

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APR 21 2017

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

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

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APR 21 2017

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center S.C. SUPREME COURT
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.

APPENDIX – VOLUME II OF IV

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d/b/a Fort Mill Medical Center Respondent,

v.

South Carolina Department of Health and Environmental Control
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Medical Center-Fort Mill Respondents,

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

APPELLANT'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL

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SC Court of Appeals

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Pursuant to Rule 212(b) of the South Carolina Appellate Court Rules, Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill (“Carolinas”) moves for leave to supplement the Record on Appeal with the materials designated herein. All of these materials are necessary and relevant to support Carolinas’ Petition for Rehearing as to Opinion No. 2017-UP-013 of the Court of Appeals (the “Court”).

PROCEDURAL HISTORY

On January 11, 2017, the Court filed Opinion No. 2017-UP-013 (the “Opinion”), which affirmed the Amended Final Order of the Administrative Law Court (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 has filed a Petition for Rehearing as to the Court’s rulings in the Opinion regarding the preservation of Carolinas’ Dormant Commerce Clause argument and the application of the arbitrary and capricious standard based on the Court’s misapprehension and misapplication of the arguments Carolinas raised, the applicable law, and the Record on Appeal. This Motion and the materials designated herein support Carolinas’ argument set forth in its Petition for Rehearing relating to the preservation of its Dormant Commerce Clause argument.

ARGUMENT

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.

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. 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.¹ (*Id.*) Because this issue preservation argument was not raised by Piedmont or DHEC in their argument on appeal over the Dormant Commerce Clause (*id.*; DHEC Final Br., p. i), Carolinas had no reason to provide arguments on this issue or reason to include in the Record on Appeal the underlying information necessary to address whether the issues had been preserved. See *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011)

¹ Rule 208(b)(2), SCACR, 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, but here, Respondent did not make such a request.

(“Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.”).

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, 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.”)

Therefore, Carolinas now moves for leave to supplement the Record on Appeal with certain portions of the ALC transcript and other ALC records so that it has the opportunity to address the preservation of Carolinas’ Dormant Commerce Clause argument. All of the materials designated herein show that Carolinas presented its Dormant Commerce Clause argument to the ALC during

the contested case hearing.² Carolinas designates the following materials to supplement the Record on Appeal:

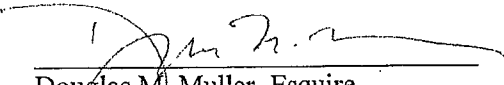
1. Transcript of the ALC contested case hearing held April 8, 2013 – May 7, 2013: pp. 99-102, 2896-2903, 2906 (*see* Attachment A hereto)³;
2. Carolinas' Counter Proffer of Evidence filed with the ALC on June 6, 2013 ("Carolinas' Proffer") (*see* Attachment B hereto);
3. Attachment 7 to Carolinas' Proffer: Carolinas' Notice of Motion and Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment filed on May 21, 2007 (*id.*);
4. Attachment 8 to Carolinas' Proffer: Presbyterian's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment dated May 18, 2007 (*id.*); and
5. Carolinas' Reply Memorandum in Support of Motion for Reconsideration filed with the ALC on April 24, 2014 (*see* Attachment C hereto).

CONCLUSION

The Court's Opinion was based on certain facts which do not appear in the Record on Appeal and which are contradicted by the materials designated herein. Consequently, these materials did not become relevant until the grounds for the Court's Opinion became known. For these reasons and the reasons set for in its Petition for Rehearing, Carolinas submits that fairness requires that it be permitted to supplement the Record on Appeal. Accordingly, pursuant to Rule 212(b), SCACR, Carolinas respectfully moves for leave to supplement the Record on Appeal with the materials designated herein by way of an Appendix to the Record on Appeal.

² Carolinas' Petition for Rehearing provides further discussion on the relevance of the materials designated herein as to the Court's determination of whether Carolinas' Dormant Commerce Clause argument is preserved for appellate review.

³ Pursuant to Rule 240(c)(3), SCACR, Appellant attaches hereto the documents in support of this Motion and its Petition for Rehearing. Appellant will prepare the Appendix pursuant to Rule 212, SCACR, upon a ruling on this Motion.



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January 26, 2017

A

ATTACHMENT A

(Transcript of the ALC contested case hearing held April
8, 2013 – May 7, 2013: pp. 99-102, 2896-2903, 2906)

1 last hearing is why they were moving all of
2 these patients from these two zip codes up to
3 a hospital in Fort Mill at an increased cost of
4 roughly \$50 million when they could just as
5 equally be served in the existing Piedmont
6 Medical Center. In addition to that at the
7 prior hearing, there was this issue of what you
8 have referred to as, you've heard us refer to
9 before, as the State Healthcare Plan issue.
10 And that issue, very simply was that when we
11 applied, we being Carolinas, applied and put in
12 that 64-bed application. There was actually a
13 memo issued by DHEC that said anyone can apply
14 for this bed need, it's shown in this county as
15 64 beds. When Charlie Miller heard about it,
16 Charlie Miller is Mr. Masterton's predecessor,
17 he went to the Commission of DHEC with a state
18 legislator, with either Mr. Andrews or Mr.
19 Westbrook, I can't recall, and that memo was
20 rescinded. So it was a memo saying anybody
21 could apply, that memo was rescinded. We, as
22 an applicant, then went through that entire
23 process for a year and a half, the result of
24 which was that Joel Grice of DHEC, who is now
25 an expert for Piedmont decided that we, being

1 Carolinas, were not eligible. His argument was
2 essentially, that the only eligible provider
3 for new beds in the county was the provider
4 that was already in the county, which would
5 mean perpetually, Piedmont had a lock on York
6 County. No one could ever move there. It was
7 an argument that strained credulity and it's an
8 argument that we fought and Presbyterian fought
9 at length in the last year. And what Judge
10 Matthews ruled is that we were right, that it's
11 a ridiculous argument to say that.

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

25 **MR. MULLER:** Your Honor, this is an issue that is

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1 important, particularly for the credibility of
2 these witnesses. If they had made a decision
3 before that is intended to eliminate
4 competition in this county and that is our
5 counter to this adverse impact argument. Our
6 counter is that their whole focus is on
7 eliminating competition which is exactly what
8 they tried to do. I think in an opening
9 statement, I'm allowed to educate the Court,
10 which I know I had before on this issue. And
11 what they're doing now is consistent with what
12 they've done before. They are trying to keep
13 competition out of York County and to keep a
14 stranglehold in York County. So that issue
15 relates to this as much as anything else. And
16 I don't see how Mr. Andrews has the right to
17 object during an opening statement to the
18 presentation of information that is factual and
19 that we're allowed to recite.

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

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

9 **MR. MULLER:** Your Honor, sort of flashing forward
10 now, leaving that issue. You know, we were
11 left with that issue, we had the remand. And
12 all parties at that point were on a level
13 playing field. And that level playing field
14 allowed all parties to be considered equally.
15 All of us, to some degree, updated all of our
16 information with new information, with updated
17 information using the 2004-2005 State Health
18 Plan as a basis. And what DHEC was asked to do
19 was to take the State Health Plan, the purposes
20 and the needs of the State Health Plan to sort
21 of inherently to consider what we have referred
22 to as Section 501 findings, but basically, the
23 findings that are inherent in the application
24 itself, in terms of justifying why your
25 hospital is appropriate. And then they had to

1 correct?

2 A: That was what was presented to DHEC. That's
3 not necessarily my opinion.

4 MR. MULLER: I have no further questions, Your
5 Honor.

6 THE COURT: Thank you, Mr. Muller.

7 MR. WESTBROOK: No further questions, Your Honor.

8 THE COURT: Anything from the Department?

9 MS. BIGGERS: No questions, Your Honor.

10 THE COURT: Thank you. We can let Mr. Sullivan go
11 about his business.

12 MR. SULLIVAN: Thank you very much.

13 THE COURT: Thank you, sir, for your patience.

14 MR. MULLER: Your Honor, I think we have a couple of
15 issues to close out the case, one is the
16 proffer.

17 THE COURT: Yes.

18 MR. MULLER: One is the issue of whether or not we
19 will do closing arguments, and the third is the
20 issue of surrebuttal. With the Court's
21 permission, perhaps we could talk about the
22 proffer and whether or not you would like to
23 hear closing arguments. And then if we could
24 just take a brief break for us to consider
25 whether we need to do any surrebuttal, whether

1 we need to ask for it.

2 **THE COURT:** Does that order sound acceptable to you,
3 Mr. Andrews, of discussion here, talk about the
4 proffer?

5 **MR. ANDREWS:** It does indeed, Your Honor.

6 **THE COURT:** Talk about the --

7 **MR. ANDREWS:** It does indeed, yes. And matter of
8 fact, we informed counsel for Carolinas and DHEC
9 last night that after evaluating our position
10 related to the proffer, we're comfortable
11 relying on the submission of documents instead
12 of testimony, so we'll save all ourselves some
13 time this morning, Your Honor. And with regard
14 to closing arguments, I thought we addressed
15 that ...

16 **THE COURT:** I thought we did too.

17 **MR. ANDREWS:** And I thought the conclusion was that
18 you didn't feel the need for it and we didn't
19 either, so we've been proceeding on the
20 assumption there we wouldn't be ---

21 **THE COURT:** And my position, as I recall, was that I
22 didn't feel like I needed to hear it, but I
23 wasn't -- if you felt like you wanted to offer
24 closing remarks, I would listen to them,
25 although I didn't really feel the need for

1 them. So, unless you just feel that you need
2 to do that, I don't see a need for it.

3 **MR. MULLER:** Well, with respect to the proffer, Your
4 Honor, maybe if I could address the proffer
5 issue first?

6 **THE COURT:** Yes. That's right. That's what we were
7 going to do.

8 **MR. MULLER:** I'm sorry. On the proffer, I think
9 what we were prepared to do today was present
10 the Court with our proffer on the competing
11 applicant issue in a pleading. Unfortunately,
12 we left some of the exhibits that we intended
13 to include with that back in Charleston. With
14 Mr. Andrews suggestion that he would be
15 submitting his proffer at a later time, if the
16 Court would allow us to go back and properly
17 prepare that document and submit it, would it
18 be acceptable to the Court to do it that way?

19 **MR. ANDREWS:** I didn't suggest, don't know what I
20 said to suggest we'd be doing it at a later
21 time. We actually have prepared our proffer
22 and were going to submit it this morning. I
23 thought that was the Court's expectation.

24 **THE COURT:** I was sort of thinking that that was the
25 way we were proceeding. But I am -- if you --

1 I don't mean to create a situation where you
2 can't offer it. If there's been a problem here
3 and you need some time to just gather what you
4 were going to submit, I can hold the record
5 open.

6 **MR. MULLER:** I made a mistake. Ms. Robertson has
7 our proffer ready to be submitted.

8 **THE COURT:** Oh, that's right.

9 **MR. MULLER:** It's in writing. The only thing that
10 is missing from it is there's some exhibits
11 that need to be supplemented that we didn't
12 have with us. So, if it's acceptable to the
13 Court, we can just hand these up in terms of
14 our proffer on the competing applicant issue.

15 **THE COURT:** Yes.

16 **MR. MULLER:** And that would be the bulk of it with
17 some supplementary exhibits to follow

18 **MS. ROBERTSON:** The memos of law, Your Honor, there
19 are four memorandums of law that were submitted
20 in the prior hearing that relate to the issue
21 of competing applicants. Those memos are
22 included as the exhibits to those memos that
23 will be sent back to you. They're quite
24 voluminous and we may send them on a disk or we
25 can send them in a hard copy, but the primary

1 documents to which they're attached are included
2 in this packet we're going to hand to you.

3 **THE COURT:** All right.

4 **MR. MULLER:** Now if it is Mr. Andrews' intention not
5 to offer a live witness but to simply read into
6 the record by page and line what he intends to
7 introduce ---

8 **MR. ANDREWS:** Actually, I was just going to hand it
9 up rather than reading it in line and the Court
10 just could incorporate it into the record, of
11 course, providing y'all a copy. I also wanted
12 to suggest procedurally, Your Honor, a step that
13 we haven't discussed but would be open to
14 either party, which would be consistent with the
15 method identifying the record for any appellate
16 matter, which is so that each party could have
17 an opportunity to review the matter submitted
18 and to supplement their submission based on
19 what's presented. We would like that
20 opportunity to review theirs; I suspect they
21 would ours and then we could supplement it by
22 whatever date the Court would establish.

23 **MR. MULLER:** And Mr. Andrews read my mind. Because
24 I had expected, I wasn't quite sure how we
25 handled it, but I assumed I'd cross-examine his

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1 witness, but if I can simply -- if he may
2 respond to ours and I may respond to his, I
3 think that would allow us both to give a
4 complete view of the file.

5 **MR. ANDREWS:** Sure. That would be fine.

6 **THE COURT:** Okay. So we can just hold the record
7 open until such time as you've both had an
8 opportunity to view each other's submissions
9 with regard to this competing applicant issue
10 and submit any supplemental matters.

11 **MR. ANDREWS:** And with regard to that, we were
12 operating on the assumption that it would be
13 consistent with typical appellate practice to
14 submit exhibits and not briefs, but if we want
15 to incorporate briefs, we haven't done that in
16 our submission, but if Carolinas is doing that,
17 then we'd probably want to incorporate briefs as
18 well related to this matter.

19 **THE COURT:** We can hold the record open for the
20 submission of any briefs you wish to submit as
21 well.

22 **MR. ANDREWS:** Thank you. Okay.

23 **MR. MULLER:** On the closing argument issue, if the
24 Court is not inclined hear closing argument, I
25 think we would probably not be so inclined to

1 offer. But if the Court could give us a few
2 minutes just to consider the issue of
3 surrebuttal if we need to ask for that. We may
4 not, but ---

5 **THE COURT:** You need about, you want to take a ten
6 minute break or so?

7 **MR. MULLER:** Yeah, that would be great.

8 **THE COURT:** Then we're in recess for ten minutes.

9 (Break from 9:43 a.m. until 10:01 a.m.)

10 **THE COURT:** All right. We're back on the record.

11 **MR. MULLER:** Your Honor, with respect to closing
12 arguments, if the Court does not feel inclined
13 to hear it, we will not give it. With respect
14 to surrebuttal, we will not ask for surrebuttal.

15 **THE COURT:** All right. Thank you. As I understand
16 our discussions prior to taking our break, the
17 parties are going to make written submission to
18 the Court as to their proffer regarding the
19 competing applicant issue. At this time,
20 Piedmont is submitting its proffer, however, it
21 may be supplementing that with a memoranda.

22 **MR. ANDREWS:** Yes, sir.

23 **THE COURT:** CHS, you'll be submitting your proffer
24 as well, however there are some exhibits that
25 will be following shortly, so we'll hold the

1 record open for all of that. Would ten days be
2 a sufficient amount of time ---

3 **MR. ANDREWS:** Yes, sir, that would be fine.

4 **THE COURT:** --- for the memoranda and the ---

5 **MR. MULLER:** Yes, Your Honor.

6 **THE COURT:** --- for the exhibits and everything. So
7 ten days. And then subsequent to that, the
8 parties wish the opportunity to submit
9 supplemental material in response to each
10 other's proffers. Would 20 days be an
11 appropriate amount of time for the parties to
12 have after the ten days? In essence, giving
13 you a total of 30 days for submission of those
14 supplemental?

15 **MR. MULLER:** That would be fine, Your Honor. One
16 issue that we may get into and I was going to
17 ask the Court about this is this May 18
18 statutory deadline that we've been dealing with,
19 and I just raise that as an issue because
20 obviously this has been a lengthy trail and
21 that may at this point be an unrealistic
22 deadline, but I was going to ask the Court how
23 you would like to address that issue.

24 **THE COURT:** Did you have anything?

25 **MR. ANDREWS:** No, sir. Whatever the Court's

1 case and a lot of issues and certainly I want
2 to give the parties every opportunity to submit,
3 to have plenty of time to submit good proposed
4 orders to the Court. What do you think?

5 **MR. ANDREWS:** Thirty days normally would be fine,
6 Your Honor. We actually have a trial during
7 that period, so if we could ask for 45 instead
8 as an accommodation, we'd be appreciate it.

9 **THE COURT:** Any objection?

10 **MR. MULLER:** We have no objection. I assume that's
11 45 days from the date that we receive the
12 transcript?

13 **THE COURT:** Yes, sir. That's what the Court --
14 that's what I was thinking, 45 days from the
15 date the transcript is in your hands.

16 **MR. MULLER:** That is fine with us.

17 **THE COURT:** Is that enough time?

18 **MR. ANDREWS:** Thank you.

19 **THE COURT:** And that will be -- that will take care
20 of that. So, I think we have the time frame,
21 that there's going to be no surrebuttal, we
22 don't need closing arguments. Was there
23 anything else that the parties ...

24 **MR. ANDREWS:** Yes, sir. There's one thing. There's
25 been some discussions that the parties have had

B

ATTACHMENT B

(Carolinas' Counter Proffer of Evidence filed with the
ALC on June 6, 2013: pp. 1-1067)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioner,

v.

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

Respondents.

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

**CAROLINAS' COUNTER
PROFFER OF EVIDENCE AND
LEGAL ARGUMENTS ON THE ISSUE
CONCERNING INTERPRETATION
OF BED-NEED PROVISION IN 2004-
2005 SOUTH CAROLINA HEALTH
PLAN**

Respondent The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") hereby submits this counter proffer of evidence on the issue concerning the interpretation of the bed-need provision in the 2004-2005 South Carolina Health Plan related to the determination of need for acute care hospital beds, as identified in this Court's order dated April 5, 2013.

PROFFER OF EVIDENCE

In response to Amisub's proffer of evidence filed on May 17, 2013, Carolinas proffers the following testimony from the prior contested case hearing in Case No. 06-ALJ-07-0713-CC (styled "*Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System and Presbyterian Healthcare System d/b/a Presbyterian Hospital York, LLC, Petitioners vs. South Carolina Department of Health and Environmental Control and Amisub of South Carolina d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Respondents*"):

1. Testimony of Leon Frishman – Transcript of Administrative Hearing (Volume 1 of 5)
– page 70, line 23 to page 86, line 6; page 88, line 1 to line 13 (Attachment 1);

FILED

JUN 06 2013

SC ADMIN. LAW COURT

2. Testimony of Mary Fechtel - Transcript of Administrative Hearing (Volume 1 of 5) – page 134, line 15 to page 135, line 2; page 144, line 22 to page 145, line 6; page 221, line 14 to page 222, line 4 (**Attachment 2**);
3. Testimony of Les Shelton – Transcript of Administrative Hearing (Volume 2 of 5) – page 612, line 24 to page 615, line 19; page 626, line 2 to line 15 (**Attachment 3**);
4. Testimony of Albert Whiteside – Transcript of Administrative Hearing (Volume 2 of 5) – page 712, line 23 to page 733, line 14 (**Attachment 4**);
5. Testimony of Dennis Gibbs – Transcript of Administrative Hearing (Volume 2 of 5) – page 594, line 1 to page 597, line 17 (**Attachment 5**);
6. Testimony of Joel Grice – Transcript of Administrative Hearing (Volume 2 of 5) – page 913, line 1 to page 1013, line 9; (Volume 3 of 5) – page 1221, line 17 to page 1223, line 10 (**Attachment 6**).
7. Carolinas further counter designates and incorporates as if fully set forth herein any additional citations to the record that are referenced in the below memoranda that may not be separately referenced above.

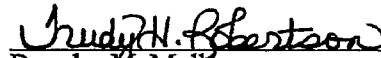
PROFFER OF LEGAL ARGUMENT

Carolinas proffers the following legal arguments from the prior contested case hearing in Case No. 06-ALJ-07-0713-CC (styled “*Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System and Presbyterian Healthcare System d/b/a Presbyterian Hospital York, LLC, Petitioners vs. South Carolina Department of Health and Environmental Control and Amisub of South Carolina d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Respondents*”):

1. Carolinas HealthCare System's Notice of Motion and Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment filed on May 21, 2007 (**Attachment 7**);
2. Presbyterian's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment dated May 18, 2007 (**Attachment 8**);
3. Carolinas HealthCare System's Memorandum in Opposition to Fort Mill Medical Center's Motion for Summary Judgment filed on June 7, 2007 (**Attachment 9**);
4. Carolinas HealthCare System's Reply Memorandum to Fort Mill Medical Center's Memorandum in Opposition to Summary Judgment filed June 13, 2007 (**Attachment 10**);
5. Carolinas HealthCare System's Notice of Motion and Motion for Summary Judgment and Memorandum in Support filed February 18, 2009 (**Attachment 11**);
6. Carolinas HealthCare System's Reply Memorandum to Amisub's Memorandum in Opposition, DHEC's Memorandum in Opposition and Presbyterian's Memorandum in Partial Opposition to Summary Judgment filed March 9, 2009 (**Attachment 12**);
7. Carolinas HealthCare System's Renewed Motion for Summary Judgment and Memorandum in Support filed September 29, 2009 (**Attachment 13**);
8. Presbyterian Hospital-York, LLC's Renewed Motion for Summary Judgment and Memorandum in Support dated September 28, 2009 and Errata dated September 29, 2009 (**Attachment 14**);
9. Order of Administrative Law Judge Carolyn C. Matthews dated and filed December 9, 2009 (**Attachment 15**);

10. Carolinas HealthCare System's Memorandum in Opposition to Respondent Amisub's Motion to Alter or Amend dated January 6, 2009 (Attachment 16).

Respectfully submitted,



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

June 6, 2013

Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioner,

v.

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

Respondents.

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

CERTIFICATE OF SERVICE

I hereby certify that I have, this 6th day of June, 2013, served a copy of the foregoing *Carolinas' Counter Proffer of Evidence and Legal Arguments on the Issue Concerning Interpretation of Bed-Need Provision in 2004-2005 South Carolina Health Plan* upon the following by hand-delivery addressed to:

Daniel J. Westbrook, Esquire
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FILED

JUN 06 2013

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 06-ALJ-07-0713-CC

Charlotte-Mecklenburg Hospital Authority)
d/b/a Carolinas Healthcare System and)
Presbyterian Healthcare System d/b/a)
Presbyterian Hospital-York, LLC)

Petitioners,

v.

South Carolina Department of Health)
and Environmental Control, and Amisub of)
South Carolina, Inc. d/b/a Piedmont)
Healthcare System d/b/a Fort Mill)
Medical Center,)

Respondents.

COPY

VOLUME ONE OF FIVE
ADMINISTRATIVE HEARING

September 9th, 10th and 11th, 2009
September 14th through 17th, 2009
September 21st through September 25th, 2009

The administrative hearing before the Honorable Carolyn C. Matthews was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the aforementioned days in September 2009, before Christine A. Cortright, Court Reporter and Notary Public, in and for the State of South Carolina, and Andie R. Taylor, Court Reporter and Notary Public, in and for the State of South Carolina.

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1 **THE COURT:** Note for the record I didn't recognize
2 Mr. Frishman with the beard.

3 **MR. FRISHMAN:** Trying to look more intelligent.

4 **THE COURT:** We'll reserve judgment on that, Mr.
5 Frishman.

6 **MS. ROBERTSON:** Your Honor, one other housekeeping
7 matter.

8 **THE COURT:** Certainly.

9 **MS. ROBERTSON:** As I understand it, and the parties
10 have talked amongst themselves I believe, that
11 all of the unobjected to exhibits, it's our
12 understanding they are pre-admitted for
13 purposes of this hearing. Is that agreeable to
14 the Court?

15 **MR. ANDREWS:** It's agreeable to us, Your Honor.

16 **MS. CRUM:** And to us, Your Honor.

17 **THE COURT:** All right then. We'll proceed with
18 that. Thanks for keeping house for me, Ms.
19 Robertson.

20 **LEON B. FRISHMAN,** having been duly sworn, testifies
21 as follows:

22 **MR. FRISHMAN - DIRECT EXAMINATION BY MS. ROBERTSON:**

23 **Q:** Mr. Frishman, can you hear me okay from over
24 here?

25 **A:** Yes, I can.

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1 Q: Thank you. My name is Trudy Robertson and I'm
2 here on behalf of Carolinas Health Care System
3 today. I'm going to be asking you some
4 questions. Mr. Frishman, can you state your
5 full name for the record, sir?

6 A: Leon Benjamin Frishman.

7 Q: Mr. Frishman, are you under subpoena to appear
8 here today?

9 A: Yes, I am.

10 Q: Where do you live, sir?

11 A: Northeast Columbia or 117 Woodshore Drive.

12 Q: And as I understand it, Mr. Frishman, you
13 started work for the Department, I'll call it
14 DHEC for purposes of our questioning here
15 today, you started work with DHEC back in 1974;
16 is that right?

17 A: That's correct.

18 Q: I also understand that through the number of
19 years that you spent with DHEC you were
20 promoted a number of times. As far as the
21 titles that you held and positions, I
22 understand you held the Division Director of
23 the Certificate of Need program; is that right?

24 A: That's correct.

25 Q: What years was that, Mr. Frishman, if you

- 1 recall?
- 2 A: I don't recall.
- 3 Q: Was that one of your early titles?
- 4 A: Yes, it was.
- 5 Q: I also understand that you were promoted, at
6 some point, to the Bureau Director of Health
7 Facilities and Services Development position?
- 8 A: That's correct.
- 9 Q: I understand that includes the Certificate of
10 Need program also --
- 11 A: That's correct.
- 12 Q: -- is that right? And your final position, I
13 believe, that you held with the Department
14 before your retirement, which we'll get to, I
15 believe you were the Deputy Commissioner for
16 Health Regulations; is that right?
- 17 A: That's correct.
- 18 Q: Okay. And this job, the deputy commissioner
19 job, that included overseeing health licensing,
20 health planning and certification; is that
21 correct?
- 22 A: That's correct.
- 23 Q: I think it was among other things as well?
- 24 A: That's correct.
- 25 Q: You retired --

1 THE COURT: Could you hold on one second?

2 MS. ROBERTSON: Yes, ma'am.

3 (Off the Record)

4 MS. ROBERTSON: Thank you, Your Honor.

5 THE COURT: You may proceed.

6 Q: Mr. Frishman, you and I are the guinea pigs,
7 first to go on this technology, but hopefully
8 we'll get through this. As I understand it,
9 you retired from DHEC on May 30, 2006; is that
10 correct?

11 A: That's correct.

12 Q: And do you still do work for DHEC?

13 A: I work part-time on an hourly basis for DHEC.

14 Q: Mr. Frishman, are you aware that we are here
15 today in this contested case concerning the
16 issue of who can construct a hospital in York
17 County?

18 A: Yes, ma'am.

19 Q: And I believe that issue flows out of a DHEC
20 decision that was issued on the day that you
21 retired, May 30, 2006?

22 A: Unfortunately, yes.

23 Q: And, Mr. Frishman, if we could just take a
24 brief look at one of the decision letters. Are
25 you able to see this on your screen --

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1 A: Yes.

2 Q: -- Mr. Frishman?

3 A: Yes, I am.

4 Q: Okay. This letter, do you recognize this
5 letter to be one of the May 30, 2006 decision
6 letters that was issued in this matter?

7 A: Yes, I do.

8 Q: And I believe if we look at this letter, it is
9 Carolinas CHS Exhibit 25. This one was
10 addressed to Mr. Del Murphy, who is with
11 Carolinas, CHS, and I believe in the second
12 paragraph you will see this is the decision
13 that was denied, the application that had been
14 submitted by Carolinas to build a 64-bed
15 hospital; is that correct?

16 A: That's correct.

17 Q: And, Mr. Frishman, are you aware there was also
18 a similar letter that went to Presbyterian
19 denying their application as well; is --

20 A: That's correct.

21 Q: -- that correct?

22 A: Yes, ma'am.

23 Q: And you're also aware that there was a letter
24 similar, except it was awarding an application
25 that was sent to Amisub to build the Fort Mill

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1 Medical Center in Fort Mill for a 100-bed
2 hospital; is that correct?

3 A: Yes, ma'am.

4 Q: Mr. Frishman, you would agree that these
5 applications were reviewed by DHEC under the
6 2004-2005 State Health Plan; is that right?
7 And I'll refer you --

8 A: Yes.

9 Q: -- for reference, if you will, to the first
10 paragraph of this decision letter.

11 A: That's correct.

12 Q: If we can just look briefly at the 2004-2005
13 State Health Plan, and this will be CHS Exhibit
14 51. I'm going to refer you to page II-7. And
15 if we can look at the language that talks about
16 the methodology. This is the 2004-2005 State
17 Health Plan. And it starts off in paragraph
18 (a), "Calculations of bed need are made for
19 individual facilities." Do you see that?

20 A: Yes, ma'am.

21 Q: Below that, as I understand it, in subparagraph
22 (b) is a formula that is used, it's got a
23 number of variables in it, but that formula is
24 used to then project bed need; is that correct?
25 That description of it, that general

1 description.

2 A: Yes, ma'am.

3 Q: And if we can look down in subparagraph (d),
4 that paragraph, Mr. Frishman, says, "Should
5 there be a need shown for additional beds for
6 a hospital, then an increase may be approved.
7 In order to provide for a cost effective
8 addition, up to the greater of 50 beds or the
9 actual projected number of additional beds, may
10 be approved, provided the hospital can document
11 and demonstrate the need for additional beds."
12 Did I read that correctly?

13 A: Yes, ma'am.

14 Q: And now, Mr. Frishman, I'm going to turn our
15 attention to a memorandum that is dated January
16 the 25, 2005. This is Carolinas Exhibit 49.
17 I'm going to try to see if I can get this to
18 where we can read it. Are you able to read
19 that on your screen?

20 A: It's actually out of focus a little bit.

21 Q: Go to autofocus, is that any better?

22 A: I can settle for that.

23 MS. ROBERTSON: May I hand to the witness a hard
24 copy of --

25 THE COURT: Certainly.

1 MS. ROBERTSON: -- this exhibit?

2 THE COURT: Certainly.

3 Q: Mr. Frishman, let me just hand you the hard
4 copy of Carolinas Exhibit 49. Sir, I believe
5 that you are familiar with this memorandum; am
6 I correct about that?

7 A: Yes, I am.

8 Q: And you've reviewed this memorandum, I believe,
9 in a draft form before it was actually sent out
10 by Mr. Grice back on January the 25th, 2005; is
11 that right?

