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
Lower Court Docket No. 11-ALJ-07-0575-CC

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.

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES AND REGULATIONS

Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") submits this reply to the Initial Brief of Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont").[1]

ARGUMENT

I. THE ALC'S APPLICATION OF THE CON LAWS VIOLATES THE DORMANT COMMERCE CLAUSE.

A. The ALC's application of the CON laws violates the dormant Commerce Clause under the discrimination tier.

Despite Piedmont's claims to the contrary, the discrimination tier of the dormant Commerce Clause analysis applies in this case because the ALC's ruling has both a discriminatory purpose and effect. The discriminatory purpose and effect of the ALC's decision is clear based on its admitted goal of reducing the outmigration of York County residents seeking healthcare in North Carolina. (Am. Final Order, Conclusions of Law ¶¶ 45-46.) The ALC seeks to reduce interstate commerce by ensuring that York County residents receive healthcare services in York County, South Carolina, from Piedmont rather than from out-of-state providers in Charlotte, North Carolina. Thus, the express purpose and practical effect of the ALC's decision is to erect a barrier that makes it more difficult for an out-of-state entity, Carolinas, to provide hospital services to York County residents and reduce the flow of consumers traveling out-of-state to receive healthcare. *See C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (stating that dormant Commerce Clause invalidates local laws that impose commercial barriers or

[1] Capitalized terms and abbreviations used and not otherwise defined herein shall have the respective meanings set forth in Carolinas' Initial Brief.

discriminate against an article of commerce based on its origin or destination out of state).

The ALC's impermissible, protectionist motivation is evident throughout the Amended Final Order. The ALC made several findings regarding the purported negative impact that competition from North Carolina hospitals, including Carolinas, has had on Piedmont over the last decade and the speculative negative impact that competition from CMC-FM will have on Piedmont in the future. (Am. Final Order, Findings of Fact ¶¶ 45-50.) The ALC relied on these findings to award several Criteria in Piedmont's favor based on alleged lost profits and increased costs Piedmont will incur because of competition from CMC-FM. (Am. Final Order, Conclusions of Law ¶¶ 32-36.) The ALC's application of the Criteria to favor Piedmont is discriminatory and protectionist because it seeks to protect Piedmont from the adverse effects of competition from an out-of-state competitor.

Piedmont argues that there is no discriminatory purpose and effect in the ALC's adverse impact analysis because the Criteria, as applied by the ALC, affect in-state and out-of-state and local and non-local entities the same. That proposition is not true. Under the ALC's application, the existing in-state or local hospital will always begin the CON review process with an inherent advantage over an out-of-state or non-local competitor attempting to enter the local market because the ALC's analysis examines a proposed hospital's impact on only the existing in-state or local hospital's operations and finances. Thus, the ALC applied the Criteria in a manner designed to benefit in-state economic interests to the detriment of out-of-state or non-local competitors, which is the very definition of economic protectionism. *See West Lynn Creamery, Inc. v. Healy*, 512

U.S. 186, 192 (1994) (defining "economic protectionism" as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").

The ALC's application of the Criteria and CON Act also discriminates against interstate commerce because it punishes Carolinas based on the expectation that Carolinas would engage in future interstate commerce by referring CMC-FM patients to affiliated facilities in North Carolina for specialized care. Conversely, the ALC rewards Piedmont for engaging in intrastate commerce based on the expectation that it would refer FMMC patients to the Piedmont hospital in Rock Hill for specialized services rather than to North Carolina hospitals. This application of the law which punishes interstate commerce and rewards intrastate commerce is discriminatory because it serves as a disincentive for hospitals and other healthcare providers from engaging in interstate commerce in their referral patterns. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 341 (1989).

Piedmont's attempt to distinguish the authorities cited in Carolinas' Initial Brief is similarly unpersuasive. For example, in its effort to distinguish *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), Piedmont argues that *Walgreen* is distinguishable because "[o]utmigration was not an issue" in that case. But it is precisely because the ALC attempts to curb outmigration in this case that its application of the CON laws and regulations is discriminatory. The ALC's express purpose is to prevent and reverse the outmigration of York County residents seeking healthcare in North Carolina, which is *per se* discrimination against interstate commerce. This case presents better grounds for a finding of impermissible discrimination under the dormant Commerce Clause than those involved in *Walgreen.*

Piedmont also fails to demonstrate that the local versus non-local framework established under dormant Commerce Clause jurisprudence does not apply in this case. Piedmont contends that the authorities cited by Carolinas in support of the local versus non-local framework are distinguishable because those cases do not involve the provision of healthcare services. There is nothing in the United States Constitution or existing legal precedent, however, that exempts healthcare providers from the strictures of the dormant Commerce Clause or suggests that the applicability of the dormant Commerce Clause analysis, including the local versus non-local framework, depends on the type of business involved in the case. In fact, just the opposite is true as the United States Supreme Court has stated that "a state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949); *see also Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (declaring that the state's "unquestioned power to protect the health and safety of its people" does not permit it to erect an economic barrier protecting local industry against out-of-state competition). While the State of South Carolina necessarily has authority to regulate the provision of healthcare services, that authority does not permit it to discriminate against out-of-state service providers.

