STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Grand Strand Regional Medical Center, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No.: 12-ALJ-07-0090-CC **RECONSIDERATION ORDER**
Grand Strand Regional Medical Center, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control and Carolinas Regional Cancer Center, Respondents.	)	Docket No.: 12-ALJ-07-0091-CC (Consolidated)

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to Respondent Carolina Regional Cancer Center's (CRCC) Motion to Alter or Amend the Court's Final Order and Decision dated March 10, 2014 (Final Order), in which it found that CRCC and Grand Strand Regional Medical Center, LLC (Grand Strand) were not competing and should both be granted a Certificate of Need (CON) for radiotherapy centers in Horry County. On March 28, 2014,[1] Grand Strand filed a Memorandum in Opposition to CRCC's Motion to Alter or Amend. After careful consideration of the arguments submitted, I find that a few of CRCC's arguments warrant reconsideration and clarification of the original Order. Accordingly,

[1] Grand Strand filed a hard copy and electronic copy of its Memorandum on March 28, but due to an error in the Court's emailing system, the electronic version that Grand Strand submitted was not discovered by the Court until March 31.

I am issuing an Amended Final Order and Decision (Amended Final Order) that will reflect the changes made upon reconsideration. The remaining arguments will be addressed below.

DISCUSSION

Remand of Grand Strand's CON Application

CRCC argues that Grand Strand's CON Application should have been remanded back to the South Carolina Department of Health and Environmental Control (DHEC or Department). CRCC contends that the Court erred in "weighing the project review criteria itself and approving Grand Strand's CON application, even though DHEC only compared the applications and never made an initial decision on whether Grand Strand's application could be independently approved." CRCC is correct that DHEC did not make an initial decision on whether Grand Strand's application could be independently approved. However, this fact does not prevent this Court from deciding whether to approve both applicants' CON applications without remanding the matter back to DHEC.

In *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assocs. of S.C., LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010), DHEC found that two applicants were competing and granted a CON to one applicant and denied the other's application. The ALC agreed with DHEC's decision to grant the one applicant a CON, but disagreed with DHEC's denial of the other CON application. Rather, the ALC found that the two applicants were not competing and that both applications were consistent with the applicable State Health Plan.[2] The South Carolina Supreme Court held that the ALC's conclusion that the two applications were not competing was legally correct. The Court not only found sufficient factual evidence in the record to support the ALC's finding, but also interpreted S.C. Code Ann. § 44-7-130(5) (2002) (the definition of "competing applicants") as plainly meaning: "If granting both applications would not exceed the need, then the applications are not competing and both may be granted (provided all other relevant criteria are met)." The Court then noted approvingly that the ALC "specifically found that both [applicants] met the relevant project criteria." The Court thus did not impose some obligation on the ALC to remand the case back to the Department when it finds that the applicants are not competing for consideration of whether the previously denied applicant

[2] It is noteworthy that when the *Spartanburg Reg'l* case was decided, the appeal went from the ALC to the DHEC board for review (the Department Board had appellate review under the old system). The Board affirmed the ALC's decision to grant both CON applications.

independently meets the project review criteria. Rather, the Court approved of the same actions taken by the ALC in that case that the ALC took in this case. Therefore, this Court rejects CRCC's argument that Grand Strand's CON Application should be remanded to DHEC.[3]

Further, CRCC cites *S.C. Dep't of Health & Envtl. Control v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987) in support of its remand argument. However, *Armstrong* involved a dispute between a restaurant owner and DHEC over a permit to operate a restaurant. After inspecting the restaurant, DHEC informed the restaurant owner that the premises did not comply with DHEC regulations. When the restaurateur failed to cease operating his restaurant, DHEC issued "an administrative order directing [the restaurateur] to cease and desist operation of his restaurant." *Id.* at 211, 359 S.E.2d at 303. The actual permit in *Armstrong*, which would be analogous to the issuance of a CON in this case, "was neither issued nor denied" by DHEC. *Id.* Rather, the issue was whether to enforce the DHEC administrative order it issued ***before*** rendering ***any*** permitting decision. The Court of Appeals held that the trial judge had "displaced the administrative" process by taking action in the case. *Id.* at 215, 359 S.E.2d at 304. The *Armstrong* case has no effect on this case. Here, the Department engaged in a lengthy review process and then made an official—albeit erroneous—agency decision that gave rise to this contested case proceeding. In *Armstrong*, there was no such agency decision made. Therefore, the Court will not rely on *Armstrong*.

