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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.

PETITION FOR REHEARING

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

Pursuant to Rules 221(a) and 240, SCACR, Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") files this Petition for Rehearing as to the Order of the Court of Appeals (the "Court") filed on September 8, 2015, and Opinion No. 2017-UP-013 of the Court filed on January 11, 2017.

STATEMENT OF THE CASE

Carolinas filed its Notice of Appeal of the Amended Final Order of the Administrative Law Court ("ALC") with this Court on January 14, 2015. After filing the Notice of Appeal, Carolinas filed a cash bond pursuant to S.C. Code Ann. § 44-7-220(B) with the Clerk of the Court in the sum of one million five hundred thousand dollars, which is the maximum amount payable by that statute. On March 17, 2015, Carolinas filed a Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process ("Motion for Relief and Petition for Supersedeas").

On March 19, 2015, the Court issued an Order which instructed Carolinas that any amendment of the pending Motion for Relief and Petition for Supersedeas be filed within ten days of the Court's Order. On March 27, 2015, in accordance with the Court's Order of March 19, 2015, Carolinas filed a Supplemental Brief and Amendment of Motion for Relief and Petition for Supersedeas ("Supplemental Brief"). The Court filed an Order on September 8, 2015, denying Carolinas' Motion for Relief and Petition for Supersedeas.

On January 11, 2017, the Court filed Opinion No. 2017-UP-013 (the "Opinion"), which affirmed the Amended Final Order of the ALC, ordering Respondent South Carolina Department of Health and Environmental Control ("DHEC") to issue a Certificate of Need ("CON") to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"). In affirming the ALC's Amended Final

Order, the Court made three rulings with respect to the findings made by the ALC: (1) Carolinas' Dormant Commerce Clause argument was not preserved for appellate review; (2) Carolinas' bed transfer provision argument was not preserved for appellate review; and (3) the ALC's Amended Final Order was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious.

Carolinas now moves this Court for a rehearing on the Court's rulings in its Order filed September 8, 2015 on its request for relief from the bond requirement, and on the Court's rulings in the Opinion regarding the Dormant Commerce Clause and the application of the arbitrary and capricious standard based on the Court's misapprehension and misapplication of the arguments raised by Carolinas, the applicable law, and the record on appeal.

REHEARING STANDARD

The scope of review for deciding a petition for rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221, SCACR, states: "A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." In order to prevail on a petition for rehearing, a party must demonstrate that the Court overlooked or misapprehended its argument. *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) .

ARGUMENT

I. THE COURT MISAPPREHENDED OR OVERLOOKED THE FACT THAT CAROLINAS PRESERVED THE DORMANT COMMERCE CLAUSE ARGUMENT FOR APPELLATE REVIEW.

a. Carolinas did not include evidence in the record on appeal or provide argument in its Final Brief to address the preservation of its Dormant Commerce Clause argument for appellate review because this issue was not raised on appeal.

At oral argument of this appeal on November 8, 2016, the Court raised *sua sponte* whether Carolinas had properly preserved its Dormant Commerce Clause argument for appellate review. In the Court's subsequent written decision of January 11, 2017, the Court has determined that Carolinas did not preserve the argument based on its belief that the record on appeal was devoid of any evidence that the issue had been raised during the contested case hearing prior to Carolinas filing of a Rule 59(e) motion. Specifically, the Court determined that:

> However, the record does not show Carolinas presented to the ALC any argument that Piedmont's positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause. Carolinas waited until filing its Rule 59(e) motion to present this argument, which is too late . . . [;]
>
> In its Rule 59(e) motion, Carolinas stated a Dormant Commerce Clause argument was presented in writing to the ALC after the conclusion of the 2009 contested case hearing. However, the record reflects that any Dormant Commerce Clause argument raised by the parties in 2009 would have concerned DHEC's interpretation of the State Health Plan to allow only existing providers to obtain a CON to fulfill York County's need for more hospital beds. There is nothing in the record showing that the issues of adverse impact or outmigration even could have been reached before the ALC issued its December 2009 order remanding the case to DHEC to consider all three competing applications[;] [and] . . .
>
> during the 2013 contested case hearing, it was incumbent upon Carolinas to present, with supporting evidence, the argument it now makes on appeal, i.e., the ALC's adoption of Piedmont's positions on adverse effect and outmigration would violate the Dormant Commerce Clause. Because

> Carolinas did not do this, it has failed to preserve its Dormant Commerce Clause argument for this court's review.

