

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Carolina Regional Cancer Center, LLC,)
)
 Petitioner,)

Docket No. 11-ALJ-07-0629-CC

vs.)

South Carolina Department of Health and)
Environmental Control and Francis B. Ford)
Cancer Center at Waccamaw Community)
Hospital and Georgetown Hospital System,)
 Respondent.)

**AMENDED
FINAL ORDER AND DECISION
GRANTING CERTIFICATE OF
NEED TO
FRANCIS B. FORD CANCER
CENTER AND CAROLINA
REGIONAL CANCER CENTER, LLC**

Francis B. Ford Cancer Center at Waccamaw)
Community Hospital,)
 Petitioner,)

Docket No. 11-ALJ-07-0639-CC
(consolidated)

vs.)

South Carolina Department of Health and)
Environmental Control and Carolina Regional)
Cancer Center, LLC,)
 Respondents,)

APPEARANCES

James G. Long, III, Esquire; E. Wade Mullins, Esquire; Jennifer J. Hollingsworth, Esquire for Carolina Regional Cancer Center, LLC;

Ashley C. Biggers, Esquire; Vito M. Wicevic, Esquire for Respondent South Carolina Department of Health and Environmental Control; and

Daniel J. Westbrook, Esquire; Travis Dayhuff, Esquire for Respondent Francis B. Ford Cancer Center at Waccamaw Community Hospital and Georgetown Hospital System.

FILED

JUN 10 2015

SC ADMIN. LAW COURT

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (the “ALC” or “Court”) pursuant to requests for a contested case hearing filed by Carolina Regional Cancer Center (“CRCC”) and Francis B. Ford Cancer Center (“Ford”), each challenging the decision by the South Carolina Department of Health and Environmental Control (“DHEC”) to grant a Certificate of Need (“CON”) to the other.

Ford applied for its CON on September 30, 2010, seeking to relocate its linear accelerator from Georgetown to Murrells Inlet, South Carolina in Georgetown County. On March 4, 2011, CRCC filed a CON application seeking DHEC approval to relocate one of its three linear accelerators from CRCC’s radiation therapy center in Myrtle Beach in Horry County to a location in Murrells Inlet in Georgetown County. DHEC reviewed the CON applications of Ford and CRCC at the same time and held a project review meeting at which both projects were presented and considered. On September 26, 2011, DHEC granted CONs to Ford and CRCC. DHEC further determined that the applications were not competing inasmuch as the moves were in the original three county service area (Georgetown, Williamsburg, and Horry). After DHEC approved both applications, CRCC and Ford timely filed requests for contested case hearings, each challenging DHEC’s approval of the other’s applications. The ALC consolidated the cases and a hearing was held over the course of eight days in December 2014.

After hearing the testimony and weighing all the evidence presented at the hearing, the Court finds that both Ford’s and CRCC’s CON applications should be approved.

STANDARD OF REVIEW AND BURDEN OF PROOF

This Court reviews contested case actions *de novo*. Marlboro Park Hosp. v. S.C. Dep’t of Health & Env’tl. Control, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). Petitioner bears the burden of proof by a preponderance of the evidence. Nat’l Health Corp. v. S.C. Dep’t of Health & Env’tl. Control, 298 S.C. 373, 379, 380 S.E.2d 841, 844 (Ct. App. 1989). CRCC bears the burden to prove that DHEC was in error for granting a CON to Ford. Likewise, Ford bears the burden to prove that DHEC was in error for granting a CON to CRCC.

FINDINGS OF FACT

Having carefully considered all testimony and exhibits presented at the hearing and taking into account the credibility of the witnesses and reliability of the evidence, I make the following findings of fact by a preponderance of the evidence.

1. Georgetown Radiation Therapy Center, LLC, d/b/a Francis B. Ford Cancer Center is a limited liability company owned by two members, Georgetown Hospital System ("GHS") and University Medical Associates ("UMA"). Ford applied for its first CON in 1999. After being approved by DHEC, Ford began providing radiation therapy services in 2004. At that time, GHS owned a 99 percent interest in Ford and UMA a one percent interest. By 2010, when Ford applied to relocate its linear accelerator to Murrells Inlet, GHS owned a 90 percent and UMA a 10 percent interest. In 2014 the ownership changed to 51 percent GHS and 49 percent UMA. GHS has the majority of seats on Ford's board of directors. GHS is the LLC's managing member and also manages Ford's operations.

2. Ford operates a single linear accelerator in Georgetown, South Carolina, in a building approximately three miles from Georgetown Memorial Hospital ("Georgetown Memorial"). Ford proposes to move its linear accelerator to the campus of Waccamaw Community Hospital ("Waccamaw") in Murrells Inlet, approximately 21 miles north of its present location in Georgetown.

3. GHS is a private, 501(c)(3)¹ not-for-profit corporation controlled by a 14-member volunteer Board of Trustees.² GHS owns two hospitals: Georgetown Memorial, which opened in 1950, and Waccamaw, which opened in 2002. GHS also owns Georgetown Physician Services, a network of over 40 employed physicians in 15-20 different physician offices.

4. GHS has won a number of awards over the past several years. It has been certified by the Joint Commission in primary stroke, childbirth, and joint replacement, and is accredited by the National Accreditation Program for Breast Centers. Waccamaw was the first hospital in South Carolina and Georgetown Memorial the third to receive the gold standard of care from Baby-Friendly USA, an initiative that the South Carolina Department of Health and Human Services asked South Carolina hospitals to pursue. These clinical programs and initiatives for which GHS

¹ This refers to Section 501(c)(3) of the Internal Revenue Code.

² Joint Exhibit 2 at 101 lists only 13.

has received recognition are particularly important for low income populations in Georgetown and Williamsburg Counties.

5. During the past three years GHS has provided charity care in amounts ranging from \$26-\$29 million annually. In addition to charity care, GHS and its foundation support a number of community programs through donations, fund-raising, and other assistance. Proceeds from these initiatives benefit the community in many ways: providing access to breast cancer care, supporting a free clinic that provides specialty physician services, providing community health screens and health education, supporting a dental clinic's provision of emergency dental care, holding numerous healthcare insurance enrollment fairs, assisting local Federally Qualified Health Centers ("FQHCs") with physician recruitment, and making significant donations to construct a local YMCA and fund its swimming program. In 2013 GHS contributions to such community programs totaled approximately \$893,000.

6. The Medical University of South Carolina ("MUSC" or "Medical University") in Charleston, South Carolina consists of three main elements: a medical school, a hospital, and a physician practice plan.

7. The Medical University, South Carolina's first medical school, was founded in 1826. The Medical University has six colleges: medicine, graduate sciences, dentistry, nursing, health professions, and pharmacy. The Medical University is a state entity.

8. The Medical University Hospital Authority ("MUHA") d/b/a MUSC Medical Center is MUSC's hospital. MUHA is a public entity.

9. University Medical Associates d/b/a MUSC Physicians ("UMA") is MUSC's physician practice plan with approximately 800 physicians. UMA is a 501(c)(3) entity.

10. MUSC provides comprehensive cancer treatment including radiation oncology, medical oncology, and cancer surgery. While these elements of cancer treatment are all available at MUSC, they are not all located in a single building under a single roof.

11. Radiation oncology services at MUSC include five linear accelerators, one gamma knife, high and low dose brachytherapy, and the infusion of radioactive drugs. Approximately 35-40 staff including radiation oncologists, physicists, researchers, dosimetrists, nurses, and therapists provide radiation oncology services at MUSC.

12. MUSC has received the National Cancer Institute's ("NCI") Cancer Center designation. Cancer centers become NCI designated by submitting a lengthy application to a NCI

committee. The NCI committee considers the center's research, grants, and the quality and comprehensiveness of the cancer care the center provides. MUSC's status as a NCI-designated Cancer Center allows MUSC to treat cancer patients with protocols and new drugs that would otherwise not be available.

13. MUSC has a three-part mission: educating in the health sciences; researching to find innovative ways of providing medical care; and delivering clinical services. While MUSC has traditionally accomplished its mission from Charleston, increasingly over the past 20 years MUSC has formed strategic alliances with other hospital systems to expand the areas where MUSC implements its mission.

14. GHS and MUSC are partners in a strategic alliance designed to bring clinical services to the GHS patient origin area⁴ in such fields as telehealth, neuroscience, cardiology, and oncology. The GHS-MUSC alliance has a joint operating council that meets every month and includes GHS's Chief Executive Officer, the MUSC President, and the Dean of MUSC's hospital.

