THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2012-213506

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

v.

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

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

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

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

v.

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

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PETITION FOR REHEARING OF APPELLANT/RESPONDENT

(caption continued from cover page):

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

v.

South Carolina Department of Health and Environmental Control and Trident Medical Center, LLC ..... Respondents,

Of whom Trident Medical Center, LLC is the.....Appellant.

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Attorneys for Appellant/Respondent Trident Medical Center, LLC

Pursuant to Rule 221, SCACR, Appellant/Respondent Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center ("Trident") hereby petitions the Court for rehearing of the panel decision filed on February 18, 2015, in the above-captioned case. Trident contends that the panel decision overlooks or misapprehends the following:

1. In holding that the plain language of Chapter II.G.1 § (A)(4)(j) of the *2008-2009 State Health Plan* ("Bed Transfer Provision") supports the Respondent Department of Health and Environmental Control's ("DHEC") decision that the Bed Transfer Provision can be used by the Respondent/Appellant Roper St. Francis Hospital-Berkeley d/b/a Roper St. Francis Hospital ("Roper") to establish a new hospital, the panel decision considers only selected language from the preamble to the Bed Transfer Provision and overlooks or misapprehends that the entire Provision, including the entire preamble, by its plain English language construction, requires that the receiving hospital be in existence.

2. The panel's holding that the Bed Transfer Provision contains no language that expressly or implicitly requires the receiving hospital be in existence overlooks or misapprehends the numerous references and requirements in the plain language of the Provision which can apply only if the receiving hospital is in existence.

3. The panel's holding that the plain language of the Bed Transfer Provision supports DHEC's policy of applying the Provision to new hospitals overlooks and is contrary to the uncontradicted admissions in the record by the ALC, in its order, and DHEC, in testimony before the ALC, that the policy is, in fact, contrary to the plain English language of the Bed Transfer Provision.

4. The panel's holding that the Administrative Law Court ("ALC") properly deferred to DHEC's interpretation of the Bed Transfer Provision as applying to new hospitals overlooks or misapprehends the established case law that deference to an agency's interpretation of a regulation is warranted only when the regulation is silent or ambiguous on the matter, which is not the case with the Bed Transfer Provision.

5. The panel's decision that the ALC properly deferred to DHEC's interpretation of the Bed Transfer Provision is contrary to the established law that an agency's interpretation is not entitled to deference when compelling circumstances exist to reject such interpretation, the compelling circumstances being, in this case, that DHEC's interpretation is arbitrary, capricious and manifestly contrary to the plain language of the Bed Transfer Provision.

6. The panel's conclusion that the ALC properly deferred to DHEC's *ad hoc* interpretation and application of the Bed Transfer Provision to Roper's project overlooks, undermines, and is contrary to the panel's recognition that the Legislature imposed stringent requirements for the *State Health Plan* with the intent that it be enforced according to its terms and that due process requires such enforcement.

7. The panel's construction of the Bed Transfer Provision in the context of the entire general hospitals section of the *State Health Plan* (Chapter II.G.1 § (A))("General Hospitals Section") overlooks and misapprehends that the General Hospitals Section contains two specific and explicit provisions for creating a new hospital facility, that Roper's proposed project does not qualify under either of them, and that allowing Roper to utilize the Bed Transfer Provision to create a new facility circumvents the requirements of those provisions. (See Chapter II.G.1 §§ (A)(4)(d) and (e) of the *2008-2009 State Health Plan*).

8. The panel's conclusion that the lack of beds in Berkeley County is an indication of need or that the area is "medically underserved" or is relevant to Roper's proposed project is not supported by the law or the uncontradicted evidence in the record, which indicates that the applicable service area in this case is Charleston, Berkeley and Dorchester Counties ("Tri-County Service Area"), that there is an excess of beds in the service area, and that Roper's proposed project is to be located within 7.9 miles of Trident's existing Trident Medical Center and 10.3 miles of Trident's existing Summerville Medical Center.

9. The panel's conclusion that it is "reasonable for DHEC to interpret the Bed Transfer Provision as allowing the transfer of beds to a hospital that has not yet been built when the transfer would improve health care access in a medically underserved community" overlooks or misapprehends that DHEC's interpretation is contrary to the plain language of the Provision and that the uncontradicted evidence in the record indicates that the applicable service area in this case is Charleston, Berkeley and Dorchester Counties ("Tri-County Service Area"), that there was an excess of beds in the service area, and that Roper's proposed project is to be located within 7.9 miles of Trident's existing Trident Medical Center and 10.3 miles of Trident's existing Summerville Medical Center.