The Court's determination unfairly penalizes Carolinas for failing to include in the record on appeal matters that have not been raised on appeal. In this appeal, neither Piedmont nor DHEC have argued that Carolinas failed to preserve its Dormant Commerce Clause argument.[1] In fact, Piedmont raised issue preservation in its Final Brief only as to the bed transfer issue, despite arguing to the ALC below that Carolinas failed to preserve the Dormant Commerce Clause argument. (Piedmont Final Br., p. 1.) Notably, Piedmont chose to set forth its own "Statement of Issues on Appeal," and it did not raise issue preservation as to the Dormant Commerce Clause argument. Nor did it rely on a general reference allowing the Court to affirm on any ground appearing on the record.[2] (*Id.*) Because this issue preservation argument was not raised by Piedmont or DHEC in their arguments on appeal over the Dormant Commerce Clause (*id.*; DHEC Final Br., p. i), Carolinas had no reason to provide arguments on this issue, and no reason to include in the record the underlying information necessary to address whether the issue had been preserved. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.").

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[1] The fact that the parties did not argue that Carolinas failed to preserve its Dormant Commerce Clause argument in the appeal made certain portions of the ALC transcript and the ALC's file irrelevant to the appeal. Because grounds raised for the first time in the Opinion are contradicted by the ALC transcript and other ALC records, Carolinas, pursuant to Rule 212(b), SCACR, has moved to supplement the record on appeal with additional portions of the ALC transcript and the ALC's file.

[2] South Carolina Appellate Court Rule 208(b)(2) provides that: "If a respondent does include his own statement of the case, he shall be bound by the matters stated or alleged in his statement of the case." Respondent's brief may also contain argument asking the Court to affirm for any ground appearing on the record as provided by Rule 220(c), SCACR; however, here it did not.

Having no notice that the preservation of Carolinas' Dormant Commerce Clause argument was at issue on appeal, Carolinas considered it improper to include certain portions of the ALC transcript and filings submitted to the ALC during the contested case hearing. *See* Designation of Matter to be Included on the Record on Appeal, dated April 17, 2015; Rule 209, SCACR ("A party shall not include any matter in his Designation which is not relevant to the appeal. . . . The Designation shall be accompanied by a certificate signed by the party's counsel of record that the Designation contains no matter which is irrelevant to the appeal."). Carolinas therefore submits that this Court's affirmance of the ALC's Amended Final Order based upon a ground which was not raised or briefed on appeal, and which it has never had an opportunity to address, is fundamentally unfair and in error. *See* Rule 208(b)(1)(B), SCACR; *Atl. Coast Builders & Contractors, LLC v. Lewis,* 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring) ("When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.")

b. The additional evidence that Carolinas proposes to supplement the record on appeal confirms Carolinas raised its Dormant Commerce Clause argument to the ALC during the contested case hearing.

i. Carolinas raised its Dormant Commerce Clause argument during its opening argument and at the close of the trial through proffer and presented testimony relating to the anti-competitive effects of Piedmont's proposed application of the State Health Plan throughout the contested case hearing.

Had Carolinas known that the Court would question whether the Dormant Commerce Clause argument had been preserved, it would have introduced into the record

on appeal the fact that Carolinas raised the Dormant Commerce Clause argument and related evidence at the contested case from its opening statement until its final post-trial proffer.

During his opening statement, Carolinas' counsel previewed evidence relating to DHEC's prior application of the CON laws to prevent an out-of-state provider, such as Carolinas, from entering the local hospital market and thereby preventing competition in violation of the Dormant Commerce Clause. This statement prompted Piedmont's counsel to take the unusual step of objecting during Carolinas' opening statement to Carolinas' arguments relating to anticompetitive practices and the exclusion of a North Carolina provider, which Piedmont insisted were to be presented to the ALC only through a proffer at the end of the hearing. (Carolinas' Motion to Supplement the Record on Appeal ("Motion to Supplement"), Attachment A: Tr. Trans. at pp. 99:6 – 102:8.)[3] The ALC subsequently agreed with Piedmont and ruled that this legal argument would need to be presented by proffer.

