THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

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

v.

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

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

FINAL BRIEF OF APPELLANT

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

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I. Did the Administrative Law Court's application of the Certificate of Need Act, State Health Plan, and Project Review Criteria violate the dormant Commerce Clause by awarding the certificate of need (a) to protect an existing hospital from competition from a non-local hospital system; (b) to reduce the amount of South Carolina patients seeking healthcare in North Carolina and other areas outside of York County; and (c) based on an in-state hospital's exclusive ability to transfer beds?

II. Did the Administrative Law Court erroneously approve Piedmont's proposal to transfer hospital beds without reviewing whether Piedmont's proposal complied with the regulatory criteria established under the State Health Plan's Bed Transfer Provision, and thereby improperly decide certain Project Review Criteria in favor of Piedmont in reliance on Piedmont's ability to transfer hospital beds?

III. Did the Administrative Law Court erroneously, arbitrarily, or capriciously apply the Certificate of Need Act, State Health Plan, and Project Review Criteria when it awarded a certificate of need by (a) failing to conduct a balanced and complete review of the applicable regulatory criteria; (b) relying on irrelevant and impertinent information to decide certain criteria; and (c) making arbitrary and irrational conclusions that contradict the plain language and statutory and regulatory purposes of the Certificate of Need Act, State Health Plan, and Project Review Criteria?

STATEMENT OF THE CASE

This case began approximately ten years ago, in March 2005, when Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas"), Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont"), and a third applicant[1], Presbyterian Healthcare ("Presbyterian"), filed certificate of need ("CON") applications with the South Carolina Department of Health and Environmental Control ("DHEC") pursuant to the 2004-2005 State Health Plan ("2004-2005 Plan" or "State Health Plan") (R. pp. 3045-3215) to construct and operate a general acute care hospital in Fort Mill, York County, South Carolina ("Fort Mill CON"). (R. p. 75). Carolinas, a North Carolina-based hospital system[2], proposed to construct and operate Carolinas Medical Center-Fort Mill ("CMC-FM"), a 64-bed general acute care hospital, consistent with the bed need recognized in the 2004-2005 Plan. (*Id.*) Piedmont initially proposed a 64-bed hospital but later amended its application by seeking to transfer 36 beds from its existing hospital in Rock Hill, Piedmont Medical Center, to its proposed new facility, the Fort Mill Medical Center ("FMMC"), and thereby construct and operate a 100-bed hospital. (R. pp. 75-76). Piedmont's hospital in Rock Hill is the sole hospital in York County. (R. p. 3069).

On May 30, 2006, DHEC denied the Fort Mill CON applications of Carolinas and Presbyterian and issued the CON to Piedmont. (R. p. 76). At the time, Piedmont argued and DHEC agreed that only an existing hospital in a county was entitled to apply for a

[1] A fourth applicant, Hospital Partners of America ("HPA"), also applied for a 64-bed hospital but HPA did not file a contested case when its application was denied.

[2] Carolinas is a non-profit healthcare system operating in both North Carolina and South Carolina. (R. p. 1320, line 25-p. 1321, line 13). Piedmont is a wholly-owned subsidiary of Tenet Healthcare, Inc. ("Tenet"). (R. p. 361, lines 5-16). Tenet is a for-profit, publicly traded company which owns and operates forty-nine (49) hospitals across the United States. (R. p. 345, lines 18-23, p. 361, lines 5-9).

CON to build a new hospital in the county ("Matthews Order"). (R. pp. 1-28). On June 12, 2006, Carolinas and Presbyterian timely requested a contested case (the "First Contested Case") to challenge DHEC's decision with the South Carolina Administrative Law Court ("ALC").

In September 2009, Judge Matthews presided over a three week hearing in the First Contested Case. After Carolinas and Presbyterian concluded their cases, Judge Matthews granted their Motions for Summary Judgment on the grounds that DHEC had erroneously adopted Piedmont's legal argument that only Piedmont, as the existing hospital in York County, was eligible to apply for a new hospital in York County. (R. p. 10). As a result, Judge Matthews remanded the Fort Mill CON applications to DHEC for further review consistent with her instructions to determine "which of the applications, 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 [DHEC]." (R. p. 27).

Piedmont appealed Judge Matthews's Order to the South Carolina Supreme Court, and Carolinas and Presbyterian cross-appealed. In a decision dated April 8, 2010, the South Carolina Supreme Court dismissed the appeal and remanded to DHEC because Judge Matthews's Order was not a "final decision" immediately appealable under S.C. Code Ann. § 1-23-610, which limits appellate review to final decisions of the ALC.[3] (R. pp. 29-33).

After DHEC regained jurisdiction over the Fort Mill CON matter, it reviewed the updated CON applications submitted on October 4, 2010 by Carolinas, Presbyterian, and

[3] The consolidated appeals went first to the South Carolina Court of Appeals, which referred them for disposition to the South Carolina Supreme Court.

Piedmont under the CON Act (S.C. Code Ann. § 44-7-160, *et seq.*), the 2004-2005 Plan, and the applicable Project Review Criteria[4] (S.C. Regs. 61-15 § 802.1, *et seq.*).[5] (R. p. 77). DHEC established the relative importance of the Criteria, listing the most important Criteria first, as follows:

Rank 1	Compliance with the State Plan (Criterion 1)
Rank 2	Community Need Documentation (Criteria 2a-2e) Distribution (Accessibility) (Criteria 3a-3g) Distribution (Criterion 22)
Rank 3	Projected Revenues (Criteria 6a-6b) Projected Expenses (Criterion 7) Net Income (Criterion 9) Financial Feasibility (Criterion 15) Cost Containment (Criteria 16a-16c) Efficiency (Criterion 17)
Rank 4	Record of the Applicant (Criteria 13a, 13b, 13d) Acceptability (Criteria 4a-4c) Adverse Effects on Other Facilities (Criteria 23a-23b)

(R. p. 81).

On September 9, 2011, eleven (11) months after the initial submissions by the parties, DHEC awarded the CON to Carolinas and denied a CON to Piedmont and Presbyterian. (R. pp. 2173-2185, 3030-3044). By the time DHEC made its decision on September 9, 2011, DHEC's staff had reviewed extensive material related to the CON applications gathered over more than six years. DHEC's findings supported the following conclusions: (1) Carolinas most fully complies with the Project Review Criteria; (2) Carolinas best justified the implementation of its project because of its

[4] The Project Review Criteria are sometimes referred to collectively as the "Criteria," and its singular components are sometimes referred to as the "Criterion."

[5] By consent of all the parties, the ALC established October 4, 2010 as the deadline for the applicants to submit to DHEC any supplemental information. On that date, Carolinas, Piedmont, and Presbyterian submitted extensive supplemental information to DHEC to update their previous applications.

current significant level of market share and utilization in Northern York County; (3) Carolinas' project is financially feasible; and (4) Carolinas' project would increase accessibility and availability of services by shifting its current market share to a facility in South Carolina, resulting in less adverse impact to existing facilities. (*Id.*)

On November 15, 2011, Presbyterian and Piedmont requested a contested case with the ALC to review DHEC's award of the CON to Carolinas (the "Second Contested Case").[6] The Second Contested Case was assigned to Judge S. Phillip Lenski and progressed through a hearing on the merits conducted over fifteen days in March and April 2013. Approximately a year after the hearing, the ALC issued a Final Order dated March 31, 2014 reversing DHEC's decision, issuing the CON to Piedmont instead, and denying the CON to Carolinas (the "Final Order"). (R. pp. 34-72). On April 9, 2014, Carolinas timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, SCRCP ("Motion to Reconsider"). (R. pp. 227-249). On May 2, 2014, the ALC vacated the Final Order. (R. p. 73). Over seven months later, on December 15, 2014, the ALC issued the Amended Final Order, maintaining its previous ruling reversing DHEC's decision, granting the CON to Piedmont, and denying the CON to Carolinas. (R. pp. 125-126).

In the Amended Final Order, the ALC expressly stated that its purpose and rationale for awarding the CON to Piedmont was to protect Piedmont from perceived adverse effects of competition from an out-of-state hospital and to reduce the number of South Carolinians who voluntarily seek healthcare from Carolinas at its North Carolina hospitals. (R. pp. 121-122, 124-125). The Amended Final Order contains numerous

[6] Presbyterian subsequently withdrew from the Second Contested Case.

findings that awarding the CON to Carolinas will adversely affect Piedmont's profits, utilization, quality of service, types of services, payor mix, and physician staff. (R. pp. 86-99, 118-120, 124-125). The ALC's Amended Final Order also favored the existing medical provider in York County, Piedmont, to the detriment of the out-of-state provider, Carolinas, by concluding that Piedmont's 100-bed facility would better meet future bed need for the area than Carolinas' 64-bed facility. (R. pp. 100-105, 113, 118-119, 123-124).

Overall, the ALC's Amended Final Order significantly departs from the conclusions reached by DHEC as to which applicant better meets the Project Review Criteria. In its post-remand decision, DHEC found that Carolinas either better meets or equally meets all Criteria and that Piedmont did not better meet any Criteria. In contrast, the ALC concluded that Carolinas better meets no Criteria and that Piedmont either better or equally meets all Criteria. As demonstrated by the below chart, the ALC reversed DHEC's findings that Carolinas either better meets or equally meets eighteen Criteria:[7]

Rank	Description	DHEC	Court
Rank 1	Compliance with the State Health Plan	Equal	Equal
Rank 2			
2a	Community Need Documentation	Equal	Piedmont
2b	Population projections	Equal	Piedmont
2c	Service to meet need	Equal	Piedmont
2d	Reduction, elimination or relocation of service	[8]	Piedmont
2e	Current or projected utilization justified	Carolinas	Piedmont

[7] This chart is derived from the Amended Final Order and DHEC's Fort Mill CON decision letter and Project Review Criteria Analysis. (R. pp. 74-126, 2173-2185).

