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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson III, Administrative Law Judge

Appellate Case No. 2014-000973
Case No. 2012-ALJ-07-0090-CC

Grand Strand Regional Medical Center, LLCRespondent,
v.

South Carolina Department of Health and
Environmental Control.....Respondent below.

Case No. 2012-ALJ-07-0091-CC

Grand Strand Regional Medical Center, LLCRespondent,
v.

South Carolina Department of Health and
Environmental Control and Carolina Regional Cancer Center..... Respondents below,

Of whom Carolina Regional Cancer Center is the.....Appellant.

BRIEF OF APPELLANT

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James G. Long III
Jennifer J. Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

E. Wade Mullins III
BRUNER POWELL
1735 St. Julian Place, Suite 200
P.O. Box 61110 (29260-1110)
Columbia, SC 29204

Attorneys for Appellant
Carolina Regional Cancer Center

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ERR IN APPROVING THE GRAND STRAND CON APPLICATION BECAUSE IT IMPROPERLY RELIED ON THE NEWLY ENACTED 2012-2013 SOUTH CAROLINA HEALTH PLAN?
- II. DID THE ADMINISTRATIVE LAW COURT'S FAILURE TO REMAND THE GRAND STRAND CON APPLICATION CONSTITUTE REVERSIBLE ERROR?
- III. DID THE ADMINISTRATIVE LAW COURT ERR IN CONCLUDING THAT GRAND STRAND'S CON APPLICATION WAS APPROVABLE?
- IV. DID THE ADMINISTRATIVE LAW COURT IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE RESPONDENT, CAROLINA REGIONAL CANCER CENTER?

STATEMENT OF THE CASE

These proceedings involve certificate of need (“CON”) applications for the provision of linear accelerator services in Horry County, South Carolina.¹ By decision issued December 28, 2011, the Respondent South Carolina Department of Health and Environmental Control (“DHEC” or “Department”) approved a CON application filed by Appellant Carolina Regional Cancer Center (“CRCC”) to add a linear accelerator in Horry County to a proposed location in Conway, South Carolina. With the approval of CRCC’s CON application, the Department denied two competing CON applications to add linear accelerator services to Horry County – one application from Respondent Grand Strand Regional Medical Center, LLC (“Grand Strand”) to a proposed location in Myrtle Beach, South Carolina, and one from North Strand Radiation Oncology Center (“North Strand”) to a proposed location in Little River, South Carolina.

The parties involved in this appeal filed their CON applications as follows. On March 9, 2011, North Strand filed a CON application to establish a new service in Little River, South Carolina, through a joint venture between McLeod Regional Medical Center and Loris Health Services, Inc. Grand Strand filed a CON application on July 19, 2011, to establish radiation therapy services as an attachment to its main hospital campus in Myrtle Beach, just three miles from CRCC’s existing Myrtle Beach facility. On March 11, 2011, CRCC filed a CON application to establish radiation therapy services in Conway, South Carolina near the Conway Hospital.

Upon review of the three applications, the Department concluded that the applications were competing under S.C. Code Ann. § 44-7-130(5) and 24A S.C. Code

¹ As discussed herein, a linear accelerator is a machine used to provide radiation therapy treatments to cancer patients.

Ann. Regs. 61-15 § 103(6). DHEC staff then analyzed which applicant most fully complied with the CON Act, South Carolina Health Plan, project review criteria, and regulations, concluding that CRCC's CON application should be approved. *See* 24A S.C. Code Ann. Regs. 61-15 § 307(2).

Upon the Department's staff decision, both Grand Strand and North Strand requested review by the DHEC Board. By decision dated February 13, 2012, the DHEC Board declined to conduct a final review conference, thereby adopting the staff decision. On March 14, 2012, Grand Strand filed two separate contested case proceedings in the Administrative Law Court challenging the Department's decision to grant a CON to CRCC and to deny a CON to Grand Strand. CRCC was named as a party in only one of the two Grand Strand actions. Also on March 14, 2012, North Strand filed two contested case proceedings in the Administrative Law Court challenging the Department's decision to grant a CON to CRCC and to deny the CON application of North Strand. CRCC was named as a party in only one of the two North Strand actions. By Orders dated May 4, 2012, all four parties: CRCC, DHEC, North Strand and Grand Strand, were made parties to all four actions and all four actions were consolidated for discovery and trial. Ultimately, North Strand abandoned its application and, by Order dated March 5, 2013, the Court dismissed North Strand's actions with prejudice. After March 5, 2013, North Strand was no longer a party to the proceedings.

The parties engaged in substantial discovery, and the Administrative Law Court heard several motions related to discovery and other pre-trial matters, and issued several discovery orders, a Confidentiality Order, and several scheduling orders. At the conclusion of discovery, Grand Strand filed a Motion for Partial Summary Judgment,

contending that based on the newly enacted 2012-2013 South Carolina Health Plan, the CRCC and Grand Strand CON applications were not competing applications as previously determined by the Department. By Order dated June 28, 2013, the Administrative Law Court denied the Motion.

A nine-day contested case trial commenced before The Honorable Ralph King Anderson, III, on September 12, 2013. A total of 11 witnesses testified at the hearing plus one witness by deposition designation. Of the 11 witnesses, four were qualified as experts. A total of 140 exhibits were admitted as evidence. By Order dated March 10, 2014, Judge Anderson issued a Final Order and Decision reversing the decision of the Department and granting both CON applications. CRCC filed a Motion to Alter or Amend the Order on March 20, 2014. On April 4, 2014, Judge Anderson issued a Reconsideration Order and Amended Final Order and Decision, both of which CRCC now appeals. On May 2, 2014, CRCC timely filed its Notice of Appeal. Within five days, CRCC posted a cash bond with the Court of Appeals as required by S.C. Code Ann § 44-7-220(B). Grand Strand did not appeal.

STATEMENT OF THE FACTS

Two existing providers provide radiation therapy services in the three-county service area of Horry, Georgetown and Williamsburg Counties. (R. pp. 4394-4396). CRCC is one of those two existing providers, and the other is Georgetown Hospital System. (*Id.*) Between these two providers, four machines operate in the service area and are clustered in the significant population centers within the service area – with CRCC having three machines at its center in Myrtle Beach and Georgetown Hospital having one machine located at its campus in Georgetown. (R. p. 4490).

Radiation therapy is one of three major modalities to treat cancer, along with surgery and chemotherapy. (R. p. 794, lines 13-18). At least half of all cancer patients will receive radiation therapy as part of their cancer treatment, between 50% and 60% on average. (R. p. 795, lines 7-11). Radiation therapy is focused on optimizing survival and outcome for cancer patients, while simultaneously improving or maintaining their quality of life. (R. p. 1746, lines 8-14). External beam radiation therapy is the most common form of radiation therapy, which focuses the beam of radiation to a precise treatment field with less side effects. (R. p. 1747, lines 3-17). IMRT and IGRT are types of external beam radiation therapy. *Id.*

A linear accelerator machine delivers an external beam of radiation to the patient. A linear accelerator puts out high energy radiation to reach the tumor, with the ability to rotate 360° around the patient to treat from any angle. (R. p. 797, lines 9-19). Before radiation therapy treatment begins, planning is done using a CT scanner, which allows for a simulation using the coordinates of the patient's body, the tumor, and maps surrounding vital structures to avoid. (R. p. 797, line 20 – p. 798, line 3).

