THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ....Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ....Respondents,

Of whom The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is...Appellant.

INITIAL BRIEF OF RESPONDENT AMISUB OF SOUTH CAROLINA, INC. D/B/A PIEDMONT MEDICAL CENTER, D/B/A FORT MILL MEDICAL CENTER

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Administrative Law Court's application of South Carolina CON law as it is written violated the dormant Commerce Clause of the United States Constitution, when: approval of Appellant's project would adversely impact the public by decreasing accessibility to quality, specialized healthcare services, particularly for the medically underserved; the ruling affects interstate commerce to no greater degree than it affects intrastate commerce; the ruling serves the purposes of the South Carolina CON Act better than they could be served by any other available means; and when any incidental effect on interstate commerce is outweighed by the putative local benefits?

II. Whether the Administrative Law Court's approval of Respondent's Certificate of Need application without making a finding that it complied with the bed transfer criteria of the South Carolina Health Plan was erroneous, when: Appellant did not raise the issue below and therefore did not preserve it for appeal; the transfer criteria of the South Carolina Health Plan do not apply to Respondent's transfer; and every individual criterion whose substance was raised below was ruled on by the Administrative Law Court?

III. Whether the Administrative Law Court's decision was erroneous, arbitrary, or capricious, when it found that Appellant's proposal would decrease accessibility and when it relied on relevant factual findings, supported by substantial evidence, in concluding that Respondent's project better met project review criteria than Appellant's?

STATEMENT OF THE CASE

The 2004-05 South Carolina Health Plan (the "State Health Plan" or "Plan") identified a need for 64 additional acute care hospital beds in York County. Based on the need identified in the Plan, in 2005 the South Carolina Department of Health and Environmental Control ("DHEC") received four competing applications for a Certificate of Need ("CON") to build a hospital near the town of Fort Mill, located in the northeastern portion of York County, near Charlotte. The four applicants were Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"), The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System ("CHS"), Presbyterian Healthcare System ("Presbyterian"), and Hospital Partners of America, Inc. ("HPA"). On March 11, 2005, CHS, Presbyterian, and HPA each filed competing applications to construct and operate a 64-bed hospital. Piedmont also initially applied to construct and operate a 64-bed hospital. However, on October 6, 2005, Piedmont submitted a new application for a 100-bed hospital, to be called Fort Mill Medical Center ("FMMC").[1] CHS's proposed hospital would be called Carolinas Medical Center – Fort Mill ("CMC-FM"). By decision letters dated May 30, 2006, DHEC approved Piedmont's application and denied the other applications. CHS and Presbyterian filed separate contested case

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[1] Piedmont Medical Center, located in Rock Hill, is the only acute care hospital in York County. It is not a legal entity, but a "d/b/a" of Amisub of South Carolina, Inc. FMMC would not be a separate legal entity, but simply another "d/b/a." Tr. at 193:10-23. Piedmont's application proposes to transfer 36 of its existing beds to FMMC, in addition to applying for the 64 new beds authorized by the Plan, giving FMMC a total of 100 beds.

actions in the South Carolina Administrative Law Court (the "ALC"), which were later consolidated. Am. Final Order at 2-3.

A final hearing was held before the Honorable Carolyn C. Matthews September 9-25, 2009. At the close of their cases, Petitioners CHS and Presbyterian moved for summary judgment. *Id.* at 3. On December 9, 2009, Judge Matthews issued an Order granting summary judgment and ruling that DHEC had erroneously interpreted the Plan to allow only existing providers to obtain a CON. Order dated December 9, 2009 ("Remand Order") at 26-27. Judge Matthews remanded the matter to DHEC to determine which, if any, of the applicants were entitled to the CON. *Id.* at 27.

On September 9, 2011, following a second administrative review, DHEC issued a staff decision approving CHS's application and denying the applications of Piedmont and Presbyterian, both of whom sought DHEC Board review. After the Board declined review, Piedmont and Presbyterian filed contested case actions in the ALC. The cases were consolidated after being assigned to the Honorable S. Phillip Lenski. During the course of litigation, Presbyterian withdrew from the case. Judge Lenski presided over a final hearing with the remaining parties from April 8 to May 7, 2013. Am. Final Order at 1, 4.

On March 31, 2014, Judge Lenski issued a Final Order awarding the CON to Piedmont. On April 9, 2014 CHS filed a Motion for Reconsideration. On May 2, 2014, the ALC vacated the Final Order. On December 15, 2014 the ALC issued an Amended Final Order, again approving Piedmont's application and denying CHS's. On January 14, 2015, CHS filed a Notice of Appeal.

ARGUMENT

CHS does not challenge the facial validity of South Carolina's CON law, only the ALC's application of it. CHS misunderstands or misrepresents that the purpose and effect of the ALC's Order is to protect the existing providers. Instead, the ALC applied the law as written in order to protect the public, consistent with the purposes of state CON law. As required by law, the ALC reached its decision by carefully considering the adverse effects CHS's proposal would have on accessibility to local healthcare services for residents of York County.

I. Legal Background

A. The Dormant Commerce Clause

The Constitution grants Congress the power "to regulate Commerce . . . among the several states." U.S. Const. art. 1, § 8. The Supreme Court has long recognized a dormant aspect of the Commerce Clause, limiting the power of states to erect barriers against interstate trade. *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005).

Courts apply a two-tiered analysis of dormant Commerce Clause claims. *Id.* The first tier focuses on discrimination. *Id.* "'Discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535, 542-43 (4th Cir. 2013) ("*Colon Health Ctrs. I*") (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). "In conducting the discrimination inquiry, a court should focus on discrimination against ***interstate***

commerce – not merely discrimination against the specific parties before it." *Colon Health Ctrs. I* at 543 (emphasis in original), *citing Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). A statute may discriminate facially, in its practical effect, or in its purpose. *Colon Health Ctrs. I* at 543. In order to prove discriminatory effect, a plaintiff must demonstrate that the challenged law "would negatively impact interstate commerce to a greater degree than intrastate commerce." *Id.* Discriminatory laws that amount to "simple economic protectionism" are subject to "a virtually *per se* rule of invalidity." *Yamaha* at 567. Such laws "will be struck down unless the state demonstrates 'both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

The second tier focuses on undue burden. *Yamaha* at 567. A deferential, "rational basis" review applies. *Yamaha* at 569; *Colon Health Centers of America, LLC v. Hazel, 2014 WL 5430973* at *5 (E.D. Va. 2014) ("*Colon Health Ctrs. II*"). The test is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970): "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. "If a legitimate local purpose is found, then the question becomes one of degree," which "will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

In analyzing undue burden, a court must bear in mind that the Constitution "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960). Indeed, "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 623-24 (1978). Consequently, "when evaluating state health and safety regulations, courts 'must give deference to the State's choice to protect its citizens in [a certain] way' when evaluating the putative local benefits of the law." *Yakima Valley Mem. Hosp. v. Washington State Dept. of Health,* 2012 WL 2720874 at *3-4 (E.D. Wash. 2012) (quoting *Nat'l Ass'n of Optoms. & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir 2009)).

The discrimination test and the undue burden test "are not separated by a bright line." *Colon Health II* at *5. Indeed, "[w]hile these rules are easy to recite, their application to a particular factual setting is often difficult." *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). As a result, "the Supreme Court has cautioned that the dormant Commerce Clause inquiry should be undertaken by 'eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects.'" *Walgreen* at 55 (quoting *West Lynn Creamery v. Healy,* 512 U.S. 186, 201 (1994)). Both the discrimination and undue burden tests are "fact-based." *Colon Health Ctrs. I* at 546.

B. South Carolina CON Law

S. C. Code Ann. § 44-7-110, et seq. (the "CON Act") requires a person or health care facility to obtain a CON before undertaking the construction or

establishment of a new health care facility, including a hospital. *Id.* §§ 44-7-130(10); 44-7-160(1). The purposes of the CON Act are to: (a) promote cost containment; (b) prevent unnecessary duplication of health care facilities and services; (c) guide the establishment of health facilities and services which will best serve public needs; and (d) ensure that high quality services are provided in health facilities in this State. *Id.* § 44-7-120.

The CON Act authorizes DHEC to administer the CON program in South Carolina, *id.* § 44-7-140, and requires DHEC to publish, at least every other year, a State Health Plan. *Id.* § 44-7-180(A), (B). Regulation 61-15 § 802 sets forth project review criteria applicable to CON applications. In the case of competing applications, DHEC must award the CON to the applicant who most fully complies with the requirements, goals, and purposes of the CON Act, the State Health Plan, and regulatory criteria. *Id.* § 44-7-210(B).

II. The ALC's Application of South Carolina CON Law

CHS's argument that the ALC's application of the CON law violates the dormant Commerce Clause relies heavily on its own misrepresentation of what the ALC actually did. As described below, the ALC applied the CON law as written, without discriminating against or unduly burdening interstate commerce.

