCDHEC
Office of General Counsel
2600 Bull Street, 3rd Floor
Columbia, South Carolina 29201

David B Summer Jr Esquire
Susan B Lipscomb, Esquire
Parker Poe Adams & Bernstein
1201 Main Street, Suite 1450
Columbia, South Carolina 29201


Stephen E Taylor, Counselor
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

January 3, 2007

Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

The Honorable Ralph King Anderson, III,
Administrative Law Judge

Docket No 04-ALC-0399-CC

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center

Respondents

INITIAL REPLY BRIEF OF APPELLANT
MRI AT BELFAIR, LLC

M Elizabeth Crum, SC Bar No 1486
A Victor Rawl, Jr , SC Bar No 9261
Anail B Kirk, SC Bar No 71101
McNAIR LAW FIRM P.A
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
lcrum@mcnair.net
vrawl@mcnair.net
akirk@mcnair.net

Attorneys for Appellant MRI at Belfair LLC

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- II THE CON ACT DOES NOT AUTHORIZE DHEC TO TREAT HOSPITALS DIFFERENTLY THAN OTHER HEALTH CARE FACILITIES OR PROVIDERS IN PROJECTING NEED FOR MRI SERVICES OR EQUIPMENT
- III THE BOARD EXCEEDED IT STATUTORY AUTHORITY BY FINDING THAT, AS LONG AS CCMC MET THE "PROJECTION OF NEED" STANDARD IN THE PLAN, IT DID NOT HAVE TO PROVIDE COMPLIANCE WITH PROJECT REVIEW CRITERIA
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Koenig V South Carolina Dept of Public Safety, 480 S E 2d 98 (Ct App
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Laird v Nationwide Ins Co, 243 S C 388, 134 S E 2d 206 (1964)

Medlock v 1985 Ford F-150 Pick Up 308 S C 68 417 S E 2d 85 (1992) 9

State v Burton, 301 S C 305, 391 S E 2d 583, 584 (1990)

State v Gaillard, 11 S C 309 (1879)

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Osteen v A C L R R Co 119 S C 438 112 S E 352 359 (1922)

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S C Code Ann § 1-23-600

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S C Code Ann § 1-23-380(A)

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S C Code Ann § 44-7-220

OTHER

Statutes and Statutory Construction 6th Edition (2000) § 46 05

REPLY TO STATEMENT OF THE CASE

In its Statement of the Case Coastal Carolina Medical Center ("CCMC") states that MRI at Belfair (Belfair" or "Appellant") is a "private provider of MRI services Belfair is a South Carolina corporation whose physicians see and diagnosis any person referred for medically appropriate diagnosis CCMC is a for profit hospital Neither Belfair nor CCMC are governmental entities, but CCMC is owned by a publicly traded corporation

CCMC also erroneously states that Judge Anderson's order granted the "Hospital's motion for summary judgment as to the sufficiency of 2003 State Health Plan ["Plan"]) MRI standard for hospitals and further found that such standard encompassed other standards such as community need documentation distribution (accessibility), acceptability and cost containment " Judge Anderson's order granted *partial* summary judgment not summary judgment. Importantly, "community need documentation distribution (accessibility), acceptability and containment" are not Plan standards as CCMC asserts but are Project Review Criteria¹ which must be identified in the Plan pursuant to the requirement of S C Code Ann § 44-7-180(B)(4) (Rev 2002) and with which CCMC's application must comply pursuant to the requirement of S C Code Ann § 44-7-210(C) (Rev 2002)

Finally, CCMC's Statement of the Case incorrectly contends that S C Code Ann § 44-7-220 (2002) was neither expressly or impliedly repealed by Act No 387 It was repealed by Act 387

¹ See DHEC Initial Brief Statement of the Case page 2 stating that the ALC ruled there is no need to show that CCMC met the Project Review Criteria outlined in the Plan and in 24A S C Code Ann Regs 61-15 § 803 (Supp 2005)

ARGUMENTS

Belfair submits these arguments in reply to the Respondents Initial Briefs

I THE STATE PLAN DOES NOT CONTAIN "PROJECTIONS OF NEED" FOR MRI SERVICES AS REQUIRED BY SECTION 44-7-180(B)

Section 44-7-180(B)(2) of the State Certificate of Need and Health Facility Licensure Act ("CON Act") provides that "the Plan, at a minimum must include projections of need for additional health care facilities beds health services and equipment. CCMC is a health care facility "undertaking a capital expenditure which is associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the Plan" DHEC Initial Brief p 3 Clearly the Plan must contain a projection of need for the additional health service, i.e. MRI not just a statement that each hospital should have an MRI Both CCMC and the Department argue that the Plan does not violate S C Code Ann § 44-7-180(B)(2) (2002) and 24A S C Code Reg 61-15 § 106 (Supp 2005) because the statement that "[e]ach hospital should have at least one MRI unit available for diagnosis is a "projection of need" that a hospital must have a MRI The clear language of Section 44-7-180(B)(2) requires the Plan to contain projections of need inter alia for new or additional health care facilities, for health services such as MRI services and for medical equipment to be used for treatment or diagnosis DHEC's and CCMC's argument is a self-fulfilling prophecy—the Plan projects a need for MRI services at a hospital because the Plan states there is a need

In support of its argument that Plan contains "projections of need" for MRI services DHEC argues that "the Department and Board made a "public policy"

decision that each hospital should have an (sic) MRI unit if it can afford it” DHEC argues that this Court should give the Department’s public policy decision great deference as DHEC is the sole State agency administering the CON Act and Program For this Court to give deference to a public policy decision of the Department or Board the Department must be statutorily authorized to make such a policy decision and there is no statutory basis, either expressly or by necessary implication for the Department to make a determination that each hospital if it can afford it should have a fixed MRI either permanently on its grounds or within its facility walls This notion of “if the hospital can afford it” espoused by both DHEC and CCMC is not even hinted at anywhere in the CON Act specifically including Section 44-7-180(B)

DHEC argues that the statute, Section 44-7-180(B) does not contain “specific methodology for determining need for every facility or project” What is contained in the statute is the requirement that the Plan set forth the “specific methodology” (projection of need”) for a health service or equipment such as MRI The flaw in Respondents arguments is that the Plan does not contain a specific methodology to determine need as required by Section 44-7-180(B)

While Respondents argue that the Plan meets the “projection of need” statutory requirement because DHEC made a public policy determination that each hospital should have a MRI if it can afford it neither Respondent addressed the Plan’s failure to establish standards of health services and equipment including scope of services, utilization travel time, regionalization and other factors relating to the proper placement of services See S C Code Ann § 44-7-180(B)(3) (Rev 2002) CCMC’s argument that Sullivan’s testimony regarding availability” includes the

concept of need is clearly erroneous as even a cursory review of the quoted testimony shows CCMC's discussion of need is nothing more than a rehash of the hearing testimony regarding 'availability' Even the Administrative Law Court ("ALC") in granting partial summary judgment recognized the difference between the health planning concept of "need" for a health service or medical equipment versus whether the same was available when the Administrative Law Judge ("ALJ") determined the Plan met the "need projection" requirement of § 44-7-180(B)(2), but there was an issue of material fact regarding whether MRI services are "available" to CCMC. Contrary to CCMC's assertion, need and availability are not synonymous.

CCMC argues that the ALJ's Order and Decision contains sufficient findings of fact to support the ALJ's conclusion that the Plan's standards meet the requirements of Section 44-7-180(B). In support of this statement, CCMC cites only to findings regarding what availability means in the Plan. CCMC did not cite to a single place in the ALJ's Order where it made a single finding of fact regarding whether the MRI Standards contained in the Plan comply with the requirements of Section 44-7-180(B).

II THE CON ACT DOES NOT AUTHORIZE DHEC TO TREAT HOSPITALS DIFFERENTLY THAN OTHER HEALTH CARE FACILITIES OR PROVIDERS IN PROJECTING NEED FOR MRI SERVICES OR EQUIPMENT

CCMC contends that it is irrelevant whether the Plan states standards for providers other than hospitals because the applicant CCMC, is a hospital and existence or adequacy of standards for other MRI providers was not before the ALC. This argument fails. The plain language of S.C. Code Ann. § 44-7-180(B)(2) requires projections of need for health services and equipment and does not

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authorize projections of need for health care services or equipment by types of health care facilities or providers. In support of its argument, CCMC points to the fact that the CON Act differentiates between different types of providers and points to the exemption physician providers, in fact it is only their offices enjoy from the CON requirements, except from acquisition of medical equipment costing over \$600,000. See S.C. Code Ann. §§ 44-7-160(6) and 44-7-170(A)(2). Of course, this case is about a piece of medical equipment, MRI, that costs more than \$600,000. The fact remains that CCMC points to a statutory basis for the disparate treatment of health care facilities in the CON Act. Notably, neither CCMC nor DHEC cited to a statutory basis to support the Plan's Standard that each hospital should have a MRI available.

DHEC simply argues that "hospital" and "health care facility" are defined separately in the CON Act. A hospital is a health care facility under the definition in the CON Act. See S.C. Code Ann. § 44-7-130(12)(Rev. 2002). DHEC's "specialized knowledge and expertise" do not form a statutory basis to determine to project a carte blanche need for a hospital to have an MRI when other health care providers like Belfair have no such carte blanche projection in the Plan. Certainly, the Legislature could amend the CON Act to authorize the Department or Board to make public policy determinations to treat hospitals differently in projecting need for MRI health services or equipment but it has not done so. Belfair, as a non-hospital provider of MRI health services, is materially prejudiced by the fact that under the Plan Standard, as interpreted by the ALC and the Department, CCMC does not have to prove a need for MRI services.

III THE BOARD EXCEEDED ITS STATUTORY AUTHORITY BY FINDING THAT AS LONG AS CCMC MET THE "PROJECTION OF NEED" STANDARD IN THE PLAN, IT DID NOT HAVE TO

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PROVE COMPLIANCE WITH PROJECT REVIEW CRITERIA.

DHEC simply argues that its interpretation of the Plan that if a hospital can afford an MRI it should have one "is entitled to the most respectful consideration and should not be overruled without cogent reasons" DHEC Initial Brief p 7 citing Converse Power Corp v S C Dep't of Health and Envtl Control, 350 S C 39 48 564 S E 2d 341, 346 (Ct App 2002)

The most cogent reason to overrule the Board interpretation is if the plain language of the statute contradicts the interpretation Brown v Department of Health and Environmental Control 348 S C 507 514 560 S E 2d 410 414-415 (S C 2002) The fact is that the plain language of the CON Act provides that even if a project complies with the requirements of the Plan, the application still can be denied if it does not meet the Project Review Criteria applicable to the project S C Code Ann § 44-7-210(C) (Rev 2002) provides "Based on project review criteria and other regulations which must be identified by the department, the department may refuse to issue a Certificate of Need even if an application complies with the State Health Plan " The Department's November 19, 2004 letter to CCMC identified the following Project Review Criteria it used to review the Project, ranked in order of importance (a) Need (compliance with the Plan) (b) Community Need Documentation and Distribution (Accessibility), (c) Acceptability and Cost Containment (R p ____)

The Plan identified "community need documentation, distribution (accessibility), acceptability and containment" (Plan p II-67 R p ____)

In approving CCMC's application the Department expressly found that the project met the identified Project Review Criteria (R. p ____)

Even though Belfair timely raised issues as to

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whether CCMC's application complied with the Project Review Criteria identified pursuant to S.C. Code Ann. § 44-7-210(C) the ALC and Board's interpretation of the Plan denied Belfair its right to a contested case hearing on whether the CCMC application complied with the Project Review Criteria --

Finally in the case of Lexington Medical Center v. DHEC, et al Docket No 04-ALJ-07-0365 (2006 WL 2899943 (S.C. Admin. Law Judge Div.)), the Department denied Lexington Medical Center ("LMC") a CON based upon the fact that while its application complied with the Standards in the applicable State Health Plan the application did not comply (was inconsistent) with three project review criteria. In that case, the Department argued and the ALC found that an application could not be approved unless it complied with both the State Health Plan Standards and the applicable Project Review Criteria. The ALC specifically concluded that

In determining whether to issue a CON to an applicant, the Department evaluates the proposed health care service or facility under the licensure standards and criteria set out in the State Health Plan for the particular service or facility and under the general project review criteria set out in Section 802 of Regulation 61-15. See S.C. Code Ann. § 44-7-210(C) (2002) 24A S.C. Code Ann. Regs. 61-15, § 307(1) (Supp. 2005). Accordingly, the Department may not issue a CON unless the application for the proposed project complies with both the State Health Plan and the regulatory project review criteria. See S.C. Code Ann. § 44-7-210(C) (2002) 24A S.C. Code Ann. Regs. 61-15, § 307(1) (Supp. 2005). Therefore, while "no project may be approved unless it is consistent with the State Health Plan," 24A S.C. Code Ann. Regs. 61-15, § 801(3) (Supp. 2005), such compliance is not sufficient in itself for the issuance of a CON and "[t]he Department may refuse to issue a Certificate of Need even if an application is in compliance with the State Health Plan but is inconsistent with project review criteria or departmental regulations," 24A S.C. Code Ann. Regs. 61-15, § 307(1), see also S.C. Code Ann. § 44-7-210(C).

Id. at 13. The same is true here.

**IV THIS COURT HAS JURISDICTION OVER THIS MATTER
PURSUANT TO THE PROVISIONS OF ACT 387, EFFECTIVE**

000678

JULY 1, 2006

Respondent CCMC argues that this Court lacks subject matter jurisdiction based upon its contention that Act 387 is not applicable to Appellant's appeal from the Board Order.² CCMC contends that since 2006 Act No. 387 ("Act 387" or "Act")³ which amends the South Carolina Administrative Procedures Act ("APA"), does not specifically address appeals from the Board, this Court lacks jurisdiction over this appeal because S.C. Code Ann. § 44-7-220 (Rev. 2002) was neither expressly nor impliedly repealed. Respondent's interpretation of Act 387 is erroneous.

It is black letter law that "[w]here a statute is clear and unambiguous, the terms of the statute must be given their literal meaning." Medlock, 1985 Ford F-150 Pick Up, 308 S.C. 68, 72, 417 S.E.2d 85, 87 (1992), citing Duke Power Co. v. South Carolina Tax Commission, 292 S.C. 64, 354 S.E.2d 902 (1987); see also Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983). In construing statutes, the terms used therein must be taken in their ordinary and popular meaning. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964); Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992). "When such terms are clear and unambiguous, there is no room for construction and courts are required to apply them according to their literal meaning." Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641, 644 (1992), citing Gunnells v. American Liberty Ins. Co., 251 S.C. 242, 161 S.E.2d 822 (1968). Further, in construing an act, its "language must be read in a sense which harmonizes with its subject matter and accords with its

² DHEC did not address this issue in its Initial Brief. However, in response to the CCMC Motion to Dismiss, DHEC's return contended that the Court had jurisdiction to hear this appeal.

³ 2006 Act No. 387 was ratified by the South Carolina General Assembly on June 7, 2006 and was signed into law by the Governor on June 9, 2006 and became effective July 1, 2006.

general purpose " Hitachi Data Systems Corporation v. Leatherman 309 S.C. 174, 420 S.E.2d 843, 846 (1992) (citations omitted)

The general purpose of the Act is to "provide a uniform procedure for contested cases and appeals from administrative agencies." Section 53, Act 387. In determining whether Act 387 repealed S.C. Code Ann. § 44-7-220 (Rev. 2002), the Court must be guided by this expressed legislative purpose.

A. Act 387 Confers Subject Matter Jurisdiction on this Court

Act 387 took effect on July 1, 2006 and applies to any actions pending on or after the effective date of the Act. Contrary to Respondent's assertion that Act 387 does not address appeals from the DHEC Board, Section 57 of Act 387 specifically requires that certain appeals from the Board proceed as provided for in the Act.

No pending or vested right, civil action, special proceeding, or appeal of a final administrative decision' exists under the former law as of the effective date of this act, except for [1] appeals of Department of Health and Environmental Control, Ocean and Coastal Resource Management and Environmental Quality Control permits that are before the Administrative Law Court on the effective date of this act and [2] petitions for judicial review that are pending before the circuit court. For those actions only the department shall hear appeals from the administrative law judges and the circuit court shall hear pending petitions for judicial review in accordance with the former law. Thereafter, any appeal of those actions shall proceed as provided in this act for review. For all other actions pending on the effective date of this act, the action proceeds as provided in this act for review.

(Section 57, Act 387 (emphasis added). Clearly the Act applies to all final administrative decisions pending as of July 1, 2006, which necessarily includes the administrative decision made by the DHEC Board on May 25, 2006 and received by Belfair on June 2, 2006.

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Under South Carolina law the Legislature is presumed to know and have taken into account existing law when enacting subsequent legislation, particularly when the amendment is as to the same code provisions. "A subsequent statutory amendment may be interpreted as clarifying original legislative intent. Stuckey v State Budget and Control Board, 339 S C 397, 401, 529 S E 2d 706, 708 (citing Cotty v Yartzeff, 309 S C 259, 422 S E 2d 100 (1992)). However, [i]t will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law." Vernon v Harleysville Mut Cas Co, 244 S C 152 155 135 S E 2d 841 844 (1964) (citing 82 C J S Statutes § 384b(2), page 904). "The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something. Denene, Inc v City of Charleston, 352 S C 208, 212, 574 S E.2d 196, 198 (2002) (citing TNS Mills, Inc v South Carolina Dep't of Revenue, 331 S C 611, 503 S E 2d 471 (1998)).