B. Piedmont fails to prove under strict scrutiny that the ALC's application of the CON laws serves a legitimate local purpose that could not be served as well by available nondiscriminatory means.

1. Piedmont fails to identify a legitimate local purpose served by the ALC's application of the CON laws.

Although Piedmont correctly states that under *Maine v. Taylor*, 477 U.S. 131, 138 (1986), a discriminatory application of state law may 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, the ALC's application of the Criteria and CON law does not advance a legitimate local purpose under the applicable strict scrutiny analysis.

As the Supreme Court states in *Taylor*, "Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity.'" *Id.* at 148 (citations omitted). Recognizing the insidious nature of discriminatory statutory and regulatory schemes, the United States Supreme Court has held that the standards for justifying a discriminatory law based on a legitimate local purpose are high and subject to the strictest scrutiny. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("Facial discrimination by itself may be a fatal defect" and "at a minimum . . . invokes the strictest scrutiny"); *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) ("Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives. . . . However it be put, the standards for such justification are high."). "[W]hen considering the purpose of a challenged statute, [a court] is not bound by 'the name, description or characterization given it by the legislature of courts of the State,' but will determine for itself the practical impact of the law." *Hughes*, 441 U.S. at 336 (1979) (citations omitted).

In this case, the ALC's findings of fact and conclusions of law show no legitimate local purpose is served by its application of the Criteria and CON Act. Rather, these findings and conclusions demonstrate that the ALC's motivating concern was Piedmont's

competitiveness in the York County healthcare market. The ALC's decision is replete with examples revealing that it sought to protect and reverse effects on Piedmont's business from competition from Charlotte-based healthcare systems. (*See, e.g.,* Am. Final Order, Findings of Fact ¶¶ 18, 21-60 and Conclusions of Law ¶¶ 32, 34-35, 46-47.) By seeking to protect Piedmont from competition, the ALC has engaged in "simple economic protectionism," which does not serve a legitimate local purpose.

Piedmont ignores the ALC's explicit anti-competitive motivation and instead claims that the "legitimate" local purpose of the ALC's ruling is "to ensure the continued provision of needed services within reach of all York County residents."[2] This purpose, however, is not stated in the ALC's decision; nor can it be inferred. The purpose of the ALC's ruling is not "to ensure the continued provision of needed services within reach of all York County residents," as Piedmont posits. Instead, the purpose of the ALC's ruling is to ensure that York County residents will have access to and obtain healthcare services from one in-state or in-county provider, Piedmont, rather than from other providers in the Charlotte area. (*See, e.g.,* Am. Final Order, Conclusions of Law ¶ 45 ("This Court concludes that the establishment of FMMC will best serve the needs by reducing the outmigration of York County residents to hospitals beyond York County.")) This is not a legitimate purpose under the dormant Commerce Clause, which prohibits a state from

[2] In connection with making this assertion, Piedmont repeatedly states that CMC-FM, if approved, would not provide specialized, tertiary services in York County. (Piedmont's Initial Brief, pp. 8, 19.) A close examination of the mere seven lines of trial testimony (i.e., Tr. 1609:9-12, 1644:1-4) that Piedmont cites to support this claim, however, reveals that Piedmont's characterization of this evidence is misleading. That testimony actually shows that CMC-FM is intended to provide 75% of all care that is provided in a hospital. Carolinas would provide an overwhelming majority of all hospital care at CMC-FM, and neither the ALC nor Piedmont has identified what services Piedmont provides that would not be available at CMC-FM or what services of those Piedmont would discontinue if CMC-FM is approved.

applying a licensing scheme in a discriminatory way for the purpose of influencing citizens to obtain goods and services in-state rather than out-of-state.