A. Adverse Impact

1. The Principle Behind Adverse Impact

The principle of adverse impact runs throughout the CON Act, the State Health Plan, and the regulatory criteria. The CON Act requires DHEC to include in each State Health Plan a finding as to whether the "benefits of improved accessibility" created by proposed facilities or services "outweigh the adverse effects caused by the duplication of any existing facility" or service. S.C. Code § 44-7-180(B)(4). The 2004-2005 South Carolina Health Plan made such a finding, noting that "the benefits of improved accessibility will be ***equally weighted*** with the adverse effects of duplication in evaluating Certificate of Need applications for [acute care hospital] beds." 2004-05 State Health Plan at II-9 (emphasis added).

In addition to the State Health Plan, the regulatory project review criteria also reflect the emphasis the General Assembly and DHEC Board have placed on the need to thoroughly assess the potential adverse effects of new projects. Four separate criteria specifically require DHEC and the court to evaluate the impact of a proposed CON project on: the ability of existing health care providers to serve medically underserved groups (Criterion 3(h)); the costs and charges of existing providers (Criterion 16(c)); the distribution of existing health services to the target population (Criterion 22); and utilization of existing facilities (Criterion 23(a)). S. C. Code Regs. 61-15 § 802 (3)(h), (16)(c), (22), and (23)(a).

The emphasis on adverse impact is consistent with the purposes of the CON Act and the basic principles of health planning. As Piedmont's expert health planner, Daniel J. Sullivan, testified at trial:

> I think the two key factors in any health planning decision are what's the benefit that's going to derive to the community and what's the negative impact on ***existing services in the community*** that would result from approving it. If we only looked at, for example, accessibility . . . you'd have a hospital in every corner . . . [F]rom a general health planning perspective . . . impact always has to be given a very high priority . . . .

Tr. at 1213:16 – 1214:7 (emphasis added). The principle behind the health planning concept of adverse impact is not, therefore, primarily protection of local providers, but protection of the local health care system and the public.

Mr. Sullivan testified that approval of CMC-FM would be detrimental to Piedmont, but, more importantly, it would be "detrimental to the quality and availability of healthcare services to York County residents." Tr. at 1180:3-16. Judge Lenski agreed:

> One of the principal differences between the applicants is that the approval of CMC-FM would have the effect of causing the erosion of quality of care at Piedmont and among specialists practicing there as a result of the diminution in the volume of patients and the degradation of the payor mix of the patients who would continue to be seen at Piedmont. Consequently, there would be no hospital in York County providing many of the high quality and tertiary services that Piedmont has added. Alternatively, the establishment of FMMC will ensure that high quality services continue to be provided and added within York County.

Am. Final Order at 52, Conclusion of Law ("CL") 47. *See* Tr. at 1201:14-1212:6 (testimony of Mr. Sullivan.)

Piedmont has won a number of impressive quality awards for its services. Am. Final Order at 5-6, Findings of Fact ("FF") 2. "In addition to standard community hospital services, Piedmont Medical Center provides specialized services not usually

offered by a hospital its size, including open heart surgery, neurosurgery, cardiac catherization, vascular surgery, neonatal intensive care, specialized women's and pediatric services, and behavioral health." *Id.* at 5, FF 1.

As acknowledged by CHS official Del Murphy, CMC-FM would not offer specialized or tertiary services. Tr. at 1609:9-12, 1644:1-4. Instead, CHS-employed physicians would refer patients needing such services out of York County to CMC-Pineville and other CHS facilities. Am. Final Order at 23, FF 49. These facts form the foundation for Judge Lenski's conclusion that CMC-FM, if approved, would adversely impact the public. Additional factual findings support this conclusion, including:

- "[O]utmigration of complex specialty services [from York County] would not only continue, but also would likely accelerate . . . . Piedmont's specialty programs, which require certain minimum volume levels to maintain quality and proficiency, as well as economic viability, would be jeopardized . . . . Loss or paring of Piedmont's specialty programs would be detrimental to York County citizens, especially those living in the western, more rural part of the country . . . ." Am. Final Order at 23-24, FF 50.

- "To maintain services to medically underserved groups and to sustain profitability, a hospital must have a strong base of managed care and commercial patients . . . . The construction of CMC-FM would further erode Piedmont's payor mix . . . . jeopardizing [its] ability to care for medically underserved individuals and maintain their current level of services . . . ." *Id.* at 24, FF 52-53.

- As a result of payor mix erosion from approval of CMC-FM, "the quality of care at Piedmont would suffer and the ability to recruit new physicians would be impaired." *Id.* at 25, FF 56.

- CMC-FM would restrict admissions of medically underserved patients. *Id.* at 37, FF 99.

- Lower patient utilization would increase Piedmont's costs. *Id.* at 26, FF 58.

2. Criterion 16(c) – Impact on Cost

Criterion 16(c) provides:

> The impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of other providers of similar services should be considered if the data are available.

S. C. Code Regs. 61-15 § 802(16)(c). Thus, the criterion focuses on two different potential adverse impacts: the first, upon the applicant's own costs and charges and the second on the costs and charges of "other providers of similar services." *Id.* As for the first part of Criterion 16(c), the ALC found that both Piedmont's and CHS's proposed costs were "reasonable" and their costs and charges "comparable" and "consistent" with those experienced by similar facilities. Am. Final Order at 37-39, FF 101, 103-05; at 50, FF 38.

As for the second part of Criterion 16(c), the ALC considered, as the criterion requires, the impact of CHS's project upon Piedmont and York County independent physicians, as the only other relevant providers of similar services. Judge Lenski found that, if approved, CHS's project would cause a significant loss of patients for Piedmont, which in turn would cause an increase in costs. Am. Final Order at 26, FF 58, *citing* Tr. at 686:15-24. There was no evidence presented that the approval of Piedmont's project would affect CHS's costs. For these reasons, Judge Lenski concluded that Criterion 16(c) was better met by Piedmont than by CHS. *See* Am. Final Order at 48, CL 32.

CHS contends that the ALC "essentially determined that Piedmont better meets Criterion 16(c) because CMC-FM will make Piedmont less profitable." CHS Initial Brief at 18. The ALC, however, applied Criterion 16(c) exactly as written and found that CMC-FM would increase Piedmont's costs. Am. Final Order at 26, FF 58. An increase in cost is not only inconsistent with the cost containment purpose of the CON Act, it is one of a number of factors the ALC identified as likely to contribute to adversely affecting public access to healthcare services in York County. *Id.* at 26, FF 58; at 52, CL 47.

3. <u>Criterion 22 – Impact on Distribution</u>

Criterion 22 provides:

> The existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population.

S.C. Code Regs. 61-15 § 802(22).

Criterion 22 directs a court to "carefully consider" a project's impact on the public, and that is what the ALC did. CHS denigrates the ALC's factual findings as "speculative," CHS Initial Brief at 19, but substantial evidence supports them. Three York County physicians, none of whom were contractually bound to either applicant, testified that approval of CMC-FM would reduce the quality of care and specialty services provided by Piedmont, impair its ability to recruit new physicians, and likely force closure of Piedmont's Women's Tower and the discontinuance of neonatal services. Am. Final Order at 25-26, FF 55-57. Forty-five York County physicians,

not employed by either applicant, submitted support letters for Piedmont.[2] Am. Final Order at 24, FF 54. In their letters and in interviews with Piedmont's experts, many of these physicians shared the same concerns about which the three physician witnesses testified. The ALC considered these physician concerns "compelling evidence" that approval of CMC-FM would have an adverse effect on the distribution of services to York County residents. Am. Final Order at 48, CL 33; *see id.* at 22-25, FF 47-50, 54-56.

4. <u>Criterion 23(a) – Impact on Utilization</u>

Criterion 23(a) requires a balancing test:

> The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services.

S.C. Code Regs. 61-15 § 802(23)(a); *cf.* 2004-05 S.C. Health Plan at II-9.

The ALC found that CMC-FM would have a significant adverse impact on the current and projected occupancy rates or use rates of Piedmont.. The ALC rejected as "unsound" CHS's argument that it would simply shift existing patients from various CHS hospitals to CMC-FM, thereby having absolutely no impact on Piedmont. Am. Final Order 48, CL 34; *see id.* at 16-17, FF 34-36. Loss of patients means loss of income, as the ALC found in this case and as other administrative law judges have found. Am. Final Order at 49, CL 35 and cases cited therein. The larger point, however, is one the Amended Final Order repeatedly makes, but one which CHS pretends not to see: Piedmont's lost patients and income mean a decrease in the

[2] CHS received only one such support letter. Am. Final Order at 24, FF. 54.

quality, quantity, and scope of services available locally that will particularly affect the medically underserved. Am. Final Order at 23-26, FF 47-60; at 37, FF 99; at 45, CL 19; at 46-47, CL 24-28; at 51-52, CL 46-47. Approval of CMC-FM would adversely impact the public because it would decrease – not increase – access to services. As a result, the balancing test required by Criterion 23(a) tilts against CHS.

