THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

Case No. 2012-ALJ-07-0090-CC

Grand Strand Regional Medical Center, LLC .....Respondent,

v.

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

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

Grand Strand Regional Medical Center, LLC .....Respondent,

v.

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

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

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Grand Strand Regional Medical Center ("Grand Strand"), a subsidiary of Hospital Corporation of America ("HCA"), is a 269-bed tertiary care hospital located in Myrtle Beach, South Carolina, that opened in 1978 at the request of local citizens to replace a non-profit community hospital. (R. p. 339, lines 16–22; R. p. 9.) Grand Strand submitted a CON application on July 11, 2011 to the South Carolina Department of Health and Environmental Control ("Department") to establish a radiation therapy center on its Myrtle Beach campus.[1] (R. pp. 3306–3310.) Carolina Regional Cancer Center ("CRCC") is an existing freestanding radiation therapy provider currently operating three linear accelerators in one location in Myrtle Beach, South Carolina. (R. p. 2636; R. p. 9.) CRCC is 100% owned by Atlantic Urology Clinics, LLC, ("AUC"), which is 100% owned by 21st Century Oncology of South Carolina, LLC, which is in turn 100% owned by Radiation Therapy Service, Inc. ("21st Century").[2] (R. p. 2874; R. p. 9.) CRCC has been approved for, but has not been issued, a Certificate of Need ("CON") to move one of its three linear accelerators from Myrtle Beach to establish a radiation therapy center in Murrells Inlet, South Carolina, which is located in northern Georgetown County.[3] (R. p. 4441; R. p. 9.) The Department is a state agency charged with, among other things, implementing South Carolina's CON regulatory program, which includes issuing CONs to radiation therapy facilities. S.C. Code Ann. § 44-7-130, -140. By statute, the

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[1] While Grand Strand has not operated a radiation therapy center in the past, its parent company, HCA, is very experienced with 80 linear accelerator units located in 40 different radiation therapy centers. (R. p. 592, lines 14–22.)

[2] 21st Century is an integrated cancer company headquartered in Florida that operates approximately 100 radiation therapy centers in 16 states. (R. p. 1365, line 15 – p. 1366, line 4; R. p. 1428, lines 1–9.)

[3] CRCC's CON approval to move this linear accelerator is the subject of another contested case currently before the Administrative Law Court. (R. p. 1305, lines 15–24.)

Department is "the sole agency for control and administration of the granting of [CONs] and licensure of health facilities." S.C. Code Ann. § 44-7-140.

Regulatory Background.

This matter arises under the regulatory program by which the State of South Carolina issues CONs for the development of health care facilities and services in this State. The regulatory scheme consists of the State Certification of Need and Health Facility Licensure Act ("CON Act"), S.C. Code Ann. § 44-7-110, *et seq.*; the regulations promulgated thereunder, 24A S.C. Code Ann. Regs. 61-15 (2012); and a State Health Plan ("Health Plan") that is revised at least biannually. In determining whether to grant or deny an application for a CON, the Department evaluates the proposed project under the review criteria found in the CON regulations and under the policies and standards set forth in the applicable Health Plan. *See* 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 Heath Plan, Project Review Criteria, and other regulations." S.C. Code Ann. § 44-7-210(C); *see also MRI at Belfair, LLC v. S.C. Dept. of Health & Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008).

The 2010–2011 Health Plan, under which Grand Strand and CRCC applied, sets forth the Health Plan standards for Radiotherapy. (R. p. 4391; R. p. 11.) The two applicants in this case propose to locate their radiation therapy facilities in the service area comprised of Horry, Georgetown, and Williamsburg counties ("Service Area"). (R. p. 2647; R. p. 3322; R. p. 9.) The 2010–2011 Health Plan states that the "following project review criteria are considered to be the most important in evaluating certificate of need applications for [radiation therapy] services: (a) Compliance with the Need Outlined in this Section of the Plan; (b) Community Need Documentation; (c) Distribution

(Accessibility); (d) Projected Revenues; (e) Projected Expenses; (f) Financial Feasibility; and (g) Cost Containment. Additionally, the Health Plan states that "benefits of improved accessibility will be equally weighed with the adverse effects of duplication in evaluating Certificate of Need applications for this service." (R. p. 4393; R. p. 11.) These criteria are considered by the Department and by the Administrative Law Court ("ALC") in making the determination as to whether an application can be approved.

The 2010–2011 Health Plan also provides standards that are directly applicable to the CON applications for linear accelerators. The only standards at issue in this appeal are Standards 6(a) and 6(b), which apply to Grand Strand as a new provider:

> 6. New Radiotherapy services shall only be approved if the following conditions are met:
>
> A. All existing units in the service area have performed at a combined use rate of 80 percent of capacity for the year immediately preceding the filing of the applicant's CON application; and
>
> B. An applicant must project that the proposed service will perform a minimum number of treatments equal to 50 percent of capacity annually within three years of initiation of services, without reducing the utilization of the existing machines in the service area below the 80 percent threshold . . .

(R. pp. 4391–4392; R. p. 1239, line 11– p. 1240, line 15; R. pp. 11–12.)

The 2010–2011 Health Plan indicated that the four existing linear accelerators in the Service Area, three at CRCC and one affiliated with Georgetown Memorial Hospital ("GMH"), were operating at 80.5% of capacity, based on total 2009 Service Area utilization of 20,918 "Total Area Treatments" with a "Planning Area Capacity" of 26,000 treatments. (R. pp. 4394–4396; R. p. 13.) Since the filing of both Grand Strand's and CRCC's CON Applications and the Department Staff's ("Staff") decisions with respect to the two applications, both dated December 28, 2011, a new 2012–2013 Health Plan

has taken effect. The new 2012-2013 Health Plan is nearly identical in terms of radiation therapy standards to the 2010–2011 Health Plan standards.[4] (R. pp. 4399–4429; R. p. 13.) The 2012–2013 Health Plan indicates that there are five linear accelerators[5] in the Service Area and they are operating at 96.7% capacity, based on total Service Area utilization of 31,902 "Total Area Treatments" in 2011, with a "Planning Area Capacity" of 33,000 treatments. (R. p. 4425; R. p. 13.) Moreover, the 2012–2013 Health Plan states "Need" in a column entitled "UNMET NEED?" (R. p. 4425; R. p. 13.) Thus, even with four operational linear accelerators, and an additional approved unit, the 2012–2013 Health Plan indicates a potential unmet need for another linear accelerator in the Service Area. (R. p. 2015, lines 14–22; R. p. 13.)

Grand Strand's Project

Grand Strand applied for a CON to establish a new 9,519 square foot radiation therapy facility within its main hospital in Myrtle Beach, which is located in Horry County, South Carolina. (R. pp. 3310, 3362; R. p. 13.) The project is estimated to cost approximately $9.8 million. (R. pp. 3310, 3362; R. p. 14.) In addition to radiation therapy, Grand Strand's project includes infusion facilities to deliver chemotherapy

[4] The only notable exception is that "Standard 8" does not require the applicant to provide expected annual referral volumes from physicians and health care facilities, which is not an issue in this appeal. (R. pp. 4422–4424.)