Nothing in the ALC's ruling supports the conclusion that York County residents will not have reasonable access to needed healthcare services from North Carolina-based providers. There is no evidence that healthcare provided by out-of-state healthcare systems, such as Carolinas, is of lower quality than that offered by Piedmont. *See Limbach*, 486 U.S. at 279 (rejecting argument that discriminatory ethanol subsidy advanced legitimate health goals because there was no evidence that out-of-state ethanol was less healthy than in-state ethanol). In fact, the substantial evidence presented by Piedmont's witnesses and experts, and adopted by the ALC, demonstrates that York County residents currently have ready access to complex and specialized healthcare services from Charlotte-based providers based on overwhelming statistics showing that York County residents voluntarily prefer to receive such services from Carolinas and other Charlotte-based providers than from Piedmont. (*See* Am. Final Order, Findings of Fact ¶¶ 22-26, 32, 45-49.) As York County residents would continue to have access to quality specialized and complex healthcare services in Charlotte if Carolinas is awarded the Fort Mill CON, the ALC's application of the Criteria and CON Act do not serve the legitimate purpose of ensuring access to needed healthcare services.

The fundamental flaw in Piedmont's argument regarding legitimate local purpose is that Piedmont fails to explain why it is legitimate to use discriminatory means to ensure that specialized and complex healthcare services are maintained by Piedmont in York County when York County residents already use and have ready access to the same services in Charlotte. There is a complete lack of evidence in the record that the marginal

increase in geographic difference to Charlotte will jeopardize the health and safety of any York County residents or will reduce their access to specialized and complex healthcare services. In fact, the evidence that York County residents voluntarily choose to leave the county for healthcare, especially complex and specialized services, demonstrates that any reduced access to certain services at Piedmont in the event that CMC-FM is established would not result in any deprivation of access.

Piedmont's claim that a legitimate local purpose is served by ensuring that Piedmont can continue to provide specialized and complex services to patients in York County is also inconsistent with the 2004-05 State Health Plan, which provides:

> Any services area may cross multiple administrative, geographic, trade and/or political boundaries. It is recognized that due to factors which may include availability, accessibility, personal or physician preferences, insurances and managed care contracts or coverage, or other reimbursement issues, patients may seek and receive treatment outside the county or inventory region in which they reside and/or outside of the state. Therefore, service areas may specifically cross inventory regions and/or state boundaries.

(2004-05 Plan, p. II-2.) This provision is significant because it recognizes that healthcare markets cannot be artificially cabined by arbitrary lines on a map, as Piedmont attempts to do.

When analyzed within the context of the economic realities of the healthcare market for York County residents, it becomes clear that the only purpose served by the ALC's discriminatory application of the Criteria is to protect Piedmont's bottom line against competition from a Charlotte-based hospital system. York County residents have had access to high quality, specialized, and complex healthcare services in Charlotte for years, and that access will continue even if Piedmont discontinues certain healthcare

services. Therefore, Piedmont's argument in support of a legitimate local purpose cannot survive the strict scrutiny under which it must be analyzed, and the Court should reject this argument accordingly.

2. *The purported legitimate local purpose of the ALC's application of the CON laws is not supported by concrete evidence, and therefore, cannot survive a strict scrutiny analysis.*

Even if the Court recognizes that maintaining needed healthcare services in York County is a legitimate local purpose, the ALC's ruling fails to demonstrate that such purpose is supported by sufficient evidence under the strict scrutiny analysis. As stated above, a claim that a discriminatory application of the law is justified by a legitimate local purpose is subject to the strictest scrutiny. This strict scrutiny analysis demands more than "mere speculation" to support discrimination against out-of-state goods and services. *Granholm v. Heald*, 544 U.S. 460, 492 (2005). Rather, this analysis requires "concrete record evidence" to justify the discriminatory purpose and effect. *Id.* at 493.

In this case, Piedmont presented no concrete evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON. Contrary to Piedmont's representations, the ALC did not make any definitive findings that Piedmont would discontinue any specialized or complex healthcare services if CMC-FM is established.[3] Rather, the ALC found merely that Piedmont's specialty programs would be "jeopardized" by the operation of CMC-FM. (Am. Final Order, Findings of Fact ¶ 50.) A generalized statement that some specialty programs would be jeopardized

[3] Although Piedmont claims that the operation of CMC-FM would decrease access to services for medically underserved York County residents, the ALC, despite Carolinas' request in its Motion for Reconsideration, failed to make any findings regarding which party best meets Criterion 3(h), which addresses the "[p]otential negative impact of the proposed project upon the ability and/or resources of existing providers to serve medically underserved groups must be considered." S.C. Regs. 61-15 § 802.3(h).

falls well short of the concrete evidence needed to justify the discriminatory application of the Criteria in this case. To justify the legitimate local purpose, as argued by Piedmont, the ALC was required under a strict scrutiny analysis to make specific findings about which specific programs and services would be discontinued based on the specific findings of when such programs and services would fall below minimum thresholds necessary to maintain those programs and services. Those findings, supported by concrete evidence, are completely lacking from the ALC's decision.