<u>Eagle</u>	<u>Container</u>	<u>Co</u>	<u>v</u>	<u>County</u>	<u>of</u>	<u>Newberry</u>
366	S C	611,		622	S E 2d	733
S C			App			2005

(2005)

Certainly, the Legislature is presumed to know that S C Code Ann § 44-7-220 (Rev 2002) provided for an appeal from the DHEC Board to the Circuit Court. Is it had wanted to preserve this procedure and forum for appeal it simply could have provided a third exception to pending appeals from administrative decision by DHEC. The Act simply did not do so.

Furthermore Section 15 of Act 387 amends S C Code Ann § 14-8-200(a) to explicitly grant this court jurisdiction over appeals of final agency decisions.

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Except as limited by subsection (b) and Section 14-8-260, the court has jurisdiction over any case in which an appeal is taken from an order judgment, or decree of the Circuit Court Family Court a final decision of an agency or a final decision of an administrative law judge

(Emphasis added) Subsection (b) includes those cases for which the South Carolina Supreme Court has appellate jurisdiction and § 14-9-260 involves transfer of cases filed with this Court that should have been filed with the Supreme Court None of these exceptions are applicable here

It is uncontested that the Board Decision is the final decision of the agency in this CON contested case Thus Act 387 expressly provides this Court jurisdiction over an appeal from the Board Order both through Sections 15 and 57

The Circuit Court would have jurisdiction over this matter under the former law S C Code § 44-7-220 (Rev 2002) only if the Appellant had filed its petition for judicial review with that court prior to July 1, 2006, the effective date of Act 387 Under the exception from administrative appeals pending in Circuit Court as of July 1 2006 the case would have stayed with the Circuit Court It is undisputed that Appellant filed its appeal of the Board decision with this Court on July 3, 2006

Unquestionably, this Court must apply the law in effect at the time an action took place Cf Colleton County Tax Payers Assn , et al v The Sch Dist of Colleton County, Opinion No 26240, filed December 11, 2006, Shearouse Advance Sheet No 47, pp 25 and 34 Since Appellant filed its appeal with this Court after July 1 2006, the provisions of Act 387 prevail over those in Section 44-7-220

Under the well-established rule of statutory construction expressio unius est

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exclusio alterius, statutes listing specific things or characteristics evidence the intent of the Legislature that the list exclude all other things and characteristics not mentioned State v Burton 301 S C 305 391 S E 2d 583 584 (1990), Pennsylvania Nat'l Mutual Casualty Ins. Co v Parker, 282 S C 546 320 S E 2d-458 463 (Ct App 1984)

B Act 387 Repealed S C Code Ann § 44-7-220

Respondent contends Act 387 does not address CON cases because on a "going forward" basis, there will be few if any, CON cases because the Act "eliminates Board review of ALC decisions in certificate of need cases"⁴ Another word for eliminate is repeal Act 387 repealed S C Code Ann § 4-7-220 Therefore Respondent's claim that this Court does not have jurisdiction and only the Circuit Court has jurisdiction is groundless

Act 387 made sweeping changes regarding the appellate process for DHEC CON decisions pending on July 1 2006 It expressly repealed the Board's authority in Section 44-7-50 (Act 387 Section 47) to hear quasi-judicial appeals from the ALC and added Section 44-7-60 (Act 387, Section 48) authorizing the Board to hold final agency conferences to review DHEC staff decisions and render the final agency determination The appeal of a Board decision is now to the ALC with an appeal of the ALC decision to this Court.

Section 4 amended Section 1-23-600 to authorize the ALC to hear contested case hearings arising for final agency decisions made by the Board Section 5 of Act

⁴ The test of whether a statute is repealed expressly or by necessary implication is not based on how many cases would be effected by the repeal

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387 amended Section 1-23-610 to provide that, for judicial review of an ALC decision including cases involving DHEC a notice of appeal is to be filed with the Court of Appeals and not to the Circuit Court. Finally, Section 2 of Act 387 amended Section 1-23-380(A) to provide that the Court of Appeals had jurisdiction to hear appeals from the ALC and not the Circuit Court

Section 2 of the Act amends Section 1-23-380(A) and provides, in pertinent part

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1, and Article 5. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Except as otherwise provided by law, an appeal is to the court of appeals.

Act 387, Section 2 (emphasis added) Respondent relies on the provision of Section 44-7-220 and the Act 387 Section 2 phrase "except as otherwise provided by law" to claim that Appellant should have appealed to the Circuit Court after posting of a bond. This reliance is misplaced.

Section 44-7-220 provided, in pertinent part

After the contested case hearing is concluded and a final board decision is made, a party who participated in the contested case hearing and who is affected adversely by the board's decision may obtain judicial review of the decision in the circuit court pursuant to the Administrative Procedures Act. An appeal taken to the circuit court from a decision of the board on a Certificate of Need application has precedence on the court's calendar and must be heard not later than forty-five days from the date the petition is filed.

(Emphasis added) Certainly Sections 57 and Section 2 of Act 387 the provisions of the APA in effect as of July 3, 2006 do no longer provide for appeal of the Board's

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final agency determination to the Circuit Court but only to this Court

CCMC argues that since Section 44-7-220 deals specifically with appeals for the Board CON decisions it falls within the "[e]xcept as otherwise provided by law" exception contained in Section 2 of the Act. CCMC claims that Section 44-7-220 effectively trumps Act 387 because the older statute specifically addresses appeals from the DHEC Board and Act 387 does not specifically address appeals of Board CON cases

As noted above, Act 387 does address all appeals from DHEC Board decisions and requires that all such appeals are governed by Act 387 unless a petition for judicial review was filed with the Circuit Court prior to July 1, 2006. See Section 14 and 57 of Act 387. Second, the process outlined in Section 44-7-220 no longer existed effective July 1, 2006. Act 387 now requires that after a "final board decision is made" a party has to request a contested case to the ALC. The right to judicial review now does not arise until after an ALC contested case hearing decision. The ability of a party to seek judicial review from a DHEC Board decision in a CON case was extinguished effective July 1, 2006. Certainly, at the least, Section 44-7-220 has been impliedly repealed.

Third, it is clear that the Legislature intended that jurisdiction of this appeal be to the Court of Appeals. The purpose of Act 387 is to "provide a *uniform procedure* for contested cases and appeals from administrative agencies." Section 53, Act 387 (emphasis added). As discussed above, through Section 57 the Legislature limited the instances where appeal procedure and forum would continue under the pre-July 1, 2006 law to two types of DHEC permit appeals: EQC and OCRM and to

cases already pending before the Circuit Court. In all other instances pending DHEC cases it is clear the Legislature intended for the appeal to be to the Court of Appeals

Section 5(B) of the Act sets forth the amendments of Section 1-23-610(B) and provides in pertinent part

For judicial review of a final decision of an administrative law judge of cases in which review is not governed by subsection (A), including cases involving the Department of Natural Resources and the Department of Health and Environmental Control a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

Further, Section 2 of Act 387,(A), S C Code Ann § 1-23-380(A) provides, in pertinent part.

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1, and Article 5. This section does not limit utilization of or the scope of judicial review available under other means of review redress relief, or trial de novo provided by law. Except as otherwise provided by law an appeal is to the court of appeals

(Emphasis added) The clearly stated purpose of the Act is to provide for uniform appeals of administrative agency decisions. Reading the Act as a whole, it is clear that the legislative intent was to repeal Section 44-7-220. The Legislature's did not intend "going forward" to allow any appeals to the Circuit Court from the DHEC Board but intended to require those appeals to go to the Court of Appeals.

Finally Respondent CCMC in fact has asserted to DHEC that Act 387 Section 4(B) applies to this matter. See Exhibit A Affidavit of M Elizabeth Crum, to Belfair's Return to the Motion to Dismiss attaching letter dated July 20 2006 from David B

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Summer Jr to Joel C Grice (R p _____) In this letter Respondent asserts

MRI at Belfair, LLC gave Notice of Appeal on July 3 2006 to the Court of Appeals under Act No 387

Assuming the applicability of the Act, S C Code Ann § 1-23-600(G)(5) effective July 1 2006 provides as follows

A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court the Court of Appeals or in cases when Section 1-23-610(A) applies the appropriate board or commission

(R p _____),

CCMC cannot have it both ways CCMC sought and obtained issuance of the CON based on Section 4 of Act 387 and relied on the very administrative agency appeals process that it says is not applicable to this appeal Act 387 applies to this case and the appeal is properly within this Court's jurisdiction

C Respondent's Remaining Allegations Are Groundless

Respondents' remaining assertions in its Motion to Dismiss are groundless The fact that prior to July 1 2006 Appellant's appeal was proceeding according to prior law is of no moment. The effective date of Act 387 was July 1 2006 By the clear language of the Act, it is intended to apply to pending actions like this one upon the effective date of the Act Section 57 of Act 387 expressly provides that the appellate procedures outlined in the Act apply to all pending actions, excluding only the exceptions discussed above The Act changes the court to which an appeal is perfected and applies the South Carolina Appellate Court Rules to those cases The Court of Appeals and not the Circuit Court has subject matter jurisdiction over CON

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appeals⁵

Moreover Respondents reliance on Section 55 of Act 387 to assert lack of subject matter jurisdiction is misplaced Section 55 is the "Savings Clause" of the Act and is intended to preserve vested statutory rights and provides in pertinent part that the Act

does not affect pending actions rights duties or liabilities founded thereon or alter discharge release or extinguish any penalty forfeiture or liability incurred under the repealed or amended law unless the repealed or amended provision shall so expressly provide After the effective date of this act all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right civil action, special proceeding criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws

Section 55, Act 387 Simply put, this "Savings Clause" provides that Act 387 cannot divest any party of a vested right or pending right to appeal review That is not the case here The Legislature simply changed the forum in which the appeal lies from the Circuit Court to this Court

This "Savings Clause" protects appellants in cases appealed prior to July 1 2006 under prior law by explicitly providing an exception to the common law rule that final relief under a statute cannot be granted after a statute is repealed State of South Carolina v Gaillard, 101 U S 433, 438 (1879)(affirming the decision of the South Carolina Supreme Court State v Gaillard 11 S C 309 (1879)) ("it is well settled that if a statute giving a special remedy is repealed without a savings clause in favor of pending suits all suits must stop where the repeals finds them If final

⁵ S C Constitution Article V Sections 9 and 11 provide that the Court of Appeals and the circuit courts shall have such appellate jurisdiction as provided for by law

relief has not been granted before the repeal went into effect it cannot be after")

There was and is no vested right as to where or in what manner or procedure the appeal is to be made. As the South Carolina Supreme Court held in *Osteen v ACLRR Co*, 119 S C 438, 112 S E 352 359 (1922) "The right of appeal is not a vested one, but a matter of grace." Further in *Horn v Blackwell*, 212 S C 480 483 48 S E 2d 322 323 (1948) our Supreme Court held "It follows that in the absence of a constitutional restriction, the Legislature in its discretion may abridge or regulate the right of appeal."

Act 387 regulates the right of appeal from the Board's Decision by providing for an appeal to the Court of Appeals pursuant to the procedural requirements of the SCACR. The SCACR unlike Section 44-7-220 do not require the posting of a bond. Certainly, the "Savings Clause" only preserves the right to appeal, not the forum or the procedure. To hold otherwise would render the provisions of Section 57 of Act 387 meaningless.

CONCLUSION

For the foregoing reasons, Appellant MRI at Belfair LLC respectfully requests that this Court determine that it has jurisdiction to hear this appeal and reverse the Order of the South Carolina Board of Health and Environmental Control and order that the Board exceeded its statutory authority in not following the requirements of S C Code Ann §§ 44-7-180(B) and 44-7-210(C). The matter should be remanded to the ALC with instructions to remand to DHEC for review under a Plan that complies with the CON Act and for review thereafter by the ALC to determine whether the CCMC project complies with the identified Project Review Criteria.

Respectfully submitted

M Elizabeth Crum SC Bar No 1486
A Victor Rawl Jr SC Bar No 9261
Anail B Kirk, SC Bar No 71101
McNAIR LAW FIRM, P A
Post Office Box 11390
Columbia South Carolina 29211
(803) 799-9800
lcrum@mcnair.net
vrawl@mcnair.net
akirk@mcnair.net

By 
M Elizabeth Crum

Attorneys for Appellant MRI at Belfair LLC

January 3 2007

Columbia, South Carolina



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 1169
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1890
FAX (803) 734-1839
WWW.SCCOURTS.ORG

January 25 2007

M. Elizabeth Crum, Esquire
A. Victor Rawl, Jr., Esquire
Ariail B. Kirk, Esquire
McNair Law Firm, P.A.
P.O. Box 11390
Columbia, SC 29211

Re MRI v. SCDHEC

Dear Counsel:

Enclosed is a copy of an Order of the Court concerning your Motion of Appellant MRI at Belfair LLC for Clarification of Respondents' Designations of Matter to be included in Record on Appeal in the above case.

The Record on Appeal is due to be served on opposing counsel and an original signed Certificate of Service filed on or before February 2, 2007.

By copy of this letter, all counsel are notified that all final briefs are due to be served and filed twenty (20) days from the date of service of the Record on Appeal.

Very truly yours,

A handwritten signature in cursive script, appearing to read "V. Claire Allen".

Deputy Clerk

VCA/et

cc David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Nancy S. Layman, Esquire
Ashley C. Biggers, Esquire

C00691

The South Carolina Court of Appeals

MRI at Belfair, LLC

Appellant,

v

South Carolina Department of Health
and Environmental Control and Coastal
Carolina Medical Center

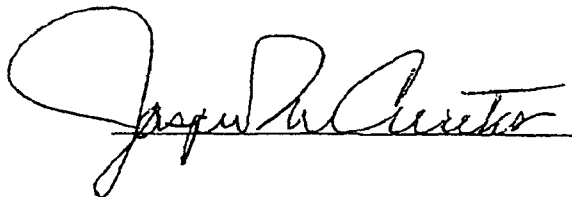
Respondents

The Honorable Ralph K. Anderson, III
Unknown County
Trial Court Case No 2004-AL-07-00399

ORDER

Based on the letter of respondent dated January 5, 2007, the appellant's January 5, 2007 motion to clarify designation is granted to the extent that the following portions of the transcript are stricken from the designations: page 116 lines 4-127 and line 25, pages 268-269 and pages 541-558.

IT IS SO ORDERED

 A J

Columbia, South Carolina

000692

1/25/07

FILED

cc M Elizabeth Crum Esquire
A Victor Rawl Jr Esquire
Anail B Kirk, Esquire
David B Summer Jr Esquire
Faye A Flowers Esquire
Nancy S Layman, Esquire
Ashley C Biggers Esquire

000693

Coastal Carolina
Medical Center

Compassion Care Community

February 7 2007

Mr Joel C Grice Director
Bureau of Health Facilities
and Services Development
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201-1708

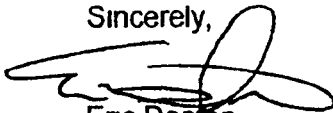
Dear Mr Grice

I want to update you regarding the existing Certificate of Need No SC-06-46 for
MRI services at Coastal Carolina Medical Center

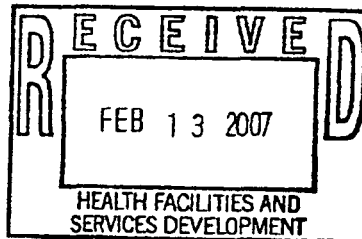
- 1 We requested bids for a new 1.5 Tesla MRI from General Electric Phillips
and Siemens Phillips will be making a presentation to us this week
Siemens is scheduled to visit us in March with their proposal
- 2 We continue to increase the usage of our mobile MRI every month for
both outpatients and inpatients

We anticipate having the new fixed service in place by mid 2007 Please let me
know if you have any questions

Sincerely,



Eric Deaton
Chief Executive Officer



1000 Medical Center Drive
Hardeeville South Carolina 29927
Main Phone (843) 784-8000 Main Fax: (843) 784-8001
www.coastalcarolinamedicalcenter.com

000694

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair LLC,

Petitioner

vs

South Carolina Department of Health and
Environmental Control and Coastal
Carolina Medical Center,

Respondent.

Docket No 07-ALJ-07-0021-CC

ORDER FOR
PREHEARING STATEMENTS.

IT IS HEREBY ORDERED that each party who intends to appear at the hearing must file with the undersigned's office a Prehearing Statement stating the following

- 1 The nature of this proceeding
- 2 Statutory provisions(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations,
- 3 The issues presented for determination,
- 4 The action requested of the Court, if any,
- 5 A brief summary of the facts to be presented at the hearing
- 6 A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion
- 7 A list of proposed witnesses and exhibits,
- 8 A statement regarding the necessity for discovery, if any
- 9 The estimated length of the hearing, and
- 10 Any dates in the next one-hundred twenty (120) days when you will not be available for a hearing

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FEB 12 2007

DHEC
OFFICE OF GENERAL COUNSEL

The Prehearing Statement must be filed with the Court and served on all parties within fifteen (15) days of the date of this Order. The parties have a continuing obligation to update the information during the course of the proceedings.

Ralph King Anderson, III

Administrative Law Judge

FILED

February 8 2007

Columbia South Carolina

FEB 08 2007

BOARD:
Elizabeth M. Hagood
Chairman
Mark B. Kent
Vice Chairman
Michael Blackmon
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:
Edwin H. Cooper, III
Carl L. Brazell
Steven G. Kiser
Coleman F. Bockhouse, MD

February 14, 2007

Re SC 06-46
Construction for the addition of a 1.5 Tesla Magnetic Resonance Imaging (MRI) unit
Coastal Carolina Medical Center
Hardeeville, South Carolina

David B. Summer, Jr.
Parker Poe Adams & Bernstein, LLP
1201 Main Street, Suite 1450
Columbia, SC 29202-1509

Dear Mr. Summer:

This is to advise that Certificate of Need SC-06-46 is due to expire on August 3, 2007.