[5] A footnote in the Health Plan indicates that the Department included CRCC's Staff-approved, but not yet operational, Conway facility in the linear accelerator count, which had been appealed by Grand Strand. (R. pp. 4426–4427.)

within its radiation therapy facility.[6] (R. pp. 3479, 3483; R. p. 351, line 13 – p. 352, line 6; R. p. 869, line 22 – p. 870, line 21; R. p. 14.) Grand Strand will treat both inpatients and outpatients at its facility, but the vast majority will be outpatient. (R. p. 355, line 25 – p. 356, line 3; R. p. 686, lines 7–9; R. p. 15.) Grand Strand is one of only two hospitals in South Carolina operating above 50,000 patient days per year that does not offer radiation therapy services. (R. p. 14.) Further, Horry County is the only county in South Carolina with a population greater than 250,000 residents that does not have hospital-based radiation therapy. (R. p. 14.)

Grand Strand, which is accredited by the Commission on Cancer of the American College of Surgeons as a community cancer center, intends to develop a comprehensive cancer center over time where patients can receive interdisciplinary cancer care, including radiation therapy, in one facility. (R. p. 347, line 23 – p. 348, line 8; R. p. 14.) A comprehensive cancer treatment program promotes interdisciplinary care.[7] (R. p. 813, lines 16–18; R. p. 14.) Grand Strand currently offers PET/CT services—a very important part of a comprehensive cancer center—in a mobile setting at its South Strand location and it anticipates that it would shift the PET/CT service to the main campus if approved for a radiation therapy center. (R. p. 516, line 13 – p. 517, line 1; R. p. 545, line 22 – p. 546, line 6; R. pp. 14–15.) Adding a radiation therapy center to Grand Strand's campus in the context of a comprehensive cancer center will allow Grand Strand to attract surgical and medical sub-specialists who provide cancer care to the Service Area, such as

[6] While outpatient chemotherapy will be administered to a large degree by the local medical oncologists, Grand Strand will be able to administer chemotherapy to inpatients, the indigent, or those patients whose insurance plans require them to use Grand Strand. (R. p. 515, line 25 – p. 516, line 12.)

[7] Interdisciplinary cancer care requires multiple cancer specialists to be involved in the care of a patient who benefits from having interaction between his or her treating physicians. (R. p. 812, line 22 – p. 813, line 15.)

GYN oncologists, oncology surgeons, colorectal surgeons, and fellowship-trained breast surgeons. (R. p. 349, line 24 – p. 350, line 20; R. p. 352, line 20 – p. 353, line 22; R. p. 15.) Without a comprehensive cancer center, or at least the promise of one, recruiting specialists can be difficult because they need a good base of patients. (R. p. 429, lines 10–25.) If approved, Grand Strand intends to partner with Sarah Cannon Center, which is a comprehensive cancer center affiliated with HCA, located in Nashville, Tennessee. The Sarah Cannon Center will provide information, research and analysis for clinical protocols surrounding care of cancer patients. (R. p. 428, line 11 – p. 429, line 5; R. p. 3319.) Currently, to receive comprehensive cancer treatment, patients residing in the Service Area must travel to the Medical University of South Carolina in Charleston, South Carolina. (R. p. 15.) Currently, there are no radiation therapy centers located within a hospital in the Service Area, which means inpatients suffering with cancer who need radiation therapy treatment must be transported off campus via ambulance multiple times during their inpatient stay. (R. p. 350, line 3 – p. 351, line 12; R. p. 15.)

Grand Strand's project will provide important services that currently are unavailable in the Service Area. In spite of the evidence presented in Grand Strand's application and at the project review meeting, the Department determined that the CON applications were competing and that CRCC's application more fully complied with the applicable requirements and standards. (R. pp. 3282–3302; S.C. Code Ann. § 44-7-210(B).) The Staff concluded that the negative impact of Grand Strand's project exceeds the benefits of its improved accessibility and denied Grand Strand's application. (R. pp. 3282–3302.)

CRCC's Project & Utilization

CRCC applied for a CON to establish a freestanding radiation therapy facility located in Conway, South Carolina ("CRCC-Conway"). (R. p. 2636; R. p. 18.) The typical size of a 21st Century radiation therapy center is between 5,000 and 12,000 square feet. (R. p. 1545, lines 21–25; R. p. 18.) CRCC-Conway's facility will be on the small end, at 3,616 square feet. (R. p. 2634; R. p. 1545, lines 13–20; R. p. 18.) Because the building is an existing site, CRCC's total project costs, including the cost of equipment, is $5.1 million. (R. pp. 2636, 2638; R. p. 18.)

AUC is the 100% owner of CRCC, and it employs all of the urologists who practice in Horry County and parts of Georgetown County. (R. p. 1428, line 18 – p. 1429, line 25; R. p. 2874; R. p. 18.) AUC is the only provider of urological services in the three county Service Area, and it owns the only provider of radiation therapy cancer treatment in Horry County. (R. p. 1553, lines 4–8; R. p. 18; R. p. 355, lines 18–19.) A strategy that 21st Century utilizes to build treatment volume is to establish a group practice like AUC and pay employed physicians in the practice profits using an ancillary profit formula from revenues generated by their referrals to the affiliated radiation therapy center. (R. p. 1501, lines 5–17; R. p. 18, n.18.) The AUC-employed urologists have a financial relationship with CRCC by virtue of participating in an ancillary bonus pool. (R. p. 1499, lines 1–6; R. p. 18, n.18.)

In 2009, before their practice was purchased by 21st Century, the urologists who later became employed by AUC referred a total of 39 patients to CRCC. (R. pp. 4455, 4483; R. p. 1714, line 19 – p. 1715, line 6; R. p. 19.) The number of referrals from AUC

to CRCC increased 700% from 2009, when AUC was independent, to 2010, after AUC was acquired by 21st Century and had a financial relationship with CRCC. (R. pp. 4455, 4483; R. p. 1813, line 22 – p. 1815, line 24; R. p. 19.) The number of referrals in 2011 from AUC to CRCC increased 1,000% when compared to 2009. (R. pp. 4455, 4483; R. p. 1813, line 22 – p. 1815, line 24; R. p. 19.) In 2011, CRCC was the highest volume radiation therapy provider in South Carolina with 25,709 treatments. (R. p. 1285, lines 2–17; R. p. 4426; R. p. 19.)

Although CRCC's affiliated AUC urologists are not required to refer their patients who have prostate cancer to CRCC for radiation therapy, prostate referrals made up the largest percentage by diagnosis mix and treatment diagnosis at CRCC for the years 2010, 2011, and 2012. (R. p. 1497, line 8 – p. 1498, line 25; R. p. 4477; R. p. 19.) From 2009 to 2011, CRCC's treatment volumes increased by approximately 65%. When CRCC's treatment volumes are removed from statewide totals, treatment volumes statewide increased just 2.2% over that same time period. (R. p. 4448; R. p. 18.) Statewide, linear accelerator treatments actually decreased from 2010 to 2011, while CRCC's treatments increased from 20,946 treatments in 2010 to 25,709 treatments in 2011, an increase of 23%. (R. p. 4448; R. p. 19.) In 2012, 43.7% of all treatment diagnoses at CRCC were related to prostate cancer and 28.4% of all revenues generated from CRCC radiation therapy treatments came from prostate cancer diagnoses.[8] (R. p. 4464; R. p. 1480, line 22 – p. 1481, line 19; R. p. 19.) Intensity-modulated radiation

[8] Although CRCC's affiliated AUC urologists are not required to refer their patients who have prostate cancer to CRCC for radiation therapy, prostate referrals made up the largest percentage by diagnosis mix and treatment diagnosis at CRCC for the years 2010, 2011, and 2012. (R. p. 1497, line 8 – p. 1498, line 25; R. p. 4477.)

therapy ("IMRT"), is one of the procedures used for the treatment of prostate cancer and is reimbursed at a higher rate than other treatments. (R. p. 19.) At CRCC, 75% of the treatments are IMRT. (R. p. 1472, line 19 – p. 1473, line 2; R. p. 19.)