Finally, the ALC conducts a *de novo* review of the Department's decision in CON cases. South Carolina Code Ann. § 44-7-210 governs CON contested case review procedures, and it expressly defines the scope of reviewable issues in CON contested cases:

> The ***issues*** considered at the contested case hearing considering a certificate of need are limited to those ***presented to or considered during the staff review.***

S.C. Code Ann. § 44-7-210(E) (emphasis added). The ALC thus may consider ***any issue*** "presented to" the Department during staff review. The Department does not have to rule on or decide every facet or alternative nuance of an issue. The Department does not have to pass upon

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[3] The Court also rejects CRCC's other, collateral arguments on this subject, as all of those arguments (except the one regarding Footnote 11) could have been made in *Spartanburg Reg'l* yet would have failed based on the Supreme Court's reasoning in that case. And as to Footnote 11, the Court agrees with CRCC that if Grand Strand decides to purchase a True Beam linear accelerator instead of the one in its application, then Grand Strand will have to get approval from DHEC. However, Grand Strand has not yet sought to procure a True Beam, regardless of its intentions.

every conceivable portion or implication of an issue. So long as the issue is presented to or considered by the Department, the ALC may hear it.

In this case, three applicants originally submitted linear accelerator CON applications to the Department. The basic issues presented to the Department involved whether the CON applications complied with the State Health Plan and Regulations. Once these issues were properly before the ALC, the ALC conducted a *de novo* review. In *Marlboro Park v. S.C. Dept. of Health & Envt'l Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004), the Department Board[4] adopted a narrow view of this Court's authority that is similar to the restrictions that CRCC seeks to impose here. Looking to the plain language of section 44-7-210(E), Judge Kittredge, writing for the Court, stated:

> A trial *de novo* is one in which "the whole case is tried ***as if no trial whatsoever had been had in the first instance.*** Moreover, when reviewing a contested case on appeal, "[t]he ALJ, as the fact-finder, must make sufficiently detailed findings supporting the denial [or grant] of a permit application." "Detailed findings enable [an appellate court] to determine whether such findings are supported by the evidence. . . ." Here, because the ALJ was conducting a *de novo* hearing, we find that he properly considered the evidence presented in his pursuit to make sufficiently detailed findings of fact for subsequent review.

Id. at 579, 595 S.E.2d at 854 (emphasis added) (internal citations omitted).

Therefore, clearly this Court conducts a *de novo* review of the issues presented to or considered by the Department staff during the review period.

Footnote 37

CRCC argues that footnote 37 in the Court's Final Order should be deleted, because a discussion of how the Court would have alternatively ruled (i.e., had the Court found the applications competing) was irrelevant in light of the Court's decision that the applications were not competing. CRCC also argues that the Court's statements in footnote 37 contradict the statement in footnote 34, in which the Court declined to consider certain facts since the Court found that the applications were not competing. CRCC also contends that the findings in footnote 37 ignore DHEC's analysis and the analysis of CRCC's expert. Finally, CRCC argues that footnote 37 "has no practical effect" and is "advisory."

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[4] The *Marlboro Park* case was decided prior to the effective date of Act 387. (2006 S.C. Acts 387, eff. July 1, 2006.). Act 387 changed the order of the CON review process. Nevertheless, Act 387 does not affect the operation of section 44-7-210(E), nor does it affect the holding in *Marlboro Park*.