12 A: I reviewed, I don't know if I reviewed it on
13 January 25th. I reviewed it before it was sent
14 out.

15 Q: Correct. You reviewed it prior to it being
16 sent out?

17 A: That's correct.

18 Q: Okay. And I believe you also discussed the
19 content of this memorandum with Mr. Grice
20 before it was sent out; is that right?

21 A: That's correct.

22 Q: Do you recall what you and Mr. Grice discussed?

23 A: Yes, ma'am. We discussed -- we tried -- we
24 discussed the meaning of the State Health Plan
25 and the institutional bed need met. We

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1 discussed that it was silent on building new
2 hospitals. That when we came up with the
3 methodology, we were thinking about adding on
4 to existing facilities. And we developed this
5 memorandum to try to clarify what we saw as a
6 whole or a lack of description as to the Health
7 Plan.

8 Q: Thank you, sir. And it's not that lengthy and
9 if you could, since we all have it on the
10 monitors, but maybe it's not so clear, Mr.
11 Frishman, I'm going to ask you, if you will, to
12 read the text of this memorandum.

13 A: The entire?

14 Q: Please.

15 A: "The continued growth about patient hospital
16 services during the past decade has resulted in
17 minimum need for additional general acute care
18 hospital beds in South Carolina. As a result,
19 the South Carolina Healthcare Planning
20 Committee and the South Carolina Board of
21 Health and Environmental Control supported the
22 planning policy initiated by approval of the
23 1999 South Carolina Health Plan that allowed
24 any individual hospital with a small positive
25 bed projection of less than 50 acute care beds

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1 to submit a Certificate of Need application for
2 a maximum of 50 additional beds. The rationale
3 for the foregoing is to develop a cost
4 effective hospital addition. Any hospital
5 projecting a need of more than 50 additional
6 beds could apply and receive approval for the
7 specific projected need calculated in the State
8 Health Plan for that hospital. This policy was
9 beneficial to many hospitals, including those
10 located in counties with multiple hospitals
11 where the net hospital bed need could show
12 little or no net hospital bed need for the
13 county. As a result, neither the 2003 nor the
14 Draft 2004-2005 State Health Plan specified any
15 county bed need for hospital beds, but rather
16 a specific projected bed need for each hospital
17 in the state. Upon approval of a 2004-2005
18 State Health Plan, the Committee recommended
19 with Board approval that all bed needs be
20 updated using the most recent utilization data
21 prior to the printing of the current State
22 Health Plan. Due to substantial projection
23 growth and greater hospital utilization in
24 several South Carolina counties, some
25 hospital's projected need calculations

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1 increased, including some hospital needs
2 increasing above 50 beds. In order to allow
3 potential CON applicants to participate in the
4 South Carolina Health Plan process equitably,
5 general hospital beds indicated in the current
6 2004-2005 South Carolina Health Plan will be
7 determined as follows. Should an individual
8 hospital show a positive bed need calculation
9 of less than 50 additional beds, it may apply
10 to receive a Certificate of Need approval for
11 a maximum of 50 additional beds. Any hospital
12 projecting a need of more than 50 additional
13 beds may apply and receive approval for the
14 specific projected need calculated in the State
15 Health Plan for that hospital. A CON for the
16 net hospital bed need in a county may be
17 requested and approved for any existing
18 hospital located in the county or for any
19 entity/applicant," entity, slash, applicant,
20 "for the development of a new hospital or an
21 addition to an existing hospital within that
22 county. Should there be any questions
23 concerning this memorandum, please contact me
24 at 803-545-4200."

25 Q: Thank you, Mr. Frishman. When this memo was

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1 released on January the 25th, 2005, you were in
2 agreement with the content of this memo,
3 correct?

4 A: Yes, ma'am.

5 Q: And, sir, if we look at the content a little
6 more closely at subparagraph three, which you
7 just read for this Court, that memo concludes,
8 doesn't it, that the net bed need in a county
9 may be requested and approved for any applicant
10 for a new hospital within that county?

11 A: Yes, ma'am.

12 Q: And you still agree with this memo today, don't
13 you, Mr. Frishman?

14 A: Yes, ma'am.

15 Q: And specifically, then, you agree that anyone
16 who wants to build a freestanding hospital in
17 York County in a location other than Piedmont
18 Medical Center, those persons can apply for the
19 64-bed need in the State Health Plan, correct?

20 A: Yes, ma'am.

21 Q: And that would include Carolinas?

22 A: Correct.

23 Q: And Presbyterian?

24 A: Correct.

25 Q: Mr. Frishman, can you identify for us what the

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1 purposes of the CON Act are?

2 A: Yes. It's State law to foster cost
3 containment, to improve quality of care, to
4 ensure facilities and services are located
5 where they're most needed in the state, and
6 there's a fourth. I'm drawing a blank on the
7 fourth.

8 Q: Did you say prevent unnecessary duplication?

9 A: That's it. No, I did not. Prevent unnecessary
10 duplication of facilities or services.

11 Q: Mr. Frishman, don't you agree that this January
12 25, 2005 of Mr. Grice, that it fosters those
13 purposes in the CON Act that you just described
14 to this Court?

15 A: Yes, ma'am.

16 Q: Mr. Frishman, I'm going to show you now one
17 final exhibit that I have and it is Carolinas
18 50. Since this one is shorter, we're going to
19 try it on the ELMO. Are you able to read that,
20 Mr. Frishman?

21 A: Yes, ma'am.

22 Q: You're familiar with this memorandum of March
23 3, 2005, aren't you?

24 A: Yes, ma'am.

25 Q: Another memo of Mr. Grice, correct?

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1 A: That's correct.

2 Q: And if we look at this memo, this memo in
3 effect rescinds the policy that Mr. Grice
4 outlined in the January 2005 memo you just
5 read; is that correct?

6 A: That's correct.

7 Q: Okay. Mr. Frishman, aren't you the one who
8 relayed to Mr. Grice to rescind the January
9 memo?

10 A: Yes, ma'am.

11 Q: And why did you relay to Mr. Grice for him to
12 rescind the January memo?

13 A: Okay. I have to go back and talk about the
14 January 25th memo first.

15 Q: Okay.

16 A: That wasn't done in a vacuum. We had discussed
17 that with our legal staff and with the
18 Commissioner and so there was a lot more people
19 involved in making this decision than just
20 myself and Mr. Grice. I got a phone call from
21 the Commissioner who stated to me that he would
22 like to reconsider this January 25th memo. And
23 so as a result of that phone call, I asked Mr.
24 Grice to compose and send out this March 3rd
25 letter or memo.

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1 Q: And following up on what you just said, when
2 you say the January memo was not created in a
3 vacuum, in fact what you're referring to is it
4 was discussed with the legal department of DHEC
5 before it was sent out in January of '05,
6 correct?

7 A: Yes, ma'am.

8 Q: It was also discussed with the Commissioner --

9 A: Yes, ma'am.

10 Q: -- correct? And at that time, is it your
11 understanding that all persons were in
12 agreement with the contents of the January '05
13 memo?

14 A: I guess -- I don't know if -- I guess so, yes.

15 Q: Okay. And the memo in effect, I mean, it did
16 go out in January '05, correct?

17 A: That's correct.

18 Q: Did you also have a conversation with Mr.
19 Stuart Andrews at the time, I guess, right
20 before this March '05 rescission memo was put
21 into effect?

22 A: I had several phone conversations with Mr.
23 Andrews. I don't remember the exact timing of
24 them.

25 Q: Okay. Is it fair to say that you disagreed

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1 with Mr. Andrews' positions?

2 A: Yes, ma'am.

3 Q: I don't believe I have any further questions at
4 this time, Mr. Frishman. Thank you.

5 **THE COURT:** Thank you. Ms. Crum. And I'll tell all
6 counsel, if somewhere else is easier for you to
7 stand or if you're not going to use this thing
8 and you want to come up here to the edge of the
9 bench or whatever works.

10 **MS. CRUM:** I'll give it a try here. If that doesn't
11 work, I'll move closer. Thanks for weeding out
12 some of the questions I was going to ask that
13 have already been asked.

14 **MR. FRISHMAN - CROSS-EXAMINATION BY MS. CRUM:**

15 Q: Let me start with this, Mr. Frishman. I'm Liz
16 Crum and if I ask you a question that's not as
17 articulate as I think it is, would you let me
18 know so that I can rephrase it, please, sir?

19 A: Yes, ma'am.

20 Q: You have been with the Department, you were
21 with the CON area in the Department for how
22 long?

23 A: '74 to '06. However many that is, 32 years.

24 Q: Thirty-two years. And you used to be a CON
25 reviewer, didn't you?

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1 A: That's correct.

2 Q: And you have personally reviewed over 500 CON
3 applications during your career with the
4 Department, haven't you?

5 A: Yes, ma'am. Probably more than that.

6 Q: Okay. You've reviewed a lot of applications
7 where there were competing applicants competing
8 for an identified need in the State Plan,
9 correct?

10 A: Yes, ma'am.

11 Q: And you have been qualified by the Department
12 in CON and non-applicability cases as an expert
13 in the South Carolina CON program and in the
14 field of health planning, haven't you?

15 A: Yes, ma'am.

16 Q: Before I get -- let me ask you about your
17 conversations with Mr. Andrews. Based on your
18 conversations with Mr. Andrews, what is your
19 understanding as to his interpretation of the
20 Plan?

21 A: He was under the impression or he felt strongly
22 that only Piedmont could apply for those beds
23 because of the way the wording in the Plan
24 stated that each -- the bed need was calculated
25 based on individual facility needs, not a

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1 Q: Now, Exhibit 25 is the same memo that is
2 Carolinas, I believe it's Exhibit 49. Was the
3 purpose of this memo, in your opinion, in your
4 understanding, to allow an applicant to come in
5 and compete if there was a net bed need in a
6 county for those beds?

7 A: I guess that was the result of this memo. I
8 think the purpose of the memo was to try to
9 clarify how we were going to administer the
10 Plan that was, in my opinion, silent on
11 building new hospitals. But that would be --
12 the result of that is that it allowed other
13 facilities to come in and apply for those beds.

14 Q: Because if you hadn't interpreted it this way,
15 then nobody but Piedmont Medical Center could
16 actually apply for those beds; is that correct?

17 MR. ANDREWS: Object to the form, Your Honor, asking
18 for legal conclusion.

19 MS. CRUM: No, ma'am, Your Honor. I'm asking him to
20 apply his technical knowledge and expertise
21 pursuant to 1-23-30, I believe, of the
22 Administrative Procedures Act.

23 MR. ANDREWS: That's a different question. No
24 objection, Your Honor.

25 THE COURT: You may answer, Mr. Frishman.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 06-ALJ-07-0713-CC

Charlotte-Mecklenburg Hospital Authority)
d/b/a Carolinas Healthcare System and)
Presbyterian Healthcare System d/b/a)
Presbyterian Hospital-York, LLC)

Petitioners,

v.

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Respondents.

COPY

VOLUME ONE OF FIVE
ADMINISTRATIVE HEARING

September 9th, 10th and 11th, 2009
September 14th through 17th, 2009
September 21st through September 25th, 2009

The administrative hearing before the Honorable Carolyn C. Matthews was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the aforementioned days in September 2009, before Christine A. Cortright, Court Reporter and Notary Public, in and for the State of South Carolina, and Andie R. Taylor, Court Reporter and Notary Public, in and for the State of South Carolina.

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1 Q: Okay. Now, this is, as I understand it, this
2 Health Plan is the one in which planning is by
3 county.

4 A: That is correct.

5 Q: Okay. It says it should be noted that
6 throughout the Plan where the term hospital bed
7 need is specified, these figures are actually
8 based upon demand or utilization data for the
9 general acute care hospital. Do you see that?

10 A: Yes, sir.

11 Q: Now, is that telling you that basically when
12 you're using the utilization data, you're using
13 utilization data for each hospital in that
14 county?

15 A: That is my understanding, but I am not a
16 planner. I would defer most of this
17 methodology to Mr. Shelton.

18 Q: Well, obviously you understood it enough to
19 know that under your reading of it --

20 A: Yes.

21 Q: -- the only one who was eligible was Piedmont?

22 A: My reading of the unit being county versus
23 hospital specific.

24 Q: Okay.

25 A: Actual calculations and how or where they get

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1 their information, I will again defer to Mr.
2 Shelton.

3 Q: Well, but you recommended to Mr. Shelton based
4 on your reading of the State Health Plan that
5 these other applicants were not eligible to be
6 included, correct?

7 A: I recommended that to Mr. Grice.

8 Q: I'm sorry, to Mr. Grice.

9 A: Yes.

10 Q: I mean, looking at that method, see where it
11 says the methodology for calculating bed need
12 follows; do you see that?

13 A: I do.

14 Q: Do you understand how that works?

15 A: Again, I'm sure I've sat down before and gone
16 through it, but that is not something I
17 normally do. I normally accept what Mr.
18 Shelton or the State Health Planning Committee
19 has set forth as far as the calculations. I
20 know there's three different scenarios,
21 depending upon the size of the hospital for the
22 percentages they use. I'm not, well, they're
23 stated right there. I don't normally go
24 through those calculations, if that's what
25 you're asking me.

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- 1 on your screen, or actually you can see it
2 here. Do you have it there in front of you?
- 3 A: Yes, I do.
- 4 Q: All right. Well, in that case instead of York
5 County being on the bottom for the total, it
6 has York County on the top?
- 7 A: Yes.
- 8 Q: Again showing patient -- again showing
9 populations in York County, again using a
10 facility use rate formula?
- 11 A: Right.
- 12 Q: Okay. In that case I'm guessing in '03 it was
13 a minus five --
- 14 A: Negative five.
- 15 Q: -- bed need in York County or for that
16 facility?
- 17 A: I would say for that facility.
- 18 Q: So in your view from '01 to '03, what changed
19 was now you are planning for just the
20 facilities, not the counties?
- 21 A: Correct.
- 22 Q: If there was not a hospital facility in a
23 county --
- 24 A: At all?
- 25 Q: At all. How would you calculate bed need for

1 that county?

2 A: I would have to defer to Mr. Shelton, sir.

3 Q: Would there be no need for a hospital because
4 there's no facility use rate to use?

5 A: My answer again is I do not know, you will have
6 to ask the planner.

7 Q: Okay. Clearly that was the one review criteria
8 you did not believe Carolinas complied with?

9 A: That's correct.

10 Q: What I'd like to do next is just I wanted to go
11 chronologically and we may need to give you an
12 exhibit so that you can see it more clearly.
13 I'm not sure. We have -- it's clearly on this
14 document, but.

15 MR. MULLER: What I'm referring to now, Your Honor,
16 is I think this is Exhibit, CHS Exhibit 4, the
17 64-bed Piedmont application. Can we give the
18 witness a copy of that? Excuse me one minute,
19 Your Honor.

20 THE COURT: Take your time, Mr. Muller.

21 MR. MULLER: This is, actually, Your Honor,
22 Presbyterian Exhibit 1.

23 THE COURT: Okay.

24 MR. MULLER: Which is in evidence. It is the
25 Piedmont 64-bed CON application. I'm going to

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1 Q: The earliest application that was filed when
2 Presbyterian became a competing applicant on
3 March the 11th was the Fort Mill Medical Center
4 application for 64 beds; is that correct?

5 A: That is correct.

6 Q: Okay. Thanks. Now, you made a recommendation
7 to Mr. Grice as to whom the CON should be
8 awarded to in this situation, right?

9 A: Yes, ma'am.

10 Q: You didn't consult with anyone other than Mr.
11 Grice about your decision and your
12 recommendation, did you?

13 A: No, ma'am.

14 Q: Did you ever discuss the Plan bed need
15 methodology with either Mr. Whiteside or Mr.
16 Shelton before you made the recommendation to
17 Mr. Grice?

18 A: I do not recall that I did, no.

19 Q: Did you discuss it with Mr. Frishman before you
20 made the recommendation?

21 A: No, ma'am.

22 Q: Now, you made -- what was your recommendation
23 to Mr. Grice?

24 A: To approve the Fort Mill application.

25 Q: And that recommendation to Mr. Grice was made

1 primarily on the basis that Fort Mill Medical
2 Center was the only applicant that complied
3 with the Plan bed need, correct?

4 A: As it was written, yes, ma'am.

5 Q: Okay. All right. Let's -- at the risk of your
6 not having to handle quite so many notebooks,
7 I want you to look at our Exhibits, when I say
8 our, Presbyterian's Exhibits 10, 11 and 12 and
9 just check to see --

10 MR. CRUM: May I approach, Your Honor?

11 THE COURT: Certainly.

12 Q: Just check to see if those are copies of the
13 summary sheets from the three applications.

14 A: Yes, ma'am. That's correct.

15 Q: I just think those would be easier for you to
16 handle than notebooks.

17 A: Much.

18 Q: Now, let's look at Regulation 61-15 Section
19 802.1.

20 MR. CRUM: I'm kind of messing Mr. Timms up because
21 we had this all set out and then since Mr.
22 Muller asked a bunch of questions, I'm skipping
23 over some things.

24 THE COURT: That's quite all right.

25 Q: Okay. Do you recognize that as the very first

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 06-ALJ-07-0713-CC

Charlotte-Mecklenburg Hospital Authority)
d/b/a Carolinas Healthcare System and)
Presbyterian Healthcare System d/b/a)
Presbyterian Hospital-York, LLC)

Petitioners,

v.

South Carolina Department of Health)
and Environmental Control, and Amisub of)
South Carolina, Inc. d/b/a Piedmont)
Healthcare System d/b/a Fort Mill)
Medical Center,)

Respondents.

COPY

VOLUME TWO OF FIVE

ADMINISTRATIVE HEARING

September 9th, 10th and 11th, 2009
September 14th through 17th, 2009
September 21st through September 25th, 2009

The administrative hearing before the Honorable Carolyn C. Matthews was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the aforementioned days in September 2009, before Christine A. Cortright, Court Reporter and Notary Public, in and for the State of South Carolina, and Andie R. Taylor, Court Reporter and Notary Public, in and for the State of South Carolina.

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- 1 A: Correct.
- 2 Q: And the same formula being applied in both
- 3 plans, correct?
- 4 A: Other than the modification of the occupancy
- 5 rate and using an extra year of population.
- 6 Q: Otherwise, the formulas were identical?
- 7 A: Yes, ma'am.
- 8 Q: The projected need in the '04 and '05 State
- 9 Health Plan for individual facilities, the 64-
- 10 bed need, is that for Piedmont Medical Center?
- 11 A: Yes. It was projected for Piedmont Medical
- 12 Center.
- 13 Q: And Piedmont Medical Center is the existing
- 14 facility in Rock Hill; is that correct?
- 15 A: That's correct.
- 16 Q: Mr. Shelton, does the language, in your
- 17 opinion, in the 2004 or 2005 State Health Plan
- 18 result in Piedmont Medical Center being the
- 19 only facility that can be approved for the 64
- 20 bed need?
- 21 A: As the Plan is written, yes, I believe that is
- 22 the only conclusion. Yes, it was for Piedmont
- 23 Medical Center.
- 24 Q: And Mr. Shelton, you drafted, participated in
- 25 the drafting of the language that is in the '04

1 and '05 Health Plan that originated in the '03
2 Health Plan. You did not intend to preclude
3 providers other than Piedmont Medical Center
4 from accessing that 64 bed need, did you?

5 A: There had never been a situation like this.
6 Primarily, when the methodology was changed in
7 2003 it was designed to assist hospitals that
8 were in a multi-provider county. For example,
9 we traditionally used McLeod Medical Center in
10 Florence which was showing a huge need. They
11 were over 90 percent occupied, but the other
12 hospitals in Florence had low utilizations. So
13 overall Florence had no need, so therefore, we
14 couldn't approve McLeod. So we did not
15 anticipate the impact that would have on a
16 county that only had a single provider that
17 might not have generated a bed need that high.

18 Q: And you didn't intend to preclude people such
19 as Carolina's entities such as Carolina's and
20 Presbyterian from applying for and being
21 approved for the 64 bed need on a single county
22 provider?

23 A: We never contemplated that possibility
24 happening.

25 Q: So you didn't intend to preclude anyone,

1 correct?

2 A: No, ma'am.

3 Q: Mr. Shelton, from a health planning
4 perspective, what is the reason to allow
5 another entity apply for bed need in a county
6 when there is only one hospital in that county?

7 A: I'm sorry. Could you restate that. I'm sorry.

8 Q: Certainly. From a health planning perspective,
9 what is the reason to allow another entity to
10 apply for bed need in a county when only one
11 hospital exists in that county, that is to
12 allow another entity that is not there to apply
13 for that bed need?

14 A: Well, the general health planning goals we
15 refer to under CON is guiding the development
16 of needed health services, while at the same
17 time, preventing unnecessary duplication. So
18 I --

19 Q: You listed those goals in the CON program,
20 right?

21 A: That would be -- yeah.

22 Q: And we've just described, it helps to develop
23 high quality of services to allow that,
24 correct?

25 A: There are proponents that improve quality and

1 drive down costs if there are alternatives
2 available.

3 Q: And it also prevents unnecessary duplication of
4 services?

5 A: That's one of the concerns that we have to
6 weight what is the impact of increasing
7 accessibility versus the impact of unnecessary
8 duplication of services.

9 Q: In allowing others to access that need it also
10 goes to the goal of ensuring that the facility
11 best meets public needs, correct?

12 A: That would be a fair assessment yes.

13 Q: Mr. Shelton, if I can just direct your
14 attention again to what is on the screen when
15 you list the population numbers for 2003 and
16 2010, that population date is that for the
17 county, York County?

18 A: Yes. York County population data is used in
19 the projections.

20 Q: Okay. Thank you.

21 THE COURT: All right. Ms. Crum, your witness.

22 MR. SHELTON - CROSS-EXAMINATION BY MS. CRUM:

23 MS. CRUM: Good afternoon, Mr. Shelton, how are you?

24 A: All right. And you?

25 Q: Mr. Shelton, did you participate at all in the

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1 situations, what facilities could apply.

2 Q: So is it a fair assessment that the reason the
3 State Health Planning Committee with the staff
4 made a recommendation that you look to an
5 overall county bed need to allow applicants
6 other than that generating the need to apply
7 was so that applicants could compete for the
8 bed need in the county?

9 A: That would probably be fair. The 2001,
10 basically no one could get beds if there was an
11 excess in the county. Under this situation,
12 even if there was an overall excess in the
13 county, there would still be an opportunity for
14 individual hospitals to get the beds they
15 needed.

16 Q: Let me go back to the 2008 Plan and make sure
17 I understand. A reason that 2004 -- I'm sorry,
18 2008-'09 Plan was changed to allow applicants
19 outside of existing hospitals in the county to
20 apply for excess bed need was so that there
21 could be competition in the county for those
22 bed need; isn't that correct?

23 A: Additional bed need, not excess bed need.

24 Q: I was saying existing hospitals and additional
25 bed need.

STATE OF SOUTH CAROLINA
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1 and Amisub of South Carolina d/b/a Piedmont
2 Healthcare System d/b/a Fort Mill Medical
3 Center. And I'll note that all parties appear
4 to be present and represented by counsel of
5 record. Is Mr. Westbrook going to be here
6 today, Mr. Andrews?

7 MR. ANDREWS: He will, Your Honor. He'll be here in
8 just a few minutes, actually.

9 THE COURT: Okay. Great. And we ended the
10 testimony on Friday I believe with Mr. Gibbs,
11 and the status of Mr. Grice is that he's going
12 to be here at 1:00; is that correct?

13 MS. ROBERTSON: Your Honor, we understand he will be
14 here around 1:15.

15 THE COURT: Okay.

16 MS ROBERTSON: That was the agreed upon time.

17 THE COURT: Okay. Then we'll arrange lunch around
18 that and go to before then, and that would
19 probably work better for everybody. Okay. So
20 we'll just go from now until noon and then come
21 back at 1:15, if that works for everybody.

22 (Off the Record.)

23 THE COURT: All right. So my understanding is that -
24 - oh, Mr. Shelton was our last witness, pardon
25 me. My understanding was that you want to read

1 into the record some portions of the Whiteside
2 deposition?

3 **MS. ROBERTSON:** That's correct, Your Honor.

4 **THE COURT:** Okay. Well, whenever you're ready, Ms.
5 Robertson, and whoever's going to do it.

6 **MS. ROBERTSON:** Robert Sumner is going to be Mr.
7 Whiteside.

8 **THE COURT:** And we will note for the record that
9 this is from the deposition of Mr. Albert
10 Whiteside which was taken on, let's see --

11 **MS. ROBERTSON:** Your Honor, it's two transcripts.

12 **THE COURT:** Two transcripts. Okay.

13 **MS. ROBERTSON:** Yes, ma'am.

14 **THE COURT:** Does it February 13, 2007? This one?

15 **MS. ROBERTSON:** It is. February 13 and then
16 February --

17 **THE COURT:** February 28.

18 **MS. ROBERTSON:** -- 28.

19 **THE COURT:** All right. And that Mr. Whiteside was
20 under oath at the time, so we will allow Mr.
21 Sumner to read whatever portions he needs to.

22 **MR. SUMNER:** Thank you, Your Honor.

23 **THE COURT:** You may proceed, Ms. Robertson.

24 **MS. ROBERTSON:** Your Honor, we're going to begin with
25 the February 13, 2007, transcript at page five.

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1 THE COURT: Okay.

2 (Ms. Robertson reading Questions and Mr. Sumner
3 reading Answers from the deposition of Mr. Albert
4 Whiteside.)

5 Q: First, I just wanted you to tell us your
6 job title.

7 A: I'm the Director of Division of Planning
8 and Certificate of Need.

9 Q: And what do your duties include?

10 A: Primarily developing the State Health
11 Plan.

12 MS. ROBERTSON: Then page six.

13 Q: Okay. What exactly is the South Carolina
14 State Health Plan?

15 A: It's a document that's required by law
16 that protects a need for various types of
17 health facilities and services and is
18 required to be developed every two years.

19 Q: Okay. Do you prepare the draft versions
20 of the South Carolina Health Plan?

21 A: I do, with assistance from others.

22 MS. ROBERTSON: We're then moving to the February 28,
23 2007, transcript starting at page 31.

24 Q: Was the final 2003 Plan written and
25 designed to exclude a new provider?

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1 A: No.

2 MS. ROBERTSON: Then page 34.

3 Q: Do you agree that the proposal submitted
4 by Fort Mill Medical Center that was
5 consistent with the bed need methodology
6 for the York County facilities?

7 A: I probably wouldn't agree with that, no.

8 Q: What would you say?

9 A: Well, I would say that we would review any
10 of them that came in, no matter from
11 where. Period.

12 Q: And why would you be willing to consider
13 any of them?

14 A: Well, I think we've got to consider any
15 application by any provider. I don't
16 think we can limit it to one potential
17 person or --

18 MS. ROBERTSON: Then on page 46.

19 Q: Under the current bed need methodology
20 referred to in Exhibit 13, do you believe
21 that any entity could have applied for and
22 potentially been approved for the 64
23 published beds needed in York County?

24 A: I think they could have been.

25 MS. ROBERTSON: Page 114, starting at line 22.

1 THE COURT: Pardon me, Ms. Robertson, what was that
2 page that last question was from?

3 MS ROBERTSON: That was page 46, starting --

4 THE COURT: Forty-six. I had 36. Okay.

5 MS. ROBERTSON: -- starting at line 25, going over
6 to page 47 through line five.

7 THE COURT: Thank you.

8 MS. ROBERTSON: Now page 114, line 22.

9 Q: Paragraph four, based on our review of the
10 language in the State Health Plan that
11 identifies beds for individual hospitals,
12 do you believe that any applicant other
13 than Piedmont could have been approved in
14 a way that was consistent with the State
15 Health Plan?

16 A: Well, if you read the language in the Plan
17 as written, probably not. Now, that may
18 not have been the best interpretation of
19 the Plan, and it's certainly subject to
20 interpretation, and I'm certain that's the
21 reason for all this discussion anyway.
22 And I know when we developed the Plan, it
23 was never designed to exclude anybody from
24 being able to apply and/or be approved.
25 But then again, the Plan and the numbers,

1 I think this may be the year it got
2 changed in the draft and the final. I'm
3 not sure if this one or the prior one, but
4 the numbers all went up a lot, so there
5 was never any thought given to some other
6 entity probably applying for beds in a
7 particular area other than the hospital
8 itself that had generated the need.

9 MS. ROBERTSON: And then page 118, beginning at line
10 18.

11 Q: What I wanted to do was just work through
12 bed need methodology because that's what
13 we've been talking about most of today.
14 Let me start, if I can with if you'll turn
15 to Exhibit 21, tab A, there's a tab one
16 and then a tab A. Tab A is the 2001 State
17 Health Plan.

18 A: Uh-huh (affirmative response).

19 Q: Now, when we say bed need methodology,
20 what I consider that to be is what is here
21 on page Roman Numeral II-7.

22 A: Okay.

23 Q: Do you see an "A" there? The methodology
24 for calculating bed need follows. And
25 then there's a formula set forth there.

1 A: Correct.

2 Q: So when you think of bed need methodology,
3 do you think of that formula as being the
4 methodology?

5 A: Yes.

6 Q: And as I understand it, it has a couple of
7 variables. I guess the first variable you
8 have is the facility use rate?

9 A: Correct.

10 Q: This is again, we're in 2001. But it's
11 the facility use rate which is then --
12 well, facility use rate is one. The other
13 one is projected population rate.

14 A: Correct.

15 Q: You multiply those and divide by 365 to
16 come up with a projected average daily
17 census?

18 A: Yes.

19 Q: With respect to that component of the
20 formula, I take it that the facility use
21 rate is the use rate of the facility based
22 on whatever its service area might be?

23 A: I guess that's one way to say it. It's
24 based on the actual number of patient days
25 that were provided at the facility

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1 regardless of where the patient came from,
2 which could mean their service area. But
3 you could have -- you could have somebody
4 from Oregon in that facility and that
5 would certainly count, and you can't say
6 Oregon is part of their service area.

7 Q: I mean, it really could be Lancaster
8 county. It could be North Carolina, which
9 is very close to Piedmont Medical Center's
10 service area?

11 A: Correct.

12 Q: But basically, it's the number of patients
13 that they have seen in a particular
14 facility in terms of hospital bed stays in
15 any given period?