Instead of being supported by concrete evidence, the ALC's generalized finding that Piedmont's specialty programs would be jeopardized is based on speculative testimony of Piedmont's witnesses. Those witnesses could not state with any certainty that Piedmont would discontinue any specific programs and services if Carolinas is awarded the Fort Mill CON. (Tr. 898:7-899:1; 1039:24-1040:25; 1288:5-19; 2830:25-2831:4.) Moreover, there are specific programs and services that Piedmont cannot discontinue under its contract with York County. (Tr. 927:5-928-9, 942:21-943:17.) Accordingly, Piedmont's claim that "certain local services would be significantly reduced or eliminated" is not supported by the concrete evidence needed to justify the ALC's discrimination under a strict scrutiny analysis. *See Granholm*, 544 U.S. at 490-93 (rejecting state's defense of discriminatory law under the dormant Commerce Clause because its claims of legitimate local purpose and lack of nondiscriminatory alternative were not supported by "concrete evidence").

3. The ALC failed to consider reasonable nondiscriminatory alternatives to its discriminatory application of the CON laws.

Piedmont also fails to present concrete evidence that the purported legitimate local purpose cannot be adequately served by reasonable nondiscriminatory alternatives.

Rather than engage in any discussion about why certain nondiscriminatory alternatives are unreasonable or not available, Piedmont asserts in conclusory fashion and without analysis that no alternatives exist that would adequately meet the alleged purpose of the ALC's ruling and even suggests that Carolinas is required to demonstrate the availability of nondiscriminatory alternatives.

Piedmont's argument fails for two reasons. First, Carolinas does not carry the burden of proving that nondiscriminatory alternatives exist. As the United States Supreme Court explained in *Hughes*, 441 U.S. at 336, and reiterated in *Taylor*, 477 U.S. at 138, once a state law is shown to be discriminatory either on its face or in practical effect, the burden falls on the state to demonstrate that the challenged application of the law serves a legitimate local purpose that cannot be served as well by available nondiscriminatory means. Thus, the ALC was required to demonstrate that nondiscriminatory alternatives do not exist.

Carolinas made this argument in its Motion for Reconsideration, and the ALC disregarded it. Instead, the ALC concluded in a footnote that it did not believe that its application of the applicable laws and regulations violated the dormant Commerce Clause without conducting any analysis under the applicable legal framework, including analyzing whether nondiscriminatory alternatives existed. As a result, the ALC erred in conducting the dormant Commerce Clause analysis.

Second, Piedmont's argument fails because it offered no evidence regarding the unavailability of nondiscriminatory alternatives. Ironically, Piedmont does offer alternatives in how mitigation can be achieved if Carolinas is awarded the Fort Mill CON. Piedmont proposes that Carolinas should agree to provide specialty and tertiary

services or that Carolinas should enter into a contract with York County similar to Piedmont's contract with York County. (Piedmont's Initial Brief, p. 20.) Certainly, DHEC has the ability to condition the issuance of a certificate of need, if warranted, under S.C. Code Ann. §§ 44-7-210 and 44-1-60(D). *See* S.C. Code Ann. § 44-7-210 (stating that DHEC staff shall issue a decision on a certificate of need application in accordance with § 44-1-60(D)); § 44-1-60(D) (providing that DHEC staff may "issue, deny or *condition*" a certificate of need) (emphasis added). *See also* S.C. Regs. 61-15 § 311 ("Implementation of the project or operation of the facility or medical equipment that is not in accordance with the Certificate of Need application or *conditions* subsequently agreed to by the applicant and the Department may be considered a violation of this Regulation") and S.C. Regs. 61-15 § 607(5) (providing that undertaking a project that is not in accordance with the "approved application or *conditions* or amendments subsequently agreed to by the applicant and the Department may be consideration a violation of this article") (emphasis added). Accordingly, it follows that the state has the authority to condition the issuance of the Fort Mill CON to Carolinas by requiring certain measures to serve the purported legitimate local purpose that Piedmont advances in its Initial Brief without discriminating against Carolinas through the application of the Criteria. As a result, Piedmont's argument that such nondiscriminatory conditions are unavailable is incorrect and cannot survive a strict scrutiny analysis.

C. The ALC's application of the CON laws violates the dormant Commerce Clause under the undue burden tier.

Piedmont erroneously argues under the dormant Commerce Clause's "undue burden" tier that any burden on interstate commerce is merely incidental because "the ALC's ruling burdens only" Carolinas. This argument is overly simplistic and ignores

that the ALC's ruling is intended to affect not only Carolinas but also thousands of York County residents who engage in interstate commerce by obtaining healthcare services in North Carolina. The express purpose and practical effect of the ALC's application of the law is to keep these patients from leaving York County to obtain healthcare services. Accordingly, Piedmont's claim that the ALC's ruling has only an incidental burden on interstate commerce because it affects only Carolinas is patently incorrect and refuted by the ALC's express goal of reducing outmigration of York County residents seeking healthcare beyond the county.