As an initial matter, the Court has amended footnote 34 (35 in the Amended Final Order) as follows in order to clarify what the Court had intended to convey. Moreover, if this Court were to find that the applications were competing, consideration of a potential move of the Conway facility to another location would be of little probative value in evaluating CCRC's application. As stated in the Final Order, the Staff would have to approve any such future relocation. That issue was not before this Court and would involve consideration of many facts that were not in this record. Therefore, in concluding in footnote 37 that Grand Strand's project more fully complies with the applicable CON requirement, the potential relocation of CCRC's Conway facility was not a consideration. And as the finder of fact, the Court is free to reject evidence. *See S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 668 n.12, 667 S.E.2d 7, 20 n.12 (Ct. App. 2008) (noting that a finder of fact is "free to accept or reject any or all of a witness' testimony, including that of an expert witness.").

The Court also notes that its comment in footnote 37 was hardly "summarily" stated. The Court provided specific grounds for why it would have found that Grand Strand better-complied had it found the two applications to be competing. And again, as the finder of fact, the Court is "free to accept or reject any or all of a witness' testimony, including that of an expert witness." *S.C. Dep't of Transp., supra.* Thus, the fact that the Court would have rejected certain facts from DHEC's analysis or from CRCC's expert's analysis is within the Court's province as the finder of fact.

Finally, whether or not the applications were competing, the Court ultimately was asked to render a decision as to whether Grand Strand should be granted a CON. Thus, the issue before the Court was not abstract or theoretical. It was an actual, concrete controversy affecting the rights of a party to the litigation. The question was not hypothetical, but was squarely before the Court, forming, in part, the basis of Grand Strand's prayer for relief. Moreover, the practical effect of footnote 37 is simply to demonstrate that Grand Strand would have received the CON regardless of whether the Court found its and CRCC's CON Applications to be competing. Offering alternative grounds for a determination – in this case, granting Grand Strand a CON – does not make the footnote advisory. *See e.g., Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 397 n.3, 635 S.E.2d 545, 548 n.3 (Ct. App. 2006) (noting that there was no need to address the trial court's additional sustaining grounds because it affirmed the trial court's initial ground for granting summary judgment); and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526

S.E.2d 716, 723 (2000) (holding that an appellate court has discretion to address any additional sustaining grounds). Therefore, the Court declines to delete footnote 37.

Consideration of the 2012-2013 State Health Plan

CRCC argues that the Court overlooked S.C. Code Ann. Regs. 61-15 § 504 (Supp. 2013) when considering the 2012-2013 State Health Plan. Specifically, CRCC emphasizes the following language in that regulation:

> Should a new plan be adopted during any phase of the review or appeals process, the applicant shall have the option of withdrawing the application and resubmitting under the newly adopted plan or continuing the review or appeal process under the plan in use when the application was submitted.

Id. Here, the Court's references to the 2012-2013 State Health Plan simply make note that the 2012-2013 State Health Plan ***supports*** the Court's other factual findings. The 2012-2013 State Health Plan is not referenced as the primary basis for the Court's decision.

Furthermore, South Carolina Code Annotated section 44-7-225 states that the "department, the Administrative Law Court, and the Court of Appeals shall consider the South Carolina Health Plan in place at the time the application was filed and may consider the current South Carolina Health Plan when making its decision." This statute tells the Court that it ***must*** "consider" the State Health Plan in place at the time the application is filed. Using the same language, it also gives the Court ***permissive authority*** to "consider" the State Health Plan in place at the time the Court renders a decision. Thus, section 44-7-225 establishes that this Court has the authority to "consider" the 2012-2013 State Health Plan in the same manner that it would "consider" the State Health Plan in place at the time the applications were filed.

Regulation 504 merely addresses the option that a CON applicant has to file a new application under a new plan if a new plan is adopted after the applicant filed its original plan. This has no bearing on the option afforded to this Court (or to the Court of Appeals for that matter) under S.C. Code Ann. § 44-7-225 (Supp. 2013) to consider the current Health Plan when making its decision.[5] And even if DHEC promulgated Regulation 61-15 § 504 to narrow the scope of its review power granted by the statute, the Department does not have the power to divest this Court or the Court of Appeals of review powers granted by the enabling statute, Section 44-7-225. *See Young v. S.C. Dep't of Highways and Public Transp.*, 287 S.C. 108, 113,

[5] The Court declines to consider the "apparent purposes of Regulation 61-15 § 504" as set forth by CRCC.