Radiation therapy is a sophisticated course of treatment wherein dosage is critical for successful treatment. (R. p. 1764, line 12 – p. 1765, line 17). A physicist is involved along with a specialized staff. *Id.* The linear accelerator is an expensive piece of equipment costing several million dollars and is housed in a specially constructed vault. (R. pp. 2636 – 2638). The Grand Strand project costs are nearly 10 million dollars, and the CRCC project costs are over five million dollars. (R. p. 3312; R. p. 2638). Maintaining a quality radiation therapy program requires substantial capital expenditure, specialization, and a high volume operation.

While radiation therapy is used to treat many different types of cancer, the most common types are breast cancer, prostate cancer, lung cancer, and metastatic cancer (where the cancer has spread from its primary site). (R. p. 798, lines 5-16). Radiation therapy can be a palliative treatment (to provide pain relief) and/or a curative treatment (to cure the disease). (R. p. 798, lines 17-21). The overwhelming majority of radiation therapy is delivered on an outpatient basis, more than 99% of the total. (R. p. 1760, lines 2-7; R. p. 2064, lines 1-6). The patient is typically treated once per day, five days per week, for a number of weeks.

The number of radiation therapy treatments a patient will have depends on several factors, including the type of cancer, the stage of the cancer, and the size of the tumor. (R. p. 798, line 25 – p. 799, line 6). The average number of treatments *for commonly seen cancers* is typically 30 or more treatments for each patient. Some patients, however, receive fewer treatments, usually as a result of the late stage or location of the tumor. (R. p. 799, line 7 – p. 801, line 18). Therefore, the average number of treatments *per patient* is less than 30.

By way of background, the Certificate of Need (“CON”) program is a comprehensive statutory scheme found at S.C. Code Ann § 44-7-110 *et seq.* (Rev. 2002) (the “CON Act”) that has been in existence for decades. The CON Act vests DHEC with the control and administration of the CON program. DHEC publishes a South Carolina Health Plan every two years. Additionally, DHEC has adopted Project Review Criteria to evaluate CON Applications, and promulgated a host of other regulations to implement and support the statutory scheme. The CON Act has clearly stated purposes and plainly sets forth the types of projects or services to which the Act applies. S.C. Code Ann. §§ 44-7-120, 160. The South Carolina Health Plan identifies the specific services and equipment requiring a CON and includes inventories, projections, standards, and a statement of the most important project review criteria. S.C. Code Ann § 44-7-180. Before the Department may grant a CON, the application must comply with the applicable South Carolina Health Plan and the Project Review Criteria found at Section 802 of Regulation 61-15. S.C. Code Ann. § 44-7-210(C). Radiation therapy is a service covered by the South Carolina Health Plan, with an entire Chapter devoted to the standards, inventory, and projections for Megavoltage Radiotherapy and Radiosurgery, along with a description of the service and most important project review criteria. (R. p. 4387).

The South Carolina Health Plan establishes the volumes for which a linear accelerator machine is determined to be at capacity. Under the 2010-2011 South Carolina Health Plan, conventional linear accelerators have a capacity of 7,000 treatments per year, based on an ability to treat 28 patients per day, 5 days per week, for 50 weeks per year. (R. pp. 4390-4391). Linear accelerators with the ability to provide

IMRT and IGRT may have a lower capacity of 5,000 treatments per year, with the requirement that the facility document the provision of these specialized services sufficient to justify a lower planning capacity. (*Id.*) Despite the planning capacity established by the Department, linear accelerators are quite capable of treating a significantly greater number of patients per day than the planning capacity contemplates and, therefore, it is not unusual for a linear accelerator to provide significantly more than 7,000 treatments per year. (R. p. 2014, line 4 – p. 2015, line 5; R. p. 4394). For the applicable service area of Horry, Georgetown, and Williamsburg Counties, the four existing linear accelerators have a planning area capacity of 26,000, and experienced total treatments of 20,918 as reported in the 2010-2011 South Carolina Health Plan, resulting in utilization at a capacity of 80.5%. (R. p. 4394). Therefore, the reported utilization in the service area barely satisfied the 80% threshold required in the South Carolina Health Plan allowing the Department to consider an additional linear accelerator in Horry, Georgetown, or Williamsburg Counties under the 2010-2011 South Carolina Health Plan.

Having satisfied the 80% threshold in utilization and in order to further distribute linear accelerator services throughout the service area, CRCC filed the underlying CON application on March 10, 2011, to expand its existing services by placing a new state-of-the-art Varian TrueBeam System in Conway, South Carolina. (R. pp. 2636-2638; R. p. 1842, line 8 – p. 1843, line 3). CRCC's project maximizes existing healthcare resources by renovating and upfitting an existing empty vault in Conway, South Carolina, that otherwise stands unused and wasted. (R. p. 2636). Grand Strand's CON application filed on July 19, 2011, seeks to place a linear accelerator at its main campus in Myrtle Beach, South Carolina, by constructing an attachment to the hospital. (R. pp. 3304, 3310).

Grand Strand's project is just three miles from the existing linear accelerators in Horry County. (R. pp. 3252, 3295).

Both CRCC's and Grand Strand's applications are governed by the 2010-2011 South Carolina Health Plan. R. p. 4376). During the pendency of this action, DHEC approved and published the 2012-2013 South Carolina Health Plan. The new Health Plan maintained the 80% threshold for application consideration and made no changes to the utilization projections required of applicants. Despite this, the ALC relied upon the newly enacted South Carolina Health Plan to determine that it could approve the Grand Strand CON application in addition to the approved CRCC CON application. CRCC submits this was an error of law.

Prior to the filing of the CON applications challenged in these actions, CRCC had applied for and was approved to relocate one of its existing linear accelerators to a facility to be constructed in Murrell's Inlet, South Carolina. (R. p. 4441). Georgetown Hospital System had similarly applied to relocate its single machine from Georgetown to Murrell's Inlet, on the campus of Waccamaw Community Hospital. The Department approved both CON applications and that decision is currently being appealed by both Georgetown and CRCC. (R. p. 1563, lines 6-13).