As a long-time radiation therapy provider in the Service Area and the only provider in Horry County, CRCC has enjoyed a lucrative business with little competition. In fact, CRCC actively guards its near-total market share against "the threat of a new entrant." (R. p. 4480.) For example, in a February 2011 email string, executives and consultants for CRCC discussed recent CON applications filed in the Service Area and concluded that CRCC "need[s] to file for Conway CON asap" (R. p. 4462) which would "close out that area as well" (R. p. 4488). When CRCC is faced with a competitor, its strategy is to delay the implementation of any linear accelerator project for as long as possible by tying up the applications in the administrative and judicial review process. In September 2009, CRCC and 21st Century executives and consultants discussed GMH's CON application in various emails and stated, "Simple answer is ***if we just want to delay*** a new machine in Murrell's Inlet, ***file an appeal*** of Georgetown and let Sam [Tolbert] provide a competing application." (R. p. 4459 (emphasis added).) Similarly, in November 2010, CRCC and 21st Century executives and consultants discussed how to handle the impending CON applications from competitors and determined that CRCC should file two separate CONs (one in Murrell's Inlet to challenge GMH and one in Conway to challenge Grand Strand) to "protect both our northern and southern service areas. ***Worse case we end up in court on both CONs and no one moves forward until the courts decide.***" (R. p. 4480 (emphasis added).) These email statements convey that

CRCC had a purposeful plan to oppose any competition in the Service Area and to use the court system to delay the implementation of any competing radiation therapy providers.

ALC's Findings and Conclusions

Most importantly, the ALC clearly stated that it found Grand Strand's expert, Dan Sullivan, to be well-qualified and that the ALC would base all of its findings of fact on Mr. Sullivan's analysis, unless otherwise stated. (R. p. 12.) The ALC found that both Grand Strand and CRCC met all of the project review criteria. (R. p. 23.) It made specific findings, however, that Grand Strand better met the project review criteria.[9] Regarding Community Need Documentation, the ALC found that Grand Strand's in-hospital radiation therapy program would benefit patients by reducing travel and facilitating consultation between cancer care providers. (R. p. 23.) Also, Grand Strand's project offers advantages in terms of cost, patient care, and convenience because it offers radiation therapy in a comprehensive cancer treatment setting, with the important benefit of not having to transfer inpatients outside of the hospital for radiation therapy. (R. pp. 23–24.) The ALC found that Grand Strand's project met the Distribution (Accessibility) criteria and that it is not an unnecessary duplication of services because it offers in-hospital treatment and comprehensive cancer care, which currently are unavailable in the Service Area. (R. p. 24.) Grand Strand's project also allows for the delivery of necessary support services, such as radiology, surgery, and physical therapy. (R. p. 24.) As to Cost

[9] As discussed in Section III.D of this Brief, infra, the ALC made a finding that Grand Strand's project most fully complies with the applicable requirements and that if the applications were competing, Grand Strand's application would be approved over CRCC's application. (R. p. 33, n.38.)

Containment, the ALC found that Grand Strand's project would promote cost containment by reducing the costs associated with transferring inpatients to off-site radiation therapy centers, by offering price competition in Horry County, and by offering patients the option of seeking treatment at a facility where the physicians do not receive a financial incentive for referring patients. (R. p. 26.)

The ALC determined that the Department erred in finding that the CON applications were competing applications. (R. pp. 31–32.) In reaching this conclusion, the ALC found that Grand Strand's radiation therapy treatment volumes and projections in its application are more reasonable and reliable than CRCC's.[10] (R. p. 31.) Relying upon Mr. Sullivan's projections, analysis, and testimony, the ALC found that Grand Strand would satisfy the first part of Standard 6-B in the 2010–2011 Health Plan. (R. p. 17.) The ALC then found that Grand Strand satisfied the second part of Standard 6-B because existing providers would not fall below the 80% threshold. (R. p. 31.)

The ALC specifically and repeatedly found that CRCC's analyses and projections regarding the adverse impact by Grand Strand on CRCC were not realistic or reliable. The ALC discounted CRCC's "draw rate" analysis as unreliable because it made unreasonable assumptions about Grand Strand's market penetration and did not take into account that Grand Strand would not receive referrals from AUC. (R. p. 17, n.16.) The

[10] CRCC created five (5) different impact scenarios, each of which showed that Grand Strand's entry in to the market would cause CRCC to fall below the 80% threshold standard. (R. p. 4554.) The ALC found that these scenarios were not credible. (R. p. 21.) For example, in his adverse impact models, CRCC's health planning expert failed to carve out or isolate the radiation therapy treatments generated by the AUC urologists' referrals, which accounted for 43% of CRCC's treatment volume in 2012. When these 43% are removed from the analysis, the number of treatments available in the market to be captured by Grand Strand is significantly reduced. (R. p. 1065, line 24 – p. 1067, line 12.)

ALC rejected CRCC's five different adverse impact scenarios because it found CRCC made "flawed assumptions about the market." (R. p. 21.) CRCC, the ALC found, also made unrealistic projections about Grand Strand's future treatment volumes. (R. p. 21.) The ALC did not accept CRCC's contention that its lower treatment volumes in the first part of 2013 were more predictive of future years than 2011 actual treatment volumes because CRCC used an incomplete data set for 2013. (R. pp. 21–22.) CRCC's own health planning expert, Sam Tolbert, admitted that is preferable to use a full year of data when projecting utilization because of the uncertainty of what can occur in the remaining part of the year. (R. p. 2090, line 16 – p. 2091, line 5; R. p. 2267, line 13 – p. 2268, line 13). The ALC also found CRCC's "referral-shift" adverse impact analysis unreliable because it was based on one or two half-hour phone calls between Mr. Tolbert and CRCC employees who speculated about how referral patterns would change upon Grand Strand's entry into the market. (R. p. 22–23.) Finally, the ALC found CRCC's adverse impact analysis unreliable because it failed to account for the cancer patients in need of radiation therapy who routinely leave the Service Area for treatment, but would be inclined to remain in the Service Area if there were a comprehensive cancer program. (R. p. 23.)

As will be seen from the arguments below, the ALC's decision is supported by both the law and the substantial evidence in the record and should stand.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT APPROPRIATELY CONSIDERED THE 2012–2013 STATE HEALTH PLAN WHEN IT APPROVED GRAND STRAND'S CON APPLICATION.

CRCC's argument that the ALC awarded Grand Strand a CON based on the 2012–2013 Plan fundamentally misapprehends and mischaracterizes the ALC's reasoning. Further, the ALC is specifically authorized by statute to consider a new Health Plan in making its decision. S.C. Code Ann. § 44-7-225. Therefore, the ALC properly exercised its discretion and did not err in awarding Grand Strand a CON for a linear accelerator.

In reviewing a decision from the ALC, the appellate court's standard of review is governed by the Administrative Procedures Act. *S.C. Dep't of Motor Vehicles v. Brown*, 406 S.C. 626, 637, 753 S.E.2d 524, 529 (2014), *reh'g denied* (Feb. 6, 2014). The appellate court may reverse or modify the decision only if the substantive rights of the petitioner have been prejudiced because the decision is:

> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B). "The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some

error of law." *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 68 (2013), *reh'g denied* (Sept. 20, 2013).