15. GHS and MUSC have identified oncology services as one of the three top priority service lines for their alliance. Ford contracts with MUSC for radiation oncology services.

16. DHEC is a state agency charged with, among other things, implementing South Carolina's CON regulatory program. S.C. Code Ann. § 44-7-140. By statute, DHEC is "the sole agency for control and administration of the granting of [CON] and licensure of health facilities." Id. As part of its duties, DHEC is required to publish, at least every other year, a South Carolina Health Plan, outlining the need for medical facilities and services in the State. The South Carolina Health Plan includes an inventory of existing facilities and services, projections of need for additional facilities and services, standards for distribution of facilities and services, and general statements regarding project review criteria for consideration of CON applications. S.C. Code Ann. § 44-7-180(B). DHEC reviewed both applications correctly.

17. Ford's CON application to relocate its linear accelerator is based on the 2010-2011 South Carolina Health Plan (the "Plan"). The Plan establishes 13 service areas for radiation therapy centers, each consisting of two or more counties. The radiation therapy service area applicable to

⁴ In the testimony this was referred to as "service area," however, for clarity this term will be known as "patient origin area." The term "service area" is a specific term created by the State Health Plan, to be used in this Order to refer to the three county service area (Georgetown, Horry, and Williamsburg) for radiation therapy.

both applications consists of Georgetown, Horry, and Williamsburg Counties. The only two radiation therapy providers currently in this service area are Ford and CRCC.

18. After receiving Ford's application, DHEC made three formal requests to Ford for additional information. Each request contained multiple questions. The first request alone contained at least 20 questions and generated a response from Ford of approximately 150 pages. Ford's health planning expert, David S. Levitt, who has extensive experience working on CON projects in South Carolina, testified that he had never known DHEC to ask three rounds of requests for additional information in any of his past CON projects. On February 7, 2011, DHEC deemed Ford's application to be complete and identified the regulatory criteria, taken from Section 802 of DHEC Regulation 61-15, most important in evaluating the application ("Priority Criteria"). DHEC grouped the Priority Criteria into three ranks, listing the ranks in their order of importance, as follows:

- Rank 1 Community Need Documentation – 2a, 2b, 2d
 Distribution (Accessibility) – 3a, 3b, 3c, 3e

- Rank 2 Acceptability – 4a, 4b
 Record of the Applicant – 13a, 13b
 Distribution – 22

- Rank 3 Financial Feasibility – 15
 Cost Containment – 16a

19. Ford submitted its first CON application for a radiation therapy center in 1999. Since then, several significant changes have occurred. GHS opened Waccamaw in 2002, and it is now larger than Georgetown Memorial. Waccamaw is licensed for 124 acute care beds and 43 acute rehabilitation beds, for a total of 167. Waccamaw staffs 145-150 of its 167 beds. Georgetown Memorial has 131 acute care beds and no rehabilitation beds. Of its 131 beds, Georgetown Memorial staffs approximately 80. Waccamaw's discharges, patient days, occupancy rates, and patient origin area growth is now higher than Georgetown Memorial's.

20. DHEC found and the Court agrees that "dramatic population shifts" have occurred since 1999 in the Georgetown-Horry-Williamsburg County service area. As acknowledged by CRCC's health planning expert, Samuel H. Tolbert, the population is growing more rapidly in Horry County than in Georgetown or Williamsburg Counties. For 2010-2015, the population in Horry County is projected to grow 9.7 percent, compared to 5.6 percent in Georgetown County,

while the Williamsburg County population is projected to decrease 0.4 percent. Horry County's population growth during this period accounts for approximately 10 percent of the population growth statewide.

21. Georgetown Memorial's patient origin area consists of eight zip codes in Georgetown, Williamsburg, and Charleston Counties.⁶ Waccamaw's patient origin area consists of five Horry County zip codes and one zip code, 29585, in Georgetown County.⁷ Zip code 29585, which lies between Murrells Inlet to the north and Georgetown to the south, is part of the Waccamaw patient origin area for three reasons: it is closer to Murrells Inlet than Georgetown, the zip code's highest population density is in its northern portion, and general travel patterns in the area are north, not south.

22. A comparison of population trends in the patient origin areas of the two GHS hospitals is revealing. For 2010-2015 the population in the Waccamaw patient origin area is projected to grow 12.7 percent, compared to 0.9 percent for the Georgetown Memorial patient origin area and 5.9 percent statewide. The majority of radiation therapy patients are over 65 years old. Projected population growth in 2010-2015 for those over 65 is 23.6 percent in the Waccamaw patient origin area, 11.8 percent in the Georgetown Memorial patient origin area, and 20.7 percent statewide. These projections show clearly that the population in the area surrounding Murrells Inlet is growing much faster than in the area surrounding Georgetown.

23. In its 1999 CON application, Ford projected 2004 populations for each county in the three county service area. A comparison of the 2004 projected populations from the 1999 application with the current projections for 2015 is useful:

<u>County</u>	<u>2004</u>	<u>2015</u>
Horry	198,701	291,080
Georgetown	56,276	66,130
Williamsburg	37,372	35,240

The comparison shows that when Ford first applied for a linear accelerator in Georgetown, the projected population distribution among the three counties was much closer than it is in 2015. Since 2004, Williamsburg County has lost population, Georgetown County has sustained a modest growth, while Horry County's population has grown significantly.

⁶ The zip codes are: 29440, 29458, 29510, 29554, 29556, 29580, 29585, and 29590.

⁷ The zip codes are: 29575, 29576, 29577, 29579, 29585, and 29588.

24. In addition to population growth, it is useful for health planning purposes to consider population densities. As Ford's health planning expert, Mr. Levitt, testified, "the more densely populated an area, the more need for services and resources." The area surrounding Waccamaw in Murrells Inlet is much more densely populated than the area surrounding Georgetown Memorial in Georgetown. Approximately 80,000 people live within a ten-mile radius of Waccamaw, even though nearly half the radius area lies within the Atlantic Ocean. By contrast, approximately 29,000 people live within a ten-mile radius of Georgetown Memorial, even though only a small portion of the radius area lies in the ocean.

25. Cancer incidence rates are an indicator of the number of new cancer cases expected in a particular region. From 2000-2007, the average cancer incidence growth rate increased in the Waccamaw patient origin area by 3.3 percent, while in the Georgetown Memorial patient origin area the increase was only 1.96 percent. These rates indicate that more cancer cases per 1000 population can be expected in the Waccamaw patient origin area than the patient origin area for Georgetown Memorial.

26. In 2010, Ford provided services to 376 patients.⁸ Of that number, 192 (51 percent) came from the Waccamaw patient origin area and 137 (36.4 percent) from the Georgetown Memorial patient origin area.

27. In 2010, Ford served 137 patients from the five Horry County zip codes included in the Waccamaw patient origin area, as well as 37 patients from other zip codes in Horry County. All total, therefore, in 2010, 174 of Ford's 376 patients, or 46.3 percent, came from Horry County alone. In 2010, 229 of Ford's 376 patients (60.9 percent) came from Horry County and zip code 29585 (the Pawleys Island zip code lying between Murrells Inlet and Georgetown).

28. For 2013, it is unclear whether 189 or 198 of Ford's patients came from Horry County. The difference, however, is immaterial. If the correct number is 198, then 50.3 percent of Ford's 2013 patients were from Horry County. If the correct number is 189, the total number of 2013 patients shown on Ford Exhibit 155 would be reduced by nine ($198 - 189 = 9$), resulting in 385 total patients ($394 - 9 = 385$), meaning that 49.1 percent of Ford's patients were from Horry County ($189/385 = 49.1\%$).⁹ In addition, Ford served 45 patients in 2013 from zip code 29585.

⁸ Ford's patients include linear accelerator patients, consults, and other types of cancer patients. Ford wanted to include all services rendered in their patient origin data in their CON application. DHEC was represented at the hearing and raised no objection to the manner in which Ford presented this evidence.

⁹ Ford Exhibit 155 shows the following number of patients and percentages for 2013:

Adding those 45 patients to the number of Horry County patients served, whether 189 or 198, would produce a sum well over half of Ford's total patients. Regardless, therefore, of whether Ford served 189 or 198 Horry County patients, a majority of Ford's patients in 2013 came from Horry County and zip code 29585, the same areas where the population growth in the three county region is greatest. Given the population and patient origin data and trends discussed above, Ford's relocation to Murrells Inlet will result in fewer patients being inconvenienced by travel time.