CRCC is a subsidiary of Radiation Therapy Services, Inc. (n/k/a 21st Century Oncology), one of the nation's largest providers of radiation therapy. (R. p. 2638). At the time of its acquisition by 21st Century Oncology, CRCC had been operating at its Myrtle Beach location for over thirty years, since March of 1980. (R. p. 2637). One of CRCC's witnesses at trial, Patricia "Sissy" Price, had been employed by CRCC and cared for cancer patients in the service area the entire 34 years of the Center's existence. (R. p.

1628, line 3 – p. 1629, line 3). CRCC, originally created as Myrtle Beach Radiation Therapy Center, started with a single linear accelerator and four employees, and at the time of trial operated three machines, including a TomoTherapy unit, providing state-of-the-art cancer care. (R. pp. 2637-2638).

Grand Strand Regional Medical Center is a tertiary care hospital in Myrtle Beach, South Carolina, and is a HCA-owned facility. (R. p. 3319; R. p. 77, line 16). Grand Strand does not currently offer any radiation therapy, but HCA operates the service in 40 locations throughout the country. (R. p. 592, lines 20-22). By way of comparison, 21st Century Oncology employs in excess of 125 radiation oncologists and operates approximately 100 radiation therapy centers in the United States alone. (R. p. 1365, lines 15-20).

The Department conducted a thorough review process for the applications. (R. p. 1202, line 5 – R. p. 1213, line 25). DHEC staff asked numerous questions seeking additional information from each applicant and held a project review meeting to thoroughly discuss and understand the projects proposed by the parties. (R. pp. 3141-3142, 3170, 3202; R. pp. 3837-3838, 4042). A project review meeting was held in Columbia, South Carolina, on November 15, 2011, after the projects were deemed complete. (R. p. 1734, line 23 – p. 1735, line 17). On December 28, 2011, the Department issued its decision letter and notified all parties of its decision. The Department found the CON applications to be competing applications as defined by the CON Regulations, approved the application submitted by CRCC, and denied the applications submitted by Grand Strand and North Strand. (R. p. 3282; R. p. 4252).

After finding that the applications were competing, the Department concluded that CRCC “would better comply” with the purposes of the CON Act. *Id.*

With its decision letter, the Department included an eighteen-page analysis comparing the three projects with a thorough and detailed explanation of the basis of the Department’s decision to choose CRCC. In determining that CRCC would “better comply” with the applicable laws and regulations, the Department considered CRCC’s “funding from cash balances, lowest project cost, to include linear accelerator cost . . . , rapid ramp up time with advanced equipment in a more economically disadvantaged area . . . , location in Conway . . . and extensive experience” (R. p. 3282). The Department’s analysis included a recognition that “the Conway area has a lower socio-economic status and the proposed site is more accessible to rural portions of the service area.” (R. p. 3298).

The CON Act prohibits the issuance of multiple CONs if two or more CON applications are competing. S.C. Code Ann. § 44-7-210(B). Therefore, if the two CON applications at issue in these contested cases are competing applications, only one CON application can be approved. It is undisputed that the two CON applications at issue in this case meet the first three elements of the definition of competing applications: *i.e.*, the CON applications were filed within the time period established in the Regulations, the CON applications are for the similar services/facilities, and each proposed project will be located in the same service area. (R. p. 30; R. p. 1212, line 10 – p. 1213, line 7; R. p. 1220, lines 10-21; R. p. 1913, line 25 – p. 1913, line 7). The ALC concluded, contrary to the Department and the substantial evidence in the record, that the applications were not competing and reversed the Department’s decision by awarding a second CON to Grand

Strand. (R. pp. 8-9). CRCC contends that the ALC's decision to approve the Grand Strand CON application was in error because of the Court's reliance on the 2012-2013 South Carolina Health Plan, the failure of the ALC to remand the Grand Strand CON application for review by the Department, the failure to apply the correct burden of proof, and finally, the substantial evidence in the Record supported approving only the CRCC CON application. Grand Strand has not appealed the approval of the CRCC CON application nor has it posted the bond required by S.C. Code. Ann. § 44-7-220(B). Accordingly, the approval of the CRCC CON application is now the law of this case and is not before this Court for review.

ARGUMENT

I. THE ALC ERRED IN APPROVING THE GRAND STRAND CON APPLICATION BECAUSE IT IMPROPERLY RELIED ON THE NEWLY ENACTED 2012-2013 SOUTH CAROLINA HEALTH PLAN.

Both CRCC and Grand Strand submitted CON applications to provide linear accelerator services under the 2010-2011 South Carolina Health Plan. These applications were filed March 10, 2011 and July 19, 2011 respectively, and it is undisputed that the Department considered both projects under the 2010-2011 South Carolina Health Plan that was in effect. (R. p. 3285; R. p. 4255). Prior to the contested case hearing, Grand Strand moved for partial summary judgment on the basis that the 2012-2013 South Carolina Health Plan, which became effective November 9, 2012, allowed for partial judgment on the issue of competing applications. (R. p. 107; R. p. 4399). Grand Strand moved on the grounds that the existence of a need in the new Health Plan warranted a finding as a matter of law that there was a need for two linear accelerators in the service area, thereby allowing the ALC to consider the Grand Strand CON application on its merit – distinct from comparing it to the CRCC CON application. (R. p. 116). CRCC and DHEC successfully opposed this Motion.

The CON Act provides that the ALC may consider a Health Plan enacted after the submission of an application, but the CON Act requires that the Health Plan in place at the time of the filing shall be considered on review. Specifically, the CON Act states: “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.” S.C. Code Ann. § 44-7-225 (emphasis added). The CON Regulations further specifically require:

All decisions on Certificate of Need applications **shall** be made based on the currently approved South Carolina Health Plan in effect at the time such application is accepted. *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.*

S.C. Code Ann. Regs. 61-15 § 504 (emphasis added). Thus, the DHEC Regulation anticipates the adoption of a new Health Plan during the review or appeals process and provides the mechanism available in such circumstance – an applicant has the option of withdrawing its current CON and reapplying under the newly enacted Health Plan, or “continuing the . . . appeal process under the plan in use when the application was submitted.” *Id.*

In the Order denying partial summary judgment on this very issue, the ALC noted it was “questionable” whether the awarding of a second linear accelerator to Grand Strand in light of the need published in the 2012-2013 South Carolina Health Plan would render other affected persons unable to apply for that need – this in response to the Department’s raising of the issue in opposition to partial summary judgment. (R. p. 84). This question was clearly answered by Grand Strand’s own expert, who admitted at trial that if the ALC were to award two linear accelerators, this would foreclose the linear accelerator available under the 2012-2013 South Carolina Health Plan and eliminate that machine. (R. p. 1112, lines 13-20, p. 1114, line 21 – p. 1115, line 2). Thus, exactly as DHEC predicted in opposing the request for partial summary judgment, awarding a second machine to Grand Strand using the need in the 2012-2013 South Carolina Health Plan prevents any provider from applying for that machine, as well as circumvents the rights of affected parties without proper notice and opportunity to be heard.