[8] Criterion 2d applies to Piedmont only because only Piedmont proposes to relocate beds to its proposed facility. Although DHEC made no specific finding about whether Piedmont satisfied Criterion 2d, it stated that it "was concerned with this criterion being adequately demonstrated" because of its concerns that Piedmont's "high level of projected market share is not reasonable." (R. p. 2178).

3a	Duplication and modernization	[9]	Equal
3b	Located to serve medically undeserved	Equal	Equal
3c	Location allows for timely delivery of support services	Equal	Equal
3d	No restriction on admissions	Equal	Piedmont
3e	Documentation of access means	Equal	Equal
3f	Access to medically underserved	Carolinas	Piedmont
3g	Provisions for access regardless of ability to pay	Carolinas	Equal
22	Distribution	Carolinas	Piedmont

Rank 3			
6a	Charges	Equal	Equal
6b	Projected Utilization/Expenses	Carolinas	Equal
7	Consistent with Similar Facilities	Equal	Equal
9	Net Income	Carolinas	Equal
15	Financial Feasibility	Carolinas	Equal
16a	Cost Containment	Carolinas	Equal
16b	Lease Alternatives	Equal	Equal
16c	Impact on Costs	Equal	Piedmont
17	Efficiency	Carolinas	Piedmont

Rank 4			
13a	Record of the Applicant	Equal	Equal
13b	Ability to Obtain Financing	Carolinas	Equal[10]
13d	Record of Compliance	Equal	Equal
4a	Acceptability	Equal	Equal
4b	Opposition	Equal	Equal
4c	Possible Transfer Agreements	Equal	Equal
23a	Adverse Impact on Existing Facilities	Carolinas	Piedmont
23b	Adverse Impact on Staffing	Equal	Equal

Carolinas received written notice of the entry of the Amended Final Order on December 15, 2014, and filed its Notice of Appeal with the South Carolina Court of Appeals on January 14, 2015.

[9] Like Criterion 2d, Criterion 3a applies to Piedmont only. DHEC found that Piedmont did "not adequately justify the duplication of services by the transfer of 36 existing beds in a project with a total project cost of either $119,808,964, or $146,522,042 which includes financing cost during construction." (R. p. 2181).

[10] The ALC made no specific findings of fact or conclusions of law in addressing Criterion 13b. Rather, the ALC determined that both applicants equally meet this Criterion because the parties do not dispute "DHEC's finding that Piedmont and CHS equally meet" Criterion 13b. (R. p. 117). As indicated by DHEC's conclusion that Carolinas better meets Criterion 13b (R. p. 2183), though, DHEC made no such finding that Criterion 13b is equally met, and the parties dispute which applicant better meets Criterion 13b.

ARGUMENT

Standard of Review

On appeal from a final decision of the ALC in a CON contested case, the Court of Appeals "may reverse or modify the decision if the substantive rights of the [appellant] have been prejudiced because the finding, conclusion, or decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; . . . (d) affected by other error of law; . . . or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-610(B).

I. THE ALC'S APPLICATION OF THE CON ACT, 2004-2005 PLAN, AND PROJECT REVIEW CRITERIA VIOLATES THE DORMANT COMMERCE CLAUSE.

A. The dormant Commerce Clause prohibits state and local laws and regulations that discriminate against or impermissibly burden interstate commerce.

The Commerce Clause of the United States Constitution grants Congress the power to regulate interstate commerce. *U.S. Const. art. I, § 8, cl. 3.* The Commerce Clause "also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Inst., Inc.*, 492 U.S. 324, 326 n.1 (1986). "The negative or dormant Commerce Clause 'prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 789 (4th Cir. 1991) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)). Thus, the dormant Commerce Clause invalidates state or local "laws that impose commercial barriers or discriminate

against an article of commerce by reason of its origin or destination." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). The principle behind the dormant Commerce Clause is that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

As the United States Supreme Court's jurisprudence has evolved, a two-tier analytical framework has been established for determining whether a state or local law or regulation is invalid under the dormant Commerce Clause: (1) a discrimination tier, and (2) an undue burden tier. *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005). Under the first tier, a court must consider whether the law or regulation discriminates against interstate commerce by providing "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013). "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the [state or] municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392.

A law or regulation may discriminate "facially, in its practical effect, or in its purpose." *Colon Health Ctrs.*, 733 F.3d at 543. Accordingly, "merely noting a law's facial neutrality is insufficient" in analyzing whether a law or regulation discriminates against interstate commerce. *Id.* "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Id.* Thus, a facially neutral law may discriminate against

interstate commerce in violation of the dormant Commerce Clause if it is applied to effectively protect or is intended to protect existing in-state interests from out-of-state competition. *Walgreen Co. v. Rullan*, 405 F.3d 50, 57 (1st Cir. 2005).

Even if a law is not discriminatory under the first tier, it may nevertheless violate the dormant Commerce Clause if it unduly burdens interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under the *Pike* framework, "[w]here a statute regulates even-handedly to effectuate a legitimate local purpose, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. Unlike the more exacting standard employed under the discrimination tier, the undue burden tier applies a "less strict scrutiny":

> The putative benefits of a challenged law are evaluated under the rational basis test, though "speculative" benefits will not pass muster. The *Pike* test requires closer examination, however, when a court assesses a statute's burdens, especially when the burdens fall predominantly on out-of-state interests. The test is therefore deferential but not toothless.

Colon Health Ctrs., 733 F.3d at 545 (internal citations omitted). If the law imposes a burden on interstate commerce, the court must then engage in a balancing approach to resolve whether the local interest "could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

B. State and local certificate of need and licensing laws and regulations are invalid under the dormant Commerce Clause if they have the effect and purpose of protecting local economic interests against competition from non-local economic interests.

Beginning in the early twentieth century, courts began invalidating under the dormant Commerce Clause state and local certificate of need and licensing laws and regulations that protect existing local or in-state interests against competition from non-

local or out-of-state interests. *See, e.g., Buck v. Kuykendall*, 267 U.S. 307, 316 (1925) (invalidating certificate of need aimed at prohibiting competition because its "effect upon [interstate] commerce is not merely to burden it but to obstruct it"). Later, in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), the Supreme Court invalidated a New York law that provided that a license to operate a milk receiving depot could not be granted by the New York Commissioner of Agriculture and Markets "unless the commissioner is satisfied that . . . the issuance of the license will not tend to a destructive competition in a market already served, and that the issuance of the license is in the public interest." *Id.* at 527 n. 3 (quoting N.Y. Agric. Mkts. Law § 258-c). In that case, H.P. Hood, a Massachusetts corporation which sold milk in Massachusetts and already maintained three milk receiving depots in New York, applied for a license for a fourth depot. The commissioner denied the application on the grounds that the new depot would "tend to a destructive competition in a market already adequately served." *Id.* at 529. Hood sued, and the United States Supreme Court ruled that the New York statute, as applied, violated the dormant Commerce Clause by discriminating against interstate commerce. According to the Supreme Court, the Commissioner's objective of preventing Hood from taking business from local businesses was impermissible because it was based "upon the sole and specific grounds that it will subject others to competition and take supplies needed locally, an end . . . always held to be precluded by the Commerce Clause." *Id.* at 542. In so holding, the Supreme Court declared that a "state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *Id.* at 538.

In *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), a case that has striking similarities to the present case, the First Circuit Court of Appeals invalidated Puerto Rico's certificate of need scheme as applied to pharmacies. Puerto Rico's certificate of need statute prohibited a person from acquiring or constructing a health facility, including a pharmacy, without having first obtained a certificate of necessity and convenience. Under the statute, a proposed new pharmacy was required to submit a certificate request. *Id.* at 53. If an affected person objected to the issuance of the certificate, the case was assigned to an administrative hearing where the parties presented, *inter alia*, expert testimony regarding the expected impact of the proposed pharmacy on competition in the local area. *Id.* At the conclusion of the hearing, the Secretary of the Health Department made a final determination based on his review of various statutory criteria. *Id.* The criteria included whether the proposed pharmacy would be located in an area that was already "saturated" by existing pharmacies. *Id.* at 54.

Walgreen brought suit claiming that Puerto Rico's certificate of need act, as applied to retail pharmacies, was invalid because it discriminated against interstate commerce or excessively burdened interstate commerce. While recognizing that the act was facially neutral because it applied to both in-state and out-of-state interests wishing to open a pharmacy, the First Circuit nevertheless found the statute invalid under the dormant Commerce Clause because it allowed the Secretary to "block a new pharmacy from locating in its desired location simply because of the adverse competitive effects that the new pharmacy will have on existing pharmacies." *Id.* at 55.

Citing the Supreme Court opinions in *Buck* and *H.P. Hood & Sons*, the *Walgreen* court observed that dormant Commerce Clause jurisprudence established that laws could

be invalidated if they "gave in-state interests the ability to manipulate a facially neutral regulatory scheme to establish advantages over out-of-state interests" or if they "permit a state to deny an operating license on the basis that the opening of a new facility in a particular location will cause undue competition for existing facilities." *Id.* at 56-57. The court held that Puerto Rico's certificate of need act suffered from both infirmities:

> It permits the Secretary to deny a proposed pharmacy market access at its desired location simply to limit competition. Further, the Secretary invokes this authority only upon the urging of a member of the largely local group of existing pharmacies, thereby permitting a predominantly local group to manipulate the regulatory scheme for its own advantage. For these reasons, the Act discriminates against commerce by permitting established pharmacies 'to retard, burden or constrict the flow of . . . commerce for their own economic advantage.'

Id. at 57. Thus, the court resolved the dormant Commerce Clause challenge by concluding that the certificate of need law was discriminatory in practice and purpose without reaching the second tier *Pike* balancing test.