B. Community Need

Regulation 61-15 refers to Criterion 2 as "Community Need Documentation." S.C. Code Regs. 61-15 § 802(2). DHEC included Criteria 2(a-e) among the priority criteria for these competing applications. Am. Final Order at 8, FF 11. Based on substantial evidence, the ALC concluded that Piedmont better met most of the community need criteria than CHS for two reasons. First, Piedmont's project would stem outmigration, while CHS's would escalate it. Second, Piedmont's proposed larger hospital would better meet public needs than CHS's proposed smaller facility. *Id.*, at 45, CL 18-19.

1. Community Need and Outmigration

CHS presents two arguments on the relationship between community need and outmigration. First, it contends that any effect its project would have on outmigration is "speculative." CHS Initial Brief at 23. Substantial evidence, however, supports the ALC's factual findings that CMC-FM would accelerate outmigration generally, but particularly with respect to patients needing specialized services and those covered by commercial insurance. Am. Final Order at 22-26, FF 46-59; at 32-37, FF 82-99.

Second, CHS contends that "the ALC seeks to reduce the amount of South Carolina residents receiving health care in North Carolina." CHS Initial Brief at 22.

That statement, however, is incorrect. The Amended Final Order contains factual findings that future outmigration resulting from approval of CMC-FM would reduce the quality of care and the scope of services available to York County residents in their home county. Am. Final Order at 22-26, FF 46-59; at 51-52, CL 46-47. CMC-FM is planned strictly as a community hospital, offering primary and secondary services only. Tr. at 1609:9-12, at 1644:1-4 (testimony of CHS official Del Murphy). CMC-FM patients needing more specialized services, such as those offered by Piedmont, would be referred by CHS-employed physicians[3] out of the county to CMC-Pineville or other CMC facilities. Am. Final Order at 23, FF 49. This outmigration would seriously threaten Piedmont's ability to continue offering specialized services. *Id.* at 23-24, FF 50, at 51-52, CL 46-47; Tr. at 225:19 - 226:7, at 1202:25 - 1203:7. In order to obtain tertiary or specialized services, therefore, residents of York County would be forced to leave their home county – not necessarily to North Carolina.

The ALC concluded that FMMC would "strengthen the York County healthcare system by reducing outmigration from York County." Am. Final Order at 45, CL 19. The ALC applied the Community Need Criteria in a manner consistent with the public needs and quality of care purposes of the CON Act:

> This court concludes that the establishment of FMMC will best serve the ***public needs*** by reducing the outmigration of York County residents to hospitals beyond York County, and in so doing, will strengthen the existing healthcare system in York County that consists largely of Piedmont Medical Center and non-contractually bound physicians on the Piedmont medical staff. Approval of Piedmont's application will help stem outmigration and

[3] CHS employs physicians through a subsidiary, Carolinas Physician Network ("CPN"). Am. Final Order at 12, FF 23.

> maintain ***quality of care***, while approval of CHS' will escalate outmigration and lead to an erosion of ***quality of care*** in York County, especially for specialty services. For all these reasons, FMMC will better serve ***public needs*** than CMC-FM.

Am. Final Order at 51-52, CL 46 (emphasis added); *see* S.C. Code Ann. § 44-7-120. The Order does not, as CHS asserts, evince an intent to reduce the number of South Carolina residents receiving health care in North Carolina; rather, it seeks to prevent the harmful effects that future outmigration would have on the availability of services to residents of York County.

2. Community Need and Hospital Size

CHS argues that the ALC applied the State Health Plan's transfer provision in a discriminatory manner, although it is impossible to see how this, like CHS's other arguments, is not a facial challenge to South Carolina CON law. CHS contends that it was disadvantaged because it could not take advantage of the bed transfer provision in the State Health Plan, but "was limited to proposing a 64-bed hospital." CHS Initial Brief at 24.[4] There are several flaws in CHS's argument.

First, CHS could have taken advantage of the bed transfer provision, but it simply never applied for a transfer. The Plan allows "affiliated hospitals" to transfer beds across county lines and does not specify that both hospitals must be within the same state. *See* 2004-05 S.C. Health Plan at II-8, 9. Moreover, CHS could have transferred beds from one of the four South Carolina hospitals in which it has an ownership interest. *See* Tr. at 1550:2-1551:31.

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[4] Since CHS never applied for a transfer, the ALC did not rule on whether it could transfer beds.

Second, CHS's argument that it was disadvantaged by being limited to a 64-bed proposal is inconsistent with the argument it forcefully, if ineffectually, presented at trial. CHS argued that a 100-bed facility would result in a "tremendous maldistribution" of hospital beds in the county. Am. Final Order at 28-29, FF 67. Far from claiming to be disadvantaged, CHS argued that its proposal was superior ***because*** it was smaller. *Id.;* Trial Ex. Jt.-A-CHS-001.1164-1165 (arguing that Piedmont's 100-bed proposal would "maldistribute" beds in the service area).

Third, the ALC did not base its decision solely on the number of beds each applicant proposed to start with, but also on each applicant's ability to accommodate future expansion in a rapidly growing area:

> Because of the growth projections in Northern York County, the hospital in Fort Mill should be designed to respond to the increased demands that will be placed on the facility over time. FMMC is designed to accommodate up to two hundred fifty (250) beds. Tr. at 2667:6-22. CMC-FM's design, however, envisions a potential future expansion of only eighteen (18) to twenty (20) beds. Tr. at 2628:5-20. The CMC-FM design contains no empty space reserved for future expansion (shell space). Tr. at 2567:24-2568:3. CHS presented no evidence of other space it could convert to accommodate additional space in the event of expansion.

Am. Final Order at 28, FF 65. By choice, CHS's maximum potential size is only 84 beds. *Id.* In short, CHS designed its Fort Mill hospital to be a small community hospital providing primary and secondary services, referring tertiary patients to CHS facilities outside of York County. *See* Tr. at 1644:1-4. Consistent with the CON regulations, the ALC found that this model failed to meet the needs of the growing community in the affected area.

C. Efficiency

Criterion 17, entitled "Efficiency,"[5] provides:

> The proposed project should improve efficiency by avoiding duplication of services, promoting shared services and fostering economies of scale or size.

S.C. Code Regs. 61-15 § 802(17).

The ALC found that Piedmont's project was more efficient and better satisfied Criterion 17 "because its proposal fosters economies of scale by spreading costs over a greater number of beds." Am. Final Order at 50, CL 41. Again, CHS argues that the bed transfer provision disadvantaged it unfairly. CHS Initial Brief at 25. As discussed above, CHS's position is flawed for several reasons, not the least of which being that the ALC based its decision in part on CHS's own design choice, which intentionally limits its ability to expand. Am. Final Order at 50, CL 41. Any significant expansion for CMC-FM would require construction, which would be both "expensive and potentially disruptive." *Id.* at 28, FF 65.

III. The ALC's Application of South Carolina CON Law Did Not Violate the Dormant Commerce Clause.

South Carolina CON law, as written and as applied in this case, is not intended to protect local providers from competition, but to protect public access to local services, without regard to whether any particular provider has an established local presence. Indeed, in the present case, both applicants are owned by out-of-state companies with existing in-state facilities.

The critical facts of the present case are these:

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[5] CHS refers to Criterion 17 as "Financial Feasibility." CHS Initial Brief at 24.

1) If CMC-FM were approved, it would not provide specialized, tertiary services in York County. Tr. at 1609:9-12, at 1644:1-4.

2) Approval of CMC-FM would jeopardize Piedmont's continuing ability to provide high quality tertiary, specialized services in York County. Am. Final Order at 23-26, FF 47-60; at 45, CL 19; at 51-52, CL 46-47.

3) CMC-FM would restrict admissions for Medicaid and indigent patients. *Id.* at 37, FF 99; at 46-47, CL 24-28.

4) The result would be decreased access to services for York County residents, particularly the medically underserved. *Id.* at 23-26, FF 47-60; at 37, FF 99; at 45, CL 19; at 46-47, CL 24-28; at 51-52, CL 46-47.

As described above, both the discrimination test and the undue burden test under the dormant Commerce Clause are fact-intensive. For this reason, cases cited by CHS about waste disposal, interstate trucking, stevedore permits, or milk processing give little practical guidance in resolving whether Judge Lenski's order unlawfully discriminates against or unduly burdens interstate commerce. None of these cases involve a situation like the present one, where except for the challenged law, certain local services would be significantly reduced or eliminated.

A. <u>The Discrimination Test</u>

1. <u>The ALC's application of South Carolina CON law did not discriminate against interstate commerce.</u>

The State Health Plan specifically required the ALC to weigh CMC-FM's adverse effects relating to duplication of services against any benefits it would bring of increased access. 2004-05 S.C. Health Plan at II-9. The ALC found, however, that

CMC-FM would decrease, not increase, access to medical services for residents of York County, particularly those in rural and underserved communities. Am. Final Order at 23-26, FF 47-60; at 37, FF 99. Regulatory Criteria 16(c), 22, and 23(a) specifically required the ALC to consider CMC-FM's impact on cost, the distribution of medical services, and patient volume. The ALC found that CMC-FM's impact on all these areas would be adverse and significant. *Id.* at 48-49, CL 32-36. The ALC applied the state law as it is written and courts give greater deference to states in the regulation of health and medical services. *See Yakima* at *3-*4.