In the Amended Final Order, the ALC clearly uses as a basis for his decision to approve two additional linear accelerators in the three county service area that “there is a need for two additional linear accelerators in the Service Area under the 2012-2013 State Health Plan.” (R. pp. 8-9). The ALC again references this stated need in the 2012-2013 South Carolina Health Plan on page 7 of the Amended Final Order. Notably, the ALC relies upon the later passed Health Plan, which uses 2011 data, but rejected the utilization declines experienced by CRCC after 2011 and discounted the testimony of CRCC’s employees explaining the significant changes in patient care resulting in decreased utilization in 2012 and 2013. (R. p. 4399; R. p. 21-22). The ALC dismisses the documented decline of CRCC’s utilization as “more likely due to less referrals from the urologists and, in particular, one urologist, who accounted for more than half of the decline, which could be a mere aberration.” (R. p. 22). In fact, the Record reflects that there is in fact an *overall decline* in all urologist referrals and it is tied directly to a national trend of reduced PSA screenings. (R. p. 1439, line 7 – p. 1442, line 8; R. p. 1648, line 13 – p. 1649, line 3; R. p. 1651, line 17 – p. 1652, line 6; R. p. 1778, line 11 – p. 1780, line 9, p. 1805, lines 9-23; R. p. 4560; R. p. 4746). The ALC’s outright refusal to consider this information is unfairly arbitrary and capricious.

In the Conclusions of Law when considering whether the approval of a second machine at Grand Strand will exceed the need for the services in the Service Area, the ALC stated: “In making this determination, I choose to consider the 2012-2013 State Health Plan.” (R. p. 31). The ALC takes the position that because the Department had only the benefit of CRCC’s projection of utilization for 2011, which was projected to be 22,419, and given the actual 2011 utilization in the 2012-2013 South Carolina Health

Plan was 25,709, this somehow “validates Grand Strand’s position taken during the CON review process that the Service Area could support two new linear accelerators in 2011.” (R. p. 31) In reaching this conclusion, it makes no sense not to consider that the actual utilization of CRCC in 2012 was 22,767 – *within 348 cases of the projection!* (R. p. 31; R. p. 4560). The evidence introduced at trial reflects that the 2011 utilization was an aberration and not a trend, occurring just after the referral changes were established with the exit of the prior owner of CRCC.²

The ALC’s decision to use the need published in the 2012-2013 South Carolina Health Plan to award a linear accelerator to Grand Strand is contrary to the CON Act and the DHEC Regulations. The result of the Amended Final Order is that other providers are prevented from applying for the machine and affected persons are stripped of their due process rights to challenge the approval of a fifth linear accelerator in the service area. *See* S.C. Const. art. I, 22. The CON Act clearly allows the ALC to consider the later approved South Carolina Health Plan when making its decision. S.C. Code Ann. § 44-7-225. A proper exercise of this discretion is the ALC’s recognition of the Department’s modification of the applicable linear accelerator standard to remove the requirement that applicants quantify expected referral volumes, realizing that such an exercise is difficult. (R. p. 17 n.17). However, awarding an applicant a linear accelerator provided for under a new Health Plan without requiring an opportunity for review by the Department and comment by affected persons is an abuse of discretion. When considering a circumstance of whether a need exists based on utilization data contained in

² Had the approvability of a fifth machine in the service area been properly before the Department for review, CRCC could have fairly presented the evidence of decreased utilization for the Department’s consideration prior to awarding an additional CON in the service area.

a later Health Plan and not available in the Health Plan from which an applicant applies, the CON Regulations provide the method to follow, namely that the applicant has the option to withdraw the pending application and resubmit under the newly adopted Health Plan “or continuing review or appeal process under the plan in use when the application was submitted.” S.C. Code Ann. Regs. 61-15 § 504.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

S.C. Energy Users Comm. v. S.C. Public Svc. Comm’n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). The ALC’s decision to simply award the additional linear accelerator to Grand Strand without any provision for the notice and participation rights of affected parties is arbitrary and capricious and violative of the CON Act and Regulations. Where the ALC’s decision is controlled by an error of law, the Order must be reversed. *See* S.C. Code Ann. § 1-23-610(B)(d).

In *Brownlee v. S.C. Dept. of Health and Envtl. Control*, 382 S.C. 129, 676 S.E.2d 116 (2009), the Supreme Court properly reversed an ALC’s Order where the decision, which resulted from the ALC’s adaption of the test of navigability of water, was controlled by an error of law. The Supreme Court found that even though the factual findings were not in dispute, the conclusion as to navigability was based on the ALC’s improper interpretation of the legal test of navigability, and thus reversed the decision. *Id.* at 141-42, 676 S.E.2d at 122-23. Similarly in this matter, regardless of the challenge to the factual determinations of the ALC as to the approvability of Grand Strand’s CON application, the Amended Final Order is controlled by an error of law in that the ALC

awarded the linear accelerator from the current Health Plan to an applicant who did not apply for it, but instead whose application was solely for the need stated under the prior Health Plan. For this reason, the ALC's decision to award a CON to Grand Strand was controlled by an error of law and must be reversed.

II. THE ALC'S FAILURE TO REMAND THE GRAND STRAND CON APPLICATION TO THE DEPARTMENT WAS REVERSIBLE ERROR.

The primary vehicle by which the CON program is implemented, and its stated goals achieved, is the requirement that a health care provider apply for, and receive, a CON from DHEC prior to undertaking certain major projects or providing certain new services. *See* S.C. Code Ann. §§ 44-7-120, 160. In determining whether to grant or deny an application for a CON, the Department evaluates the proposed project under the review criteria found in the CON regulations and under the policies and standards set forth in the applicable South Carolina Health Plan. *See id.* at § 210(C). The project review criteria set forth in Regulation 61-15 include thirty-three separate criteria that fall into five general categories: (1) criteria related to the need for the proposed project; (2) criteria related to the economic considerations of the project; (3) criteria related to the project's impact on the resources of the health care system; (4) criteria related to the suitability of the site of the project; and (5) criteria related to certain special circumstances, such as the project's ability to serve medically underserved groups. *See* 24A S.C. Code Ann. Regs. 61-15 §§ 801, 802. As required by the CON Act, the South Carolina Health Plan contains the following statistics, standards, and findings with regard to the various facilities and services regulated by the CON Act:

- (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.

S.C. Code Ann. § 44-7-180(B).

The CON Act clearly states that the Department “is designated the sole state agency for control and administration of the granting of Certificates of Need and licensure of health facilities and other activities necessary to be carried out under this article.” S.C. Code Ann. § 44-7-140. Further, it is “[o]n the basis of staff review of the application, [that] the staff shall make a staff decision to grant or deny the Certificate of Need and the staff shall issue a decision in accordance with Section 44-1-60(D).” *Id.* § 44-7-210(C). The Department may not issue a CON to an applicant “unless the application complies with the South Carolina Heath Plan, Project Review Criteria, and other regulations.” *See id.* § 44-7-210(B); *see also MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008) (holding that compliance with the State Health Plan and the Project Review Criteria were independent requirements for approval of a CON). The CON Act prohibits the issuance of multiple CONs if two or more CON applications are competing. S.C. Code Ann. § 44-7-210(B). Therefore, if the two CON applications at issue in these contested cases are competing applications, only one CON application can be approved.