More recently, the Fifth Circuit Court of Appeals held that the application of a permitting ordinance was unconstitutional under the dormant Commerce Clause because it protected existing permit holders from competition in *Fla. Transp. Servs. v. Miami-Dade County*, 703 F.3d 1230 (5th Cir. 2012). Although that case involved a stevedoring permitting ordinance, the ordinance operated similarly to the CON program involved in this case because it conditioned an applicant's ability to operate its business at a certain location on meeting certain criteria, including need, financial strength, and competency. *Id.* at 1236. In that case, the "needs" criteria was applied to deny new applicants permits because the duplication of services sought by the applicants could lead to destructive competition and cause economic hardship to the existing operators. *Id.* at 1239. The court ruled that the application of the ordinance in this fashion unconstitutionally

burdened interstate commerce under the *Pike* test because it protected and insulated existing businesses from any new competition. *Id.* at 1258-1262; *see also Medigen, Inc. v. Public Serv. Comm'n*, 985 F.2d 164 (4th Cir. 1993) (invalidating certificate of convenience and necessity law for transporters of infectious medical waste under the *Pike* balancing test because the law limited competition).

C. The ALC's application of the CON Act, State Health Plan, and Project Review Criteria violates the dormant Commerce Clause because it is intended to and will protect Piedmont against competition from an out-of-state competitor, reduce the amount of South Carolina patients seeking healthcare from out-of-state providers, and provides in-state hospitals with an advantage over out-of-state hospitals in obtaining a CON.

In awarding the CON to Piedmont, the ALC applied the CON Act, the 2004-2005 Plan, and Project Review Criteria to effectuate the illegitimate purpose of protecting Piedmont's existing hospital against competition from its out-of-state rival, Carolinas. The ALC's decision discriminates - in both purpose and effect - against an out-of-state competitor in favor of the existing local hospital. As such, the ALC applied the applicable regulations and criteria in violation of the dormant Commerce Clause.

The ALC did not mask its discriminatory intent to deny the CON to Carolinas because of its out-of-state status. Instead, the ALC made clear that the unifying purpose of its decision was to protect Piedmont from competition and to stop York County residents from receiving hospital care in North Carolina – primarily from Carolinas, which has established itself as the preferred healthcare provider in Northern York County. (R. pp. 121-122, 124-125). In so doing, the ALC substituted its judgment for those of the resident healthcare consumers by restricting Carolina's access to the York County hospital market. The dormant Commerce Clause, however, forbids this type of economic protectionism.

1. Adverse Impact

The ALC's most blatant application of the Project Review Criteria in a constitutionally impermissible manner is found in its legal conclusions regarding "adverse impact." Piedmont made adverse impact the central focus of its case, presenting dozens of hours of witness testimony on direct and cross-examination and hundreds of demonstrative and trial exhibits regarding the potential impact CMC-FM would have on Piedmont.[11] The ALC recognized this dynamic in the Final Amended Order, stating that the "most heavily disputed application of the Project Review Criteria relates to DHEC's analysis of . . . adverse impact." (R. p. 120).

Although DHEC ranked adverse impact among the least important criteria for its review, the ALC devoted a substantial number of its factual findings and legal conclusions to addressing CMC-FM's potential impact on Piedmont. (R. pp. 86-99, 118-122, 124-125). The ALC's adverse impact analysis, though, was one-sided and only assessed whether CMC-FM would have an adverse impact on Piedmont without conducting the same analysis of whether FMMC would adversely impact Carolinas – despite the fact that Carolinas' hospitals in North Carolina have obtained a majority market share in Northern York County.[12] Thus, the ALC applied the "adverse impact"

[11] The opening statement of Piedmont's counsel illustrates aptly how insulation from competition from a North Carolina hospital provider was Piedmont's primary goal in seeking the reversal of DHEC's decision. In concluding his opening statement, Piedmont's counsel stated, "For years, [Carolinas] has been taking patients, paying patients out of the Fort Mill area over into North Carolina and providing them, steering them for hospital services. The presence of CMC-Fort Mill will only escalate that process. The only way to halt the out-migration and to give Piedmont the ability, the opportunity to provide high-quality services to all of York County is to allow it to build the Fort Mill Medical Center. Thank you (R. p. 296, lines 1-11).

[12] The 2009 inpatient market share for community hospital services in Northern York County was divided primarily among three providers: Carolinas at 52.9%, Piedmont at 28.7%, and Presbyterian at 16.8% - in total accounting for 98.4% of the inpatient discharges in Northern York County for community hospital services. (R. pp. 2132-2133).

criteria in a discriminatory manner that only considered CMC-FM's effects on the existing local hospital without looking at FMMC's potential impact on out-of-state and out-of-county hospitals, such as Carolinas.

The ALC's one-sided analysis of "adverse impact" is both discriminatory in effect and purpose because it is inherently biased in favor of the existing local hospital and against non-local competitors. This bias becomes even more pronounced when the ALC's legal conclusions are analyzed on a Criterion-by-Criterion basis. As demonstrated below, the ALC conclusions for each "adverse impact" Criterion for which it found Piedmont better meets were motivated by a unifying – but constitutionally impermissible – purpose: to protect Piedmont from non-local competition and to reduce the number of South Carolinians seeking healthcare in North Carolina.

a. Project Review Criterion 16c – S.C. Regs. 61-15 § 802.16(c)

Although DHEC Regulations provide that Criterion 16c is intended to evaluate cost containment, the ALC incorrectly included Criterion 16c in the "adverse impact" Criteria. Criterion 16c assesses the "impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of other providers of similar services should be considered if the data are available." S.C. Regs. 61-15 § 802.16(c). The ALC found that Piedmont better meets Criterion 16c:

> The effect on Piedmont of the loss of over one thousand (1000) patients and millions of dollars a year will make it more difficult for the hospital to recoup its fixed costs. Its associated per unit cost per unit of services associated would increase. As a result, the operation of CMC-FM would have an adverse effect on existing providers. For that reason, Piedmont best meets § 802.16(c).

(R. p. 121). The ALC gave no other rationale for determining that Piedmont better meets Criterion 16c beyond CMC-FM's purported adverse effect on Piedmont's costs.

The ALC's application of Criterion 16(c) violates the dormant Commerce Clause because its intent and effect is to protect the local hospital's profitability from being harmed by a new market entrant. By basing its conclusion on the finding that the operation of CMC-FM will make it more difficult for Piedmont to recoup its fixed costs, the ALC essentially determined that Piedmont better meets Criterion 16c because CMC-FM will make Piedmont less profitable. The dormant Commerce Clause prohibits the ALC from applying the CON regulatory scheme to protect local interests from declining profitability based on competition from a non-local competitor. *See Carbone*, 511 U.S. at 393 (ruling that municipal ordinance requiring that waste be processed in a town-sponsored waste facility violated dormant Commerce Clause because its central purpose was to ensure the facility's profitability); *Walgreen*, 405 F.3d at 58 (invalidating certificate of need scheme that resulted in protection of "mostly local group of existing pharmacies from competitive pressure"); *Medigen*, 985 F.2d at 167 (declaring invalid a certificate of need regulation intended to protect existing local businesses).

b. Project Review Criterion 22 – S.C. Regs. 61-15 § 802.22

Criterion 22 provides that the "existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population." S.C. Regs. 61-15 § 802.22. The ALC reversed DHEC's decision that Carolinas better meets Criterion 22 and concluded that Piedmont better meets it because "the operation of CMC-FM would have an adverse effect on the distribution of services provided by

existing healthcare providers to the residents of York County." (R. p. 121). The ALC based this conclusion on the testimony of three physicians on Piedmont's medical staff and letters from approximately 40 other physicians in York County that utilized Piedmont Medical Center. (*Id.*)

Although the ALC's legal conclusion that Piedmont better meets Criterion 22 references CMC-FM's speculative adverse effects on physicians on Piedmont's medical staff, the findings of fact demonstrate that the ALC's primary concern was the extent to which changes in the physician market arising from the establishment of CMC-FM market would affect Piedmont. According to these findings, the ALC speculated that CMC-FM could force physicians on Piedmont's hospital staff to become employed by Carolinas' affiliated physician network, CPN[13], or seek staff privileges at CMC-FM and, consequently, reduce the amount of patient referrals they make to Piedmont. (R. pp. 88-89, 96-97, 98-99). Thus, the ALC decided Criterion 22 in Piedmont's favor because increased competition from CMC-FM would negatively impact Piedmont's ability to retain its staff physicians and receive their referrals. In other words, the ALC decided this Criterion on the basis that competition from CMC-FM would hinder Piedmont's ability to maintain its physician relationships and referral base, and ultimately its utilization and profitability. Again, applying the regulations for the purpose and intended effect of protecting an existing local hospital from competition from a non-local hospital violates the dormant Commerce Clause.

[13] "CPN" is an abbreviation of Carolinas Physicians Network.

c. Project Review Criterion 23a – S.C. Regs. 61-15 § 802.23(a)

Criterion 23a provides that the "impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services." S.C. Regs. 61-15 § 802.23. In reversing DHEC's conclusion that Carolinas better meets Criterion 23a, the ALC ruled that Carolinas did not meet this Criterion and that Piedmont did meet it. (R. pp. 121-122). In so ruling, the ALC focused solely on the negative financial impact resulting to Piedmont from competition from CMC-FM:

> [T]he court finds Piedmont has proven, by a preponderance of the evidence, that [Carolinas] would continue to acquire market share from Piedmont if CMC-FM were established. This would be accomplished through services provided by CMC-FM, as well as by the increased outmigration of patients to [Carolinas] facilities outside of York County for more specialized services. . . . Under the incremental approach [for assessing adverse impact], Piedmont would lose from one thousand six hundred (1,600) to three thousand (3,000) inpatients per year. When the loss of outpatients is projected, the total annual lost income caused by the operation of CMC-FM would range from $12,000,000 to $22,000,000, depending upon which expert's analysis is considered.

(R. pp. 121-122). Thus, the ALC's ruling on Criterion 23a favored Piedmont based on the determination that Piedmont's income would be adversely affected by competition from an out-of-state provider operating a hospital in York County.