This Department's authority to extend a Certificate of Need is limited by Regulations to two six-month periods. A complete new application for review under Certification of Need would be required for this project if a valid construction contract is not negotiated prior to the expiration of this Certificate of Need or its extensions.

In order to extend this Certificate of Need, it will be necessary that you submit a written request for the extension at least thirty (30) days prior to the expiration date.

Please continue to send the Department the required monthly progress reports documenting the status of the project.

If I can be of further assistance, or if you have any questions about the extension process, please contact me at (803) 545-4200.

Sincerely,

Victoria R. Tibshirany
Bureau of Health Facilities and Services Development

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0602 203521

PARKER POE

PARKER POE ADAMS & BERNSTEIN LLP

Attorneys and Counselors at Law

David B Summer, Jr

Partner

Telephone: 803.253.8910

Direct Fax: 803.255.8017

daidssummer@parkerpoe.com

1201 Main Street

Suite 1450

P.O. Box 1509

Columbia SC 29202 1509

Telephone 803 255 8000

Fax 803 255 8017

www.parkerpoe.com

February 23, 2007

Via Hand Delivery

The Honorable Ralph King Anderson, III

Administrative Law Judge Division

Edgar A. Brown Building, Suite 224

1205 Pendleton Street

Columbia, South Carolina 29201

**Re MRI at Belfair, LLC v South Carolina Department of Health and Environmental
Control and Coastal Carolina Medical Center
Docket No 07-ALJ-07-0021-CC**

Dear Judge Anderson

Enclosed for filing with the Court, please find the original and one copy of the Respondent Coastal Carolina Medical Center's Prehearing Statement in the above referenced matter. I would ask that your office kindly file the enclosed and return a filed-stamped copy to my office via our courier.

By copy of this letter, I am serving counsel of record with a copy of this Prehearing Statement. If you should have any questions, please do not hesitate to contact me.

With best regards, I am

Sincerely,

David B. Summer, Jr
David B Summer, Jr

RECEIVED

DBS:cs

cc M. Elizabeth Crum, Esq - Via Hand Delivery

Anail B Kirk, Esq - Via Hand Delivery

Nancy S Layman, Esq - Via Hand Delivery

Ashley C Biggers Esq - Via Hand Delivery

FEB 23 2007

**DHEC
OFFICE OF GENERAL COUNSEL**

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CHARLESTON SC
CHARLOTTE, NC
RALEIGH, NC
SPARTANBURG SC

RECEIVED

FEB 23 2007

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DHEC
OFFICE OF GENERAL COUNSEL

MRI at Belfair, LLC	)	DOCKET NO 07-ALJ-07-0021-CC
	)	
Petitioner,	)	PREHEARING STATEMENT
	)	OF
vs	)	COASTAL CAROLINA MEDICAL CENTER
	)	
South Carolina Department of Health and	)	
Environmental Control and,	)	
Coastal Carolina Medical Center	)	
	)	
Respondents	)	
	)	

Pursuant to the February 8, 2007 Order for Prehearing Statements, Respondent Coastal Carolina Medical Center (the "Hospital") files the following Prehearing Statement

1 *The nature of this proceeding* This is the Petitioner MRI at Belfair's ("Belfair") third Administrative Law Court appeal aimed at preventing the Hospital from providing MRI services to its patients. This latest action arises from the January 9, 2007 request for a contested case hearing by the Petitioner concerning the Department of Health and Environmental Control's (the "Department") August 4, 2006 decision acknowledging the Hospital's plan's to make temporary use of a mobile MRI unit to provide MRI services to its patients during the construction and implementation phase of the Hospital's fixed 1.5 Tesla MRI unit pursuant to its certificate of need issued on August 3, 2006.

2 *The statutory provisions conferring subject matter jurisdiction to this agency and other applicable statutes and regulations* S.C. Const. Art. I, § 22, S.C. Code Ann. § 1-23-600, S.C. Code Ann. § 44-1-60, S.C. Code Ann. § 44-7-110 *et seq.* (the State Certification of Need and Health Facility Licensure Act), S.C. Reg. 61-15 Rule 11 RPALC and *The 2003 State Health Plan*

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3 *The issues to be presented for determination* Reserving its right to raise any and all issues presented to the Department or to the Board of Health and Environmental Control below and to respond to any issues raised by Belfair, the Hospital opposes Belfair's request for contested case hearing and contends as follows

(a) Belfair's initial request for contested case hearing (Board review conference) filed on September 8, 2006, is not timely and therefore this matter must be dismissed

(b) Assuming the timeliness of Belfair's request, the Department's acquiescence in the Hospital's plans to make temporary use of a mobile MRI unit during the interim period of the fixed MRI construction and installation is appropriate under the applicable law,

(c) Assuming the timeliness of Belfair's request, the Department's acquiescence in the Hospital's plans to make temporary use of a mobile MRI unit during the interim period of the fixed MRI construction and installation is part and parcel of the Department's decision to grant the Hospital a Certificate of Need to provide MRI services to its patients, which decision is on appeal to the Court of Appeals. Therefore, this Court lacks jurisdiction to consider Belfair's request

(d) Assuming the timeliness of Belfair's request, the Department's acquiescence in the Hospital's plans to make temporary use of a mobile MRI unit during the interim period of the fixed MRI construction and installation is entirely consistent with the prior orders of this Court and of the Board of Health and Environmental Control approving the Department's decision to grant the Hospital a Certificate of Need to provide MRI services to its patients,

(e) Assuming the timeliness of Belfair's request, the Department's acquiescence in the Hospital's plans to make temporary use of a mobile MRI unit during the interim period of the fixed MRI construction and installation is consistent with the Department's long time practice

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and policy of permitting providers, once they have been approved for a service, to take interim or temporary measures to ensure prompt delivery of the service to patients pending implementation of the permanent service or when repair or replacement is necessary

4 *The action requested of the Court if any*, Coastal Carolina Medical Center requests that the Court affirm the August 4 2006 letter of the Department acquiescing in the Hospital's plans to make use of mobile MRI services during the implementation of its certificate of need to establish fixed MRI services

5 *A brief summary of the facts to be presented at the hearing*

On November 10, 2005 after contested case hearing, this Court issued its Final Order and Decision in Docket No 04-ALJ-07-0399-CC affirming the Department's approval of the Hospital's certificate of need application for the construction and addition of a fixed 1.5 Tesla Magnetic Resonance Imaging ("MRI") unit for use in diagnosing and treating the Hospital's patients. The Petitioner MRI at Belfair ("Belfair") appeared and contested the Hospital's application to provide MRI services.

On December 9 2005 Belfair requested that the Board of Health and Environmental Control review and reverse this Court's decision to approve the Hospital's Certificate of Need application for MRI services. On May 25, 2006, the Board issued its order rejecting Belfair's appeal and affirming the Court's Final Order and Decision. On July 3, 2006, Belfair filed its Notice of Appeal of the Board's decision to the Court of Appeals. Although it could have done so, Belfair chose not to request a stay from the Court of Appeals, which stay, if granted, would have prevented the Hospital from moving forward with its project.

Therefore, in the absence of any legal impediments, the Department issued a Certificate of Need to the Hospital on August 3 2006, granting the Hospital the authority to acquire and

install a fixed 1.5 Tesla MRI unit. On August 4, 2006, as part of that CON implementation process, the Hospital notified the Department and received acknowledgement from the Department of the Hospital's plans to make temporary use of a *mobile* 1.5 Tesla MRI unit during the interim period of construction and installation of the fixed unit.

On August 9, 2006, an article appeared in the local newspaper, *The Island Packet*, announcing the Hospital's intent to provide interim mobile MRI services. According to Belfair, Belfair's principal, Dr. Borelli, did not see the newspaper article until his return from out of town. On August 22, 2006, Belfair's counsel sent email correspondence to the Department, citing the August 9 *Island Packet* article, noting Belfair's objection to the Hospital's mobile MRI services, and requesting a copy of the Department's August 4 letter acknowledging the Hospital's plan to make interim use of a mobile MRI pending construction of the housing for the permanent, fixed MRI. According to Belfair, its counsel received the Department's August 4 letter on August 24, 2006. On August 28, 2006, Belfair again wrote the Department objecting to the Hospital's interim use of mobile technology.

On September 8, 2006, seventeen days after its initial correspondence to the Department objecting to the Hospital's mobile services, Belfair filed its request for contested case review of this matter with the Administrative Law Court (Docket No. 06-ALJ-07-0714-CC). On September 15, 2006, in follow up to its request for contested case hearing, Belfair wrote the Court arguing that the automatic stay provisions of S.C. Act No. 387 (S.C. Code Ann. § 1-23-600(G)(2)(1976, as amended)) applied to the Department's August 4, 2006, acknowledgment of the Hospital's plans to use mobile MRI services.

On October 18, 2006, this Court denied Belfair's request for a cease and desist order and remanded this case to the DHEC Board, holding that the provisions of S.C. Code Ann. § 44-1-60

(effective July 1, 2006), required Belfair to present this case to the Board as a prerequisite to review by this Court. In its order, this Court indicated that Belfair's request for contested case hearing should be treated as being its request for final Board conference for purposes of determining timeliness. On October 26, 2006, the Petitioner filed a motion for reconsideration of the Order of Remand, and on November 30, 2006, the Court denied Belfair's motion for reconsideration.

On January 8, 2007, the DHEC Board declined to give Belfair a final review conference on this matter and did not address any of the issues raised by the parties or by the Court's October 18, 2006 Order of Remand. The basis of the Board's declination was its finding that by the time of its November 9, 2006 meeting, more than sixty days had passed since Belfair's September 8, 2006 filing.¹ On January 9, 2007, Belfair filed another request for a contested case hearing concerning this matter, this time including the Board's refusal to provide a final review conference.

6 *A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.* The Hospital anticipates moving the Court for an order dismissing this case on the grounds related to timeliness and jurisdiction set forth above. The Hospital reserves the right to file further motion if the Hospital determines during the course of discovery that any such motions are warranted.

7 *A list of proposed witnesses and exhibits.* Reserving its right to call any witnesses listed by any party to the proceeding, Respondent Coastal Carolina Medical Center identifies the following persons as potential witnesses at trial of this matter:

¹ Under § 44-1-60((F)) the final review conference must be held within sixty days of receipt of the request for review.

- A Mr Eric Deaton
Chief Executive Officer
Coastal Carolina Medical Center
- B Patricia Etheridge, M D
Chief of the Medical Staff
Coastal Carolina Medical Center
- C Richard Knapp
Richardson Knapp & Associates
- D Mark Richardson
Richardson Knapp & Associates
- E Mr Joel C Grice
Director, Certification of Need Program
Division of Planning and Certification of Need
Department of Health and Environmental Control
- F Ms Tori Tibshirany
Division of Planning and Certification of Need
Department of Health and Environmental Control

Reserving its right to utilize and introduce as evidence any documents identified by any party to the proceeding, Respondent Coastal Carolina Medical Center identifies the following as potential exhibits at trial of this matter:

- A All documents contained in the files of the Department of Health and Environmental Control, which constitute the record in this matter
- B All documents contained in the files of the Department of Health and Environmental Control, which constitute the record in the underlying matters (04-ALJ-07-0399-CC and 06-ALJ-07-0714-CC), being the Department's file on the Hospital's certificate of need application to provide MRI services through the use of a fixed 1.5 Tesla MRI unit and the Department's file on the Hospital's intended temporary use of mobile MRI services during implementation its CON

000703

C All documents contained in the record before the Board of Health and Environmental Control and/ or the Court of Appeals in the underlying appeal of the Hospital's certificate of need application to provide MRI services through the use of a fixed 1.5 Tesla MRI unit

-D *The 2003 State Health Plan*

Respondent Coastal Carolina Medical Center anticipates that other substantive and demonstrative exhibits will be added to the above after discovery is complete

8 *A statement regarding the necessity for discovery if any* Respondent Coastal Carolina Medical Center believes that the discovery process can be completed within the 90-day discovery period

9 *The estimated time required for hearing* Respondent Coastal Carolina Medical Center estimates the time required for hearing of this matter to be two (2) days

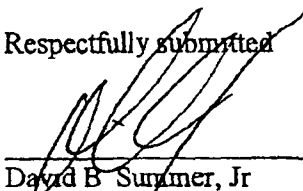
10 *Any dates in the next one hundred twenty (120) days when you will not be available for a hearing*

Counsel for Respondent is committed to attend a hearing on a matter pending before the Administrative Law Court scheduled to last from March 21, 2007 through March 22, 2007. Counsel for Respondent is also aware of a hearing on another matter pending before the Administrative Law Court set for hearing no earlier than March 12, 2007. Finally, counsel respectfully requests protection for the period of March 12, 2007 through March 27, 2007 to complete discovery on a third matter pending before the Administrative Law Court, which matter has been set for trial beginning September 3, 2007.

SIGNATURE ON FOLLOWING PAGE

000704

Respectfully submitted



David B. Sumner, Jr.

Faye A. Flowers

PARKER POE ADAMS & BERNSTEIN, LLP

1201 Main Street, Suite 1450

Post Office Box 1509

Columbia, SC 29202

(803) 255-8000, (803) 255-8017 (fax)

Attorneys for Respondent

Coastal Carolina Medical Center

Columbia, South Carolina
February 23, 2007

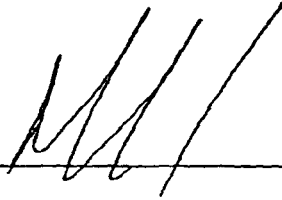
000705

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 23 2007 s/he served the foregoing Prehearing Statement of Coastal Carolina Medical Center on all parties of record by hand delivering the same addressed as follows

Ashley C Biggers, Esquire
Nancy S Layman, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

M Elizabeth Crum, Esquire
Ariail B Kirk, Esquire
McNair Law Firm
1301 Gervais Street, 11th Floor
PO Box 11390
Columbia, SC 29211


A handwritten signature in dark ink, consisting of several stylized, overlapping loops and strokes, is positioned above a horizontal line.

Columbia, South Carolina

000706

BOARD
Elizabeth M Hagood
Chairman

Jean H Cooper III
1st Vice Chairman
Kisner
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD
Henry C. Scott

Paul C. Aughton III

Clayton A. McCall

Coleman F. Buckhouse, MD

OFFICE OF GENERAL COUNSEL

February 23 2007

VIA HAND DELIVERY

The Honorable Ralph King Anderson III
Administrative Law Court
Edgar Brown Building
1205 Pendleton Street Suite 224
Columbia, South Carolina 29201

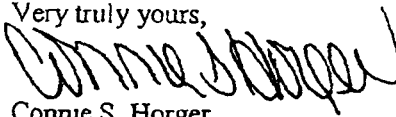
Re *MRI at Belfair LLC vs South Carolina Department of Health and Environmental
Control and Coastal Carolina Medical Center*
Docket No 07 ALJ-07-0021-CC
OGC No 20352 1

Dear Judge Anderson

Enclosed please find the original and one copy of *South Carolina Department of Health
and Environmental Control's Prehearing Statement* in the above-referenced matter. Kindly
return the file-stamped copy to me via my courier.

By copy of this letter, as evidenced by the Certificate of Service, I am serving a copy of
the same upon counsel for all parties.

Very truly yours,


Connie S. Horger
Paralegal for Ashley C. Biggers

/csh
Enclosures as stated

cc (w/Enclosures)

M. Elizabeth Cium, Esquire
David B. Summer, Jr., Esquire
Faye Flowers, Esquire

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S:\Sten\1FC\VI L H\ers\MRI Belfair III JD 521LTR Filem 2007 doc

Office of General Counsel

Columbia Office 2600 Rte 111 S. Columbia, SC 29204

MRI at Belfair LLC,

Petitioner,

VS

South Carolina Department of Health and
Environmental Control and Coastal
Carolina Medical Center,

Respondents

)
Docket No 07-ALJ-07-0021-CC
)
)
)
) SC DEPARTMENT OF
) HEALTH AND ENVIRONMENTAL
) CONTROL'S PREHEARING
) STATEMENT
)
)
)
)
)

Pursuant to the Order for Prehearing Statements issued by this Court on February 8, 2007, Petitioner South Carolina Department of Health and Environmental Control (Department or 'DHEC) by and through its undersigned counsel hereby submits the following Prehearing Statement.

1 THE NATURE OF THIS PROCEEDING

This is a contested case hearing. Petitioner MRI at Belfair (Belfair or Petitioner) challenges the December 14, 2006 approval by DHEC to permit Coastal Carolina Medical Center to use a mobile MRI unit pending the implementation of the CON issued to Coastal Carolina Medical Center on August 3 2006 for a fixed MRI unit and the construction of building to house the same.