The colloquy between the ALC and parties' legal counsel, which took place during Carolinas' opening statement, was as follows:

> *MR. MULLER: In addition to that at the prior hearing, there was this issue of what you have referred to as, you've heard us refer to before, as the State Healthcare Plan issue. And that issue, very simply was that when we applied, we being Carolinas, applied and put in that 64-bed application. There was actually a memo issued by DHEC that said anyone can apply for this bed need, it's shown in this county as 64 beds. When Charlie Miller heard about it, Charlie Miller is Mr. Masterton's predecessor, he went to the Commission of DHEC with a state legislator, with either Mr. Andrews or Mr. Westbrook, I can't recall, and that memo was rescinded. So it was a memo saying anybody could apply, that memo was rescinded.* ***We, as an***

[3] Pursuant to Rule 240(c)(3), SCACR, Carolinas has filed a Motion to Supplement the Record on Appeal with attachments in support of its position set forth in the Motion to Supplement and this Petition for Rehearing.

applicant, then went through that entire process for a year and a half, the result of which was that Joel Grice of DHEC, who is now an expert for Piedmont decided that we, being Carolinas, were not eligible. His argument was essentially, that the only eligible provider for new beds in the county was the provider that was already in the county, which would mean perpetually, Piedmont had a lock on York County. No one could ever move there. It was an argument that strained credulity and it's an argument that we fought and Presbyterian fought at length in the last year. *And what Judge Matthews ruled is that we were right, that it's a ridiculous argument to say that.*

MR. ANDREWS: Your Honor, excuse me for interrupting. I really apologize. I know it's absolutely against the pale, but Mr. Muller is making the arguments the flip side of what was addressed by the motion in limine, which we were not to go into the basis for the award of the hospital based on the Plan to Piedmont. He's arguing why that was improper, which certainly invites the counter. And I'm not sure why this is being presented at all. So I apologize for the interruption, but it was something that seemed to be completely off the record.

MR. MULLER: Your Honor, this is an issue that is important, particularly for the credibility of these witnesses. ***If they had made a decision before that is intended to eliminate competition in this county and that is our counter to this adverse impact argument. Our counter is that their whole focus is on eliminating competition which is exactly what they tried to do.*** *I think in an opening statement,* ***I'm allowed to educate the Court, which I know I had before on this issue. And what they're doing now is consistent with what they've done before. They are trying to keep competition out of York County and to keep a stranglehold in York County. So that issue relates to this as much as anything else.*** *And I don't see how Mr. Andrews has the right to object during an opening statement to the presentation of information that is factual and that we're allowed to recite.*

MR. ANDREWS: If we're permitted an opportunity to explain the basis for the Department, then we're fine. I thought that was the determination that was not going to be something that was considered by you at all in this case.

THE COURT: With regard to this, I did sign that motion that we're going to allow you to make that proffer at some point, and we're going to do that at the end of the proceeding with regard to the State Health Plan. And I understand what you're saying. Let's try to keep the references to the State Health Plan to a minimum if we could. Thank you, sir.

(Carolinas' Motion to Supplement, Attachment A: Tr. Trans. at pp. 99:6 – 102:8.) (emphasis added).

The point of Carolinas' opening statement was that Piedmont was presenting a variation of its State Health Plan argument – to convince the ALC (as it had done in the previous, erroneous review by DHEC) to exclude Carolinas because it was a North Carolina provider that did not have a hospital in York County and therefore its services to York County citizens constituted "out-migration." Piedmont's objection during the opening statement, and the ALC's ruling that the argument would need to be made by proffer, effectively forced Carolinas to rely upon the proffer to present this legal argument. Carolinas omitted this portion of the hearing transcript from the record on appeal because neither Piedmont nor DHEC raised issue preservation as an argument in response to Carolinas' Dormant Commerce Clause argument. This portion of the hearing transcript demonstrates that Carolinas raised its Dormant Commerce Clause argument to the ALC. *See Long v. Norris & Assocs. Ltd.*, 342 S.C. 561, 578, 538 S.E.2d 5, 14 (Ct. App. 2000) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon . . . counsel to harass the judge by parading the issue before him again." (internal quotation marks and citations omitted)).

With respect to the evidence, the parties each presented and cross-examined witnesses and presented evidence relating to the application of CON Act and regulatory criteria and the competitive effects of their application, including the effects on interstate commerce. The central issue in dispute throughout the contested case hearing was whether and to what extent the establishment of Carolinas' proposed hospital would impact the outmigration of South Carolina residents to hospitals in North Carolina. Evidence and testimony on this issue was not expressly presented in relation to the Dormant Commerce Clause because it would have been improper for fact and expert witnesses to provide legal

opinions regarding the constitutionality of such application. However, contrary to the Court's suggestion in the Order, the ALC had sufficient facts from which to consider and determine if Piedmont's proposed application of the CON Act and regulatory criteria violated the Dormant Commerce Clause.