When construing a statute, the Court is guided first by the plain language of the section. As stated by the South Carolina Supreme Court:

> When the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted. *Paschal v. State Election Comm'n,* 317 S.C. 434, 454, S.E.2d 890 (1995); *Miller v. Doe,* 312 S.C. 444, 441 S.E.2d 319 (1994). The statutory terms, therefore, must be applied according to their literal meaning. *Paschal,* 317 S.C. at 436, 454 S.E.2d at 892; *Holley v. Mount Vernon Mills, Inc.,* 312 S.C. 320, 440 S.E.2d 373 (1994). In such circumstances, this Court simply lacks the authority to look for or impose another meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. *Paschal,* 317 S.C. at 437, 454 S.E.2d at 892; *Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760 (1993).

Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003), *quoting, State v. Benjamin,* 341 S.C. 160, 163, 533 S.E.2d 606, 607 (Ct. App. 2000).

Section 44-7-225 of the South Carolina Code states:

> The department, **the Administrative Law Court**, and the Court of Appeals shall consider the South Carolina Health Plan in place at the time the application was filed and **may consider the current South Carolina Health Plan when making its decision**.

(Emphasis added.) The language of section 44-7-225 is clear and unambiguous. The ALC has the discretion to consider the current Health Plan when reviewing the facts and law to render a decision on the applications filed under a previous Health Plan. The current Health Plan can inform the ALC's decision and it can provide support for the decision.

CRCC, however, without any authority or basis in the law, attempts to limit what portions of the new Health Plan the court may consider and how the court may utilize the information contained in the new Health Plan when making its decision. (App.'s Br. 16.)

CRCC's argument that Regulation 61-15 §504[11] somehow controls and requires an applicant to withdraw its application when a new Health Plan becomes effective and to reapply under the new Health Plan is patently incorrect. First, an administrative regulation cannot take precedence over a statute.[12] *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute.") (internal citations omitted). Regulation 61-15 § 504 does not speak, and cannot speak, to the ALC's authority to take evidence and conduct its hearing—that determination is the province of the General Assembly. Rather, Regulation 61-15 § 504 merely states that an applicant may choose to withdraw its application and file under a new Plan; it does not alter or limit in any way the ALC's discretion to consider a newly enacted Plan in making its determination.

Second, accepting CRCC's argument would eviscerate section 44-7-225 and render it meaningless. CRCC would have this Court read out of the statute the language that clearly permits the reviewing bodies to consider a newly enacted Health Plan. *See Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (holding that appellate courts "will not construe a statute in a

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[11] Regulation 61-15 § 504 states:

> All decisions on Certificate of Need applications shall be made based on the currently approved South Carolina Health Plan in effect at the time such application is accepted. Should a new plan be adopted during any phase of the review or appeals process, **the applicant** shall have the option of withdrawing the application and resubmitting under the newly adopted plan or continuing the review or appeal process under the plan in use when the application was submitted. In cases where applications are withdrawn and resubmitted under the newly adopted South Carolina Health Plan within forty-five (45) calendar days of the date of withdrawal, no additional filing fee shall be required.

(Emphasis added.)

[12] The ALC, in its Order denying Grand Strand's Motion for Partial Summary Judgment, considered CRCC's argument and found Regulation 61-15 §504 invalid because it contradicts Section 44-7-225, a later-enacted statute. (R. p. 83.)

way which leads to an absurd result or renders it meaningless."). Such a result would tie the hands not only of the ALC, but also of this Court, in considering a new Health Plan. CRCC's attempts to twist and limit the ALC's discretion are improper, unwarranted, and contrary to the plain, literal meaning of the statute.

Despite CRCC's erroneous assertions to the contrary (App.'s Br. 16–18), the ALC did not award Grand Strand a CON for a linear accelerator under the 2012–2013 Health Plan, nor did the ALC base its award to Grand Strand solely upon the need identified in the 2012–2013 Health Plan. A fair reading of the Record and the ALC's Order makes that apparent. The ALC heard testimony from eleven witnesses over a nine-day hearing, during which Grand Strand's expert Dan Sullivan testified that the current market demonstrates that two linear accelerators may be awarded without bringing the existing units below 80% utilization. (R. p. 975, line 14 – p. 977, line 18; R. p. 1021, lines 3–7; R. p. 1029, line 15 – p. 1030, line 13; R. p. 1036, line 16 – p. 1039, line 7.) The 2012–2013 Health Plan recognizes that existing need. (R. p. 4425; R. p. 1030, lines 5–7; R. p. 13.) The ALC accepted Mr. Sullivan's testimony and determined that the market in the Service Area could support two linear accelerators. (R. pp. 12, 20.) The ALC referenced the new Health Plan as support for its other, detailed factual findings regarding the need for two new radiation therapy facilities in the Service Area, and its decision that the two applications were not competing—it did not award Grand Strand a linear accelerator based solely on the need identified in the new Plan. (R. pp. 12–13, 20–23, 31–33.) In fact, the ALC was asked in a motion for partial summary judgment to rule as a matter of law that the applications were not competing based on the identified need in the new Health Plan. (R. p. 116.) The ALC declined that invitation and held that the 2012–2013 Health Plan "alone does not satisfy Grand Strand's burden of proving, as a matter of law,

that approval of its application would not exceed the need for its proposed services and/or facilities." (R. p. 84)

CRCC further argued that awarding two linear accelerators under the 2010–2011 Health Plan would eliminate the stated need in the 2012–2013 Health Plan. (App.'s Br. 16.) This argument is misguided and patently self-serving considering that CRCC plans to apply for another linear accelerator under the 2012–2013 Health Plan "based on [its] past strategy." (R. p. 4485.) This "past strategy," as explained earlier, is one of fending off competition and maintaining as near an exclusive hold on radiation therapy in the Service Area as possible. Even though approving both CRCC's and Grand Strand's application under the 2010–2011 Health Plan may have eliminated the need under the 2012–2013 Health Plan, it is no reason to deny an applicant a CON that could have been, and should have been, awarded under the Health Plan effective at the time of its application. The fact that Grand Strand applied for a linear accelerator before the new Health Plan became effective should have no bearing on whether it can be awarded a CON following the enactment of a new Health Plan. The reason the new 2012–2013 Health Plan identified a need for a linear accelerator is because the then-existing need under the older Health Plan had not been satisfied and the Department failed to approve both CON applications. Grand Strand and CRCC applied to satisfy the need that existed at the time of their applications under the 2010–2011 Health Plan. If both Grand Strand's and CRCC's applications had been approved before the new Health Plan became effective, the new Health Plan would not have reflected a need.

It is appropriate for applicants seeking a CON for a linear accelerator to use their analysis of the existing market to determine a need, as both parties did in this case. Because the applicants here conducted their own analyses of the market, it is to be

expected that their calculations identified an existing need that was ***later*** recognized in a new Health Plan. This is a function of timing and should not be construed to prevent applicants from applying for or being awarded CONs based on existing need.

Following CRCC's argument to its logical conclusion leads to the absurd result that any time there is a need in the Service Area, that need cannot be awarded under the current Health Plan until it is formally recognized in a newly adopted Plan. This argument would prevent any applicant—even CRCC—from receiving a CON under an older Health Plan upon a new Health Plan becoming effective. Such a result ignores the reality of CON contested cases and would serve only to further delay CON applications in an endless round of remands, re-applications, and rehearings.