As a result, the ALC engaged in constitutionally impermissible economic protectionism in applying Criterion 23a. The sole purpose and practical effect of the ALC's ruling in this regard was to protect Piedmont's market share from competition. In *H.P. Hood & Sons*, the United States Supreme Court declared that states cannot regulate with the primary purpose of prohibiting competition. 336 U.S. at 538. Relying on *H.P. Hood & Sons*, courts have routinely invalidated regulatory schemes and practices that

protect local interests by prohibiting non-local interests from entering the market. *See, e.g., Walgreen*, 405 F.3d at 57 (ruling that certificate of need regulations violated the dormant Commerce Clause because it denied "a proposed pharmacy market access at its desired location simply to limit competition"). These cases demonstrate that the ALC's application of Criterion 23a, as well as the other "adverse impact" Criteria, are discriminatory and violate the dormant Commerce Clause.

2. *Need - Project Review Criteria 2a, 2b, 2c, and 2e - S.C. Regs. 61-15 § 802.2(a)-(c), (e)*

The ALC determined that Piedmont better meets Criteria 2a, 2b, 2c, and 2e, which the ALC referred to as the "need" Criteria, and reversed DHEC's determination that the applicants equally meet Criteria 2a, 2b, and 2c and that Carolinas better meets Criteria 2e. The ALC summarily decided that Piedmont better meets the "need" Criteria because Piedmont's hospital is intended to reduce the outmigration of patients from York County to North Carolina and other surrounding areas:

> In addition to meeting the need for new hospital services, Piedmont's application was specifically intended to strengthen the York County healthcare system by reducing outmigration from York County. While patients have sought medical services outside of York County for years, primarily in the Charlotte area, the outmigration accelerated from 2005 to 2011. The effects of outmigration . . . reduced the ability of Piedmont and many of the independent physicians on Piedmont's medical staff to meet the healthcare needs of York County residents. Piedmont demonstrated by a preponderance of the evidence that the establishment of FMMC would strengthen the capacity of existing York County providers to meet those needs.

(R. p. 118). Thus, the ALC concluded that Piedmont better meets the "need" Criteria because FMMC would curb the flow of patients travelling to North Carolina for healthcare.[14]

In applying Criteria 2a, 2b, 2c, and 2e to reduce the amount of patients seeking healthcare in North Carolina and other non-local markets, the ALC purposely sought to interfere with interstate commerce in the healthcare industry. The dormant Commerce Clause prohibits the application of regulations that discriminate and burden interstate commerce in such manner. Although the ALC obviously believes that York County residents should obtain healthcare in York County for the benefit of Piedmont and other healthcare providers, denying a license to construct a facility engaged in interstate commerce on the "grounds that [the new facility] will subject others to competition and take supplies needed locally" is an end "always held to be precluded by the Commerce Clause." *H.P. Hood & Sons*, 336 U.S. at 542; *see also*, *Carbone*, 511 U.S. at 393 ("States and localities may not attach restrictions to exports or imports in order to control commerce in other States."). But that is exactly what the ALC did by applying the "need" Criteria to curb outmigration. In effect, the ALC seeks to reduce the amount of South Carolina residents receiving healthcare in North Carolina by preventing Carolinas from importing its hospital services to Northern York County and referring, or exporting, its patients to other facilities in North Carolina.

[14] The ALC's improper focus on preventing outmigration from York County disregards that the 2004-2005 Plan specifically contemplates that a health service area may cross over state boundaries for the purpose of accessibility. The 2004-2005 Plan provides: "Any service area may cross multiple administrative, geographic, trade and/or political boundaries. It is recognized that due to factors which may include availability, accessibility, personal or physician preferences, insurance and managed care contracts or coverage, or other reimbursement issues, patients may seek and receive treatment outside the county or inventory region in which they reside and/or outside of the state. Therefore, service areas may specifically cross inventory regions and/or state boundaries." (R. p. 3057). The reality is that many York County residents seek healthcare from Carolinas and other providers in the Charlotte metropolitan area.

In addition to *H.P. Hood & Sons,* the United States Supreme Court's opinion in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Resources*, 504 U.S. 353 (1992), illustrates the unconstitutionality of the ALC's application of the "need" criteria under the dormant Commerce Clause. That case involved a Michigan statute that allowed a county to only accept waste generated in that county and restricted the import of solid waste from both in-state and out-of-state. *Id.* at 361. The Court invalidated the statute because the waste restrictions were discriminatory under the dormant Commerce Clause and afforded "local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas." *Id.*

Like the waste restrictions involved in *Fort Gratiot*, the ALC's application of the "need" Criteria seeks to limit out-of-state and out-of-county interests from accessing the local market. In *Fort Gratiot*, the relevant market was local waste disposal areas; whereas, in this case, the market is local healthcare services. Therefore, the ALC violated the dormant Commerce Clause by attempting to reduce the amount of York County patients obtaining healthcare in North Carolina and other non-local markets. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (invalidating under the dormant Commerce Clause a local ordinance that "erect[ed] an economic barrier protecting a major local industry against competition without the State").

In addition to finding that Piedmont better meets the "need" Criteria because of CMC'-FM's and FMMC's speculative effect on outmigration, the ALC concluded that Piedmont better meets them because FMMC's 100-bed hospital could better handle the demand for hospital services in Northern York County than CMC-FM's 64-bed hospital.

(R. p. 118). According to the ALC, Carolinas' "proposed facility would be too small to fully meet the demand" for hospital services in Northern York County. (*Id.*)

The ALC's application of the "need" Criteria to reach this conclusion may appear non-discriminatory on its face, but a close examination of how the CON regulations permit only an existing hospital to transfer beds to a proposed new facility demonstrates that the "need" Criteria, as applied by the ALC, discriminate against out-of-state hospital systems and favor existing local hospitals.

Although the 2004-2005 Plan recognized a need for only an additional 64 beds, Piedmont proposed a 100-bed hospital because it could transfer unused beds at its existing hospital in York County to FMMC under DHEC's Bed Transfer Provision in the State Health Plan. Carolinas, however, could not transfer beds from its hospitals in North Carolina under DHEC's Bed Transfer Provision. (R. p. 909, line 20-p. 911, line 22; pp. 3063-3064). Unlike Piedmont, Carolinas was limited to proposing a 64-bed hospital consistent with the need recognized in the 2004-2005 Plan.

By providing Piedmont with an advantage over its out-of-state competitor, Carolinas, based on Piedmont's exclusive ability to propose a hospital with more beds, the ALC applied the "need" Criteria in a manner that unconstitutionally discriminates against out-of-state hospital systems. Carolinas, as an out-of-state hospital system without the ability to transfer beds, started from a point of disadvantage under the ALC's application of the Criteria. And the discriminatory application of such Criteria was only exacerbated by the ALC punishing Carolinas for being the preferred hospital provider in Northern York County as a result of its conclusion that the "need" for a Carolinas hospital in Northern York County was too substantial to accommodate with a 64-bed

hospital. Thus, the ALC impermissibly precluded Carolinas from better meeting the "need" Criteria by applying the Criteria so that only an existing in-state hospital with the ability to transfer empty beds could meet them. *See Walgreen*, 405 F.3d at 57 (finding CON statute in violation of dormant Commerce Clause because it permitted "a predominantly local group to manipulate the regulatory scheme for its own advantage").

3. Financial Feasibility – Project Review Criterion 17 – S.C. Regs. 61-15 § 802.17

Criterion 17 provides that the "proposed project should improve efficiency by avoiding duplication of services, promoting shared services and fostering economies of scale or size." S.C. Regs. 61-15 § 802.17. The ALC reversed DHEC's finding that Carolinas better meets Criterion 17 by concluding that Piedmont better satisfied the Criterion because Piedmont's "proposal fosters economies of scale by spreading costs over a greater number of beds" and because its proposed 100-bed hospital could better accommodate future growth. (R. p. 123). Therefore, the ALC again applied the Criteria to give Piedmont an advantage unavailable to an out-of-state competitor, such as Carolinas, by relying on Piedmont's ability to transfer unused beds to FMMC. As discussed above, the ALC's application of the Criteria in a manner that permits the existing local hospital to exploit a regulatory provision that discriminatorily applies to only in-state hospitals violates the dormant Commerce Clause.

D. <u>The ALC erred by failing to conduct the proper dormant Commerce Clause analysis.</u>

The ALC erred in rejecting Carolinas' argument that its application of the Criteria violated the dormant Commerce Clause by failing to conduct any analysis under the applicable legal standard. In fact, the ALC rejected Carolinas' dormant Commerce Clause argument with a mere footnote:

> [T]he court does not believe it violated the Dormant Commerce Clause in its analysis and application of the State Health Plan or Project Review Criterion in the original or amended decision. The same plan, criterion and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers. . . . Because the court chose to accept or reject certain testimony and assign different weight and credibility to the evidence presented by the parties in the *de novo* hearing does not mean that its decision violates the Dormant Commerce Clause or the Commerce Clause. Similarly, merely because [Carolinas] disagrees with the court's ruling, does not render its analysis in violation of the Dormant Commerce Clause.

(R. p. 75). The ALC did not engage in any analysis of the dormant Commerce Clause issues beyond this footnote.

Rather than conduct the analysis under well-established dormant Commerce Clause precedent, the ALC erroneously ruled that no constitutional violation can arise from its application of the Criteria because it would have applied them equally to in-state and out-of-state applicants. In connection with this ruling, the ALC deleted specific references about outmigration of York County residents to North Carolina in the Amended Final Order. For example, in the Final Order, the ALC stated, "This court concludes that the establishment of the FMMC will best serve the public needs by reducing the outmigration of York County residents to **North Carolina** hospitals." (R. p. 71) (emphasis added). In the Amended Final Order, the ALC revised the paragraph by deleting "North Carolina hospitals" and inserting "hospitals **beyond York County**." (R. p. 124) (emphasis added). The ALC's revision, however, did not correct the constitutional problem with its analysis. Rather, the ALC ignored long-standing law that unequivocally establishes that a discriminatory regulatory scheme is no less unconstitutional because it discriminates against in-state interests as well as out-of-state

interests. This principle is firmly entrenched in dormant Commerce Clause jurisprudence.