Following the conclusion of the parties' respective cases, the ALC discouraged the parties from providing closing arguments, which would have been the most appropriate time for Carolinas to renew its argument regarding the Dormant Commerce Clause. (Carolinas' Motion to Supplement, Attachment A: Tr. Trans. at pp. 2896:18-2898:2; 2906:19-23.) Instead, the ALC directed the parties to proffer their respective positions regarding the outstanding legal issues to the Court via written submissions. (Carolinas' Motion to Supplement, Attachment A: Tr. Trans. at pp. 2897:2-2903:14.)

Consistent with the ALC's direction, Carolinas presented its Dormant Commerce Clause argument by proffer. (Carolinas' Motion to Supplement, Attachment B: Carolinas' Counter Proffer of Evidence filed with the ALC on June 6, 2013.) In that pleading, Carolinas' Counter Proffer of Evidence filed with the ALC on June 6, 2013 ("Carolina's Proffer"), under the heading "Legal Argument" as Item #2, Carolinas submitted to the ALC the arguments previously advanced to Judge Matthews in Presbyterian's Motion for Summary Judgment and Memorandum in Support dated May 18, 2007 (labeled in the proffer as "Attachment 8"), which specifically included the Dormant Commerce Clause legal argument, although as the adoption of Presbyterian's prior argument. (Carolinas' Motion to Supplement, Attachment B: Carolinas' Proffer at Attachment 7 & 8.) Further, Carolinas own summary judgment motion dated May 21, 2007, which was identified as Attachment 7 to Carolinas' Counter Proffer, stated that:

> Taking SCDHEC's interpretation to its logical conclusion, the only hospitals that could apply for bed need would be the existing hospitals in the various counties in South Carolina, as there is no demonstrated bed need in the 2004-2005 SHP for any new facility. This would preclude not only new healthcare providers from entering the market, but virtually any new facility, such as FMMC. Such an interpretation would lead to anti-trust, commerce, free trade and constitutional issues with the State of South Carolina, as it would prohibit any new healthcare provider from ever entering any hospital market in South Carolina, and it would provide the existing hospitals with a captive and exclusive market.

(Carolinas' Motion to Supplement, Attachment B: Carolinas' Proffer at Attachment 7.)

Through this proffer, Carolinas argued, as it does in this appeal, against an application of the CON Act and State Health Plan that "places a barrier on any new entry in the South Carolina hospital market" and that "favor[s] in-state interest and actually closes the hospital market to out of state interest in favor of existing providers that cannot be justified and serves no use other than economic protectionism for the existing South Carolina hospitals." (Carolinas' Motion to Supplement, Attachment B: Carolinas' Proffer at Attachment 8.) This proffer, which Carolinas did not include in the record on appeal due to its relevancy, shows that Carolinas has been consistent in arguing that an interpretation, whether by DHEC or by the ALC, of the State Health Plan, CON Act, S.C. Reg. 61-15, and the Project Review Criteria that prevents a North Carolina health care provider from operating a hospital in York County and which favors a South Carolina provider is a violation of the Dormant Commerce Clause.

ii. The parties' post-trial motions and the ALC's Final Order and Amended Final Order provides further evidence that Carolinas raised its Dormant Commerce Clause argument to the ALC during the contested case hearing.

As indicated in its Final Brief, Carolinas timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, SCRCP (the "Motion to Reconsider"). (R. pp. 227-249.) In Piedmont's Response Memorandum to the Motion to Reconsider, Piedmont argued that Carolinas failed to properly raise the Dormant Commerce Clause argument at the contested case hearing, and therefore this argument was untimely. (R. pp. 250-51.) Carolinas filed a Reply to Piedmont's Response Memorandum to the Motion to Reconsider, asserting, with supporting evidence, that its Dormant Clause Argument was not untimely.[4] (Carolinas' Motion to Supplement, Attachment C.)

The ALC initially vacated the Final Order. (R. p. 73.) Seven months after vacating the Final Order, the ALC issued an Amended Final Order, which included substantial revisions to the previous version. (R. pp. 74-126). In the Amended Final Order, the ALC revised portions of the prior Final Order to strengthen the ALC's decision from an appellate challenge on the basis of the Dormant Commerce Clause. 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).