CON contested cases often take several years to resolve, while a Health Plan is issued every two years.[13] By allowing the Department and reviewing courts to consider a new Health Plan when making their decisions, Section 44-7-225 recognizes the likelihood that a contested case will not resolve before a new Health Plan becomes effective. This statute provides the necessary discretion to consider changes that have been made in the new Health Plan due to the unavoidable passage of time and to take those changes into account. The ALC committed no error in considering the 2012–2013 Health Plan. The information in the 2012–2013 Health Plan supported the ALC's other factual findings and the expert testimony that showed that the two CON applications were not competing.

[13] For example, in this case, the first CON application was filed in March 2011, the case was tried in September 2013, and an Amended Final Order and Decision was rendered in April 2014. *See* R. pp. 8–10, 33.

Further, the need existed when Grand Strand filed its CON application, and, because of the utilization numbers, CRCC and Grand Strand's CON applications were not competing.[14] Because the two CON applications were not competing, there is no error in approving them both.

II. CRCC Failed to Preserve and Therefore Waived Its Argument that the Administrative Law Court Should Have Remanded Grand Strand's CON Application; Regardless, the Administrative Law Court Has the Authority to Approve Grand Strand's Application After a De Novo Review.

CRCC argues that the ALC exceeded its authority by approving Grand Strand's CON application instead of remanding Grand Strand's application back to the Department when it found the applications were not competing. (App.'s Br. 20–23.) CRCC's argument fails because CRCC has not preserved the issue for appellate review, CRCC waived this argument, and the ALC has the authority to approve Grand Strand's CON application based on its de novo review of the Department's December 28, 2011 Decision Letters.

A. Failure to Preserve and Waiver.

CRCC first argued that the ALC must remand the case to the Department in its Motion to Alter or Amend. Not once during the nine day trial did CRCC contend that the ALC lacked the authority to approve Grand Strand's application or request that the judge remand the case to the Department if the judge found the applications were not competing. It is well-established that an issue may not be raised for the first time in a

[14] Grand Strand assumed that in 2017, there would be a total of 31,802 treatments performed in the Service Area, and of those total treatments, 24,565 would be performed at CRCC facilities if Grand Strand were not present in the market. (R. p. 1034, line 2 – p. 1039, line 7; R. p. 4450; R. pp. 4617–4618.) The ALC, which explicitly stated that it found the testimony of Grand Strand's expert to be credible and reliable (R. pp. 12, 31), found that if Grand Strand's 2017 volume exceeds 5,525 treatments, it would decrease the existing providers below the 80% threshold. (R. p. 20.) The ALC then found Grand Strand would likely perform 4,851 treatments in 2015 and 5,168 treatments in 2017, and that the existing providers would not fall below the 80% threshold. (R. pp. 20, 31.)

Rule 59(e) motion to alter or amend when it could have been raised at trial. *Johnson v. Sonoco Products Co., et al.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

The issue of how the ALC was to proceed in making its decision was squarely before the court. In fact, the judge and counsel for CRCC engaged in a brief colloquy about this exact issue. Counsel for CRCC stated that the judge, if he found the applications to be competing, was to determine which application should be approved:

> If there are two competing applications, only one can be approved. And so therefore, if they're competing, **Your Honor would then** move and do what the Department did in its analysis, which is to **compare the applications and choose the one that is most superior looking at the regulations**, the purposes of the Act, the Health Plan, the project review criteria, and the other [Department] regulations.

(R. p. 314, lines 15–25) (emphasis added). In response to a question from the judge, CRCC's counsel represented to the court that the "correct legal outcome" would be for the judge to compare the applications and award one of the applicants a CON for a linear accelerator:

> THE COURT: So where I can be clear. If I was to decide that Grand Strand meets the criteria the best, then CRCC would not be seeking a linear accelerator?
>
> MR. LONG: Your Honor, if you were to do – if you were to decide – I think the analysis would be this way, Your Honor. You decide if the applications are competing, you determine that the applications are competing, which we state that they are, then Your Honor should compare the applications. **If Your Honor determines that the Department's comparison was faulty or you disagree with it based on the evidence that you hear, you can flip the decision and award the linear accelerator to Grand Strand and deny the one to Conway.**
>
> THE COURT: All right.

> MR. LONG: And that's the – **and that is the correct legal outcome**. We would – we do not believe that there should be two linear accelerators approved in this process, and therefore, Your Honor should only approve one of the two. We don't think it's a close question of whether it's ours or theirs, but if Your Honor disagreed, then yes, that would be the result.
>
> THE COURT: All right.

(R. p. 316, line 3 – p. 317, line 3) (emphasis added). On appeal, however, CRCC argues:

> [I]t was reversible error for the ALC to reverse the Department's decision not to award a CON to Grand Strand and to take the additional step to mandate the issuance of a CON to Grand Strand without first remanding the matter back to the Department.

(App.'s Br., 20.) First, there is no legal distinction between approving Grand Strand's application if the ALC found the two applications competing and approving Grand Strand's application when the ALC found the two applications were not competing. In either situation, the ALC must determine, based on the evidence presented in a de novo hearing, whether Grand Strand's application meets the project review criteria and comports with the CON Act and its regulations. CRCC admitted to the judge that he can approve Grand Strand's application if he finds the two applications competing. CRCC offers no reason why the ALC is prohibited from approving Grand Strand's application when they are not competing.

Second, because CRCC in its opening argument instructed the ALC that it had the authority to reverse the Department's decision and award a CON to Grand Strand, CRCC has waived this issue. *See State v. Rios*, 388 S.C. 335, 341, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Rios waived appellate review of this issue because an issue conceded in the trial court cannot be argued on appeal."). To argue now to this Court that the ALC lacks the authority to approve Grand Strand's CON application and instead must remand it to the Department after CRCC stated to the judge that he could approve Grand Strand's

application is disingenuous. Accordingly, this Court should dismiss this argument as CRCC failed to preserve it for review.

B. The ALC has the Authority to Approve Grand Strand's CON Application.

Despite CRCC's issue preservation problem, CRCC's argument that the ALC should have remanded Grand Strand's application to the Department is also without merit. First, a contested case hearing before the ALC is a de novo hearing, during which the entire case is presented as if there had been no hearing or determination below. *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). In a de novo contested case hearing, "the ALC serves as the sole finder of fact . . . ." *Be Mi, Inc. v. S. C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014). "Consequently, the ALC is authorized to make a final determination—after a final agency decision and subject to judicial review—as to whether an administrative agency should have granted or denied a particular [application]." *Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014), *reh'g denied* (May 7, 2014). Second, South Carolina Supreme Court precedent is directly adverse to CRCC's contention and supports the ALC's authority to approve Grand Strand's CON application.

In *Spartanburg Regional Medical Center v. Oncology & Hematology Associates of South Carolina, LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010), the Supreme Court endorsed the very action the ALC ordered in this case, which CRCC opposes. The facts of the *Spartanburg* case are very similar to the instant case. The *Spartanburg* contested case involved two CON applicants vying to place linear accelerators in the Spartanburg County. *Id.* at 81–82, 690 S.E.2d at 784. One applicant was applying to enter the

market with its first linear accelerator and the other applicant was an existing provider with three linear accelerators in the service area. *Id.* The Department staff concluded that the CON applications were competing and approved the existing provider's application and denied the other applicant's application. *Id.* at 81, 690 S.E.2d at 784. The new radiotherapy provider whose application was denied requested review by the ALC. *Id.* at 81, 690 S.E.2d at 784–85.