The United States Supreme Court established this principle over a century ago in *Brimmer v. Rebmen*, 138 U.S. 78 (1891), in which it concluded that a Virginia statute, which imposed special inspection fees from animals slaughtered over 100 miles from the place of sale, violated the dormant Commerce Clause. The Court explained:

> This statute cannot be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all states, including Virginia; for a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.

Id. at 82-83 (internal quotations omitted).

The Supreme Court reaffirmed this principle several decades later in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). In that case, the Supreme Court invalidated on dormant Commerce Clause grounds a city ordinance that required all milk sold in Madison, Wisconsin, to be pasteurized, processed, and bottled at a city-approved plant within five miles of Madison. *Id.* at 350. The Court concluded that the ordinance discriminated against interstate commerce because it "erect[ed] an economic barrier protecting a major local industry against competition from without the State." *Id.* at 354. In declaring the ordinance unconstitutional, the Court rejected the argument that the ordinance was not discriminatory because it applied to in-state milk distributors as well as out-of-state distributors. According to the Court, it was "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n. 4. *See also Fort Gratiot*, 504 U.S. at 361-62 (relying on *Brimmer* and *Dean Milk* to hold that waste disposal ordinance violated

dormant Commerce Clause despite its equal treatment of out-of-state and in-state waste); *Carbone*, 511 U.S. at 391 (ruling that waste "ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition"); *Walgreen,* 405 F.3d at 58 (invaliding discriminatory certificate of need program that applied equally to all newcomers to protect existing pharmacies in the local markets, regardless of whether the newcomers were from in-state or out-of-state); *Fla. Transp. Servs.*, 703 F.3d at 1258-59 (finding a dormant Commerce Clause violation when permitting decision affected in-state Florida corporation that operated in a neighboring county). Therefore, the controlling factor under the dormant Commerce Clause analysis is not whether the challenged law or regulation applies equally to in-state and out-of-state interests but whether it protects local interests against competition from non-local interests.

These cases illustrate the clear error in the ALC's rejection of Carolinas' dormant Commerce Clause argument. Even if the ALC's statement that the "same plan, criterion and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers" is true, it is irrelevant to whether the ALC applied the Criteria in a constitutionally impermissible manner. The ALC's application of the Criteria in the same or similar manner to an in-state competitor would have the purpose and practical effect of protecting Piedmont against competition from non-local applicants. Under the precedent outlined above, the ALC's application of the Criteria to erect barriers of entry into the York County hospital market for the purpose and effect of protecting a local hospital from competition is unconstitutional under the dormant Commerce Clause – regardless of whether the competing applicant was from Columbia

or Charlotte. As a result, the ALC's defense of its analysis is flawed and cannot save the clearly unconstitutional purpose and effect of the ALC's application of the Criteria.

II. THE ALC ERRONEOUSLY APPROVED PIEDMONT'S PROPOSAL TO TRANSFER BEDS TO CREATE A 100-BED HOSPITAL.

Because it operates the only existing hospital in York County, Piedmont seeks to utilize the Bed Transfer Provision in the 2004-2005 Plan to enhance its application by transferring 36 beds from Piedmont Medical Center to FMMC, making its proposed hospital in Fort Mill a 100-bed hospital. (R. p. 906, line 19–p. 908, line 18; p. 909, line 20-p. 911, line 22)). Carolinas has consistently argued that Piedmont's proposal to transfer beds is not justified under the 2004-2005 Plan and Criteria based on Piedmont's declining utilization at its existing hospital and inferior market share in Northern York County. (R. p. 1556, line 10-p. 1584, line 19; p. 1808, line 3-p.1815, line 24; p. 1816, line 3-p. 1844, line 18; pp. 2134-2171). In its second review, DHEC ultimately agreed with Carolinas' position, finding that Piedmont's hospital does not better meet several Criteria because Piedmont failed to demonstrate that it could recapture enough market share to sufficiently utilize its proposed 100-bed hospital. (R. pp. 2173-2185). The ALC subsequently reversed DHEC's decision in the Second Contested Case and determined that several Criteria – Criteria 2a, 2b, 2c, 2e, 3a, 6b, and 17 – should be decided in Piedmont's favor, in part, because of Piedmont's exclusive ability as the incumbent, in-county hospital to transfer beds to construct a larger hospital. (R. pp. 117, 118, 123).

In addition to the fundamental flaw of favoring the existing hospital because it is the only applicant able to transfer beds to construct a larger hospital, the ALC erred in approving the transfer of beds from Piedmont to FMMC because it failed to make any findings of fact or conclusions of law that Piedmont meets the mandatory criteria

required to transfer beds under DHEC's Bed Transfer Provision in the 2004-2005 Plan. Under the Bed Transfer Provision, a proposal to transfer beds "**must comply**" with eight established criteria. (R. p. 3063) (emphasis added); *see also Trident Medical Ctr. v. S.C. Dep't of Health and Envt'l Control*, Opinion No. 5297, 2015 S.C. App. LEXIS 18, *22-23 (Ct. App. Feb. 18, 2015 (stating that the "Bed Transfer Provision consists of a list of eight criteria with which a CON applicant **must comply**") (emphasis added). The ALC's decision is devoid of any consideration of the criteria under the Bed Transfer Provision.

By awarding Piedmont a CON to establish a 100-bed hospital, which includes 36 beds to be transferred to FMMC, without making any findings or conclusions regarding the criteria under the Bed Transfer Provision, the ALC exceeded its authority under the CON Act and 2004-2005 Plan. Moreover, by basing its conclusions that Piedmont better meets Criteria 2a, 2b, 2c, 2e, 3a, 6b, and 17 on its ability to construct a 100-bed hospital, the ALC impermissibly assumed that Piedmont could transfer beds without conducting the required analysis under the Bed Transfer Provision. Therefore, the ALC's conclusions as to these Criteria and its award of a CON for a 100-bed hospital are infected with legal error and should be vacated. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 520-22, 560 S.E.2d 410, 417-18 (2001) (reversing and remanding decision where ALC failed to conduct consistency review required under applicable law and failed to make any factual findings relating to such review).

III. THE ALC ERRONEOUSLY, ARBITRARILY, AND CAPRICIOUSLY APPLIED THE CON ACT, STATE HEALTH PLAN, AND PROJECT REVIEW CRITERIA.

The ALC's Amended Final Order contains multiple errors of law that caused the ALC to conclude that Piedmont better meets several Project Review Criteria. In applying the Criteria, the ALC relied on mistaken interpretations of the applicable Criteria or

disregarded their plain language. The ALC's conclusions conflict with DHEC's interpretation and application of the same Criteria and reveal an arbitrary and capricious reasoning process that cannot be reconciled with the purposes of the CON Act and its implementing regulations.

In resolving the conflict between DHEC's and the ALC's findings and conclusions, the Court should "defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration . . . 'unless there is a compelling reason to differ.'" *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 766 S.E.2d 707, 718 (2014) (quoting *S.C. Coastal Conservation League v. S.C. Dep't of Health Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)). Where, as here, the ALC's and the agency's interpretation of a statute or regulation differs, the Court should defer to the agency's interpretation rather than the ALC's interpretation. *Id.* at 718-19 (ruling under administrative agency deference doctrine that DHEC had reasonably interpreted environmental statute and regulations and refusing to defer to ALC's different interpretation and application of the same statute and regulations).

A. The ALC erroneously applied the "adverse impact" criteria by failing to balance adverse impact against increased accessibility and disregarding the proposed projects' impact on the functional balance of healthcare distribution.

In awarding the CON to Piedmont, the ALC exceeded its authority under the CON Act and applicable regulatory criteria with the intent to protect the existing hospital in York County and keep a competitor out of the market because it effectively repeated the erroneous decision that DHEC made initially when it awarded the CON to Piedmont prior to the First Contested Case.

In the First Contested Case, Judge Matthews found that the two DHEC reviewers, Joel Grice and Mary Fechtel, exceeded their statutory authority by erroneously determining that only Piedmont could qualify for a CON under the State Health Plan because it was the only existing hospital in York County. Specifically, Judge Matthews found that:

> In this case, the record is replete with evidence that there is no uniformity among the Department witnesses in terms of their interpretation of the Plan. While both Mr. Grice and Ms. Fechtel ultimately testified they believed it was clear that only Piedmont Medical Center (and, in turn, FMMC) complies with the Plan's Bed Need under Regulation 61-15 § 802.1, it took them well over a year to arrive at that conclusion. . . . Ms. Fechtel's testimony makes it clear that the Department never conducted a true comparative analysis and did not make its determination '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' as required by the CON Act. See S.C. Code Ann. § 44-7-210(C) (Rev. 2002). Under the circumstances, I find that the Department committed an error of law and exceeded its statutory authority when it construed this ambiguous Plan so that only the existing hospital could comply with the Plan Bed Need.

(R. pp. 22, 24).

Although the ALC nominally adopted Judge Matthew's prior ruling in the Second Contested Case. (R. p. 125), the ALC minimized the comprehensive review of all applications conducted by a new reviewer, Beverly Brandt of DHEC, and effectively determined that only Piedmont could be awarded the CON based on the ALC's application of the adverse impact criteria and Piedmont's ability to transfer beds. In so doing, the ALC relied on the same two employees of DHEC who conducted the erroneous first review - Joel Grice and Mary Fechtel. After complimenting Ms. Brandt for her "thorough" review on remand in the Final Order, the ALC stated that it relied on the "testimony" of the two former DHEC employees who were <u>not</u> involved in DHEC's

second review. (R. p. 70). In fact, Ms. Fechtel did not even testify in the Second Contested Case, and Mr. Grice, who had retired from DHEC, was testifying as a paid consultant and expert for Piedmont. Judge Lenski stated in the Final Order:

> DHEC conducted a thorough review process for the applications. DHEC staff asked numerous questions of both applicants seeking additional information and held a project review meeting to thoroughly discuss and understand the proposed projects. The Project Review Criteria Analysis was thorough and detailed. This court finds that the Department properly reviewed and analyzed both applications. To the extent that the court disagrees with aspects of Ms. Brandt's analysis, **it was persuaded by the testimony of Mr. Grice and Ms. Fechtel, both of whom worked within the CON program for many years and possessed greater experience and institutional knowledge**.