In analyzing whether the ALC's application of state CON law discriminates against interstate commerce, the "fulcrum" of the inquiry should be whether the Amended Final Order "erects a special barrier to market entry by non-domestic entities." *Colon Health Ctrs. I* at 546. The relevant focus is not on CHS or any particular CON applicant, but on "interstate commerce generally." *Id.* at 546; *see id.* at 543, *citing Exxon.*

Judge Lenski's order erects no special barriers to entry in the York County market. CHS could have been awarded the CON if it had convinced the ALC it would: (a) provide specialty, tertiary services at CMC-FM, or (b) ensure that Piedmont would be able to continue to provide those specialty services, or perhaps even (c) agree to enter into a contract with the county similar to Piedmont's. *See* Am. Final Order at 9-10, FF 12-14 (describing Piedmont's "impressive," long-term contract with York County, under which York County citizens derive "innumerable benefits"). CHS made no effort, however, to convince the court of (a) or (c). As for (b), CHS attempted to convince the ALC that CMC-FM would cause no impact on Piedmont because it would

serve only patients CHS shifted to CMC-FM from other CHS facilities. Am. Final Order at 14, FF 28. The ALC, however, found that such a shift simply would not occur. *Id.* at 14-17, FF 29-36.

Had there been a third competing applicant, its application would have been reviewed in the same manner. Regardless of its location, headquarters, or state of incorporation, the third applicant also would not have been approved if its adverse impact on accessibility for county residents outweighed any benefits of accessibility. *See* S.C. Health Plan, II-9. This would be true even if the third applicant were a large, South Carolina-based hospital system, as Piedmont expert (and former DHEC CON Director) Joel Grice testified:

> Q: Mr. Grice, if it were instead of Carolinas, if it were Palmetto Health System that were proposing to build a hospital in Fort Mill and to shift patients needing complex care to Columbia instead of to Charlotte, would your analysis about the effect on Piedmont be any different?
>
> A: No sir.
>
> Q: Why not?
>
> A: Because here again, you have another provider from another area outside of that region that would be taking the patients away. Removing patients from the county and they would be getting – let's say Palmetto here in Columbia had a satellite up there, they would be referring their tertiary patients down to Columbia to Palmetto Health.
>
> Q: So, is your principal concern that Carolinas is located outside of state or that it's located outside of York County and that is the basis for the opinion you saw from 3(a)?
>
> A: It's outside of York County.

Tr. at 1119:14-1120:10. A major in-state hospital system would therefore be affected no differently by the law than CHS. *See Minnesota v. Clover Leaf Creamery,* 449 U.S. 456, 473, n. 17 (1981) (upholding state law against a dormant Commerce Clause challenge, in part because "[t]he existence of major in-state interests adversely affected by [a state law] is a powerful safeguard against legislative abuse").

To assume another scenario, suppose the State Health Plan identified a need for 64 additional hospital beds in a county adjacent to York County. Two applicants submit competing CON applications to build a hospital, one applicant being the only hospital located in the county and the second applicant being Piedmont. If the evidence proved that Piedmont's project would result in the diminishment or discontinuance of high quality specialty services in the county, Piedmont's application would likely be denied.

In other words, the CON laws, as written and as applied in this case, affect in-state and out-of-state, local and non-local entities the same. In a dormant Commerce Clause analysis, "[d]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter." *Colon Health Ctrs. I* at 542-43. As illustrated above, there was no differential treatment in this case between in-state and out-of-state providers. There certainly is no evidence, despite CHS's bald assertions, of a discriminatory purpose by Judge Lenski. And in order to prove discriminatory effect, CHS would have to demonstrate that the ALC's application of state CON law "would negatively impact interstate commerce to a greater degree than intrastate commerce." *Id.* at 543.

It is also significant that Piedmont and CHS hardly fit the stereotypes of insider and outsider. Piedmont is a subsidiary of Tenet Healthcare Corporation, a Texas-based company that owns 49 hospitals in ten states. Am. Final Order at 5, FF 1. As CHS official Del Murphy testified, Tenet is "more of a national healthcare system" than CHS. Tr. at 1548:24-1549:1. According to Mr. Murphy, CHS is a "North Carolina and South Carolina Healthcare System focused entirely really on those two states." Tr. at 1548:18-24. CHS currently has an ownership or management interest in several South Carolina hospitals, surgery centers, and freestanding emergency departments. Tr. at 1550:2-1551:31; CHS Trial Ex. 18. In addition, CHS is a 50 percent owner (with, ironically, Amisub) of a radiation therapy center ***in York County***. Tr. at 1550:5-9. In other words, both Tenet and CHS are based outside of South Carolina but have existing facilities in the state and the county.

In *Colon Health Ctrs. I*, two out-of-state plaintiffs challenged Virginia laws requiring them to obtain a Certificate of Public Need ("COPN") before operating certain medical equipment in the state. The court of appeals, noting the fact-based nature of a dormant Commerce Clause analysis, reversed a lower court order dismissing the case and remanded for further factual development, *id.* at 546, 549, providing the district court with several guiding principles:

- "Modern dormant Commerce Clause jurisprudence is motivated primarily by a desire to limit economic protectionism – that is, regulatory measures designed to 'benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 542, *citing Dept. of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008).
- "Discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and

burdens the latter." *Id.* at 542-43, *citing Oregon Waste Sys.*, 511 U.S. 93, 99 (1994).

- "In order to prove discriminatory effect . . . plaintiffs must demonstrate that the challenged statute, if enforced, would negatively impact interstate commerce to greater degree than intrastate commerce." *Id.* at 543, *citing Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001).

- "In conducting the discrimination inquiry, a court should focus on discrimination against ***interstate commerce*** – not merely discrimination against the specific parties before it." *Id.* at 543 (emphasis in original), *citing Exxon* at 127.

Colon Health I at 542-543.

On remand, the district court granted the defendants' motion for summary judgment. *Colon Health Ctrs. II* at *7. The district court began its analysis with an observation:

> When a state exercises its traditional authority to regulate public health, resultant burdens inevitably fall on business ventures that would otherwise operate without legal restraint in an unregulated market. That Virginia's COPN program may make it more difficult for Plaintiffs to enter the Virginia medical services market is insufficient to demonstrate a dormant Commerce Clause violation.

Id. at *5.

On remand, defendants presented evidence that over a 14-year period COPN approval rates for in-state and out-of-state applications had been "virtually identical." *Colon Health Ctrs. II* at *5. In response, Plaintiffs, like CHS in the present case, argued that, as applied to them, the program was discriminatory. The court rejected plaintiff's argument and upheld the law, as the dormant Commerce Clause "protects the interstate market, ***not particular interstate firms*** . . . ." *Id.* (quoting *Exxon*, 437 U.S. at 127-28 (emphasis in original)). "The mere fact that the COPN requirement

discouraged Plaintiffs from doing business in Virginia does not permit striking down an entire regulatory program – or any portion of it – as unconstitutional." *Colon Health Ctrs. II* at *6.

CHS relies heavily on *Walgreen*, but it is distinguishable from the present case on a number of grounds. In *Walgreen*, a retail pharmacy challenged the constitutionality of Puerto Rico's CON law, which required any retail pharmacy seeking to open or relocate within the Commonwealth to first obtain a CON. The court ruled that the CON Act, as applied to pharmacies, violated the dormant Commerce Clause by discriminating against interstate commerce.[6] Outmigration was not an issue, and there was no suggestion that any retail pharmaceutical services would be discontinued in the Commonwealth if pharmacies were exempted from CON requirements. The plaintiff did not seek to provide services to Puerto Rican residents outside the Commonwealth, but in it. By contrast, CHS's project would provide primary care services within York County, but would purposefully and in effect diminish or discontinue existing specialized services in the county. Am. Final Order at 22-26, FF 46-59; at 51-22, CL 46-47.

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[6] At least one court has criticized *Walgreen* for applying the discrimination test, rather than the undue burden test.

> I do not find the reasoning of *Walgreen* particularly persuasive. A local law which benefits a selected group of in-state and out-of-state companies to the detriment of all other competitors, by definition, does not "discriminate" on the basis of local versus out-of-state origin . . . . As a result, the undue burden test applies.