[4] Carolinas omitted the Reply to Piedmont's Response Memorandum to the Motion to Reconsider from its record on appeal based on relevancy. This Reply further shows how Carolinas' Dormant Commerce Clause argument was raised to the ALC during the contested case hearing and thus preserved for appellate review.

Despite Piedmont's issue preservation argument to the ALC, the ALC did not rule that Carolinas failed to preserve its Dormant Commerce Clause argument. Instead, the ALC specifically ruled upon the Dormant Commerce Clause argument by addressing it directly:

> [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).

As noted above, in response to the parties' post-trial motions, the ALC: (1) vacated the Final Order; (2) took many months to issue an Amended Final Order which, among other revisions, attempted to address deficiencies related to Carolinas' Dormant Commerce Clause argument; (3) considered and rejected Piedmont's issue preservation argument; and (4) ultimately considered and ruled upon the Dormant Commerce Clause legal issue. Under the circumstances, the ALC reviewed and decided on the Dormant Commerce Clause legal argument, and consistent with the South Carolina Supreme Court's decision in *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) (discussed more fully below), the issue was properly preserved for appellate review.

c. The Court erred in concluding that it could not consider Carolinas' Dormant Commerce Clause argument because Carolinas' legal argument on the application of the Dormant Commerce Clause differed from Presbyterian's proffer argument.

The Court's decision on issue preservation concludes that Carolinas' legal argument regarding the Dormant Commerce Clause on appeal differs from the Dormant Commerce Clause argument previously raised at the conclusion of the first contested case in 2009, and therefore, it cannot be considered because the argument was not fully raised in its current form until the Motion to Reconsider was filed.

That ruling is at odds with the Court's rule that any doubts as to whether an appellant has preserved argument should be resolved in favor of finding the argument preserved, *see State v. Jenkins*, 408 S.C. 560, 568, 759 S.E.2d 759, 763 fn. 7 (Ct. App. 2014) (resolving doubt about issue preservation in favor of appellant) (citing *Atl. Coast Builders & Contractors*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (recognizing "it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful"), and the South Carolina Supreme Court's more expansive interpretation of Rule 59, SCRCP. As the Supreme Court stated in *Elam, supra*:

> [O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. . . . [C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, ... If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review.

Elam, 361 S.C. at 24-25, 602 S.E.2d at 780-81 (citations omitted).

The prior contested case and the present one were clearly in different postures. Given the ALC's ruling at the beginning of the second contested case hearing, Carolinas was not allowed to present its legal argument relating to the Dormant Commerce Clause, but Carolinas did present the legal issue in its opening statement and by proffer, and it has been consistent in arguing that any interpretation, whether it be by DHEC or the ALC, of the State Health Plan, CON Act, S.C. Reg. 61-15, and the Project Review Criteria that prevents a North Carolina health care provider from operating a hospital in York County and which favors a South Carolina provider is a violation of the Dormant Commerce Clause. The South Carolina Supreme Court's holding in *Elam* does not limit the issues that can be raised in a motion for reconsideration, and it is consistent with federal law on the subject. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (providing once a constitutional claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below); *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (holding although SCDOT did not phrase its objection in the exact terms used in issues on appeal, it was sufficient to preserve it for appellate review). Further, even if the Court determines that the proffer was incomplete, it was more than sufficient to show that Carolinas had argued and was arguing that any interpretation made in the CON process that results in prohibiting out-of-state competition violates the Dormant Commerce Clause. *See State v. Myer*, 301 S.C. 251, 391 S.E.2d 551 (1990) (providing that while the proffer was not complete, it was sufficient to preserve the issue for appellate review).

Additionally, because Carolinas has argued that it is the ALC's interpretation "as applied" that is unconstitutional, it would have been unlikely that Carolinas would have

advanced that argument until the ALC issued the Final Order, as Carolinas was defending DHEC's agency decision, which found in favor of Carolinas, and Carolinas' position was such that it was not arguing that DHEC's underlying agency decision was unconstitutional. *See In re Estate Timmerman*, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998) (providing when a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issues for appeal); *Godfrey v. Heller*, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993) (providing where the theory of unjust enrichment was first raised in the trial court's order, appellant should have challenged this basis for recovery by a Rule 59(e) motion to preserve the issue for appeal).