16 A: Correct.

17 Q: That's one variable. The other variable
18 is -- is projected population growth, and
19 that's county population?

20 A: That's correct.

21 Q: So you're multiplying the county
22 population in York County by the
23 facility's use rate?

24 A: Correct.

25 Q: And then you divide by 365 and you come up

- 1 with this projected average daily census
2 number?
- 3 A: That's correct.
- 4 Q: All right. And in that subsection we're
5 looking at, that's A(1)?
- 6 A: Uh-huh (affirmative response).
- 7 Q: I guess part two of the formula is, you
8 take that average daily census --
- 9 A: Projected average daily census.
- 10 Q: -- projected average daily census and you
11 divide by, I think what you called on the
12 first day of your deposition the occupancy
13 factor?
- 14 A: Correct..
- 15 Q: Is the occupancy factor unique to a
16 facility?
- 17 A: Yes.
- 18 Q: Okay. In what way?
- 19 A: It's based on bed size.
- 20 Q: Okay. So it has some bearing to the size
21 of a facility, but is it related to
22 anything other than the size of the
23 facility?
- 24 A: It used to be related to the number of
25 admissions. Now I think we've cut all

1 that out, and now it's only related to the
2 size of the facility.

3 Q: Okay. So when you look in 2001 --

4 A: And I don't remember 2001.

5 Q: I know. But I'm going to direct you to a
6 page if we can look at for York County and
7 Piedmont.

8 A: In 2001 it was --

9 Q: It's on page Roman Numeral II-14. Do you
10 see that?

11 A: Yeah. It was 75 percent, I believe, is
12 what it says.

13 Q: But there are the calculations right
14 there. I mean, they separate the county
15 population by age cohort, by age ranges.

16 A: Correct.

17 Q: And then they multiply that by patient
18 days, divide by 365, and then divide
19 further by the occupancy factor.

20 A: Yes. That's the gist of it.

21 Q: All right. When you go to 2003, look at
22 tab D.

23 A: I think you mean tab E.

24 Q: I'm sorry. You're right. Tab E, page
25 Roman Numeral II-7.

- 1 A: Uh-huh (affirmative response).
- 2 Q: Now again, this is the State Health Plan,
- 3 I guess, where we discussed the fact that
- 4 there was a change in language from where
- 5 the word facility was introduced.
- 6 A: Correct.
- 7 Q: When you look at the bed need methodology
- 8 in the 2003 Health Plan, the formula that
- 9 we've been talking about, has the formula
- 10 changed at all?
- 11 A: I don't think it did unless the occupancy
- 12 factors were changed, because we changed
- 13 those somewhere, but the gist of the
- 14 formula has not changed.
- 15 Q: Okay. But other than the occupancy
- 16 factor, which appears to have changed, the
- 17 formula itself is identical?
- 18 A: That's right.
- 19 Q: So back in 2001, you know, presumably you
- 20 had this county concept. The formula was
- 21 identical to what it was in 2003?
- 22 A: Correct.
- 23 Q: The only --
- 24 A: Unless the occupancy factor changed.
- 25 Q: Right. But basically the formula is

1 identical?

2 A: That's correct.

3 Q: It is identical today to what it was in
4 2001?

5 A: Yes.

6 MR. ROBERTSON: Then we move down to page 124, line
7 15.

8 Q: In 2001, you used the formula, you
9 calculate the bed need?

10 A: Correct.

11 Q: In the 2004-2005 State Health Plan, you
12 used that same formula to calculate the
13 bed need, correct?

14 A: Correct. And in one we had the county
15 total and in the other, we did not.

16 Q: Is there any difference in York County
17 between the 2001, other than the fact that
18 the numbers have changed, is there any
19 difference in how that looks in the 2001
20 State Health Plan than there is in the
21 '04-'05 Health Plan in terms of the
22 formula?

23 A: There's probably not any difference in how
24 it looks.

25 Q: It looks the same. You've got --

1 A: It's how it's applied is the key.

2 Q: And what do you mean by that?

3 A: Whether or not you're looking at
4 individual facilities or are you looking
5 at the county?

6 Q: Well, in York County, it's one and the
7 same, right?

8 A: That's the only facility in York County.

9 Q: So with respect, York County is unchanged
10 from '01 to '04-'05?

11 A: For the most part, yeah.

12 Q: With respect to facility use rates, and
13 let's assume for a second that we're no
14 longer on county-wide planning, we're on
15 facility-only planning, is there any
16 facility in Fort Mill, South Carolina,
17 called the Fort Mill Medical Center that
18 has shown a bed need?

19 A: Not at present.

20 Q: There's not facility use rate for that
21 facility, I take it?

22 A: That's correct.

23 Q: Because the facility has never been built
24 and it's a different location than the
25 Piedmont Medical Center in Rock Hill?

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1 A: Correct.

2 MS. ROBERTSON: Then we go to line 18 on page 126.

3 Q: Is there anywhere in the State Health Plan
4 that suggests that there is a demonstrated
5 bed need for Fort Mill Medical Center in
6 Fort Mill, South Carolina?

7 A: Is there anywhere in the Plan that says
8 there's identified need?

9 Q: Yeah. For that facility?

10 A: No.

11 MS. ROBERTSON: Then page 127, starting at line 13.

12 Q: Is there anything in 2004-2005 State
13 Health Plan that suggests that a new
14 entity cannot apply for a CON for an
15 identified bed need?

16 A: No.

17 MS. ROBERTSON: Thank you.

18 THE COURT: Thank you very much, Mr. Sumner.

19 MR. SUMNER: Your Honor, I think I'm going to be
20 Albert Whiteside for Ms. Kirk, as well.

21 THE COURT: Okay. Well once you've assumed the
22 identity, you might as well get whatever you
23 get, huh?

24 MS. KIRK: Your Honor, we emailed everybody our
25 designations, but would you like a copy?

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1 THE COURT: That's quite all right. I'll just --
2 what I'm doing is actually highlighting it in
3 my copy and that way I can look back at it and
4 refer to it I need to. Thanks.

5 MS. KIRK: Okay. Great. We're going to start with
6 the February 13, 2007 deposition.

7 THE COURT: Okay.

8 MS. KIRK: On page five at line 19.

9 (Ms. Kirk reading Questions and Mr. Sumner reading
10 Answers from the deposition of Mr. Albert Whiteside.)

11 Q: First, I just wanted you to tell us your
12 job title.

13 A: I'm the Director of the Division of
14 Planning and Certificate of Need.

15 Q: And what do your duties include?

16 A: Primarily developing the State Health
17 Plan.

18 Q: When a new CON application comes into the
19 Department, are you responsible for
20 assigning it to a reviewer?

21 A: Yes.

22 Q: Okay. What exactly is the South Carolina
23 State Health Plan?

24 A: It's a document that's required by law
25 that projects a need for various types of

1 health facilities and services and is
2 required to be developed every two years.

3 Q: Okay. Do you prepare the draft versions
4 of the South Carolina Health Plan?

5 A: I do, with assistance from others.

6 MS. KIRK: Moving on to the February 28, 2007,
7 deposition beginning on page 30, line 22.

8 Q: Under the draft 2003 Plan, could a new
9 provider come into the market in South
10 Carolina?

11 A: I guess so. I mean it certainly wasn't
12 written and designed to exclude a new
13 provider.

14 Q: Was the final 2003 Plan written and
15 designed to exclude a new provider?

16 A: No.

17 MS. KIRK: Moving on to line 22.

18 Q: Was '04-'05 Plan designed to keep out new
19 providers?

20 A: No.

21 MS. KIRK: Page 34, line ten.

22 Q: Do you agree that the proposed -- do you
23 agree that the proposal submitted by Fort
24 Mill Medical Center was the only project
25 that was consistent with bed need

1 methodology for the York County
2 facilities?

3 A: I probably wouldn't agree to that, no.

4 Q: Well, what would you say?

5 A: Well, I would say that we would review any
6 of them that came in, no matter from
7 where. Period.

8 Q: And why would you be willing to consider
9 any of them?

10 A: Well, I think we've got to consider any
11 application by any provider. I don't
12 think we could limit it to one potential
13 person or --

14 Q: Do you believe the Presbyterian
15 application was consistent with the '05
16 Health Plan?

17 A: Do I believe they were consistent? Do you
18 mean their application of 64 beds?

19 Q: Yes, sir.

20 A: Was the number 64? I mean if the number
21 was 64, I'd say, yeah, that would be okay.
22 But I don't know what the number was.

23 Q: Here you go. Look at that, Mr. Whiteside.

24 A: The number is 64, and I'm assuming that's
25 the Plan they applied under, the 2004-'05.

1 Q: I think that's in --

2 A: Yeah. That's what this letter says. So
3 in my opinion, yeah. They could certainly
4 have applied and they potentially could
5 have been approved.

6 MS. KIRK: Page 47 at line one.

7 Q: Do you believe that any entity could have
8 applied for and potentially been approved
9 for the 64 published beds needed in York
10 county?

11 A: I think they could have been.

12 MS. KIRK: Page 70, line 12.

13 Q: Do you recall having considered the issue
14 that's presented about whether other
15 hospitals could have been approved for the
16 bed need identified in the Plan for
17 particular hospitals before the York
18 County series of applications?

19 A: No, not really. I remember Joel talking
20 to people about could they apply and could
21 somebody be approved. I mean, I guess the
22 answer would be sure, anybody could.

23 MS. KIRK: Page 126, line six.

24 Q: So I mean, is it consistent if you're
25 going to assume that only a facility --

1 only a facility that had demonstrated a
2 need can apply under the State Health
3 Plan, the '04-'05 State Health Plan, would
4 the Fort Mill Medical Center in Fort Mill
5 qualify?

6 A: Well, I've never said that nobody could
7 apply.

8 Q: Right.

9 A: And I've never said nobody could be
10 approved.

11 Q: Is there anywhere in the State Health Plan
12 that suggests that there's a demonstrated
13 bed need for Fort Mill Medical Center in
14 Fort Mill, South Carolina?

15 A: Is there anywhere in the Plan that says
16 there's identified need?

17 Q: Yeah. For that facility.

18 A: No.

19 MS. KIRK: Page 127, line 13.

20 Q: Is there anything in the 2004-2005 State
21 Health Plan that suggests a new entity
22 cannot apply for a CON for identified bed
23 need?

24 A: No.

25 MS. KIRK: Page 139, line 21.

- 1 Q: Since the bed need is based on Piedmont
2 Medical Center, should Fort Mill Medical
3 Center be treated any differently than
4 Presbyterian?
- 5 A: Not in my opinion.
- 6 MS. KIRK: Page 141, line five.
- 7 Q: You've testified that you've read the
8 draft plans, correct?
- 9 A: Correct.
- 10 Q: And that you were the one who met with the
11 State Health Planning Committee on the
12 draft Plan?
- 13 A: Uh-huh (affirmative response). Yes.
- 14 Q: Did Mr. Grice write any of the draft Plan?
- 15 A: No.
- 16 Q: Does Mr. Grice preside over the meetings
17 with the State Health Planning Committee?
- 18 A: No.
- 19 Q: Does Mr. Grice write the staff
20 recommendation on the draft Plans?
- 21 A: No, not usually. He may have some input,
22 but he doesn't write them.
- 23 Q: Did he write the '03 staff proposed
24 changes?
- 25 A: No. He may have input. I usually write

1 all of that, more or less.

2 Q: Does Mr. Grice travel around to go to the
3 public hearings on the Plan?

4 A: No.

5 Q: Who does that?

6 A: I do.

7 Q: And who attends the board meetings where
8 the Plan is presented to the DHEC board?

9 A: Myself and the Chairman of the Planning
10 Committee.

11 Q: Does Mr. Grice do that?

12 A: He usually goes, if I'm not mistaken.

13 Q: Does he participate or is he observing or
14 --

15 A: Mostly observe. Usually only Dr. Wilson,
16 and he's the Chairman, does any discussion
17 with the Board.

18 Q: Does anyone within the DHEC staff approve
19 the Plan that you draft?

20 A: Not really. We develop it. It's
21 primarily developed by Les and myself, and
22 when Vernon Schroeder was there, and him.
23 And we circulate what we do to the other
24 staff here to see if we can get any other
25 input, and we then send it to the Planning

1 Committee for their review. We like
2 input.

3 MS. KIRK: Page 143, line three.

4 Q: When you suggested the staff changes on
5 Exhibit 30, you intended that to clarify
6 the existing Plan language rather than
7 actually make a substantive change to it,
8 correct?

9 A: It was primarily designed to clarify what
10 had previously been approved.

11 Q: And does that Exhibit 30 reflect your
12 understanding of one interpretation of the
13 current Plan?

14 A: Yeah. I guess you could say that.

15 THE COURT: All right. Mr. Andrews.

16 MR. ANDREWS: Your Honor, we're actually going to
17 ask Ms. Gillespie to play the role of Mr.
18 Whiteside.

19 THE COURT: All right, Ms. Gillespie. You may come
20 up.

21 MR. ANDREWS: Your Honor, there's -- we provided
22 prior notice to the other parties concerning
23 designations. There's a slight adjustment,
24 we're going to add a designation of page 80,
25 line 21 through 23. But otherwise --

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 06-ALJ-07-0713-CC

Charlotte-Mecklenburg Hospital Authority)
d/b/a Carolinas Healthcare System and)
Presbyterian Healthcare System d/b/a)
Presbyterian Hospital-York, LLC)

Petitioners,

v.

South Carolina Department of Health)
and Environmental Control, and Amisub of)
South Carolina, Inc. d/b/a Piedmont)
Healthcare System d/b/a Fort Mill)
Medical Center,)

Respondents.

COPY

VOLUME TWO OF FIVE
ADMINISTRATIVE HEARING

September 9th, 10th and 11th, 2009
September 14th through 17th, 2009
September 21st through September 25th, 2009

The administrative hearing before the Honorable Carolyn C. Matthews was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the aforementioned days in September 2009, before Christine A. Cortright, Court Reporter and Notary Public, in and for the State of South Carolina, and Andie R. Taylor, Court Reporter and Notary Public, in and for the State of South Carolina.

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MR. GIBBS - DIRECT EXAMINATION BY MS. ROBERTSON:

Q: Mr. Gibbs, will you state your full name for the record, please.

A: Dennis L. Gibbs.

Q: And you work for the Department, DHEC, correct?

A: Yes.

Q: What is your job title?

A: I'm the director of the division of health licensing.

Q: And how long have you been in this position?

A: Six and half years.

Q: One of the facilities that you license under your position is a hospital, correct?

A: Yes.

Q: Mr. Gibbs, I would like for us to look at CHS Exhibit 51, which is the 2004-2005 State Health Plan. We'll go to page II-4. We can look down at the definition of hospital. Can you see that, Mr. Gibbs?

A: Yes.

Q: If you could read for us, please, the definition of hospital in the 2004-2005 State Health Plan?

A: Yes. "A hospital means a facility organized and administered to provide overnight medical

1 or surgical care or nursing care or illness,
2 injury, or infirmity and may provide
3 obstetrical care, and in which all diagnoses,
4 treatment or care is administered by or under
5 the direction of persons currently licensed to
6 practice medicine, surgery or osteopathy."

7 Q: Thank you. And whether we're looking at the
8 definition of hospital in the State Health Plan
9 or the CON Act or even the regulation 61-16,
10 the definition is substantially the same; would
11 you agree with that?

12 A: It is substantially the same.

13 Q: And if a facility is providing services that
14 are commensurate with the definition of
15 hospital, then that facility has to be licensed
16 as a hospital, correct?

17 A: Yes.

18 Q: And licensure, as I understand it, is required
19 annually; is that correct?

20 A: Yes, the license is renewed annually.

21 Q: Mr. Gibbs, what is on your screen now is CHS
22 Exhibit 9. I believe this is a memorandum
23 dated March 7, 1995 to hospital administrators
24 from John T. McNeely. Is that correct?

25 A: Yes, ma'am.

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1 Q: If you look at this memo, would you agree that
2 this memo was written to clarify what the
3 Department DHEC's position would be on when it
4 would allow hospitals to be under a single
5 license or when they would have to be, or
6 facilities would have to be licensed
7 separately; is that a fair description?

8 A: Yes.

9 Q: And as I understand it. this memo, the contents
10 of it, it is still being applied today,
11 correct?

12 A: Yes.

13 Q: And can you describe for us when a hospital has
14 to be licensed separately.

15 A: Well, there are two criteria that are
16 established. It might be easier to answer that
17 question when they could be licensed the same.

18 Q: Okay.

19 A: They would have to have exactly the same
20 licensee, the same legal entity that would be
21 the licensee for both facilities. And they
22 would have to be on adjoining grounds. It
23 couldn't be separated by property that was
24 owned by some other entity.

25 Q: So property for two hospitals would have to be

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1 contiguous at some point? They'd have to touch
2 at some point to be under the same license. Is
3 that correct?

4 A: That is correct.

5 Q: And if a hospital is in Fort Mill, South
6 Carolina, and another hospital is in Rock Hill,
7 South Carolina, those two hospitals could not
8 be under the same license, correct?

9 A: That's correct.

10 Q: Would those two hospitals also have to have
11 separate medical staffs?

12 A: Yes. They would have to have separately
13 organized medical staffs. Some of the
14 physicians might be the same people, but it
15 would be separately organized.

16 Q: Thank you, sir. I don't believe I have any
17 additional questions.

18 **THE COURT:** Thank you very much. Ms. Crum.

19 **MR. GIBBS - CROSS-EXAMINATION BY MS. CRUM:**

20 Q: Mr. Gibbs, that memo has been continuously in
21 effect since 1995, correct?

22 A: That is correct.

23 Q: Now, as the director of licensing, you also are
24 responsible, or your staff is responsible for
25 inspecting hospital facilities, correct?

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 06-ALJ-07-0713-CC

Charlotte-Mecklenburg Hospital Authority)
d/b/a Carolinas Healthcare System and)
Presbyterian Healthcare System d/b/a)
Presbyterian Hospital-York, LLC)

Petitioners,

v.

South Carolina Department of Health)
and Environmental Control, and Amisub of)
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Healthcare System d/b/a Fort Mill)
Medical Center,)

Respondents.

COPY

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1 criterion under project review criterion?

2 A: That is correct. In the regulations, it is
3 ranked as the most important, and in the
4 letter. In the letter ordering the criteria
5 of being the most important.

6 Q: And, in fact, Mr. Grice, the CON Act says that
7 compliance with the Plan is most important,
8 doesn't it?

9 A: That is correct.

10 Q: Because you can comply under 44-7-230(C) --
11 220(C), I'm sorry, with every project review
12 criterion, but if you don't comply with the
13 Plan, you're still denied?

14 A: That is correct.

15 Q: Okay. Now, what conversations did you have
16 with Mr. Andrews, Mr. Westbrook, Mr. Levitt, or
17 anyone else representing Fort Mill Medical
18 Center with regard to the interpretation of the
19 2004-2005 Plan bed need?

20 A: Well, you know, I think they -- we probably
21 discussed it some of our meetings, their
22 position that certainly there's was the only
23 one that was consistent. I met with all the
24 applicants and listened to, you know, what they
25 saw as being the strongest issues in their

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1 application. But I did not consider not even
2 addressing that issue in our letter. I'm sure
3 had I not done so, perhaps the attorneys
4 representing Piedmont Medical Center would not
5 have been pleased, but I had thought about
6 doing it, it was really Mr. Frishman who told
7 me, he said, I think you need to do it. And
8 then I realized, because we'd most likely be in
9 appeal, I wanted to strengthen it, and that's
10 why I added it as number four.

11 Q: And Mr. Grice, didn't Ms. Fechtel also tell you
12 that she thought compliance with the Plan
13 should be listed first in the decision letter?

14 A: She may have.

15 Q: Regardless of where it's listed, it's still the
16 most important review criteria?

17 A: That is correct.

18 Q: Let's look at Presbyterian Exhibit 14. It's
19 the State Health Plan. Mr. Grice, I've got a
20 copy here.

21 A: Thank you.

22 Q: It might be easier for you to look at.

23 A: Thank you.

24 Q: And if you would address yourself to Exhibit
25 14, page Roman Numeral II-4, the definition of

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- 1 hospital.
- 2 A: Okay.
- 3 Q: Could you just read that into the record for
- 4 me, please, sir.
- 5 A: "A hospital means a facility organized and
- 6 administered to provide overnight medical or
- 7 surgical care, or nursing care of illness,
- 8 injury, or infirmity and may provide
- 9 obstetrical care and in which all diagnosis,
- 10 treatment or care is administered by or under
- 11 the direction of persons currently licensed to
- 12 practice medicine, surgery or osteopathy."
- 13 Q: Now, the hospital is the facility, correct?
- 14 A: That's correct.
- 15 Q: Okay. And facility is the structure, right?
- 16 A: That's correct.
- 17 Q: Another way to put it would be bricks and
- 18 mortar, correct?
- 19 A: That is correct.
- 20 Q: All right, sir. And do you remember whether or
- 21 not that's basically the same definition of
- 22 hospital that is used in Regulation 61-15
- 23 Section 103.15?
- 24 A: I'm sure it is.
- 25 Q: I can show you a copy if you want to look at

1 it, Mr. Grice.

2 A: It appears it's a little bit different. The
3 definition in Regulation 61-15 goes into a
4 little more detail at the beginning saying that
5 a hospital is a facility organized and
6 administered to provide service to accommodate
7 two or more non-related persons for the
8 diagnosis, treatment and care of such persons
9 over a period exceeding 24 hours.

10 Q: And it goes on to say and provides medical or
11 surgical care, etcetera, correct?

12 A: Yes, ma'am.

13 Q: Okay. But basically, again, hospital is the
14 facility or the structure, the bricks and
15 mortar, correct?

16 A: That's correct.

17 Q: Okay. Let's look at Regulation 61-15, Section
18 103.13.

19 A: Okay.

20 MS. CRUM: Blow that one up, please, ma'am.

21 Q: Now, again, health care facility means a
22 hospital, right?

23 A: That is -- yes, ma'am. That is one of the type
24 health care facilities.

25 Q: Now, the full name of the CON Act is the

1 Certificate of Need and Health Facilities
2 Licensure Act, correct?

3 A: That's correct.

4 Q: Okay. Let's look on Regulation 61-15 Section
5 202.2.B.8.b. That's the ownership disclosure
6 section, Mr. Grice.

7 A: Okay.

8 MS. CRUM: Your Honor, that's found on page ten.

9 THE COURT: Thanks.

10 A: Yes.

11 Q: Now, under B, would you just read that into the
12 record, please, sir.

13 A: Okay. Name and address of licensee or
14 prospective licensee, parenthesis, note, the
15 licensee is defined as the legal entity who, or
16 whose governing body has the ultimate
17 responsibility and authority for the conduct of
18 the facility or service; the owner of the
19 business. The licensee must be the entity to
20 whom the Certificate of Need is issued, end
21 quote, end parentheses.

22 Q: Now, in this particular application for Fort
23 Mill Medical Center; Amisub of South Carolina,
24 Inc. is the licensee, correct?

25 A: That is correct.

1 Q: Because it's the legal entity whose governing
2 body has ultimate responsibility and authority
3 for the conduct of the facility; is that
4 correct?

5 A: That's correct.

6 Q: Okay. Now, there's a distinction between the
7 licensee, the legal entity and the facility,
8 the bricks and mortar, isn't there?

9 A: Yes, it is.

10 Q: Let's look one more please.

11 MS. CRUM: Can we cut the ELMO on please, ma'am, for
12 a minute.

13 Q: Now, I think we already established that the
14 name of, the full name of the Certificate of
15 Need Act, Certificate of Need -- the South
16 Carolina Certificate of Need and Health
17 Facilities Licensure Act, right?

18 A: That's correct.

19 Q: And 61-16 is the section that actually licenses
20 hospitals, right?

21 A: That's correct.

22 Q: Provides the licensure requirements. Now, how
23 is licensee defined under Regulation 61-16?

24 A: It says, "The licensee is the individual with
25 who rests the ultimate responsibility for

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1 maintaining approved standards for the
2 facility."

3 Q: And then how is facility defined?

4 A: It says, "For administrative purposes,
5 hospitals and institutional general firms in
6 South Carolina which are subject to licensure
7 laws as required by Section 44-7-310, Code of
8 Laws of South Carolina, 1976."

9 Q: And then it defines a general hospital as a
10 facility with an organized medical staff,
11 correct?

12 A: That's correct.

13 Q: Is there any question in your mind, Mr. Grice,
14 that facility references bricks and mortar, the
15 structure of the hospital itself?

16 A: That is logical, yes, ma'am.

17 Q: Well, based on everything you've read, do you
18 have any question about that?

19 A: Based on the information that we have here,
20 that would be the interpretation that we would
21 make.

22 Q: So we've looked at the regulations and the Plan
23 and the licensure requirements for hospitals,
24 right?

25 A: That's correct.

- 1 Q: You want to look at the CON Act to see if that
2 changes your mind?
- 3 A: No, ma'am.
- 4 Q: Okay. Now, the Department is the sole
5 authority to carry out the dictates of the CON
6 Act based on reg -- I'm sorry, statute 44-7-
7 140, correct?
- 8 A: That's correct.
- 9 Q: Okay. And you're supposed that out under the
10 terms of the Certificate of Need Act, the
11 regulations and the health care plan, right?
- 12 A: That's correct.
- 13 Q: Now, Mr. Grice, look for me, do you have a copy
14 of the CON Act up there?
- 15 A: I don't believe I do. Well, let me see, I
16 think I -- no, wait, I'm not sure I do.
- 17 Q: Tell you what, we can just look at the
18 regulation; how about that?
- 19 A: Yes, ma'am, I do. I'm sorry. I think I do.
20 I do. Wait a minute, I'm sorry.
- 21 Q: Now the purposes -- can you just tell the Court
22 what the purposes of the CON Act are.
- 23 A: Well, it's defined in the regulations and in
24 the statute also. The purpose of the CON
25 program is to promote cost containment, to try

1 to -- let me see here. Gosh. Promote cost
2 containment, to -- I probably need to look at
3 it to refresh my memory. It's in the -- hold
4 on one second.

5 Q: It's --

6 A: Here it is in Section 101.

7 Q: Okay.

8 A: Promote cost containment, prevent unnecessary
9 duplication of health facilities and services,
10 guide the establishment of health facilities
11 and services which will best serve public needs
12 and ensure that high quality services are
13 provided in health facilities in the state.

14 Q: Let me give you a copy of that --

15 A: Okay. Sure. Thank you.

16 Q: And what does it go on to require the --

17 **MS. CRUM:** We can cut the ELMO back and let's get
18 back to the --

19 Q: And what does the Act require to achieve these
20 purposes?

21 A: Well, it says to achieve these purposes, it
22 requires the issuance of a Certificate of Need
23 before undertaking a project described by the
24 article and adoption of procedures and criteria
25 for submittal of an application or appropriate

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1 review before issuance of the Certificate of
2 Need. And three, preparation and publication
3 of a State Health Plan. And finally, four, the
4 licensure of facilities rendering medical,
5 nursing or other health care.

6 Q: Well, Mr. Grice, you would agree with me,
7 wouldn't you, that the preparation and
8 publication of the State Health Plan is
9 intended to achieve the purposes of the CON
10 Act?

11 A: That's correct.

12 Q: Okay. Let's look at the -- go back to the
13 State Health Plan just a minute, which is
14 Exhibit 14, and it's page, starting on page
15 seven, please, sir.

16 A: Okay.

17 Q: And the very beginning, the methodology for
18 calculating bed need is as follows, you see
19 calculation of bed need are made for individual
20 facilities?

21 A: Yes, ma'am.

22 MS. CRUM: Would you highlight that, please, ma'am.
23 Just the first part --

24 A: Okay. You want me to start reading A there.

25 Q: Calcu --

- 1 A: I'm sorry?
- 2 Q: Calculation of bed need are made --
- 3 A: Okay. Calculations of bed need are made for
4 individual hospitals because of the differing
5 occupancy --
- 6 Q: I'm sorry, Mr. Grice, I'm just talking about A
7 under the methodology for calculating bed needs
8 is as follows. That's Roman Numeral II-7, see
9 that?
- 10 A: I thought that's what I was reading under A.
11 Roman Numeral II-7, right?
- 12 Q: Roman Numeral II-7, yes, sir.
- 13 A: I'm looking at II-7. Let me look here. I'm
14 looking at A. Gosh, we're not looking at the
15 same page. This must not be II-7. Let me let
16 you look.
- 17 Q: Yes, sir, you see where it says A right there.
- 18 A: Yeah, that's what I thought I was reading. It
19 wasn't the same A you had up there.
- 20 Q: I think this might be the 2008 Plan with the
21 2004 cover on it. That won't work. Okay. Mr.
22 Grice, would you look at the screen. Does that
23 look like the 2004-05 Plan to you?
- 24 A: Well, that's the cover for the 2004-05 Plan.
- 25 Q: Mr. Grice, there should be a notebook up there

1 that has our exhibits 1 through 37, I believe,
2 in it.
3 A: Let me see here.
4 Q: Let me turn to page seven, please, sir.
5 A: Okay.
6 Q: You see where it says methodology for
7 calculating bed need is as follows.
8 A: Yes.
9 Q: A.
10 A: Yes. A, calculations of bed need are made for
11 individual facilities, period.
12 Q: Okay. Now, the individual facility at issue
13 for York County is Piedmont Medical Center,
14 correct?
15 A: That's correct.
16 Q: So the 64 bed need was made uniquely for
17 Piedmont Medical Center, correct?
18 A: That's correct.
19 Q: Now, you determined in this case, didn't you,
20 that the 2004 Plan only allows an existing
21 acute provider, in this case Piedmont Medical
22 Center, to be approved for its additional bed
23 need, or the hospital generated the bed need,
24 Piedmont Medical Center can allocate those beds
25 to a new facility they would have ownership in,

1 right?

2 A: That's correct.

3 Q: Okay. Tell me how anybody other than Piedmont
4 Medical Center or an entity that is affiliated
5 with Piedmont Medical Center or owned by
6 Piedmont Medical Center could ever be approved
7 for the 64 bed need under the 2004 Plan?

8 A: Well, that was -- that was my issue about the
9 memorandum, trying to provide some
10 interpretation.

11 Q: And, in fact, it couldn't be because nobody
12 else could be approved, could they?

13 A: Based on this strict language, it would be
14 difficult. Yes, ma'am, that's true.

15 Q: And when you say yes, ma'am, it's true, do you
16 mean, yes, ma'am, nobody else could be
17 approved?

18 A: Unless they were sold the rights to do so,
19 that's correct, in my opinion.

20 Q: Now in response to some questions from Mr.
21 Muller, he asked you about the transfer of the
22 additional bed need; do you remember that?

23 A: Yes.

24 Q: Okay. When you say unless the beds were -- the
25 additional bed need was sold, are you talking

1 about transfer?