2 THE STATUTORY PROVISION(S) CONFERRING SUBJECT MATTER
JURISDICTION TO THE ADMINISTRATIVE LAW COURT (COURT)
AND OTHER APPLICABLE STATUTES AND REGULATIONS

The statutory provisions conferring subject matter jurisdiction to the Administrative Law Court (Court) include S C Code Ann §§ 1-23-310 to 390 (2005 & Supp 2006) S C Code Ann § 1-23-600 (Supp 2006) S C Code Ann § 44-1-60 (Supp

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2006) and S C Code Ann § 44-7-210 (2002) The statutory provisions giving rise to the controversy include S C Code Ann § 44-7-110 *et seq* (2002) State Certification of Need and Health Facility Licensure Act The regulatory provisions giving rise to the controversy include Section 102 of 24A S C Code Regs 61-15 (Supp 2006) Certification of Need for Health Facilities and Services

3 THE ISSUES TO BE PRESENTED FOR DETERMINATION

The issue presented for determination in this contested case hearing is whether the Department's decision to approve the mobile MRI was consistent with S C Code Ann § 44-7-110 *et seq* (2002), State Certification of Need and Health Facility Licensure Act and Section 102 of 24A S C Code Regs 61-15 (Supp 2006)

4 THE ACTION REQUESTED OF THE COURT

The Department respectfully requests that the Court deny and dismiss the appeal by MRI at Belfair and uphold the Department's decision to approve the use of the mobile MRI pending construction and implementation of the CON for the permanent MRI unit

5 A BRIEF SUMMARY OF THE FACTS TO BE PRESENTED AT THE HEARING

On August 3, 2006, the Department issued Certificate of Need SC-06-46 to Coastal Carolina Medical Center for the construction for the addition of a 1.5 Tesla Magnetic Resonance Imaging (MRI) unit. On August 4, 2006, David B. Summer, counsel for Coastal Carolina Medical Center, submitted a written request to the Department and asked that they be authorized to use a mobile MRI at Coastal Carolina Medical Center until construction and installation of its fixed MRI was completed. That same day, Victoria R. Tibshirany issued a written response on behalf of the Department which approved temporary full-time use of a mobile MRI unit during the interim period

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of the fixed MRI construction and installation as outlined in Mr Summer's August 4 2006 letter Belfair filed a request for a contested case hearing with the Administrative Law Court which remanded the matter to the Department for consideration by the Board of the Department pursuant to S C Code Ann. § 44-1-60 (Supp 2006) The Board decided not to conduct a final review conference regarding the decision. Belfair subsequently filed another request for a contested case hearing with the Administrative Law Court on January 9 2007

6 A SUMMARY OF ANY MOTIONS EXPECTED TO BE RAISED AT THE HEARING AND THE APPROPRIATE AUTHORITY UNDERLYING THE MOTION

The Department does not anticipate raising any motions at the hearing but reserves its right to do so

7 A LIST OF PROPOSED WITNESSES AND EXHIBITS

WITNESSES

Joel C Grice, Director
Bureau of Health Facilities and Services Development
SC Department of Health and Environmental Control
1777 St Julian Place Suite 201
Columbia, South Carolina 29204

Victoria R. Tibshirany
Program Coordinator II
Bureau of Health Facilities and Services Development
SC Department of Health and Environmental Control
1777 St Julian Place Suite 201
Columbia, South Carolina 29204

The Department reserves the right to supplement its witness list as may prove necessary

000710

EXHIBITS

The exhibits will include the entire Department file concerning this matter. The Department reserves the right to supplement its exhibit list as may prove necessary.

8 - A STATEMENT REGARDING THE NECESSITY FOR DISCOVERY, IF ANY

The Department reserves the right to conduct standard discovery as may prove necessary, pursuant to the Rules of Procedure for the Administrative Law Court.

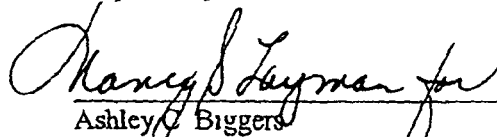
9 THE ESTIMATED TIME REQUIRED FOR THE HEARING

The Department estimates that the hearing will take approximately one (1) day.

10 ANY DATES IN THE NEXT 120 DAYS WHEN YOU WILL NOT BE AVAILABLE FOR A HEARING

March 2-8, 16, 22, 30
April 12-13, 27
May 10-11, 15-18, 25 & 28
June 8, 14 & 22
July 4-6, 12, 16-24

Respectfully submitted,



Ashley C. Biggers
Staff Attorney for South Carolina
Department of Health and Environmental
Control
2600 Bull Street
Columbia, South Carolina 29201-1708
(803) 898-3350

February 23, 2007
Columbia, South Carolina

5:51pm 11/23/2007 per MR Ir/Belfair III 203521 PHS doc Feb 23 doc

000711

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair LLC

Petitioner

vs

South Carolina Department of Health and
Environmental Control and Coastal
Carolina Medical Center,

Respondents

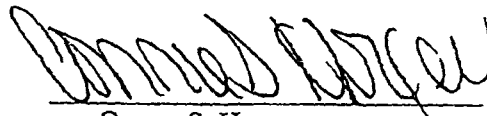
Docket No 07-ALI-07-0021-CC

CERTIFICATE OF SERVICE

I Connie S Horger Paralegal for the South Carolina Department of Health and
Environmental Control hereby certify that I have on this 23rd day of February 2007
served a copy of *South Carolina Department of Health and Environmental Control's*
Prehearing Statement upon all parties and counsel of record in the above-captioned case
via U S Mail addressed as follows

M Elizabeth Crum Esquire
McNair Law Firm, PA
Post Office Box 11390
Columbia, South Carolina 29211

David B Summer, Jr Esquire
Faye Flowers, Esquire
Parker, Poe, Adams & Bernstein, LLP
Post Office Box 1509
Columbia, South Carolina 29202


Connie S Horger

February 23 2007
Columbia, South Carolina

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000712

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

M. Elizabeth Crum
mcrum@mcnair.net
Direct Facsimile: (803) 933-1484

www.mcnair.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 799-9800
FACSIMILE (803) 376-2219

February 23, 2007

RECEIVED

FEB 23 2007

HAND DELIVERY

DHEC
OFFICE OF GENERAL COUNSEL

The Honorable Ralph King Anderson, III
Administrative Law Judge
1205 Pendleton Street
Columbia, South Carolina 29201

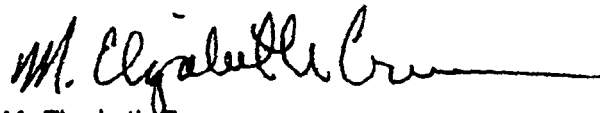
Re MRI at Belfair, LLC v. SCDHEC and Coastal Carolina Medical Center
(Docket No. 07-ALC-07-0021-CC)

Dear Judge Anderson:

Enclosed herewith for filing with the Court, please find the Prehearing Statement of Petitioner MRI at Belfair, LLC. By copy of this letter and by certificate of service appended to the Statement, I am serving counsel of record.

Should you have any questions with respect to this filing, please do not hesitate to contact me.

Sincerely,



M. Elizabeth Crum

Enclosure

cc Nancy S. Layman, Esquire (hand delivered)
Ashley C. Biggers, Esquire (hand delivered)
David B. Summer, Jr., Esquire (hand delivered)

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FEB 23 2007

STATE OF SOUTH CAROLINA

BEFORE THE ADMINISTRATIVE LAW COURT

DHEC

OFFICE OF GENERAL COUNSEL

MRI at Belfair, LLC,

Docket No 07-ALC-07-0021-CC

Petitioner,

v

South Carolina Department of Health
And Environmental Control and
Coastal Carolina Medical Center,

Respondents

PREHEARING STATEMENT

OF MRI AT BELFAIR, LLC

In response to the Order for Prehearing Statement issued by the Honorable Ralph K. Anderson, III, dated February 8, 2007, the Petitioner, MRI at Belfair, Inc ("Belfair"), respectfully submits the following

1 THE NATURE OF THIS PROCEEDING This matter arises from the Department of Health and Environmental Control's ("DHEC" or "Department") determination dated August 4, 2006, to authorize Coastal Carolina Medical Center ("CCMC") to operate a mobile magnetic resonance imaging ("MRI") unit on its campus without obtaining either a certificate of need ("CON") or a non-applicability determination ("NAD") for the acquisition and operation of the MRI as required by the State Certificate of Need and Health Facilities Licensure Act, S C Code Ann §§ 44-7-110, et seq (Rev 2002) ("CON Act") and 24 A S C Code Ann Reg 61-15 (Supp 2006)

2. STATUTORY PROVISION(S) CONFERRING SUBJECT MATTER JURISDICTION TO THE AGENCY AND OTHER APPLICABLE STATUTES AND REGULATIONS,

a Article I, § 22 of the South Carolina Constitution,

- b the South Carolina Administrative Procedures Act, S C Code Ann §§ 1-23-600(B) (Supp 2006),
- c the CON Act,
- d S C Code Ann § 44-60 (Supp 2006),
- e the CON Regs, and
- f the Rules of Procedure of the Administrative Law Court

3 ISSUES PRESENTED FOR DETERMINATION,

a Whether the Department's approval of CCMC's acquisition and use of a mobile MRI without obtaining a CON or NAD for the mobile MRI violated the CON Act and CON Regs,

b Whether CON SC-06-06, issued August 3, 2006, by the Department to CCMC to install a different, fixed MRI in a construction addition to the hospital authorized or otherwise allowed the Hospital to acquire and operate a mobile MRI without a CON or NAD,

c Whether Belfair had to request a final agency conference before the Board of Health and Environmental Control ("Board") in order to seek relief from the Administrative Law Court ("Court") pursuant to S C Code Ann § 1-23-600(B) (Supp 2006), and

d Whether the Board has statutory authority to hold a final agency conference on a matter that arises under Article I, section 22 of the South Carolina Constitution

4 THE ACTION REQUESTED OF THE COURT, IF ANY,

Belfair requests that this Court declare the Department's August 4, 2006 letter authorizing CCMC to acquire and operate a mobile MRI without the necessity of obtaining either a CON or an NAD be declared in violation of the CON Act and CON Regs and therefore in excess of the Department's statutory authority Belfair further

requests that this Court order CCMC to cease and desist from operating the mobile MRI unless and until it gets either a CON or a NAD to do the same

5 A BRIEF SUMMARY OF THE FACTS TO BE PRESENTED AT THE HEARING,

The identical parties to this case were originally before this Court in 2005 on Belfair's request for contested case review of the Department's decision to approve CCMC's CON application for the acquisition and operation of a fixed 1.5T GE magnetic resonance imaging unit ("Fixed MRI") and construction of an addition to CCMC to house the fixed MRI, for a total project cost of \$3,201,000 in Hardeeville, Jasper County, South Carolina ("Fixed MRI Construction Project"). See MRI At Belfair, LLC, v. South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center, Docket No. 04-ALC-07-0399-CC (hereinafter referred to as "Fixed MRI Construction Project Case"). On November 10, 2005, after a contested case hearing, this Court issued a Final Order and Decision affirming the Department's CON determination. Belfair appealed to the Board of Health and Environmental Control ("Board"). On May 25, 2006, the Board issued an order affirming the Court's Final Order and Decision, which order was not received by Belfair until June 2, 2006.

On July 3, 2006, Belfair appealed the Board's order to the Court of Appeals following the procedures established by 2006 Act No. 387, which became effective on July 1, 2006. This appeal is currently pending.¹ Belfair did not seek a stay prohibiting the Department from issuing CON SC-06-06 for the Fixed MRI Construction Project. At

¹ Belfair filed its final brief and reply on February 22, 2007.

CCMC's request, on August 3, 2006, the Department issued CON SC-06-06 for the Fixed MRI Construction Project.

On August 4, 2006, CCMC requested "authorization to utilize a mobile MRI at Coastal Carolina Medical Center until construction and installation of its fixed MRI, granted in the above referenced CON application, is complete " The Department sent no notice of its August 4, 2006 letter approving "temporary full-time use of a mobile MRI unit during the interim period of the fixed MRI construction and installation" to Belfair, much less the certified mail notice required by S C Code Ann § 44-7-60(E) (Supp 2006)

The mobile MRI is leased from Alliance Imaging, a different company from the Fixed MRI The Alliance Imaging lease agreement also contemplates that Alliance Imaging will operate the mobile MRI with its personnel and not the hospital's employees The mobile MRI will be housed in a trailer parked on the hospital grounds It is not the same project as the Fixed MRI Construction Project On information and belief, the capital cost under generally accepted accounting principles exceeds the \$600,000 threshold The mobile MRI project is a materially different project from the Fixed MRI Construction Project

On September 8, 2006, Belfair requested a contested case hearing on the Department's approval of the mobile MRI On September 15, 2006 Belfair asked this Court to enforce the S C Code Ann § 1-23-600(G) (Supp 2006) automatic stay against CCMC requesting that the Court "require CCMC to cease and desist providing mobile MRI services " After briefing by the parties and a hearing, this Court, on October 18,

2006 ruled that Belfair should have first sought review by the Board and remanded the case to the Board and therefore denying Belfair's request to enforce the automatic stay against CCMC as moot. Belfair then filed a Motion to Reconsider and Alter or Amend Order on Remand on October 26, 2006. Following a conference call and additional briefing on this matter, this Court denied the Motion to Reconsider and Alter or Amend Order on Remand on November 30, 2006.

This matter was remanded to the DHEC Board. The DHEC Board determined on November 17, 2006,² **without any notice to Belfair**, not to hear Belfair's request. On December 29, 2006, upon receiving DHEC's Board Meeting Agenda for January 11, 2007, counsel for Belfair e-mailed DHEC to ask whether Belfair's remanded request for final agency review would be heard on that date. However, due to the DHEC Board's Clerk's vacation schedule, Belfair's counsel received no response. On January 2, 2007, through discussion with counsel for DHEC, Belfair's counsel learned that the DHEC Board had already decided not to hear Belfair's request on December 14, 2006,³ albeit notice of the Board's decision had yet to be sent to Belfair. On January 8, 2007, Belfair's attorneys received the Board's written decision not to hold a review conference on the Order on Remand from the Court in MRI at Belfair v. SCDHEC and Coastal Carolina Medical Center, only to discover that the Board had taken action at a telephonic meeting on November 17, 2006 without notice to Belfair.

² Belfair's Motion to Alter or Amend was still pending before this Court.

³ DHEC counsel had not received notice of the Board meeting and was mistakenly informed that the Board had decided at its December 14, 2006 meeting not to hear the remanded request for final agency conference.

On January 9, 2007, Belfair requested a contested case review of the Board's January 8, 2007 written determination not to hear the Belfair request for final agency conference. This matter was assigned to the Honorable Ralph King Anderson, III on January 23, 2007.

6 A SUMMARY OF ANY MOTIONS EXPECTED TO BE RAISED AT THE HEARING AND THE APPROPRIATE AUTHORITY UNDERLYING THE MOTION,

Belfair will file a Motion to Enforce Automatic Stay and intends to file a Motion for Summary Judgment

7 A LIST OF PROPOSED WITNESSES AND EXHIBITS,

Joel C. Grice
Director, Bureau of Health Facilities and Services Development
Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Victoria R. Tibshirany
Project Reviewer
Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

A. Joseph Borelli, MD
President and Manager
MRI at Belfair, Inc
18 Clarks Summit Drive
Bluffton, SC 29910

8. A STATEMENT REGARDING THE NECESSITY FOR DISCOVERY, IF ANY;

Belfair anticipates serving standard interrogatories, requests for production of documents and requests for admission. Belfair will depose one or more of Respondents' witnesses.

000719

9 THE ESTIMATED LENGTH OF THE HEARING, AND,

One day

10. ANY DATES IN THE NEXT ONE-HUNDRED TWENTY (120) DAYS WHEN YOU WILL NOT BE AVAILABLE FOR A HEARING

February 26 and 28

March 1, 2, 8, 13, 15, 16 and 20

April 6, 17, 20

May 8 through 11, 15, 25, 29 and 31

Respectfully submitted,

M ELIZABETH CRUM S C BAR NO 1486

LCRUM@MCNAIR NET

ARIAIL B KIRK S C BAR NO 71101

AKIRK@MCNAIR NET

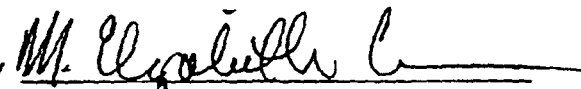
McNair Law Firm P A

POST OFFICE BOX 11390

COLUMBIA, SOUTH CAROLINA 29211

(803) 799-9800

By


M Elizabeth Crum

Attorneys for MRI at Belfair, LLC

February 23, 2007

Columbia, South Carolina

000720

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC,

Petitioner

Docket No 07-ALC-07-0021-CC

South Carolina Department of Health
and Environmental Control and
Coastal Carolina Medical Center,

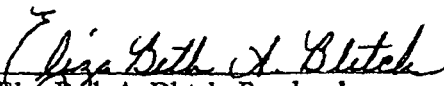
Respondents

CERTIFICATE OF
SERVICE

I, ElizaBeth A. Blitch, do hereby certify that I have this date served one (1) copy of the Prehearing Statement of Petitioner MRI at Belfair LLC upon the following counsel of record by causing said copy to be hand-delivered to the following addresses

David B Summer, Jr, Esquire
Parker Poe Adams & Bernstein
Post Office Box 1509
Columbia, South Carolina 29202-1509

Nancy S Layman, Esquire
Ashley C Biggers, Esquire
SCDHEC
Office of General Counsel
2600 Bull Street, 3rd Floor
Columbia, SC 29201


ElizaBeth A Blitch, Paralegal
McNair Law Firm, P A
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

February 23, 2007

Columbia, South Carolina

000721

McNAIR LAW FIRM, P.A.