Additionally, Piedmont's argument under the undue burden test mistakenly limits the assessment of the burdens on interstate commerce by examining only the effects of the ALC's ruling on Carolinas without analyzing how the ALC's application would affect interstate commerce if it is applied in a similar fashion in other cases or by other states. Dormant Commerce Clause jurisprudence requires reviewing courts not to focus on the impact on the specific parties before them but to evaluate the practical effect of an application of a challenged statute "by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. Piedmont, however, ignores this part of the analysis.

Under this analysis, the ALC's application of the Criteria and CON Act has more than an incidental burden on interstate commerce. If many or every state enacted or applied certificate of need regulations to prevent local residents from obtaining healthcare from out-of-state or non-local providers, it would have a substantial burden on interstate competition by reducing competition in interstate markets, barring competitors from

entering local markets, and reducing the number of healthcare consumers obtaining healthcare in out-of-state or non-local markets. The ultimate effect of such widespread regulations would be higher prices and lower quality healthcare. *See Fla. Transp. Servs. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012) (finding that adoption of challenged stevedoring permitting practices by other governmental entities would burden interstate commerce by barring market entry, raising prices, and reducing quality of stevedoring services); *see also Environmental Techs. Council v. South Carolina*, 901 F. Supp. 1026 (D.S.C. 1995) (finding South Carolina hazardous waste statutes and regulations violated dormant Commerce Clause, in part, based on impact of other states adopting similar regulatory schemes). The Court should reject Piedmont's attempt to limit the undue burden analysis to the effect of the ALC's ruling on Carolinas and instead examine the practical effect of the ALC's application of the Criteria and CON Act if other states applied similar schemes aimed to keep patients in local healthcare markets and out of non-local and out-of-state markets.

Accordingly, the ALC's application of the Criteria and CON Act has more than an incidental burden on interstate commerce, and that burden is not outweighed by any putative local benefits. As discussed above, the putative local benefits of the perpetuation of high quality, specialized healthcare services within York County is speculative and not supported by concrete evidence. Moreover, the ALC's ruling does not advance that putative benefit because Carolinas will provide a substantial majority of the hospital care that York County residents require, and any services that Carolinas will not provide will continue to be accessible to York County residents in nearby Charlotte. Lastly, the state has reasonable alternatives to ensure that any specialized healthcare

services potentially in jeopardy remain in York County without unnecessarily burdening interstate commerce, as the ALC has done. The ALC's application of the Criteria and CON Act violate the dormant Commerce Clause under the undue burden test, and Piedmont's claims to the contrary fail.

II. THE ALC ERRONEOUSLY, ARBITRARILY, AND CAPRICIOUSLY APPLIED THE CON LAWS ON ADVERSE EFFECTS OF DUPLICATION, IMPACT, ACCESSIBILITY, AND NEED.

A. The ALC erroneously applied the CON Act and the State Health Plan by failing to properly balance the adverse effects of duplication against improved accessibility.

Piedmont's argument on the ALC's application of the CON Laws misstates two critical points: First, the CON Act and the State Health Plan require that the ALC weigh the "adverse affects [sic] caused by the duplication,"[4] of a new hospital and an existing hospital, but they do not require that the ALC protect the market share of the existing hospital or otherwise insulate it from increased competition. Second, the weighing process requires the ALC to consider whether "the benefits of improved accessibility" outweigh the adverse effects even if they exist, and the substantial evidence at trial establishes that Carolinas' proposed hospital would improve accessibility to patients in York County, including medically underserved patients.

Piedmont is the only medical provider with a hospital in York County, and it prefers to keep things that way. Piedmont's challenge to the award of a CON to Carolinas was premised on the argument that, prior to the construction of a new hospital, it was losing the competition to attract patients to its hospital in Rock Hill because of the expansion of Carolinas' physicians network into York County. Piedmont claims that the

[4] S.C. Code Ann. § 44-7-180(B)(4); 2004-2005 Plan, p. II-9 (emphasis added).

introduction of a new hospital would further exacerbate those losses. In particular, it argued to the ALC that CMC-FM represents a real threat because tertiary and acute care patients would be referred to Carolinas' larger hospitals in Charlotte. (Am. Final Order, Findings of Fact ¶ 50.) Ironically, it proposes to reverse this "outmigration" by doing the exact same thing – by referring tertiary and acute care patients from its proposed primary care hospital, FMMC, to its larger hospital in Rock Hill, which happens to be the only hospital in York County. (Tr. 488:18-489:14.) By this convenient logic, the patients would be kept in York County, rather than being sent to another hospital that, while physically closer to them, is owned by a competitor over the state line.[5]