336 S.E.2d 879, 882 (Ct. App. 1985) ("An administrative regulation is valid so long as it is reasonably related to the purpose of the enabling legislation.").

Therefore, the Court rejects CRCC's application of Regulation 61-15 § 504.

Shifting of Burden of Proof to CRCC

CRCC asserts that this Court shifted the burden of proof from Grand Strand to CRCC. CRCC charges this Court with having "overlooked the dearth of evidence provided by Grand Strand" and "focused instead on the perceived weaknesses in CRCC's evidence and expert testimony."

However, as mentioned above, as the trier of fact, this Court has the discretion to determine what amount of weight to give to the evidence, and may accept or reject evidence presented. *See State v. Dorce*, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995) ("The trial judge was presented with contradicting testimony, and it was within his province, as the trier of fact, to weigh the credibility of the evidence presented to determine which witnesses he deemed credible."); *Moore v. Benson*, 390 S.C. 153, 164, 700 S.E.2d 273, 279 (Ct. App. 2010) ("[T]he fact finder [] was free to accept or reject the testimony."). Therefore, the Court was free to reject CRCC's evidence in favor of Grand Strand's.

Moreover, the Court's mention of weaknesses in CRCC's evidence is perfectly proper as part of this Court's "credibility determinations," just as the ALC made in its order in *Spartanburg Reg'l Med. Ctr., supra.* Indeed, the Supreme Court in that case found that credibility determinations were among several other factors – including findings of fact, conclusions of law, and legal analysis – that made the ALC opinion "far from conclusory." This Court not only set forth the respective methods of determining market share, but also set forth its reasoning for its decision to accept one method and reject the other. Therefore, an appellate court would be able to review this Court's decision and state, as the Supreme Court did regarding the ALC's order in *Spartanburg Reg'l Med. Ctr., supra*, that it "need not speculate about why the ALC reached the decision it did because the written order makes the reasons manifest." Just because the Court does not share CRCC's opinion about the credibility of Grand Strand's draw-

rate analysis does not make its decision reversible error. Indeed, the Court would naturally expect CRCC to disagree with a decision that adopts the findings and reasoning of its adversary.[6]

Overlooked or Misapprehended Key Facts

Having carefully considered the alleged misapprehensions or overlooked facts enumerated in CRCC's Motion, the Court, as the trier of fact, considered all of the relevant evidence, rejected that which was not probative, and attributed more weight to some evidence than other evidence. However, the Court agrees with CRCC as to one factual error: the Court stated the following on page 14 of its Final Order: "Grand Strand estimated that there will be 13,205 treatments in the market in 2017 that will not be available for capture by Grand Strand." However, the number of treatments that will be unavailable to Grand Strand in 2017 should have been 11,360. This correction will be reflected in the Court's forthcoming Amended Final Order. Aside from that oversight, the Court rejects the remainder of CRCC's contention that the Court overlooked or misapprehended key facts.

Though the Court need not specifically respond to any of the other allegations brought by CRCC, the Court will provide the following observations seriatim in response to CRCC's allegations (note: the order of the observations will correspond to the order of the allegations):

- **CRCC Bullet #1 – Mr. Sullivan's experience.** The Court has not overstated Mr. Sullivan's experience. There is evidence in the trial transcript that supports the finding that Mr. Sullivan is an accomplished and well-qualified health planning expert with significant knowledge of the market. (Sullivan Trial Tr. 610:3-617:6). Moreover, CRCC never challenged Mr. Sullivan's qualifications or experience with respect to his work on linear accelerator CON applications. The transcript is replete with evidence documenting Mr. Sullivan's work on Grand Strand's CON, the project review meeting, his challenge of CRCC's application, and his work on his draw-rate analysis. (Sullivan Trial Tr. 618:1- 622:4; 622:23-623:2, 629:1-631:1, 681:4-683:16, 685:3-687:21, 772:2-777:7; Joint Ex. #2, Pet. Ex. #16, 24).