During the five-day *Spartanburg* contested case hearing, the "issue of need was central to the case because [the new provider] argued that the Department had erred at the outset by characterizing the applications as competing." *Id.* at 86, 690 S.E.2d at 786. The new provider presented data projections to show that the approval of both applications would not exceed the need for radiation therapy in the service area. *Id.* at 86–88, 690 S.E.2d at 787. The existing provider predictably presented different projections that indicated only one application could be approved. *Id.* at 87, 690 S.E.2d at 787. Ultimately, the ALC relied upon the new provider's expert testimony and projections and issued an order concluding that "the two CON applications were not competing 'because granting both [CON a]pplications will not exceed the need for linear accelerator facilities and the services which they provide.'" *Id.* at 82, 690 S.E.2d at 785. The ALC found in *Spartanburg* that both CON applications were consistent with the Health Plan and ordered the Department to issue a CON for both proposed projects. *Id.* Thus, in the *Spartanburg* case, the ALC rendered a decision exactly like the ALC's decision in the instant case.

The providers in *Spartanburg* appealed to the circuit court, which affirmed the ALC's decision. *Id.* at 83, 690 S.E.2d at 785. The Supreme Court certified the case pursuant to Rule 204(b), SCACR. The issues presented on appeal were whether

substantial evidence supported the ALC's order and whether the ALC erred in granting the emerging provider's CON application. *Id.* at 89, 690 S.E.2d at 788. In affirming the ALC's decision, the Supreme Court stated that

> the evidence substantially supports the legal conclusion that the two applications were not competing. Moreover, based on the evidence presented, the granting of both CONs does not violate the State Health Plan and will further the overall purpose of [the CON Act].

Id. at 83, 690 S.E.2d at 785. The *Spartanburg* case is on all fours with this case—both factually and procedurally—and the *Spartanburg* case supports the ALC's order. Importantly, the Supreme Court never remanded the case back to the Department for further determination, as CRCC is requesting in the instant case.[15]

In spite of the controlling Supreme Court precedent to the contrary, CRCC still asserts that the ALC lacks the authority to award a CON to Grand Strand. CRCC repeatedly contends that the Department did not undertake a review of the merits of Grand Strand's application. (App.'s Br. 21–22.) The Department issued two separate Decision Letters—one to Grand Strand and one to CRCC. The Department's Decision Letters, however, are clear that the Department conducted a detailed review and analysis of Grand Strand's application, just as it did for CRCC's application, addressing each of the applications' compliance with the project review criteria. (R. pp. 3294–3302; R. pp. 4264–4271.) In fact, the Department states, in each Decision Letter:

> Individually, the **Department has determined all applications comply with the 2010–2011 South Carolina Health Plan**. However, collectively, there are issues with exceeding the service area need.

[15] While CRCC argues that the issue of remand was not before the Supreme Court in the *Spartanburg* case (App.'s Br. 21, n.3), it is unlikely that Spartanburg Regional would have missed the opportunity to request remand in that case if such a remedy were available. Moreover, it is highly unlikely that the Supreme Court would have committed such an egregious procedural error as failing to remand its decision back to the Department Staff for approval if that were required.

(R. p. 3282; R. p. 4252) (emphasis added). CRCC's argument ignores the clear language in the Department's Decision Letters and is particularly surprising considering that CRCC says no fewer than four times in its Brief that the Department conducted a thorough review of the applications. (App. Initial Br. 10, 11, 21, and 22.) It is difficult to understand how the Department could conduct a thorough review of the applications and compare the applications to determine which best meets the project review criteria, yet still not consider the merits of Grand Strand's application.[16] Because the Department has already determined that both applications comply with the 2010–2011 Health Plan, there is nothing to remand back to the Department. Thus, the ALC is not intruding on the Department's sole authority to review and grant CON applications. Further, the ALC's decision to approve Grand Strand's application is supported by substantial evidence in the record, as discussed in Section III of this Brief.

CRCC's argument that the ALC cannot award a CON to an applicant if the Department did not review the application separately from—instead of in comparison with—other applicants would impermissibly tie the hands of the ALC, eviscerate the de novo review process, grossly extend the CON process in a manner not envisioned by the legislature, and add unnecessary burdens on the Staff. Further, the argument ignores the reality of the Department's review process. As is evidenced by the Department's Decision Letters, the Department thoroughly reviews each application and makes detailed findings. Whether the application is the only one being considered or it is being considered along with other non-competing or competing applications does not change the fundamental analysis undertaken by the Staff.

[16] Indeed, as set forth previously, CRCC actually admitted at the contested case that the ALC has the authority to overturn the Department's decision to deny a CON to Grand Strand and to approve a CON for CRCC. (R. p. 316, line 3 – p. 317, line 3.)

The Department clearly analyzed and reviewed Grand Strand's CON application. (R. p. 3282; R. p. 4252.) The Department, albeit erroneously, determined that the applications were competing and that CRCC should be awarded the CON. (R. pp. 3294–3302; R. pp. 4264–4271.) Having made that determination, there was no need for the Department to explicitly state whether it would, under other circumstances, approve Grand Strand's application. It is unreasonable to suggest that the ALC does not have the authority to award a CON based on the review of the Department's decision unless the Department expressly signals in its decision letter that the denied application would have been approvable but for the approval of the other, competing CON application. In fact, the Department's Decision Letters stated that each application complied with the 2010–2011 Health Plan. Moreover, the Decision Letters were more than sufficient to permit the ALC to review on a de novo basis whether the applications were competing and the merits of the respective CON applications under the Health Plan, the CON Act, and its regulations. CRCC's argument to the contrary would only perpetuate and further complicate the already lengthy legal process involved in CON cases. Therefore, this Court should dismiss CRCC's argument and affirm the ALC's ruling.

III. THE ADMINISTRATIVE LAW COURT'S DECISION TO APPROVE GRAND STRAND'S CON APPLICATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

CRCC wrongly asserts that the ALC's decision to approve Grand Strand's application is not supported by substantial evidence. (App.'s Br. 23–32.) As this Court is well aware, the substantial evidence standard is a deferential standard of review. CRCC offers several specific examples of why it contends the ALC erred. None of these arguments have merit. The ALC's order in this case is a thorough, well-reasoned, 28-

page Amended Final Order that includes specific factual and legal findings, and is supported by substantial evidence in the record.

A contested case hearing conducted before the ALC in a CON matter is a de novo hearing, in which "the whole case is tried as if no trial whatsoever had been had in the first instance." *Marlboro Park Hosp.*, 358 S.C. at 579, 595 S.E.2d at 854 (internal quotations omitted). A contested case hearing before the ALC is the final step in the administrative review process. *Engaging & Guarding Laurens Cnty.'s Env't*, 407 S.C. at 344, 755 S.E.2d at 449. On appeal from a CON contested case, the reviewing court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B); *Spartanburg*, 387 S.C. at 89, 690 S.E.2d at 787. Therefore, judicial review of an ALC decision is limited to a determination of whether it is supported by substantial evidence in the record. *Id.* "Substantial evidence is not merely a scintilla of evidence, nor is it evidence viewed blindly from one side." *Marlboro Park Hosp.*, 358 S.C. at 580, 595 S.E.2d at 855. The appellate court will consider the entire record and need only find evidence that would allow reasonable minds to reach the same conclusion as the administrative law judge. *Spartanburg*, 387 S.C. at 89–90, 690 S.E.2d at 787. When the evidence conflicts on an issue, the appellate court will defer to the ALC's findings of fact. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011).