As stated above, Piedmont's argument ignores the fact that the State Health Plan specifically contemplates that patients often seek and receive healthcare outside of their county of residence and that hospital service areas may cross regional and state boundaries. (2004-2005 Plan, p. II-2.) Piedmont's former CEO, Charles Miller, testified that the "natural tendency" of residents in Northern York County is to seek healthcare in Charlotte because they are "oriented" in that direction by their work, shopping, and other interests. (Tr. 965:24-967:10.) He acknowledged that despite Piedmont's relatively low number of patients in Northern York County, its construction of a new hospital is a "defensive strategy" intended to keep North Carolina providers from encroaching upon Piedmont's market share. (Tr. 1044:2-1046:3.) In short, the "adverse impact" argument to which the ALC devoted approximately half[6] of the court's findings in the Amended

[5] By contrast, Piedmont's expert, Joel Grice, conceded in his earlier, 2006 decision issued while he was employed at DHEC that none of the applicants, including Piedmont, could reverse "outmigration," and that crossing over state lines for tertiary or emergency care was often warranted. (Tr. 1341:23-1346:12.)

[6] These findings start at p. 11 of the Amended Final Order and extend to p. 26.

Final Order is only a slight variation of Piedmont's unsuccessful arguments before Judge Matthews in the First Contested Case – that only the existing hospital in York County is entitled to build a new hospital in York County and the incursion of North Carolina providers should be prohibited.

Neither the CON Act, Criteria, nor the State Health Plan state their purpose as protecting existing providers from competition. They instead require that DHEC, and ultimately the ALC, consider the adverse effects of the duplication of hospitals, and whether any adverse effects are outweighed by improved accessibility to patients. Duplication would result by Piedmont's construction of its own hospital in relatively close proximity to its existing hospital in Rock Hill, and Carolinas' expert testified that this duplication would have an adverse effect on Piedmont. (Tr. 2437:16-2441:11.) Instead of focusing on duplication, the ALC mistakenly focused on competition. It relied on the testimony of three "independent"[7] physicians, all of whom testified that the existing encroachment of Carolinas' physician practices into York County resulted in a decline in their own utilization, and that in their view Piedmont would only be able to maintain its business by keeping its North Carolina competitor out of York County.

It is readily apparent that these witnesses are far from "independent." Piedmont's first "independent" witness, Dr. Arun Adlakha, testified that he was then on the Board of Governors of Piedmont. (Tr. 154:2–156:6.) The two other "independent" physicians offered by Piedmont as witnesses, Dr. Sunsil Singhi and Dr. Norman Taylor, had equally strong connections with Piedmont and had engaged in discussions with Piedmont about affiliation. Dr. Singhi acknowledged that his partner was on the Board of Governors of

[7] In its first Order, the ALC described these physicians as "independent." (Order, Findings of Fact ¶¶ 24-25, 36.)

Piedmont and that his practice was "currently talking" with Piedmont about becoming employed by Piedmont as part of its system. (Tr. 782:1–14.) Dr. Taylor testified that he was formerly Chief of Staff at Piedmont, he was currently on the Credentials Committee for the medical staff, his partner in his medical practice was Chairman of the Board of Governors of Piedmont, and that his practice had discussed affiliating with Piedmont's parent, Tenet, on "several occasions."[8] (Tr. 257:2-16; 292: 12-23; 302:1–24; Ex. Joint-B-PMC-001.0515.) The 45 "independent" physicians[9] who supported Piedmont's application consisted of 34 physicians from Piedmont's medical staff, including many from Dr. Singhi's and Dr. Taylor's medical practices. (Ex. Joint-B-PMC-001.0232-0241, 001.0993-0994.) It is not surprising that other doctors from the York County Medical Society joined in, as Dr. Singhi is the Society's current president, Dr. Taylor was a past president, and Piedmont operates the only hospital in York County. (Tr. 257:8-10; Ex. Joint-B-PMC-001.0244, 001.0993-0994.)

The remainder of Piedmont's "adverse impact" evidence was presented through the testimony of its healthcare experts, Joel Grice, Dan Sullivan, and David Levitt. While all three experts advanced Piedmont's theory of adverse impact caused by increased competition, the majority of them did not agree that CMC-FM would be less accessible or would fail to provide services to the medically underserved. In his testimony, Grice found that that CMC-FM would provide improved accessibility for patients, Carolinas equally met the "accessibility" criteria under Criterion 3(d), (f), and (g), and CMC-FM

[8] Dr. Taylor also testified that his practice talked to Carolinas "years ago" about becoming affiliated. (Tr. 292: 17-19).