The ALC concluded, contrary to the Department’s decision and the substantial evidence in the Record before it, that the applications of CRCC and Grand Strand were not competing and further that Grand Strand was entitled to a CON. In making this

finding, the lower court appears to confuse the nature of the review necessary to make this determination and acted beyond its authority. The Amended Final Order reads:

I find that Grand Strand's and CRCC's CON applications are not competing applications as defined by the applicable law and both applications satisfy the State Health Plan, the Project Review Criteria (PRC), and the purposes of the Certificate of Need Act. Furthermore, there is a need for two additional linear accelerators in the Service Area under the 2012-2013 State Health Plan. In reaching this decision, this Court compared the CON applications to determine which application more fully complied with the requirements, goals, and purposes of the CON program, State Health Plan, PRC, and the regulations developed by the Department. Therefore, I conclude that both CRCC and Grand Strand should be granted CONs.

(R. pp. 8-9).

The method of analysis undertaken by the lower court is not appropriate in light of the explicit mandates of the CON Act and the procedures set forth by regulation. The statutory and regulatory framework of the CON Act directs the court to undertake a comparison of which application "more fully complies" with the appropriate authority *only if* the applications are determined to be competing. *See* S.C. Code Ann. § 44-7-130(5); *see also* 24A S.C. Code Ann. Regs. 61-15 § 103(6). It is unclear whether and why the ALC compared the applications, given the finding that the applications were not competing. It is clear, however, from the Amended Final Order that the lower court simply granted the second CON because of the 2012-2013 South Carolina Health Plan, as has been discussed herein.

CRCC submits that it was reversible error for the ALC to reverse the Department's decision not to award a CON to Grand Strand and to take the additional step to mandate the issuance of the CON to Grand Strand without first remanding the matter back to the Department. The CON Act is clear that it is the Department that is the sole state agency vested with the power to make a determination as to the approvability

of a CON project. *See* S.C. Code Ann. § 44-7-140. While certainly the ALC as part of a judicial review has the authority to reverse the decision of the Department, the Department must first have made a decision on the merits of the CON application under review. *See id.* § 44-7-210(C); *see also, e.g., Marlboro Park Hosp. v. S.C. Dept. of Env'tl. Ctrl.*, 358 S.C. 573, 576, 595 S.E.2d 851, 852-53 (Ct. App. 2004) (reversing lower court to affirm ALC's reversal of DHEC staff approval of CON based on lack of need and adverse impact evidence presented at trial); *Roper Hosp., Inc. v. S.C. Dept. of Env'tl. Ctrl.*, 2002 WL 31423787, Docket No. 01-ALJ-07-0378-CC (S.C. Admin. Law J. Div. Sept. 5, 2002) (reversing of DHEC staff approval of CON for endoscopy center by ALC where evidence at trial proved application failed to meet necessary criteria).³

In this matter, the evidence establishes that the Department's initial consideration was whether the applications were competing applications. Finding the applications to be competing, the Department then undertook a lengthy and detailed analysis of comparison to determine which application "most fully complied" with the applicable standards. (R. pp. 3285-3302). Of critical importance, at no time did the Department staff make a determination that Grand Strand's CON application complied with the project review criteria or other regulations. "Based on project review criteria and other regulations, which must be identified by the department, the department may refuse to issue a [CON] even if an application complies with the South Carolina Health Plan." S.C. Code Ann. § 44-7-210(B). The substantial evidence in the Record in fact supports that the Department

³ To the extent the Grand Strand may refer to the *Spartanburg Regional* case as supportive of its position, it is important to acknowledge that the propriety of the ALC's decision to award a second linear accelerator to a competing applicant was not challenged on appeal, nor was the issue of granting a second linear accelerator based on need published in a subsequent Health Plan an issue. *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010).

would not conclude that Grand Strand's CON application complied with the project review criteria. However, this initial decision is to be made by the Department staff, not by the ALC in a contested case proceeding. *See* S.C. Code Ann. § 44-7-210(C).

The Department's linear accelerator analysis specifically concluded that Grand Strand understated its impact to CRCC's existing operations in Myrtle Beach, failed to increase geographic access, and would have an adverse impact on existing providers in the service area. (R. pp. 3295-3297). These concerns were identified as deficiencies in Grand Strand's compliance with the following project review criteria: Community Need Documentation, Distribution (Accessibility), and Adverse Effects on Other Facilities. (*Id.*; *see also*, 24A S.C. Code Ann. Regs. 61-15 §§ 801, 802). The testimony of the Department's witness at trial, Beverly Brandt, corroborates the evidence of the staff decision that Grand Strand's CON application was not in compliance with several project review criteria, as well as the purposes of the CON Act. Ms. Brandt, the staff reviewer for the applications under review, testified that she was very concerned regarding the strong support of the medical oncology group for the Grand Strand project and the resulting adverse impact on CRCC's existing operations, given that Grand Strand described that relationship as "significant." (R. p. 1210, line 21 – p. 1211, line 10; p. 1266, line 18 – p. 1267, line 4). Ms. Brandt also testified that she believed Grand Strand's projected utilization and claimed minimal impact on CRCC's existing operations was "understated." (R. p. 1210, lines 7-17).

For the ALC to ignore the substantial evidence in the Record indicating the lack of approvability of Grand Strand's Project, as well as to ignore the fact that the Department never conducted an independent review of the Grand Strand CON

application in order to make a decision on its merits, and to then approve the granting of a CON *sua sponte* warrants reversal. Where a decision under appeal is affected by an error of law or reflects an unlawful procedure, this Court should reverse. S.C. Code Ann. §§ 1-23-610(B)(c)-(d).

III. THE ALC ERRED IN CONCLUDING THAT THE GRAND STRAND CON APPLICATION WAS APPROVABLE.

Not only is the ALC's Decision granting a CON to Grand Strand without a Department determination on remand contrary to the statutory and regulatory requirements of the CON Act, but it is not supported by the substantial evidence in the Record. Reviewing this matter on appeal, this Court may reverse or modify the ALC where the Decision is not supported by the substantial evidence in the record. "As to factual issues, judicial review of administrative agency orders is limited to a determination of whether the order is supported by substantial evidence. When finding substantial evidence to support the ALC's decision, the Court need only determine that, based on the record as a whole, reasonable minds could reach the same conclusion." *Murphy v. S.C. Dept. of Health and Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194-95 (2012) (internal quotations omitted). As is appropriate in regulatory matters where exclusive authority is vested in an agency of the State, the ALC and this Court must "give deference to the interpretation of a regulation by the agency charged with its enforcement." *Id.* at 640, 723 S.E.2d at 195; *see also* S.C. Code Ann. § 44-7-140 (designating DHEC as "the sole state agency for control and administration of the granting of [CON] and licensure of health facilities and other activities necessary to be carried out under this article.")