In its Decision Letter to Grand Strand, the Department made detailed findings on Grand Strand's application and determined that Grand Strand addressed all of the project review criteria. (R. pp. 4264–4267.) The ALC conducted a de novo review of that Decision Letter and disagreed with the Department's findings regarding community need, accessibility, and adverse impact. (R. pp. 23–26.) In its Order, the ALC first found that

Grand Strand's and CRCC's applications were not competing. (R. pp. 29–32.) The ALC based this decision on Grand Strand's estimated treatment volumes and projections in its application, Grand Strand's 2017 threshold analysis, and the testimony of Grand Strand's health planning and finance expert. (R. p. 31.) Having found Grand Strand's expert's projections and analysis more reliable than those of CRCC's expert, the ALC determined that approving both applications would not bring existing providers below 80% utilization. (R. p. 31.) Clearly, substantial evidence exists in the Record to support the ALC's decision.[17]

In its brief, CRCC repeatedly asserts the ALC "fails to acknowledge" several facts presented by CRCC. (App.'s Br. 25–26.) Essentially, CRCC argues the ALC erred in not accepting CRCC's theory of the case and view of the facts. However, that argument does not satisfy the deferential standard of review on appeal, which requires the appellate court to look at all the evidence in the Record and determine whether substantial evidence exists to support the ALC's Order. The ALC's decision to accept the testimony of one expert over another and rely upon the evidence presented by one party over another is not reversible error. *S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586 (1992) (finding that the fact-finder was within its discretion to accept one party's expert testimony over another's); *Florence County Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 425 S.E.2d 61 (Ct. App. 1992) (holding it is within the trial court's discretion to determine how much weight to give to expert testimony). In its Order, the ALC detailed the evidence presented by CRCC and

[17] In fact, in its Order, the ALC acknowledges that, while it determined that the CON applications were not competing, if the CON applications had been competing, then Grand Strand's application was superior for a variety of reasons. (R. p. 33, n.38.)

why it found Grand Strand's evidence more reliable. CRCC's displeasure at the result is expected, but it does not alter the truth that the ALC's Order is well supported by substantial evidence in the Record.

A. Substantial Evidence in the Record Supports the ALC's Findings Regarding Utilization and Market Share.

CRCC argues that substantial evidence does not support the ALC's Order because the ALC calculated its own data projections and Grand Strand offered no utilization data. (App.'s Br. 24.) This assertion is false. First, Grand Strand's expert, Dan Sullivan, testified that based on Grand Strand's utilization projections, the Department could approve two linear accelerators in the Service Area without bringing the existing units below the 80% threshold. (R. p. 975, line 14 – p. 978, line 14; R. p. 1020, line 20 – p. 1021, line 15; R. p. 1036, line 16 – p. 1039, line 7.) The twenty percent (20%) market share the ALC used in its analysis was not "arbitrarily" created by the court, as CRCC alleges. This number was established in Grand Strand's CON Application (R. p. 3337), was used by the Department in its Decision Letter to Grand Strand (R. p. 4265), and was offered by Mr. Sullivan during the hearing (R. p. 927, line 15 – p. 931, line 5).

Second, the ALC's findings regarding Dr. Holt and the referrals from Coastal Cancer Center ("CCC") to Grand Strand's proposed radiation therapy facility comport with the evidence presented. The ALC found Dr. Holt never committed that Coastal would send all or even a substantial portion of referrals to Grand Strand. (R. p. 16, n.14.) The ALC is correct. The evidence presented at the hearing is that Grand Strand expected

referrals from CCC, but Dr. Holt never quantified the number of referrals.[18] (R. p. 385, lines 11–19; R. p. 884, line 23 – p. 886, line 21.)

Third, the ALC's findings regarding the relationship between AUC and CRCC and the referral patterns are supported by substantial evidence in the Record. The evidence clearly supports the ALC's determination that AUC, the urology practice that owns CRCC, will refer its patients to CRCC and that Grand Strand will not receive those referrals. (R. pp. 4451, 4564–4612, 4617, 4430–4434; R. p. 1035, line 2 – p. 1036, line 15.) Finally, CRCC's argument that the ALC placed "unreasonably significant weight" on the relationship between AUC and CRCC in its findings regarding projected utilization is disingenuous considering Mr. Tolbert, CRCC's expert, projected 100% of AUC's referrals would go to CRCC. (R. p. 1962, line 12 – p. 1963, line 4.) Therefore, CRCC's argument that the ALC's findings are not supported by substantial evidence in the Record must fail.

B. Substantial Evidence in the Record Supports the ALC's Determination on Accessibility and Adverse Impacts.

The ALC found, based on substantial evidence in the Record, that Grand Strand's project will create access for in-hospital radiation therapy, which will both allow inpatients less burdensome access to radiation therapy and provide the necessary building block for the establishment of a comprehensive cancer treatment center—valuable services conspicuously absent in the Service Area. (R. p. 24; R. p. 906, line 13 – p. 915, line 22.) It further found that CRCC will suffer no significant adverse impact from the immaterial loss of referrals it will experience with the establishment of Grand Strand's

[18] In fact, Dr. Holt's practice, CCC, is the only medical oncology practice in Horry County. Several of the physicians in CCC supplied letters of support to CRCC. (R. p. 23, n.28.)

project. (R. p. 31; R. p. 926, lines 12–21; R. p. 1039, line 8 – p. 1040, line 21.) Therefore, the ALC's findings are supported by substantial evidence.

C. CRCC's Remaining Arguments are Meritless.

CRCC contends the ALC's Order contains additional findings that lack support in the Record, thereby warranting reversal. (App.'s Br. 30–32.) The two issues CRCC references, however, have substantial support in the Record and, regardless, are immaterial to the ALC's ultimate decision. First, CRCC argues the ALC erred in stating that CRCC did not take the position with the Department Staff that the Grand Strand project will impact CRCC's operation due to the loss of referrals from CCC. (App.'s Br. 30–31.) In footnote 19 of the Amended Final Order, however, the ALC lists various portions of testimony that show CRCC did not take this position with the Department Staff during the initial review process. (R. p. 19, n.19.) Regardless, in its Order, the ALC considers the adverse impact CRCC will experience from Grand Strand's project and finds that it will not be material. (R. p. 31.) Second, CRCC contends there is no evidence to support the ALC's finding that Grand Strand intends to partner with the Sarah Cannon Center. (App.'s Br. 31–32.) This assertion is false. Grand Strand's 2012 Action Plan states that a goal is to partner with the Sarah Cannon Center in Nashville, TN, which is at least partially owned by HCA and is a cancer treatment resource for Grand Strand. (R. p. 428, line 11 – p. 429, line 10; R. p. 4642.) All of the ALC's findings in its Amended Final Order are supported by substantial evidence. CRCC's assertions to the contrary are meritless, and this Court should affirm the ALC's Amended Final Order.

D. Alternatively, If This Court Finds the ALC Erred in Determining the Applications Are Not Competing, Then Grand Strand's Application Should Be Approved and CRCC's Should Be Denied.