2 A: Both, transfer or the need itself.

3 Q: Show me what under the 2004 Plan authorizes a
4 facility that has generated need to first
5 transfer that need to another entity to create
6 a new hospital?

7 A: There is no such language in there.

8 Q: Show me what language under the Plan allows
9 Piedmont Medical Center to sell the additional
10 bed need to another entity?

11 A: There -- does not go into that detail.

12 Q: Okay. In fact, Mr. Grice, the only entity that
13 really complies with the 2004 Plan bed need,
14 methodology would be the facility licensed as
15 Piedmont Medical Center, correct?

16 A: Yes, based on the strict reading of these
17 standards.

18 Q: Let's look at page 15 on the Plan, Roman
19 Numeral II-15. . Look under Clarendon County,
20 please. And if you could just pull that out
21 for me.

22 A: Clarendon County.

23 Q: Actually, I don't see Clarendon County. Why
24 don't we use, go back to II-14. Look at
25 Clarendon County up there and pull that out on

1 II-14, please, ma'am. Just Clarendon County.
2 Thank you. Now, there's a bed need for
3 Clarendon County for Clarendon Memorial
4 Hospital for four beds, right?

5 A: That's correct.

6 Q: Under that provision, Clarendon County could
7 determine whether it wanted to implement those
8 beds or give them to somebody else, right?

9 A: Under what provision?

10 Q: I'm sorry, under your interpretation of the
11 Plan, the individual facility controls the bed
12 need?

13 A: Certainly they could -- they could make an
14 attempt to contact the Department and see if
15 that would be acceptable. And I think under
16 this Plan, actually that four could be expanded
17 to 50, but that would be based on the
18 institution.

19 Q: Just as the four beds are?

20 A: It's -- it would be a possibility, which as we
21 had talked earlier, particularly in cases where
22 we've got LTACs etcetera where the 2004-2005
23 Plan didn't really show any bed needs for
24 LTACs, the long-term acute care hospitals are
25 having a hard time being established in the

1 state because the only way they could be
2 established would be to either lease or acquire
3 beds from existing facilities and mostly
4 existing facilities did not want to lose beds
5 or have them leased within their own facility
6 to, you know, to lose control and not have
7 access to that capacity. So like in this
8 situation, four beds is not enough to be able
9 to really make a viable health care facility,
10 but it would be possible if someone wanted to
11 acquire those beds, like for an LTAC, for
12 instance, that could be done.

13 Q: All right, sir. Let me ask you to go on over
14 to page 15, please, sir. And I want you to
15 look at Georgetown County. You see Georgetown
16 County?

17 A: Yes, ma'am.

18 Q: Okay. You've got two hospitals in Georgetown
19 County, right?

20 A: That's correct.

21 Q: And Georgetown Memorial and Waccamaw Community?

22 A: That's correct.

23 Q: Got the same owner, don't they?

24 A: They do.

25 Q: Under your interpretation of the Plan,

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1 Georgetown County -- the owners of Georgetown
2 Memorial could control whether or not any other
3 entity could enter the market, couldn't they,
4 by determining whether one could give bed to
5 anyone, couldn't they?

6 **MR. WESTBROOK:** Objection to the question on the
7 grounds that Ms. Crum is assuming the market is
8 Georgetown County.

9 **THE COURT:** Sustained.

10 **Q:** Mr. Grice, let me rephrase that. Could
11 Georgetown Memorial and Waccamaw Community
12 Hospital control whoever could enter into their
13 service area by determining to whom they could
14 give the beds?

15 **A:** Yes, ma'am, technically under this Plan. And
16 I might mention, in this particular situation,
17 those two hospitals have a combined -- it has
18 been combined because of recent developments at
19 Waccamaw Community Hospital, and so the need is
20 only 23.

21 **Q:** Isn't that what it says? I'm sorry.

22 **A:** Yes, ma'am. I was just -- I didn't want to
23 confuse you by the 131 and 52, those are
24 existing beds.

25 **Q:** All right. Let's look at one more. Let's look

1 at page 16.

2 MS. CRUM: Let's go back up to Horry County. Would
3 you go back to the last number, please, ma'am.

4 Q: Horry County, there are three hospitals in
5 Horry County, right?

6 A: That's correct.

7 Q: Conway, Grand Strand and Loris Community
8 Hospital?

9 A: That's correct.

10 Q: Each one of those hospitals controls the bed
11 need that they generated, right?

12 A: That's correct.

13 Q: And so each one of them can determine whether
14 or not a hospital can access the bed need in
15 their respective service areas, can they?

16 A: Yes, ma'am, under this current health plan.

17 Q: And the same would be true for York County,
18 correct?

19 A: That's correct.

20 Q: Aiken County, which has one hospital?

21 A: That's correct.

22 Q: And Lexington County, which has one hospital?

23 A: That's correct.

24 Q: Okay. In other words, the way that you were to
25 interpret the Plan as it's written, the

1 existing hospitals that generate the bed need
2 are the gatekeepers that unless the hospital
3 decides to give beds to somebody, DHEC can't
4 even review an application, can they?

5 **MR. WESTBROOK:** Objection to the use of the term
6 "gatekeepers" and to the conclusion it's --
7 which is really argumentative, no evidentiary
8 basis for the question. I'd ask her to
9 rephrase that question.

10 **MS CRUM:** Absolutely, I can rephrase the question.

11 **THE COURT:** Well, I'm going to overrule that
12 objection. It seems like where this whole line
13 of questioning has been going to. He hasn't
14 been qualified as an expert but he could be if
15 he wanted to be, he may have been in your list
16 of witnesses.

17 **MS. CRUM:** Your Honor, he was listed both by
18 Piedmont Medical -- by Fort Mill Medical Center
19 and the Department as experts.

20 **THE COURT:** I thought so. To me, that's an ultimate
21 issue. Ask away.

22 **A:** Well, DHEC cannot refuse someone to accept an
23 application and not view it. Generally, most
24 applicants are informed, they know what their
25 goals are when they submit it and, you know,

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1 but if they submit an application, even if it
2 were inconsistent with the health plan, we
3 cannot give it back to them and say we're not
4 going to review it. We must accept and review
5 the application.

6 Q: But you can't approve it if it's inconsistent
7 with the Plan?

8 A: That's correct. That is correct, because that
9 is what, you know, the State Certification
10 Health Licensure Act says Plan rules, it's the
11 Bible. If it says no, we can't do it; that's
12 correct.

13 Q: Let me rephrase my question, Mr. Grice, and ask
14 it another way. Unless Piedmont Medical Center
15 either transfers or sells its bed need to an
16 unrelated entity, no other applicant is
17 approvable for that bed need, is it?

18 A: Under that Plan, the 2004-2005, that is
19 correct.

20 Q: Let's show CON Act. That's the 44-7-220(C).
21 It's 220. Okay. Mr. Grice, you're familiar
22 with 44-7-220(C), aren't you?

23 A: Yes, ma'am.

24 Q: In a case where there are competing applicants
25 -- have you got that section, Mr. Grice.

1 A: I think -- isn't that 44-7 -- wait a minute --
2 210(C)?

3 Q: Yes, sir, you are correct. I can't type.
4 That's what happens when you type your own
5 questions. 210(C), you're absolutely correct,
6 Mr. Grice. In a situation where you have
7 competing applicants, Mr. Grice, the Department
8 has to -- well, doesn't have to approve, the
9 Department may approve the applicant that most
10 fully complies with requirements, goals and
11 purposes of this article and the State Health
12 Plan, project review criteria, and the
13 regulations adopted by the Department, right?

14 A: That's correct.

15 Q: So an applicant to be approved has to first
16 comply the State Health Plan?

17 A: That's correct.

18 Q: And you have competing applicants, then they
19 also have to comply with goals, requirements,
20 purposes of, when it says the article, that's
21 the CON Act, right?

22 A: Yes, ma'am.

23 Q: Okay. Now, look at Section 44-7-130
24 subparagraph 5, the definition of competing
25 applicants.

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1 A: Okay.

2 Q: Now, competing applicants means two or more
3 persons or health care facilities as defined in
4 this article who apply for Certificates of Need
5 to provide similar services or facilities in
6 the same service area within a time frame as
7 established by Departmental regulations and
8 whose application, if approved, would exceed
9 the need for the services or facilities. Did
10 I read that correctly?

11 A: Yes, ma'am.

12 Q: Okay. Now, in order to be competing
13 applicants, each of the applicants has to be
14 approvable, doesn't it?

15 A: Not necessarily, in my opinion. I mean, there
16 could be -- not necessarily talking about the
17 State Health Plan now, but there could be some
18 compelling reason, an applicant could have
19 severe problem, financial problem, could not
20 get financing where it would not be able to be
21 approvable, but yet apply, so.

22 Q: Well, let's go back to the State Health Plan,
23 because that's what we're talking about.

24 A: Okay.

25 Q: Now, first off we know that unless an applicant

1 complies with the State Health Plan, it cannot
2 be approved, correct?

3 A: That's correct.

4 Q: And in this case, the only applicant that the
5 Department found that could be approvable was
6 Piedmont Medical Center because they gave the
7 beds to Fort Mill Medical Center, right?

8 A: That's correct.

9 Q: Okay. Therefore, Presbyterian and Carolinas
10 were not approvable, were they?

11 A: No, ma'am, not in this situation.

12 Q: Therefore, they could never be competing
13 applicants, could they?

14 A: They applied to be competing applicants. They
15 submitted their application to meet the
16 requirement to be competing, not necessarily
17 that definition, but the definition in the
18 regulations where competing applicants, if they
19 want to compete, must apply within 15 days
20 after the first applicant goes to the State
21 Register.

22 Q: Is there another definition of competing
23 applicant in either the CON Act or the
24 regulations other than this section?

25 A: No, that. But here again, Presbyterian and

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1 Carolinas had access to the regulation. They
2 did apply to be competing. And basically, at
3 the time that we accepted their application,
4 you know, we were trying to be open and not
5 necessarily be closed regarding the Health Plan
6 and we did -- we did accept them as competing
7 applicants.

8 Q: But you shut the door and said they couldn't be
9 approved, didn't you, under the Plan?

10 A: We did in the decision letter. That's correct.

11 Q: And so they could not be competing applicants
12 as defined under the CON Act and the regs,
13 could they?

14 A: Well, when we look at that definition, it says
15 who apply within the time frame, which they
16 did, and whose applications, if approved, would
17 exceed the need. It certainly would have
18 exceeded the need.

19 Q: But they couldn't be approved so it wouldn't
20 exceed the need, would it, Mr. Grice? If
21 you've got one applicant that meets the 64-bed
22 need and you've got two that don't meet the
23 requirements of the Plan, they can't be
24 approved, can they?

25 A: No. If we had denied Piedmont or Fort Mill

1 Medical Center, we would have had to deny all
2 the projects based on our final analysis.

3 Q: Correct.

4 MS. CRUM: Your Honor, I --

5 THE COURT: I was going to say, Ms. Crum, that
6 looked like a good stopping place. I know
7 you're on a roll but I'm sure Mr. Grice is
8 tired. So why don't we reconvene tomorrow
9 morning with Mr. Grice and finish up with you.

10 MS. CRUM: Nine o'clock?

11 THE COURT: Nine o'clock. Does that suit everybody
12 or do you have people you want to talk to?

13 MR. MULLER: Your Honor, just for planning purposes,
14 we expect Mr. Grice will only go tomorrow
15 morning. If he exceeds that morning, how would
16 we handle the next witness?

17 MS. CRUM: I guess my question would be if Mr. Grice
18 doesn't feel like going forward tomorrow then
19 we're going to need to figure out what to do,
20 because I think it's pretty clear that we're
21 not going to finish by tomorrow morning. I
22 think it's going to take a day and a half like
23 it did with Ms. Fechtel.

24 MR. WESTBROOK: I think so, too.

25 THE COURT: Okay.

1 MR. WESTBROOK: And I wasn't here this morning, or I
2 was in the lobby actually when I heard there's
3 a funeral that you're going to tomorrow.

4 THE COURT: Well, yeah, I'm going to try. I'm not
5 going to make it to the 11:00 funeral but if I
6 get there by 12:00, I can do the visitation so
7 I was going to break for lunch right at 12:00
8 and come back at 1:15.

9 MS. CRUM: I guess the real question is whether Mr.
10 Grice feels like going forward, because
11 obviously we're not going to do anything --

12 MR. GRICE: Well, I will certainly try. Well, I
13 plan, if you need me to do it I --

14 THE COURT: Well, you look pretty healthy, Mr. Grice
15 --

16 MR. GRICE: -- unless something, unless I pass out
17 here, I'll be here.

18 MS. CRUM: We don't want you to do that.

19 MR. WESTBROOK: In the event that he -- again, I
20 hope Mr. Grice feels great tomorrow. In the
21 event that he doesn't, would we just break for
22 the afternoon or would you have a witness,
23 Doug, that you'd be ready to call?

24 MR. MULLER: I think my preference would be to
25 finish Mr. Grice and then go to my witness.

1 THE COURT: All right.

2 MR. MULLER: So if we could perhaps break if Mr.
3 Grice does not feel up to going in the
4 afternoon.

5 MR. WESTBROOK: That's fine with me. Whatever works
6 for y'all.

7 THE COURT: All right. Thank y'all. Everybody have
8 a good evening.

9 (There being nothing further, the hearing adjourned
10 at 5:07 p.m.)

11 DAY 5 - September 15, 2009

12 THE COURT: I'll note for the record that this is
13 day five of our case and that all parties
14 appear to be present and represented by
15 counsel. And when we recessed yesterday
16 afternoon, Ms. Crum was in the process of
17 conducting direct examination of Mr. Grice.
18 When you are ready, you can continue that. Mr.
19 Grice, if you'll come back up and I'll remind
20 you that you're still under oath.

21 MR. GRICE: Yes, ma'am.

22 MR. GRICE - CONTINUATION OF CROSS-EXAMINATION BY MS.

23 CRUM:

24 Q: Good morning, Mr. Grice.

25 A: Good morning, Ms. Crum.

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1 Q: You know you've done this before and you
2 remember you're still under oath?

3 A: Yes, ma'am.

4 Q: Okay. Let me first do a little housekeeping
5 here. Could you please tell the Court what
6 your title and job description was when you
7 retired from the Department?

8 A: Well, when I was hired with the Department
9 originally --

10 Q: No. Retired.

11 A: I'm sorry. Retired. I retired December 30,
12 2007, and I was Director of the Bureau of
13 Health Facilities and Services Development.

14 Q: And what did your job duties entail?

15 A: Those job duties entailed supervision of four
16 programs, the Certificate of Need program,
17 development of the South Carolina State Health
18 Plan, the Medicaid Permit Act and the
19 Certificate of Public Advantage program or
20 COPA.

21 Q: And Mr. Whiteside was in charge actually of
22 with development of State Health Plan; is that
23 correct?

24 A: Yes, ma'am. He was Director of Division
25 Health. Actually, I think it was called

1 Director of Division of Planning and
2 Certification of Need. And he was over the
3 State Health Plan development.

4 Q: And in your position, you were the person
5 responsible for making all CON decisions,
6 correct?

7 A: Yes, ma'am. That's correct.

8 Q: Okay. And yesterday I had also started asking
9 you about the process that you used in
10 reviewing Certificate of Need applications. In
11 this case, prior to making a decision, did you
12 personally review each of the applications?

13 A: Yes. Not to the extent that the primary
14 reviewer would of course, but I was given the
15 file along with the summary sheets that were
16 developed by the primary reviewer. And, of
17 course, I had been involved in all the
18 meetings, if they were public hearings for
19 instance, or project review committee meetings.
20 But, yes, I had access to the file. Not that
21 I absolutely read every word throughout a
22 voluminous application, but I had access to it
23 and did review it. And in a competitive
24 situation, certainly a lot more time was spent
25 than in an application that was not

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1 controversial nor non-competitive.

2 Q: How many hours do you think you spent reviewing
3 the Fort Mill Medical Center file?

4 A: It's difficult to say because that would be
5 over a period of time. But probably at the
6 end, I spent the last week before the decision
7 working on these projects. As had been
8 mentioned yesterday, we realized Ms. Fechtel
9 was not there that week. But I as I recall, I
10 think Ms. Fechtel had actually prepared
11 everything to have -- so that I would have
12 access to it that last week. And she was, of
13 course, available the day the decision was
14 issued, which I think was on a Tuesday. And
15 she was also available by telephone if I wanted
16 to call her, you know, on either at Myrtle
17 Beach or the holiday we had prior to the
18 decision.

19 Q: When you said she had prepared everything, are
20 you talking about she prepared a draft of the
21 summary sheets?

22 A: Yes, ma'am. As I recall, she had prepared the
23 draft and asked me to edit it. I went through
24 and edited it. You know, I read it and if I
25 had any changes or concerns or whatever, I did

1 that. And I think she went back and corrected
2 that, as I recall, because of the time
3 constraints and we wanted that decision on the
4 30th of May. Sometime -- she actually didn't
5 finish the final editing until later. But all
6 of the work was done on the sheets that I --
7 that she had prepared and I edited.

8 Q: And Ms. Fechtel had testified that she had
9 recommended approval of Fort Mill Medical
10 Center based on grounds one, which is the
11 contract with York County; and ground four,
12 which was the Plan. And when I say those
13 grounds, I'm of course talking about the
14 decision letter; is that your recollection?

15 A: You know, if that's what she testified, I
16 agree. I do know that she had no problem with
17 the decision to approve the Fort Mill Medical
18 Center, and of course, she and I discussed the
19 reasons. A was responsible for drafting the
20 letter. She typed the letter now, too, and had
21 input into it, but, yes, that sounds reasonable
22 that certainly she agreed with those reasons.

23 Q: Okay. The commitment to the community and the
24 fact that a 100-bed hospital was more efficient
25 were the grounds that you developed, correct?

1 A: That's correct. That was always a concern I
2 had had particularly since, as I mentioned
3 yesterday, I had concerns about some smaller
4 hospitals being developed in South Carolina
5 within metropolitan areas like Providence
6 Northeast that had had serious problems in my
7 concern. And we have to learn sometimes from
8 our mistakes. And I realize that that hospital
9 was too small to have been approved, and we
10 didn't want that to occur again.

11 Q: I think you said yesterday that that was a 46-
12 bed hospital?

13 A: Yes, ma'am. It did have 18 beds that were
14 licensed as hospital-based nursing home beds
15 that could have been converted to hospital beds
16 in the future. And that was part of the
17 approval at one time, but today that hospital
18 eliminated those hospital-based nursing homes
19 and today only has 46 beds, even though it has
20 been approved for some additional beds, but
21 there not yet constructed or licensed.

22 Q: Now, Mr. Grice, nobody in this case was
23 proposing hospital-based nursing home beds,
24 were they?

25 A: No, ma'am, I don't believe so.

1 Q: Did you check to see if there was anything --.

2 A: No. The only one -- the only one that -- I'm
3 thinking about Hospital Partners, they're not
4 involved in this case. They had some -- I
5 don't know if they even had -- they had some
6 different items there but they're not part of
7 this case.

8 Q: Mr. Grice, unless I say otherwise, I'll only be
9 asking cases about the applicants that are
10 parties to this appeal, okay?

11 A: Yes, ma'am.

12 Q: And if we do need to get into Hospital
13 Partners, I'll identify it for you, okay?

14 A: Sure.

15 Q: Thank you. Let's talk about, I want to come
16 back to something. Yesterday I asked you about
17 the LTACs, the Long-Term Acute Care Hospital.

18 MS. CRUM: Could you please show me page Roman
19 Numeral II-153? This is, Your Honor, this is
20 full State Health Plan. It's DHEC Exhibit 1.

21 Q: Do you see where it says standard?

22 MS. CRUM: Would you just highlight those for me,
23 please, ma'am?

24 Q: Now, those are the standards the Department has
25 to apply in order to improve a long-term acute

1 care hospital, right?

2 A: Yes, ma'am.

3 Q: Look at three. Let me read it to you. "Long-
4 term acute care hospital beds will only be
5 approved if there is an existing hospital
6 converting existing general acute beds to LTAC
7 beds, or if there is a specific need for
8 additional general acute care beds indicated in
9 the Plan." Now, and the acute care beds can
10 only be identified for existing hospitals,
11 right?

12 A: Yes, ma'am, in the 2004-5 Plan, that's right.

13 Q: That's right. This is the 2004-5 Plan we're
14 looking at, right?

15 A: Right. That's correct, yes.

16 Q: Okay. So there is a specific provision in the
17 State Plan that requires an LTAC to be able to
18 access the additional general acute care beds
19 indicated in the Plan for an existing hospital,
20 right?

21 A: That's correct.

22 Q: Okay. Let's go to Presbyterian Exhibit 12. I
23 think you may still have a copy of that over
24 there, Mr. Grice. It's the decision letter for
25 Fort Mill. Do you still have a copy of that?

- 1 A: I do.
- 2 Q: Okay. Thank you. Let's go to page 853,
3 paragraph three.
- 4 MS. CRUM: Could you just bring that out, please,
5 ma'am. This is 851, paragraph three.
- 6 Q: Now, this is a part of the letter that you
7 drafted, correct, Mr. Grice?
- 8 A: Yes, ma'am, it is.
- 9 Q: Okay. And you found that Piedmont, because
10 Piedmont Medical Center had been operating for
11 more than two decades in York County, it had
12 demonstrated commitment to the community,
13 right?
- 14 A: Yes, ma'am, that's correct.
- 15 Q: Okay. Now, there's no statutory provision in
16 the CON Act, is there, Mr. Grice, that provides
17 a basis for the Department to authorize and to
18 use commitment to the community as a ground to
19 make a determination, is there?
- 20 A: I don't believe that word, those words are
21 precisely in the criteria, that's correct.
- 22 Q: And I would ask you about the Certificate of
23 Need application -- I'm sorry, the Certificate
24 of Need Act, Mr. Grice.
- 25 A: No, there's not. That's correct.

1 Q: Okay. All right. Now, there is also no
2 standard for acute care hospitals in the State
3 Plan that authorizes the Department to make a
4 CON decision based on a provider's, quote,
5 commitment to the community, is there?

6 A: Not in those words. That's correct.

7 Q: Well, in any other words, Mr. Grice, what is in
8 the State Plan that would -- I'm just on that
9 Plan now.

10 A: Right, I understand that.

11 Q: That would authorize you to do that?

12 A: That's correct.

13 Q: When you say that's correct, you mean there's
14 nothing in the Plan?

15 A: There are no words, and the State Health Plan
16 does not go into that detail, that's correct.

17 Q: Well, when you say exactly into that detail,
18 Mr. Grice, it makes it kind of loose-ended,
19 like there's something else that might be
20 there. Is there anything in the State Plan
21 that you relied on in using commitment to the
22 community as a grounds to approve Fort Mill
23 Medical Center?

24 A: No. Other than Fort Mill Medical -- no, other
25 than Piedmont Medical Center was an existing

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1 facility in York County that was the result of
2 American Medical International, today Tenet
3 Healthcare, acquiring the old York General
4 Hospital. They made that commitment 20 years
5 ago, no other hospital did. And they had been
6 successful in replacing -- I'd just say
7 reputation, that's not in the Health Plan of
8 course, but that facility is identified,
9 Piedmont Medical Center is. So, no, it didn't
10 go into that detail, its not -- no words of the
11 nature commitment to the community is in the
12 Health Plan.

13 Q: Okay. Now, Mr. Grice, when you put commitment
14 to the community in there as a basis for your
15 decision, you relied on project review
16 criteria, correct?

17 A: That's correct.

18 MS. CRUM: Let's show Regulation 61-15, Section
19 802.2.13, please, ma'am.

20 Q: You should have a copy of the regulations.

21 A: Okay.

22 Q: Mr. Grice, it's on page, starts on the bottom
23 of page 25, see that?

24 A: I do.

25 Q: Okay. Now, am I correct that one of the

1 project review criteria that you're relying on
2 as the basis for your finding of commitment to
3 the community is 13, record of the applicant
4 (owner and/or administrator).

5 A: Yes, ma'am. There is a relationship, that's
6 correct.

7 Q: Okay. Now, 13(a).

8 MS. CRUM: Let's highlight 13(a).

9 Q: 13(a) says, "The applicant's record should be
10 one of successful operation with adequate
11 management experience." Now, the applicant in
12 this case is Amisub, correct?

13 A: That's correct.

14 Q: All right. And what this requires is that the
15 Department has to look to see if the applicant
16 has successfully managed a hospital, correct?

17 A: That's correct.

18 Q: And it has to show that it has successful
19 management -- adequate management experience,
20 correct?

21 A: That's correct.

22 Q: Okay. Now, where does it show, say anything
23 about that it has to have a commitment to the
24 service area?

25 A: It doesn't use those words. But we've got to

1 realize that my interest here is the fact that
2 the Piedmont Medical Center made an investment
3 in the community. They are the ones that
4 demonstrated the need here. They have had a
5 successful operation. They made a decision 20
6 years ago and I was involved in those, that
7 application submission, and knew about the sale
8 of the old York General Hospital and met the
9 representatives at that time. They're the ones
10 that took the risk and purchased York General
11 Hospital and had been an investor in that
12 community for 20 years. So, you know, what I'm
13 saying is that is what I meant by commitment to
14 the community. They have a successful
15 operation, they took the risk 20 years ago,
16 nobody else did, no other applicant from
17 surrounding areas. And for what ever it's
18 worth, I feel that's significant. Because they
19 have been successful, everything else being
20 equal, you know, they made that risk and they
21 were successful in developing the facility,
22 making large capital expenditures, and adding
23 on to it and having tertiary services. And
24 that area has grown, which maybe no one
25 predicted 20 years ago, but for whatever

1 reason. I feel like that's a significant thing
2 to think about.

3 Q: And 13(a) is your regulatory basis for thinking
4 about this commitment to the community when AMI
5 was allowed to buy the existing hospital in
6 York County?

7 A: I certainly think it relates to their
8 successful operation. They made a decision,
9 you know, more than 20 years ago to acquire a
10 county facility when the county could no longer
11 operate it. And they have been successful in
12 developing that facility to be successful.
13 That is a record of successful operation in my
14 opinion.

15 Q: Mr. Grice, you also found that Presbyterian and
16 Carolinas had successfully operated -- had
17 successful operation and adequate management
18 experience, didn't you?

19 A: That's correct. We did not find them
20 inconsistent with that criteria.

21 Q: So the only difference is that you found that
22 the applicant had operated Piedmont Medical
23 Center for 20 years?

24 A: They made the decision to make that investment
25 in the community, that's correct.

- 1 Q: It doesn't say anything about investing in the
2 community, does it?
- 3 A: No. It doesn't go into that detail, but that's
4 part of successful operation. I mean, you're
5 not going to be able to operate a facility
6 unless you have ownership in it and made a
7 decision to develop it.
- 8 Q: Let's look to 13(b), please, sir. Now, the
9 record of the applicant also includes they have
10 to demonstrate the ability to obtain necessary
11 capital financing, right?
- 12 A: Yes, ma'am.
- 13 Q: And what does that have to do with commitment
14 to the community?
- 15 A: The relationship there is we want to try to
16 apply that commitment to community, would be
17 that, you know, certainly they had made
18 financial investments in the past. But of
19 course this criterion right now, the 13(b) is
20 more related to this application and getting
21 financing for it. So it's not as strongly
22 related there.
- 23 Q: Okay. So am I correct then that you did not
24 use 13(b) as a basis for your finding,
25 commitment to the community?

1 A: Well, it relates. The way it would relate
2 would be, as I had mentioned earlier, and we
3 can tie 13(b) into 13(a), the fact that the
4 applicant had in more than 20 years put
5 significant financial funds, capital funds,
6 into the existing facility and developed
7 tertiary services. And so it was a much
8 superior hospital than it certainly was prior
9 to their acquisition 20 years before, more than
10 20 years before. So they had demonstrated the
11 ability to obtain financing over that period of
12 time. And we saw, based on their reputation,
13 that they did have documents in the application
14 that they could obtain financing for this
15 project and that helped demonstrate their
16 ability, in my opinion, to obtain necessary
17 additional funds for development of this
18 project.

19 Q: Mr. Grice, what I'm trying to find out is what
20 you relied on in making the determination that
21 commitment to the community was a project
22 review criterion that you could use as a basis
23 to approve Fort Mill Medical Center, okay?

24 A: I understand.

25 Q: All right. So let's look at 13(d). "The

1 applicant's record or his representative's
2 record of cooperation and compliance with state
3 and federal regulatory programs will be
4 considered."

5 **MS. CRUM:** And let's just blow up all of 13 for a
6 minute.

7 **Q:** The record of the applicant, and that's owner
8 and/or administrator. Mr. Grice, who's the
9 administrator of Tenet -- I'm sorry Fort Mill
10 Medical -- not Fort Mill Medical Center -- of
11 Piedmont Medical Center?

12 **A:** Mr. Charles Miller.

13 **Q:** Okay. What entity actually administers Fort
14 Mill Medical Center?

15 **A:** Well, the large corporate owner is Tenet Health
16 Care.

17 **Q:** Let me show you the first page of the 2008
18 Piedmont Medical Center Joint Annual Report to
19 the hospital.

20 **MS. CRUM:** What exhibit number is that, 41? Tell
21 you what, I'll just put it up here. Can I put
22 it up on the ELMO, please, ma'am?

23 **MR. WESTBROOK:** Ms. Crum, what -- that's Exhibit 41.

24 **MS. CRUM:** 41.

25 **MR. WESTBROOK:** Of Presbyterian?

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1 MS. CRUM: Presbyterian.

2 Q: Okay. That's the 2008 Joint Annual Report for
3 Presbyterian -- I'm sorry, for Piedmont Medical
4 Center, correct?

5 A: Yes, ma'am.

6 Q: Okay. Who is the name of operating authority?
7 What's the name?

8 A: Tenet Corporation.

9 Q: Now, Tenet Corporation is the parent company of
10 Amisub, right?

11 A: Yes, ma'am.

12 Q: And who owns the building?

13 A: Tenet Corporation.

14 Q: Okay. And this is a report that Piedmont
15 Medical Center is required to give the
16 Department annually, correct?

17 A: That's correct.

18 Q: Let's look at 2007 Joint Annual Report, which
19 would be Presbyterian Exhibit 42. Okay. Yet
20 again, the name of the operating authority for
21 Piedmont Medical Center is Tenet Corporation,
22 correct?