It is well established that the weight and credibility to be assigned to the evidence submitted at trial is within the province of the finder of fact. *See, e.g., S.C. Cable Tel. Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C.216, 222, 417 S.E.2d 586, 589 (1992). In the Amended Final Order, the ALC clearly “chose” one set of data projections, and concomitantly one party’s expert, over the other. (R. p. 12). The Amended Final Order makes few references to trial testimony in support of its findings or conclusions, and rarely references exhibits that support its determinations. The Amended Final Order explicitly states the court “will be basing these findings of fact on the analysis used by Mr. Sullivan unless otherwise indicated.” *Id.* In fact, however, it appears the Court relies on its own data projections, rather than those offered by either party. (R. . 16, n.15).

Despite the 21-month delay between the decision date and the final hearing (and resultantly the ALC’s finding that “the year 2015 is no longer a viable third year of operation”), Grand Strand’s expert failed to present any updated utilization projections at the final hearing, relying instead on critiquing the substantial amount of work done by CRCC’s expert, Sam Tolbert. (R. p. 13, n.10; R. p. 2409, line 24 – p. 2410, line 12). Confronted with this lack of evidence in the Record, the Court chose to independently calculate utilization projections in order to conclude that the approval of both linear accelerators in Horry County would not exceed the need. (R. p. 16-17, n.15) It is not the province of the ALC to create factual support where none exists in the Record. *See e.g. Lee County School Dist. Bd. of Trustees v. MLD Charter School Academy Planning Comm.*, 371 S.C 561, 568, 641 S.E.2d 24, 28 (2007) (holding that an appellate court will not search the record for substantial evidence to support an order containing inadequately supported factual findings). Additional findings and conclusions in the Amended Final

Order are clearly contradicted by the substantial evidence in the Record, reflecting a clearly erroneous view of the reliable and probative evidence submitted below.

A. The Record Does Not Support the Market Share Analysis Created by the Court.

In the Amended Final Order and Decision, the ALC finds that “[f]or 2017, Grand Strand can reasonably assume a 20% market share for Horry County as explained below.” (R. p. 15). The ALC then explains, “Grand Strand can reasonably assume a 20% market share for radiation therapy in Horry County by 2017 because Grand Strand’s unit would be the fourth unit in the county, which theoretically lends itself to a 25% market share.” *Id.* The Decision continues on with several factual findings that purportedly warrant arbitrarily reducing the anticipated market share of Grand Strand to 20%, which are unsupported by the substantial evidence in the Record.

First, the ALC makes conflicting findings with regard to the impact that Grand Strand’s publicly stated relationship with Dr. Holt and Coastal Cancer Center will have on Grand Strand’s utilization – and as a result, completely fails to acknowledge the adverse impact a machine at Grand Strand will have on CRCC’s existing operations just three miles away. The evidence in the record is that Coastal Cancer Center is one of the two largest referral sources to CRCC’s existing operations, and in 2012, it was the largest referral source. (R. p. 1713, lines 13-18; R. p. 4495). The ALC concludes in Footnote 14 of the Decision that “Dr. Holt never committed that Coastal would send all, *or even a substantial portion*, of its patients to Grand Strand for radiation therapy services.” (R. p. 16, n.14) (emphasis added). This finding is directly contradicted by the evidence in the Record. Grand Strand’s own CON application is uncontroverted evidence highlighting Dr. Holt’s commitment to Grand Strand, which demonstrates that the ALC’s finding to

the contrary was error. Grand Strand's expert, Mr. Sullivan, advised DHEC during review: "Prior to filing its application, [Grand Strand] discussed its plans with Coastal [Dr. Holt's practice], and they indicated that they anticipated referring *a significant number of patients* to its radiation therapy program, if approved." (R. p. 4220) (emphasis added). Grand Strand also submitted a second letter of support from Dr. Holt himself, after project review and well into the review period, to specifically and intentionally reiterate Dr. Holt and Coastal Cancer Center's hope for a linear accelerator at Grand Strand to serve the vast majority of the practice's patients, who are seen at their offices "adjacent to Grand Strand's main campus." (R. p. 4245).

The Amended Final Order references three letters of support received by CRCC from Coastal Cancer Center physicians who practice in the Conway/Loris area as a consolation to the "strong support" Coastal Cancer Center expressed for Grand Strand's project. (R. pp. 22-23, n.28). The ALC fails to acknowledge that those same three physicians provided letters of support for Grand Strand's application as well, thereby rendering their patients as equally up for grabs between the providers. (R. p. 3706-3707, p. 3709). Nor did the Decision acknowledge Dr. Holt's refusal to support CRCC and surprising decision to support Grand Strand after informing CRCC of his intention to stay neutral. (R. p. 1703, lines 3-15). That the Court downplays Grand Strand's own reliance on a "significant" relationship with the largest area referral source, and discredits the concerns and fears of the Department and CRCC's long-time staff, particularly in light of the analysis addressed below regarding the other large referral source in the area, is clearly erroneous, arbitrary, and unsupported by substantial evidence. *See Be Mi, Inc. v.*

S.C. Dept. of Revenue, 408 S.C. 290, 297, 758 S.E.2d 737, 741 (Ct. App. 2014) (“Substantial evidence is more than a mere scintilla of evidence.”)

Second, while the ALC completely disregards the full weight of the evidence supporting that a significant change in Coastal Cancer Center’s referrals patterns would take place upon the approval of a machine at Grand Strand, the court places unreasonably significant weight on the relationship between the employed urologists and CRCC. As a result, the ALC makes unsupported findings regarding the projected utilization of Grand Strand.

Upon 21st Century Oncology’s acquisition of CRCC, the company simultaneously purchased Atlantic Urology Clinics, LLC (“AUC”), a physician group representing the practicing urologists in Horry County, South Carolina. (R. p. 1428, line 18 – p. 1430, line 10; R. p. 2874). No urologists are owners or have an ownership interest in CRCC; rather, the urologists are employed by CRCC’s parent entity. *Id.* While the ALC appeared to understand the nature of the relationship between the AUC-employed urologists and CRCC, the ALC made findings regarding expected referral patterns that are wholly unsupported by the Record. (R. p. 18, n.18). Specifically, and without any evidentiary support, the ALC concluded that “AUC employs all the urologists who practice in Horry and parts of Georgetown County, and it is the only provider of urological services in the three-county Service Area.” (R. p. 18).