10. The panel's conclusion that Trident and Roper are not competing applicants under the applicable law misapprehends that, as a matter of law, approval of both projects would exceed the need for general hospital beds in the Tri-County Service Area.

These grounds are more fully explained in Trident's Memorandum in Support of its Petition for Rehearing and are supported by Trident's detailed arguments in final briefs filed with the Court.

For the foregoing reasons, the reasons set forth in Trident's Memorandum, and for any other reason supported by the briefs and Record, Trident respectfully requests that the Court grant REHEARING of the panel decision and REVERSE the panel decision insofar as it affirms DHEC's decision to grant Roper's Certificate of Need Application.

Respectfully submitted,

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Attorneys for Appellant/Respondent Trident Medical Center, LLC

March 5, 2015
Columbia, South Carolina

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PROOF OF SERVICE

The undersigned hereby certifies that on March 5, 2015 s/he caused a copy of the Appellant/Respondent's Petition for Rehearing to be served on all parties of record by hand delivering the same, addressed as follows:

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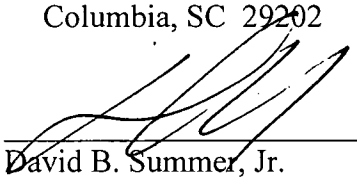

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING OF APPELLANT/RESPONDENT

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Attorneys for Appellant/Respondent Trident Medical Center, LLC

The Appellant/Respondent Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center ("Trident") submits this Memorandum in Support of its Petition for Rehearing.

FACTS

For purposes of this Memorandum, the relevant facts are as follows.[1] On December 10, 2008, the Respondent/Appellant Roper St. Francis Hospital-Berkeley, Inc. d/b/a Roper St. Francis Hospital-Berkeley ("Roper") filed a Certificate of Need ("CON") application under the *2008-2009 South Carolina Health Plan* ("State Health Plan") requesting approval for the construction of a new hospital to be located in Berkeley County within the Charleston-Berkeley-Dorchester health planning area (the "Tri-county Service Area"). Specifically Roper proposed to transfer 50 licensed hospital beds from its downtown Charleston hospital in order to create a new 50-bed community hospital in Goose Creek. Roper proposed to locate its new hospital on a site just 7.9 miles from Trident's existing Trident Medical Center and 10.3 miles from Trident's existing Summerville Medical Center.

In August, 2008, Trident filed its own CON application to construct a 50-bed community hospital in Berkeley County. Trident proposed to located its hospital on a site adjacent to a freestanding emergency department that Trident operated in Moncks Corner. Because Trident believed that there was not enough need in the Tri-county Service Area for two new hospitals, a belief supported by the statements of need in the State Health Plan, Trident took the position that Roper was a competing applicant to Trident and its proposed facility.

[1] Trident respectfully refers the Court to its briefs previously filed with the Court for a detailed discussion of the facts.

In its application, Roper indicated that no hospital or other medical facility existed at Roper's proposed site to receive the transfer of the beds from Roper's downtown hospital. In order to accomplish the transfer of hospital beds, Roper proposed to construct an entirely new receiving hospital and to create all new ancillary services, such as operating rooms, mammography, ultrasound, nuclear medicine, and other imaging equipment and services, emergency department services, laboratory equipment and services, and outpatient functions to support the transferred beds, at a total project cost of approximately $113 million.

Given the proximity of Roper's proposed hospital to Trident's existing hospitals, virtually all of the population residing in the area to be served by Roper is already within 30 minutes' drive time of a hospital. Quantified, only 940 additional persons will be brought within 30 minutes' drive of a hospital as a result of the construction of Roper's proposed new hospital. The State Health Plan contains the statement that "[g]eneral Hospital beds are located within approximately thirty (30) minutes travel time for the majority of residents of the State . . ." (Relative Importance of Project Review Criteria, p. II-11). The consensus of the experts presented at trial was that a 30-minute time travel measure for hospital services is reasonable for health planning purposes.