- **CRCC Bullet #2 – Grand Strand's Provision of Comprehensive Care.** The evidence supports the findings regarding Grand Strand's intention to provide comprehensive cancer services. Grand Strand's radiation therapy center is equipped to provide chemotherapy services. (Joint Ex. #2 at 125, 129; White Tr. 89:13-90:6; Collins Tr. 607:22-608:21). While Grand Strand acknowledged that

[6] CRCC references in footnote 2 of its Motion the fact that inpatient market share was previously accepted by the ALC as a proxy for market share, citing *Beaufort-Hilton Head Radiation Oncology Center v. S.C. Dep't of Health & Envtl. Control*, 01-ALJ-07-0507-CC (Mar. 19, 2003 S.C.A.L.C). However, this Court has already addressed this point in footnote 23 of its Final Order and stands by what it said therein.

Dr. Holt will continue to perform chemotherapy as he has done in the past, Grand Strand's CEO indicated that he expected Grand Strand to perform some chemotherapy treatment and planned to do so in the future. (White Trial Tr. 90:7-19). Although CRCC states that Grand Strand will not house PET/CT at the hospital, Mr. White testified that Grand Strand would shift PET/CT services to the main campus if it is approved for a linear accelerator. (White Tr. 254:13-255:1; 283:22-284:6). Moreover, Grand Strand's witnesses never testified that some form of interdisciplinary care was not presently occurring at Grand Strand during tumor boards. Rather, Grand Strand's witnesses testified that patients will be able to go to one location to receive all of their cancer needs, and comprehensive care promotes interdisciplinary care. (White Tr. 85:23-86:8; Collins Tr. 551:16-18). Grand Strand also stressed that establishing a comprehensive cancer center would allow it to recruit surgical and medical sub-specialists who provide cancer care, such as GYN oncologists, oncology surgeons, colorectal surgeons, and fellowship-trained breast surgeons. (White Tr. 87:24-88:20, 90:20-91:22; Sullivan Tr. 646:22-648:7).

- **CRCC Bullet #3 – Grand Strand's 20% market share assumption.** The Court did not overlook Grand Strand's overall market share in its primary and secondary service areas. Rather, the Court notes found that Grand Strand's overall market share was not an appropriate metric to use in this instance because of the presence of an entrenched competitor who has a solid historical reputation. The Court noted on page 9 of the Final Order the reasons why Grand Strand's assumption of 20% for linear accelerator market share in the third year of operations was reasonable. With respect to Grand Strand's internal calculations, the Court is well aware of Grand Strand's "what if" analysis and considered the testimony of its CFO Robert Grace and the testimony of its expert, Mr. Sullivan, and found the "what if" analysis to be unreliable. (Grace Tr. 413:22-415:2, 417:24-418:4, 451:24-452:19, 465:13-22; Sullivan Tr. 783:24-785:5).

- **CRCC Bullet #4 – Dr. Holt's Letter of Support.** While Dr. Holt did not provide a letter of support to CRCC, there was no evidence in the transcript that CRCC ever asked for one. The Court also notes in footnote 27 in the Final Order (28 in the Amended Final Order) that Dr. Holt was responsible for only 30 treatment plans at CRCC in 2013, while the three medical oncologists whose support for CRCC-Conway was critical—Drs. Cody, Karpenko and Goldberg—were responsible for a combined 100 treatment plans at CRCC through May 2013, and all three provided letters of support for CRCC-Conway project. According to CRCC, Drs. Cody, Karpenko and Goldberg were the CCC physicians whose support it really needed. (Lewis Tr. 1342:2-1343:23; Pet. Ex. #50; Joint Ex. 1A at 228-30). Moreover, both applicants received hundreds of support letters for their respective projects. (Joint Ex. #1 at 638-641; Joint Ex. #1-A at 1-240; Joint Ex. #2 at 868-74). Lastly, as noted on page 17 of the Final Order, CRCC's Medical Director, Dr. Francke, admitted that he has not had an indication from any of the Coastal physicians that they would cease referring to CRCC if both projects are approved.