ATTORNEYS AND COUNSELORS AT LAW

www.mcnairlaw.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA SOUTH CAROLINA 29211
TELEPHONE (803)799-8800
FACSIMILE (803)378-2219

February 22, 2007

Hand Delivered

RECEIVED

FEB 22 2007

The Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

DHEC
OFFICE OF GENERAL COUNSEL

Re *MRI at Belfair LLC v SCDHEC and Coastal Carolina Medical Center*
(Docket No 04-ALC-0399-CC)

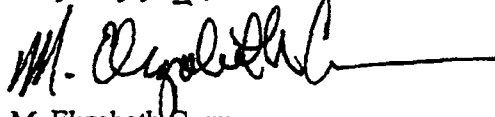
Dear Mr Richstad.

Enclosed herewith for filing with the Court please find the original and fifteen (15) copies of the Final Brief of Appellant and Final Reply Brief of Appellant in the above-captioned case. The Record on Appeal was filed earlier today with the Court.

With respect to the Certificate of Counsel bound with the Final Brief of Appellant, the Certificate reflects compliance with Rule 211(b), SCACR, but for an update to Footnote 3 on Page 4. The footnote in the Initial Brief of Appellant discussed a Motion to Dismiss that was pending before the Court at the time the Initial Brief was filed. Footnote 3 has been updated to reflect the October 17, 2006 decision of the Court to deny the Motion to Dismiss.

Should you have any questions with respect to this filing, please do not hesitate to contact me.

Very truly yours,



M. Elizabeth Crum

Enclosures

cc David B. Summer, Jr., Esquire (via hand delivery)
Faye A. Flowers, Esquire (via hand delivery)
Nancy S. Layman, Esquire (via hand delivery)
Ashley C. Biggers, Esquire (via hand delivery)

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ANDERSON CHARLESTON CHARLOTTE COLUMBIA GEORGETOWN GREENVILLE HILTON HEAD ISLAND MYRTLE BEACH RALEIGH

COLUMBIA BRICK

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

DHEC
OFFICE OF GENERAL COUNSEL

Docket No 04-ALC-0399-CC

MRI at Belfair, LLC

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

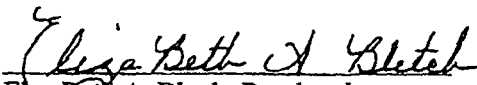
Respondents

CERTIFICATE OF SERVICE

I, ElizaBeth A Blitch, do hereby certify that I have this date served three (3) copies of the Final Brief of Appellant and Final Reply Brief of Appellant in the above-captioned appeal upon the following counsel of record by having said copies to be hand delivered by law firm courier to the following addresses

Nancy S Layman, Esquire
Ashley C Biggers, Esquire
SCDHEC
Office of General Counsel
2600 Bull Street, 3rd Floor
Columbia, South Carolina 29201

David B Summer, Jr, Esquire
Faye A. Flowers Esquire
Parker Poe Adams & Bernstein
1201 Main Street, Suite 1450
Columbia, South Carolina 29201


ElizaBeth A Blitch, Paralegal
McNair Law Firm, P A
Post Office Box 11390
Columbia, South Carolina 29211
(803) 753-3319

February 22, 2007

Columbia, South Carolina

COLUMBIA 887823v1

000723

MCNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

www.mcnairlaw.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11TH FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 799-8800
FACSIMILE (803) 378-2219

February 22, 2007

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FEB 22 2007

The Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

DHEC
OFFICE OF GENERAL COUNSEL

Re *MRI at Belfair LLC v SCDHEC and Coastal Carolina Medical Center*
(Docket No 04-ALC-0399-CC)

Dear Mr Richstad

Enclosed herewith for filing with the Court please find fifteen (15) copies of the Record on Appeal in the above-captioned case. The copy bound with the original Certificate of Counsel has been marked for the convenience of the Court. The Record was served on counsel for the Respondents on February 2, 2007 and the Certificate of Service was filed with the Court that date. Later this afternoon, we will be filing Appellant's final briefs in this appeal.

Should you have any questions with respect to this filing, please do not hesitate to contact me.

Very truly yours,


M. Elizabeth Crum

Enclosures

cc David B. Summer, Jr., Esquire (via hand delivery)
Faye A. Flowers, Esquire (via hand delivery)
Nancy S. Layman, Esquire (via hand delivery)
Ashley C. Biggers, Esquire (via hand delivery)

000724

ANDERSON CHARLESTON CHARLOTTE COLUMBIA GEORGETOWN GREENVILLE HILTON HEAD ISLAND MYRTLE BEACH RALEIGH

COLUMBIA 881811v1

MCNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

ANAIL B. KIRK
akirk@mcnair.net
BANK OF AMERICA TOWER
1301 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 1138
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 753-3219
FACSIMILE (803) 378-0000

Via Facsimile and U.S. Mail

February 22, 2007

Mr. Jody Hamm
Freedom of Information Officer
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

RE Request for Information Pursuant to the South Carolina Freedom of Information
Act regarding Coastal Carolina Medical Center's MRI Projects

Dear Mr. Hamm:

Pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10, *et seq.* (1976), I am writing to request a copy of the following:

- 1) Any documents in the Department's possession related to the August 3, 2006 Certificate of Need (CON) issued to Coastal Carolina Medical Center for construction for the addition of a fixed 1.5 Tesla MRI unit (SC-06-06) dated after August 3, 2006, specifically including any progress reports documenting compliance with the timetable set forth in said CON application, and
- 2) Any documents in the Department's possession related to the utilization of a mobile MRI at Coastal Carolina Medical Center

I will be pleased to reimburse the Department for the costs of copying these files. Please do not hesitate to contact me should you have any questions regarding this request. Please call me as soon as the documents are ready and I will send a courier for them.

Sincerely,

Anail B. Kirk

Anail B. Kirk

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Freedom of
Information Office

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cc

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3/8/07

jhec.sc.gov

MCNAIR LAW FIRM, P A.
ATTORNEYS AND COUNSELORS AT LAW

M. ELIZABETH CRUM
lerum@mcnair.net

www.mcnair.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

2007-02-22
= 10:50 AM
Feb 22

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 292
TELEPHONE (803) 799-9800
FAX (803) 799-2219

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February 2, 2007

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DHEC
OFFICE OF GENERAL COUNSEL

David B Summer, Jr, Esquire
Susan B Lipscomb, Esquire
Parker, Poe, Adams & Bernstein L L P
1201 Main Street, Suite 1450
Columbia, South Carolina 29202-1509

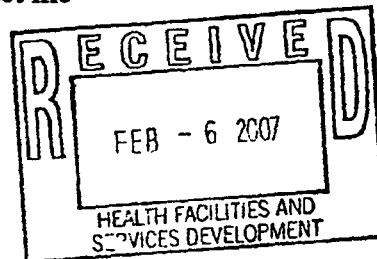
Nancy S Layman, Esquire
Ashley C Biggers, Esquire
Office of General Counsel
SCDHEC
2600 Bull Street
Columbia, South Carolina 29201

Re *MRI at Belfair LLC v SCDHEC and Coastal Carolina Medical
Center*
(Docket No 04-ALC-07-0399-CC)

Dear Counsel

Pursuant to Rule 210(a), SCACR, enclosed herewith and served upon you please find three (3) copies of the Record on Appeal in the above-captioned matter. You will also find enclosed a copy of our letter to the South Carolina Court of Appeals filing the Certificate of Service for the Record.

Should you have any questions with respect to this matter, please do not hesitate to contact me.



Sincerely,

M. Elizabeth Crum by
M. Elizabeth Crum *Elizabeth A. Stetel*
with permission

Enclosures

cc The Honorable Kenneth A. Richstad

000726

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

www.mcnairlaw.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET 11th FLOOR
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803)799-8800
FACSIMILE (803)376-2219

February 2, 2007

Hand Delivered

The Honorable Kenneth A. Richstad
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re *MRI at Belfair LLC v SCDHEC and Coastal Carolina Medical
Center*
(Docket No 04-ALC-0399-CC)

Dear Mr. Richstad:

Pursuant to Rule 210(a), SCACR, enclosed herewith for filing with the Court please find the original Certificate of Service for the Record on Appeal in the above-captioned case, which Certificate indicates service of three (3) copies of the Record upon counsel for Respondents. I am also enclosing a copy of the letter transmitting the Record to counsel.

Should you have any questions with respect to this filing, please do not hesitate to contact me.

Very truly yours,

M Elizabeth Crum by
M Elizabeth Crum *Elizabeth A. Blitch,*
with permission

Enclosures

cc David B. Summer, Jr., Esquire (via hand delivery)
Susan B. Lipscomb, Esquire (via hand delivery)
Nancy S. Layman, Esquire (via hand delivery)
Ashley C. Biggers, Esquire (via hand delivery)

000727

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

Docket No 04-ALC-0399-CC

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center,

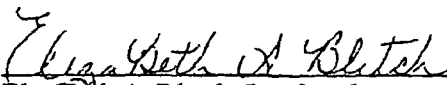
Respondents

CERTIFICATE OF SERVICE

I, ElizaBeth A. Blitch, do hereby certify that I have this date served three (3) copies of the Record on Appeal (Volumes 1-3) in the above-captioned matter upon the following counsel of record by having said copies hand delivered by law firm courier to the following addresses

Nancy S. Layman, Esquire
Ashley C. Biggers, Esquire
SCDHEC
Office of General Counsel
2600 Bull Street, 3rd Floor
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Susan B. Lipscomb, Esquire
Parker Poe Adams & Bernstein
1201 Main Street, Suite 1450
Columbia, South Carolina 29201


ElizaBeth A. Blitch, Paralegal
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 753-3319

February 2 2007

Columbia, South Carolina

000728

BOARD
Elizabeth M. Hagood
Chairman
Wm H. Cooper III
Chairman
Steven G. Kiser
Secretary



C. Earl Hunter, Commissioner
Promoting and protecting the health of the public and the environment.

BOARD
Henry C. Scott
Paul C. Aughery III
Glenn A. McCall
Coleman F. Buckhouse, MD

OFFICE OF GENERAL COUNSEL

February 22, 2007

VIA HAND DELIVERY

The Honorable Kenneth A. Richstad, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

*Re MRI at Belfair LLC v South Carolina Department of Health and Environmental
Control and Coastal Carolina Medical Center*
Docket No. 04-ALJ-07-0399-CC
Our File Number 20026

Dear Mr. Richstad:

In connection with the above-referenced appeal, enclosed for filing please find an original and fourteen (14) copies of the *Brief of Respondent South Carolina Department of Health and Environmental Control Certificate of Counsel and Proof of Service*. Kindly file the enclosed and return a file-stamped copy to me via my courier.

By copy of this letter under separate cover, I am serving all parties of record with three (3) copies of the same.

With kind regards,

Very truly yours,

Connie S. Horger
Paralegal to Ashley C. Biggers

/csh
Enclosures as stated

000729

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Office of General Counsel
Columbia Office 2600 Bull Street, Columbia, SC 29201, Phone 803-732-2222

The Honorable Kenneth A. Richstad
February 22, 2007
Page 2

cc (w/Enclosures)
M. Elizabeth Crum, Esquire
Ariail B. Kirk, Esquire
A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
1201 Gervais Street, 11th Floor
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Parker, Poe, Adams & Bernstein, LLP
1201 Main Street, Suite 1450
Columbia, South Carolina 29201

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

SC Court of Appeals

Docket No 04-ALJ-07-0399-CC

MRI at Belfair LLC,

Appellant

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center

Respondents

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that this Final Brief complies with Rule
211(b) South Carolina Rules of Civil Procedure

February 22, 2007



Ashley C. Biggers

Nancy S. Layman

South Carolina Department of Health and
Environmental Control

2600 Bull Street

Columbia, South Carolina 29201

(803) 898-3350

*Attorneys for Respondent South Carolina
Department of Health and Environmental
Control*

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

SC Court of Appeals

Docket No 04-ALJ-07-0399-CC

MRI at Belfair, LLC,

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center

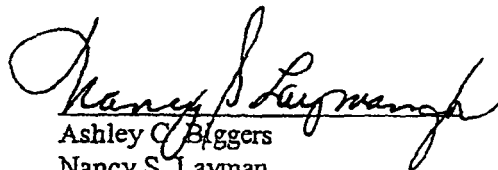
Respondents

PROOF OF SERVICE

I certify that on February 22, 2007 I served the foregoing *Brief of Respondent South Carolina Department of Health and Environmental Control* on the following parties of record by hand delivering three (3) copies of the same addressed to counsel as follows

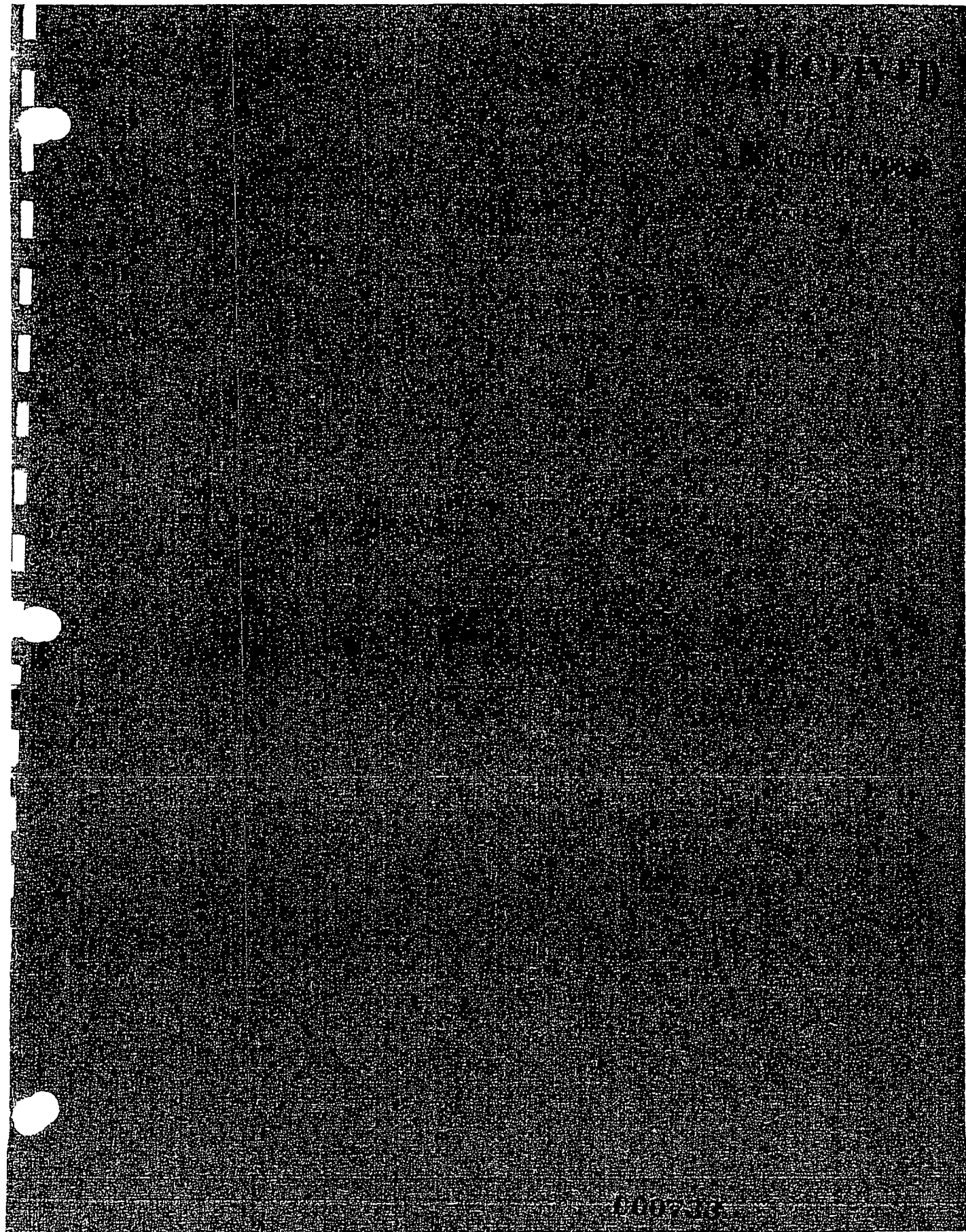
M Elizabeth Crum, Esquire
Anail B Kirk, Esquire
A. Victor Rawl, Jr Esquire
McNair Law Firm PA
1301 Gervais Street, 11th Floor
Columbia, South Carolina 29201

David B Summer Jr, Esquire
Faye A Flowers, Esquire
Parker, Poe, Adams & Berstein LLP
1201 Main Street, Suite 1450
Columbia South Carolina 29201



Ashley C Biggers
Nancy S Layman
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, South Carolina 29205
(803) 898-3350

*Attorneys for Respondent South Carolina
Department of Health and Environmental
Control*



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STATEMENT OF ISSUES ON APPEAL

- I The CON Award to CCMC does not violate Section 44-7-180(B) regarding projection of need and SHP standards
- II It is not error to treat hospitals differently than other health care facilities for purposes of applicability of the MRI standards in the SHP
- III The Board did not violate Section 44-7-210(c) or exceed its statutory authority by finding the project could be approved without having to prove compliance with project review criteria.
- IV The Board did not err in determining that, in this particular case "available" for CCMC means twenty-four hours seven days a week

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STATEMENT OF THE CASE

This matter arises from MRI at Belfair LLC's (Belfair) challenge of the Certificate of Need (CON) approved by the South Carolina Department of Health and Environmental Control (DHEC or Department) for the construction of an addition for a 1.5T Magnetic Resonance Imaging (MRI) unit for Coastal Carolina Medical Center (CCMC). Located in Hardeeville in Jasper County, CCMC is a forty-one (41) bed hospital; it is the only hospital in that county.