Under the State Health Plan, an individual hospital with a facility-specific bed need could seek approval to add the needed beds at its existing facility or to place them at another site if the hospital already has a physical presence there. (Chapter G.1 § (A)(4)(d)). The State Health Plan also allowed a provider to use a stated need for additional hospital beds in the planning area as a whole to create a new hospital anywhere in the planning area, if approved by DHEC. (Chapter G.1 § (A)(4)(e)). Thus, the only two

provisions of the State Health Plan that expressly allowed new hospitals required as a prerequisite that need exist ("New Hospital Provisions").

At the time Roper filed its CON, Roper had no need for beds under the State Health Plan, and, in fact, had an excess of 6 beds at its downtown hospital. There was a 48 bed surplus in the Tri-county Service Area as a whole when Roper applied. Because of the lack of need for any new hospital beds for Roper or in the Tri-County Service Area as a whole, Roper could not utilize either of the New Hospital Provisions. Instead, Roper was allowed to submit its CON application under a provision of the State Health Plan that does not on its face apply to the creation of a new facility. Chapter II, Section G.1(A)(4)(j) of the State Health Plan (the "Bed Transfer Provision") was made available to Roper because DHEC apparently had an unwritten policy of interpreting the Bed Transfer Provision to allow a hospital to transfer beds from a licensed facility even when no licensed receiving facility existed to receive them.[2]

On June 26, 2009, DHEC approved both Trident's and Roper's applications, finding that the projects were not competing. Trident appealed the approval of Roper's application and the finding that the projects were not competing to the Board of Health and Environmental Control ("Board"). The Board declined to conduct a final review and Trident requested contested case review on those issues before the Administrative Law Court ("ALC").

On September 26, 2012, the ALC issued its Final Order and Decision ("Order") affirming DHEC's decision to approve both Trident's and Roper's CON applications. Although the ALC conceded in its Order that the plain language of the Bed Transfer

[2] After Roper filed its application, the unwritten policy was affirmed by the Board of Health and Environmental Control in a May 8, 2009 written decision in an unrelated case.

Provision limited its application to cases in which both the transferring and receiving hospitals exist, the ALC nevertheless deferred to the Department's contrary interpretation and approved Roper's application as consistent with the State Health Plan. The ALC also found that Trident and Roper were not competing applicants because the need for hospital facilities and services in the area would not be exceeded if both hospitals were approved.

In its February 18, 2015 Opinion No. 5297, the Court of Appeals panel affirmed the ALC's decision to defer to DHEC's interpretation of the Bed Transfer Provision, holding that the plain language of the Provision supported such action. The panel also determined, as a matter of law, that the need for new hospital services was not exceeded by approval of both Trident and Roper's CON applications.

Trident has filed herewith a Petition for Rehearing asserting numerous grounds on which the panel decision misapprehends or overlooks important evidentiary and legal matters in reaching the above conclusions. Trident submits this memorandum in support of its Petition for Rehearing.

ISSUES 1 – 3

Plain Language Interpretation

In holding that the plain language of the Bed Transfer Provision supports DHEC's interpretation that the Provision can be used by Roper to establish a new hospital and that no language in the Provision contradicts such interpretatiion, the panel decision considers only selected language from the preamble to the Bed Transfer Provision and overlooks or misapprehends that the entire Provision, including the entire preamble, by its plain English language construction, requires that the receiving hospital be in existence.

For example, the preamble to the Bed Transfer Provision provides in its entirety that "Changes in the delivery system due to health care reform have resulted in the ***consolidation*** of ***facilities*** and the establishment of provider networks. These consolidations and agreements may lead to situations where ***affiliated hospitals*** may wish to transfer beds ***between themselves*** in order to serve ***their patients*** in a more efficient manner. A proposal to ***transfer or exchange*** hospital beds requires a Certificate of Need and must comply with the following criteria. . . ." (Emphasis added). The panel decision focuses on only one statement of purpose in the preamble, that a bed transfer between affiliated hospitals might be used "in order to serve their patients in a more efficient manner."