Florida Transportation Services, Inc. v. Miami-Dade County, 757 F.Supp.2d 1260, 1275 (S.D. Fla. 2010) ("*Fla. Trans. I*"), *aff'd Florida Transportation Services, Inc. v Miami-Dade County,* 703 F.3d 1230 (11th Cir. 2012) *("Fla. Trans. II").*

A number of other facts distinguish *Walgreen.* In 1979, when the Puerto Rican legislature amended the CON Act to add the requirement for pharmacies, it exempted existing pharmacies, 92 percent of which were Puerto Rican companies. *Walgreen* at 55. By 2001, local ownership had increased to 94 percent. *Id.* at 56. Opposition to CON applications came largely from locally owned pharmacies. Twenty-three percent of opposed applications were denied, but "virtually no" unopposed applications were denied. *Id.* Over 50 percent of out-of-Commonwealth applicants were required to undergo the entire CON administrative process, compared to less than 25 percent of local applicants. *Id.* Puerto Rico granted CONs to 90 percent of local applicants, but to only 58 percent of out-of-Commonwealth applicants. *Id.* Finally, the Puerto Rican law ***required*** denial of an application if the proposed location was in an area "saturated" with pharmacies. *Id.* The record in the present case contains no facts like these.

Moreover, adverse impact under South Carolina law and the ALC's application of that law is closely tied to the purposes of the CON Act: maintaining or increasing the quality of services, cost containment, avoiding unnecessary duplication, and meeting public needs. *See* S.C. Code Ann. § 44-7-120. In *Walgreen,* the Commonwealth failed even to offer any such justifications for its vague "saturation" regulation. Under these specific facts and circumstances the court concluded that the purpose of the Puerto Rican law was "simply to limit competition." *Id.* at 57.

None of the other cases CHS relies on are CON cases and none involve the provision of healthcare services, with the exception of *Colon Health Ctrs. I,* discussed *supra* at 23-24. Despite citing *Colon Health Ctrs. I*, CHS rejects its emphasis on an in-

state versus out-of-state benefit and burden analysis, instead arguing that the proper inquiry is local versus non-local. CHS Initial Brief at 27-28. The cases CHS cites in support of that proposition involve slaughterhouses (*Brimmer v. Rebman,* 138 U.S. 78 (1891)); milk processing (*Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *H.P. Hood and Sons, Inc. v Du Mond*, 336 U.S. 525 (1949)); stevedore licenses (*Fla. Trans. Services II*); waste disposal (*C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Fort Gratiot Sanitary Landfill, Inc. vs. Mich. Dept. of Natural Resources*, 504 U.S. 353 (1992)); and retail pharmacy services (*Walgreen*).

None of these cases, including *Walgreen,* involved a situation where, absent the challenged law, specialized healthcare services (or any services) would be reduced or discontinued within a county, forcing residents to travel out of the county to receive such services, to the particular disadvantage of medically underserved patients. *See* Am. Final Order at 23-24, FF 49-53; at 51-52, CL 46-47.

In *Dean Milk*, the court struck down a city ordinance requiring that all milk sold in Madison, Wisconsin be processed within five miles of the city. *Id.* at 350, 356. There was no suggestion that absent the ordinance, citizens of Madison would be unable to buy any milk locally. The Madison ordinance was struck down because, in practical effect, it excluded from sale in Madison milk "produced and pasteurized in Illinois." *Id.* at 297-98. Because the ordinance plainly discriminated against interstate commerce, it was immaterial whether it also discriminated against Wisconsin milk processors outside the Madison area. *Id.* at 298 n.4 and accompanying text.

In *Hood,* another milk case, the court struck down a state law regulating licenses for milk plants. Although the plaintiff met all criteria for a license, its

application was denied on grounds that issuance would "tend to a destructive competition.". *Id.* at 660. Again, there was no evidence that granting the plaintiff a license would force locals to go elsewhere to buy milk.

Brimmer, a decision from 1891, involved a Norfolk, Virginia ordinance which essentially imposed a tax on the sale of meat from animals slaughtered over 100 miles from the city. *Id.* at 82. There was no evidence, however, that striking down the ordinance would mean residents of Norfolk would necessarily have to drive 100 miles to buy meat or else resign themselves to a vegetarian diet.

In *Fla. Trans. II*, 703 F.3d 1230, the court of appeals affirmed a district court decision invalidating (under the undue burden test) a county ordinance regulating stevedore permits. The Port Director who administered the permit program "did not abide by the ordinance," but instead, automatically renewed permits of existing permit holders – even those not providing services – and repeatedly denied permits to new applicants. *Id.* at 1236-37. The Port Director justified his decisions by superficial "needs assessments" that "did not address any of the other ordinance requirements, such as the applicant's competency, financial ability, or safety record." *Id.* at 1239; *cf.* Am. Final Order at 44-52 (evaluating both applicants on all relevant regulatory criteria). Again, there was no evidence or suggestion that invalidating the law would result in the loss or reduction of stevedore services for the Port of Miami.

The ordinance struck down in *Carbone,* like the statute struck down in *Fort Gratiot*, involved the processing of waste. CHS analogizes the processing of waste to the provision of services to hospital patients – an especially poor comparison. *See* CHS Initial Brief at 22. *Carbone*'s ordinance required local waste processing, while *Fort*

Gratiot's statute prohibited it. The invalidation of neither law resulted in waste going unprocessed or in citizens having to drive long distances to obtain waste processing services.

A review of all the cases cited by CHS to support its emphasis on local versus non-local businesses merely highlights that South Carolina's CON law is appropriately tailored to ensure access to medical services for all of the state's citizens. It does not "avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot* at 361. Rather than arbitrarily targeting the movement of goods or services across political boundaries, the South Carolina CON law - as written and as applied here - takes a balanced approach to ensure that medical services are distributed such that all citizens have the reasonable access that they need.

2. South Carolina CON laws, as written and as applied, serve a legitimate local purpose that could not be served as well by available nondiscriminatory means.

Even if a state law does discriminate against interstate commerce, it will be upheld against a dormant Commerce Clause challenge if it serves a legitimate local purpose that could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

In *Maine v. Taylor*, a state law prohibited the importation of live baitfish. Despite finding that the statute discriminated against interstate commerce, the Supreme Court concluded it did not violate the dormant Commerce Clause. Deferring to factual findings by the district court, the Supreme Court ruled that the Maine statute was supported by a legitimate purpose: to protect native fisheries from parasitic infection

and adulteration by non-native species. *Id.* at 142-43, 151. Again relying on the lower court's fact findings, the Supreme Court held that the legitimate purposes behind the state law could not be served as well by available nondiscriminatory means. *Id.* at 143, 146-47, 151.

By contrast, the existence of nondiscriminatory alternatives played a substantial role in many of the cases cited by CHS. For example, the public health justification for the ban on milk processed outside a certain radius struck down in *Dean Milk* would have been better served by a law that simply made all milk subject to same local safety regulations. *Id.* at 354-55. Similarly, the *Fort Gratiot* Court struck down a flat ban on out-of-county waste, noting the availability of non-discriminatory alternatives such as imposing limits on amounts of waste, rather than on its geographic origin. *Fort Gratiot* at 367.

South Carolina CON laws, as written and as applied in this case, serve legitimate state purposes: cost containment, prevention of unnecessary duplication, meeting public needs, and quality control. S.C. Code Ann. § 44-7-120. Under the facts of this case, as determined by the ALC with the support of substantial evidence, those purposes could not have been served as well by other available means. Indeed, CHS does not suggest that any "nondiscriminatory" alternatives to the law exist that would adequately meet the stated purpose of the ALC's ruling: to ensure the continued provision of needed services within reach of all York County residents. Rather, CHS ignores this stated purpose and erroneously paints the ALC's ruling as simple economic protectionism.

B. The Undue Burden Test

As discussed above, South Carolina CON laws, as written and as applied in this case, do not discriminate against interstate commerce. Any effect on interstate commerce is incidental. As a result, the challenged order must be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* at 142. Rather than demonstrate any burden on interstate commerce, CHS has demonstrated that the ALC's ruling burdens only CHS, by denying its application in one particular instance. Such a limited "burden" on a single out-of-state entity cannot outweigh the significant benefit sought by the CON law and the ALC Order: protecting York County residents from the diminishment and elimination of accessible medical services.

In *Yakima*, the court granted summary judgment for defendants in an as-applied challenge to a state CON law requiring annual minimum volume for certain catheterization procedures. The court noted the special deference given state health and safety regulations. *Id.* at *5. The court also observed that the *Pike* test is not concerned with *actual* benefits, but "putative" ones. *Id.* at *11 n.6 (defining "putative" as "supposed" and noting that use of the word in *Pike* "further signals that courts are to give deference to the asserted benefits of states' public-safety laws"), *citing Nat'l Ass'n of Optoms.* at 8.

CHS cites only two undue burden cases in support of its argument: *Fla. Trans. II*, which has already been distinguished, and *Medigen of Kentucky, Inc. v. Public Service Commission of West Virginia*, 985 F.2d 164 (4th Cir. 1993). In *Medigen*, another waste case, a West Virginia law required transporters of infectious medical

waste to obtain certificates in order to haul it through the state. The law prohibited issuance of the certificates unless current service was inadequate. *Id.* at 166. Defendants conceded that the law imposed a significant burden on interstate commerce. *Id.* The court found that the goal of the law – "providing universal service at reasonable rates" – was reasonable, but that the law did not accomplish that goal. *Id.* at 167 ("Restricting market entry . . . necessarily ***limits*** the available service . . . and does nothing to insure that services are provided at reasonable prices") (emphasis in original). Striking down the law in *Medigen* did not diminish the waste transportation services in the state, since the law itself "limit[ed] the number of medical waste transporters from which a medical waste generator can seek service." *Id.*

In the present case, the putative local benefits include the perpetuation of high quality, specialized healthcare services within York County. In relation to these benefits, any incidental burden on interstate commerce cannot reasonably be viewed as "clearly excessive." In fact, CHS has not demonstrated that any burden on interstate commerce will result, only that one company – CHS itself – will not be allowed to refer all or nearly all patients requiring specialized services and covered by private insurance out of the county. *See Exxon* at 127 (holding that a court should focus on interstate commerce – not merely "the specific parties before it").