[9] Although its brief uses the term "non-contractually bound," Piedmont routinely identified these physicians as "independent" in its submissions to DHEC and during project review. (Ex. Joint-B-PMC-001.0654, 001.0993-0994.)

would be an accessible facility to the medically underserved.[10] (Carolinas Ex. 32; Tr. 1122:9-1123:23;1128:3-16; 1341:6-1342:4.) Sullivan also found that Carolinas and Piedmont equally meet these Criteria, and he conceded at trial that he thought CMC-FM would be as equally accessible as FMMC. (Carolinas Ex. 32; Tr. 1251:23-1252:7; 2883:20-2884:5.)

Implicit in Piedmont's "adverse impact" argument is the acknowledgement that CMC-FM would be well-utilized and improve accessibility to its existing patients in Northern York County. Carolinas' market share for primary care, community hospital services in Northern York County was approximately 52.9% in 2009, and from 2005 to 2010 Carolinas' hospitals in North Carolina experienced a 69% increase in total inpatient discharges of York County residents. (Joint-A-CHS-001.0009-0010, Figures 3-4; Joint-A-CHS-001.1215; Tr. 1613:3-17.) Despite the fact that Piedmont operates the only hospital in York County, only 28.7% of patients in Northern York County who received community hospital services in 2009 obtained treatment at Piedmont. (Joint-A-CHS-001.0009-0010, Figures 3-4; Joint-A-CHS-001.1215.)

The CON Act makes clear that the adverse effects of duplication alone are insufficient to justify denying a CON to a new hospital when those effects are

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[10] S.C. Regs. 61-15 § 802.3(d), (f) and (g).

3. Distribution (Accessibility):

d. The proposed facility should not restrict admissions. If any restrictions are applied, their nature should be clearly explained. ...

f. The applicant should address the extent to which all residents of the area, and in particular low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other medically underserved groups, are likely to have access to those services being proposed.

g. The facility providing the proposed services should establish provisions to insure that individuals in need of treatment as determined by a physician have access to the appropriate service, regardless of ability to pay.

outweighed by increased accessibility to patients. The bulk of the evidence, including testimony from Piedmont's own experts, established that accessibility to patients would be improved by CMC-FM and that accessibility to the medically underserved would not be diminished, as Piedmont argues. Piedmont's "adverse impact" argument is simply a restatement of its prior, flawed argument that only the existing hospital in York County should be allowed to build a new hospital in the county because the ALC is obliged to protect the incumbent hospital from competition that existed even before the new hospital is built.

B. The ALC erroneously, arbitrarily, and capriciously concluded that a larger Piedmont hospital was justified and better for York County.

Piedmont concludes in its Initial Brief that CMC-FM would "decrease accessibility by causing the reduction or elimination of specialty services in [York County], by restricting access for medically underserved patients, and by designing and building a hospital too small to meet the growing demands of [York County]." (Piedmont's Initial Brief, p. 36.)

As discussed previously, the concept of building a primary care hospital in Fort Mill and treating tertiary or specialty services at another hospital is the same proposal advanced by Piedmont, and Piedmont's own experts do not support its argument that FMMC will be "more accessible" to the medically underserved than CMC-FM. In support of its claim regarding the need for a larger hospital, Piedmont made the remarkable assertion in its opening statement at the hearing that Piedmont needs a larger hospital in Fort Mill because its existing hospital in Rock Hill is underutilized. Piedmont's counsel asserted:

> Now, Piedmont wants to build a 100-bed facility, a 100-bed hospital in Fort Mill. And to get to a 100 beds, Piedmont has to

> transfer 36 of its present beds in Rock Hill, up to Fort Mill. And as Mr. Masterton [Piedmont's current CEO] will tell you, that's not going to be a problem in doing that because right now on any given day on any average day at Piedmont Medical Center, he'll tell you there are about 100 unused beds at Piedmont. There are whole wings of the hospital that are shut down right now, they're closed off where beds are not being used. So transferring 36 beds to Fort Mill not only won't be a problem, it makes sense.

(Tr. 88:6-20.) This "underutilization" argument is even more unfathomable considering Piedmont's diminishing number of patients from Northern York County, where the new hospital will be located. Piedmont's market share for community hospital services in Northern York County diminished from a high of 47.3% in 2003 to a low of 28.7% in 2009. (Joint-A-CHS-001.0009, Figure 3.)