- **CRCC Bullet #5 – CRCC's Draw Rate Analysis.** In this bullet point, CRCC misstates the facts. First, CRCC's draw-rate analysis is set forth in CRCC Exhibit 13, not CRCC Exhibit 12. There is no indication that CRCC's expert backed out urology referrals in his draw-rate analysis. In fact, using the likely number of treatments per patient, CRCC's draw-rate analysis indicates that Grand Strand will not bring CRCC below the 80% threshold. Furthermore, I disagree with CRCC's analysis in Exhibit 12 that it removed "the urology patients when calculating Grand Strand's market share." In that analysis, CRCC took Grand Strand's *inpatient* admissions and carved out certain special services for which Grand Strand was a primary provider in the Service Area, such as cardiovascular services, ***urological surgery***, and medical urology cases. (Resp. Ex. #12 at 12906; Tolbert Tr. 2000:22-2001:9) (emphasis added). CRCC could have simply carved out the actual AUC referrals/treatments to CRCC from the threshold analyses, as did Grand Strand. In fact, several CRCC documents show the exact percentage of prostate cancer treatments and the exact number of AUC referrals under treatment at CRCC in 2012. (Tolbert Tr. 2002:8-2003:24; Pet. Ex. #52 at CRCC 72; Resp. Ex. #10).

- **CRCC Bullet #6 – CRCC's Facility**. While the Court noted in the Final Decision that CRCC's proposed facility was "underwhelming," the Court also noted that both projects will promote cost containment, and the introduction of Grand Strand's radiation therapy center in the market will promote cost containment through price competition and by providing an alternative treatment setting where there are no financial incentives to refer. Nevertheless, CRCC's Conway facility would not be comparable to even its other facilities in the area.

- **CRCC Bullet #7 – Drive Time.** CRCC asserts that the Court "downplayed the 20-minute reduction in drive time that CRCC's Conway facility would afford to the average patient." However, the finding that the savings were only 20 minutes was made in context of both projects. The nearest comprehensive cancer center, which Grand Strand is proposing to develop, is located in Charleston, South Carolina, 100 miles away.

- **CRCC Bullet #8 – Adverse Impact to CRCC.** Footnote 18 states, "CRCC never took the position with the Staff at the PRM or in follow-up written submission that Grand Strand's project would result in a substantial loss of CCC referrals." That finding is not the same as stating that "CRCC never argued to DHEC that Grand Strand's project would adversely impact its operation," as CRCC states in its Motion. The Court addressed CRCC's adverse-impact analyses at length in the Final Order, and there is evidence supporting the Court's determination as to any adverse impact that CRCC will incur as a result of the approval of Grand Strand's project.

- **CRCC Bullet #9 – Volume of Unavailable Treatments.** The Court has already addressed this allegation, agreeing with CRCC, and has corrected the

volume number of unavailable treatments in the forthcoming Amended Final Order accordingly.

- **CRCC Bullet #10 – CRCC's Current Utilization Data.** The Court considered the evidence presented by both sides with respect to CRCC's declining utilization, and concluded that CRCC's 2013 decrease in the first seven months of the year was an aberration due to one urologist referring far less patients than his urologist partners. The Court also was swayed by the testimony of Mr. Tolbert who testified that it is preferable to use a full year of data when projecting utilization because of the uncertainty of what can occur in the remaining part of the year, which would have been five full months. (Tolbert Tr. 1828:16-1829:5, 2005:13-2006:13). Moreover, the Court also recognized that even though CRCC experienced a volume decrease in 2012 over 2011, nine months into 2012, CRCC's plan was to apply for the additional linear accelerator that would be shown as needed in the 2012-2013 Health Plan, despite knowledge of a change in the urology cancer screening protocols, which purportedly would lead to less urology cancer detection. (Pet. Ex. #74 at Tolb. 1353-54; Lewis Tr. 1338:19-1340:18; Francke Tr. 1543:14-17). Finally, the Court noted that a change in the protocol merely changes when the cancer will be detected, not if it will be detected.