The panel uses this language as dispositive proof that the Bed Transfer Provision supports Roper's stated goal to move closer to the small percentage of its patients at Roper Downtown who come from Berkeley County. This narrow and selective reading of the Bed Transfer Provision ignores the remainder of the Provision and its many requirements, which must be met before a transfer can be made, all of which indicate that the hospital receiving the beds must be in existence. In other words, the plain language of the Bed Transfer Provision indicates that it cannot be used to create a new hospital. (*See Dreher v. S.C. Dep't of Health & Envtl. Control*, 399 S.C. 259, 265, 730 S.E.2d 922, 925 (Ct.App. 2012)("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.") (*quoting*, *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260 626 S.E.2d 6,10 (2005)).

According to its entire preamble, the Bed Transfer Provision was promulgated to address and assist providers in their response to health care reforms that resulted in the "consolidation of facilities" and "the establishment of provider networks" where "affiliated hospitals"[3] might wish to "exchange" or transfer beds "between themselves" in order to serve "their patients" more efficiently. The plain and ordinary meaning of this language contemplates two existing, related hospitals, each with existing beds and patients, who, because of the changing health care environment, may need to swap or reallocate resources. Hospitals cannot consolidate, cannot be affiliated or part of provider networks, cannot transfer or exchange beds between themselves, and cannot enter into agreements with one another when one hospital exists and the other does not.

The remainder of the Bed Transfer Provision requirements contain references to the plural "applicants," "bodies," and "facilities" and contains numerous references to the "facility giving up the beds" as contrasted with "the facility receiving the beds." To work around these plain English references to two extant facilities, DHEC deems a single hospital, *i.e.*, the one transferring the beds, to be both the facility transferring the beds and the facility receiving the beds. DHEC must then ignore or contort the remaining requirements of the Provision to fit this scenario.

For example, the Bed Transfer Provision requires that the "applicants must document with patient origin data the historical utilization of the receiving facility by

[3] Trident contends that the finding of the panel that Roper's yet-to-be-created hospital is an "affiliated hospital" overlooks or misapprehends the applicable definition of "affiliated hospitals" set forth in Chapter II(B) of the State Health Plan as "two or more health care facilities, whether inpatient or outpatient, owned, leased, sponsored, or who have a formal legal relationship with a central organization and whose relationship has been established for reasons other than for transferring beds, equipment or services." (Emphasis added). Roper intends to create its Goose Creek hospital for the purpose of receiving the transfer of beds from its downtown campus. It is true that once the bed transfer occurs, Roper will operate the new hospital to serve patients. However, if no bed transfer can occur, there will be no Goose Creek hospital, as that is the reason for its creation.

residents of the county giving up beds" and that "[t]he facility receiving the beds must demonstrate the need for the additional capacity based on both historical and projected utilization patterns." Only if the receiving facility exists can it demonstrate that it is being utilized by residents of the county giving up the beds, in this case, Charleston. Only if the receiving facility exists can it demonstrate historical utilization to support its need for "additional" capacity at its site.

The only way to find support for DHEC's interpretation in the words of the Bed Transfer Provision is to ignore or alter these plain English requirements. The panel decision does just that because it misapprehends or overlooks the plain language of the entire Bed Transfer Provision.

The panel also overlooks the acknowledgment by the DHEC witnesses at trial that DHEC's interpretation of the Bed Transfer Provision is not in accord with the plain meaning of the words of the Provision. Likewise, the panel decision misapprehends or overlooks that the ALC in its Order also recognized and acknowledged that "[i]t cannot be denied that, on its face, Section II(G)(1)(A)(4)(j) of the 2008-2009 State Health Plan (the bed transfer provision) appears to anticipate the existence of an existing facility."

Despite this finding regarding the plain language of the Bed Transfer Provision, the ALC nevertheless deferred to DHEC's interpretation that the Provision could be applied to create a new hospital. The panel decision upholds the ALC's deference to DHEC. Such holding is illogical, arbitrary, capricious, and overlooks or misapprehends established case law. *See Kiawah Development Partners, II, v. South Carolina Department of Health and Environmental Control*, Op. No. 27065 (S.C. Sup. Ct. refiled December 10, 2014)(Shearouse Adv. Sh. No. 49 at 11) (Setting forth the two step process

for analyzing regulations administered by agencies and requiring adherence to the clear meaning of the regulation); *Savannah Riverkeeper v. S.C. Dep't of Health & Envtl. Control,* 400 S.C. 196, 207, 733 S.E.2d 903, 908 (2012) ("An agency's interpretation of a statute or regulation that is erroneous or controlled by error of law presents a compelling reason not to defer to the agency's interpretation."); *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("The first question of statutory interpretation is whether the statute's meaning is clear on its face...If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.").