The Department approved the CON on November 22, 2004, based on the 2003 South Carolina Health Plan (SHP), which stated that "[e]ach hospital should have at least one MRI unit available for diagnosis of emergency patients, inpatients, and outpatients" (R. p. 746, 1240-42). Additionally, the application complied with 24A S.C. Code Ann. Regs. 61-15 § 501 (Supp. 2004) "Certification of Need for Health Facilities and Services." Belfair challenged the decision to grant the CON by filing a request for contested case hearing with the Administrative Law Court (ALC) (R. p. 21).

Prior to the merits hearing, CCMC filed a Motion for Summary Judgment based on the language of Standard (1) of the CON Standards for MRIs in the SHP quoted above. The Department joined in the Motion. Petitioner Belfair also filed a Motion for Summary Judgment, arguing that the standards for MRIs in the SHP do not comply with the requirement of S.C. Code Ann. § 44-7-180(B)(2) (2002), i.e., the SHP failed to project need for additional health care facilities, beds, health services, and equipment. The Court heard all parties in a Motions hearing at the ALC on August 12, 2005.

On August 15, 2005, the ALC convened all parties in a conference call to rule on the Motions for Summary Judgment. At that time, ALC denied Belfair's Motion and

partially granted CCMC's Motion. The Court ruled that there is no need to show that CCMC met the Project Review Criteria outlined in the SHP and in 24A S C Code Ann Regs 61-15 § 803 (Supp 2004) (a) Community Need Documentation (b) Distribution (Accessibility), (c) Acceptability, and (d) Cost Containment. However, the Court ruled there remained a question of material fact as to whether CCMC had an MRI available for diagnosis of emergency patients, inpatients and outpatients as intended by the Department. The case then proceeded to trial on the narrow issue of whether CCMC had an MRI *available* for diagnosis of emergency patients inpatients and outpatients (Emphasis added.)

A three-day hearing on the merits was held on August 23, 24 and 25 2005 at the ALC in Columbia, South Carolina. By Final Order and Decision filed November 10 2005, the ALC ruled that the facts of the case clearly demonstrate that CCMC needs a fixed in-house MRI unit in order to have an MRI unit sufficiently available to it (R. p 7-18)

Belfair appealed the Final Order and Decision of the ALJ to the Board of Health and Environmental Control ('Board ') on December 9, 2005, pursuant to S C Code Ann § 1-23-610(A) (2005). The Board heard arguments on the appeal on May 11, 2006. The Board upheld the ALJ's Final Order and Decision by Order dated May 25, 2006 (R. p 5). Belfair received written notice of the Board's Order on June 2 2006. On July 3 2006 Belfair filed its Notice of Appeal of the Board's Order with the Court of Appeals pursuant to Section 2 of 2006 Act 387 (effective July 1, 2006).

000739

ARGUMENT

The South Carolina Department of Health and Environmental Control (DHEC or Department) is the 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) S C Code Ann § 44-7-140 (2002) Pursuant to S C Code Ann § 44-7-150(3) (2002) the Department promulgated 24A S C Code Ann Regs 61-15 (Supp 2005) Certification of Need for Health Facilities and Services A person or health care facility is required to obtain a CON from the Department prior to undertaking a capital expenditure which is associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the Plan 24A S C Code Ann Regs 61-17 § 102(1)(d) (Supp 2005) The purpose of the CON Act 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 S C Code Ann § 44-7-120 (2002)

The Court s standard of review in this matter is set forth in S C Code Ann § 1-23-610(D) (2005), which provides

(D) The review of the administrative law judge s order must be confined to the record The reviewing tribunal may affirm the decision or remand the case for further proceedings, or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is

- (a) in viol ition 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

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(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

The Administrative Law Judge is the sole finder of fact. The reviewing tribunal may not alter the Administrative Law Judge's factual findings or make new findings of fact. Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002).

I The CON Award to CCMC does not violate Section 44-7-180(B) regarding projection of need and SHP standards

The State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110 *et seq.* (2002) was enacted 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. Section 44-7-120. Before an entity can operate certain health care facilities and services in South Carolina, the Department must issue a Certificate of Need to that entity, subject to certain statutory exemptions. See S.C. Code Ann. §§ 44-7-160 and -180 (2002). The CON program is also administered under the guidelines of 24A S.C. Code Ann. Regs. 61-15 (Supp. 2004). Additionally, Section 44-7-210(C) provides that [t]he Department may not issue a Certificate of Need unless an application complies with the State Health Plan Project Review Criteria, and other regulations. The Department's decision must be based on the currently approved State Health Plan in effect at the time such application is accepted. Regulation 61-15 § 504.

The SHP is developed by the Department with the advice of the State Health Planning Committee for use in the administration of the CON program, pursuant to S.C.

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Code Ann § 44-7-180 The authorizing statute states that the SHP must include an inventory of existing health care facilities, beds, specified services, and equipment projections of need for additional health care facilities, beds health services and equipment, standards for distribution of health care facilities beds, specified health services, and equipment and a general statement of the project review criteria considered most important in evaluating CON applications S C Code Ann § 44-7-180(B) (2002) The SHP is given final approval by the Board before taking effect

At the time that the application in the present case was filed the 2003 SHP was in effect. The 2003 SHP contained three specific standards that must be satisfied prior to the approval of a CON for an MRI unit

- a. Each hospital should have at least one MRI unit available for diagnosis of emergency patients inpatients and outpatients
- b. In order to promote cost-effectiveness, the use of shared mobile MRI units should be considered
- c. The applicant agrees in writing to provide to the Department utilization data on the operation of the MRI service

(R. p 746) In addition, the 2003 SHP lists the following project review criteria as most important in evaluating certificate of need applications for this service community need documentation, distribution (accessibility) acceptability, and cost containment (R p 747)

The Department, as the sole state agency responsible for administering the CON program, is given great discretion in administering the terms and conditions of that program See Byerly Hospital v State Health and Human Servs Fin Comm n 319 S C 225 460 S E 2d 383 (1995)

In preparing the 2003 SHP the Department and the Board made a public policy decision that each hospital should have an MRI unit if it can afford it. (R p 666-67

675 76 824) There is no specific methodology set forth in the statute for determining need for every facility or project, nor is that a requirement in the statute that *each* facility or service have projection of need. The standards contained in the 2003 SHP address the need for an MRI unit by hospitals. The standards comply with the statutory requirements of Section 44-7-180(B).

II It is not error to treat hospitals differently than other health care facilities for purposes of applicability of the MRI standards in the SHP

Hospitals and health care facilities are defined separately in the CON Act. A hospital is defined as "a facility organized and administered to provide overnight medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy." S.C. Code Ann. § 44-7-130(12) (2002). "Health care facility" means "acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which Certificate of Need review is required by federal law." S.C. Code Ann. § 44-7-130(12) (2002).

It is appropriate to give due consideration to the Department's utilization of its specialized knowledge and expertise in the application of the CON Act and CON regulations. See S.C. Code Ann. § 1-23-330(4) (2005). In promulgating the 2003 SHP, the Department utilized its special knowledge to include the provision that [e]ach

hospital should have at least one MRI unit available for diagnosis of emergency patients inpatients, and outpatients. The Department did not err in including that provision in the SHP. The provision for hospitals is not a ground for reversal in this case.

III The Board did not violate Section 44-7-210(c) or exceed its statutory authority by finding the project could be approved without having to prove compliance with project review criteria.

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 & Envtl Control, 292 S C 199 202, 355 S E 2d 536 538 (1987). "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." Converse Power Corp v S C Dep't of Health and Envtl Control, 350 S C 39 48, 564 S.E. 2d 341, 346 (Ct App 2002).

In preparing the 2003 SHP the Department, with the advice of the State Health Planning Committee and the approval of the Board, clearly determined that each hospital should have at least one MRI unit available for the diagnosis and treatment of emergency patients. (R p 666-67, 675-76, 696-701, 724-25, 824). The Department has interpreted this standard to mean that if a hospital can afford an MRI unit then a CON should be approved for one. (R p 803, 824). The decision of the ALC, as affirmed by the Board that CCMC should be granted a CON for at least one fixed MRI unit if the hospital can afford it is consistent with the SHP and within its statutory authority.

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IV The Board did not err in determining that "available" for CCMC means twenty-four hours, seven days a week.

The Department approved the CON for CCMC on November 22, 2004. It based its decision on the fact that the proposal was consistent with standards for MRI services as outlined in the 2003 SHP. It strengthened the healthcare delivery system to the citizens of Jasper County, it increased accessibility of such services, and it had community and physician support. (R. p. 1240-42)

MRIs may be modular, permanently affixed to an area adjacent to a hospital (if space within the hospital is insufficient), mobile, transported one or more times a week to a facility, or within the four walls of a hospital. Mobile units are available at a given site fewer than five times a week. CCMC considered sharing a mobile MRI but rejected the plan as neither cost-effective nor conducive to the health and well-being of its patients.

Belfair is a freestanding unit located more than 12 miles from CCMC. (R. p. 237) Owned by Dr. Albert J. Borelli, Jr., who reads the MRI scans there. Belfair is open Monday through Friday from 7:00 AM to 6:00 PM. (R. p. 196, 221, 237) It has no on-call responsibilities with any health care facilities. (R. p. 237) CCMC has an emergency room that operates 24 hours a day, seven days a week.

Although 10 MRI units exist in Beaufort County, including both mobile and fixed MRI units, none exists in Jasper County. Most of the existing MRI units are older, lower-cost equipment. (R. p. 692-95) Facilities that are not hospitals are not required to have a CON for MRI equipment if the cost is less than \$600,000.

The 2003 South Carolina Health Plan, Standard (1), for Magnetic Resonance Imaging states: Each hospital should have at least one MRI unit available for diagnosis.

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of emergency patients, inpatients and outpatients (R. p 744-46) The Department interprets this statement as meaning that a hospital should have an MRI within its walls and, if it does then the MRI is available to its patients (R. p 700-01) In particular a hospital with an emergency room should have an in-house, full-time MRI service for its patients Only small, rural hospitals in South Carolina "that absolutely do not have the funding" are using mobile MRI units (R p 702)

Both the State Health Planning Committee and the DHEC Board believe that Standard (1) means that every hospital should have at least one MRI unit in-house whenever the patients need it (R. p 666-67, 675-76 696-701 824) The need for an in-house MRI at CCMC was reiterated by Dr Etheridge, a family physician and Chief of Staff at CCMC (R. p 357-64, 367), and by Dr Moesch a radiologist whose group in Savannah, Georgia provides remote radiology readings 24 hours a day to CCMC (R p 380-82, 386-87 389-90)

Contracting with the provider of mobile MRI services would not provide sufficient availability for the hospital Transporting a patient has its own risks A transferred inpatient must leave the safety net of services and providers who are on site in the hospital, which can produce additional stress and harm to the patient (R p 358-60) There may be an interruption in the patient receiving necessary medications (R p 360) The hospital is also dependent on the availability of an ambulance and staff to attend the patient during transport. (R. p 360-61) Finally there is always the possibility an ambulance could be involved in an accident while transporting the patient (R p 363-63)

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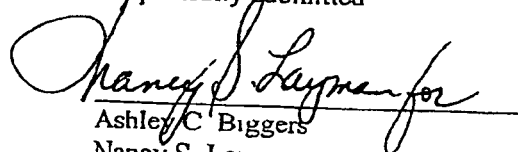
CCMC's expert, Health Planner Mark Richardson testified that to meet the needs of a hospital's patients, an MRI should be available 24/7, which means the service can be accessed every hour of every day (R. p. 553-70). A technician can be on-call during evenings and on weekends.

The evidence in the record clearly establishes that in order to have an MRI unit available to it, CCMC needs an in-house, fixed MRI unit. The decision of the ALC as approved by the Board is therefore supported by the evidence in the record.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court affirm the decision below to grant the CON to CCMC.

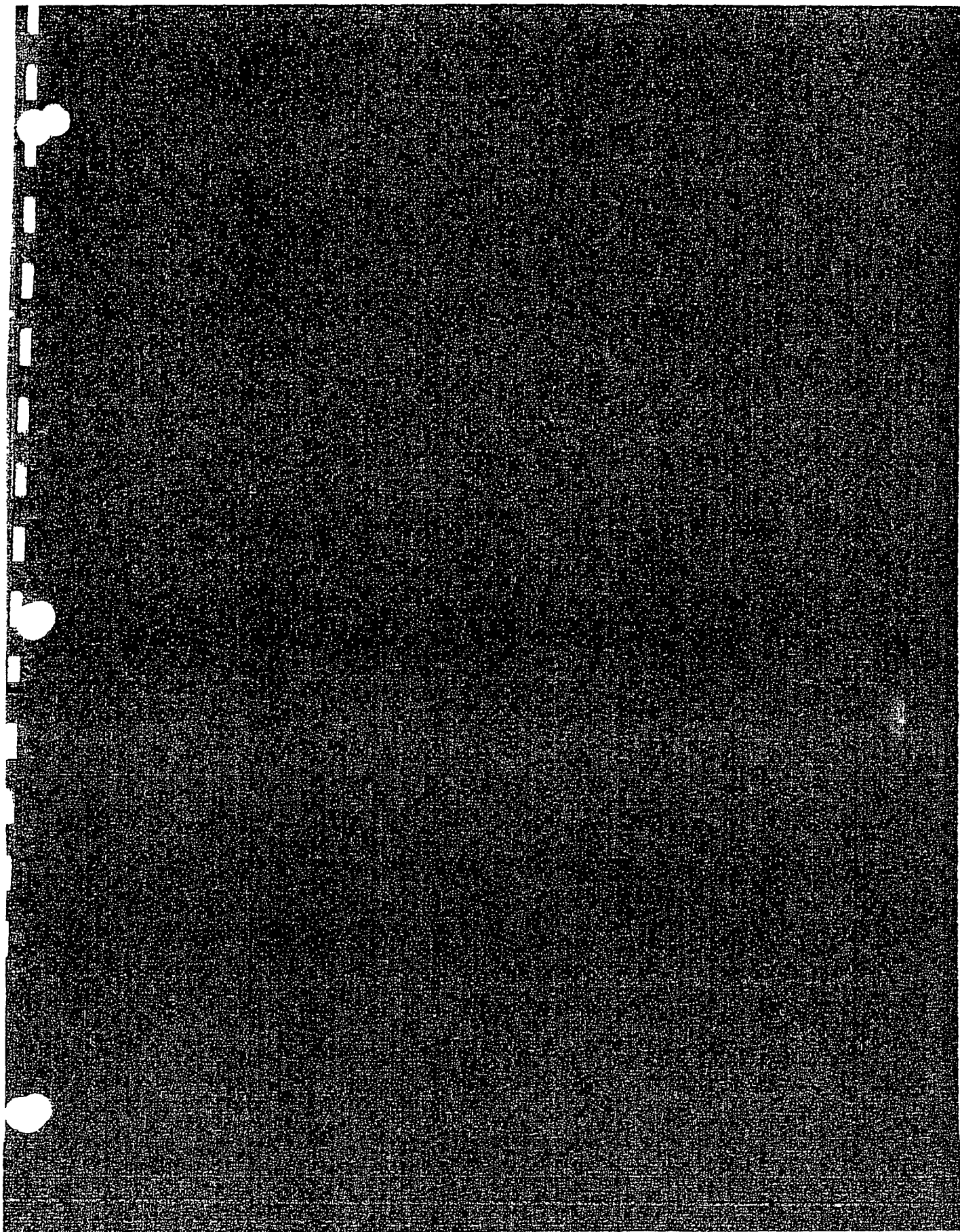
Respectfully submitted,



Ashley C. Biggers
Nancy S. Layman
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
(803) 898-3350

*Attorneys for Respondent South Carolina
Department of Health and Environmental Control*

February 22, 2007
Columbia, South Carolina



THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

The Honorable Ralph King Anderson, III,
Administrative Law Judge

Docket No 04-ALC-0399-CC

MRI at Belfair, LLC

Appellant,

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center

Respondents

FINAL BRIEF OF APPELLANT
MRI AT BELFAIR, LLC

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DHEC
OFFICE OF GENERAL COUNSEL

M Elizabeth Crum, S C Bar No 1486
lcrum@mcnair net
A Victor Rawl Jr, S C Bar No 9261
vrawl@mcnair net
Anail B Kirk, S C Bar No 71101
akirk@mcnair net
McNAIR LAW FIRM, P.A
Post Office Box 11390
Columbia South Carolina 29211
(803) 799-9800

Attorneys for Appellant MRI at Belfair LLC

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STATEMENT OF ISSUES

- I WAS THE CON AWARD IN VIOLATION OF THE REQUIREMENTS OF SECTION 44-7-180(B) REGARDING PROJECTION OF NEED AND PLAN STANDARDS?
- II DOES THE ORDER NOT MAKE SUFFICIENT FINDINGS OF FACT REGARDING THE EFFICACY OF THE PLAN FOR THE COURT TO MAKE A MEANINGFUL REVIEW?
- III SHOULD THE ORDER BE REVERSED BECAUSE THERE IS NO STATUTORY BASIS TO TREAT HOSPITALS DIFFERENTLY FROM OTHER HEALTH CARE FACILITIES?
- IV DID THE BOARD VIOLATE THE PROVISIONS OF S C CODE ANN § 44-7-210(C) AND EXCEED ITS STATUTORY AUTHORITY WHEN IT FOUND AS A MATTER OF LAW THAT THE PROJECT BE APPROVED WITHOUT REGARD TO COMPLIANCE WITH PROJECT REVIEW CRITERIA?
- V DID THE BOARD ERR IN DETERMINING THAT, FOR ACUTE HOSPITALS LIKE CCMC, "AVAILABLE" MEANS TWENTY-FOUR HOURS, SEVEN DAYS A WEEK?
- VI ARE THE ORDER'S FINDINGS THAT CCMC'S MRI SERVICE AVAILABILITY NEEDS CAN ONLY BE MET BY A TWENTY-FOUR/SEVEN ON SITE MRI ARBITRARY AND CAPRICIOUS, CHARACTERIZED BY AN ABUSE OF DISCRETION OR AN UNWARRANTED EXERCISE OF DISCRETION, AND ARE CLEARLY ERRONEOUS IN LIGHT OF THE EVIDENCE ON THE RECORD AS A WHOLE?