- **CRCC Bullet #11 – Mr. Tolbert's Referral Analysis.** The Court does not find Mr. Tolbert's "referral analysis" to be conservative. He overstated the number of referrals that Grand Strand is likely to receive. Furthermore, Mr. Tolbert's analysis was based in part on one or two thirty-minute phone calls with Ms. Price and Dr. Francke, both of whom are CRCC employees strongly opposed to Grand Strand's project. During these conversations, they discussed where the higher volume referral sources might refer patients if Grand Strand were present in the market. (Tolbert Tr. 1943:10-1944:6; 1950:7-1951:2). The low-volume physician referrers, which accounted for 127 patient referrals to CRCC in 2012, were never discussed with Ms. Price or Dr. Francke. (Tolbert Tr. 1951:24-1952:11). Mr. Tolbert also assumed that 40% of these patients, or 51 patients, would be redirected to Grand Strand, which is the equivalent of over 1,000 treatments. (Resp. Ex. #10).

To the contrary, the evidence supports Grand Strand's assertion. While a "referral analysis" was considered by Mr. Sullivan, he correctly determined that such an analysis would not be reliable. (Sullivan Tr. 2111:8-2113:17). Although not included in the Final Order, the Court heard convincing expert testimony from Grand Strand that CRCC provided no reasonable basis to assign a 40-40-20% split to Grand Strand, CRCC and GMH, respectively, to the low-volume referral physicians who may not have a nexus to the area and who have historically referred patients to CRCC. (Sullivan Tr. 2111:8-2112:12; Resp. Ex. #10). Of 275 CCC patient referrals to CRCC in 2012, 152 resided in Myrtle Beach, North Myrtle Beach, and the Murrells Inlet area. Mr. Tolbert assumed that 75% of these patients would be redirected to Grand Strand, even though CRCC's practice manager, Ms. Price, testified that Grand Strand's location would offer no travel

time advantage to patients and a significant number of patients would originate from the area around Murrells Inlet, where two CON applications for radiation therapy centers have been approved. (Tolbert Tr. 1966:7-1970:10; Resp. Ex. #10 at Tolb. 12844). Ultimately, Mr. Tolbert concluded that only *two* out of the 128 non-AUC physicians would continue to send 100% of their patients to CRCC. (Tolbert Tr. 1705:6-15; Resp. Ex. 11 at Tolb. 12895).

- **CRCC Bullet #12 – Grand Stand's Project and Duplication**. The Court correctly determined that Grand Strand's project would not unnecessarily duplicate services. The Court found that currently, there is neither a comprehensive cancer center nor an in-hospital radiation therapy center located in the service area. The nearest such facilities require cancer patients to travel long distances for inpatient and comprehensive cancer treatment. As there was a need for two CONs in the service area, the duplication was not unnecessary.

- **CRCC Bullett #13 – Competition and Cost Containment**. CRCC has no competition in Horry County and therefore CRCC has an advantage when negotiating prices with third party PPO payors. When there is a single provider in a geographic area, the provider has the ability to raise prices in a way that would not be possible in a market with competition. (Sullivan Reb. Tr. 2082:14-24). Moreover, the "cost containment" The Project Review Criteria (PRN) in the CON regulation requires more than just consideration of cost of the service. Grand Strand addressed cost containment and identified methods of funding and demonstrated the feasibility of the funding option. (Joint Ex. #1 at 670, 674; Resp. Ex. #6 at Tolb. 12927). CRCC did not challenge this portion of Grand Strand's cost-containment analysis. PRN 16(c) also requires that "[t]he impact of the project upon the applicant's cost to provide services and the applicant's patient charges" be reasonable. 3 S.C. Code Ann. Regs. 61-15 § 802(16)(c) (Supp. 2013). CRCC did not directly address the impact that Grand Strand's project would have on Grand Strand's cost to provide services and on its patient charges. The evidence also reflected that an in-hospital radiation therapy center would alleviate charges associated with transporting patients to and from a freestanding facility up to three times during a hospital stay. (Sullivan Reb. Tr. 2073:19-2074:7).