(R. p. 70) (emphasis added).

Carolinas noted in its Motion to Reconsider that Ms. Fechtel was not involved in the second review and did not testify during the Second Contested Case (R. p. 236), and the ALC later removed the reference to its reliance on Ms. Fechtel's testimony in the Amended Final Order (R. p. 124). After the ALC deleted the reference to "Ms. Fechtel" in the Amended Final Order, that left the persuasion to Mr. Grice, the architect of the prior, failed interpretation in DHEC's first review and now a paid expert for Piedmont. Even then, the ALC's rulings on the Criteria only match a small portion of Mr. Grice's opinions. In his testimony, Mr. Grice frequently agreed with Ms. Brandt and found that Carolinas and Piedmont equally meet many of the Criteria, while the ALC concluded that Piedmont better meets the same Criteria. (R. pp. 237-238).

If there is consistency to the ALC's ruling and Mr. Grice's opinions, it relates to what Piedmont labeled the "adverse impact" Criteria, Criteria 22 and 23(a), of which

both the ALC and Mr. Grice found that Piedmont better meets.[15] The error in the ALC's analysis is that it improperly placed too much weight and importance on "adverse impact" while ignoring the increased accessibility offered by CMC-FM, through which Carolinas intended to serve its existing patient base and predominant market share in Northern York County with a closer hospital.

The ALC's ruling is inconsistent with the CON Act, 2004-2005 Plan, and Criteria. The CON Act provides specifically that:

> With the advice of the health planning committee, the department shall prepare a South Carolina Health Plan for use in the administration of the Certificate of Need program provided in this article. The plan at a minimum must include: . . . (4) a general statement as to the project review criteria considered most important in evaluating Certificate of Need applications for each type of facility, service, and equipment, **including a finding as to whether the benefits of improved accessibility to each such type of facility, service, and equipment may outweigh the adverse affects caused by the duplication of any existing facility, service, or equipment**.

S.C. Code Ann. § 44-7-180(B)(4) (emphasis added). The 2004-2005 Plan includes a similar statement in the hospital section that "the benefits of improved accessibility will be equally weighted with the adverse affects of duplication in evaluating Certificate of Need applications for these beds." (R. p. 3064). Criterion 23(a) similarly 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." S.C. Regs. 61-15§ 802.23(a).

[15] The ALC's reliance on Mr. Grice's testimony is significant under the dormant Commerce Clause. Mr. Grice testified that when he was the CON administrator he was instructed by legislators to "try to protect and assist South Carolina-licensed hospitals. And that is our main focus, not to make some decision that's going to negatively impact them." (R. p. 1061, line 15-p. 1062, line 12). The ALC stated that it was persuaded by Mr. Grice's "institutional knowledge and history with DHEC's CON program," and its express purpose of awarding the CON to Piedmont to protect Piedmont from competition from a North Carolina hospital reveals the extent to which the ALC adopted Mr. Grice's approach.

Collectively, these statutory and regulatory requirements make clear that the "adverse effects of duplication" alone are insufficient to justify denying a CON to a new hospital, particularly one that will offer substantially increased accessibility to its existing patients. Despite the regulatory requirement to conduct a balancing analysis, the ALC failed to weigh the increased accessibility that Carolinas' patients would achieve from CMC-FM against CMC-FM's purported adverse impact on Piedmont. In fact, the ALC's ruling reflects that it was solely focused on adverse impact. For example, in addressing review criteria 23(a), the court concluded: "Although CMC-FM will undoubtedly serve [Carolinas'] patients, the court finds Piedmont has proven, by a preponderance of the evidence, that [Carolinas] would continue to acquire market share from Piedmont if CMC-FM were established." (R. p. 121). These conclusions focus on adverse impact and do not adequately address the increased accessibility that CMC-FM would offer to residents in Northern York County, where it has a majority market share.[16]

Similarly, in addressing Criterion 22, which promotes the functional balance of healthcare distribution, the ALC concluded that "the operation of CMC-FM would have an adverse effect on the distribution of services provided by existing healthcare providers to the residents of York County." (R. p. 121). By focusing on adverse impact rather than functional distribution between the competing applicants, the ALC ignored Piedmont's majority market share in the rest of York County. When considered with Carolinas' majority market share in Northern York County, these facts demonstrate that the existence of a Carolinas hospital in Fort Mill and Piedmont's existing hospital in Rock Hill would establish a "functional balance" of distribution under Criterion 22.

[16]As noted previously, in 2009 Carolinas had a 52.9% inpatient market share in Northern York County, almost double that of Piedmont at 28.7%. (R. pp. 2132-2133).

The ALC's analysis of Criterion 23a and 22 contrasts sharply with DHEC's determination that increased accessibility resulting from CMC-FM outweighs the adverse impact that CMC-FM would have on Piedmont and would enhance the balance of distribution of healthcare. According to DHEC, "Carolinas best meets Project Review Criterion 23a as it currently has a high level of market share in Northern York County and already serves a significant percentage of York County residents. Carolinas has almost as much market share of York County as a whole as Piedmont."[17] (R. p. 2184) In addressing Criterion 23a, DHEC also recounted the alleged adverse impact that Piedmont claimed would result from the construction of a new hospital by a North Carolina provider in Fort Mill. (*Id.*) Nevertheless, DHEC found that any adverse impact would be outweighed by the increased accessibility to hospital services achieved by Carolinas' patients from the establishment of CMC-FM. (*Id.*)

Similarly, DHEC found that Carolinas better meets Criterion 22 because Carolinas is the only applicant that proposes to successfully shift its current market share and because of concerns about whether FMMC could balance the distribution of healthcare to the target population. (R. p. 2182). According to DHEC, it is doubtful that Piedmont could recapture patients to the extent it proposes and because it "is not clear that the number of beds proposed to be constructed are fully justified given the target population includes patients who would have to drive past Piedmont to reach FMMC." (*Id.*)

[17] While the ALC failed to make any express findings regarding the increased accessibility resulting from the establishment of CMC-FM, the ALC's findings demonstrate that it is beyond dispute that Carolinas' hospital in Fort Mill would significantly increase accessibility to hospital services for its patients in York County. This conclusion is implicit in the ALC's findings that CMC-FM would be well-utilized and that Carolinas' York County discharges increased by a total of one thousand eight hundred (1,800) patients from 2005 to 2010. (R. pp. 85, 101).

The stark distinction between DHEC's and the ALC's analysis of Criteria 22 and 23a reveals that DHEC correctly applied these Criteria by addressing how the proposed projects would impact the functional balance of the distribution of healthcare and by conducting the required balancing of increased accessibility and adverse impact. The ALC, however, neglected these regulatory requirements. Therefore, the ALC's application of Criteria 22 and 23a is legally flawed because it focuses solely on adverse impact. Accordingly, the ALC's conclusions conflict with the CON Act's, 2004-2005 Plan's, and Criteria's requirement that adverse impact be weighed against increased accessibility, and the Court should vacate DHEC's conclusion as to this criterion. *See Kiawah Dev. Partners,* 766 S.E.2d at 720-22 (reversing ALC's decision in contested case because it erred in interpreting permitting regulation in a way that avoided statutory intent of balancing of economic and environmental considerations).

Although there are relatively few cases that address similar situations, one such case is a Florida appellate court decision, *Dep't of Health & Rehabilitative Services v. Johnson & Johnson Home Health Care*, 447 So. 2d 361 (Fla. Dist. Ct. App. 1st Dist. 1984). In *Johnson & Johnson*, the court considered the legality of an administrative agency rule that prohibited a new home health agency from receiving a CON unless it was seeing an average of 300 patients a day. The stated purpose of the "rule of 300" was to halt the proliferation of new home health businesses and to protect the existing, licensed businesses from competition. *Id.* at 362-63.

In finding that this rule exceeded the agency's statutory authority, the *Johnson & Johnson* court found:

> The stated purpose of the rule was to halt the proliferation of home health agencies. The record before the hearing officer showed that the rule of 300

> was designed to protect the existing industry from competition. There is no reasonable relationship shown between the prohibition of the rule and the health, morals, safety or welfare of the public. The rule is arbitrary and capricious and cannot stand. . . .The hearing officer correctly concluded that the rule of 300 precluded a balanced consideration of all the statutory criteria. The rule allows HRS to ignore some statutory criteria and emphasize others, contrary to the legislative purpose it is supposed to implement. The rule exceeds delegated legislative authority.

Id. (internal citations omitted). Other courts have similarly found that an administrative review that applies unbalanced criteria in a manner that is inconsistent with the state certificate of need act is invalid as a matter of law. *See, e.g., Fairmont Gen. Hosp. v. W. Va. Health Care Auth.*, 218 W. Va. 360, 368-69, 624 S.E.2d 797, 805-806 (2005) (administrative agency's invocation of five-mile geographic limitation and its failure to balance statutory criteria was in violation of certificate of need law).

In sum, the ALC erroneously applied the CON Act, 2004-2005 Plan, and Criteria by making adverse impact the primary basis of its decision without weighing such impact against increased accessibility or properly analyzing the competing projects' impact on the functional balance of healthcare distribution. As a result, the Court should vacate the ALC's conclusions regarding adverse impact and reinstate DHEC's decision.