IV. <u>The ALC Did Not Err in Approving Piedmont's Bed Transfer.</u>

As discussed in relation to CHS's dormant Commerce Clause argument, Piedmont's proposal to transfer 36 of its existing, but unused, beds to FMMC was appropriate and fair. *See supra* at 16-17. CHS further argues that the ALC failed to consider or address State Health Plan criteria for Piedmont's bed transfer. CHS Initial

Brief at 29-30; *see* 2004-05 S. C. Health Plan at II-8, 9. CHS did not raise this issue (the ALC's failure to consider or address the criteria in its Final Order) at trial or in a post-trial motion. It is not, therefore, preserved for appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526, S.E.2d 716 (2000); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995).

In any event, the Plan transfer criteria do not apply to Piedmont's proposal, which is simply a transfer of beds between divisions of the same legal entity. Tr. at 193:10-23. The Plan criteria apply to transfers between affiliated, but separate, legal entities, as evidenced by criterion 7, which requires a "written contract or agreement between the governing bodies of the affected facilities." Piedmont Medical Center and Fort Mill Medical Center are simply "d/b/a's" of Amisub of South Carolina, Inc., which has only one governing body. Trial Ex. Jt.-Ex.-B-PMC-001.0019. Amisub cannot contract with itself.

Even if the Plan's transfer criteria were applicable, every individual criterion whose substance CHS raised at trial or in its post-trial motion was ruled on by the ALC. The eight criteria are listed below and discussed in turn.

1) A transfer or exchange of beds may be approved only if there is no overall increase in the number of beds.

CHS never raised the issue that Piedmont's transfer would increase the number of beds in the county, so it is not preserved for appeal. It is undisputed that a transfer would not increase the number of beds.

2) Such transfers may cross county lines; however the applicants must document with patient origin data the historical utilization of the receiving facility by residents of the county giving up beds.

CHS never raised this issue and the criterion is not applicable since Piedmont's transfer would not cross a county line.

3) <u>Should the response to Criterion 2 fail to show a historical precedence of residents of the county transferring the beds utilizing the receiving facility, the applicants must document why it is in the best interest of these residents to transfer the beds to a facility with no historical affinity for them.</u>

CHS never raised this issue and the criterion is not applicable since Piedmont's transfer would not cross a county line.

4) <u>The applicants must explain the impact of transferring the beds on the health care delivery system of the county from which the beds are to be taken; any negative impacts must be detailed along with the perceived benefits of such an agreement.</u>

This issue was raised by CHS and ruled on by the ALC. Trial Ex. Jt.-A-CHS-001.1164-1165; Am. Final Order at 28-29, FF 67, at 45, CL 18.

5) <u>The facility receiving the beds must demonstrate the need for the additional capacity based on both historical and projected utilization patterns.</u>

This issue was raised by CHS and ruled on by the ALC. Am. Final Order at 45, CL 18.

6) <u>The facility giving up the beds may not use the loss of these beds as justification for a subsequent request for the approval of additional beds.</u>

CHS never raised the issue that Piedmont would use the transfer as justification for a future request for additional beds, so the issue is not preserved for appeal.

7) <u>A written contract or agreement between the governing bodies of the affected facilities approving the transfer or exchange of beds must be included in the Certificate of Need application.</u>

CHS never raised the issue that Piedmont has failed to enter into such a contract, so the issue is not preserved for appeal. Moreover, this criterion is not

applicable to Piedmont's transfer because Piedmont Medical Center and FMMC are merely two business names of the same legal entity, Amisub of South Carolina, Inc., which has one governing body and cannot contract with itself.

> 8) Each facility giving up beds must acknowledge in writing that this exchange is permanent; any further transfers would be subject to this same process.

CHS never raised the issue that Piedmont has failed to make such an acknowledgement, so the issue is not preserved for appeal.

V. The ALC's Application of South Carolina CON Law was Not Erroneous, Arbitrary, or Capricious.

A. The ALC Reviews Factual Issues De Novo and its Findings are Reviewed Under the Substantial Evidence Rule.

CHS repeatedly criticizes the ALC for making its own factual findings, rather than following DHEC's. *See, e.g.*, CHS Initial Brief at 35-36, 41-42, 45-49. It is well established that "courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" *Kiawah Development Partners, II v. S.C. DHEC*, 441 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (quoting *S.C. Coastal Conservation League v. S.C. DHEC*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)). It is equally well established that the ALC, when presiding over a contested case, reviews factual issues de novo. *Marlboro Park Hosp. v. S.C. DHEC,* 358 S.C. 573, 577, 579, 595 S.E.2d 851, 853, 854 (Ct. App. 2004), *citing Brown v. S.C. DHEC*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). Factual findings by the ALC must be upheld if supported by substantial evidence. *Marlboro Park*, 358 S.C. at 577, 595 S.E.2d at 853.

B. The ALC Correctly Considered Adverse Impact, Accessibility, and Functional Balance.

1. Criterion 23(a) - Adverse Impact and Accessibility

As discussed *supra* at 13-14, Criterion 23(a) requires a balancing of CMC-FM's adverse impact against any increased accessibility it would bring. S.C. Code Regs. 61-15 § 802(23)(a). In this case, the ALC found that CMC-FM would ***decrease*** accessibility, by causing the reduction or elimination of specialty services in the county, by restricting access for medically underserved patients, and by designing and building a hospital too small to meet the growing demands of the county. Am. Final Order at 23-26, FF 47-60; at 28, FF 65; at 37, FF 99. CHS accuses the ALC of focusing "solely" on adverse impact, but here the adverse impact ***is*** decreased accessibility.

CHS points out that DHEC made different factual findings from the ALC, the most significant being DHEC's finding that CMC-FM would cause no adverse impact whatsoever. Am. Final Order at 26, FF 60. CHS proposed to accomplish this by a massive shift of patients from its other facilities to CMC-FM. *Id.* at 14-17, FF 28-26; at 26, FF 60. The ALC rejected CHS's "shift" theory for a number of reasons:

> 1) "Even if CHS has no desire to serve new patients, which seems implausible, it would not have the ability to control patient admissions . . . ." *Id.* at 14-16, FF 29-32.
>
> 2) It would be "untenable" for CHS not to seek a return of its $75,000,000 projected investment of CMC-FM. *Id.* at 16, FF 34.
>
> 3) CHS "has every incentive" to recoup its recent $300,000,000 investment in CMC-Pineville, which projected in its 2007 North Carolina CON application that 20 percent of its patients would come from York County. *Id.* at 16, FF 33.

4) While CHS identified its incentive for establishing CMC-FM as the need to relieve utilization on its other facilities, "superior alternatives are available to CHS to decompress utilization," notably available excess capacity at several existing CHS facilities to which CHS could shift patients. *Id.* at 17, FF 36.

2. **Criterion 22 - Distribution and Functional Balance**

CHS notes that the ALC further disagreed with DHEC's findings relative to Criterion 22 (Distribution). As discussed *supra* at 12-13, Criterion 22 provides:

> The existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population.

S.C. Code Regs 61-15 § 802(22). The ALC relied on the testimony and letters by independent York County physicians to find that approval of CMC-FM would reduce the quality of care and scope of services provided in York County. Am. Final Order at 24-26, FF 54-57. From those facts the ALC concluded that approval of CMC-FM would adversely effect the distribution of services to the target population. *Id.* at 48, CL 33.

As CHS notes, the ALC findings differ significantly from DHEC findings on the issue of distribution. As discussed above, DHEC accepted CHS's "shift" theory, which the ALC rejected as without support. Am. Final Order at 14-17, FF 28-36; at 26, FF 60.

The second major theory proposed by CHS relating to Criterion 22 was its "maldistribution" argument, accepted by DHEC, but rejected by the ALC. CHS's position was that, based on bed to population ratios, Piedmont's 100-bed hospital would

"maldistribute" county beds by placing a disproportionate number in Northern York County. Am. Final Order at 28-29, FF 67, *citing* Tr. at 2659:23 – 2660:1.

DHEC accepted the maldistribution theory without reservation. The ALC found:

> Beverly Brandt, DHEC's CON Director at the time of the agency's decision, relied heavily on CHS' maldistribution model in presenting the grounds for her decision, stating that she was concerned with the effect of Piedmont's proposal on the "balance of the distribution [of beds] to the target population." Tr. 2663:20-2664:3. Her analysis of the applications used virtually the same language advanced by CHS in finding that "the replacement/relocation of the 36 beds in Northern York County does not appear to equitably distribute beds within the county and reduces accessibility to greater Rock Hill and Western York." Tr. 2662:12-16; Jt. Ex. 1-B at 1007.