29. CRCC contended at trial that Ford's patient origin data should not be admitted into evidence and relied upon because it is not limited to linear accelerator patients and because it is otherwise flawed. CRCC's contentions are without merit. The inclusion of different types of radiation oncology patients in the data is appropriate, and the data is both reliable and probative.

30. Although a not-for-profit corporation, Ford has economic, as well as other, interests to protect. Opening Ford in 2004 was extremely important to the GHS Board. Provision of a comprehensive system of oncology care is one of GHS's highest priorities. Oncology is a priority service line for the GHS-MUSC alliance. GHS and MUSC have invested significant funds and other resources into the provision of oncology services, through Ford and other initiatives, in the Georgetown-Horry-Williamsburg County service area.

31. Given these interests, as well as the population and patient origin trends described above, Ford decided that a redeployment of its resources to Murrells Inlet was necessary. GHS's Chief Executive Officer, Bruce P. Bailey, first began considering a relocation in 2006-2007. However, CRCC's owner at that time, Dr. Bass, appeared content to keep CRCC's linear

<i>County</i>	<i>Patients</i>	<i>Percent</i>
Georgetown	152	38.6%
Horry	198	50.3%
Williamsburg	31	7.9%
Other	13	3.3%
Total	394	

If the correct number for Horry County were 189, rather than 198, simple math would result in the following:

<i>County</i>	<i>Patients</i>	<i>Percent</i>
Georgetown	152	39.5%
Horry	189	49.1%
Williamsburg	31	8.1%
Other	13	3.4%
Total	385	

accelerators in Myrtle Beach. The competitive landscape changed, however, in May 2010, when 21st Century Oncology, Inc. ("21st Century") simultaneously acquired CRCC and Atlantic Urology Clinics ("Atlantic"). That transaction exacerbated concerns of Ford's leadership that Ford was vulnerable to a competitor in Murrells Inlet, given the population and patient origin trends discussed above. As a result, in 2010 the GHS Board unanimously approved the plan to relocate the Ford linear accelerator to Murrells Inlet. MUSC also supported the relocation. On September 30, 2010, Ford submitted its application to DHEC. It is clear that sufficient financial analysis was done to satisfy DHEC. Likewise, the information in the record is satisfactory to this Court.

32. Comprehensive cancer care¹⁰ is multidisciplinary cancer care provided by radiation oncologists, medical oncologists, surgical specialists, and other ancillary providers. Providing comprehensive cancer care at a single location facilitates coordination, consultation, and communication among cancer providers, and it is convenient for patients.

33. Centers that provide comprehensive cancer care have more opportunities than centers that provide only radiation treatments to offer patients access to clinical trials, as most clinical trials require both radiation and medical oncology.

34. Co-locating a center that provides comprehensive cancer care with an acute care hospital provides cancer patients with convenient access to the full range of health care services provided at the hospital.

35. Ford's proposed center in Murrells Inlet will provide comprehensive, multidisciplinary cancer care.

36. Ford's Murrells Inlet center will have a new TrueBeam linear accelerator,¹¹ a CT simulator, high dose brachytherapy equipment, and treatment planning. In addition to housing the radiation treatment equipment, the Ford center's building will also have spaces designated for physician offices, conference rooms for tumor boards and peer review conferences, and a cancer products shop that will provide prostheses, wigs, scarves, caps, and specialized soaps and deodorants.

¹⁰ The proposed Ford center at Waccamaw has not been designated by NCI as a Comprehensive Cancer Center. The use of the term "comprehensive" is to suggest complete or inclusive, and not to suggest any designations or certifications.

¹¹ The linear accelerator at Ford's center in Georgetown is over 10 years old and it lacks the capabilities of newer accelerators at MUSC.

37. The Ford center will be attached via covered walkway to a building with the following: an infusion center where medical oncologists will provide chemotherapy; imaging modalities including mammography, x-ray, ultrasound, MRI, CT, and PET CT; and offices for cancer surgeons and specialists. The Ford center will also be adjacent to a building that houses an OB/GYN group.

38. Ford's center in Murrells Inlet will be located across the road from Waccamaw Community Hospital as part of the Waccamaw campus,¹² making the full range of Waccamaw's hospital services available to patients including: emergency department services; surgery, including low dose brachytherapy; imaging; and other services.

39. Ford's Murrells Inlet center will have staff called "navigators" available to assist cancer patients who need to move from one building to another on the Waccamaw campus to receive the various elements of their cancer care.

40. Because Ford's proposed center at Murrells Inlet will provide comprehensive cancer care on the campus of an acute care hospital, Ford's Murrells Inlet center will be a better location with respect to patient care and patient convenience than Ford's Georgetown center.

41. The Georgetown Community Care Network (the "Network") is an organization that assists poor and uninsured persons obtain access to health care. The Network serves persons residing in the patient origin areas of Georgetown Memorial and Waccamaw. The Network recently received the Jackson Health Charitable Services Award as a "Program of Promise."

42. The Network's mission is funded by a \$500,000, two-year grant from the Duke Endowment, an approximately \$200,000 per year investment by GHS, an award of \$192,000 from the Department Health and Human Services for the current year, and yearly donations from the Georgetown Hospital Foundation.

43. The Network includes hospital partners (discharge planners, cancer care navigators, and emergency room staff at Georgetown Memorial and Waccamaw); medical safety net partners (Smith Free Clinic and St. James-Santee and Little River Medical Center FQHCs); community partners (organizations like Helping Hands that provide food, shelter, and clothing); behavioral health partners (Waccamaw Mental Health and Georgetown Commission on Alcohol and

¹² Ford's center in Georgetown is located three miles away from the nearest hospital, Georgetown Memorial.

Substance Abuse); and physician partners employed by GHS's physician practice plan, the free clinic, and the FQHCs.

44. The Network helps poor and uninsured persons obtain access to providers of primary care, behavioral health, and specialty care, including cancer treatment. The Network also provides transportation to get persons to locations where this medical care is provided.

45. Requests for assistance from the Network are processed by six staff members employed by GHS. These staff members assess the needs of the individual, develop care plans, and connect the individual with the appropriate Network partner to provide the assistance needed. Thereafter, the individual's case remains open for at least a year for additional care coordination that may be needed. There is no charge for this care coordination.

46. The Network has established a transportation committee that is referred to as the "transportation collaborative." There are eleven members of the transportation collaborative that meet every six weeks to work on medical transportation issues.

47. The Network's transportation collaborative has the following resources available to provide persons in Georgetown, Horry, and Williamsburg Counties with transportation to cancer care: volunteer drivers from Neighbor-to-Neighbor (170 drivers), Assisted Rides (50 drivers), and the American Cancer Society; LogistiCare, a Medicaid transportation provider; and Med-Sure, an ambulance service. Transportation for cancer care makes up approximately 10% of the volume of transportation provided by the Network's transportation collaborative.

48. If the transportation resources described above are not available, the Network's transportation collaborative has the following back-up resources available to provide transportation to cancer care: taxi vouchers, gasoline cards, and rides provided by the Network's staff.

49. The Network's transportation collaborative is currently satisfying the demand in Georgetown, Williamsburg, and Horry Counties for assistance with transportation to cancer care, and as of the date of this trial, no individual who has sought assistance from the Network had to miss a cancer treatment for lack of transportation to a cancer care provider.

50. The Network's transportation collaborative is currently working on the following initiatives: a new transportation guide that will be disseminated by the Network's partners and be available on the GHS website; developing incentive programs to increase volunteer drivers; and expanding the St. James-Santee FQHC's transportation services to include transportation to other

providers, including cancer care. The second and third initiatives described above are part of the transportation collaborative's planning to address the expected increased need for transportation services in the future, including the increased need generated by the Ford center moving from Georgetown to Murrells Inlet.

51. Moving the Ford center from Georgetown to Murrells Inlet will not result in poor and uninsured persons in Georgetown and Williamsburg Counties losing access to cancer care as the Network's transportation collaborative operates a robust system of transportation from these areas to medical care on the Waccamaw Neck, also known as the Murrells Inlet and Pawley's Island areas.