- **CRCC Bullet #14 – AUC Referrals to CRCC**. CRCC asserts that the lack of referrals on a "nasty relationship" between the urologists and the prior owner of CRCC, explains why the AUC urologists began referring significant number of patients to CRCC when they become financially affiliated with CRCC. However, the evidence in the record also suggests that the increase referrals could be related to other factors. The evidence included findings by the United States General Accounting Office, showing that limited specialty groups, primarily urologists who self-refer, substantially increased the percentage of their prostate cancer patients they referred for IMRT treatment after they began to self-refer. Among all providers who referred a Medicare beneficiary diagnosed with prostate cancer in 2009, those that self-referred *were 53 percent more likely to refer their*

patients for IMRT and less likely to refer them for other, less costly treatments, like prostatectomy or brachytherapy. The study suggests that financial incentives for self-referring providers, specifically those in limited specialty groups like urology practices, were likely a major factor driving the increase in the percentage of prostate cancer patients referred for IMRT. (Sullivan Tr. 741:14-747:4). Moreover, a strategy that 21st Century utilizes to build volume is to establish a group practice like AUC and pay employed physicians in the practice profits using an ancillary profit formula from revenues generated by their referrals to the affiliated radiation therapy center. (Lewis Tr. 1239:5-17). The AUC-employed urologists have a financial relationship with CRCC by virtue of participating in an ancillary bonus pool. (Lewis Tr. 1237:1-6).

- **CRCC Bullet #15 – DHEC Factors.** CRCC asserts that this Court misapprehended the factors that DHEC was supposed to consider when comparing the projects. The Court did not assert "that DHEC Staff failed to consider CRCC's monopoly of radiation therapy services in Horry County." Rather, the Court noted that DHEC failed to consider that issue. In terms of comparing the projects, the Court found that the CON applications were not competing, and thus a comparison of the projects by each PRC was not necessary to find that both projects could be approved. Furthermore, CRCC focuses too greatly on the word "monopoly" in footnote 32 (33 in the Amended Final Order), rather than to the highly relevant reference in footnote 32 to "cost containment." As discussed above, the fact that CRCC has no competition in the market allows it to set the price for services because payors have virtually no leverage. That issue is relevant.

- **CRCC Bullet #16 – CRCC Adverse Impact Model.** CRCC asserts that "this Court ignored that the adverse impact model used by CRCC's expert was initially raised by Grand Strand's expert in his deposition." The Court did not ignore the fact that the adverse-impact model used by CRCC's expert, referenced as the "referral analysis," was initially raised by Mr. Sullivan in his deposition. Rather, the Court agreed with Grand Strand's expert that such an analysis would not be reliable because it was mostly based on speculation. (Sullivan Tr. 2111:8 – 2113:17).

- **CRCC Bullet #17 – Applications Not Competing.** CRCC claims that every adverse-impact scenario presented to the Court, except for the pre-discovery projections contained in Grand Strand's CON application, indicated that the approval of both applications would reduce the existing units below the 80% threshold. This statement is not correct. In fact, using Mr. Tolbert's own 2017 treatment projection, Grand Stand presented three different adverse-impact scenarios premised on the capture of the available treatments at different market share rates — 25%, 30%, and 35%. Each of these adverse-impact scenarios showed that even at a 35% capture rate, all of the existing units in the service area would be operating above the 80% threshold. (Pet. Ex. #39, 40, 41). Furthermore, applying the correct number of likely linear accelerator treatments (21) to

CRCC's draw-rate analysis would result in a treatment volume at Grand Strand below CRCC's "tipping point," which means all units would be operating above 80% in the year 2017. Finally, the evidence in the record indicates that Mr. Tolbert's adverse-impact analyses were not reliable. At least one showed that Grand Strand would be the highest-volume single-unit provider in the entire state after three years of operation, despite the heavily entrenched competition. (Joint Ex. #5 at IX-9). Even Mr. Tolbert admitted that the scenario was "farfetched." (Tolbert Tr. 1997:1-1999:12; Resp. Ex. #12 at Tolb. 12904).

ORDER

IT IS THEREFORE ORDERED that CRCC's Motion to Alter or Amend is **GRANTED IN PART AND DENIED IN PART**, in keeping with this Order.

IT IS FURTHER ORDERED that all additional factual findings in this Order are incorporated into the Amended Final Order as findings of fact.

IT IS FURTHER ORDERED that all additional legal conclusions in this Order are incorporated into the Amended Final Order as conclusions of law.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

April 4, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

April 4, 2014
Columbia, South Carolina