23 A: Yes, ma'am.

24 Q: And the building ownership is Tenet
25 Corporation, correct?

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1 A: That's correct.

2 Q: And Ms. Susan Parker filled out this form and
3 t h e e m a i l a d d r e s s i s
4 susan.parker@TenetHealthcare.com, correct?

5 A: That's correct.

6 Q: So the owner, operator, of this facility is
7 Tenet Corporation, correct?

8 A: That's correct.

9 MS. CRUM: Let's go back to 13, please, ma'am.
10 There we go.

11 Q: Tell me how you relied on the applicant's
12 record or his representative's record of
13 cooperation and compliance with state and
14 federal regulatory programs to use this as a
15 basis for a finding of commitment to the
16 community?

17 A: Well, the applicant in this case is actually
18 Amisub of South Carolina, Inc. I realize Tenet
19 Corporation owns the building but --

20 Q: And operates it, doesn't it?

21 A: That's correct. But Amisub is though, is the
22 entity that the Department of Health and
23 Environmental Control has control over it,
24 issues a license to, and that's who we would
25 issue the Certificate of Need to. Even though

1 there is a large corporate owner, we're dealing
2 directly and have authority over Amisub, not
3 Tenet necessarily, so it's Amisub of South
4 Carolina that we enter things with.

5 Q: Okay. How does 13(d) form a basis for your
6 finding of commitment to the community as a
7 project review criterion?

8 A: 13(d) wouldn't necessarily, you know -- I mean,
9 certainly, you could -- you could say that, you
10 know, they have been committed and provided,
11 you know, cooperation and compliance with South
12 Carolina, but that is a standard criterion
13 there where, you know, we should consider each
14 applicant's record, even those out of state.
15 Now, it's hard for us to gather information
16 from out-of-state applicants since we don't
17 have the licensure records on any of their
18 facilities. But the in-state facilities, the
19 ones that we do license in South Carolina we
20 have easier access to. Even though we do have
21 authority and have in the past contacted other
22 states to get more information regarding an
23 entity that's not licensed in South Carolina.

24 Q: Back to my question, Mr. Grice. I think you
25 answered it by saying 13(d) did not form a

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1 basis for a finding of commitment to the
2 community.

3 A: It's not as important. I mean, certainly there
4 is a relationship there, but I did use that
5 particular criteria in that regard.

6 Q: So out of 13, what criteria did you use to
7 support your findings of commitment to
8 community?

9 A: I think (a) and (b), 13(a) and (b).

10 Q: Okay. The only -- let's go to regulation 61-
11 15, section 802.2.4, please? That would be on
12 page 24, Mr. Grice.

13 A: All right.

14 Q: See "applicability"?

15 A: I do.

16 Q: Okay. I mean, I'm sorry, acceptability. Is
17 that the other criterion -- criteria that you
18 used to support your finding of commitment to
19 the community?

20 A: Yes. I think 4(a) is the most compelling one
21 in that group.

22 Q: Okay.

23 MS. CRUM: 4(a), if you could highlight that,
24 please, ma'am.

25 Q: "The proposal and applicant should have the

1 support of affected persons, including local
2 providers in the target population. The lack
3 of opposition should not be considered support
4 for the purposes of these criteria." Did I
5 read that correctly?

6 A: Yes, ma'am.

7 Q: Okay. Now, Mr. Grice, an affected person is
8 basically somebody that is in the community, a
9 provider who is going to provide similar
10 services, a business, it's folks in the
11 community that's going to be served, right?

12 A: That's correct.

13 Q: This talks about the support from the affected
14 persons, doesn't it?

15 A: It does.

16 Q: It doesn't talk about the commitment from the
17 applicant to the affected persons, does it?

18 A: Not specifically, that's true.

19 Q: It doesn't even indirectly talk about it, does
20 it, Mr. Grice?

21 A: No, but I think there is a relationship there,
22 too. I mean, the -- you know -- but, no it
23 doesn't go into detail.

24 Q: Okay. Let's go to 4(b), please. Did you use
25 4(b) as a basis for the finding that FMMC

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1 should be approved because they have a
2 commitment to the community?

3 A: No.

4 Q: What about 4(c)? Let's show 4(c). Possibility
5 of transfer agreements. Did you use that one?

6 A: No, ma'am.

7 Q: So as I understand it, you've testified that
8 there's not a Plan standard, there's not a CON
9 requirement, and the only project review
10 requirements that you relied on for your
11 finding of commitment to the community was
12 13(a) and b) and 4(a), is that correct?

13 MR. WESTBROOK: Objection as mischaracterization of
14 his testimony.

15 MS. CRUM: I'm asking him to tell me if it was
16 correct or not.

17 MR. WESTBROOK: Well, I think we go through --

18 THE COURT: I'll permit the -- I'll permit the
19 question.

20 MR. WESTBROOK: If I could explain my --

21 THE COURT: How is that a mischaracterization?

22 MR. WESTBROOK: Well, because the question was,
23 obviously I don't have it verbatim, but the
24 question was something like this. You've
25 testified that the only criteria that supports

1 community commitment is blah, blah, blah,
2 you've testified that this. That, I think, is
3 not what he's testified. And I don't think --
4 and I think that's mischaracterization.

5 **THE COURT:** Okay. I'll agree with you on that. Can
6 you rephrase your question, please, Ms. Crum?

7 **MS. CRUM:** Mr. Grice, have you testified here today
8 that the only two project review criterion that
9 you used as a basis to support your finding of
10 community commitment, a commitment to the
11 community, was 13(a) and (b) and 4(a)?

12 **A:** Yes, ma'am. Those were the most compelling
13 ones. That's correct.

14 **Q:** What others are there? That's what I'm asking
15 you.

16 **A:** Well, we've been over all of them, Ms. Crum.
17 But, I mean, the ones that you just mentioned
18 are the ones that are the strongest.

19 **Q:** Okay. Well, you say we've been over all of
20 them. What are the other ones that we have
21 been over that you used to support your finding
22 of commitment to the community? That's all I'm
23 trying to find out, Mr. Grice.

24 **A:** The other ones that we discussed that we said
25 perhaps were not as strong. I mean, the ones

1 that we've testified within the last 15
2 minutes.

3 Q: The other ones in 13 --

4 A: Yes, ma'am.

5 Q: -- and 4?

6 A: Yes, ma'am.

7 Q: Okay. Let's look on page -- excuse me,
8 Presbyterian Exhibit 12, page 850 and 851, it's
9 ground one. Starts on 850.

10 **MS. CRUM:** Just start with paragraph one, please,
11 ma'am.

12 Q: This is the first ground that you used to
13 approve Fort Mill Medical Center and to deny
14 Presbyterian and Carolinas, correct?

15 A: That's correct.

16 Q: And this ground in general terms deals with the
17 contract, right, between -- and read over to
18 the next page.

19 A: That is correct.

20 Q: Okay. Now, let's just read, let me read the
21 first paragraph to you first. "After careful
22 and thorough review of each of the four
23 competing Certificate of Need applicants for a
24 new additional general acute hospital to be
25 located in York County, Department staff have

1 determined that the Fort Mill Medical Center
2 proposal best demonstrates the compelling,
3 definitive characteristics to be most
4 beneficial to the current and future citizens
5 of York County during the coming decades.
6 Specifically, the Fort Mill Medical Center will
7 function under the same licensee, Amisub of
8 South Carolina, Inc., as Piedmont Medical
9 Center must operate within all parameters of an
10 existing contract from Piedmont Medical Center
11 in York County. The aforementioned contract
12 was amended in recent years and requires the
13 facility to maintain the charges that are
14 consistent with the peer group hospitals to be
15 subject to substantial voluntary penalty by
16 York County Council. The contract also
17 requires establishment of a local governing
18 board and advisory committees for PMC.
19 Submission of quarterly filed reports to York
20 County, maintenance of countywide EMS, with
21 contractual established response times and
22 equipment, and maintenance of the urgent care
23 center in western York County and maintenance
24 of substantial required capital investments by
25 the hospital, along with the community

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1 supporting these scholarships and donations.
2 This contract which no other applicant is bound
3 by will ensure that charges remain reasonable
4 at both PMC and the proposed new hospital at
5 Fort Mill. The contract will continue to
6 remain in effect for additional 39 years." Is
7 that your language?

8 A: Yes, ma'am.

9 Q: Okay. Let me ask you a couple of things to
10 start with. You talk about in here -- well,
11 let's see if I can do this. The aforementioned
12 contract was amended in recent years and
13 requires the facility to maintain charges. The
14 facility that you're talking about there is
15 Piedmont Medical Center, right?

16 A: That's correct.

17 Q: And let's look on down here. The maintenance
18 of substantial required capital investment by
19 the hospital along with the community, that
20 again is Piedmont Medical Center, right?

21 A: That's correct.

22 Q: Okay. Down here in the last sentence you
23 actually talk about the proposed new hospital
24 in Fort Mill, right?

25 A: That's correct.

1 Q: All right. Now, the contract with York County,
2 the regulation that you rely on as their
3 project review criterion to support your
4 finding about the contract is Regulation, what,
5 61-15, Section 802.24(a) and 13(a), right?

6 A: Yes, ma'am.

7 Q: Okay. Let's go back and look at 802.2.4.a.
8 We've already established that that relates to
9 support from affected persons, right?

10 A: That's correct.

11 Q: Let's look at 13(a). Now, that has to do with
12 an applicant's record to be one of successful
13 operation with adequate management experience.
14 How does the contract, you finding about a
15 contract, how is that supported by this
16 criteria -- criterion?

17 A: Well, the contract has been in place ever since
18 Piedmont Medical Center was developed, that
19 contract with the County. So that's part of,
20 you know, this facility and its relationship
21 with the County. And I think that does relate
22 to, you know, their -- their record of the
23 applicant relating to the operation. Now, I
24 know that there were times that the contract
25 wasn't enforced and there were problems, but at

1 least there was a contract, and it has been
2 amended and is stronger and will be in place
3 for many more years. And the real issue here
4 that our interest was in regarding this was a
5 fact that it will also cover the new hospital,
6 the new satellite hospital, so that's where
7 this was important is that it covered that
8 hospital that was unique.

9 Q: Is it fair to say you were -- you felt it
10 necessary to have a contract in place so that
11 York County Council could enforce it vis-a-vis
12 the hospital, the new one?

13 A: No. This is the only contract of this nature
14 in the state, but I think it's unusual and
15 unique. It would probably be a good idea for
16 many of the counties in South Carolina that
17 have allowed proprietary companies to go in and
18 had -- have been clever enough to follow it up
19 with a situation like this. But I think it is
20 a good process and I was impressed that it
21 would cover the new facility.

22 Q: And it is your testimony that 13(a) is one
23 criteria that you used, one criterion you used
24 to support your finding of commitment to the
25 community?

1 A: Well --

2 Q: I'm sorry, the contract, not the commitment.
3 We've done that one already.

4 A: Yes. I mean, you know, we can only put so many
5 words in a criteria. And things evolve in
6 time. These regulations haven't been amended
7 in years. But, and we've never had a contract
8 like this before in the state. And I think
9 that criterion, 13(a), relates to it. I think
10 it is a significant item and I think it should
11 be considered and I think 13(a) is the best
12 criterion for it to be analyzed under.

13 Q: Let's go to 13(d) just a minute. With regard
14 to the contract between York County and Amisub
15 and Tenet, it says the applicant's record or
16 his representative's record of cooperation and
17 compliance with state and federal regulatory
18 programs will be considered. The contract
19 between York County and Amisub is certainly not
20 a state or federal regulatory program, is it?

21 A: No, ma'am, it's not.

22 Q: Okay. And is DHEC a party to the contract?

23 A: No, they're not.

24 Q: Let's also look at 802.2.6.a. In the decision
25 letter you made a finding in ground one that

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1 the contract which no other applicant is bound
2 by will assure that charges remain reasonable
3 at the Piedmont PMC and proposed new hospital
4 in Fort Mill, correct?

5 A: Yes, ma'am.

6 Q: Is this the project review criterion that you
7 used as a basis for that finding?

8 A: Yes. It's a relationship. Yes, ma'am.
9 Certainly it applies there that we want to be
10 sure that proposed charges are comparable with
11 those established by other facilities for
12 similar services and so it does relate, that's
13 correct.

14 Q: Other than the project review criteria that we
15 have just discussed, are there any other
16 project review criteria that you relied upon
17 for your finding that the contract between York
18 County and Amisub/Tenet could serve as the
19 basis for your decision?

20 A: I want to just flip through real quickly. I
21 think the ones we mentioned are the strongest.
22 That's correct.

23 Q: And in fact, those are the ones you testified
24 to in your deposition, aren't they?

25 A: Yes, ma'am, that's correct.

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1 Q: Now, Mr. Grice, there is no statutory provision
2 in the CON Act that the Department interprets
3 to authorize and to use the contract between
4 York County and Tenet/Amisub as a ground to
5 make a determination to whom to award a CON, is
6 there?

7 A: No, ma'am, there's not.

8 Q: And the same thing is true about the Plan
9 standards, correct?

10 A: That's correct.

11 Q: Okay. Let me ask you about the contract.
12 We've had a lot of discussion about contracts.
13 Did you read the contract and the eight addenda
14 contained in the CON application file?

15 A: I did review it. I probably didn't read it
16 word for word, but I did review summaries and
17 had access to it, yes.

18 Q: What summaries did you review?

19 A: I think it might, one might have even been --
20 I don't know. There might have been a letter
21 in the file or Ms. Fechtel might have done a
22 summary for me that I did -- I remember reading
23 a summary.

24 Q: Are you talking about the summary sheet?

25 A: No, ma'am. Well, Ms. Fechtel's summary may

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1 have been in the summary sheet, but I believe
2 there may have been some other information.

3 Q: Are you talking maybe about project review
4 summary that Mr. -- you know, prior to the
5 project review hearing, Mr. Grice?

6 A: It could have been.

7 Q: But you didn't read the contracts?

8 A: Not word for word. We had the contract. We
9 had access to it, but I didn't read every word
10 of it.

11 Q: Do you remember, Mr. Grice, that the first
12 contract that mentioned pricing, the first
13 addendum, was addendum six?

14 A: I do remember addendum six, yes.

15 Q: Okay. Do you remember that addendum six and I
16 think I got a copy here. It might be a little
17 easier for you to look at, Mr. Grice.

18 A: Okay.

19 Q: We've made addendum six Presbyterian's Exhibit
20 21 and it's just easier to handle than handling
21 the entire CON notebook. Okay. What's the
22 date of that addendum, Mr. Grice?

23 A: August 25, 1995.

24 Q: Okay. And then let me show you Presbyterian's
25 Exhibit 23, which is a copy of the eighth

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1 addendum. Do you recognize both of those, Mr.
2 Grice?

3 A: Yes.

4 Q: And you didn't read one of those, did you?

5 A: As I mentioned earlier, I did not read them
6 word for word, no, ma'am.

7 Q: Now, what is the date of the eighth addendum,
8 Mr. Grice?

9 A: It was December -- wait a minute. Let me
10 check. I'm sorry. I believe it's June 7,
11 2004, I believe.

12 Q: Okay.

13 A: It's very confusing. I believe that's it. I
14 don't see a date where it was signed, but
15 apparently the first paragraph --

16 Q: Could you just read the first paragraph into
17 the record, please, Mr. Grice?

18 A: It says, "This eighth amendment to hospital
19 agreement dated as of December 8, 1980, among
20 American Medical International Inc. and Amisub
21 of South Carolina, Inc. and or York County,
22 South Carolina, as amended and modified from
23 time to time, made and entered into the 7th day
24 of June 2004 --

25 Q: Okay. Let me stop you right there. Based on

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1 that, do you think that the addendum was
2 entered into the 7th day of June, 2004?

3 A: Yes.

4 Q: Okay. Now, look on over, if you would.

5 **MS. CRUM:** Let's pull up Exhibit 23, and pull up
6 page 16416. That's the Bates stamp.

7 Q: Second page, Mr. Grice --

8 A: Okay.

9 Q: -- with the Bates stamp at the bottom.

10 **MS. CRUM:** The first "whereas", let's highlight
11 that.

12 Q: Mr. Grice, you see that "whereas" that says,
13 "Whereas issues have arisen concerning the
14 pricing provisions for section 3.1.e and other
15 sections of the agreement as amended and
16 modified"? When you looked at that, did you
17 call anyone from the applicants, like a
18 representative, and ask them what issues had
19 arisen?

20 A: No. I was aware of the issues that had arisen.
21 That was information that had been given to the
22 Department. We had access to where the prices
23 had been very high, they had gotten extremely
24 high.

25 Q: Did you call or have anyone call and ask how

1 they had been resolved, the issues had been
2 resolved?

3 A: I believe I was aware that I think part of this
4 contract, this -- this amendment, was to take
5 care of that. And I believe probably when I
6 met the gentleman from York County, they
7 discussed that also.

8 Q: When you met the gentleman from York County,
9 what are you talking about, Mr. Grice?

10 A: The county council members who made an
11 appointment to come down to discuss their
12 support for the project.

13 Q: Okay. And did they tell you that they had
14 gotten the hospital to enter into the eighth
15 addendum in order to keep the prices down?

16 A: Well, I don't remember specifically the detail,
17 but I was aware that there had been a problem
18 and it had been resolved. And the new
19 agreement with the new addendums were stronger
20 and it was emphasized that if this occurred
21 again, the County Council had the right to
22 assess a fine as much as a \$100,000 a month if
23 it were not corrected.

24 Q: And this is your understanding after you met
25 with those three County Council members?

- 1 A: It was confirmed. Yes, I was aware that there
2 had been a problem. I mean, before I met with
3 them I was aware. And, but, you know, this was
4 confirmed. That's where someone actually who
5 was very familiar with it talked to me
6 directly.
- 7 Q: Okay. Mr. Grice, would you look at the 100-bed
8 application, which is Piedmont Exhibit 2 and
9 address yourself to page 614?
- 10 A: Do I have that?
- 11 Q: Look behind you. I think it might be there.
- 12 A: I'm not sure I see Exhibit 2.
- 13 MS. CRUM: Your Honor, may I approach and see if we
14 can find it?
- 15 THE COURT: Certainly. If we're missing it, I'm
16 sure I've got a copy of it.
- 17 Q: I'm sure we can find it. It's the 100-bed
18 application. Should be back here.
- 19 A: This says Exhibit 4(b).
- 20 Q: Does that have page 614 in it?
- 21 A: And that's the Bates stamp page?
- 22 Q: Yes, sir, Bates stamp.
- 23 A: No, ma'am. It doesn't go that far. Let me
24 check again. Okay, I have it.
- 25 Q: Okay. Mr. Grice, you also talked about the

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1 fact that you had read a summary made from an
2 applicant. Look at this letter of April 25,
3 2006. Take a minute and review it. Is that
4 the summary you're talking about that you read
5 about the sixth addendum to the contract and
6 the eighth addendum to the contract?

7 A: Yes, ma'am. That's one. There may have been
8 others, but that's one I do remember. That's
9 correct.

10 Q: Well, if there were others, are they all
11 contained in the DHEC record?

12 A: Yes, ma'am, everything would be in the record.

13 Q: Now, let's look at Presbyterian Exhibit 13. It
14 is a copy, it's the copy of the reconsideration
15 file, Mr. Grice.

16 MS. LAYMAN: Excuse me, Liz. What file did you say
17 that was?

18 MS. CRUM: 13 is the exhibit number.

19 MS. LAYMAN: Which --

20 MS. CRUM: DHEC's reconsideration file. Your Honor,
21 we do a -- we made a second binder of that.
22 It's Exhibit 13, Presbyterian.

23 A: I have it..

24 Q: Now, Mr. Grice, Presbyterian, after the May 30,
25 2006 decision, asked the Department to

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- 1 reconsider its decision, didn't it?
- 2 A: Yes, ma'am, they did.
- 3 Q: And you denied reconsideration, didn't you?
- 4 A: That's correct.
- 5 Q: During the reconsideration process, did you
- 6 consult with anyone about our request to
- 7 reconsider? When I say anyone, I'm talking
- 8 about the Department.
- 9 A: What I'm trying to remember, Ms. Crum, is I
- 10 know this was when there was a change in the
- 11 statute. And I, for some reason -- did the
- 12 Board of Health and Environmental Control make
- 13 that reconsideration decision? They may have.
- 14 I just can't remember.
- 15 Q: Mr. Grice, do you remember that you denied
- 16 reconsideration on July 12, 2006? And then
- 17 there was a request for final agency review to
- 18 the DHEC Board, at which point they chose not
- 19 to hear the request.
- 20 A: Okay.
- 21 Q: And then there was a few -- do you remember
- 22 that?
- 23 A: I think so. Right.
- 24 Q: Okay. Now, you reviewed the reconsideration
- 25 request, didn't you?

1 A: Yes, certainly.

2 Q: And you denied it?

3 A: That's correct.

4 Q: My question is during your reconsideration
5 review, did you consult with anyone at the
6 Department about the reconsideration request,
7 like Ms. Fechtel?

8 A: Yes. Yes, I mean, certainly. There are
9 certain requirements that have to be met within
10 the regulations for the staff to grant
11 reconsideration. And we determined that, you
12 know, there had not been sufficient new
13 information provided for us to reconsider the
14 decision.

15 Q: Did you consult with the Commissioner with
16 regard to the reconsideration request?

17 A: No, ma'am. We don't -- you know, at this point
18 on a staff level, we don't go to the
19 Commissioner.

20 Q: Were you visited by any representatives of Fort
21 Mill Medical Center about the reconsideration
22 request?

23 A: No. I don't recall any, you know. It was just
24 the normal kind of appeals process
25 reconsideration that happens often. And, no,

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1 it was -- I don't remember any kind of
2 controversy regarding that period of time when
3 we made that decision on reconsideration.

4 Q: Okay. Let's look at page 81-R. And am I
5 correct, Mr. Grice, when there's a R after it,
6 that's the Department's designation of
7 reconsideration for numbering purposes?

8 A: Okay.

9 Q: Okay. Now, do you see 81-R? Are you there?

10 A: I do.

11 Q: Is this South Carolina Court of Appeals
12 remittitur, is that something that was before
13 you when you made your reconsideration request?
14 I'm sorry, when you made your decision?

15 A: I think the decision was made in 2006, correct?

16 Q: Yes, sir.

17 A: Right. And this letter is dated June 10, 2005.

18 Q: Yes, sir.

19 A: Okay. So --

20 Q: Mr. Grice, maybe it would be helpful, look on
21 page 20-R. See that? That's an index of the
22 exhibits that Presbyterian attached to its
23 reconsideration request, right?

24 A: Yes, that's correct.

25 Q: And you see number five, Atherton versus Tenet

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1 Healthcare? Q

2 A: I do.

3 Q: Okay. Let me ask you again. Was the Atherton
4 case -- and it goes from page 81-R through 103-
5 R -- was that something before the Department
6 or you when you made your reconsideration
7 decision?

8 A: Yes, ma'am. That was part of the packet that
9 was submitted.

10 Q: All right, sir. Did you read it?

11 A: I was aware, yeah. You know, as far as the
12 summaries, yes. And this has been a long time
13 ago, Ms. Crum, but --

14 Q: Let's look at page 82B, please.

15 MR. WESTBROOK: I'm sorry, Ms. Crum, what page was
16 that?

17 MS. CRUM: 82, I said B, but it should be an R. It
18 kind of looks like a B, but it's an R.

19 MR. WESTBROOK: Looks like BR, actually.

20 Q: 82-R, correct; you see that? That's a Supreme
21 -- that's a Court of Appeals case in this
22 matter, right, its decision? Is that correct,
23 Mr. Grice?

24 A: That's correct.

25 Q: Okay. Did you read this case?

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1 A: I did not certainly have time to read every
2 word, you know.

3 Q: Look on page 83-R. That section 103.1(e),
4 pricing, that's the pricing provision out of
5 the sixth addendum between York County and
6 Tenet/Amisub, isn't it?

7 A: Yes, that's correct.

8 Q: Look on 83-BR. I'm going to read something to
9 you and I want to make sure I've read it
10 correctly, okay?

11 A: Okay.

12 Q: "In this complaint, Atherton asserts for the
13 last several years the hospital charges for
14 Tenet and Amisub have been the highest in the
15 group of ten peer hospitals in the regional.
16 Atherton alleges that York County entered into
17 the agreement to directly benefit the citizens
18 and residents of the county." Did I read that
19 correctly?

20 A: Yes, ma'am.

21 Q: Okay. Now, the look on 104-R.

22 MS. CRUM: And, Your Honor, while we're there, this
23 is the case that I had asked that you take
24 judicial notice of.

25 THE COURT: Yes. Sure. And it is an unpublished

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1 opinion.

2 Q: See 104-R, Mr. Grice?

3 A: Yes, I do.

4 Q: Is the date that the summons was filed June 19,
5 2003?

6 A: That is correct.

7 Q: And we've established that the date that the
8 eighth amendment was executed June 7, 2004,
9 right?

10 A: Yes, ma'am. That's correct.

11 Q: Let's go to 107-R. See paragraph 16 there?

12 A: Yes.

13 **MS. CRUM:** Pull that, please, ma'am. Okay.

14 Q: On March 1, 1994 (prior to the sixth addendum
15 to the contract with York County discussed
16 below was signed) MME merged with American
17 Medical Holding (here and after AMI), a
18 Delaware Corporation headquartered in Dallas,
19 Texas, and thereby acquired the liabilities of
20 AMI. Tenet changed the names of all things
21 known by AMI to Tenet and became responsible
22 for the liabilities of the Tenet -- of AMI.
23 Did I read that correctly?

24 A: No, ma'am. It's March 1, 1995, not 1994.

25 **THE COURT:** You said '94.

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1 Q: '94. Okay, 1995. Thank you. Look on over to
2 page 108-R.

3 MS. CRUM: If you'd pull out paragraph 24.

4 Q: See where it says, "A major objective of York
5 County in entering into this agreement --" And
6 the agreement was between York County and
7 Amisub/Tenet's predecessor, right?

8 A: Yes, ma'am.

9 Q: "-- in entering into this agreement is that
10 such care be provided in a cost effective basis
11 as prices favorably comparable to those paid
12 for similar services provided by comparable
13 acute care hospitals in the same geographic
14 region." Did I get that one right?

15 A: Yes, ma'am.

16 Q: Okay. And let's go to page 110.

17 MR. WESTBROOK: Objection, Your Honor. Just on this
18 one grounds. I think before we go any further
19 it would be helpful, in fact necessary, for Ms.
20 Crum to identify the document from which she is
21 reading from. Right now, all we're getting is
22 Bates pages. We know it's related to the
23 Atherton case, but is this the complaint, the
24 allegations of the complaint, the answer, the
25 order?

1 **THE COURT:** Thank you, that would be helpful.

2 Q: Mr. Grice, remember I had asked you to identify
3 the date of the summons on page 104-R?

4 A: Yes, ma'am.

5 Q: Look right after that and see was the compliant
6 filed on June 19, 2003? Is that at 105-R?

7 A: Yes, ma'am. 104-R, that's correct, and 105-R,
8 yes.

9 Q: And these paragraphs I've been reading from are
10 from the complaint?

11 A: Yes, ma'am.

12 Q: Okay.

13 **THE COURT:** Thank you, Ms. Crum.

14 Q: Paragraph 30 of the compliant. "For the last
15 several years the hospital charges for Tenet
16 and Amisub have been the highest in the group
17 of ten peer hospitals in the region noted
18 above." Did I read that correctly?

19 A: Yes, ma'am.

20 Q: And then paragraph 33. "The actions by Tenet
21 and Amisub in charging the patients at Piedmont
22 Medical Center the highest rates for medical
23 care within the ten member group is a
24 fundamental breach of the agreement entered
25 into with York County." Did I read that

1 correctly?

2 A: Yes, ma'am.

3 Q: And, Mr. Grice, do you know whether or not the
4 Court of Appeals actually determined that
5 Atherton was not a direct third-party
6 beneficiary under the contract and had no right
7 to enforce it?

8 A: I don't remember the specifics on that.

9 MS. CRUM: Okay. Your Honor, if we could take a
10 break, I think I could maybe cut out some of
11 this?

12 THE COURT: Certainly.

13 MS. CRUM: And wrap up in about 15 minutes.

14 THE COURT: I've got 10:20 and we'll come back in
15 about 15 minutes.

16 (A short break was taken.)

17 THE COURT: Whenever you're ready, Ms. Crum.

18 Q: Mr. Grice, I want to take you back to
19 Regulation 61-15, Section 802.256.A. There are
20 a couple of questions I actually forgot to ask
21 you about.

22 A: Okay.

23 Q: That's on page 24 of the regulations.

24 A: Okay.

25 Q: Do you see it says that the proposed charges

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1 should be comparable to those charges
2 established by other facilities with similar
3 services within the service area or state?

4 A: Yes, ma'am.

5 Q: Now, when we talk about similar services, we're
6 talking about specific types of services,
7 aren't we; for example, cardiac cath or
8 appendectomy?

9 A: That's correct.

10 Q: Now, you found that the contract, and this was
11 in your ground one, insured that the charges
12 would remain reasonable. Is reasonable, in
13 your mind, the same as comparable?

14 A: It should be. Yes, ma'am. If it's -- if it's
15 reasonable, you would think certainly it should
16 be comparable to what other facilities would be
17 charging.

18 Q: Okay. Now, contracts with York County,
19 addendum six and addendum eight, actually
20 requires that, and correct me if I'm misstating
21 this, Mr. Grice, that Piedmont not have the
22 highest average charge per case for all the
23 product lines, right?

24 A: That's correct.

25 MR. WESTBROOK: Objection. Calls for a legal

1 conclusion.

2 **THE COURT:** Your Honor, that was a basis of one of
3 his decisions. I can stop and I can have him
4 read the contract. I would be happy to do
5 that. Would you please put --

6 **MR. WESTBROOK:** If I may explain my objection.

7 **THE COURT:** Sure.

8 **MR. WESTBROOK:** I think that Mr. Grice can be asked
9 about his understanding, as long as it's clear
10 that he's not making -- that is complex
11 contract, very complex, and for him to say it
12 requires this or it requires that is I think
13 inappropriate and outside the scope of his
14 expertise.

15 **THE COURT:** All right. Ms. Crum, if you could
16 phrase it in the manner of, of his
17 understanding of what the contract --

18 **MS. CRUM:** Certainly will. I'm going to put the
19 contract up and get him to read it to me. It's
20 Exhibit 23, page 417. That's it. Thank you.