52. Moving the Ford center from Georgetown to Murrells Inlet will not result in poor and uninsured persons in Georgetown and Williamsburg Counties losing access to cancer care because the Network's transportation collaborative will continue to function and will expand its transportation services that provide access to medical care including cancer care. Moreover, even after the relocation, GHS-employed physicians will continue to provide medical oncology, chemotherapy, and breast surgical services in Georgetown, in the same building where Ford currently operates. Ford has not ruled out providing radiation services in Georgetown after relocating its linear accelerator to Murrells Inlet. To do so, Ford would have to obtain another CON for a second linear accelerator. Ford would not have to build a new vault in Georgetown, however, as its current vault will remain in the same building in which it is currently located. Even if radiation therapy services are not brought back to Georgetown, the vault could be used for High Dose Radiation ("HDR") services.

53. CRCC's expert health planner, Mr. Tolbert, opined that if the Ford center were to move to Murrells Inlet, the Network would not be able to satisfy the needs of underserved patients in Georgetown and Williamsburg Counties for transportation to cancer treatment. Tolbert's opinion is based primarily upon Tolbert's belief that the volunteer drivers are unreliable. The Court finds that this opinion is not persuasive as it is not based upon credible analysis or evidence. Moreover, this opinion ignores the Network's successful record of providing transportation to cancer treatment, and it fails to appreciate that volunteer drivers are not the Network's only transportation resource.

54. Approximately 85 letters of support for Ford's application were submitted to DHEC.¹³ No letters of opposition were submitted. Ford's health planning expert, Joel C. Grice, who worked in DHEC's CON program for over 29 years, testified that while some of the letters had questionable wording, most were "very good" in quality. Grice further testified that DHEC has never required a minimum number of support letters for a CON application. Ford's health planning and finance expert, Mr. Levitt, who has worked on 450-500 CON applications in approximately 15 states, testified he had never known of a CON application being denied for lack of support letters. The Court finds that the majority of Ford's support letters were acceptable.

55. Ford's application projects total project costs of \$11,523,451. These costs are comparable to other radiation therapy CON applications recently approved by DHEC. Ford's proposed building is larger than CRCC's proposed building.¹⁴ Ford's cost per square foot is also consistent with other CON applicants. For example, Ford's total cost per square foot is slightly lower than the cost per square foot that CRCC projects for its linear accelerator relocation project (\$1156 for Ford, \$1160 for CRCC), while Ford's construction and equipment cost per square foot is significantly lower than CRCC's (\$806 for Ford, \$948 for CRCC).

56. Ford's project cost includes \$4,298,652 for the cost of a new linear accelerator. Ford's current linear accelerator is over ten years old, even though the average useful life for such equipment is seven years. Even if Ford does not relocate, therefore, it intends to purchase a new linear accelerator. From a cost containment or operational standpoint, it would make no sense for Ford to buy a new linear accelerator, install it in its Georgetown site, then move and reinstall it in Murrells Inlet. Regardless, therefore, of whether its CON is approved, Ford will spend approximately \$4.3 million for a new linear accelerator. While Ford's proposed building project is more expensive than CRCC's proposed building project, Ford's proposed building will be larger than that of CRCC's proposed building.

57. DHEC cautioned GHS to be conservative in projecting costs for CON projects. Mr. Grice testified that during the years he supervised the CON program, CON applicants were advised to make sure their projected costs were sufficient to cover actual costs, since DHEC often exercised its authority to impose significant fines for cost overruns. As an example of Ford's conservative

¹³ Approximately 75 of the letters were found in sequence in the digitized record of Joint Exhibit 2. The remainder were found at different locations thereafter.

¹⁴ CRCC's proposed building will be approximately 6,893 square feet. Ford's proposed building will be approximately 9,971 square feet.

approach to cost projections, equipment costs in the relocation CON application are projected at list price, rather than at a negotiated discount price.

58. During its first five years of operation in Murrells Inlet, Ford projects a steady annual increase in net revenue, going from approximately \$6 million in year one to \$7.6 million in year five. Nevertheless, during its first four years of operation in Murrells Inlet, Ford projects its expenses will exceed revenues. It is not unusual for new healthcare projects to incur losses at their outset. Ford's projected losses decline each year, going from a \$530,008 loss in year one to an \$81,879 loss in year four. In year five, Ford projects excess revenue over expenses of \$5,299. The GHS Board was fully aware that the proposed relocation would lose money in its first few years of operation, yet unanimously approved the project.

59. Earnings Before Interest, Depreciation, Taxes, and Amortization ("EBIDTA") is the difference between net revenue and operating expenses and represents the cash flow of a venture. Ford projects EBIDTA that increases each of its first five years of operation, going from over \$930,000 in year one to approximately \$1.46 million in year five.

60. Ford's application offered several alternative sources of funding: operating income, cash resources, existing lines of credit, insurance of debt, investments, and funded depreciation. GHS has \$91.3 million in funded depreciation investments. GHS has \$190 million in cash and cash equivalents and has an "A" bond rating from Moody's. As a result, it is unlikely GHS would incur debt to pay for the \$11.5 million relocation project. Nevertheless, GHS chose to take a conservative approach in its pro forma budget, imputing interest costs for Ford of over \$400,000 per year out of "an abundance of caution."¹⁵

61. Another conservative measure that Ford took was to include corporate overhead in its pro forma budget. While there is no requirement for including corporate overhead, inclusion is a more conservative approach that increases expenses and negatively affects the bottom line.

62. Excluding imputed interest and corporate overhead from Ford's pro forma budget would have been acceptable to DHEC. Had Ford excluded these costs, its pro forma budget would have looked quite different. Instead of losses it would have shown excess revenue over expenses in year one of \$455,000, in year two of \$787,000, and in year three of \$873,000.

¹⁵ Both Ford's health planning and finance expert, Mr. Levitt, and 21st Century's CFO, Richard Lewis, testified that Generally Accepted Accounting Principles ("GAAP") do not require imputed interest for non-incurred costs. For this reason, CRCC did not include imputed interest in its financial projections.

63. CRCC's health planning expert, Mr. Tolbert, criticized Ford's relocation project as a poor investment. However, Tolbert's investment analysis rests on a series of flawed assumptions. He assumes Ford will provide charity care equal to 3.48 percent of its gross revenue, but that is the percentage of charity care provided by Waccamaw Community Hospital, not Ford, which projects charity care of 2.2 percent of gross revenue. Tolbert also assumes Ford will require variable staffing and projects the hiring of additional staff. Fixed staffing, however, at the numbers set forth in Ford's application is sufficient for Ford's project. Finally, Tolbert incorrectly depreciates imputed interest and miscalculates Ford's physician fees. As a result of these flawed assumptions, Tolbert's criticisms are unfounded.

64. Ford's relocation to Murrells Inlet will not have a material adverse impact on CRCC, currently the only other radiation therapy provider in the three county service area, either as presently located or if CRCC relocates one linear accelerator to Murrells Inlet. As an initial matter, CRCC is an entrenched provider, having been in operation in Myrtle Beach since 1980. Although CRCC's ultimate parent company is 21st Century, its direct parent is Atlantic, which employs the urologists from whom 21st Century acquired Atlantic in 2010.¹⁶ Atlantic is the only urology practice in Georgetown, Williamsburg, and Horry Counties. Urologists are the primary referral source to radiation therapy centers for prostate cancer patients. Since 2010, when 21st Century simultaneously acquired Atlantic and CRCC, referrals by Atlantic urologists have accounted for 28-36 percent of CRCC's treatment volume.

65. The current South Carolina Health Plan (2012-2013) shows that in 2011, the most recent year for which data is provided, CRCC performed more linear accelerator treatments than any other radiation therapy provider in the state. Since 2010, when 21st Century acquired CRCC and Atlantic, CRCC's annual utilization rate has been substantial. During that same period (2010-2013), CRCC's market share in the three county service area has ranged from 77-81 percent. Given CRCC's longstanding presence in the region, its built-in stream of referrals from Atlantic urologists, and its strong utilization rate and market share, any impact from Ford's relocation will be insignificant. In 2010, CRCC's treatment volume was 20,946, which then peaked in 2011 with 25,709 treatments, and then declined to a 2013 volume of 22,134.

¹⁶ The urologists owned Atlantic Urology Clinics, PA. After acquiring it, 21st Century converted it to an LLC.