B. The ALC erroneously, arbitrarily, and capriciously applied the "need" Criteria by relying on irrelevant findings.

The ALC erred in applying Criteria 2a, 2b, 2c, and 2e by conflating their individual standards and concluding that Piedmont better meets them based on findings that are irrelevant to the ultimate determinations that must be made for each specific Criterion. The ALC failed to individually analyze each "need" Criterion and concluded that Piedmont better meets them collectively based on two factors: (1) Piedmont's 100-bed hospital would better meet the need of the growing population of Northern York

County than would Carolinas' proposed 64-bed hospital, and (2) the establishment of FMMC would strengthen the capacity of existing York County healthcare providers to meet the healthcare needs of York County residents. (R. p. 118). As discussed below, these findings are irrelevant to the determination of which applicant better meets the respective "need" Criteria.

Criterion 2a provides that the "target population should be clearly identified as to the size, location, distribution, and socioeconomic status (if applicable)," and Criterion 2b requires that "[p]rojections of anticipated population changes should be reasonable based upon accepted demographic or statistical methodologies." S.C. Regs. 61-15 § 802.2(a)-(b). The ALC erroneously determined that Piedmont better meets these Criteria because it did not base its conclusion on the applicants' identification of the target population or the reasonableness of their projections in anticipated population changes. Rather, it based its ruling on Criteria 2a and 2b on the size of FMMC and the finding that FMMC will strengthen the capacity of existing York County healthcare providers, both of which are immaterial. Clearly, these factors have no bearing on which applicant better identifies the target population or reasonably projected population changes, and the ALC erred in relying on them to award Criteria 2a and 2b in favor of Piedmont.[18] *See Sierra Club v. S.C. Dep't of Health & Envtl. Control*, Opinion No. 5253, 2014 S.C. App. LEXIS 201, *28-30, *42-47 (Ct. App. July 30, 20014) (ruling that ALC erred in finding compliance

[18] The ALC's failure to apply Criteria 2a and 2b according to their own language is further evidenced by the fact that Piedmont's and Carolinas' respective expert witnesses unanimously agreed with DHEC that both applicants equally meet these Criteria. While the ALC may reach its own conclusions regarding which applicant better meets the respective criteria, the fact that it disregarded the undisputed conclusions presented by DHEC, Carolinas, and Piedmont that Criteria 2a and 2b are equally met by both applicants suggests that the ALC applied the Criteria in an incorrect manner.

with regulatory requirements based on factual findings that were irrelevant to the regulatory criteria).

Criterion 2c provides that the "proposed project should provide services that meet an identified (documented) need of the target population." S.C. Regs. 61-15 § 802.2(c). The ALC erred as a matter of law in concluding that Piedmont better meets this Criterion because it did not consider the respective services to be provided by respective hospitals. The ALC made no findings regarding the extent to which FMMC and CMC-FM would offer similar or different services or which services provided by FMMC and CMC-FM would better meet the needs of the target population. Instead, it based its conclusion on factors completely irrelevant to Criterion 2c, namely the threat of decreased utilization and the purported strengthening of the York County healthcare providers' ability to meet the healthcare needs of the county's residents. Thus, the ALC again exceeded its authority by relying on factors not included in Criterion 2c and incorrectly analyzed which applicant better meets Criterion 2c by applying a standard that completely disregards the legal criteria set forth in the regulation.

Criterion 2e provides that "[c]urrent and/or projected utilization should be sufficient to justify the expansion or implementation of the proposed service." S.C. Regs. 61-15 § 802.2(e). This Criterion seeks to ensure that hospital beds do not sit empty and unnecessarily duplicate other beds and that the costs associated with constructing the hospital can be recouped through sufficient utilization. Thus, Criterion 2e implements the CON Act's purposes of promoting cost containment and avoiding unnecessary duplication of health care facilities and services. *See* S.C. Code Ann. § 44-7-120.

While the ALC concluded that Piedmont better meets this Criterion based, in part, on utilization projections, it subverted the Criterion's purpose by arbitrarily and capriciously applying it in disregard of the mandate to determine whether projected utilization is "sufficient" to justify the proposed facility. The ALC did this by finding that Piedmont's proposed less-utilized hospital better meets Criterion 2e than Carolinas' proposed better-utilized hospital because Carolinas would be over-utilized. According to the ALC, Piedmont better meets Criterion 2e because "CMC-FM's own projections show that, by the third year of operation, it would be operating at an occupancy level that would justify the approval of new beds. . . . These projections are further evidence that [Carolinas'] proposed facility would be too small to fully meet the demand." (R. p. 118). This rationale cannot be squared with Criterion 2e, which seeks to ensure that a proposed facility is justified by sufficient utilization.

If the Court accepts the ALC's conclusion that CMC-FM would be better utilized than FMMC and too small to fully meet demand, then *a fortiori,* Carolinas' projected utilization is sufficient to justify the implementation of CMC-FM under Criterion 2e and better meets this Criterion. Rather than reach this logical conclusion under the plain language of Criterion 2e, the ALC effectively turns Criterion 2e on its head by ruling that Carolinas does not better meet it because Carolinas will have *more* than sufficient utilization to justify the facility. As a result, the ALC arbitrarily and capriciously determined that Piedmont better meets Criterion 2e. *See MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 314, 709 S.E.2d 626 (2010) (rejecting DHEC's interpretation of CON Act that conflicted with Act's purpose of promoting cost containment and preventing unnecessary duplication of healthcare facilities and services).

By contrast, DHEC applied the correct standard for determining which applicant's utilization projections are more sufficient to warrant the new hospital under Criterion 2e. During the trial, DHEC reviewer Beverly Brandt testified that Carolinas better meets Criterion 2e because its "projections were based on their high level of their current market share." (R. p. 1202, lines 5-9). She also testified that she did not find Piedmont's utilization projections plausible because it "had been steadily losing market share and . . . utilization of their services was substantially declining. And then they felt that . . . building this hospital that all of a sudden the market share was going to increase substantially." (R. p. 1202, line 21-p. 1203, line 7; *see also*, R. p. 2181). Thus, DHEC correctly applied Criterion 2e in accordance with its plain language.

Based on the legal errors made by the ALC in applying Criteria 2a, 2b, 2c, and 2e and its arbitrary and capricious reasoning discussed above, the Court should vacate the ALC's conclusions regarding these Criteria and reinstate DHEC's conclusions that Carolinas and Piedmont equally meet Criteria 2a, 2b, and 2c and that Carolinas better meets Criterion 2e.

C. The ALC disregarded the plain language of Criterion 3d and erroneously based its conclusion in favor of Piedmont on irrelevant factors.

The ALC erred in applying Project Review Criterion 3d by disregarding the plain language of the regulation and basing its conclusion on findings regarding the alleged patient acceptance practices of a small number of autonomous physician practices that will not control CMC-FM's admission policies.

Criterion 3d requires that "[t]he **proposed facility** should not restrict admissions. If any restrictions are applied, their nature should be clearly explained." S.C. Regs. 61-15 § 802.3(d) (emphasis added). Although DHEC found that both applicants equally

meet this Criterion, the ALC reversed DHEC's conclusion and concluded that Piedmont better meets it. Significantly, the ALC did not determine that CMC-FM would restrict admissions or deny access to patients in any way. Rather, the ALC's sole rationale for determining that Piedmont better meets Criterion 3d is that "CPN practices in York County limit access for indigent, Medicaid, and even Medicare patients. Whereas Piedmont and the non-contractually bound physicians who have privileges there do not." (R. p. 119). Thus, the ALC did not decide Criterion 3d on the actual admission policies and practices of Carolinas or CMC-FM but on the internal policies of individual physician practices within CPN. The plain language of Criterion 3d, however, restricts the assessment to whether the "proposed facility" would restrict admissions.

The ALC's reliance on the purported practices of a small number of CPN physicians excluding certain patients is especially problematic in this instance because it disregards the distinction between Carolinas and CPN. The ALC based its conclusions that CPN physicians restrict acceptance of medically underserved patients on telephone surveys of CPN physician practices conducted by Piedmont's expert, David Levitt, under the false pretense that he was seeking medical treatment for a family member. (R. p. 109; pp. 699, line 1-p. 722, line 20). This finding demonstrates that the Court incorrectly conflated Carolinas with CPN even though CPN is comprised of individual physician practice groups which establish their own practices for accepting Medicaid, Medicare, and uninsured patients. (R. p. 1510, lines 10-18; p. 1517, line 14-p. 1518, line 7; p. 1532, line 24-p. 1533, line 11). Although the only testimony in the record was that Carolinas does not have a policy restricting the acceptance of Medicaid, Medicare, and uninsured patients by its hospitals or physicians (*id.*) and that Carolinas would not restrict

admissions of such patients at CMC-FM (R. pp. 2147, 7860-7863), the ALC concluded that Carolinas did not better meet Criterion 3d. Thus, the ALC erroneously determined this Criterion on alleged practices of certain physician practice groups that do not control the admission policies of Carolinas. This is not permitted under the plain language of Criterion 3(d).

In addition, the ALC's ruling is arbitrary and capricious because it is undermined by other findings made regarding Carolinas' admissions practices. For example, the ALC concluded that Carolinas and Piedmont equally meet Criterion 3g, which provides that the facility should establish provisions to insure that individuals in need of medical treatment will have access to service, regardless of ability to pay. S.C. Regs. 61-15 § 802.3(g). The ALC provided no explanation for the determination that the applicants equally meet this Criterion. (R. p. 120). As a result, it is impossible to determine how the ALC can reconcile its seemingly contradictory conclusions that Carolinas will restrict access to indigent patients at the same time that Carolinas ensures access to healthcare to individuals regardless of their ability to pay.

The inconsistencies in the ALC's reasoning with regards to access to care did not end there. For example, after noting that between 45-80 percent of admissions came through the emergency rooms of several of Carolinas' nearby facilities and that a majority of inpatient admissions normally come through the emergency room, the ALC found that Carolinas "has no control over who presents at the emergency departments of its hospitals." (R. p. 88). This is significant because the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, requires hospitals to provide emergency health care treatment to anyone who comes to an emergency department for

treatment regardless of ability to pay. Thus, the ALC implicitly recognized that Carolinas' cannot and will not restrict a majority of its patient base from receiving healthcare at CMC-FM but ignored this inconvenient fact in awarding Criterion 3d in Piedmont's favor.