21 **Q:** Would you just read little Roman Numeral ii,
22 please?

23 **A:** Okay. "Effective with the MedPAR reporting
24 period beginning October 1, 2003. In the
25 event MedPAR pricing information submitted to

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1 or obtained by the "hospital" shall, at any
2 time, show that the average charge per case by
3 the hospital for all product lines is the
4 highest in the peer group established and
5 described in this agreement, Amisub and Amisub
6 parent shall in no event more than 15 business
7 days after receipt of such MedPAR report or
8 information:"

9 Q: Mr. Grice, is it your understanding of the
10 eighth addendum to the contract that the
11 hospital cannot have an average charge per case
12 for all product lines as the highest in the
13 peer group?

14 A: Yes, ma'am.

15 Q: Okay. Now, do you know how, under the
16 contract, Piedmont Medical Center calculates
17 its average charge per case for all product
18 lines?

19 A: No, ma'am, not specifically.

20 Q: Do you know whether or not they take each
21 product line, average the charge, and then get
22 an average for all, the average charge for all
23 product lines; do you know that?

24 MR. WESTBROOK: Objection, asked and answered. He's
25 already said he didn't know. That was the

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1 previous question she asked, do you know how
2 it's calculated, he said no. Then she
3 basically asked it again, the same question in
4 a long-winded way.

5 MS. CRUM: Your Honor --

6 THE COURT: Yes.

7 MS. CRUM: -- what he said was not specifically, so
8 I was trying to give him a specific to see if
9 he understood that.

10 THE COURT: Okay. I'll permit the question. Mr.
11 Grice, you may answer.

12 A: I think the answer is no.

13 Q: Then, Mr. Grice, do you know whether or not the
14 average charge per case for all product line is
15 the same as a charge for a specific service?

16 A: I wouldn't know for sure. I would not know how
17 those calculations would result.

18 Q: What is MedPAR?

19 A: You know, I have forgotten. I think it -- I
20 don't know. Right offhand I don't know if it
21 was an acronym or -- I'm not sure.

22 Q: Let's go to the second ground. I think you've
23 talked about ground one, three, and four
24 already. Let's go to the second ground, which
25 is a 100-bed efficiency finding, you remember

1 that one? This is on page 853 -- I'm sorry
2 851, ground two --

3 A: Okay.

4 Q: -- in your decision letter.

5 A: Yes.

6 Q: Says the development of a 100-bed general acute
7 care hospital in York County by Fort Mill
8 Medical Center would result in economies of
9 scale and operating efficiencies that cannot be
10 achieved in small facilities, such as the 64-
11 bed facility proposed by the competing
12 applicants. The initial construction of the
13 larger increment of 100 beds is more cost
14 efficient and that it will alleviate the likely
15 need for follow-up construction for additional
16 beds over relatively -- over a relative short
17 period of time. Did I read that correctly?

18 A: Yes, ma'am.

19 Q: And that is specifically your finding, isn't
20 it?

21 A: It is.

22 Q: And that was not Ms. Fechtel's recommendation
23 to you, was it?

24 A: No, ma'am.

25 Q: Okay. Now, Mr. Grice, only Piedmont Medical

1 Center had existing licensed beds that it could
2 transfer so that Fort Mill Medical Center could
3 get to a compliment of 100 beds, didn't they?

4 A: That's correct.

5 Q: You had some testimony yesterday with questions
6 by Mr. Muller about 100 beds, and I think you
7 said to the effect that you would try to
8 encourage folks with the State Health Plan to
9 have a threshold for new hospitals at 100 beds;
10 is that correct?

11 A: That's correct.

12 Q: Okay. So am I to understand that you went to
13 Mr. Grice to say we need to have a minimum
14 hospital size of 100 beds for a satellite?

15 A: I had talked to Mr. Whiteside about --

16 Q: Mr. Whiteside, I'm sorry.

17 A: Right. And, you know, I know that, you know,
18 it could have been controversial, but I think
19 it's a good idea. I know the State of Georgia
20 does that. And I think it would be beneficial,
21 particularly for the development of new
22 satellite hospitals. As I mentioned yesterday,
23 if we have a replacement of an older existing
24 county hospital, oftentimes they're not 100
25 beds. They've been operating for years at

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1 lower number, 50 or 60, and of course if they
2 were replaced, they could only replace the beds
3 they have. But in developing newer hospitals
4 in an area that's rapidly growing near a
5 metropolitan area, I think it would be good to
6 do at least 100. But we've not reached that
7 level in this state to require in the Plan.
8 But I think there are a lot of benefits related
9 to that. And as I mentioned earlier, I feel
10 like that it is important because I think I
11 mentioned earlier we've seen firsthand where
12 some hospitals have not done well, and I think
13 it is because of too small a total bed number.

14 Q: Let me ask you a couple of things about that,
15 Mr. Grice. First, did you take your idea about
16 the minimum size satellite hospital to the
17 State Health Planning Committee?

18 A: No, ma'am.

19 Q: Just to Mr. Whiteside?

20 A: That's correct.

21 Q: Okay. Now, the State Health Planning Committee
22 in South Carolina has never adopted anything
23 with regard to a minimum size of 100-bed
24 hospital, has it?

25 A: No, it has not.

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1 Q: But, in fact, in the 2008 Plan, did they find
2 that a 50-bed hospital, satellite hospital,
3 would be an economic planning unit?

4 A: They may have. I was not at the Department, I
5 don't think, when that Plan was approved, but
6 that may be true.

7 Q: Now, you also talked about we had examples in
8 South Carolina, and you talked yesterday about
9 Providence and Providence Northeast, remember
10 that?

11 A: Yes, ma'am.

12 Q: Any other example that you could give us?

13 A: I guess Providence Northeast is the most
14 compelling one that I have thought of that I've
15 heard -- that I've been more involved with and
16 heard more people talk about to me personally.
17 And right offhand, some of the other new
18 satellites may have been near 100 but not quite
19 there. I know that we've had applications
20 recently in the state and they may not -- they
21 may be under appeal. But like even I think in
22 Berkeley County there might have been competing
23 ones where I think Roper and Trident might have
24 been applying. And I don't remember the exact
25 bed number, but I think they might have been

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1 less than 100. But here again, if those
2 hospitals had been approved or if one were
3 approved, they would be the only hospital in
4 the county there, and that county is growing.
5 But, and oftentimes an application can be
6 restrained by the number of beds available that
7 a hospital actually can build. And so the
8 fortunate thing here with this application
9 relating to Fort Mill Medical Center is that
10 the applicant had the ability to be able to do
11 the 100 beds. They didn't have to do it, but
12 they, because they had an existing facility
13 where they could transfer beds, they did have
14 the ability to do it.

15 Q: And the other applicants didn't have the
16 ability to transfer existing licenced beds, did
17 they?

18 A: No, ma'am, they didn't.

19 Q: Okay. Now, is the only hospital that you can
20 think of as your example for too small a
21 hospital Providence Northeast?

22 A: That is the one. I mean, there may be others
23 that I don't have as much information on, but
24 Providence Northeast was very small. We're
25 talking about 46 beds to be built as a

1 satellite in a rapidly growing area. That was
2 too small.

3 Q: Mr. Grice, under the 2004-2005 Plan you
4 approved the transfer of, was it 46 or 48 beds
5 at the Village of Pelham from Spartanburg
6 Regional Medical Center to Pelham to establish
7 a new hospital, right?

8 A: That's correct.

9 Q: Okay. You didn't find that that was too small,
10 did you?

11 A: No. And of course, there weren't competing
12 applications either. I mean, that's what they
13 applied for, it was consistent with the
14 standards of the Plan. We had no reason to
15 deny, and it wasn't a competitive thing.
16 Perhaps if there had been another application
17 competing, you know, that would have been an
18 issue.

19 Q: Okay. But under the 2004 Plan, Spartanburg
20 Regional controlled the existing beds, didn't
21 they?

22 A: They did.

23 Q: Now, let me ask you a little bit about
24 Providence Northeast. I think you said you
25 heard from a lot of people. Were those

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1 physicians?

2 A: A lot of physicians who talked to me, and just,
3 I guess, educational wise, the fact if
4 physicians do have to travel to see patients,
5 they want their time to be used wisely and not
6 to be traveling just to see one patient
7 necessarily, particularly when you look at the
8 amount of time it takes. Now, I know a lot of
9 hospitals today have physicians on staff that
10 treat patients and not necessarily any
11 physicians going there. But a lot of times
12 specialists may go in certain instances, so
13 that is a consideration.

14 Q: Okay. Now, there is a real difference between
15 York County and the Richland Lexington Counties
16 in the terms of numbers of acute hospitals,
17 isn't there?

18 A: Yes, ma'am.

19 Q: Okay. York County has one, Piedmont?

20 A: That's correct.

21 Q: Richland County has Providence Northeast,
22 Providence, Baptist, Richland, and Lexington
23 Medical Center is approximately seven miles
24 from Richland, Baptist and Providence downtown,
25 right?

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1 A: That's correct.

2 Q: And so what doctors really don't like to do is
3 have to cover multiple hospitals?

4 A: That is correct.

5 Q: And isn't that one of the reasons that they
6 complained about Providence Northeast and it
7 didn't work very well?

8 A: I am sure it is that. That was for their own
9 personal life, that's true.

10 Q: And that's not the situation in York County, is
11 it?

12 A: Well, you know, here again, it depends on the
13 physician. And even though we only have one
14 hospital in York County, we do have many up in
15 Charlotte, which isn't that far away. A lot of
16 the patients out-migrate to Charlotte and some
17 patients, you know, stay in York County. But
18 physicians, a lot of physicians that are
19 employed by various hospitals in Charlotte
20 practice in South Carolina. It's possible they
21 might, you know, have to see their patient at
22 one hospital or another. But I mean, in a way,
23 even though we're talking about state lines, I
24 think it could be similar in a sense.

25 Q: Well, now, the South Carolina CON Act prohibits

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1 you from giving any, from looking at adverse
2 impact on North Carolina hospitals, correct?

3 A: That is correct.

4 Q: Okay. Now, did you get any letters from
5 physicians that said don't approve another
6 hospital because we don't want to have to round
7 at another hospital?

8 A: I don't recall that in the York County
9 situation.

10 Q: Do you know whether or not Presbyterian's
11 hospital is designed so that it has sufficient
12 ancillary services and mechanical services to
13 be able to increase the size to 100 beds?

14 A: I'm sure it is, because we did a site visit at
15 their facility in Huntersville, which had
16 actually shelled in 50 more -- a space for 50
17 more beds to be a 100-bed facility.

18 Q: What is the JCAHO, part of the Joint
19 Commission?

20 A: Yes.

21 Q: What is it?

22 A: Joint, let's see, Joint Commission on
23 Healthcare. I can't -- I don't know all the
24 words.

25 Q: Okay. Do you know what the Codman Award is?

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- 1 A: What, I'm sorry.
- 2 Q: The Codman Award is?
- 3 A: No, ma'am, not right offhand.
- 4 Q: Do you know whether it's a quality award given
- 5 by Joint Commission?
- 6 A: That sounds reasonable.
- 7 Q: But you don't know.
- 8 A: I don't know.
- 9 Q: Okay. Go to 1494 for a minute, please. Mr.
- 10 Grice, this is out of the Presbyterian
- 11 application, and you remember y'all asked each
- 12 party to designate a point of contact. And I
- 13 was designated to be the point of contact for
- 14 Presbyterian, do you remember that?
- 15 A: Yes, ma'am.
- 16 Q: Okay. And this is a letter asking for
- 17 additional information, isn't it?
- 18 A: It is.
- 19 **MS. CRUM:** Go over to the next page. Highlight --
- 20 no, flip back one more. Skip two pages there.
- 21 Okay. Highlight paragraph five, please.
- 22 Q: Okay. Mr. Grice, isn't it true that the
- 23 Department asked Presbyterian, Carolinas and at
- 24 that point Hospital Partners to identify all of
- 25 its deficiencies, violations, penalties,

1 etcetera, and asked us to include JCAHO
2 inspections?

3 A: Yes, ma'am.

4 Q: That same request was never made to Fort Mill
5 Medical Center, was it?

6 A: No. And I think the reason we made that
7 request to the out-of-state entities is because
8 we didn't have access to any information
9 because they weren't licensed in South
10 Carolina.

11 Q: Doesn't that request go to the record of -- the
12 applicant's record of compliance?

13 A: It does.

14 Q: Okay. Would you go back to Presbyterian
15 Exhibit 13, please, sir, and page 83-BR.

16 A: Okay.

17 Q: Okay. I'm going to read something to you and
18 see if, it's in the last paragraph, it's the
19 second to last sentence. It says, next one,
20 right down here, "Respondents answered setting
21 forth numerous defenses, including the defense
22 that neither Atherton nor the reported class
23 for third-party beneficiaries," gesundheit,
24 "and thus lacked standing to enforce the
25 contract." Except for the gesundheit, did I

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1 read that correctly?

2 A: Yes, ma'am.

3 Q: Do you know whether or not summary judgment was
4 granted in this case because of lack of
5 standing?

6 A: I don't, I don't know.

7 Q: Let's look at page 238-R in Exhibit 13,
8 Presbyterian exhibit.

9 A: Okay.

10 Q: Now, this is a -- does this appear to you to be
11 a lawsuit out of the United States District
12 Court for the Southern District of Florida?

13 A: Yes, it does.

14 Q: Okay. Flip on over if you would to page 243-R,
15 paragraph 25, out of that complaint.

16 A: Okay.

17 Q: It says, "The Tenet hospitals that were part of
18 the inflated charging scheme described in the
19 complaint include--" And if you flip on over
20 to page 244-R, third, second line, third line,
21 do you see Piedmont Medical Center identified?

22 A: Yes, ma'am.

23 Q: Look on over to page 550-R. This is the email
24 from Mr. Andrew's to you and Ms. Fechtel dated
25 May 29th, enclosing the Tenet local settlement

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- 1 materials, isn't it?
- 2 A: I'm having trouble, my 550-R is different.
- 3 I've got to check another page, let me see. I
- 4 have it.
- 5 Q: Okay. Now, you actually got that material
- 6 prior to your decision, right? That came in on
- 7 Memorial Day 2006, didn't it?
- 8 A: Yes. No, that says June 29th.
- 9 Q: Oh, June 29th, I'm sorry. It is part of
- 10 reconsideration then?
- 11 A: Yes.
- 12 Q: And if you will look on over to page 555-R.
- 13 See where it says corporate integrity
- 14 agreement?
- 15 A: Yes.
- 16 Q: What is a corporate integrity agreement, Mr.
- 17 Grice?
- 18 A: I think it may be self-explanatory. From a
- 19 legal standpoint, I don't -- I'm not familiar,
- 20 but I would think it would be an agreement of
- 21 a corporation that would have to do with them,
- 22 you know, being honest and forthright and
- 23 exhibiting integrity. That's what my layman's
- 24 definition would be.
- 25 Q: Okay. And do you know, and if you don't,

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1 that's fine, but do you know whether or not
2 it's an agreement between the Office of the
3 Inspector General from the United States
4 Department of Health and Human Services and a
5 hospital about its conduct?

6 A: That's what this appears to state, yes.

7 Q: Okay. Do you know whether or not there is
8 another hospital in South Carolina that is
9 subject to a corporate integrity agreement?

10 A: I don't know.

11 Q: Look on page 576-R, please, sir. This is
12 letter from Mr. Andrew's -- no, Mr. Westbrook
13 to you. Is that correct?

14 A: Yes, ma'am.

15 Q: Would you just read the first paragraph A-1 in,
16 please?

17 A: York County and Amisub resolved their
18 differences through the eighth amendment to the
19 contract between them (the contract). In the
20 Atherton case cited, the court granted summary
21 judgment for Amisub. Amisub was not a party to
22 the Florida case cited.

23 Q: Do you remember that Florida case cited, it
24 didn't use the term Amisub, but it did say
25 Piedmont Medical Center, didn't it?

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- 1 A: Yes, ma'am, it did.
- 2 Q: Mr. Grice, I'm just about finished here. If
- 3 you would look at page 299-R.
- 4 A: Okay.
- 5 Q: From 299-R through 328-R are various, I guess,
- 6 blogs and emails and stuff posted in York
- 7 County after the May 30th decision, correct?
- 8 A: Yes, ma'am.
- 9 Q: And is that something that you read prior to
- 10 your reconsideration determination?
- 11 A: I was familiar. In fact, I had followed the
- 12 blogs through the review. So, yes, I was
- 13 familiar with the controversy. And a lot of
- 14 this, of course we know blogs are not always
- 15 deal with those intelligent people in the
- 16 community, but yes, I was familiar with this.
- 17 Q: Okay. So let me let you look at page 301-R.
- 18 Read, do you see where it says "field of
- 19 springs"?
- 20 A: Yes.
- 21 Q: "DHEC did not listen to the people. Only to
- 22 the owners of the land where the hospital is
- 23 going to be built. This is not the field of
- 24 dreams, but the field of springs. Just because
- 25 they built it does not mean that they will

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1 come. DHEC doesn't seem to care if the care at
2 Piedmont is poor. We are accustomed to going
3 across the state line for quality care so we
4 will continue to do so. As for the increase
5 in the beds coming to Fort Mill, it is because
6 they can't fill them in Rock Hill. And they
7 can't keep staff there to keep them open." Did
8 I read that accurately?

9 A: Yes, ma'am, you read the words accurately.

10 Q: Did you consider that?

11 A: I was aware of the feeling of people, some
12 people. You know, everybody has their
13 perception. As I mentioned earlier, there had
14 been a lot of talk in the community, a lot of
15 newspaper information stirring up concern and
16 I was aware of that. And, you know, I think
17 every, as we mentioned yesterday, every
18 hospital probably in this country have someone
19 or many former patients who had unfortunate
20 poor experiences, and that's just they way of
21 life unfortunately, it's not a perfect world.
22 But I was aware of the feeling, the feeling a
23 lot of the people felt that there should be an
24 option, there should be a, you know, some other
25 provider other than Amisub in York County.

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1 However, there were choices, you know, in
2 Charlotte too, that weren't that far away. But
3 I felt like the decision that we made was the
4 best one for the citizens of York County in the
5 development of a hospital at this time.

6 Q: There was no other -- there is no other choice
7 for acute care inpatient services in York
8 County as we sit here today, is there?

9 A: Not in York County, that's correct.

10 Q: Now, Mr. Grice, yesterday in a line of
11 questioning from Mr. Muller, he asked you about
12 why you didn't tell the applicants that they
13 couldn't be approved under the State Health
14 Plan, remember that line of questioning?

15 A: I do.

16 Q: And you said, and I'm just paraphrasing here,
17 correct me if I paraphrase it incorrectly,
18 okay?

19 A: Okay.

20 Q: That you didn't tell the hospitals, the big
21 hospitals, or their attorneys, because they
22 could look at the Plan and determine what the
23 Plan meant, remember that?

24 A: That was what I had mentioned at one time.
25 Certainly, we did not encourage the applicants

1 to apply. They contacted us, that was the
2 interest they had. I'm sure they had contacted
3 their attorneys and their health -- the
4 planners that were on staff at the hospitals
5 ahead of time. We did not tell them to take
6 their application back. We don't have the
7 authority to do that. They submitted, we
8 reviewed them competitively. And, you know, I
9 am not going -- I didn't want to make a
10 judgment prematurely, many things could happen,
11 and we made the best decision, reviewed them
12 competitively. I knew we'd end up having this
13 reviewed in court like we are today. And I
14 guess that's why we're here, because, you know,
15 this has got to be a very emotional situation
16 just like the blogs we're looking at, and there
17 was a lot of stir in the community coming from
18 the various applicants stirring up people.
19 I've seen this happen before. But putting that
20 all aside, my opinion is we made the best
21 decision based on the best product, the best
22 size facility, the best applicant for York
23 County at this time.

24 Q: Let me go back to my question, Mr. Grice. As
25 I understood your testimony, you said you

1 didn't tell the hospitals or their attorneys
2 because they could go look at the Plan that
3 they couldn't be approved. I'm not talking
4 about applying; that they couldn't be approved.
5 You testified it wasn't your job to do that,
6 didn't you?

7 A: I don't know that I said it wasn't my job to do
8 that. I don't think it's appropriate. They
9 made a decision to apply, and I think it would
10 have been premature for me to tell them that
11 we're going to deny them, that they are
12 inconsistent with the Plan. We must remember
13 that I testified, that I tried to be open, I
14 tried to have the Health Plan, some
15 interpretations. Even Mr. Frishman told me
16 after, you know, the memorandum that I did was
17 rescinded that we were going to go to the
18 Health Planning Committee, there could have
19 been other options. And I think it would be
20 premature and improper for me to have told
21 applicants that they're inconsistent. I made
22 that decision to put that in the -- in the
23 letters I mentioned, when the decision letter
24 was done, but the decision itself was based on
25 competitiveness. But I elected to put the Plan

1 as a reason.

2 Q: Mr. Grice, my question to you is, if you
3 wouldn't tell Presbyterian and Carolinas that
4 in your opinion of the Plan they didn't meet
5 the Plan requirements, why is it when FMMC came
6 in and asked you whether or not they could
7 withdraw their application and reapply, you
8 told them it was okay?

9 A: That is a question they asked that was
10 consistent with the Regulations. If either
11 Presbyterian or Carolinas had come in and asked
12 a similar question that would have worked
13 appropriately, I would have told them the same
14 thing.

15 Q: Didn't we have testimony yesterday that
16 Carolinas met with you as late as April of 2006
17 and you assured them that they could still be
18 approved under the Plan?

19 MR. WESTBROOK: Objection. Mischaracterization. I
20 don't recall that testimony at all.

21 Q: Mr. Grice, remember me --

22 A: I don't remember.

23 THE COURT: I'll allow the question.

24 A: I don't remember those exact words that I told
25 somebody they could be approved under the Plan.

1 Let me say this. We reviewed them
2 competitively. And I tried to make the Plan
3 not be an issue, but it's there, it is an
4 issue. And I certainly -- I think it would be
5 highly improper and I think the applicants
6 would have been very offended if I had told
7 them we are going to deny you because my
8 interpretation that the Plan is -- you're
9 inconsistent with the Plan. I tried to have
10 that memorandum that would accommodate
11 everyone; that didn't fly. But I still was
12 open, and many things could have happened
13 during the review process that might have
14 changed everything. But as it ended, we made
15 the decision competitively and I decided to
16 address the Plan also. Because of
17 considerations by Mr. Frishman and Ms. Fechtel,
18 I thought about not even addressing the Plan,
19 but I did.

20 Q: Mr. Grice, you said many things to the
21 applicant during the review process. Other
22 than the State Health Planning Committee and
23 the Board changing the Plan, what could have
24 happened during the review process, using your
25 interpretation of the Plan, that would have

1 made either Presbyterian or Carolinas
2 approvable?

3 A: Well, here again, this is based on what could
4 have happened in my opinion. If for some
5 reason Piedmont Medical Center had withdrawn,
6 if Amisub had withdrawn, we'd have three
7 applications left, and technically, if we look
8 at it, they wouldn't have been approvable
9 based on what we've discussed here, but it's
10 possible. You know, whatever might have
11 happened, if Tenet Healthcare had been sold, or
12 whatever, it could have been that an applicant
13 could have gone to Piedmont and said can we do
14 a joint venture, can we have those beds. Now,
15 I know there's some question about whether or
16 not the Health Plan, whether that would have
17 been consistent with the actual standards in
18 the Health Plan, but I think under some
19 circumstances it possibly could be.

20 Q: Mr. Grice, none of them would have been
21 competitive applicants in the review cycle,
22 would they? This scenario that you just gave
23 us.

24 A: I'm sorry. Now, what was that again?

25 Q: If you -- the scenario, the scenario that you

1 just gave us, if somebody wanted to come in and
2 do a joint venture or something like that, they
3 wouldn't have been competitive applicants in
4 the review cycle, would they?

5 A: No. But let's say this. They were competitive
6 and let's suppose a month before the decision,
7 let's say, this is hypothetical, if for some
8 reason Piedmont withdrew their application.
9 We'd have three applications. Those applicants
10 could have made whatever decision, they could
11 decide to withdraw themselves, reapply, or
12 whatever. But I mean, I don't think -- I don't
13 think it would be proper for me to make that
14 kind of interpretation that early. And as I
15 said, my goal was to review them competitively,
16 which I did.

17 Q: One last question. Under the Plan, as you
18 interpret it, there is no way that Presbyterian
19 or Carolinas could be approved for the 64-bed
20 need in York County, could they?

21 A: That is correct. That was my decision on May
22 30, 2006.

23 Q: Thank you, sir.

24 THE COURT: Is that it, Ms. Crum?

25 MS. CRUM: Yes, ma'am.

1 THE COURT: All right. Would you like to take a
2 break, Mr. Westbrook, before we begin or are
3 you ready?

4 MR. WESTBROOK: Maybe five minutes.

5 THE COURT: Sure. Let's take five minutes.

6 (A short break was taken.)

7 THE COURT: All right, Mr. Westbrook, you may begin
8 your cross-examination.

9 MR. WESTBROOK: Thank you, Your Honor.

10 MR. GRICE - CROSS-EXAMINATION BY MR. WESTBROOK:

11 Q: Mr. Grice, I'm Dan Westbrook. I'm representing
12 Amisub in this case. Just a -- I'd like to
13 start off with just a couple of sort of points
14 I wanted to clarify or ask you to clarify with
15 respect to a couple of Ms. Crum's questions
16 towards the end. The corporate integrity
17 agreement that she asked you about, are you
18 familiar with that document?

19 A: No, sir, not in detail, no.

20 Q: I believe she asked you if any other hospitals
21 in South Carolina had ever been covered or
22 subject to a corporate integrity agreement. Do
23 you recall that question?

24 A: Yes, sir. I do.

25 MS. CRUM: Excuse me, Your Honor. I object to that

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 06-ALJ-07-0713-CC

Charlotte-Mecklenburg Hospital Authority)
d/b/a Carolinas Healthcare System and)
Presbyterian Healthcare System d/b/a)
Presbyterian Hospital-York, LLC)

Petitioners,

v.

South Carolina Department of Health)
and Environmental Control, and Amisub of)
South Carolina, Inc. d/b/a Piedmont)
Healthcare System d/b/a Fort Mill)
Medical Center,)

Respondents.

COPY

VOLUME THREE OF FIVE

ADMINISTRATIVE HEARING

September 9th, 10th and 11th, 2009
September 14th through 17th, 2009
September 21st through September 25th, 2009

The administrative hearing before the Honorable Carolyn C. Matthews was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the aforementioned days in September 2009, before Christine A. Cortright, Court Reporter and Notary Public, in and for the State of South Carolina, and Andie R. Taylor, Court Reporter and Notary Public, in and for the State of South Carolina.

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1 Plan, do you remember that?

2 A: Yes, ma'am.

3 Q: Well, hospital is a defined term in the general
4 acute bed need section of the 2004-2005 Plan,
5 isn't it?

6 A: It is.

7 Q: Okay. And the hospital is the facility
8 organized and administered to provide overnight
9 medical and surgical care, right?

10 A: That's correct.

11 Q: Okay. And in determining the bed need, the
12 Department uses a formula that actually looks
13 to the hospital's historic utilization of
14 patients that are treated at the facility,
15 right?

16 A: That's correct.

17 Q: There's not a specific provision in the 2004
18 Plan that authorizes the transfer of additional
19 -- for example, the 64 additional bed need
20 that's shown for Piedmont Medical Center, is
21 there?

22 A: No, ma'am. There is not specific language in
23 that regard and -- and, you know, the
24 Department has limited staff to develop the
25 Plan. This was a very difficult Plan. It took

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1 probably more than two years to have this one
2 approved and, you know, so there are oftentimes
3 new situations occur in the state where the
4 Department really has to make some
5 interpretations to really do effective health
6 planning. So that particular situation isn't
7 specified in detail, but it is -- it is a
8 provision that we have allowed in the past.

9 Q: So it's an interpretation that you made in the
10 2004-5 Plan to allow the transfer of 64 beds
11 from Piedmont Medical Center to a new facility,
12 Fort Mill Medical Center?

13 A: Yes, because those beds, new beds, were
14 basically institutionally at Piedmont and
15 Piedmont had an option, in our opinion, either
16 add those beds at the existing facility or
17 relocate them since it was a substantial
18 number. And if we didn't have that kind of
19 revision and we never were flexible, it would
20 be that existing county hospitals would become
21 mega-hospitals and we'd have -- we would not
22 increase accessibility in growing areas to the
23 population.

24 Q: And I believe you also testified that Piedmont
25 had the option, not only of transferring the

1 beds to Fort Mill Medical Center, but of
2 entering into an agreement and transferring
3 them to another entity, for example
4 Presbyterian, or selling the bed need to
5 Presbyterian; is that correct?

6 A: The Plan doesn't go into that detail either.
7 I think in my --

8 Q: But that's what you testified to.

9 A: Yes, ma'am. In my opinion, I think that could
10 be a possibility.

11 Q: All right. And you've talked an awful lot
12 about commitment to the community and you used
13 the contract between York County and Amisub
14 Tenet as demonstrating the commitment to the
15 community, right?

16 A: Yes, ma'am.

17 Q: I haven't heard you define community. Do you
18 mean York County since the contract is between
19 York County Council and Amisub Tenet?

20 A: I think that would be accurate, yes. Because
21 Piedmont Medical Center, basically, is the only
22 hospital in York County and that -- that
23 contract is between the County Council and
24 Amisub.

25 Q: Now, you've talked a lot about adverse impact

ADMINISTRATIVE LAW COURT

Petitioners.

v.

South Carolina Department of Health and
Environmental Control and Amisub of
South Carolina, Inc. d/b/a Piedmont
Healthcare System d/b/a Fort Mill Medical
Center.

Respondents.

Docket No. 06-ALJ-07-0713-CC

PETITIONER CAROLINAS
HEALTHCARE SYSTEM NOTICE
OF MOTION AND MOTION FOR
SUMMARY JUDGMENT

PLEASE TAKE NOTICE that the above-named Petitioner, Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System ("CHS"), by and through its undersigned attorneys, and pursuant to Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court and Rules 10(c) and 56 of the South Carolina Rules of Civil Procedure, will move before the Presiding Judge of the Administrative Law Court, at such place, date and time as the parties may be heard, for an Order granting summary judgment in its favor in these contested cases involving a Certificate of Need to build and operate a new hospital in York County, South Carolina. The grounds for this motion are set forth in the attached memorandum of law, which is submitted simultaneously herewith and incorporated as if fully set forth herein.