66. Petitioner CRCC is a for-profit corporation that provides radiation therapy services in Myrtle Beach, South Carolina. CRCC formerly was owned by Dr. Steve Bass, but in May 2010, Dr. Bass sold the company to 21st Century, a for-profit corporation headquartered in Florida. Simultaneously with its acquisition of CRCC, 21st Century acquired Atlantic. Atlantic is the only urology practice in Georgetown, Horry and Williamsburg Counties.

CRCC is a freestanding radiation therapy facility that currently operates three linear accelerators at its main campus in Myrtle Beach, South Carolina. CRCC is a subsidiary of 21st Century, which is an integrated cancer care provider that owns and operates more than 150 radiation therapy facilities in the United States and employs approximately 175 radiation oncologists, in addition to affiliations with over 600 additional non-radiation therapy medical specialists in 16 states. 21st Century acquired CRCC in May 2010, and since the acquisition has upgraded imaging equipment on one linear accelerator and replaced a second linear accelerator, as well as added high dose radiation therapy to the Center.

67. Radiation therapy is one of several treatment modalities available to persons diagnosed with cancer, along with chemotherapy and surgery. The most common form of radiation therapy is external beam radiation delivered by a linear accelerator machine. One visit to the radiation therapy center to receive radiation is a single treatment. Treatments are delivered over a period of time, varying from as little as three weeks to up to eight or even nine weeks of treatment. Palliative treatments, given as comfort care for terminal cancers, typically have shorter treatment plans, while curative treatments have longer treatment plans. Lung cancer, prostate cancer, and breast cancer typically have longer treatment plans extending more than six weeks. Because treatment is delivered daily, having services accessible to the patients is of critical importance.

68. By letters dated September 26, 2011, DHEC decided that a CON should issue to both CRCC and Ford. DHEC determined that the Applications of CRCC and Ford were not competing, because neither Applicant proposed to add a new linear accelerator machine to the service area.

69. In both letters, DHEC based the decision on the following

1. The applicant has adequately documented the need for the project within the application
2. The project will increase accessibility and availability of radiation therapy services to the identified service area;
3. The applicant's record is one of successful operation with adequate management experience; and

4. The applicant has demonstrated this project to be financially feasible based upon the information available.¹⁸

70. On November 14, 2011, the DHEC Board declined to conduct a Final Review Conference on either party's request for review.

71. CRCC currently operates three linear accelerator machines in its Myrtle Beach center, a tomotherapy machine and two conventional linear accelerator machines. In 2013, CRCC provided 22,134 treatments, which represents not less than 85.8% of planning capacity.

72. The philosophy of 21st Century is to distribute services into the service area closer to patients, with the belief that providers are healthy and should bear the inconvenience of travel, as opposed to the sick cancer patients. Promptly upon acquisition of CRCC by 21st Century, CRCC began investigating options for distributing the three existing linear accelerators into the community served by the center. With the assistance of local health planners, CRCC analyzed its patient origin data and concluded that a substantial portion of the existing patients resided in the Murrells Inlet area, defined by CRCC and its health planner to be the zip codes of 29575 (Surfside), 29576 (Murrells Inlet), 29585 (Pawley's Island), and 29588 (Socastee). Very few CRCC patients reside south of Pawley's Island. CRCC's expert performed an analysis of the drive times for each of the zip codes in the entire service area and determined that CRCC's patients in the four identified Murrells Inlet area zip codes would be better served by its linear accelerator located in Murrells Inlet, as compared to traveling to the existing machines clustered in Myrtle Beach.

73. In support of its CON application, CRCC documented that 29% of the service area patients treated during the six months following 21st Century's acquisition of CRCC originated from the Murrells Inlet area. In light of the growing population base in the same area, I find that CRCC identified an appropriate target population to relocate an existing machine to a center in Murrells Inlet which would be in the best interests of a significant portion of its existing patients.

74. Concurrently with the filing of the CON application under review, CRCC applied for and was approved to expand its existing linear accelerator services in the service area with the addition of a linear accelerator in Conway, South Carolina. With the addition of this fifth linear accelerator in the service area and the relocation to Murrells Inlet, linear accelerator services will

¹⁸ In the letter to Ford, Number 4 read: "The applicant has demonstrated this project to be financially feasible based on the information provided for the Georgetown Hospital System." (Emphasis Added).

be available to the major population centers in the service area. The 2013 population distribution by zip code supports this distribution of services within the service area.

75. Mr. Tolbert confirmed that CRCC only assumed 80% of the Murrells Inlet area patients would redirect to the proposed new location, with 20% continuing to use Myrtle Beach or choosing the future Conway machine. Mr. Tolbert's comprehensive drive time analysis, having reviewed each zip code in the three county service area, reasonably concluded that, for the four zip codes in the Murrells Inlet area, a 31% reduction in drive time is experienced by those residents with a linear accelerator machine in Murrells Inlet. I find that Mr. Tolbert's forecast is reasonable and appropriate for purposes of establishing sufficient need to support the relocation of one of CRCC's three machines to Murrells Inlet.

76. In 2013, CRCC served 211 patients in the four Murrells Inlet area zip codes. This number is substantially higher than the partial year 2010 experience underlying the need analysis in the CON Application. I find that 211 patients is a substantial and sufficient patient base to support CRCC's relocated linear accelerator and that the remaining two linear accelerators will have capacity to support the patients in the existing location. However, this does not adversely affect the relocation proposed by Ford.

77. CRCC's freestanding radiation therapy centers work collaboratively with area specialists and related modalities as part of its integrated cancer care model. CRCC's radiation therapists participate in several tumor boards at the area hospitals to collaborate in comprehensive cancer care. CRCC has data links with area hospitals for facilitation of comprehensive cancer treatment for patients. CRCC also participates in clinical trials through 21st Century's Research Department.

78. CRCC's proposed location for the construction of the freestanding radiation therapy facility to house the relocated and replaced linear accelerator is less than one mile from Waccamaw's campus. By virtue of its location, CRCC's patients will have access to a number of ancillary services, including radiology, medical oncologists, surgeons, and related services important for comprehensive cancer care. The CRCC radiation oncologists will continue to provide interdisciplinary care at the tumor board meetings at Waccamaw. Having radiation therapy treatment offered in a free-standing center just one mile from an acute care hospital offers the co-location of cancer services that is beneficial to patient care. I find that these facts establish that the relocation of one of three machines from Myrtle Beach to Murrells Inlet by CRCC and the

relocation of Ford to Murrells Inlet is a proper distribution of linear accelerator services to best suit the public needs in the radiation therapy service area.

79. I find that CRCC has a record of successful operation with adequate management experience.

80. I find that CRCC's financial pro formas evidence that CRCC's project is financially feasible as determined by DHEC. Ford's expert agreed that CRCC's project is financially feasible.

81. CRCC's project is based primarily on its current patient distribution and the improvement in access offered to its Murrells Inlet area patients with the relocation of one linear accelerator from Myrtle Beach to Murrells Inlet. CRCC's proposal does not eliminate services in Myrtle Beach, leaving two linear accelerators to serve that population center. CRCC's project does not rely on any shift in referral patterns and CRCC projects no adverse impact to Ford from the relocation.

82. Radiation therapy is a service overwhelmingly based on physician referrals. Since the filing of the CON Applications, GHS or its partner, MUSC, have employed approximately two-thirds of their referral sources and therefore those patient referrals are "locked in" and would not be at risk. With the employment of Dr. Brackett's group and Waccamaw Oncology after the filing of these proceedings, the potential impact of a CRCC machine in Murrells Inlet on Ford is minimal, even if Ford relocates to Murrells Inlet.

83. Both parties asserted numerous shortcomings in opposition to the CON application of the other which include generally, the following:

- a. By CRCC: Ford lacked proper adverse impact analysis; Ford included "Consults" and other cancer patients as "treatments"; discrepancy in patient origin data; travel and transportation issues; burden on underserved groups; Roper case implication; financial analysis and outlook; lack of comprehensive care result and letters of support; and fails distribution project review criteria 22.
- b. By Ford: referrals by employed urologists; move by CRCC was to counter Ford's relocation; service not as comprehensive; adverse impact on Ford; fails community need criteria; and fails distribution project review criteria 22.

While some of the assertions have some evidentiary support, none of these assertions is supported by the greater weight of the evidence, and therefore the Court rejects them. Moreover, these assertions, even if established, would not be sufficient to overcome the broader view derived

from consideration of the testimony and evidence as a whole, and upon which I find and conclude that the relocation sought by both applicants to a rapidly growing area (where both have a substantial patient base) at, or near, the campus of Waccamaw, will best serve the citizens of the state in general and the residents of the three county service area in particular.