The data submitted at trial evidences that urologists other than AUC-employed urologists provide referrals to radiation therapy in the service area. (R. p. 4496). The data similarly shows that urologists practicing outside of the service area refer patients for radiation therapy services in the service area. (*See id.*) The ALC’s finding that AUC-

employed urologists are the only providers of urology services in the three-county service area is simply without evidentiary support. This finding, particularly in light of the summary dismissal of Coastal Cancer Center's alliance with Grand Strand, reflects that the utilization projections created by the ALC are arbitrary and unfairly biased in favor of Grand Strand.

Moreover, the ALC determines as one basis for finding that Grand Strand, as a fourth unit in Horry County, will not receive 25% of the service area market: "(b) CRCC has an affiliation with an existing urology practice, which means Grand Strand [sic] would not receive any urology referrals from that practice" (R. p. 16). This finding is again wholly unsupported by the substantial evidence in the Record. Richard Lewis, Vice President of Operations Finance for 21st Century Oncology, testified that the AUC-employed urologists have no contractual requirement to refer patients to CRCC, and that, in fact, AUC urologists presently refer patients to the other existing provider, Georgetown Memorial Hospital. (R. p. 1498, lines 21-25). This testimony was corroborated by Rosa Maynor, Regional Director of the Southeast Region for 21st Century Oncology and responsible for the South Carolina market, who testified that employed physicians are not required to refer to 21st Century Oncology's radiation therapy centers. (R. p. 1866, lines 11-25) Grand Strand's own expert testified it would be too speculative to make any assumptions about the future referral practices of any particular physician. (R. p. 1041, line 17 – p. 1043, line 7). To be exceedingly conservative, CRCC's expert projected in his referral pattern analysis that 100% of projected referrals from AUC-employed urologists would stay at CRCC, but he testified that his opinion is that some portion of those referrals would go to a Grand Strand

facility. (R. p. 4495; R. p. 1962, line 12 – p. 1963, line 8). For the ALC to ignore all of this evidence and find and conclude that Grand Strand will not receive any urology referrals and that “CRCC fails to properly account for the unavailability of the AUC referrals . . .” is clearly arbitrary, capricious, and contrary to the substantial evidence in the record. (R. pp. 16, 31).

B. Grand Strand’s Project Fails to Improve Accessibility and any Minimal Improvement is Substantially Outweighed by the Adverse Effects of Duplication.

The 2010-2011 South Carolina Health Plan explicitly requires that the Department (and by extension the ALC) review specific Project Review Criteria at a stated level of importance and instructs that “[t]he benefits of improved accessibility will be equally weighed with the adverse effects of duplication in evaluating Certificate of Need applications for this service.” (R. p. 4393). While the parties may quibble about the various Project Review Criteria and Grand Strand’s compliance with the same, it is clear from the substantial evidence in the Record that Grand Strand did not and cannot prove that its CON application should be approved in light of its minimal, if any, improvement in accessibility, when compared to the significant and materially adverse impact the project will have on existing providers.

CRCC’s Myrtle Beach facility with three linear accelerator machines is located just three miles from the campus of Grand Strand, where the new linear accelerator is proposed to be located. (R. p. 4490; R. p. 1155, line 14 – p.1156, line 7; R. p. 1786, lines 18-23). Grand Strand offered at trial that the ability to treat inpatients with radiation therapy was an improvement to accessibility. The greater weight of the evidence confirms that radiation therapy is an outpatient service – that, according to Mr. Sullivan, Grand Strand’s own expert, “The vast majority of people that receive cancer services

receive them on an outpatient basis, and it's the outpatients that really benefit from it" (R. p. 911, lines 6-10). The Amended Final Order concludes that radiation therapy is overwhelmingly provided on an outpatient basis. (R. p. 10). Indeed, inpatient treatment accounts for less than one percent of the total treatments. (R. p. 837, line 13 – p. 838, line 15). It is undisputed that prior to the conflict over Grand Strand's desire to add linear accelerator services, CRCC provided radiation therapy to the few Grand Strand inpatients requiring radiation therapy on an as needed and emergent basis without incident. (R. p. 4636; R. p. 4561; R. p. 526, line 23 – p. 527, line 23; R. p. 1666, line 15 – p. 1668, line 18). The fundamental truth is that Grand Strand's project is not needed and solely serves to adversely impact the existing providers without offering any improvement in accessibility. The Department was correct in this conclusion in its Decision Letter, and the ALC's reversal is contrary to the substantial evidence in the Record and directly violates the mandates of the Health Plan. (R. pp. 3296-3297).

C. The Amended Final Order Contains Additional Findings and Conclusions Not Supported by the Substantial Evidence in the Record.

The Amended Final Order contains a number of additional conclusions that are simply not supported by the substantial evidence in the Record, and without those findings the result would be different. For example, the Amended Final Order states that CRCC "never took the position with the DHEC staff" that the loss of referrals from Coastal Cancer to Grand Strand would adversely impact its utilization. (R. p. 19, n.19). The issue of the alliance between Coastal Cancer Center and Grand Strand was squarely before the Department and got the attention of the staff reviewers. (R. p. 3296). The knowledge CRCC had from Dr. Holt was that he purportedly "did not want to get involved" in the CON fight, and he chose not to provide a letter of support to CRCC. (R.

p. 1660, lines 11-12; p. 1709, lines 3-15). Moreover, it was not until CRCC was able to conduct discovery in these proceedings that the true depth of the planned partnership between Grand Strand and Dr. Holt's medical oncology group came to light. (R. p. 4649; R. p. 4651; R. p. 4656; R. p. 4658; R. p. 2412, line 4 – p. 2413, line 1). For the ALC to conclude that CRCC did not adequately raise this issue with DHEC to somehow minimize the importance of the issue is clearly erroneous and the inclusion merely operates as prejudice to CRCC and the well-supported case presented at trial.

The Amended Final Order also proclaims that "if approved, Grand Strand intends to partner with Sarah Cannon Center, which is a comprehensive cancer center affiliated with HCA, located in Nashville, Tennessee. The Sarah Cannon Center will provide information, research, and analysis for clinical protocols surrounding the care of cancer patients." (R. p. 14). This conclusion is wholly unsupported by the evidence before the court. In fact, the long-time CEO of Grand Strand, Doug White, testified:

Q: You didn't talk to anybody at the Sarah Cancer Center – I mean the Sarah Cannon Center in Nashville, right?

A. Not once.

Q: Do you know who Sarah Cannon is?

A. No.

(R. p. 438, lines 20-25). Mr. Adam Rudd, Chief Operating Officer for Grand Strand, referenced Sarah Cannon Center only twice in his testimony and solely in reference to having assistance in determining what linear accelerator to obtain for the application. (R. p. 569, line 9 – p. 570, line 4; p. 570, lines 18-24). The Record is wholly devoid of any reference to a partnership or collaboration between Grand Strand's proposed project and

the Sarah Cannon Center. The Amended Final Order once again seeks to create evidentiary support for the approval of Grand Strand's CON application where none exists in the Record.