II. THE COURT MISAPPREHENDED OR FAILED TO APPLY THE PROPER STANDARD OF REVIEW IN AFFIRMING THE FINDINGS OF THE ALC.

The Court referenced the proper standard of review in the Opinion as follows:

> The Administrative Procedure Act governs the standard of review from a decision of the ALC, allowing this court to reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Ct. App. Opp., p. 3) (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2016)). Despite recognizing the applicable standard of review, the Court affirmed the ALC's Amended Order, which contained multiple errors of law.

In section III of the Opinion, the Court summarizes the arguments that Carolinas made in section III of its Final Brief and at oral argument as follows: "Carolinas contends

the ALC's application of certain Project Review Criteria was arbitrary and capricious." (Ct. App. Op., p. 5.) The Court rejects Carolinas' argument, as framed by the Court, holding: "the ALC's decision was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious." (Ct. App. Op., p. 5.) In making this ruling, the Court misapprehends or overlooks that Carolinas, in section III of its Final Brief and at oral argument, raised legal errors as a basis for the Court to reverse the ALC's Amended Final Order. (Carolinas Final Br., pp. 29-49) ("The ALC **erroneously**, arbitrarily, and capriciously applied the CON Act, the State Health Plan, and Project Review Criteria. (emphasis added)). Accordingly, Carolinas requests that the Court order a rehearing in order to address its argument that the ALC's Amended Order should be reversed on the basis of it containing multiple legal errors.

III. THE COURT OVERLOOKED OR MISAPPREHENDED CAROLINAS' ARGUMENTS RAISED IN ITS MOTION FOR RELIEF AND PETITION FOR SUPERSEDEAS.

As required by S.C. Code Ann. § 44-7-220(B), Carolinas posted a $1.5 million dollar bond to perfect its appeal of the ALC's denial of its application for a certificate of need to construct a hospital in Fort Mill, South Carolina. In its Motion for Relief and Petition for Supersedeas and in its Supplemental Brief,[5] Carolinas sought relief from the appeal bond because it is unconstitutional under the South Carolina and United States Constitution. Carolinas maintains that the bond requirement under § 44-7-220(B) violates the separation of powers doctrine under the South Carolina Constitution because it interferes with the South Carolina Supreme Court's constitutional authority to promulgate

[5] Both pleadings are in the record of the Court. The Motion for Relief and Petition for Supersedeas was received by the Court for filing on March 17, 2015. The Supplemental Brief was deemed filed on March 27, 2015 but received by the Court on March 30, 2015.

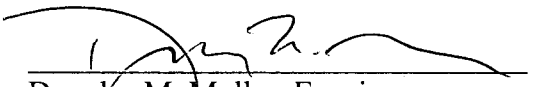
its rule of procedure and practice in the appellate courts of this State. Carolinas further maintains that the bond requirement violates the Equal Protection Clause of the South Carolina and United States Constitutions because it imposes an arbitrary and discriminatory appeal bond requirement on a narrow class of appellants without being rationally related to a legitimate state interest. Lastly, Carolinas maintains that § 44-7-220(B) violates the due process provision of Article I, § 22 of the South Carolina Constitution by substantially burdening appellants' rights to judicial review of the ALC's certificate of need decisions involving a competing applicant. Because the South Carolina Appellate Court Rules are potentially inconsistent on whether this argument needs to be raised at this stage of the case in order to preserve the right to be considered by the South Carolina Supreme Court,[6] Carolinas incorporates by reference its arguments raised in its Motion for Relief and Petition for Supersedeas and its Supplemental Brief and Amendment of Motion for Relief and Petition for Supersedeas.

CONCLUSION

For the aforementioned reasons, Carolinas requests that the Court order a rehearing as prayed above, and reverse the Court's Order filed on September 8, 2015, and that it reverse the ALC's Amended Final Order.

[6] SCACR Rule 240(i) states: "(i) Rehearing. The court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Conversely, SCACR Rule 242(d)(2) states: "(d) Content of Petition.,,[o]nly those questions raised in the Court of Appeals **and** in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (emphasis added).

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

January 26, 2017

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,

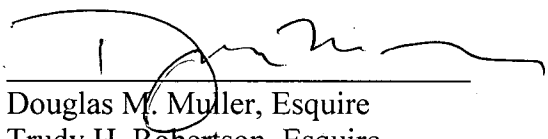
Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

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 Petition for Rehearing*** by hand delivery, 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



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

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