If this Court were to determine that there is not substantial evidence in the Record to support the ALC's determination that Grand Strand's and CRCC's applications are not competing, then only one CON application may be approved. In such a situation, this Court should approve Grand Strand's application and deny CRCC's application. The ALC found that Grand Strand's project "more fully complies with the applicable requirements" (R. p. 33, n.38) and that "Grand Strand would have received the CON regardless of whether the Court found its and CRCC's CON Applications to be competing" (R. p. 39). The ALC specifically found that (1) Grand Strand's project stands apart from CRCC's because Grand Strand will offer in-hospital radiation therapy and access to comprehensive cancer treatment;[19] (2) Grand Strand will offer individuals the option of receiving radiation therapy at a facility that does not financially reward physician referral sources; and (3) because Grand Strand will be entering a market dominated by a single provider, non-governmental payors will have the ability to negotiate rates in Horry County for radiation therapy services. (R. p. 33, n.38.) The ALC also found that the access Grand Strand's project affords to the citizens of the Service Area, most of whom live in Horry County, outweighs any alleged duplication of services or adverse impact due to its proximity to CRCC's Myrtle Beach facility. (R. p. 33, n.38.)

Grand Strand recognizes the ALC's above findings were not dispositive of the case because the ALC found the applications were not competing. Nonetheless, the

[19] As testified to at the hearing, the addition of a linear accelerator will not by itself establish the comprehensive cancer treatment center Grand Strand seeks to provide, but it is the foundational block without which the center will not come to fruition. (R. p. 908, line 22 – p. 911, line 5; R. p. 409, line 15 – p. 410, line 16.)

inclusion of those findings is appropriate because it serves the interests of judicial economy and provides this Court with sufficient factual findings concerning which application should be approved if only one may be approved. *See Cabiness v. Town of James Island*, 393 S.C. 176, 188, 712 S.E.2d 416, 423 (2011) (ruling on non-dispositive issues in the interest of judicial economy). Because the ALC has made specific findings that Grand Strand's application meets the applicable criteria and is superior to CRCC's project, a remand to the ALC is unnecessary. Substantial evidence in the Record supports the ALC's findings regarding the superiority of Grand Strand's project; thus, in the interest of judicial economy, this Court may affirm the ALC's findings and approve Grand Strand's CON application. *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543, n.2 503 S.E.2d 445, 447 (1998) (deciding that, even though the matters could be decided by the lower court, it was appropriate to grant a petition for a writ of certiorari because it would serve the interest of judicial economy "by eliminating numerous inevitable appeals" of the issue).

IV. THE ADMINISTRATIVE LAW COURT DID NOT SHIFT THE BURDEN OF PROOF TO CRCC.

CRRC's final argument is a transparent rehashing of its complaint that the ALC did not agree with the evidence CRCC presented during the hearing, which is not a sufficient reason to overturn a decision of the ALC. Nothing in the ALC's Amended Final Order indicates that it shifted the burden of proof from Grand Strand to CRCC. In fact, the ALC specifically states that Grand Strand, as the moving party, "bears the burden of establishing by a preponderance of the evidence that approval of both applications for linear accelerator services would not exceed the need for the services in the service area." (R. p. 30.)

CRCC points to the fact that Grand Strand's health planning expert, Mr. Sullivan, used baseline data projections of CRCC's expert, Mr. Tolbert, as proof of a dearth of evidence to support Grand Strand's position that approval of both projects would not bring existing providers below the 80% threshold. (App.'s Br. 33.) CRCC fails to paint a true picture of how Mr. Sullivan used Mr. Tolbert's own data. In fact, Mr. Sullivan merely accepted Mr. Tolbert's baseline projected 2017 Service Area and CRCC treatment volume data as correct, giving him the benefit of the doubt, and then applied key assumptions, which Mr. Tolbert failed to apply to his own analysis,[20] to demonstrate that the Service Area could easily support two new linear accelerators, even if Grand Strand captured 35% of the available market.[21] (R. pp. 4450-4454; R. p. 1038, line 8 – p. 1039, line 7; R. p. 31.) The analysis of Grand Strand's expert in no way shifted the burden of proof to CRCC. Rather, Grand Strand was able to sustain its burden of proving its case that the applications were not competing, even when relying on CRCC's expert's own baseline estimates. The ALC found Grand Strand's evidence more credible and reliable than CRCC's, which does not mean it shifted the burden of proof. (R. pp. 12, 16–17, 20–23, 25–26, 32–33.)

CRCC's only complaint is that the ALC did not accept its expert's analysis, which is not legally cognizable error. The ALC was well within its authority to reject the evidence presented by CRCC in favor of the evidence Grand Strand presented. *See State*

[20] The key assumptions Mr. Tolbert failed to consider include the strength of CRCC's entrenched market presence; the number of treatments performed on each prostate cancer patient as confirmed by 21st Century's Chief Medical Officer, Dr. Constantine Mantz; CRCC's guarantee of capturing 100% of the AUC referrals, which comprise 43% of its total treatments; and CRCC's support from area physicians and another hospital, including the medical oncologists at CCC. (R. pp. 20–23.)

[21] The "available market" does not include any of the treatment referrals from AUC urologists because of their financial relationship with CRCC. (R. pp. 4451, 4564–4612, 4450, 4430–4434; R. p. 1035, line 2 – p. 1036, line 15; R. p. 20.)

v. Dorce, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995) ("The trial judge was presented with contradicting testimony, and it was within his province, as the trier of fact, to weigh the credibility of the evidence presented to determine which witnesses he deemed credible."); *Moore v. Benson*, 390 S.C. 153, 164, 700 S.E.2d 273, 279 (Ct. App. 2010) ("[T]he fact finder [] was free to accept or reject the testimony.").

The standard of review in this case requires this Court to determine whether, when considering all the evidence in the Record—not just the evidence offered by one party—reasonable minds could reach the same result as the ALC. There can be no doubt that in this case the ALC's Amended Final Order is supported by substantial evidence in the Record, and this Court should affirm the ALC's decision to award both parties a CON for a linear accelerator.

CONCLUSION

For the foregoing reasons, Grand Strand respectfully requests this Court affirm the ruling of the Administrative Law Court that Grand Strand's and CRCC's CON applications are not competing and that both applications should be approved. If this Court finds that substantial evidence does not support the ALC's ruling that the applications are not competing, then Grand Strand requests this Court approve Grand Strand's CON application and deny CRCC's CON application.

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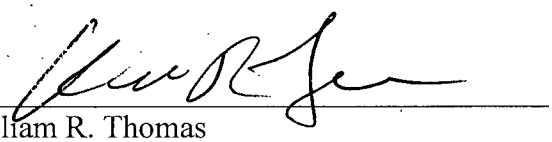
Respectfully submitted,



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January 23, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

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Grand Strand Regional Medical Center, LLC .....Respondent,

v.

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

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

Grand Strand Regional Medical Center, LLC .....Respondent,

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

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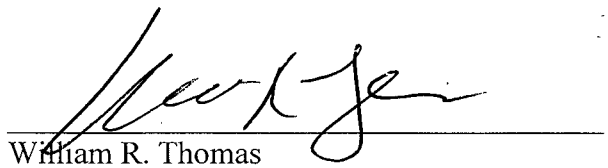

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and Carolina Regional Cancer Center..... Respondents below,

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

PROOF OF SERVICE

The undersigned hereby certifies that on January 23, 2015 s/he has caused a copy of the Brief of Respondent to be served upon all parties of record by hand delivering a copy of the same, addressed as follows:

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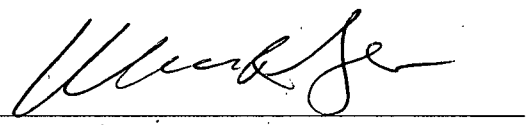

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