Am. Final Order at 29, FF 68.

The Court found three significant flaws with CHS's maldistribution model. First, CHS prepared the model before 2010 census data was published. Second, CHS failed to include in its population count a zip code (29707) that would be part of the new hospital's primary service area. *Id.* at 29, FF 69. As a result, CHS understated the projected population for northern York County. *Id.* Third, the ALC found that the "more reasonable period for projecting the bed-to-population ratio would be in 2020, not 2015." *Id.* at 29, FF 70. Updated 2020 population projections show that a 100-bed hospital "would result in an equitable distribution of beds and will better meet the need for a new hospital in the Fort Mill area." *Id.*

Finally, CHS argues that the ALC should have agreed with DHEC that a 100-bed hospital was unjustified because patients from zip codes 29730 and 29732 would

not "drive past Piedmont to reach FMMC." CHS Initial Brief at 36; *see* Am. Final Order at 32, FF 80, *citing* Jt. Ex. 1-A at 56-57 (S-CHS-53-54). However, the ALC relied on Piedmont's transportation engineering expert Robert Walsh, who testified that, based on travel time studies he conducted, in many portions of the two zip codes "residents could travel to FMMC without having to drive past Piedmont." Am. Final Order at 32, FF 80. Even for those portions of the zip codes for which the drive to Piedmont would be quicker, the time saved would be ten minutes or less. *Id.*

As support for its position CHS offers *Dept. of Health & Rehab. Servs. v Johnson & Johnson Home Heath Care,* 447 So.2d 361 (Fla. Dist. Ct. App. 1st Dist. 1984), in which the court invalidated a CON rule requiring home health agencies to serve a minimum number of patients. The court found the only purpose for the rule was "to protect the existing industry from competition." *Id.* at 362. The court found "no reasonable relationship . . . between the prohibition of the rule and the health, morals, safety or welfare of the public." *Id.* at 363. *Johnson & Johnson* is totally dissimilar to the present case, in which Judge Lenski made de novo factual findings, backed by substantial evidence, supporting his conclusions that approval of CMC-FM would decrease access to specialized healthcare services in York County, thereby adversely impacting the public.

3. <u>The ALC's Reliance on Testimony of Joel Grice</u>

CHS not only faults the ALC for disagreeing with Ms. Brandt's findings, it objects to the ALC's reliance on the testimony of Piedmont expert Joel Grice.[7] CHS

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[7] CHS also criticizes the ALC for a reference to former DHEC reviewer Mary Fechtel in its March 31, 2013 order (the "Vacated Order"). The reference to Ms.

implies that Mr. Grice's testimony is tainted because he, as DHEC's CON Director at the time, awarded the CON to Piedmont in 2006.[8] However, a trial judge is in the best position to evaluate the credibility of a witness, including that of experts. *Woodall v. Woodall,* 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); 32A C.J.S. *Evidence* § 727, at 82-83 (1996). The trier of fact may give an expert's testimony the weight he or she determines it deserves. *Florence County Dept. of Soc. Servs. v. Ward,* 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). The trier of fact may accept the testimony of one expert over that of another. *See S.C. Cable Television Assn v. So. Bell Tel. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992).

A number of experts testified in this case. The Findings of Fact in the Amended Final Order rely most heavily on Piedmont health planning expert David Levitt. *See* Am. Final Order FF 14, 31, 38, 41, 43-45, 52, 54, 58, 64, 95, 101-02, 104, 107. The second most referenced expert is CHS planner Dawn Carter. *See id.*, FF 28, 39, 43-45, 49, 71, 112. The Amended Final Order refers to Mr. Sullivan, Ms. Platt, and Mr. Grice approximately the same number of times, through none of them are referenced as many times as Ms. Brandt, who was not qualified as an expert.

Fechtel, who testified in the 2009 hearing but not in the hearing before Judge Lenski, was obviously a mistake, but is deleted from the Amended Final Order.

[8] Prior to the 2003 State Health Plan, the planning unit for acute care hospital bed need was the county. Remand Order at 20. In the 2003 Plan, however, the planning unit was changed to the individual hospital(s) in a county. *Id.* The 2004-05 Plan kept the hospital as the planning unit. As a result, the 64 additional bed-need identified for York County in the 2004-05 Plan was based on Piedmont's need. From this DHEC concluded that Piedmont was the only applicant that could be approved. *Id.* at 11. Mr. Grice was not the "architect" of the Plan language, as CHS accuses. The Plan must be approved by DHEC's Health Planning Committee and Board. *See* S.C. Code Ann § 44-7-180. The ALC concluded the language was ambiguous and that DHEC's interpretation was erroneous because it applied the Plan in a manner that precluded competing applicants from being approved. *Id.* at 26-27.

The ALC relied on Mr. Grice's testimony as support for only three factual findings, none of them involving Criteria 22 or 23(a). *See* Am. Final Order at 37, FF 100 (financial projections); FF 101 (charges); at 39, FF 108 (financial feasibility). Finally, during the summation of the Conclusions of Law, Judge Lenski complimented all parties, stating "[t]o the extent that the court disagrees with certain aspects of Ms. Brandt's analysis, it was persuaded by the testimony of Mr. Grice, an expert with three decades of institutional knowledge and history with DHEC's CON program."[9]

C. The ALC Relied on Relevant Findings in Analyzing Community Need.

1. Criteria 2(a-c)

As discussed *supra* at 14-17, the ALC concluded that Piedmont better met the Community Need criteria for two main reasons. First, the court concluded that Piedmont's 100-bed proposal, with the capacity to expand to 250 beds, would better meet the community need than CHS's much smaller proposal. Am. Final Order at 45, CL 18. Second, the establishment of FMMC would strengthen the ability of existing providers to meet the healthcare needs of York County residents. *Id.* at 45, CL 19. *See also id.* at 23-26, FF 47-60; at 37, FF 99; at 46-47, CL 24-28; at 51-52, CL 46-47 (finding that approval of CMC-FM would result in the reduction or loss of quality, specialized healthcare services in the county, particularly affecting the medically

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[9] In contrast to Mr. Grice's experience, when Ms. Brandt took charge of DHEC's CON program in 2008, she had never been involved in CON decision making and was only "on the periphery" of the CON process. Tr. at 1403:25-1404:6. At the time she took the job she had received no formal CON training, though she later attended "a couple of seminars and some on-line courses," as well as a half or full day of in-house training on health care reimbursement. Tr. at 1404:19-1405:5. Upon her appointment, Ms. Brandt admittedly had no "depth in health care management and finance" and at the time of trial had never been qualified as an expert. Tr. at 1406:13-1407:23.

underserved). CHS argues both reasons are irrelevant to a determination of community need.

The criteria must be construed in light of the purposes of the CON Act. The purposes of Criterion 2(a) (identification of the target population) and 2(b) (projected population changes) feed into the broader purpose of 2(c): "The proposed project should provide services that meet an identified (documented) need of the target population." *See* S.C. Code Regs. 61-15 § 802 (2a-c). These purposes clearly fall within the scope of the four purposes of the CON Act, especially that of "guid[ing] the establishment of health facilities and services which will best serve public needs." *See* S.C. Code Ann. § 44-7-120.

The ALC found that the larger Piedmont proposal "would be better positioned to meet the needs of the rapidly growing Fort Mill area than CMC-FM." Am. Final Order at 45, CL 18. The ALC further found that "Piedmont demonstrated by a preponderance of the evidence that the establishment of FMMC" would further meet the healthcare needs of York County residents. *Id,* CL 19. These findings are clearly relevant to any determination of community need, in light of "the requirements, goals, and purposes of the CON Act, the State Health Plan, [and] the project review criteria." *See* S.C. Code Ann. § 44-7-210(B); S.C. Code Regs. 61-15 § 307(2).

2. <u>Criterion 2(e)</u>

Criterion 2(e) states that "projected utilization should be sufficient to justify . . . implementation of the proposed service." S.C. Code Regs. 61-15 § 802(2)(e). CHS argues that its project better met Criterion 2(e) because of its higher current market share than Piedmont. CHS Initial Brief at 41-42. The ALC found that CMC-FM's

high projected utilization did not justify implementation of a 64-bed hospital with the capacity to add only another 18-20 beds. "CMC-FM's own projections show that, by the third year of operation, it would be operating at an occupancy level that would justify the approval of new beds, but with little shell space available to it for expansion." Am. Final Order at 45, CL 18. In other words, the CHS proposal therefore is not sufficient because it is not adequate for the purpose. *See Webster's Unabridged Dictionary of the English Language* (Portland House 1989) (defining "sufficient" as "adequate for the purpose").

D. The ALC Relied on Relevant Findings in Concluding that CMC-FM Would Restrict Admissions for Medically Underserved Patients.