84. To the extent that any Finding of Fact set forth herein is deemed not to be a Finding of Fact but a Conclusion of Law, may it be deemed as such.

CONCLUSIONS OF LAW

Based upon the above findings of fact, the Court concludes the following as a matter of law:

1. The ALC has jurisdiction over this contested case proceeding pursuant to S.C. Code Ann. § 44-1-60(F) and § 1-23-600(A). In DHEC permitting cases, the Administrative Law Judge is the finder of fact. Brown v S.C. Dep't of Health & Env'tl. Control, 248 S.C. 507, 560 S.E.2d 410. This Court's review of a DHEC decision on a CON application is *de novo*. Marlboro Park Hosp. v. S.C. Dep't of Health & Env'tl. Control, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004).

2. The State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110 to -394 ("CON Act"), requires a person or health care facility to obtain a CON before undertaking an expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000). S.C. Code Ann. §§ 44-7-130(3) (2002); 3 S.C. Code Ann. Regs. 61-15 § 102(1)(c).

3. DHEC is responsible for administering the CON program in South Carolina. S.C. Code Ann. § 44-7-140. As such, DHEC's duties include promulgating regulations, S.C. Code § 44-7-150(3), and preparing a South Carolina Health Plan, S.C. Code Ann. § 44-7-180(B).

4. DHEC promulgated Regulation 61-15 in order to administer the CON program to achieve the purpose of the CON Act. Regulation 61-15 § 802 sets forth 33 project review criteria applicable to CON applications. These criteria fall into five general categories: (1) need for the proposed project; (2) economic considerations of the project; (3) the project's impact on the resources of the health care system; (4) suitability of the site of the project; and (5) certain special circumstances. 3 S.C. Code Ann. Regs. 61-15 §§ 801-802. During the application review process, DHEC establishes the relative importance of these project review criteria and notifies each applicant of the ranking. 3 S.C. Code Ann. Regs. 61-15 §§ 304, 801(2). While a project does not have to satisfy every project review criterion to be approved, no project may be approved unless it is consistent with the South Carolina Health Plan. 3 S.C. Code Ann. Regs. 61-15 § 801(3).

5. In determining whether to grant or deny a CON application, DHEC evaluates the proposed project under the project review criteria found in Regulation 61-15 § 802 and under the policies and standards in the applicable South Carolina Health Plan. S.C. Code Ann. § 44-7-210(C). Pursuant to the CON Act, the Department may not issue a CON to an applicant “unless the application complies with the South Carolina Health Plan, Project Review Criteria, and other regulations.” S.C. Code Ann. § 44-7-210(C).

6. At the contested case hearing before this Court, the issues to be considered are limited to those presented to or considered by DHEC during the staff review and decision-making process. S.C. Code Ann. § 44-7-210(E). As long as no new issues are considered in these contested case proceedings, any evidence pertinent to the issues considered by DHEC staff may be considered by this Court. Marlboro Park Hosp. v. S.C. Dep’t of Health & Envtl. Control, 358 S.C. 473, 578-79, 595 S.E.2d 851, 854 (Ct. App. 2004).

7. This Court must consider the South Carolina Health Plan in effect at the time the CON applications were filed and may also consider the South Carolina Health Plan in effect at the time of this decision. S.C. Code Ann. § 44-7-225. Thus, this Court must consider the 2010-2011 South Carolina Health Plan and may also consider the 2012-2013 South Carolina Health Plan.

8. DHEC determined that Project Review Criteria 2a, 2b, and 2d (Community Need Documentation); 3a, 3b, 3c, and 3e (Distribution (Accessibility)); 4a and 4b (Acceptability); 13a and 13b (Record of the Applicant); 22 (Distribution); 15 (Financial Feasibility); and 16a (Cost Containment) were determined to be most important in the review of the CRCC and Ford CON Applications.

8. CRCC and Ford have timely filed a request for contested case hearing challenging DHEC’s approval of their respective CON applications. As a result, each party bears the burden of proof in its contested case. Leventis v. S.C. Dep’t of Health & Envtl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue). To succeed, therefore, each must prove by a preponderance of the evidence that its opponents application should be denied. Anonymous v. State Board of Med. Exam’rs, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding that the standard of proof in an administrative proceeding is generally the preponderance of the evidence); Nat’l Health Corp. v. S.C. Dep’t of Health & Envtl. Control, 298

S.C. 373, 379, 380 S.E. 2d 841, 844 (Ct. App. 1989) (stating that the preponderance of the evidence standard applies in CON disputes).

9. The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trial judge who observes a witness is in the best position to judge the witness's demeanor and veracity and to evaluate the credibility of his testimony. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Milliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

10. Under Rule 702 of the South Carolina Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." An expert is granted wide latitude in determining the basis of his opinion, and where an expert's testimony is based upon facts sufficient to form an opinion, the trier of fact must weigh its probative value. Small v. Pioneer Mach., Inc., 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997).

11. "[E]xpert testimony is essential in cases which involve a subject of special technical science, skill, or occupation of which the members of the jury or the trial court are not presumed to be specially informed." 32A C.J.S. Evidence § 729, at 85 (1996). In general, "expert opinion evidence is to be considered or weighed by the triers of facts like any other testimony or evidence ... [;] the triers of fact cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding to the contrary of the opinion." 32A C.J.S. Evidence § 727, at 82-83 (1996). However, the trier of fact may give an expert's testimony the weight he or she determines it deserves. Florence County Dep't of Soc. Servs. v. Ward, 310 S.C.69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). Further, the trier of fact may accept the testimony of one expert over that of another. S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 417 S.E.2d. 586 (1992).

12. The CON Act defines "competing applicants" as follows:

"Competing applicants" means two or more persons or health care facilities as defined in this article who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame as established by department regulations and whose applications, if approved, would exceed the need for services or facilities.

S.C. Code Ann. § 44-7-130(5). The service areas referenced in Section 130(5) are developed by the health planning committee and DHEC staff, and they are ultimately approved by the DHEC Board and published in the State Health Plan. S.C. Code Ann. § 44-7-180.

13. If CON applications are competing as defined by the CON Act, DHEC is authorized – and this Court standing in the shoes of DHEC is authorized – to approve only one CON application. S.C. Code Ann. § 44-7-210(B) (“In the case of competing applications, the department shall award a Certificate of Need, if appropriate, on the basis of which, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by the department. . .”).

14. If, on the other hand, CON applications are not competing under the CON Act, DHEC is authorized – and this Court is authorized – to review the CON applications individually and grant CONs to all the applications that satisfy the State Health Plan standards and the Project Review Criteria. *Id.* (“The department may not issue a Certificate of Need unless an application complies with the South Carolina Health Plan, Project Review Criteria, and other regulations.”).

15. CRCC’s expert health planner, Mr. Tolbert, opined that the CON applications of Ford and CRCC are competing because Ford and CRCC propose to relocate linear accelerators to Murrells Inlet.¹⁹ This opinion contradicts the opinion Tolbert previously provided to CRCC.

16. Ford’s expert health planners, Mr. Grice and Mr. Levitt, opined that Ford and CRCC are not competing applicants under the CON Act because the proposed projects are relocations of existing services within the service area that will not exceed the need for linear accelerator services. DHEC also concluded that Ford and CRCC were not competing applicants during staff review of these applications. The Court agrees with Ford and DHEC.

17. The relevant service area provided by the State Health Plan for the CON applications at issue in this case is Georgetown, Williamsburg, and Horry Counties. 2010-2011 South Carolina State Health Plan at IX-8. The relevant service area is not Murrells Inlet.

18. Because Ford and CRCC propose to *relocate* linear accelerators that are already operating in the service area rather than *add* linear accelerators to the service area, these relocations do not change the need for services in the service area or the linear accelerator capacity in the

¹⁹ To the extent CRCC claims that Ford concedes the CON applications are competing in a response to a request to admit, this claim is rejected as a fair reading of Ford’s response reveals no such concession. This claim is also rejected because Ford unambiguously states Ford’s position that Ford and CRCC are not competing applicants elsewhere.

service area. Therefore, approving both CON applications cannot “exceed the need” for linear accelerator services in the three county service area, and Ford and CRCC are not competing applicants under the CON Act. S.C. Code Ann. § 44-7-130(5).