Piedmont's larger hospital also comes at a substantial increased cost – ranging from $42 million to almost $63 million more than CMC-FM,[11] depending on whether FMMC is financed - which is inconsistent with the CON Act's purpose of "cost containment." More importantly, as noted in counsel's opening statement quoted above, Piedmont intends to fill FMMC with patients from the Greater Rock Hill area, and not Northern York County or Western York County. In his testimony, Piedmont's expert, David Levitt, acknowledged that Piedmont's revised projections and patient origin numbers since its original application had the majority of its proposed patients at FMMC originating from the Greater Rock Hill area, and not from Northern York County, and it decreased its projection of patients originating in Western York County by over 800 patients. (Joint-B-PMC-001.0032; Pet. Ex. 2, 0032; Pet. Ex. 3, 0029; Tr. 849:1-851:9.)

[11] The ALC erroneously found that CMC-FM hospital would cost $79,101,360. (Am. Final Order, Findings of Fact ¶ 9.) The actual project cost is approximately $1.5 million less - $77,532,435. (Joint-A-CHS-001.0966 and 001.0991.) FMMC proposed hospital cost is $119,808,964 or $146,522,042, depending on whether the construction is financed and includes financing costs. (Am. Final Order, Findings of Fact ¶ 10.)

As part of its strategy to protect its market share, Piedmont justified its larger, far more expensive hospital by claiming it would fill FMMC with patients from Greater Rock Hill who should be seen at the existing, underutilized Piedmont Medical Center in Rock Hill.

Piedmont's alternative argument is that CMC-FM will be so well-utilized that it is too small. This argument illustrates perfectly that Carolinas is the applicant best suited to provide accessibility. Carolinas was required, however, to meet the 64-bed need outlined in the State Health Plan. Piedmont's insistence that Carolinas should have transferred beds from another hospital, as Piedmont did, is a new argument that is inconsistent with the position it took throughout the Second Contested Case that it was the only applicant eligible to transfer beds and to build a 100-bed hospital. When asked the specific question, Piedmont's expert David Levitt only identified Piedmont and another South Carolina hospital in Lancaster County as eligible to transfer beds to Fort Mill, and he suggested that Carolinas would have needed to affiliate with a South Carolina hospital to accomplish that transfer. (Tr. 830:6-831:22.)

C. Piedmont's criticism of DHEC is not supported by the evidence.

Piedmont's criticism of Beverly Brandt's experience and credentials at DHEC in a footnote is unwarranted. (Piedmont's Initial Brief, p. 41, n. 9.) Ms. Brandt has a Master's degree in Public Health. Prior to assuming Grice's position at DHEC, she had 22 years of experience in DHEC's Bureau of Radiological Health, where she had extensive experience working with healthcare facilities. (Tr.1375:4-1376:24;1403:5-1404:15.) More importantly, her review of the applications involved others in DHEC, including experienced health care planner Les Shelton who had been engaged in the prior review, as well as others who attended project review and who participated in the

analysis of the applications. (Tr. 1406:13-1407:23.) Piedmont's criticism was not shared by the ALC, who described DHEC staff's review as "thorough and detailed" and concluded that DHEC "properly reviewed and analyzed the applications." (Am. Final Order, Conclusions of Law ¶ 43.)

CONCLUSION

For the foregoing reasons, Carolinas requests that the Court vacate the ALC's Amended Final Order and reinstate DHEC's issuance of the Fort Mill CON to Carolinas. In the alternative, Carolinas requests that the case be remanded to the ALC for a determination of which applicant most fully complies with the requirements, goals, and purposes of the CON Act, the 2004-2005 Plan, Criteria, and other applicable regulations in accordance with the appropriate legal standards discussed above and in Carolinas' Initial Brief.

Respectfully submitted,

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June 12, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

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

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Reply Brief of Appellant*** and ***Designation of Matter to be Included in the Record on Appeal*** by depositing same in the United States Mail with proper postage affixed, addressed as follows:

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The Honorable Jenny Abbott Kitchings
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Re: Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center v. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill
Appellate Case No. 2015-000056

Dear Ms. Kitchings:

Enclosed for filing, please find an original and one (1) copy of each of the following:

(1) Reply Brief of Appellant;
(2) Appellant'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 a copy of the same.

Thank you for your assistance in this matter.

Sincerely,

Moore & Van Allen PLLC

Trudy Hartzog Robertson

Trudy Hartzog Robertson

THR/ws
Enclosures: as stated

cc: Stuart M. Andrews, Esq.
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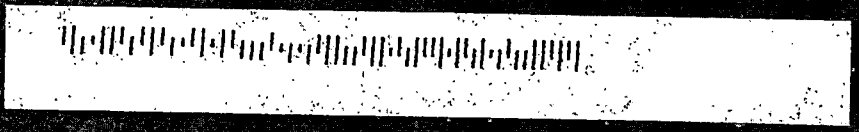

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