Remarkably, during the Second Contested Case hearing the ALC reached the contradictory conclusion that the evidence on which it relied in the Amended Final Order to determine that Piedmont better meets Criterion 3d was of limited probative value. The ALC determined that CMC-FM would restrict admissions based on telephone surveys overseen by Piedmont's expert witness, Mr. Levitt. (R. p. 109). After Carolinas objected to the introduction of this evidence (R. pp. 139-142, p. 276, line 10-p. 279, line 8; p. 702, line 15-p. 719, line 12), the ALC agreed that it was unreliable:

> [B]ecause of the limited size of the survey group, the fact that Mr. Levitt did not conduct all of the surveys, the very limited nature of the survey questions asked and the lack of identity of parties answering Mr. Levitt and the other employee's questions at the various practices, the Court finds that this evidence is of limited probative value.

(R. p. 718, line 19-p. 719, line 2). Nevertheless, the ALC relied specifically on the surveys to conclude that Piedmont better meets Criterion 3d, further demonstrating the arbitrary and capricious nature of its conclusion.

Criterion 3d does not permit the ALC to base its determination as to whether an applicant will restrict admissions based on the patient acceptance practices of autonomous physician practice groups that do not control the proposed facility's admissions policies. By doing exactly that, though, the ALC exceeded its authority, misapplied the Criterion, and then compounded that legal error by basing it on evidence, which, in the ALC's own words, is "of limited probative value" and based off of a

"limited" sample size. Therefore, the ALC's conclusion that Piedmont better meets Criterion 3d is arbitrary, capricious, and legally flawed, and DHEC's finding that the applicants equally meet Criterion 3d should be reinstated.

D. <u>The ALC erred by only partially conducting the required analysis under Criterion 16c.</u>

The ALC erred in applying Criterion 16c because it only partially considered the factors relevant to that Criterion. Criterion 16c requires that the "impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of other providers of similar services should be considered if the data are available." S.C. Regs. 61-15 § 802.16(c). DHEC found that Carolinas and Piedmont equally meet Criterion 16c, but the ALC reversed that decision and found that Piedmont better meets it. The only justification given by the ALC for this conclusion is the following:

> The effect on Piedmont of the loss of over one thousand (1000) patients and millions of dollars a year will make it more difficult for the hospital to recoup its fixed costs. Its associated costs per unit of services associated would increase. As a result, the operation of CMC-FM would have an adverse effect on existing providers.

(R. p. 121)

The ALC's determination of Criterion 16c is legally flawed because it fails to consider the two applicants' respective impacts on their own services and patient charges. Although this is the primary assessment that must be conducted under Criterion 16c, the ALC completely disregarded it. Instead, it based its conclusion regarding this Criterion solely on a one-sided analysis of CMC-FM's impact on Piedmont. While Criterion 16c permits the ALC to consider this data, if available, it does not permit the ALC to ignore the primary factor of evaluating the impact of the applicant's project on its own services

and charges. Because the ALC ignored this primary factor, its conclusion as to Criterion 16c is legally incorrect. *See Sierra Club*, 2014 S.C. App. LEXIS 201 at *32-33, *39-41 (ruling that ALC erred in finding compliance with regulatory criteria where it only conducted one part of the two-part analysis required under the regulation). Therefore, its conclusion that Piedmont better meets Criterion 16c should be vacated, and DHEC's finding that the applicants equally meet this Criterion should be reinstated.

E. The ALC arbitrarily and capriciously decided Criterion 6b in contravention of its purpose of ensuring projected revenues will be supported by sufficient utilization.

The ALC erred in reversing DHEC's finding that Carolinas better meets Criterion 6b by arbitrarily and capriciously deciding that Piedmont's less-utilized proposed hospital better satisfies this Criterion, which is intended to ensure that a project's revenues will be supported by sufficient utilization.

Criterion 6(b) provides that "projected levels of utilization should be reasonably consistent with those experience by similar facilities in the service are and/or state. In addition, projected levels of utilization should be consistent with the need level of the target population." S.C. Regs. 61-15 § 802.6(b). This Criterion falls under the regulatory heading of "Projected Revenues," which indicates that its purpose is to ensure that the projected utilization is reasonable and will generate sufficient revenue to justify the project. As explained by Piedmont's expert, Mr. Levitt, projected utilization is addressed in the Projected Revenue section of the CON regulations "[b]ecause the utilization will drive the financial pro-forma." (R. p. 812, lines 16-21).

When this purpose is considered, it is clear that DHEC appropriately applied this Criterion to determine that it is better met by Carolinas because Carolinas' current market

share in Northern York County will ensure that the hospital will be financially successful. (R. p. 2182). In contrast, the ALC's conclusion that Piedmont better meets Criterion 6b contravenes the Criterion's purpose by deciding it in favor of Piedmont's proposed less-utilized hospital. The ALC expressly found that "FMMC's projected levels of utilization are lower" than CMC-FM, but nevertheless concluded that Piedmont better meets Criterion 6b. (R. p. 123) According to the ALC's fallacious reasoning, Piedmont better meets a Criterion intended to assess whether a project will have sufficient utilization to ensure reasonable revenue projections despite that Piedmont has considerably less market share in Northern York County and proposes to construct a significantly larger hospital that will be less-utilized than the competing hospital sought by Carolinas.

This ruling is arbitrary and capricious because it cannot be rationally concluded that a less-utilized hospital will better fulfill the Criterion's purpose of ensuring sufficient revenues derived from reasonable utilization projections. By contrast, DHEC correctly applied Criterion 6b and awarded it in favor of Carolinas because Carolinas' utilization projections are based on its current dominant market share in Northern York County. Accordingly, the Court should vacate the ALC's conclusion as to Criterion 6b and reinstate DHEC's conclusion as to this Criterion. *See MRI at Belfair, LLC*, 392 S.C at 322, 709 S.E.2d at 630 (refusing to defer to DHEC's interpretation of CON regulation that was "manifestly at odds with legislative intent" of CON Act).

F. <u>The ALC arbitrarily and capriciously decided Criterion 17 in favor of the larger, more expensive, and less utilized hospital proposed by Piedmont.</u>

The ALC arbitrarily and capriciously decided that Piedmont better meets Project Review Criterion 17 by finding that the larger, more expensive, less-utilized hospital of

Piedmont would be more efficient than Carolinas' smaller, less expensive, better utilized hospital.

Criterion 17 requires that the "proposed project should improve efficiency by avoiding duplication of services, promoting shared services and fostering economies of scale or size." S.C. Regs. 61-15 § 802.17. DHEC concluded that Carolinas better meets this Criterion because Carolinas "already has a significant market share" and that CMC-FM "would shift [Carolinas'] existing market share into a South Carolina facility." (R. p. 2183) It also found that Piedmont's 100-bed "project is the most costly and they provide no information to support" Piedmont's alleged economies of scale. (*Id.*)

The ALC reversed this finding, concluding that Piedmont better meets Criterion 17 because "its proposal fosters economies of scale by spreading costs over a greater number of beds." (R. p. 123). This conclusion was supported by the finding of fact that "it is more efficient to build a 100 bed hospital capable of meeting future need for services than to build a 64 bed facility that requires expansion within a few years of opening." (R. p. 113).

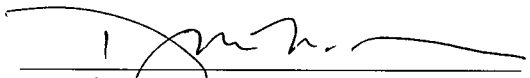
The ALC's conclusions as to Criterion 17 are arbitrary and irrational. The ALC concluded that FMMC, which will have more empty beds, fewer patients, be more expensive to build and operate, and is sponsored by an applicant with an eroding patient base, will be more efficient than CMC-FM, which will be smaller, better utilized, cheaper to build, and sponsored by the applicant with the dominant market share in the surrounding area. It is illogical to determine, as the ALC does, that Piedmont will improve efficiency when it already operates a nearby underutilized hospital and continues to lose market share in Northern York County. *See Deese v. S.C. State Bd. of Dentistry*,

286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary and capricious if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.") Therefore, the Court should vacate the ALC's conclusion as to Criterion 17 and reinstate DHEC's conclusion that Carolinas better meets it.

CONCLUSION

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

Respectfully submitted,



Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

July 31, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

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

v.

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

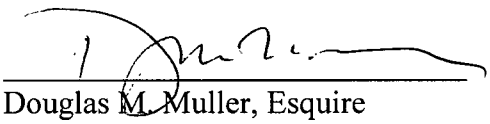
Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Appellant's Final Reply Brief*** by depositing same in the United States Mail with proper postage affixed, addressed as follows:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley &
Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201



Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

August 3, 2015

Charleston, South Carolina

Moore&VanAllen

Douglas M. Muller.
Attorney at Law

T 843 579 7032
F 843 579 8719
dougmuller@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

VIA HAND DELIVERY

August 3, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter St.
Columbia, SC 29201

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

Dear Ms. Kitchings:

With regard to the above referenced action, enclosed for filing please find the following:

1. The original and sixteen (16) copies of the Final Brief of Appellant, with the original being unbound;

2. The original and sixteen (16) copies of the Final Reply Brief of Appellant, with the original being unbound;

3. The original and sixteen (16) copies of the Record on Appeal, with Certificate of Counsel attached, the original being unbound.

4. The original and one (1) copy of the Proof of Service of the Final Brief of Appellant;

5. The original and one (1) copy of the Proof of Service of the Final Reply Brief of Appellant; and

6. The original and one (1) copy of Appellant's Certificate of Compliance with Rule 211(b), as to each Brief.

Please file the originals and return a date-stamped copy of each to me via the bearer of this letter.

Thanks for your assistance in this matter and please call me with any questions.

Sincerely,

MOORE & VAN ALLEN, PLLC

Douglas M. Muller

DMM/ws

Enclosures

cc w/enc.: Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Ashley M. Biggers, Esquire
Vito M. Wicevic, Esquire

Charlotte, NC
Research Triangle Park, NC
Charleston, SC