Criterion 3(d) provides: "The proposed facility should not restrict admissions. If any restrictions are applied, their nature should be clearly explained." S.C. Code Regs. 61-15 § 802(3)(d). The ALC concluded that Piedmont better met Criterion 3(d) because "CPN internal records suggest CPN practices in York County limit access for indigent, Medicaid, and even Medicare patients. Whereas Piedmont and the non-contractually bound physicians who have privileges there do not." Am. Final Order at 46, CL 24.

CHS argues that the ALC's conclusion should be vacated because it focuses on CHS-employed physicians rather than CMC-FM. The ALC, however, found that:

> Because the CHS primary care practices are not accepting new Medicaid patients and have not accepted them for at least two years, York County Medicaid patients would not have access to CHS primary care physicians. Tr. 609:23-610:3. These Medicaid patients would also not be in a position to receive referrals to CHS specialty physicians who would be responsible for admitting patients to CMC-Fort Mill. Tr. 610:3-4. ***The CHS primary care***

> ***physicians would function as the gatekeepers for CMC-Fort Mill.*** Tr. 610:4-6. ***If the flow of medically underserved patients into CHS primary care offices is restricted, the referrals and ultimate admissions of those individuals into CMC-Fort Mill would be restricted as well.***

Am. Final Order at 37, FF 99 (emphasis added).

Next, CHS argues that the ALC's conclusion is based on telephone surveys that Judge Lenski described as "of limited probative value." Tr. at 599:1-2. The ALC's conclusion, however, is not based on telephone surveys, but on "CPN internal records." Am. Final Order at 46, CL 24; *see id* at 35-37, FF 93-94, 96-97.[10]

CHS argues that the ALC's conclusion regarding Criterion 3(d) is inconsistent with findings that CMC-FM would be unable to control emergency room admissions. However, the ALC specifically concluded that "the Findings of Fact reflect the court's concern that the practices of physicians affiliated with CHS via CPN would limit ***non-emergency*** access to CMC-FM." *Id.* at 47, CL 28.

Finally, CHS argues that the ALC's conclusions with respect to Criteria 3(d) and 3(g) are inconsistent. The ALC concluded that both applicants equally met Criterion 3(g), which provides:

> The facility providing the proposed services should ***establish provisions*** to insure that individuals in need of

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[10] Other findings also support the ALC's conclusion. A much higher percentage of self-pay and charity patients from York County were served by Piedmont than CHS. Am. Final Order at 37, FF 98. The previously referenced telephone surveys, while of limited value standing alone, were consistent with the CPN data relied on by the ALC. Finally, CHS grossly overestimated the charity care CMC-FM would provide, by ignoring relevant data, *id.* at 33, FF 85; at 34, FF 90, and by reclassifying bad debt as charity care, contrary to the requirements of the State Health Plan. *Id.* at 33-34, FF 87-88, at 47, CL 26-27.

> treatment as determined by a physician have access to the appropriate service, regardless of ability to pay.

S.C. Code Regs. 61-15 § 802(3)(g) (emphasis added). All that is required by Criterion 3(g) is that provisions be established. By contrast, Criterion 3(d) requires that such provisions actually be implemented to ensure that admissions are not restricted. There is no inconsistency in the ALC's conclusions on these criteria.

E. The ALC Appropriately Analyzed Criterion 16(c).

As discussed *supra* at 10-12, Criterion 16(c) addresses a project's adverse impact on its own costs and charges and on the costs and charges of similar providers. S.C. Code Regs. 61-15 § 802(16)(c). No evidence was presented that CMC-FM would affect Piedmont's charges, although the ALC found that approval of CMC-FM would adversely impact Piedmont's costs. Am. Final Order at 26, FF 58.

CHS argues that the ALC erred in not addressing the impact that either project would have on its own costs and charges, which CHS characterizes, without explanation, as "the primary factor." There was no evidence presented that CMC-FM would adversely impact CHS's costs or charges. The only evidence presented that Piedmont would adversely impact itself was rejected by the ALC: "Ms. Brandt disagreed with Piedmont's strategy, opining that FMMC would actually harm Piedmont, while CMC-FM would not. Jt. Ex. 1-B at 1011. The court finds no support for Ms. Brandt's position." *Id.* at 26, FF 60. The ALC also found that both applicants' proposed costs were "reasonable" and their costs and charges comparable to those of similar facilities. *Id.* at 37-39, FF 101, 103-05; at 50, FF 38.

F. <u>The ALC Appropriately Analyzed Criterion 6(b).</u>

Criterion 6(b) provides:

> The projected levels of utilization should be consistent with those experienced by similar facilities in the service area and/or state. In addition, projected levels of utilization should be consistent with the need level of the target population.

S.C. Code Regs. 61-15 § 802(6)(b).

CHS argues that the ALC erred in concluding that Piedmont better met Criterion 6(b) than CHS. CHS Initial Brief at 47. In fact, the ALC concluded that "both Piedmont and CHS ***equally meet*** . . . Criterion 6b." Am. Final Order at 50, CL 39 (emphasis added).

CHS asserts a "more is better" approach to Criterion 6(b). In CHS's view, the higher the utilization, the better a project complies with the criterion. *See* CHS Initial Brief at 47-48. CHS's view is not supported, however, by the language of the criterion: "projected levels of utilization should be ***consistent with the need level of the target population.***" S.C. Code Regs. 61-15 § 802(6)(b) (emphasis added). The ALC found that, due to its limited size, CMC-FM's projected occupancy rate (70 percent by only its third year of operation) could force the facility to expand. For this reason, CMC-FM's projected utilization was not consistent with the need level of the population, whereas FMMC's larger size "places it in a better position to accommodate the expanding population of fast growing Northern York County." Am. Final Order at 50, CL 39. Nevertheless, the ALC found both applicants equally satisfied the criterion.

G. The ALC Appropriately Analyzed Criterion 17.

As discussed *supra* at 18, Criterion 17 provides: "The proposed project should improve efficiency by avoiding duplication of services, promoting shared services and fostering economies of scale or size." S.C. Code Regs. 61-15 § 802(17). The ALC concluded that Piedmont better satisfied Criterion 17 "because its proposal fosters economies of scale by spreading costs over a greater number of beds. Not only will FMMC's 100 beds better accommodate future growth, FMMC is better designed for expansion than is CMC-FM." Am. Final Order at 50, CL 41.

CHS disputes the ALC's conclusion for several reasons. First, it notes that FMMC will have "more empty beds" and "fewer patients" than CMC-FM. CHS Initial Brief at 49. FMMC will have more empty beds because it will have a larger facility. "A seventy (70) percent occupancy rate is an indicator that expansion may be needed, especially in a smaller hospital." Am. Final Order at 30, FF 73. The ALC found that under CHS's utilization model, occupancy at CMC-FM by 2020 would exceed 96 percent. Am. Final Order at 28, FF 63. CMC-FM, however, was designed for only minimal expansion. *Id.* at 28, FF 65; at 40, FF 110; at 45, CL 18.

CHS next argues that Piedmont's project is less efficient because it is more expensive than CHS's. CHS Initial Brief at 49. Criterion 17 speaks to economies of scale, however, and the costs per bed of the two projects are the same. *Id.* at 38, FF 103.

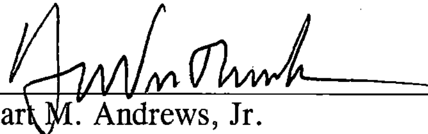
Finally, CHS argues that FMMC is less efficient because it is "sponsored by an applicant with an eroding patient base." CHS Initial Brief at 49. The ALC found, however, that FMMC was the key to restoring Piedmont's eroded patient base. Am.

Final Order at 26, FF 59-60; at 30-32, FF 74-81. *See also* Am. Final Order at 40, FF 111-112 (additional factual findings on the relative efficiency of the two projects).

CONCLUSION

For the reasons set forth above, Piedmont respectfully requests that this Court affirm the Amended Final Order of the Administrative Law Court.

NELSON MULLINS RILEY & SCARBOROUGH LLP



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Columbia, South Carolina

June 2, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center,
d/b/a Fort Mill Medical Center ....Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ....Respondents,

Of whom The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is..Appellant.

PROOF OF SERVICE

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center,d/b/a Fort Mill Medical Center, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

1. **Initial Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center; and**

2. **Respondent's Designation of Matter to be Included in the Record on Appeal.**

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June 2, 2015

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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RE: Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center vs. South Carolina Department of Health and Env. Control, et al
Appellate Case No. 2015-000056
Our File No. 05946/01509

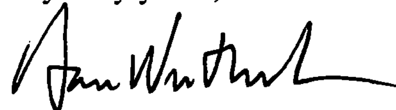
Dear Ms. Kitchings:

I am enclosing an original and one copy of each of the following:

1. Initial Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center;
2. Respondent's Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

By copy of this letter, I am serving all counsel of record with these pleadings.

Very truly yours,



Daniel J. Westbrook

DJW:myb
Enclosures
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