Issues 4 – 6

Deference to the Agency

The panel's holding that the ALC properly deferred to DHEC's interpretation of the Bed Transfer Provision as applying to new hospitals overlooks or misapprehends the established case law that deference to an agency's interpretation of a regulation is warranted only when the regulation is silent or ambiguous on the matter, which is not the case with the Bed Transfer Provision. Further it is established law that an agency's interpretation is not entitled to deference when compelling circumstances exist to reject such interpretation, the compelling circumstances being, in this case, that DHEC's interpretation is arbitrary, capricious and manifestly contrary to the plain language of the Bed Transfer Provision. (See Argument I. above).

Further, the panel's conclusion that the ALC properly deferred to DHEC's interpretation of the Bed Transfer Provision, when the plain language requires otherwise,

overlooks, undermines, and is contrary to the panel's recognition in its decision that the Legislature imposed stringent requirements for the State Health Plan with the intent that the Plan be enforced according to its terms and that due process requires such enforcement. Granting DHEC the broad deference to interpret the Plan contrary to its plain meaning is contrary to the laws governing the authority of DHEC to develop and administer the State Health Plan and to the laws governing administrative and judicial oversight of DHEC by the ALC and the courts.

As the panel decision implicitly recognizes in holding that the State Health Plan is intended to be enforceable, far from giving the Department the sole and unbridled discretion to interpret the Plan at will, the law imposes a strict statutory structure, requiring both public notice and public comment, which is designed to result in the consistency of health planning in the State. Allowing the Department to create ad hoc standards for the establishment of new hospitals by "interpreting" portions of the Plan contrary to their plain meaning violates both the statutory process and the purpose of the State Health Plan." *See Triska v. S.C. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) ("DHEC must follow its own regulations and the provisions of the Administrative Procedures Act . . . in carrying out the legitimate purposes of the agency."). *See also* S.C. Code Ann. § 44-1-60(G); S.C. Code Ann. §1-23-600(Supp. 2012); *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court.").

Issues 7 – 9

State Health Plan Requirements

In its decision, the panel appropriately concludes from the established case law and from the language of the State Health Plan itself that the Bed Transfer Provision must be construed in light of the entire general hospitals section of the Plan (Chapter II.G.1 § (A))("General Hospitals Section"). The panel's decision, however, overlooks and misapprehends that the General Hospitals Section contains two specific and explicit provisions setting forth the requirements for creating a new hospital and that Roper's proposed project does not qualify under either of them.

As discussed earlier, the New Hospital Provisions of the State Health Plan both require that need exist before a new hospital can be created. One obvious reason for the requirement of need prior to creating a new hospital is illustrated by Roper's proposed project.

Roper does not simply propose to transfer beds from an existing hospital. It proposes to construct an entirely new receiving hospital facility and to create all new ancillary services, such as operating rooms, mammography, ultrasound, nuclear medicine, and other imaging equipment and services, emergency department services, laboratory equipment and services, and outpatient functions to support the transferred beds, at a total project cost of approximately $113 million. All of this cost and duplication of services is to be added to the health care system so that Roper can make itself more convenient to the small percentage of its patients residing in Berkeley County that choose, for whatever reason, to utilize Roper's downtown Charleston hospital. The

record shows that the location Roper chose for its project improves timely access to hospital services for only 940 people.

Under the New Hospital Provisions of the State Health Plan, which specifically address the creation of new hospitals, Roper cannot justify its project because no need exists. Nevertheless, the panel's decision affirms DHEC's "interpretation" of the Bed Transfer Provision, which does not expressly relate to the creation of new hospitals, to allow Roper's project to be approved. This holding undermines and overlooks the New Hospital Provisions of the State Health Plan and the stated goals of the CON program to "promote cost containment" and "prevent unnecessary duplication of health care facilities and services." S.C.Code Ann. § 44-7-120 (2002). *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006)("A statute as a whole must receive practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers.").