19. As Ford and CRCC are not competing applicants, the Court must review the CON applications individually to determine whether one or both satisfy the State Health Plan standards and the Project Review Criteria.

20. The applicable CON regulation provides as follows:

If an applicant amends or alters his project after receipt of a Certificate of Need, the Department will decide whether or not the amendment is substantial and thereby constitutes a new project.

3 S.C. Code Ann. Regs. 61-15 § 605. A finding that a project has substantially changed requires the CON applicant to start the CON process over again with the filing of a new CON application.

21. Before trial CRCC filed a motion for summary judgment asserting that UMA increasing its ownership in the LLC that owns Ford from 10% to 49% and UMA/MUSC becoming the manager of operations at Ford are substantial changes requiring a remand to DHEC. The Court denied this motion.

22. CRCC’s expert health planner, Mr. Tolbert, opined that DHEC should be notified when the ownership of a CON applicant changes and when the entity managing the operations of a CON applicant changes. Tolbert did not opine that UMA’s increased ownership interest in Ford constitutes a substantial change, and instead offered that an ownership change that does not change the identity of the majority owner with controlling interest in the CON applicant “may or may not be an issue for DHEC.”

23. Ford’s expert health planners, Mr. Grice and Mr. Levitt, opined that UMA’s increased ownership in the LLC that owns Ford is not a substantial change for CON purposes because this ownership change did not change GHS’s status as the majority owner with the controlling interest in Ford. Both Grice and Levitt also opined that changing the entity that will manage the operations of a facility is not a substantial change, and such a change would not trigger an obligation to notify DHEC.

24. To the extent that CRCC continues to contend that UMA’s increased ownership in Ford is a substantial change for CON purposes, the Court rejects this claim. This change in ownership is not substantial for CON purposes because it did not change GHS’s position as the

majority owner with a controlling interest in Ford. 3 S.C. Code Ann. Regs. 61-15 § 202(2)(d)(9) (CON applicant must provide assurance in the CON application “[t]hat the controlling interest in any health care facility shall not be sold or leased or otherwise disposed of unless the Certificate of Need has been fulfilled.”). I conclude that this transfer of interest is not substantial for CON purposes.

25. While there was testimony that UMA and/or GHS have considered having UMA or another party manage the operations at Ford instead of GHS, it is undisputed that there has been no actual change in Ford’s management, nor has a decision been made to make a change. As there has been no actual change in management, there can be no substantial change in management.²⁰

26. The purposes of the CON Act are “to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State.” S.C. Code Ann. § 44-7-120. Cost containment is addressed below in the Court’s conclusions regarding Criterion 16a, which Ford’s application satisfies. In addition, Ford’s projected costs are consistent with those of recent and similar CON projects approved by DHEC. The Ford application is not an unnecessary duplication, as addressed below in the Court’s conclusions regarding Criteria 3a and 3b, which Ford’s application satisfies. Ford’s project will serve public needs, as addressed below in the Court’s conclusions regarding all the Priority Criteria, but especially Criteria 2d, 3b, 3c, and 22, all of which Ford’s application satisfies. In addition, Ford’s project will serve public needs by offering patients the alternative of receiving services from a comprehensive, multidisciplinary cancer care provider affiliated with a major academic medical center and the resources it provides. The project ensures the provision of high quality health services, as addressed below in the Court’s conclusions regarding Criteria 2d, 3c, and 22, all of which Ford’s application satisfies.

27. Ford’s application complies with all radiation therapy standards in the 2010-2011 South Carolina Health Plan except for standards 3, 4, 6, and 7, which are not applicable to Ford’s project.

28. Criterion 2a provides: “The target population should be clearly identified as to the size, location, distribution and socioeconomic status (if applicable).” Ford clearly identified the

²⁰ Even if the change in the management that was considered had been implemented, the Court agrees with Grice and Levitt that such a change would not be a substantial change for CON purposes.

target population as those living in Georgetown, Horry, and Williamsburg Counties. Ford submitted detailed information about this population's size, location, distribution, socioeconomic status, projected growth, population densities, and cancer incidence rates. Ford also submitted detailed evidence showing that the majority of its patients within the three county service area would originate from the Waccamaw patient origin area. Ford satisfies Criterion 2a.

29. Criterion 2b provides: "Projections of anticipated population changes should be reasonable and based upon accepted demographic or statistical methodologies, with assumptions and methodologies clearly presented in the application. The applicant must use population statistics consistent with those generated by the state demographer, State Budget and Control Board." The most rapid area of population growth in the three county service area is Horry County and the Waccamaw patient origin area. This is also the area of the greatest population density and highest cancer incidence rates. Ford satisfies Criterion 2b.

30. Criterion 2d provides: "In the case of a reduction, relocation, or elimination of a facility or service, the applicant should address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underserved groups, to obtain needed health care."

31. The patients currently served by Ford's center in Georgetown will continue to be served by a Ford center in Murrells Inlet. More particularly, the evidence establishes that Ford's center in Murrells Inlet will be closer to the majority of the patients that currently receive linear accelerator treatments in Georgetown.

32. Low income persons and other underserved groups without adequate transportation resources will not lose access to cancer care as a result of this relocation because the Georgetown Community Care Network has established a robust system that provides, and will continue to provide, transportation to Murrells Inlet for cancer treatment. Ford satisfies Criterion 2d.

33. Criterion 3a provides: "Duplication and modernization of services must be justified. Unnecessary duplication of services and unnecessary modernization of services will not be approved." Ford's project is neither unnecessary nor duplicative. Ford is simply relocating its existing linear accelerator to another site in the three county service area adjacent to Waccamaw Community Hospital. The new site will be closer to the majority of Ford's patients and it is in the

part of the three county service area where population growth is highest. Ford satisfies Criterion 3a.

34. Criterion 3b provides: "The proposed service should be located so that it may serve medically underserved areas (or an underserved population segment) and should not unnecessarily duplicate existing services or facilities in the proposed service area." Ford has presented detailed population projections. The Ford center, with the assistance of the Georgetown Community Care Network, will serve both underserved areas and underserved individuals in Murrells Inlet. Ford satisfies Criterion 3b.

35. Criterion 3c provides: "The location of the proposed service should allow for the delivery of necessary support services in an acceptable period of time and at a reasonable cost." Criterion 3e provides: "The applicant must document the means by which a person will have access to its services (e.g. outpatient services, admission by house staff, admission by personal physician.)" Ford's new location will be in a comprehensive cancer center, in a building connected to an oncology building with chemotherapy and imaging services, on the campus of an acute care hospital, with nearby medical office buildings with supporting physician services. For these reasons, Ford's new location will be superior to its present location. Ford satisfies Criteria 3c and 3e.

36. Criterion 4a provides: "The proposal and applicant should have the support of 'affected persons' (including local providers and the target population). The lack of opposition should not be considered support for the purposes of these criteria." Criterion 4b provides: "Where documented opposition exists to a proposal, such opposition will be considered along with the application." Ford's application had ample support and no opposition. Ford therefore satisfies Criteria 4a and 4b.

37. Criterion 13a provides: "The applicant's record should be one of successful operation with adequate management experience." Ford has operated successfully since it opened in 2004. Its owners have successfully operated a number of other health care facilities and have more than adequate management experience. Ford satisfies Criterion 13a.

38. Criterion 13b provides: "The applicant should have a demonstrated ability to obtain necessary capital financing." Ford's owners have ample investments, funded depreciation, and cash to fund this project. Ford satisfies Criterion 13b.

39. 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." Ford intends to relocate in Murrells Inlet, the part of the three county service area that is growing fastest, with the highest population densities and highest cancer incidence rates and where most of Ford's patients originate. Fewer people will be inconvenienced by the travel time necessary for radiation therapy. DHEC considered the effect of Ford's project and concluded that the relocation would functionally balance distribution of services. After further careful consideration, this Court agrees but further finds and concludes that also allowing CRCC's relocation to Murrells Inlet also does not counter functional balance but instead enhances it.