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STATEMENT OF THE CASE

This appeal arises from an application for a certificate of need ("CON") under the South Carolina Certificate of Need and Health Facilities Licensure Act S C Code Ann §§ 44-7-110 et seq (2002) ("CON Act") Appellant MRI at Belfair (Belfair' or "Appellant) seeks reversal of the Order of the South Carolina Board of Health and Environmental Control ("Board) dated May 25 2006 (Board Order") (R pp 5-18) which Order upheld the Final Order and Decision of the Administrative Law Court (ALC) dated November 10 2005 ("ALC Order") (R pp 7-18) sustaining the Department of Health and Environmental Control ("DHEC or "Department) staff's decision to grant a CON to Coastal Carolina Medical Center ("CCMC" or "Hospital") for a fixed magnetic resonance imaging unit ("MRI") and construction of a \$3,201,000 addition to the Hospital to house the MRI in Hardeeville, Jasper County South Carolina ("Project")

On November 24, 2004, Belfair filed a request for contested case hearing with the Clerk of the ALC and with the Clerk of the Board seeking reversal of the Department's decision (R p 21) On December 21 2004 the Administrative Law Judge ("ALJ") issued an Order for Prehearing Statements and each party filed their Prehearing Statements on January 20 2005 (R pp 22-28) During the discovery process, pursuant to the Order for Prehearing Statements Belfair filed Amended Prehearing Statements (R pp 29-34)

On August 2 2005, CCMC filed a Notice of Motion and Motion for Summary Judgment and Memorandum in Support at the ALC (R pp 35-54) On August 3 2005, Belfair filed a Notice of Motion and Motion for Summary Judgment and Memorandum in Support at the ALC (R pp 67-85)

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On August 12 2005, both parties filed memoranda in opposition to the respective Motions for Summary Judgment (R p 86-106)

On August 12 2005 Judge Anderson heard the summary judgment motions¹ and on August 15 2005 the Judge issued a verbal order granting partial summary judgment to CCMC and limiting the contested case hearing to whether MRI services were available to CCMC as the word "available" is used in the 2003 South Carolina Health Plan ("Plan")² Judge Anderson declined to issue a written Order granting partial summary judgment prior to the merits hearing instead issuing it as part of the ALC Order after the merits hearing (R pp 8-11)

The contested case was heard August 23-25 2005 only on the issue of MRI service availability Proposed Orders were filed on October 12 2005 and the ALC Decision was filed on November 10 2005 (R pp 7-18)

Belfair filed its appeal with the Board and the ALC on December 9 2005 serving the Board by hand delivery and serving the parties by mail on December 9 2005 (R pp 107-122) Pursuant to the Board's briefing schedule Belfair's Brief to the DHEC Board was filed on March 24, 2006 and briefs from CCMC and DHEC were filed on April 10, 2006 A hearing before the DHEC Board was held on May 11 2006 and the Board Order was dated May 25, 2006 (R p 5) The Board's Order adopts and incorporates the ALC's Order (R pp 5-18) The Order was mailed to Appellant on June 1, 2006 and received by Appellant on June 2 2006

Pursuant to Section 2 of Act No 387 of 2006 (H 3285 R 390) which became effective July 1 2006 Appellant Belfair timely filed and duly served its Notice of

¹ DHEC joined in the CCMC Motion for Partial Summary Judgment during the Motions hearing

² Based on the Judge's oral ruling the remaining discovery conducted by the parties was only as to the issue of "availability" of MRI services to CCMC and the parties reserved the right to conduct additional discovery if needed

Appeal of the Board's Order by hand delivery on the parties on July 3, 2006 and this appeal followed³ (R pp 19-20)

CCMC is a forty-one (41) bed general hospital with thirty-one (31) acute beds and ten (10) rehabilitation beds located in Hardeeville, Jasper County South Carolina very close to the Beaufort County line. CCMC is a for-profit hospital owned by LifePoint Hospitals, Inc. CCMC opened its doors to the public in November 2004. On May 7, 2004, CCMC filed the Project application under the Plan. The Project proposed service area includes Jasper County and the ZIP Code in Beaufort County that encompasses Bluffton where Belfair is located. More than fifty percent (50%) of the population CCMC proposes to serve is located in the Bluffton ZIP Code.

Belfair is a South Carolina limited liability company owned by Dr. A. Joseph Borelli, Jr.,⁴ which sought and received a CON to operate a 1.5 Tesla General Electric ("GE") fixed MRI on May 21, 2001. Belfair is licensed as a "free standing technology" facility. See S.C. Code Ann. § 44-7-130 and 24A S.C. Code Ann. Reg. 61-15 § 103.11 (Supp. 2005). Belfair is an "affected person" under the CON Act. See S.C. Code Ann. § 44-7-130(1) (2002). Belfair began operations on April 22, 2002. Belfair is one of several GE United States national show sites and also is an international show site for GE. Belfair also serves as a clinical evaluation site for GE's newly developed MRI products providing the Beaufort/Jasper service area access to potentially life-saving diagnostic technology 12-18 months before other

³ On July 24, 2006, CCMC filed a Motion to Dismiss this appeal. Appellant and DHEC each filed Returns to the Motion contending that the appeal was properly perfected before this Court. On October 17, 2006, the Court issued its Order stating: "Motion to Dismiss is denied. The parties may raise the issue in their briefs to this Court."

⁴ Dr. Borelli is board certified by the American College of Radiology ("ACR") and serves on its Committee on MRI Accreditation, including as a reviewer to determine whether MRI facilities, including hospitals, receive ACR certification.

MRI service providers in the State Belfair and Dr Borelli have been honored with the Community Service Award from the Hilton Head Volunteers in Medicine Clinic in 2002 2003 and 2004 for providing the greatest amount of free care to the local indigent population

During the agency review process Belfair opposed the Project contending inter alia that the purposes of the CON Act could best be carried out by CCMC providing MRI services through a shared arrangement⁵ either mobile MRI services, another ownership sharing arrangement or a transfer agreement, none of which had to be with Belfair CCMC contended, inter alia, that because it was a hospital it needed an MRI accessible twenty-four hours a day seven days a week ('twenty-four/seven') On November 22 2004 DHEC issued its decision letter to grant the CON ("Staff Decision") and Belfair timely requested contested case review (R pp 1240-1243)

ARGUMENTS

This appeal is taken pursuant to the provisions of the South Carolina Administrative Procedures Act, as amended by Act 387 of 2006 effective July 1 2006 ('APA') The standard of review is that this Court may only reverse or modify the Board's Order if Belfair's substantial rights have been prejudiced by the Board action and the action is, inter alia

- (a) in violation of constitutional or statutory provisions,
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure

⁵ Dr Borelli stated to the Project Review Committee that if CCMC would utilize mobile or shared services as provided for in Standard 2 of the Plan, Belfair would not oppose the Project

- (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 § 1-23-380(6) (Section 2 Act 387) See also S C Code Ann § 1-23-600(C) (Section 4 Act 387)

This action arises under the CON Act and duly promulgated regulations 24A S C Code Ann Reg 61-15 (Supp 2005) The Department is the sole state agency designated to administer the granting of CONs and other activities necessary to carry out the CON program S C Code Ann § 44-7-140 (2002) The Department is a creature of statute and its authority is dependent upon statute in this case, the CON Act As such, the Department and its Board can only exercise "those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to powers expressly granted " Brooks v South Carolina State Bd of Funeral Serv 271 S C 457 461 247 S E 2d 820 822 (1978) In this matter the Department is possessed only with those powers that are specifically delineated in the CON Act. See City of Rock Hill v S C Dep't of Health and Env'tl Control 302 S C 161 394 S E 2d 327 (1990), City of Columbia v Bd of Health and Env'tl Control, 292 S C 199, 355 S E 2d 536 (1987) Thus the Board is bound by the provisions of the CON Act and accompanying regulations and cannot take an action contrary to the requirements of the CON Act and regulations

The CON Act requires DHEC to establish the CON program 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 South Carolina S C Code Ann § 44-7-120 (2002) To carry out these purposes the Act requires, in pertinent part

- (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

Id The Department has duly promulgated regulations 24A S C Code Ann Reg 61-15 (Supp 2005) that govern the review and approval or denial of CON applications

Section 44-7-210(C) of the Act prohibits the Department from issuing a CON unless the project "complies with the State Health Plan, Project Review Criteria⁶ ["Criteria"] and other regulations " and requires the Department to identify the Criteria applicable to each application and requires the Department to deny a CON application that does not comply with the Criteria even if the application does comply with the Plan In other words to be approvable a CON application has to comply both with the requirements of the Plan and with the identified Criteria Importantly the CON Act requires that the State Health Plan contain specific standards and information for each health facility health service or equipment identified in the Plan

The CON Act requires that at least once every two (2) years the Department with the advice of the State Health Planning Committee appointed by the Governor must prepare a State Health Plan and present it for approval by the Board S C Code Ann § 44-7-180 (2002) The Plan is effective upon approval of the Board

⁶ The Project Review Criteria is set forth in 24A S C Code Ann Reg 61 15 Part 8 §§ 801 et seq (Supp 2005)

I THE CON AWARD IS IN VIOLATION OF THE REQUIREMENTS
OF SECTION 44-7-180(B) REGARDING PROJECTION OF
NEED AND PLAN STANDARDS

The MRI standards set forth in the Plan ("MRI Standards" or "Plan Standards") do not comply with the statutory requirements of S C Code Ann § 44-7-180 (2002) and 24A S C Code Reg 61-15 § 106 (Supp 2005). Since the Plan does not comply with State law, the Board exceeded its authority in approving the Project under the CON Act and the decision to approve the Project is in violation of law. Accordingly, until the Standards for MRI in the Plan comply with the requirements of the CON Act the Project must be denied and the Order reversed and the CON voided.

The cardinal rule of statutory construction is that the legislative intent must be ascertained and it must prevail. Gardner v. Biggart, 308 S C 331, 417 S E 2d 858 (1992). In attempting to ascertain the legislative intent of an act, the courts look to the clear and unambiguous language of the statute. Defender Properties, Inc. v. Doby, 307 S C 336, 415 S E 2d 383 (1992). It is black letter law that "[w]here a statute is clear and unambiguous, the terms of the statute must be given their literal meaning." Medlock v. 1985 Ford F-150 Pick Up, 308 S C 68, 71, 417 S E 2d 85, 87 (1992), citing Duke Power Co. v. S C Tax Comm'n, 292 S C 64, 354 S E 2d 902 (1987), see also Gambrell v. Travelers Ins. Cos., 280 S C 69, 310 S E 2d 814 (1983).

Section 44-7-180(B) of the CON Act provides

The plan at a minimum must include

(1) an inventory of existing health care facilities, beds, specified health services, and equipment;

(2) projections of need for additional health care facilities, beds, health services, and equipment;

(3) standards for distribution of health care facilities, beds, specified health services, and equipment including scope of services to be provided, utilization and occupancy rates, travel time, regionalization, other factors relating to the proper placement of services, and proper planning of health care facilities and

(4) a general statement as to the project review criteria considered most important in evaluating certificate of need applications for each type of facility service, and equipment including a finding as to whether the benefits of improved accessibility to each such type of facility service, and equipment may outweigh the adverse affects caused by the duplication of any existing facility, service or equipment.

The State Health Plan must address and include projections and standards for specified health services and equipment which have a potential to substantially impact health care costs and accessibility

(Emphasis added)

The Plan sets forth three (3) Standards⁷ for MRI CON review Those Standards are

- 1) Each hospital should have at least one MRI unit available for diagnosis of emergency patients inpatients and outpatients
- 2) In order to promote cost-effectiveness the use of shared mobile MRI units should be considered
- 3) The applicant agrees in writing to provide the Department utilization data on the operation of the MRI service

(R p 76)

As even a cursory review of the Plan Standards show they contain no standards for distribution of MRI health services and equipment including scope of MRI services to be provided, MRI utilization rates, travel time regionalization and other factors relating to the proper placement of MRI services The Plan vis-a-vis MRI on its face, is defective and a CON application can only be approved pursuant to standards that comply with the requirements of the CON Act and this Plan does not comply with the CON Act requirements The Board's Order is in excess of its statutory authority and made on unlawful procedure

⁷ The Board Order states that the Plan contains two standards The Order did not apparently consider that Standard 3 was a standard in that it is not mentioned in the Order (R pp 17-18)

Standard 1 of the Plan provides [e]ach hospital should have an MRI unit available for emergency patients inpatients and outpatients " In denying Belfair's Summary Judgment Motion the ALC's Order specifically found

Here, the very language of the 2003 Plan reflects that each hospital have at least one MRI unit available for diagnosis of emergency patients inpatients and outpatients " Furthermore the undisputed evidence established that in the 2003 Plan the DHEC Board in keeping with the State Health Planning Committee made a public policy decision that each hospital if it could afford it, should have an MRI In other words each hospital needs an MRI Moreover, the Board eliminated the requirement in the 2003 Plan that a hospital applying for a MRI must address the utilization of existing resources in order to be approved for its first MRI

(R p 10)(emphasis added)(footnote omitted)

First the Board simply cannot ignore the mandatory statutory requirement of Section 44-7-180(B)(3) (the Plan must at a minimum include standards for utilization of services and equipment) that the Plan address the utilization of existing resources

The Board's decision to remove the utilization requirements from the Plan and to approve the CCMC Project without reference to existing MRI utilization in the service area is in violation of law and exceeds the Board's authority This "public policy" decision cannot override the express requirements of Section 44-7-180(B) The Plan cannot automatically authorize approval of a hospital's CON application for an MRI without regard to utilization of other MRI service providers, be they other hospitals, free standing imaging centers such as Belfair or physician's offices providing imaging services

In granting partial summary judgment to CCMC and DHEC the Order also found that there was no genuine issue of fact as to whether there was a need for a fixed, hospital-based MRI at CCMC because the Plan determines need i.e. the Plan requires that "each hospital should have an MRI unit available for emergency

patients, inpatients and outpatients" and granted partial summary judgment for Respondents (R p 10)(emphasis added) There is neither express authority nor any necessary implication in the CON Act that authorizes the Plan to define need for a health service by the category of health care facility defining the service i.e. need for MRI services is automatic at a hospital but there must be some other (unspecified in the Plan) need standard for other health care facilities or free standing imaging centers

In contradiction to the Order's conclusion in its CON Summary Sheet the Department staff expressly found that "[t]he Plan does not project needs for MRIs in South Carolina, but does present three (3) standards that must be satisfied prior to [CON approval]" (App p 10) DHEC's staff findings constitute an admission by the Department that the Plan does not contain a projection of need for MRI as required by § 44-7-180(B)(2) The Plan's failure to contain a projection of need for MRI is an obvious violation of the clear and unambiguous requirement of Section 44-7-180(B)(1)

Simply put, the Administrative Law Judge interpreted the Plan Standard 1 to be a finding of need and the Board adopted this finding This legal conclusion in the face of the Department's own finding when it made the initial determination that the Plan does not contain a need projection, is arbitrary and capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion in the face of the DHEC testimony and the "Certificate of Need Summary Sheet" statements that the "2003 South Carolina Health Plan does not project needs for MRI in South Carolina" (App p 10)

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II THE ORDER DOES NOT MAKE SUFFICIENT FINDINGS OF FACT REGARDING THE EFFICACY OF THE PLAN FOR THE COURT TO MAKE A MEANINGFUL REVIEW

In denying Belfair's Motion for Summary Judgment, the Order states "whether the ALC can question the efficacy of the 2003 Plan are questions that warrant inquiry into the facts of the case to clarify the application of the law " (R p 10) Assuming that this issue is one of fact and not of law, as Belfair contends the Order made no findings regarding whether the MRI Standards contained in the Plan comply with the requirements of Section 44-7-180(B) This issue was properly raised before both the ALC and the Board The failure to make findings of fact sufficient for the Court to review is on its face reversible error as a matter of law Brown v Dept of Health and Env'tl Control, 348 S C 507, 560 S E 2d 410 (2002) At a minimum the Court should remand this matter to the ALC to make findings of fact as to whether the MRI Standards contained in the Plan comply with the requirements of Section 44-7-180(B)

The Board should have granted summary judgment to Belfair on the Plan's failure to contain Standards for MRI that comply with the requirements of Section 44-7-180(B) and issuance of a staff decision under an invalid Plan The Order is in violation of the requirements of the CON Act and exceeds the Board's statutory authority

III THE ORDER SHOULD BE REVERSED BECAUSE THERE IS NO STATUTORY BASIS TO TREAT HOSPITALS DIFFERENTLY FROM OTHER HEALTH CARE FACILITIES

The Plan Standard 1 only addresses hospitals and no other health care facility or person that under the CON Act has the right to apply for a CON to provide MRI

services. There is neither a provision nor any necessary implication that can be drawn therefrom under the CON Act that gives the Board through the Plan the ability to treat hospitals differently from other health care facilities or persons that have the statutory right to apply for a CON for MRI services. The Board's motion to deny Belfair's appeal and approve the Project CON states "[b]ased upon the fact that it is in the State Health Plan that every hospital should have an MRI, I move that (sic) affirm ALJ decision and award this to CCMC." (App. p. 5)

The CON Act defines "health care facility" as meaning

acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which Certificate of Need review is required by federal law.