Further, the panel's conclusion that the lack of beds in Berkeley County is an indication of need and that the area is "medically underserved"[4] is not supported by the law and is contrary to the uncontradicted evidence in the record. The applicable service area in this case, as set forth in the State Health Plan is the Tri-county area composed of Charleston, Berkeley and Dorchester Counties. Allocation and distribution of hospital services must be determined for the service area, not just Berkeley County. As the uncontradicted evidence in the record shows there was a surplus of beds in the service

[4] Regulation 61-15 defines "medically underserved groups" as "groups which have traditionally experienced difficulties in obtaining equal access to health services (e.g. low income persons, racial and ethnic minorities, women, the elderly, and handicapped persons), particularly those needs identified in the applicable South Carolina Health Plan as deserving of priority." (3 S.C. Code Ann. Regs. 61-15, § 802(31)).

area when Roper filed it application and Roper's proposed project was to be located within 7.9 miles of Trident's existing Trident Medical Center and 10.3 miles of Trident's existing Summerville Medical Center.

Even assuming that parts of Berkeley County are "medically underserved", Roper's project will not alleviate that condition. Therefore, the panel's conclusion that it is "reasonable for DHEC to interpret the Bed Transfer Provision as allowing the transfer of beds to a hospital that has not yet been built when the transfer would improve health care access in a medically underserved community" is contrary to the State Health Plan and the uncontradicted evidence in the record.

Issue 10

Competing Applicants

The panel's conclusion that Trident and Roper are not competing applicants under the applicable law misapprehends that, as a matter of law, approval of both projects would exceed the need for hospital services in the Tri-County Service Area. Under the law, "'competing applicants' means two or more persons or health care facilities . . . who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities." S.C.Code Ann. § 44-7-130(5)(2002). *See also* 3 S.C. Code Ann. Regs. 61-15, § 103(6).

In reaching the conclusion that the need for hospital services would not be exceeded by the approval of both Trident and Roper's projects, the panel decision defers to DHEC's finding that, because Roper proposed to transfer existing licensed beds, the need for those services would not be exceeded. DHEC viewed Roper's application to

construct a brand new $113 million hospital with its substantial duplication in ancillary services at a location over 25 miles from Roper Downtown as a simple "repositioning" of a portion of Roper Downtown's licensed bed complement, for which no further analysis of need was required. The panel decision concurs and interprets the law to require that the approval of both applications actually "cause" the need for the services to be exceeded. Neither of these positions is supported by the law.

At the time it applied, Roper did not have a positive, or even a neutral, bed need. Roper had an excess of beds. Likewise the Tri-county Service Area had an excess need for beds. The panel decision accepts the notion that, because the excess need bed count did not change as result of Roper's being allowed to move its excess beds, the need for hospital services will not be exceeded by the approval of two new 50-bed hospitals in Berkeley County.

Under the competing applicants law, however, the test is not whether the bed count for the facility or for the service area remains unchanged or unaffected. Under the competing applications law, the test is whether two or more projects can be approved when those projects will exceed the need for the services or facilities. The law does not require that the approval of both projects be the cause of the excess. Because the State Health Plan reflects an aggregate excess of beds in the Tri-county Service Area and because Roper's existing hospitals show an excess of beds, as a matter of law, DHEC was required to conclude that Roper's proposed hospital by itself or in conjunction with Trident's proposed hospital exceeded the need for hospital services in the service area

and that, therefore, Trident and Roper were competing applicants.[5] To draw any other conclusion is inconsistent with the State Health Plan.

CONCLUSION

For the foregoing reasons, the reasons set forth in Trident's Petition for Rehearing, and for any other reason supported by the briefs and Record, Trident respectfully requests that the Court grant REHEARING of the panel decision and REVERSE the panel decision insofar as it affirms DHEC's decision to grant Roper's Certificate of Need Application.

Respectfully submitted,

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March 5, 2015
Columbia, South Carolina

[5] Unlike Roper, Trident did show a need for additional hospital beds under the Plan. Once Trident's project was approved, that need was met and no further need existed for Roper to justify its project.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2012-213506

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

v.

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

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

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

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

v.

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

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

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

PROOF OF SERVICE

(caption continued from cover page):

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

v.

South Carolina Department of Health and Environmental Control and Trident Medical Center, LLC .....Respondents,

Of whom Trident Medical Center, LLC is the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on March 5, 2015 s/he has caused a copy of the Memorandum in Support of Petition for Rehearing of Appellant/Respondent to be served on all parties of record by hand delivering the same, addressed as follows:

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