40. In arguing that Ford fails to satisfy Criterion 22, CRCC mistakenly relies on a 2002 DHEC staff decision denying a CON application by Roper Medical Center to relocate a linear accelerator from downtown Charleston to the Mt. Pleasant/East Cooper area, while approving a similar application from MUSC. In fact, the 2002 staff decision is entirely consistent with DHEC's decision to approve the Ford relocation. Neither matter involved competing applications. In 2002, DHEC approved MUSC's application in part because it was relocating to the campus of an affiliated hospital, just as Ford proposes to do now. DHEC denied Roper's application to relocate to East Cooper, suggesting West Ashley as a better alternative for Roper, since:

- a) Roper had an affiliated hospital in West Ashley, not in East Cooper.
- b) More of Roper's patients lived closer to West Ashley than East Cooper.
- c) The West Ashley population was growing more rapidly than East Cooper's.

Similarly, Ford proposes to move to its principal hospital, closer to most of its patients, and closer to where the population is growing most rapidly. Ford satisfies Criterion 22.

41. Criterion 15 provides: "The applicant must have projected both the immediate and long-term financial feasibility of the proposal. Such projection should be reasonable and based upon accepted accounting procedures." Despite projected losses in its first four years of operation, Ford's project is feasible immediately and in the short term. It is not unusual for new healthcare projects to incur losses at their outset. Ford's projected losses decrease substantially each year until year five, when its projected revenues exceed expenses. In the meantime, Ford's owners have sufficient cash reserves to sustain the project.

42. Ford's project is also financially feasible long term. Ford is moving closer to its patients, closer to the population growth, and closer to its hospital, all of which will help ensure long term feasibility. Moreover, Ford's financial projections are extremely conservative, imputing interest and including corporate overhead expense. Ford satisfies Criterion 15.

43. Criterion 16a provides: "The applicant should have identified and sought alternative sources and/or methods of funding and demonstrated that the method chosen was the most feasible option." Ford's application offered several alternative sources of funding: operating income, cash reserves, existing lines of credit, issuance of debt, investments, and funded depreciation. GHS has ample means to fund the project. Ford satisfies Criterion 16a.

44. Criterion 23a provides: "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." Although adverse impact was not identified by DHEC as a priority criterion, CRCC argued that approval of Ford's application would adversely impact CRCC. However, CRCC is an entrenched provider. Its relationship with Atlantic and the Atlantic urologists assure CRCC of a steady referral base. CRCC's market share and utilization rate is extremely high, so that it can easily sustain some loss, should any occur. Any impact on CRCC would be offset by the increased accessibility resulting from Ford's relocation to Murrells Inlet, where it will offer comprehensive cancer services in the portion of the service area where population growth is greatest and where most of Ford's patients originate. Ford satisfies Criterion 23a.

45. CRCC's CON Application proposes the relocation and replacement of one of three existing machines from the existing facility in Myrtle Beach to a new facility in Murrells Inlet. I have found that CRCC's CON Application properly identified the target population to be served by the relocation and established that an appreciable reduction in drive time would be experienced by a substantial portion of the existing patient base. Based upon CRCC's CON Application and the testimony at trial, I conclude that CRCC's CON Application satisfies Project Review Criteria 2a, 2b, and 2d (Community Need Documentation).

46. CRCC's proposed relocation distributes radiation therapy services further into the service area. By decreasing the drive time for a substantial portion of its patient base, CRCC ensures that access to services is improved for those residents residing closer to Murrells Inlet and preferring not to travel to the Myrtle Beach location. CRCC's proposed location will be in close

proximity to Waccamaw's medical campus, with easy access by CRCC's patients to any needed support services. The process by which patients access CRCC's services and are treated by the facility was clearly explained. CRCC clearly documented satisfaction of the Project Review Criteria 3a, 3b, 3c, and 3d (Distribution (Accessibility)).

47. The preponderance of the evidence submitted at trial supports the decision of the Department that CRCC adequately documented the need for its project and that the project will increase accessibility and availability of radiation therapy services to the identified service area. Adverse effects looks to the "impact on current and projected occupancy rates or use rates" and thus, for these proceedings, it is the adverse effects on radiation therapy treatment volumes that is measured by the CON Regulations. 3 S.C. Code Ann. Regs. 61-15 § 802.23(a). I conclude that Ford failed to demonstrate that the relocation of a single machine from Myrtle Beach to Murrells Inlet by CRCC will have a material adverse effect on the relocated Ford facility. As a result, the CRCC CON Application satisfied Project Review Criteria 23 (Adverse Effects on Other Facilities).

48. CRCC submitted over 300 letters from the community and providers in support of its application to relocate a linear accelerator to Murrells Inlet. Ford's documented opposition in favor of its own relocation application is noted but does not render the CRCC project unacceptable. CRCC's CON Application satisfies the Project Review Criteria 4a and 4b (Acceptability).

49. CRCC's presence in the service area for more than three decades is undisputed. CRCC provided the testimony of the Regional Administrator who has been with the Myrtle Beach facility since its inception under different ownership in 1980. With the acquisition of CRCC by 21st Century, CRCC is now under the direction of one of the nation's largest providers of radiation therapy services. CRCC's financial statements show a very profitable existing operation and evidence that the project will be financed by existing cash reserves, which are substantial. CRCC clearly demonstrated satisfaction of the Project Review Criteria 13a and 13b (Record of the Applicant).

50. Upon 21st Century's entry into the market with the acquisition of CRCC in Myrtle Beach, the administration promptly began investigating opportunities to distribute the clustering of machines into the service area, as well as look for opportunities to expand services. CRCC's philosophy of distributing services out to the communities it serves, which underpins CRCC's proposal to replace and relocate a linear accelerator machine to Murrells Inlet, along with Ford's

relocation, represents a functional balancing of linear accelerator services in the three county service area. CRCC's CON Application for this reason and others identified herein, satisfies the Project Review Criteria 22 (Distribution).

51. The immediate and long-term financial feasibility of CRCC's project was established in the CON Application and is without objection from Ford. CRCC's CON Application satisfies the Project Review Criteria 15 (Financial Feasibility).

52. The total project cost for CRCC's replacement and relocation project is \$7,993,972.08. This project cost is substantially lower than that of Ford's²¹ and other recent linear accelerator projects. It is apparent that 21st Century's expertise in developing freestanding linear accelerator centers involves proficiencies in economies of scale that is passed along to consumers through containment of costs. The CON Application for CRCC's project establishes that CRCC has ample funding to establish the project. CRCC's CON Application satisfies the Project Review Criteria 16a (Cost Containment (Minimizing Costs)).

53. In conclusion, CRCC has established that its Application to relocate one linear accelerator from Myrtle Beach to Murrells Inlet is justified and in compliance with the purposes of the CON Act and the Project Review Criteria. As a result, the approval of the CRCC CON Application should be affirmed.

54. To the extent that any Conclusion of Law set forth herein is deemed not to be a Conclusion of Law but a Finding of Fact, may it be deemed as such.

²¹ Ford's proposed building is substantial larger than CRCC's proposed building.

ORDER

After careful review of the evidence presented in this matter and based upon the findings of fact and conclusions of law stated above, the Court finds that CRCC has failed to prove by a preponderance of the evidence that Ford's CON application should be denied. The Court finds that Ford's application satisfies the purposes of the CON Act, the South Carolina Health Plan, and the Project Review Criteria and should be approved.

AND IT IS SO ORDERED.

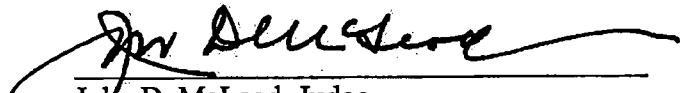
IT IS FURTHER ORDERED that after careful review of the evidence presented in this matter and based upon the findings of fact and conclusions of law stated above, the Court finds that Ford has failed to prove by a preponderance of the evidence that CRCC's CON application should be denied. The Court finds that CRCC's application satisfies the purposes of the CON Act, the South Carolina Health Plan, and the Project Review Criteria and should be approved.

AND IT IS SO ORDERED.

IT IS HEREBY ORDERED that the South Carolina Department of Health and Environmental Control shall issue the requested Certificate of Need to Francis B. Ford Cancer Center and to Carolina Regional Cancer Center

AND IT IS SO ORDERED.

June 10, 2015
Columbia, S.C.

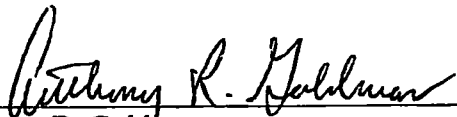


John D. McLeod, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

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

June 10, 2015
Columbia, S.C.



Anthony R. Goldman
Judicial Law Clerk

RECEIVED

JUL 10 2015

SC Court of Appeals