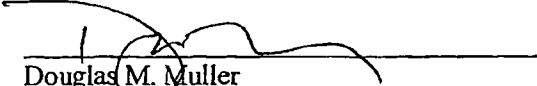
PLEASE BE PRESENT TO DEFEND IF SO MINDED.

100

MAY 2 - 2007

W. B. BARNES, LAW CO.

Respectfully submitted,



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Hospital Authority d/b/a Carolinas HealthCare
System

May 18, 2007
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charlotte-Mecklenburg Hospital Authority,
d/b/a Carolinas HealthCare System and
Presbyterian Healthcare System, d/b/a
Presbyterian Hospital-York, LLC,

Petitioners,

v.

South Carolina Department of Health and
Environmental Control and Amisub of
South Carolina, Inc. d/b/a Piedmont
Healthcare System d/b/a Fort Mill Medical
Center,

Respondents.

Docket No. 06-ALJ-07-0713-CC

MEMORANDUM OF
PETITIONER CAROLINAS
HEALTHCARE SYSTEM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

Petitioner, Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System ("CHS"), submits this memorandum in support of its motion under Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court ("ALC") and Rules 10(c) and 56 of the South Carolina Rules of Civil Procedure for summary judgment in these contested cases involving a Certificate of Need ("CON") to build and operate a new hospital to be built and operated in York County, South Carolina.

I. STATEMENT OF UNCONTESTED MATERIAL FACTS

This case arises from a dispute over who is eligible to apply for a CON to fill a 64-hospital-bed-need in York County, South Carolina. The South Carolina Department of Health and Environmental Control ("SCDHEC") has decided that only the existing hospital in York County, Piedmont Medical Center ("Piedmont") in Rock Hill, has a demonstrated need under the applicable South Carolina Health Plan, and that only Piedmont can ask for, and receive, the hospital beds and the CON. Despite SCDHEC's decision, SCDHEC has awarded the CON to

another, newly created but non-operating entity, Fort Mill Medical Center ("FMMC") in Fort Mill, and it has declared that all other CON applicants are ineligible to be approved to build and operate a new hospital in York County because they do not have an existing hospital in York County.

A. CON Application Chronology and Procedural History:

On October 15, 2004, the 2004-2005 South Carolina State Health Plan (the "2004-2005 SHP") went into effect. Using a formula set out in the 2004-2005 SHP, an additional sixty-four (64) hospital beds were identified as needed in York County, South Carolina based on the population growth in that county. As of October 15, 2004 and through today, there is only one (1) hospital currently located in York County – Piedmont, in Rock Hill.

On November 22, 2004, FMMC filed its first CON application for a new hospital containing sixty-four (64) hospital beds. On March 11, 2005, three (3) other applicants – CHS, Presbyterian Healthcare System d/b/a Presbyterian Hospital – York ("Presbyterian") and Hospital Partners of America ("HPA") – each timely filed a CON application to build and operate a new York County hospital containing sixty-four (64) hospital beds. CHS' CON application, Presbyterian's CON application, and HPA's CON application were subsequently deemed by SCDHEC to be "competing" with FMMC's CON application.

On October 5, 2005, FMMC withdrew its first CON application to build and operate a sixty-four (64) hospital bed hospital, and the next day FMMC filed a second CON application to build and operate a one-hundred (100) hospital, which included its initial request for sixty-four (64) hospital beds, together with the transfer of an additional thirty-six (36) hospital beds from Piedmont's existing hospital in Rock Hill.

On May 30, 2006, following SCDHEC project review in March of 2006, SCDHEC issued a letter to FMMC approving its CON application to build and operate a one-hundred (100)

bed hospital (the "Proposed Decision"), and issued separate letters to CHS, to Presbyterian, and to HPA denying their respective CON applications to build and operate a sixty-four (64) bed hospital in York County.

On June 12, 2006, CHS timely requested a contested case hearing to challenge SCDHEC's Proposed Decision. Also on June 12, 2006, Presbyterian requested reconsideration of SCDHEC's Proposed Decision. HPA chose not to contest SCDHEC's Proposed Decision.

On July 11, 2006, SCDHEC denied Presbyterian's request for reconsideration of SCDHEC's Proposed Decision. On July 25, 2006, Presbyterian submitted a request for a final review conference to the SCDHEC Board (Board Docket Number 06-RFR-10). On August 24, 2006 (with a written memorandum following dated August 31, 2006), the SCDHEC Board, acting within its power, decided not to conduct a final review conference, thus rendering the Proposed Decision a final agency decision ("Final Agency Decision").

Presbyterian thereafter, on September 7, 2006, requested a contested case hearing to challenge SCDHEC's Final Agency Decision.

The contested case hearings filed by CHS and Presbyterian were consolidated on January 10, 2007, and the consolidated cases were re-organized under a new case number set forth in the caption above. The instant motion is related to "Phase I" of a bifurcated discovery process, as set forth in the Consent Scheduling Order dated January 5, 2007.

B. CHS' Application and Decision Process by SCDHEC:

CHS is a non-profit, self-supporting public healthcare system that is the largest healthcare system in North and South Carolina, and the third largest public healthcare system in the United States. CHS owns, leases and manages hospitals, nursing homes, physician practices, home health agencies, radiation therapy facilities, physical therapy facilities, and other healthcare

related operations which together comprise more than 4,100 licensed beds and approximately 25,000 employees. CHS' headquarters are in Charlotte, Mecklenburg County, North Carolina, immediately adjacent to York County, South Carolina. CHS has an existing presence in York County through its ownership and operation of several physician practices in York County, and its participation (as a joint venturer) in a radiation therapy center in York County. See generally <http://www.carolinashealthcare.org>.

Joel Grice is the SCDHEC Director of Bureau of Health Facilities and Services Development (the "Bureau"). See Exhibit A (Joel Grice ("Grice") Depo., p. 6, lines 20-25). The Bureau's main function is to administer the CON program in South Carolina. Id. (Grice Depo., p. 7, lines 8-18). Mr. Grice is the person who is ultimately responsible for making CON decisions (awards and denials) in South Carolina. Id. (Grice Depo., p. 8, lines 2-6).

After the 2004-2005 SHP was published in October of 2004, various healthcare providers began to inquire of SCDHEC whether the bed need shown in York County could be filled through a CON application for a new hospital by an applicant other than Piedmont. CHS, through its Vice President, Del Murphy, asked Mr. Grice whether CHS was eligible to apply for a new hospital to accommodate the 64-bed need in York County, and he was told by Mr. Grice that any provider was eligible to be approved for a CON for the bed need, and specifically that CHS could apply. See Exhibit B (Del Murphy ("Murphy") Depo., p. 27, line 20-p. 32, line 13). In response to the inquiries from CHS and other healthcare providers, Mr. Grice issued a memorandum on January 25, 2005, in which he stated "*[a] CON for the net hospital bed need in a county may be requested and approved for any existing hospital located in the county, or for any other entity/applicant, for the development of a new hospital or an addition to an existing hospital within that county.*" See Exhibit C (January 25, 2005 Grice Memorandum) (emphasis

added); see also Exhibit A (Grice Depo., p. 22, lines 8-23; p. 24, lines 15-22; p. 25, line 6-p. 27, line 11; p. 28, lines 5-11; p. 29, line 9-p. 31, line 15; p. 44, lines 9-20). Thereafter, CHS at significant expense readied its application for a CON to build and operate a new hospital in York County.

On March 3, 2005, Mr. Grice issued another memorandum that was intended to rescind his previous memorandum of January 25, 2005. See Exhibit D (March 3, 2005 Grice Memorandum); Exhibit A (Grice Depo., p. 31, line 18-p. 32, line 4; p. 32, line 21-p. 33, line 23). This memorandum stated simply that “[t]he aforementioned decision to rescind the policy was determined after further study and discussion relating to hospital bed need planning issues with [SCDHEC’s] Office of General Counsel.” Exhibit D. The memorandum further stated that SCDHEC planned to convene the South Carolina State Health Planning Committee “in order to seek their recommendations as to the most beneficial method to resolve and clarify any further issues that may occur regarding hospital bed need methodology interpretation.” Id. (emphasis added).

On March 11, 2005, SCDHEC accepted the CON applications from CHS, Presbyterian and HPA to build and operate a new, 64-bed hospital in York County, together with the filing fees associated with those applications. See Exhibit A (Grice Depo., p. 53, lines 7-14); Exhibit E (Mary Fechtel (“Fechtelt”) Depo., p. 30, lines 9-25). At no time during the filing of these applications, or at any time prior to May 30, 2006, did SCDHEC indicate to any of the applicants that they were ineligible to apply for a CON for the existing bed need. See, e.g., Exhibit A (Grice Depo., p. 59, line 15-p. 60, line 5; p. 68, line 2-p. 70, line 6); Exhibit B (Murphy Depo., p. 27, line 20-p. 32, line 13; p. 38, line 22-p. 40, line 14; p. 41, line 17-p. 42, line 7; p. 45, lines 11-15; p. 48, line 18-p. 49, line 19; p. 50, line 17-p. 52, line 20).

The State Health Planning Committee subsequently met and received public comment on the hospital bed need methodology in the 2004-2005 SHP. As part of this process, CHS (through Del Murphy) submitted a written comment. Mr. Murphy testified that he viewed the health planning process as an attempt to clarify the hospital bed need methodology, and not as an attempt to change the eligibility of who may apply for a CON to build and operate a hospital. See Exhibit B (Murphy Depo., p. 33, line 4-p. 35, line 14).

Albert Whiteside is the SCDHEC Director of Division Planning and Certificate of Need. Mr. Whiteside has the primary responsibility for state health care planning in South Carolina, and he is the lead SCDHEC staff member who considers changes to the South Carolina State Health Plan and presents them to the State Health Planning Committee for approval before presenting the final plan to the SCDHEC Board.¹

On November 3, 2005, as the result of its meeting and public comments, Mr. Whiteside issued a Memorandum on behalf of the State Health Planning Committee which stated:

"No changes should be made to the 2004-2005 South Carolina Health Plan. Certificate of Need (CON) staff should review CON applications for additional general hospital beds and/or facilities utilizing the current bed need methodology of the 2004-2005 South Carolina Health Plan in conjunction with the Project Review Criteria as outlined in Regulation No. 61-15, Certification of Need for Health Facilities and Services, in order to make CON decisions that are in the best interest of the public. In addition, the staff will review this section of the Plan in detail to recommend any modifications for future considerations by the South Carolina State Health Planning Committee as the new calculations and bed need section of the Draft Plan are formulated during the coming year."

Exhibit H (November 3, 2005 Whiteside Memorandum).

From the time of initial filing of the "competing" CON applications in early March of 2005 until a decision was made on the applications on May 30, 2006 (a period of approximately

¹ Mr. Whiteside testified to his job title and responsibilities in a brief beginning to his deposition in this matter on February 13, 2007, which was reconvened to a later date. The February 13, 2007 testimony has not, as of this date, been transcribed by the court reporter. CHS will submit deposition excerpts at a later date, if necessary, supporting this testimony.

fifteen (15) months), SCDHEC never advised CHS, Presbyterian or HPA that its interpretation of the "unchanged" 2004-2005 SHP meant that they were ineligible for a CON. See Exhibit A (Grice Depo., p. 59, line 15-p. 60, line 5; p. 68, line 2-p. 70, line 6); Exhibit B (Murphy Depo., p. 27, line 20-p. 32, line 13; p. 38, line 22-p. 40, line 14; p. 41, line 17-p. 42, line 7; p. 45, lines 11-15; p. 48, line 18-p. 49, line 19; p. 50, line 17-p. 52, line 20). SCDHEC's review process included repeated requests by SCDHEC for additional information from CHS (see Exhibit B (Murphy Depo., p. 19, line 14-p. 20, line 1), together with site visits by SCDHEC to CHS' facilities in North Carolina. Id. (Murphy Depo., p. 18, lines 13-16). SCDHEC did the same with the other hospital applicants. On August 5, 2005, CHS, Presbyterian, and HPA were notified by SCDHEC that their CON applications were deemed to be "complete." See Exhibit I (August 5, 2005 Notification of Completeness to CHS); Exhibit E (Fechtel Depo., p. 31, lines 11-15). A comprehensive CON project review meeting was conducted by SCDHEC on March 23, 2006, and it included representatives on behalf of all of the applicants, as well as numerous SCDHEC staff members.

At no point in this lengthy process were any of the applicants told they were ineligible to qualify for a CON to build and operate a new hospital in York County under the 2004-2005 SHP. See Exhibit A (Grice Depo., p. 59, line 15-p. 60, line 5; p. 68, line 2-p. 70, line 6); Exhibit B (Murphy Depo., p. 27, line 20-p. 32, line 13; p. 38, line 22-p. 40, line 14; p. 41, line 17-p. 42, line 7; p. 45, lines 11-15; p. 48, line 18-p. 49, line 19; p. 50, line 17-p. 52, line 20). In fact, both Mr. Grice and the SCDHEC staff member assigned to review the applications, Mary Fechtel, testified that they never even thought about eligibility under the 2004-2005 SHP until shortly before the decision was made. See Exhibit A (Grice Depo., p. 72, lines 9-21; p. 94, line 24-p. 95, line 10; p. 161, lines 12-24; p. 168, line 15-p. 171, line 22); Exhibit E (Fechtel Depo., p. 15, line

13-p. 16, line 2; p. 50, line 16-p.51, line 9; p. 53, lines 21-22). Mr. Grice and Ms. Fechtel determined, in May 2006 apparently, that since the planning unit for the hospital bed need methodology was based on the "facility" rather than the "county," only the "facility" demonstrating the bed need in the 2004-2005 SHP was eligible to apply for a CON. Exhibit A (Grice Depo., p. 77, line 17-p. 78, line 4; p. 109, lines 3-10); Exhibit D (Fechtels Depo., p. 22, lines 5-21; p. 50- line 16-p. 51, line 9).

Because of the fact that Piedmont operates the only hospital in York County, the applications of all four (4) hospital applicants received a great deal of public and media scrutiny. Mr. Grice was repeatedly quoted in area newspapers as stating that any applicant could apply, and in an article written in the Rock Hill newspaper *The Herald* on March 19, 2006, he stated "*I think any one of these applications is approvable.*" See Exhibit J (March 19, 2006 Article); Exhibit A (Grice Depo., p. 12, lines 12-17; p. 59, lines 2-8; p. 97, lines 5-17).

In the May 30, 2006 decision letters in which SCDHEC granted a CON to FMMC and denied the CON applications of CHS, Presbyterian and HPA, SCDHEC stated four (4) grounds for approval of FMMC and for denial of the other applicants. See Exhibit K (three (3) decision letters of FMMC, Presbyterian and CHS). The first three (3) grounds were based upon SCDHEC's opinion that Piedmont (rather than FMMC) had an existing presence in the community, an existing contract with York County, and that its development of a larger facility would benefit the community as a whole and be more efficient. *Id.* As a fourth basis, the decision letter further stated that FMMC:

"...is the only project of the competing CON applications that is consistent with the hospital bed need methodology as specifically outlined in the 2004-2005 S.C. Health Plan. The aforementioned Plan uses individual facilities as the unit calculation of bed need instead of the county. Therefore, the bed need for York County, as indicated in the 2004-2005 S.C. Health Plan, is based on Piedmont Medical Center as the planning unit,

not York County. The number of bed needs is based on the service area and market share of Piedmont Medical Center, not the entire medical patient population in York County."

Id.

In effect, SCDHEC's decision to grant a CON to FMMC and to deny the CON applications of the other hospital-applicants was based on its belief that only FMMC was eligible for the CON under the 2004-2005 SHP, and that because Piedmont : (a) demonstrated a bed need in its Rock Hill facility; and (b) was operating an existing hospital in York County, only FMMC should be awarded the CON for a new facility in Fort Mill. See, e.g., Exhibit A (Grice Depo., p. 10, lines 13-18; p. 11, line 16-p. 12, line 3; p. 105, lines 8-11).

In his deposition in this case, Mr. Grice admitted that the Fort Mill hospital proposed by FMMC would have to be separately licensed from the existing Piedmont facility in Rock Hill and that it would be a distinct facility from the existing Piedmont facility in Rock Hill. See Exhibit A (Grice Depo., p. 99, lines 11-17; p. 99, line 24-p. 100, line 2); see also Exhibit E (Fechtel Depo., p. 60, line 25-p. 61, line 8). Similarly, Dennis Gibbs, the Director of the Division of Health Licensing, also testified in his deposition in this case that the proposed FMMC would require a separate license. See Exhibit L (Dennis Gibbs ("Gibbs") Depo., p. 6, lines 1-2; p. 13, line 23-p. 15, line 6); Exhibit F (March 7, 1995 Memorandum of John T. McNeely).

C. Development of Bed Need Methodology in the South Carolina State Health Plan:

Mr. Whiteside testified that the bed need methodology sections of the State Health Plan changed during the drafting of the 2003 South Carolina State Health Plan in response to changes requested by several hospitals, including the Georgetown Hospital System, Tuomey Healthcare System in Sumter, and the Greenville Hospital System. These hospitals submitted comments to SCDHEC that were initially focused on a provision in the South Carolina State Health Plan that

allowed existing hospitals to add up to an additional fifty (50) beds as an "efficient addition" exception to the general rules requiring demonstration of county need. Exhibit G (Albert Whiteside ("Whiteside") Depo., p. 7, line 5-p. 15, line 5).

In response, the SCDHEC health planning staff recommended changes to the language in the draft 2003 Plan that addressed general hospital bed need, primarily to address what Mr. Whiteside termed the "Florence Rule." Using Florence County as an example, he noted that when State Health Planning was calculated by county need, there were some hospitals in the county that were efficient and productive and which demonstrated a bed need, while other hospitals were less efficient and showed a negative bed need. As a result, the entire county might, if assessed county-wide, show that no beds were needed, while a particular facility might very well have a demonstrated need. Id. (Whiteside Depo., p. 25, line 21-p. 27, line 8).

As a result of the "Florence Rule," the SCDHEC staff decided to make changes to the draft 2003 Plan to reflect that bed need methodology was based on facility planning, rather than on county-wide planning. Id. (Whiteside Depo., p. 25, lines 1-25). The formula for calculating bed need was unchanged, but changes were made to the text of the South Carolina State Health Plan to remove references to the county as the unit of planning. Id. (Whiteside Depo., p. 22, line 4-p. 25, line 16). Additionally, in the actual section in which bed need was calculated, totals were removed for each county so that the focus was on the facility need, rather than on county-wide need. Id. (Whiteside Depo., p. 24, lines 15-21).

Mr. Whiteside testified that these changes were not intended to prevent a new healthcare provider from applying for a CON for demonstrated bed need in a particular county. Id. (Whiteside Depo., p. 30, line 22-p. 31, line 5; p. 31, line 22-p. 32, line 1). Significantly, Mr. Whiteside did not interpret the changes to the State Health Plan as precluding new providers

from competing for a CON to build and operate a new hospital, and his belief was that new providers like CHS or Presbyterian could apply for a demonstrated bed need and be consistent with (and approved under) the 2004-2005 SHP. Id. (Whiteside Depo., p. 34, line 10-p. 35, line 14; p. 46, line 22-p. 47, line 5). Mr. Whiteside further testified there is nothing in the 2004-2005 SHP that would prohibit a new hospital provider from applying for new beds. Id. (Whiteside Depo., p. 127, lines 13-16).

Mr. Whiteside testified that the "county-wide" bed need formula used in 2001 was virtually identical to the "facility only" hospital bed need formula used in the 2004-2005 SHP. Id. (Whiteside Depo., p. 123, lines 3-25). The number of hospital beds needed was calculated in exactly the same manner, and in fact the only changes to the State Health Plan from 2001 to 2004-2005 had been a change in some of the terminology, but there was no change in the fundamental manner in which bed need was calculated. Id. (Whiteside Depo., p. 124, line 23-p. 125, line 16). In single hospital counties such as York County, the actual calculation for hospital bed need in 2001 was identical to the calculation made in 2004-2005, other than the fact that the variable numbers (such as projected population growth) had changed. Id. (Whiteside Depo., p. 125, lines 11-16). In effect, the basic formula used to calculate hospital bed need methodology was unchanged in the 2001 and 2004-2005 versions of the South Carolina State Health Plan. Id. (Whiteside Depo., p. 126, line 25-p. 127, line 12).

II. ARGUMENT AND CITATION OF AUTHORITY

A. SCDHEC's CON Staff Interpretation of Eligibility Under the 2004-2005 SHP is Plainly Incorrect and Contradicts the Interpretation Given by SCDHEC's Director of Health Planning:

In its May 30, 2006 decision letter, SCDHEC based its decision to deny a CON to CHS on the premise that the 2004-2005 SHP only allows the facility that has a demonstrated hospital bed need in the plan to apply for new beds. In fact, there is no specific language in the 2004-

2005 SHP which prohibits any hospital entity from applying for the hospital beds. Instead, the existing hospitals in this state are inventoried to determine an estimated bed need using a formula that takes into account projected populations in the county, an estimated occupancy rate based on the size of the hospital, and historical utilization at the inventoried hospitals. The existing hospitals in each county *have* to be used as a planning unit, as obviously there can be no data of that type from a new facility which does not yet exist.

In the 2004-2005 SHP, the methodology by which hospital bed need is calculated is virtually identical to the methodology used in the 2001 SHP, with only minor variations. The primary difference is that the hospital, rather than the county itself, is now used as the "planning unit" in order to deal with what Mr. Whiteside referred to as the "Florence Rule," which was intended to address the narrow situation in which a thriving hospital could not apply for new beds because the county-wide need was not sufficient. In counties like York County, however, the methodology used in the 2001 SHP is identical to the methodology used in the 2004-2005 SHP, with the only difference being that the population projections have changed, and the occupancy rates have changed.

Mr. Whiteside, who is in charge of planning for the State Health Planning Committee, testified that the change from a "county" planning unit to a "hospital" planning unit was not intended to mean that a new entity could not apply for a demonstrated bed need shown in a particular county or at a particular hospital. By contrast, Mr. Grice has admitted that he is not authorized to provide policy interpretations on the interpretation of the 2004-2005 SHP. Exhibit A (Grice Depo., p. 33, lines 5-23). In this particular case, Mr. Grice's own interpretation of the 2004-2005 SHP was plainly incorrect. In his May 30, 2006 decision letter, Mr. Grice stated that *"the number of bed needs is based on the service area and market share of Piedmont Medical*

Center, not the entire medical patient population in York County.” In fact, bed need in the 2004-2005 SHP uses a methodology that factors in: (a) the projected population in York County; (b) age ranges of the population in York County; (c) a standard occupancy rate; and (d) an historical utilization rate at Piedmont, which is currently the only hospital in Rock Hill from which data could be drawn.

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.

Mr. Grice acknowledged in his testimony that it was not his intent to stifle competition among healthcare providers, and Mr. Whiteside made it abundantly clear in his testimony that the State Health Plan could not be interpreted in this manner. As Mr. Whiteside noted, to interpret the plan in that manner would mean that FMMC was ineligible to apply for a CON, as it is a “new facility” in Fort Mill, and not the “existing facility” (Piedmont) in Rock Hill. And, importantly, South Carolina CON laws and regulations would not contain the concept of a “competing applicant” if there could be no new competing applicants, only the expansion of existing hospital facilities.

As such, the interpretation of the 2004-2005 SHP by SCDHEC’s CON staff to preclude CHS from being awarded a CON is plainly incorrect, and this incorrect interpretation infects its

decision to the point that the case should be remanded to SCDHEC with instructions to deny its previous award of a CON to FMMC.

B. SCDHEC is Estopped From Declaring that CHS is Ineligible for a CON Under the 2004-2005 SHP:

Because SCDHEC had, up until the time of its May 30, 2006 decision letter, represented to CHS that it was qualified to apply for the CON, and because CHS justifiably relied on those representations and spent significant monies in preparing and filing a CON application, SCDHEC is legally estopped from declaring that CHS is ineligible to be awarded the CON.

As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy. South Carolina Department of Social Services v. Parker, 275 S.C. 176, 268 S.E.2d 282(1980). This does not mean that estoppel cannot apply against a government agency, however, including the South Carolina Department of Health and Environmental Control. See, e.g., Midland's Utility Inc. v. South Carolina Department of Health and Environmental Control, 298 S.C. 66, 378 S.E.2d 256 (1989).

To prove estoppel against the government, the relying party must prove: (i) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (ii) justifiable reliance upon the government's conduct; and (iii) a prejudicial change in position. Midland's Utility, Inc., 298 S.C. at 70. Furthermore, where a party relies on the representations of a government agent, that agent must be acting within the proper scope of his authority. Landing Development Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985); Kerr v. City of Columbia, 232 S.C. 405, 102 S.E.2d 423 (1958).

Lack of Knowledge and of the Means of Knowledge of the Truth as to the Facts in Question: In this case, the "fact" in question is the correct interpretation of the 2004-2005 SHP

with regards to who can apply for a CON to fill general acute care hospital bed needs. While the 2004-2005 SHP indicates that the planning unit for hospital bed need is calculated based on the utilization of a specific facility, it does not expressly prohibit other entities from applying to fill those needs (if indeed there is any limitation). For that reason, CHS lacked independent knowledge as to whether or not it was qualified to apply. The 2004-2005 SHP is ambiguous on the point.

The ambiguity of the plan is evidenced by the uncertainty within the SCDHEC itself as to whether or not 2004-2005 SHP prohibits an entity from applying to fill bed needs in a county where it does not have an existing facility. SCDHEC processed the CON applications for almost fifteen (15) months before SCDHEC made a determination that the 2004-2005 SHP precluded CHS, Presbyterian and HPA from eligibility. Initially, SCDHEC clearly interpreted the 2004-2005 SHP to allow CHS to apply, but later unilaterally and without prior notice decided to preclude CHS from obtaining the CON. Mr. Grice of SCDHEC has conceded that reasonable arguments can be made that the bed need is community based, and that it is not specific to any institution. Exhibit A (Grice Depo., p. 57, lines 18-25; p. 106, lines 13-21). Certainly, CHS cannot be held to have knowledge of the correct interpretation of the 2004-2005 SHP, when the agency charged with interpreting and enforcing it lacked such "knowledge."

CHS' position is well supported by South Carolina case law. In Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979), Abbeville Arms planned to construct a multi-family housing project after reviewing the Abbeville zoning ordinance, the official zoning map, and obtaining a letter permitting the project from the zoning administrator. Five (5) days after it applied for a zoning permit, however, the Abbeville city council issued a resolution that stated that the official zoning map was defective and that the property in question should not have been

zoned to permit Abbeville Arms' housing project. In discussing this first element of estoppel, the Supreme Court of South Carolina found that the city was estopped to deny the building permit because "the defect [on the zoning map] was latent...." *Id.* at 494.

Landing Development Corp. v. City of Myrtle Beach, *supra*, another case on point, involved the development of condominium units for short-term rentals in a district zoned for "permanent occupancy." The zoning ordinance did not define "permanent occupancy" and there was no law equating "permanent occupancy" with occupancy by a permanent resident. Landing Development Corp., 285 S.C. at 219. The Director of Zoning and Housing for Myrtle Beach represented to the developer that the ordinance allowed for short term rentals, and initially issued licenses to permit short-term rentals, but later informed the developer that such rentals were not permitted. *Id.* at 220. The Supreme Court concluded that Myrtle Beach was estopped from denying business licenses for the short-term rentals, holding that the residents lacked the knowledge or means to know that short-term vacation rentals were prohibited. *Id.* at 221. In Landing Development Corp., like the case at hand, the statute in question was ambiguous, and the only definitive source of information concerning the interpretation and enforcement of the ordinance was the Director (here, SCDHEC).

Similarly, in County of Charleston v. National Advertising Co., 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987), the Supreme Court of South Carolina held that Charleston County was estopped from revoking a permit where the county granted an advertising company permission to place its billboards in a certain location, but later changed its interpretation of the ordinance. In making its decision, the Supreme Court of South Carolina noted that the county had previously interpreted the ordinance to permit the placement of the billboards. *Id.*

Justifiable Reliance upon the Government's Conduct: The determination that CHS was not qualified to apply for a CON came only at the "last minute," in the last few days of a fifteen (15) month application process and it was only revealed to CHS in the final decision letter of May 30, 2006. Before that time, SCDHEC and Mr. Grice consistently represented to CHS, directly and indirectly, that it was qualified and eligible to apply and that its application was "approvable" for the CON. Those representations began well before the March, 2005 application, and continued through May of 2006. CHS continued to believe it was qualified to apply for the CON. While one of those representations was contained in Mr. Grice's January 25, 2005 memorandum which was later rescinded for further study in March of 2005, it was rescinded only to invite commentary from the public over the correct interpretation of the 2004-2005 SHP – not because SCDHEC disaffirmed the interpretation. Had it done so, SCDHEC would not have accepted three (3) applications from CHS, Presbyterian and HPA only days later. After that, for the next year, SCDHEC continued to accept CHS submissions and continued to interact with CHS as a legitimate applicant. At no point, until the final rejection letter, was CHS informed by the SCDHEC that it was not qualified to apply. It is clear that CHS justifiably relied on SCDHEC's representations, specifically those of Joel Grice and Mary Fechtel (which it specifically sought out before beginning the application process).

CHS underwent a lengthy application process based on SCDHEC's representation. It spent significant monies, and committed significant time and resources in pursuit of the CON application, that could have been utilized elsewhere. CHS would not have committed those resources and spent its money for a CON to which it believed it was not qualified to apply. Moreover, it was reasonable for CHS to rely on SCDHEC's representations, and to do so through every phase of the application process. SCDHEC had accepted CHS' application, accepted

CHS' filing fee and deemed CHS' application complete. SCDHEC is the agency in charge of administering the CON program in South Carolina. It regularly issues opinions and holds public meetings about the CON program; it accepts, rejects and evaluates CON applications. Mr. Grice, as its Director, is the public official who interprets the 2004-2005 SHP. He is the administrator, supervisor, and head of the CON program of SCDHEC. His statements and representations carry the weight of governmental authority.

It was also reasonable for CHS to assume that SCDHEC would have informed CHS if SCDHEC had determined that CHS was not qualified. The logical time for such a determination (or change in position) would be at the time CHS applied in March of 2005, yet SCDHEC continued to treat CHS as a legitimate applicant. SCDHEC - by its own admission - did not decide that CHS was not qualified to apply until sometime in May 2006, and only informed CHS of this fact in its decision letter. CHS was justified to act on SCDHEC's representation that it was qualified to apply from March 2005 until May 2006 because, during that time, SCDHEC in fact believed that CHS was qualified to apply.