This Court may reverse or modify the decision below if the decision is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-610(B)(e). Substantial evidence "is more than a mere scintilla of evidence, but is something less than the weight of the evidence." *Porter v. SC. Public Svc. Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). "This deferential standard of review does not mean, however, that the Court will accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." *Id.* at 21, 507 S.E.2d at 332. In this matter, the ALC's findings are clearly supported by no more than a scintilla of evidence and are clearly erroneous in light of the greater weight of the evidence. For this reason, reversal of the decision to award of CON to Grand Strand is warranted.

IV. THE ALC IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE RESPONDENT, CAROLINA REGIONAL CANCER CENTER.

Finally, it is apparent from the Record considering the breadth of the evidence offered by CRCC and the minimal showing of Grand Strand that the ALC unfairly and improperly expected CRCC to "disprove" Grand Strand's right to relief rather than require Grand Strand to meet its burden of proof as the moving party. The burden of proof in the contested case proceeding filed by Grand Strand is on Grand Strand. *Leventis v. S.C. Dept. of Health and Envtl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000). Thus, Grand Strand bore the burden of proving by a preponderance of the evidence that the Department erred in concluding the applications were competing

and in determining the CRCC's application most fully complied with the CON Act, the Regulations and Project Review Criteria. *See Anon. v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 376, 496 S.E.2d 17, 19 (1998); *see also, Amisub of S.C., Inc. v. S.C. Dept. of Health and Env'tl. Control*, Docket No. 10-ALJ-07-0767-CC, 2011 WL 7119244 *5 (S.C. Admin. Law J. Div. Sept. 13, 2011). Grand Strand's expert admitted that he intentionally chose not to update any utilization information, choosing instead to simply 'attack' the significant amount of work undertaken by CRCC and its expert, Mr. Tolbert. (Sullivan Trial Tr. 2147:24-2148:12)

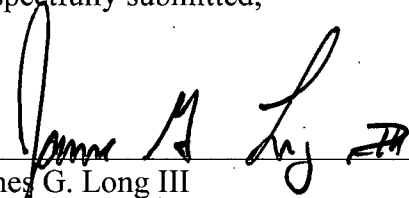
The lack of credible evidence supporting Grand Strand's theories is perhaps best highlighted by the ALC's creation of its own analysis of market share for a fifth linear accelerator rather than accepting that proffered by CRCC. Notably, Grand Strand failed to submit any evidence on the issue since the filing of the application three years prior. While claiming to find Mr. Sullivan's analysis "sound," the ALC nonetheless "[found] slight discrepancies in his math." (R. p. 16, n.15). In the Amended Final Order, the ALC refers to data and projections in the CON application itself – filed July 19, 2011 – more than two years prior to the final hearing. (R. pp. 15-17; R. p. 3304). Yet, despite having only this outdated utilization and projection information to refer to, the ALC finds "[b]ecause of the twenty-one month time span between the decision date and the contested case hearing, the year 2015 is no longer a viable third year of operations. Presently, the third year of Grand Strand's operation would be 2017." (R. p. 13, n.10). The ALC then undertakes substantial analysis to determine Grand Strand's market share and volume projections in 2017, an analysis never presented by Grand Strand.

Grand Strand clearly bore the burden of proof in the contested cases. A party who has the burden of proof put forth a basis to overturn the decision of the Department, to whom the ALC and this Court are to grant a level of deference. *Murphy v. S.C. Dept. of Health and Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012). In this case, Grand Strand chose to simply criticize CRCC's evidence – such an approach is insufficient to meet the burden of proof. To the extent the ALC required CRCC to “disprove” Grand Strand's right to a fifth linear accelerator in the service area in light of Grand Strand's lack of proof, an incorrect burden was imposed and reversal is appropriate given the error of law. *See e.g., State Accident Fund v. S.C. Second Injury Fund*, No. 27424, 2014 WL 3734452, *3 (S.C. July 30, 2014).

CONCLUSION

For the reasons set forth herein, the Appellant respectfully requests that this Court reverse the decision of the Administrative Law Court to grant a CON to Respondent, Grand Strand Regional Medical Center.

Respectfully submitted,



James G. Long III
Jennifer J. Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

E. Wade Mullins III
BRUNER POWELL
1735 St. Julian Place, Suite 200
P.O. Box 61110 (29260-1110)
Columbia, SC 29204

Attorneys for Appellant

February 4, 2015
Columbia, South Carolina

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In the Court of Appeals

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson III, Administrative Law Judge

Appellate Case No. 2014-00973
Case No. 2012-ALJ-07-0090-CC

Grand Strand Regional Medical Center, LLCRespondent,
v.

South Carolina Department of Health and
Environmental Control.....Respondent below.

Case No. 2012-ALJ-07-0091-CC

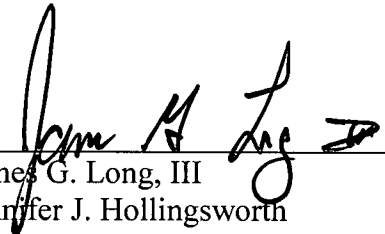
Grand Strand Regional Medical Center, LLCRespondent,
v.

South Carolina Department of Health and
Environmental Control and Carolina Regional Cancer Center..... Respondents below,

Of whom Carolina Regional Cancer Center is the.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the *Brief of Appellant Carolina Regional Cancer Center* complies with Rule 211(b), SCAR.



James G. Long, III
Jennifer J. Hollingsworth
Tanya A. Gee
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

*Attorneys for Appellant
Carolina Regional Cancer Center*

February 4, 2015

THE STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I, James G. Long, III, hereby certify that on February 4, 2015, I caused a copy of the *Brief of Appellant Carolina Regional Cancer Center* to be served on all parties of record via hand-delivery, addressed as follows:

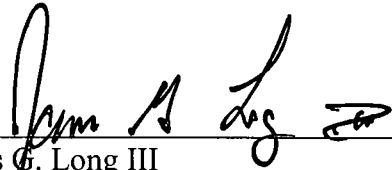
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SC Court of Appeals

William R. Thomas, Esquire
Walter H. Cartin, Esquire
Amber B. Carter, Esquire
Parker Poe Adams & Bernstein, LLP
1201 Main Street, Suite 1450
Columbia, SC 29201
*Attorneys for Respondent Grand Strand Regional
Medical Center, LLC*

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201
*Attorneys for Respondent South Carolina Department
of Health and Environmental Control*



James G. Long III
Jennifer J. Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

E. Wade Mullins III
BRUNER POWELL
1735 St. Julian Place, Suite 200
P.O. Box 61110 (29260-1110)
Columbia, SC 29204

*Attorneys for Appellant
Carolina Regional Cancer Center*

February 4, 2015
Columbia, South Carolina