S.C. Code Ann. § 44-7-120(10) (2002). Clearly, as a hospital, CCMC falls within the definition of a health care facility.

S.C. Code Ann. § 44-7-160 (2002) requires a person⁸ or health care facility to obtain a CON before undertaking nine (9) enumerated actions, three (3) of which are pertinent to this case. First, if a health care facility makes a capital expenditure in excess of \$2,000,000, the project requires a CON. S.C. Code Ann. § 44-7-160(3) (2002), 24A S.C. Code Ann. Reg. 61-15 § 102.1 c (Supp. 2005). The Project is \$3,201,000 and CCMC is a health care facility. Section 44-7-160(3) is applicable to the Project.

⁸ Person is defined as "an individual, a trust or estate, a partnership, a corporation including an association, joint stock company, insurance company, and a health maintenance organization, a state, a political subdivision, or an instrumentality including a municipal corporation of a state, or any legal entity recognized by the State." S.C. Code Ann. § 44-7-130(15) (2002).

Second if a health care facility makes a capital expenditure for the addition of a health service for which the Plan contains specific standards a CON is prerequisite to the expenditure S C Code Ann § 44-7-160(4) (2002) 24A S C Code Ann Reg 61-15 102 1 d (Supp 2005) CCMC proposes to add MRI services and there are standards contained in the Plan for MRI services Section 44-7-160(3) is applicable to the Project

Third, if a health care facility or person acquires medical equipment used for diagnosis and the capital cost is in excess of \$600 000 a CON is required S C Code Ann § 44-7-160(6) (2002) 24A S C Code Ann Reg 61-15 § 102 1 f and § 103(25) (Supp 2005) Certainly Section 44-7-160(6) is applicable to the Project

None of these three (3) statutory provisions contain language that authorizes the Board through the South Carolina Health Plan or otherwise to make a public policy decision that each hospital "needs" an MRI available to it twenty-four/seven Certainly the Legislature could amend the CON Act and give the Board the authority through the South Carolina Health Plan or otherwise to make need determinations based upon the category or classification of a health care facility It simply has not done so

The Plan Standard provides, in relevant part, that "[e]ach hospital should have at least one MRI unit available for diagnosis of emergency patients inpatients and outpatients " (R p 76) During the ALC hearing the Department took the position that the Plan provided that each hospital should have an MRI on site (either in the hospital or on the grounds) if the hospital could afford it (R pp 16-17)

During argument before the Board at the May 11 2006 hearing counsel for CCMC argued that the ALC Order is saying that "[t]his Board has already given me a

policy pronouncement in the form of the State Health Plan that every hospital should have [an MRI] " (R p 737) DHEC's counsel argued that an MRI unit is so basic to hospital services that the Department, the State Health Planning Committee and the Board has made a public policy determining that each hospital needs an MRI on site if it can afford it (R pp 738-740)

Based upon Standard 1 the Board found that "[h]ere the 2003 Plan sets forth that each hospital should have an MRI unit available for emergency patients inpatients and outpatients " (R. p 10) However, throughout the case while CCMC the Department the ALC and the Board relied on the public policy "finding" in the Plan no one cited to the statutory basis in the CON Act for a hospital to be treated differently vis-a-vis provision of MRI services from any other health care facility or from a person applying to provide MRI services

There is no provision in the CON Act that authorized the Board to make a policy decision to treat hospitals any different from other health care facilities for purposes of MRI Standards or for any other health care service enumerated in the Plan The clear and unambiguous language of the CON Act requires that all health care facilities are to be treated the same for purposes of the Act and Plan

In singling out hospitals and stating that only they "need" MRI services the Board acted in excess of its statutory authority The CON Act contains no power expressly or by reasonable necessary implication that authorizes the Board to treat hospitals differently other health care facilities for purposes of obtaining a CON for the provision of MRI services

IV THE BOARD VIOLATED THE PROVISIONS OF S C CODE ANN § 44-7-210(C) AND EXCEEDED ITS STATUTORY AUTHORITY WHEN IT FOUND AS A MATTER OF LAW THAT THE PROJECT BE APPROVED WITHOUT REGARD TO COMPLIANCE WITH PROJECT REVIEW CRITERIA

The Board found that "the MRI standards under the 2003 Plan do not require CCMC to establish (a) Community Need Documentation (b) Distribution (Accessibility) (c) Acceptability and (d) Cost Containment"⁹ (R p 11) In other words based upon the Plan MRI Standards the Board found as a matter of law that the Project does not have to comply with the Project Criteria contained in 24A S C Code Ann Reg 61-15 Part 8, Project Review Criteria (Supp 2005) This finding is directly contrary to the express mandate of S C Code Ann 44-7-210 (2002) Section 44-7-180(B) requires the Department to identify in the Plan for each health service those general Project Review Criteria important to each specific health service For MRI services the Plan identifies the following Project Review Criteria

- a Community Need Documentation
- b Distribution (Accessibility)
- c Acceptability and
- d Cost Containment

(R p 77)

Section 44-7-210(A) requires that the Department identify for each project the Project Review Criteria ranked in order of importance that it will apply to the Project. See also 24A S C Code Ann Reg 61-15 § 304 (Supp 2005) In the Department's November 19 2004 letter to CCMC, it identified the following Project Review Criteria that it would use to review the Project, ranked in order of importance (1) Need (compliance with the Plan) (2) Community Need Documentation and Distribution (Accessibility) (3) Acceptability and Cost Containment (R p 1233)

⁹ These Project Review Criteria are found in 24A S C Code Ann Reg 61-15 § 802

Section 44-7-210(C) of the CON Act provides in relevant part

The department may not issue a Certificate of Need unless an application complies with the State Health Plan, Project Review Criteria and other regulations. Based on project review criteria and other regulations which must be identified by the department the department may refuse to issue a Certificate of Need even if an application complies with the State Health Plan

(Emphasis added) See also 24A S C Code Ann Reg 61-15 § 307 1 (Supp 2005)

The language of the CON Act is clear that the Plan Standards and the Criteria are separate and distinct requirements and that an application has to meet both in order to be approved

In its CON Summary Sheet the Department staff identified each of the enumerated Project Review Criteria and found that the Project was consistent with each of the Criteria it had identified in its November 19, 2004 letter (App p 11). Clearly the Department determined that the Project had to be reviewed under and be consistent with the Project Review Criteria

Belfair contested the DHEC findings as to the Project's compliance with the enumerated Project Review Criteria (R pp 22-28 30-32). As a result of the granting of the Respondents' Partial Summary Judgment Motion on the ground that the Plan established need and the MRI Standards in the Plan did not require CCMC to establish compliance with the applicable Project Review Criteria (nor give Belfair to opportunity to prove non-compliance), Belfair was prohibited from presenting any evidence testimony or argument of CCMC's failure to comply with the identified Project Review Criteria and others identified by Belfair (R p 128, l 6 through p 129 l 9). The net effect of the Board's Order is a legal finding that the provisions of the Plan override the express statutory requirements of the CON Act.

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The conclusion of law that MRI Standard 1 vitiates the need for a hospital to comply with the identified Project Review Criteria is obviously contrary to the express statutory requirement of S C Code Ann § 44-7-210(C) (2002). Furthermore, this conclusion would render the Project Review Criteria superfluous in any case where a hospital applied for an MRI. In construing legislative intent, courts seek to give meaning to every provision of a statute and not to interpret a statute so as to render any part thereof meaningless. The Board's interpretation of the Plan renders the express requirements of Section 44-7-210(C) meaningless.

Further, Section 44-7-180(B)(4) requires that, for each service or equipment covered by the Plan, there be included a statement as to whether the benefits of improved accessibility outweigh the adverse affects caused by the duplication of the service or equipment. The Plan contains this requirement and states that the benefits of improved accessibility outweigh the adverse affects of duplication of MRI services or equipment. (R p 77). The Department's November 19, 2004 letter expressly listed 24A S C Code Ann Reg 61-15 § 802.3 a (Supp 2005) as an applicable criterion. This criterion provides: "Duplication and modernization of services must be justified. Unnecessary duplication of services and unnecessary modernization of services will not be approved." 24A S C Code Ann Reg 61-15 § 802.3 a (Supp 2005). By finding that the MRI standards in the Plan do not require CCMC to establish that it meets the Distribution (Accessibility) requirements of 24A S C Code Ann Reg 61-15 § 802.3 a, the Board violated both the requirements of Sections 44-7-180(B) and 44-7-210(C).

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The case should be remanded to the ALC with instructions that an evidentiary hearing be held regarding CCMC's compliance with the Criteria established by the Department and those other Criteria raised by Belfair in its Prehearing Statements

V THE BOARD ERRED IN DETERMINING THAT, FOR ACUTE HOSPITALS LIKE CCMC, "AVAILABLE" MEANS TWENTY-FOUR HOURS, SEVEN DAYS A WEEK.

Regarding CCMC and other acute hospitals the Board interpreted the word "available" as used in Standard 1 to mean "immediate access twenty-four hours seven days a week" (R pp 16-17) The Order found that

Not all hospitals are necessarily open twenty-four hours seven days a week or even treat individuals who would need an MRI Therefore available as used in the 2003 Plan does not mean that any hospital is entitled to at least one onsite MRI unit as long as it can afford the unit Rather, the application of the above two standards [Standards 1 and 2] must be made based upon the facts of the case in light of the MRI needs of the hospital

(R pp 17-18) Hospitals are licensed in South Carolina pursuant to the requirements of 24A S C Code Ann Reg 61-16 (Supp 2005) ("Hospital Regs") The fact is that all hospitals as defined in 24A S C Code Ann 61-16 § 101 D are required to be open and providing services to their patients twenty-four/seven

Standard 2 of the Plan provides "In order to promote cost-effectiveness the use of shared mobile MRI units should be considered" (R. p 746) The word "available" is defined as "1 usable 2 accessible" The Merriam-Webster Dictionary (1998) As noted above in interpreting statutes or regulations words are to be given their plain and ordinary meaning

Obviously the clear mandate of Standard 2 is for hospitals or any other health care facility or person that is open twenty-four/seven to consider the use of shared

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MRI services based upon the projected utilization of MRI services at the hospital¹⁰
To interpret Plan Standard 1 to mean that every hospital that is open twenty-four
hours seven days a week is entitled to an MRI if it can afford it is to render Standard
2 meaningless

It is uncontested that for services it does not provide or when patients are to ill
to be treated at CCMC CCMC makes these services available to its patients through
transfer agreements with other hospitals in South Carolina and Georgia CCMC has
entered into transfer agreements with other area hospitals CCMC has transfer
agreements with St Joseph s Hospital in Savannah Georgia (R pp 755-758) with
Beaufort Memorial Hospital in Beaufort South Carolina (R pp 759-761) with the
Medical University Hospital (MUSC) in Charleston South Carolina (R pp 762-767)
and with Colleton Medical Center (R pp 768-779) in Colleton County, South
Carolina (R pp 768-779) Certainly CCMC could transfer its patients for MRI
services just as easily as it can transfer them for cardiac orthopedic or neurology
services Clearly MRI services are available to hospitals through transfer
agreements to other facilities

Furthermore MRI services are made available to many smaller hospitals in
South Carolina through mobile MRI services where the MRI unit comes to the
hospital grounds several days per week. (R p 131) Obviously the use of mobile
services is clearly contemplated under the wording of Standard 2 of the Plan

While CCMC is required to be open twenty-four/seven there is no requirement
that its physician staff be in the hospital or even the emergency department twenty-

¹⁰ As noted above by finding that each hospital should have a fixed MRI and the hospital applicant
does not have to comply with the identified Project Review Criteria the Order voided the utilization
considerations

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four/seven A physician only has to be "on call " that is available to go to the hospital if needed (S C Code Reg 61-16 § 308)

VI THE ORDER'S FINDINGS THAT CCMC'S MRI SERVICE AVAILABILITY NEEDS CAN ONLY BE MET BY A TWENTY-FOUR/SEVEN ON-SITE MRI ARE ARBITRARY AND CAPRICIOUS, CHARACTERIZED BY AN ABUSE OF DISCRETION OR AN UNWARRANTED EXERCISE OF DISCRETION AND ARE CLEARLY ERRONEOUS IN LIGHT OF THE EVIDENCE ON THE RECORD AS A WHOLE

The evidence is uncontested that orthopedists and neurologists/neurosurgeons are among the heaviest users of MRI services for their patients (R p 384-385) The fact is that CCMC testified that it did not even have a neurologist even on its staff and a patient in need of neurology services had to be transferred from CCMC to another hospital (R pp 469-470) Furthermore, the orthopedic surgeons and general surgeons at CCMC are only on call twenty (20) days a month at CCMC but might be available on other days if they were called and decided to come in (R p 371-372)

More importantly for the definition of "available" reading Standards 1 and 2 as a whole, the radiology department at CCMC is not staffed by a physician twenty-four/seven The physician group staffing the CCMC radiology department is a Savannah Georgia based group (R p 379, l 16 through p 380, l 23) On-site radiology coverage is only available at CCMC on an as-needed basis for biopsy procedures or other hands-on procedures and, otherwise cover the hospital through tele-radiology from Savannah and after 10 00 pm by a group from a suburb of Atlanta (R pp 381 391) In order to provide the hands-on services, a radiologist has to drive from Savannah to CCMC in Hardeeville Further there would not be a MRI technician

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available twenty-four/seven but they would be subject to an "on call" schedule like the radiologists (R p 407) Finally, Dr Vincent Mesh was not aware of any inpatients being transferred from CCMC to another facility for MRI services (R p 402)

Finally Dr Tricia Etheridge a family practice physician and Chief of the Medical Staff at CCMC, testified that, since the hospital opened she was not aware of a single patient presenting to the hospital that needed an emergent MRI (R p 373) Most of her patients that need MRI services are out-patients (R p 374)

Further it is uncontested that Belfair only approximately twelve (12) miles from CCMC specifically offered "on call" services to CCMC so that CCMC's patients had access to MRI services twenty-four/seven CCMC never responded to that offer

Additionally approximately two-thirds (2/3) of the patients that CCMC projects it would provide MRI services to are out-patient and not hospital based Obviously out-patient services are provided during normal business hours when Belfair and the other nine (9) facilities providing MRI services in Beaufort and Jasper counties are open

Clearly, there is no need to have a fixed MRI on site at CCMC when the physicians are only "available" after hours on an "on call" basis and the radiologists have to drive either from Savannah or possibly Atlanta In light of the fact that physicians are "available" to the hospital when they are not on site and they do not have to be on site the Board exceeded its authority in determining that for acute hospitals' "available" means on site twenty-four/seven

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CONCLUSION

For the foregoing reasons Appellant MRI at Belfair LLC respectfully requests that this Court reverse the Order of the South Carolina Board of Health and Environmental Control

Respectfully submitted

M Elizabeth Crum S C Bar No 1486
lcrum@mcnair net
A Victor Rawl Jr , S C Bar No 9261
vrawl@mcnair net
Anail B Kirk S C Bar No 71101
akirk@mcnair net
McNAIR LAW FIRM P A
Post Office Box 11390
Columbia South Carolina 29211
(803) 799-9800

By 

Attorneys for Appellant MRI at Belfair LLC

February 22 2007

Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA BOARD OF HEALTH
AND ENVIRONMENTAL CONTROL

— The Honorable Ralph King Anderson, III,
Administrative Law Judge

Docket No 04-ALC-0399-CC

MRI at Belfair LLC

Appellant

v

South Carolina Department of Health and Environmental Control
and Coastal Carolina Medical Center

Respondents

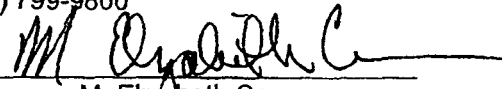
CERTIFICATE OF COUNSEL

The undersigned certifies that this Appellant's Final Brief complies with Rule 211(b) SCACR but for an update to Footnote 3 on Page 4. The footnote in the Initial Brief of Appellant discussed a Motion to Dismiss that was pending before the Court at the time the Initial Brief was filed. Footnote 3 has been updated to reflect the October 17, 2006 decision of the Court to deny the Motion to Dismiss.

Respectfully submitted,

M. Elizabeth Crum, S.C. Bar No. 1486
lcrum@mcnair.net
A. Victor Rawl, Jr., S.C. Bar No. 9261
vrawl@mcnair.net
Anail B. Kirk, S.C. Bar No. 71101
akirk@mcnair.net
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

By


M. Elizabeth Crum

February 22, 2007

Columbia, South Carolina

COLUMBIA 881810v1

Attorneys for Appellant MRI at Belfair LLC

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and Coastal Carolina Medical Center, Respondents

FINAL REPLY BRIEF OF APPELLANT
MRI AT BELFAIR, LLC

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DHEC
OFFICE OF GENERAL COUNSEL

M Elizabeth Crum, S C Bar No 1486
lcrum@mcnair net
A Victor Rawl, Jr, S C Bar No 9261
vrawl@mcnair net
Anail B Kirk, S C Bar No 71101
akirk@mcnair net
McNAIR LAW FIRM, P A
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Attorneys for Appellant MRI at Belfair, LLC

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