Prejudicial Change in Position: During the entire CON process, CHS earnestly attempted to assemble a successful CON application, and it expended significant time, money, and resources. The pursuit of the CON created opportunity costs for CHS. The attention of CHS' leadership was diverted from other tasks, and resources that could have been dedicated to other projects were instead diverted to the CON application process.

Agent Acting Within the Proper Scope of His Authority: The acts of a government agent that are within the proper scope of his authority may give rise to estoppel. For example, in Landing Development Corp., supra, the Supreme Court of South Carolina held that a city was estopped from repudiating an interpretation of a zoning ordinance made by its zoning director.

Landing Development Corp., 285 S.C. at 426. In County of Charleston v. National Advertising Co., *supra*, the Building Inspector who made the representations to the advertising company was designated as the official charged with its enforcement of the ordinance. National Advertising Co., 292 S.C. at 418.

Here, Mr. Grice told CHS it was eligible to apply, and he and other SCDHEC staff members regularly interacted with CHS throughout the application process. Mr. Grice is the Director of SCDHEC whose main function is to administer the CON program in South Carolina. Clearly, the ability to accept or reject CON applications, to determine whether or not they qualify under the 2004-2005 SHP, is within the scope of Mr. Grice's authority.

Based on the foregoing, CHS has established all of the necessary elements of estoppel against a government agency, and SCDHEC should be legally estopped from declaring that CHS was ineligible to be approved for a CON under the 2004-2005 SHP.

C. **If SCDHEC's CON Staff Interpretation of the 2004-2005 SHP is Correct, FMMC is Ineligible for a CON:**

If the Court determines that SCDHEC's CON staff has interpreted the 2004-2005 SHP to allow only the award of new beds to a "facility" identified in that plan because the planning unit is by "facility" rather than by county, it is equally clear that FMMC is not be entitled to a CON, and the case should be remanded to SCDHEC with instructions to deny its previous award of a CON to FMMC.

The South Carolina regulations governing the award of a CON by SCDHEC are contained in S.C. Code of Regulations 61-15 ("S.C. Regs. 61-15"). S.C. Regs. 61-15 governs the implementation of the 2004-2005 SHP and it defines the terms that are used in that plan. The term "facility" in S.C. Regs. 61-15 equates to the term "hospital," and refers to only a single

hospital, not a hospital “system.” Specifically, S.C. Regs. 61-15 provides in pertinent part as follows (with our emphasis supplied in bold below):

SECTION 102. Applicability

*1. A person or **healthcare facility** as defined in this Regulation is required to obtain a Certificate of Need from the Department of Health and Environmental Control before undertaking any of the following:*

*a. The construction or other establishment of a new **healthcare facility**;*

SECTION 103. Definitions

*...13. **Healthcare facility** means acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, tuberculosis hospitals, nursing homes, kidney disease treatment centers (including freestanding hemodialysis centers), ambulatory surgical facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions and any other facility for which Certificate of Need review is required by federal or state law*

*15. **Hospital** means a facility organized and administered to provide services to accommodate two or more non-related persons for the diagnosis, treatment and care of such persons over a period exceeding 24 hours and provides medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy*

The 2004-2005 SHP uses both the term “facility” and the term “hospital” when addressing bed need. The 2004-2005 SHP defines a “hospital” as follows (our emphasis is in bold): “A ‘hospital’ means a **facility** organized and administered to provide overnight medical or surgical care”

As in S.C. Regs. 61-15, this definition makes no mention of a hospital “system,” nor does it expressly indicate that bed need for a “hospital” may be met by the development of a sister hospital in a different location and town from the “facility” shown in the 2004-2005 SHP.

The "facility" or "hospital" shown as demonstrating a bed need in the 2004-2005 SHP is Piedmont Medical Center in Rock Hill, South Carolina. There is no mention in the 2004-2005 SHP of a different and yet-to-be developed facility or hospital known as "Fort Mill Medical Center" in Fort Mill, South Carolina, which has no demonstrated bed need because it does not exist. Under a strict interpretation of the 2004-2005 SHP, the "bed need" in the plan is not the transfer of thirty-six (36) hospital beds from Rock Hill to Fort Mill, but rather the need for sixty-four (64) additional hospital beds only in Rock Hill. As Mr. Whiteside of SCDHEC acknowledged in his deposition, FMMC in Fort Mill does not have a demonstrated bed need under the 2004-2005 SHP. Exhibit G (Whiteside Depo., p.126, lines 18-24). As such, it would not be entitled to the award of a CON if SCDHEC's interpretation of the 2004-2005 SHP is correct.

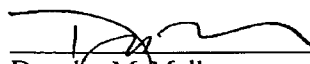
D. CHS adopts by reference those statements and positions of Presbyterian that are not otherwise adverse to CHS:

Pursuant to Rule 10(c), South Carolina Rules of Civil Procedure, CHS adopts by reference those statements, positions and exhibits of Presbyterian that are not otherwise adverse to CHS.

III. CONCLUSION

Based on the foregoing, CHS respectfully requests that its motion for summary judgment be granted and that these matters be remanded back to SCDHEC with instructions to deny the award of the CON to FMMC.

Respectfully submitted,



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Attorneys for Petitioner Charlotte-Mecklenburg
Hospital Authority d/b/a Carolinas HealthCare
System

May 18, 2007
Charleston, SC

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Charlotte-Mecklenburg Hospital Authority,)
d/b/a Carolinas HealthCare System and)
Presbyterian Healthcare System, d/b/a)
Presbyterian Hospital-York, LLC,)

Petitioners,)

v.)

South Carolina Department of Health and)
Environmental Control and Amisub of)
South Carolina, Inc. d/b/a Piedmont)
Healthcare System d/b/a Fort Mill Medical)
Center,)

Respondents.)

Docket No. 06-ALJ-07-0713-CC

CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of May, 2007, I have served a copy of the foregoing

Petitioner Carolinas Healthcare System's Notice of Motion and Motion for Summary Judgment

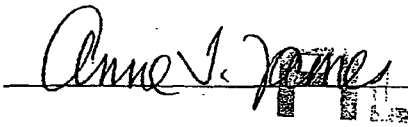
with Supporting Memorandum upon the following by electronic mail only, addressed to:

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Anne I. Jones

MAY 21 2007

SC ADMIN. LAW COURT

EXHIBIT A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charlotte-Mecklenburg Hospital
Authority d/b/a Carolinas Healthcare
System,

Petitioner,

vs.

Case No.: 06-ALJ-07-0489-CC

South Carolina Department of Health
and Environmental Control and Amisub
of South Carolina, Inc. d/b/a Piedmont
Healthcare System d/b/a Fort Mill
Medical Center,

Respondent,

Presbyterian Healthcare System, d/b/a
Presbyterian Hospital-York, LLC,
Intervenor.

COPY

Charlotte-Mecklenburg Hospital
Authority d/b/a Carolinas Healthcare
System,

Petitioner,

vs.

Case No.: 06-ALJ-07-0490-CC

South Carolina Department of Health
and Environmental Control,

Respondent,

Amisub of South Carolina, Inc. d/b/a
Piedmont Healthcare System d/b/a
Fort Mill Medical Center and Presbyterian
Healthcare System, d/b/a
Presbyterian Hospital-York, LLC
Intervenors.

JOEL C. GRICE
Thursday, February 15, 2007

COMPUSCRIPTS, INC.
A Full-Service Court-Reporting Agency
Post Office Box 7172
Columbia, SC 29202
803-988-0086

1 Presbyterian Healthcare System, d/b/a
2 Presbyterian York, LLC,

3 Petitioner,

4 vs.

Case No.: 06-ALJ-07-0713-CC

5 South Carolina Department of Health
6 and Environmental Control and Amisub
7 of South Carolina, Inc. d/b/a Piedmont
8 Healthcare System d/b/a Fort Mill
9 Medical Center,

10 Respondent,

11 Charlotte-Mecklenburg Hospital
12 Authority d/b/a Carolinas Healthcare
13 System,

14 Intervenor.

15 _____

16 Presbyterian Healthcare System, d/b/a
17 Presbyterian York, LLC,

18 Petitioner,

19 vs.

Case No.: 06-ALJ-07-0712-CC

20 South Carolina Department of Health
21 and Environmental Control,

22 Respondent,

23 Amisub of South Carolina, Inc. d/b/a
24 Piedmont Healthcare System d/b/a
25 Fort Mill Medical Center and
Charlotte-Mecklenburg Hospital Authority
d/b/a Carolinas Healthcare System,

Intervenors.

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D E P O S I T I O N

WITNESS: JOEL C. GRICE

DATE: Thursday, February 15, 2007

TIME: 10:08 a.m.

LOCATION: South Carolina Department of
Health and Environmental Control
1777 St. Julian Place
Columbia, South Carolina

TAKEN BY: Attorneys for Presbyterian
Healthcare System, d/b/a
Presbyterian Hospital-York, LLC

REPORTED BY: EILEEN CROSS
Court Reporter

1 STIPULATION: It is stipulated by and
2 among counsel that this deposition is being taken
3 pursuant to the Administrative Law Court, and that
4 the deponent does not waive the right to read and
5 sign the deposition transcript.

6 - - - - -

7 JOEL C. GRICE, having been duly
8 sworn, testified as follows:

9 EXAMINATION

10 BY MS. CRUM:

11 Q. Mr. Grice, I think we've done this a bit
12 before, but I'm Liz Crum and I'm here representing
13 Presbyterian Hospital-York. I'm going to ask you
14 questions. And if it is less than the model of
15 clarity that I intended it to be, would you let me
16 know and I'll try to rephrase it so that we're on
17 the same wavelength.

18 Okay?

19 A. I will.

20 Q. Thank you, sir. Would you please just
21 give me your name and your brief work history at
22 DHEC.

23 A. My name is Joel C. Grice. I'm currently
24 director of Bureau of Health Facilities and
25 Services Development. I joined the Department in

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1 1975 as an environmentalist in the division of
2 health licensing and worked in that position three
3 years, and joined the.

4 Certificate of Need Division in 1978 as a
5 Public Health Analyst III. I was promoted in 1981
6 to a Planner IV, and in 1984 was promoted to
7 director of the Office of Certification of Need.
8 And in the year 2000, I became the bureau director
9 of Health Facilities and Services.

10 Q. Is it Health Facilities and Services
11 Development?

12 A. It's development. It's a long name.
13 It's Bureau of Health Facilities and Services
14 Development.

15 Q. What is the scope of that bureau?

16 A. That bureau has four functions in it.
17 Our main function is to administer the Certificate
18 of Need Program. And in conjunction with that, we
19 also are responsible for administering the
20 development of the State Health Plan at least
21 every two years.

22 We also administer the Medicaid Permit
23 Act where we advise nursing homes each year how
24 many Medicaid patient days they may participate
25 in, and we're also responsible for administering

1 the Certificate of Public Advantage Program.

2 Q. Are you the person who's responsible
3 ultimately for making Certificate of Need
4 decisions in terms of to whom to award or deny
5 CON?

6 A. Yes, I am.

7 Q. In fact, in this particular case did you
8 make the decision to whom to award and to whom to
9 deny?

10 A. Yes, I did.

11 MS. CRUM: Mark that as Exhibit 1,
12 please.

13 (EXH. 1, Consent Scheduling Order on
14 Bifurcated Discovery Issues, was marked for
15 identification.)

16 BY MS. CRUM:

17 Q. Mr. Grice, you understand that in this
18 case the discovery has been bifurcated and that
19 your deposition today is only being taken for the
20 purpose set out in the order of bifurcation that
21 I've given you and marked as Exhibit 1?

22 A. Yes, I do.

23 Q. Would you turn over to page 3 of Exhibit
24 1.

25 A. Okay.

1 Q. Do you recognize this May 30, 2006,
2 letter regarding the Presbyterian Healthcare
3 System Fort Mill application?

4 A. Yes, I do. That's the decision letter
5 that was issued on May 30 for the application in
6 York County, and this is the one pertaining to
7 Presbyterian Healthcare System.

8 Q. I'm not going to ask you questions about
9 that, but I am going to ask you questions with
10 regard to paragraph 4. If you could review
11 paragraph 4 on page 2.

12 A. Okay.

13 Q. Mr. Grice, that's the paragraph in which
14 you found that only FMMC, Fort Mill Medical
15 Center, complied with the State Plan as consistent
16 with the hospital bed need methodology in the
17 State Plan, correct?

18 A. That's correct.

19 Q. You also found that Presbyterian was not
20 consistent with the state bed need methodology,
21 correct, in the 2004-2005 plan?

22 A. That is the -- that is as the words say
23 in there, the methodology as specifically
24 outlined. Yes, that's correct.

25 (EXH. 3, Letter to David S. Levitt from

www.compuscriptsinc.com

1 Joel C. Grice dated 5/30/06, was marked for
2 identification.)

3 BY MS. CRUM:

4 Q. Let me show you what's marked as Exhibit
5 3. Can you identify this May 30, 2006 certified
6 mail letter for me?

7 A. Yes. This is the letter issued for the
8 approval of the certificate of Piedmont Medical
9 Center for the 100-bed facility in York County.

10 Q. Was it Piedmont Medical Center or the
11 Piedmont Healthcare System d/b/a Fort Mill Medical
12 Center?

13 A. It is Piedmont Healthcare System doing
14 business as Fort Mill Medical Center, that's
15 correct.

16 Q. Would you just review paragraph 4 on page
17 2 of this letter, please.

18 A. Yes. Okay.

19 Q. That paragraph is virtually identical to
20 the paragraph in the letter to Presbyterian
21 Hospital-York, correct?

22 A. It is.

23 Q. And it finds that only Fort Mill Medical
24 Center complies or is consistent with hospital bed
25 need methodology outlined in the South Carolina

1 Health Plan?

2 A. It does, as specifically outlined.

3 That's correct.

4 Q. Mr. Grice, Fort Mill Medical Center,

5 AMISUB of South Carolina, Inc. d/b/a Fort Mill

6 Medical Center put in an application to build a

7 64-bed hospital on January the 24th, 2005, did it

8 not?

9 A. Yes, it did.

10 Q. Mr. Grice, you don't have your CON

11 application file up here, do you?

12 A. I don't. I'm sorry.

13 Q. I will tell you that I did not bring all

14 of the file since I thought it would be easier for

15 you to access yours than for to me carry all of

16 that. But I'm going to represent to you -- I'm

17 going to mark this as Exhibit 4.

18 MS. LAYMAN: We can take a break and we

19 can get it.

20 MS. CRUM: Sure. That's fine.

21 (A recess was taken at this time.)

22 (EXH. 4, Certificate of Need Application,

23 was marked for identification.)

24 BY MS. CRUM:

25 Q. Mr. Grice, I was asking you to look at

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1 they requested that the Department hold one public
2 hearing on all the applications together.

3 Q. Mr. Grice, I'm going to ask you to see if
4 you can identify this letter. It's dated October
5 the 10th, 2005. Actually, it doesn't have your
6 name on it so I'll wait and ask Ms. Fechtel about
7 this one.

8 Mr. Grice, I'm going to show you this and
9 have it marked as Exhibit 10.

10 (EXH. 10, Memorandum to Licensed Health
11 Care Providers from Joel C. Grice dated 1/25/05,
12 was marked for identification.)

13 BY MS. CRUM:

14 Q. Exhibit 10, A memorandum dated January
15 25, 2005. See if you recognize that.

16 A. Yes, I do.

17 Q. Tell me what that is, please.

18 A. It's a memorandum that I drafted on
19 January 25, 2005, to be provided to licensed
20 health care providers in the state regarding the
21 interpretation of the general hospital bed needs
22 as indicated in our current 2004-2005 South
23 Carolina Health Plan.

24 Q. And was this your interpretation of the
25 2004-2005 general hospital bed need as of January

1 need calculation of less than 50 additional beds,
2 it may apply and receive CON approval for a
3 maximum of 50 additional beds."

4 And, No. 2, "Any hospital reflecting a
5 need of more than 50 additional beds may apply and
6 receive approval for the specific projected need
7 as calculated in the State Health Plan for that
8 hospital."

9 And, 3, "A CON for the net hospital bed
10 need in a county may be requested and approved for
11 any existing hospital located in the county, or
12 for any other entity/applicant, for the
13 development of a new hospital or an addition to an
14 existing hospital within that county."

15 Q. So as of January the 25th, 2005 as the
16 director of the Bureau of Health Facilities and
17 Services Development, it was your departmental
18 policy's interpretation that the State Plan
19 general bed need would allow an entity other than
20 an existing hospital to utilize any bed need more
21 than 50 beds within the county, correct?

22 A. Yes.

23 MR. ANDREWS: Object to the form.

24 BY MS. CRUM:

25 Q. Mr. Grice, Presbyterian Health Care-York

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1 and the Department are adverse in this lawsuit,
2 aren't they?

3 A. Yes, they are.

4 Q. That would be a safe bet?

5 A. Yes, it is.

6 Q. She said laughing. Who did you discuss
7 this memorandum with prior to issuing it?

8 A. I discussed it with Leon Frishman, who
9 was our deputy commissioner at the time. The
10 memorandum was my idea because I knew that we had
11 a situation of having competing applicants in York
12 County, a situation that we had not anticipated,
13 and I wanted to try to give some clarification to
14 this issue. And so this was an attempt to try to
15 have a solution. So that's why, you know, it was
16 drafted and distributed on January 25, 2005.

17 Q. What was the situation that you had not
18 anticipated?

19 A. Well, the draft 2004 Health Plan, which
20 was a document that was -- went through the public
21 hearing process, had used I think 2002 utilization
22 data from existing hospitals. It was a long
23 process in getting that plan to go through the
24 approval process.

25 And, as I recall, the need -- the

1 institutional need for Piedmont Medical Center at
2 that time was 24 beds or was around there, in the
3 low 20s. And, of course, that was pretty typical
4 with what we had seen in the last few years, and
5 that would have meant that a hospital, Piedmont,
6 an existing hospital could have added anywhere --
7 any number up to 50 as an institutional need.

8 In the development of the Plan, because
9 it was kind of a long process, the Health Planning
10 Committee along with our staff recommended that we
11 update data because we already had the 2003
12 hospitals sending reports in, and the process was
13 long and we wanted to be as current as possible.

14 So the Health Planning Committee
15 recommended and the Board concurred we update
16 data, but no one knew what the numbers would be
17 until the final plan was actually printed. When
18 it was approved and printed, the needs were higher
19 in some areas but substantially higher in York
20 County. It went from the low 20s to 64. A little
21 bit shocking, but there had been tremendous growth
22 in that area. Utilization was up at Piedmont.

23 We went up a year and out in projecting
24 populations, I believe, to perhaps 2012; went out
25 a year. So that number went up more than anyone

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1 would have anticipated. It was a number that was
2 not seen by anyone in the public hearings. So it
3 had never been anticipated the number would be
4 that.

5 So I didn't think anything of it at the
6 time. But, of course, when that was reviewed by
7 health care providers around the state and
8 particularly in the Charlotte area, I think an
9 opportunity was seen that that was a number
10 sufficient -- a real need that someone may want to
11 submit an application in that county.

12 Q. So I guess what you're saying, then --
13 and correct me if I'm wrong because I'm not trying
14 to put words in your mouth. I'm just trying to
15 understand what was not anticipated.

16 Is what you're telling me it was not
17 anticipated there would be a bed need in excess of
18 50 beds in any county?

19 A. Yes, ma'am, that's correct. Well, let me
20 say an institutional need, yes. You know, we have
21 many counties that have multiple hospitals. But
22 some counties have only one, like York County.
23 And that particular need, you know, wasn't
24 anticipated to go up that much. No particular
25 need was anticipated to increase, you know, say

1 three-fold in light of the update of that. And it
2 was just something that had not occurred -- had
3 not been anticipated. So I guess interest arose
4 that the staff had not anticipated.

5 Q. And that interest was that there might be
6 providers other than the institution upon which
7 the need was based --

8 A. That's correct.

9 Q. -- to apply for that need for another
10 hospital in the county?

11 A. That's correct.

12 Q. You said that you talked to Mr. Frishman
13 prior to drafting the January 25, 2005, memo. Did
14 you discuss that memorandum with anyone outside of
15 the Department?

16 A. No, I didn't. No one outside of the
17 Department. I drafted it. Mr. Frishman reviewed
18 it. We let our attorneys look at it and let the
19 commissioner review it and, you know, I signed it
20 and it went out.

21 Q. At the point that you signed it, did
22 anyone that reviewed it prior to your signing it
23 and sending it out object to your interpretation
24 of the Plan as of July -- I'm sorry, January 25,
25 2005?

1 A. Not actively, you know. Of course, Mr.
2 Whiteside is the one responsible for planning. I
3 showed it to him. I drafted it. I don't know
4 that he, you know, supported it a hundred percent.
5 He didn't really object, but I felt this was an
6 important issue and I was trying to prevent a
7 problem in the future. And so, you know, we went
8 with it.

9 Q. Did you feel like it was an important
10 issue to allow competition? When I say
11 competition, to allow an applicant other than the
12 specific institution generating the need to be
13 able to apply for beds that were over and above 50
14 in a particular service area?

15 A. Well, I guess the basis of this -- my
16 concern was that the Plan that we had used -- the
17 Plan that we used the last year or two that had
18 been institutional had very minimal needs of
19 single digit numbers or, you know, a very small
20 number, and many hospitals were using those needs
21 to perhaps add a 50-bed increment to their
22 hospitals or less.

23 And here we had a larger need and,
24 therefore, when you get a larger need it is
25 perhaps a need sufficient enough to be a satellite.

1 hospital. And, therefore, you know, there may be
2 interest by the parties. And, apparently, that's
3 what occurred, you know, in this instance.

4 We had other hospitals in North Carolina
5 interested in applying. And my concern was that
6 because this is current I wanted to be sure that
7 we were fair and equitable. Here again, I didn't
8 want to -- we got our state certificate need
9 program but I didn't want to violate any kind of
10 federal laws. I'm not an attorney. And I
11 would -- in fact, you know, that's just my
12 thoughts on it.

13 I wanted to be sure that, you know, we
14 would not be criticized, that we had some policy
15 to go by that everybody could look at it and have
16 some understanding of.

17 Q. When you say "fair and equitable," do you
18 mean to allow entities, be they in-state or
19 out-of-state, to have the ability to apply for the
20 bed need generated by a specific institution and
21 be able to compete for that bed need? I'm just
22 trying to find out what you mean by fair and
23 equitable.

24 A. Right. In other words, if you had a
25 large bed need and, here again, historically for

1 the last few years we have not seen that. We've
2 seen a need where an existing hospital might get
3 the beds that they might need, and that's one of
4 the reasons we had a particular methodology that
5 we did. There's not been large needs.

6 In this situation, because we had
7 interest and here -- I'm not an attorney but I
8 felt that I just didn't want us to violate any
9 kind of federal statutes. I know nothing about
10 it, but I just wanted to be sure that, you know,
11 that this might resolve some potential problem
12 that we might have. That if there was a large
13 need that certainly perhaps others would have an
14 opportunity to apply and would have some basis to
15 have some comfort in that.

16 Q. Mr. Grice, let me show you something, and
17 I'll mark this as Exhibit 11.

18 (EXH. 11, Memorandum to Licensed Health
19 Care Providers from Joel C. Grice dated 3/3/05,
20 was marked for identification.)

21 BY MS. CRUM:

22 Q. Mr. Grice, do you recognize that
23 memorandum dated March 3, 2005, from you to
24 licensed health care providers in the state?

25 A. Yes, I do.

1 Q. Could you please tell me what that is?

2 A. It's a memorandum that I issued
3 rescinding the policy that was issued on January
4 25, 2005.

5 Q. And to whom did you send that memorandum?

6 A. It was distributed to anyone that
7 requested -- basically any licensed health care
8 providers. Particularly, this related to
9 hospitals.

10 Q. Licensed health care providers in South
11 Carolina?

12 A. Yes, that would be right. Basically the
13 people right now, I mean, anyone that requested
14 this we provided it to. But generally when we do
15 memorandum on our State Health Plan the only
16 providers we really have, you know, what it
17 relates to are existing in South Carolina is who
18 we address it to. But certainly applicants might
19 have gotten it too. But as far as mailings, it
20 would go to existing facilities.

21 Q. The memo states that the decision was
22 made on February 1 to rescind the departmental
23 policy issued by this office on January the 25th,
24 2005.

25 Why did you wait a month to notify

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1 everybody that the policy had been rescinded?

2 A. Workload. Just workload. I'm weeks
3 behind work today, unfortunately.

4 Q. Why was the policy rescinded?

5 A. Basically after the issuance of the
6 January 25, 2005, policy, there had been a lot of
7 discussion I think that had gotten back to the
8 Department, I think the South Carolina Hospital
9 Association, and others. And, you know, I think
10 it was really seen that our staff really didn't
11 have the authority to make an interpretation like
12 that, you know.

13 It was what I thought would be helpful,
14 but apparently something that was really beyond
15 the scope of our authority. And so in talking to
16 our general counsel, what we did, we rescinded it
17 and then said as an alternative to such a policy
18 we would get our staff to schedule a meeting with
19 the South Carolina Health Planning Committee in
20 the near future to see, you know, their
21 recommendation as to the most beneficial method
22 resolving or clarifying any future issues that may
23 occur regarding the hospital bed methodology.

24 Q. You mentioned the South Carolina Hospital
25 Association had gotten involved in the

1 relating to an issue of our Planning Committee and
2 planning process. And certainly it would have
3 been included in the file if any party had written
4 a letter and used that as an attachment. But our
5 staff would not have put it in there because, you
6 know, we did see that as really adding paperwork,
7 you know. We were familiar with what was going on
8 in that realm and we would put it in the file.

9 Q. Mr. Grice, maybe I misunderstood your
10 testimony. And let me see if I understand it
11 correctly because I don't want to misstate
12 something.

13 I thought you had testified that the
14 January 25, 2005, memorandum dealing with the
15 general hospital bed need department policy
16 interpretation arose out of the interest of the
17 Charlotte hospitals in applying for the 64 beds
18 that was in the State Plan for York County.

19 Did I misunderstand that?

20 A. No, that's correct.

21 Q. So, in essence, the January 25, 2005,
22 memo did have something to do with the York County
23 matter?

24 A. There was a relationship, yes, but it was
25 rescinded.

1 with the deadline for competing application, yes,
2 which would be 15 days after the application for
3 the Fort Mill Medical Center was published in the
4 South Carolina State Register.

5 Q. And the 15 days, to the best of your
6 recollection, would have been March the 12th?

7 A. At that time, that's correct.

8 Q. In fact, Presbyterian Hospital-York,
9 Charlotte-Mecklenburg Hospital Authority d/b/a
10 Carolinas Healthcare System, and Hospital Partners
11 of America d/b/a Lake Wylie Medical Center each
12 filed an application on March the 11th, 2005,
13 correct?

14 A. That's correct.

15 Q. And at that time each of them was deemed
16 to be a competing applicant to the Fort Mill
17 Medical Center January application?

18 A. That's correct.

19 Q. Mr. Grice, in the Department's review and
20 in your review of a Certificate of Need
21 application, isn't always the first project review
22 criteria ranked in order of importance the ability
23 to comply with the standards or criteria in the
24 State Plan?

25 A. Yes.

1 analogy: a home health agency. We may show a
2 need for one. We have several. Any one would
3 meet that need. We have to select the best one.
4 The one that best meets the most important
5 criteria in our Chapter 8 of Regulation 61-15. So
6 that's always the process we have to use in
7 competing applications.

8 Q. Could you go on over now to page 57-R
9 under the middle column is the heading
10 "competition is healthy." If you could look down
11 to the sixth paragraph starting with "the State
12 Health Plan." Can you just read the next two
13 paragraphs either to yourself or out loud.

14 A. All right. Okay.

15 Q. Those two paragraphs, does that
16 adequately describe what you told the reporter?

17 A. Yes, it does.

18 Q. Then you agree, don't you, that an
19 argument can be made looking at the State Health
20 Plan that the 64 beds identified in the Plan are
21 community bed needs?

22 MR. ANDREWS: Object to the form.

23 THE WITNESS: Yes. I think arguments can
24 always be made, yes. I mean, anybody can argue,
25 absolutely.

1 be fair in our process.

2 Q. At no time did you tell -- correct me if
3 I'm wrong because I don't want to misquote you --
4 did you tell the newspaper that the three
5 competing applicants, other than AMISUB, would not
6 meet the bed need methodology in the Plan?

7 A. That's correct. I did not tell them
8 that. And, you know, I think you have to look at
9 a lot of the words here. Even one of the other
10 quotes we looked at I said that -- basically you
11 can always look at words. If you look at our
12 reason No. 4, it said specific. So, you know, I
13 certainly feel very comfortable about what was
14 said.

15 Q. Mr. Grice, at no time did you tell
16 Presbyterian Hospital-York, Charlotte-Mecklenburg
17 Hospital Authority d/b/a Carolinas Healthcare
18 System, or Hospital Partners of America that they
19 did not comply with the bed need methodology for
20 the State Plan, did you, until the May 30 letter?

21 A. That's correct. They chose to apply. We
22 did not encourage them to apply. They chose to
23 apply and we reviewed them competitively and we
24 made a competitive decision, and that was it. We
25 made the best decisions.

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1 Q. At no time did you tell any of the
2 competing applicants that anything but the
3 applications would be reviewed competitively,
4 correct?

5 A. That's correct. That's correct.

6 Q. In reviewing applications competitively
7 that would necessarily mean, would it not, that
8 each would have an equal chance under the State
9 Plan to access those 64 beds?

10 MR. ANDREWS: Object to the form.

11 THE WITNESS: When you review
12 competitively you're looking, as we mentioned
13 earlier, which applicant best meets the important
14 criteria. You can always compare applicants with
15 various criteria, and one may better meet it than
16 another.

17 So they were reviewed competitively, and
18 Piedmont, in the criteria that we picked to be the
19 most important, of the four medical centers in our
20 opinion better met those criteria.

21 BY MS. CRUM:

22 Q. If only Fort Mill Medical Center met the
23 bed need methodology under the Plan, please
24 explain to me how the other three could be
25 competing for beds that they didn't have a right

1 reason 4 is correct.

2 Q. Mr. Grice, the applications for the three
3 applicants that the Department deemed to be
4 competing were filed on March the 11th, 2005. Why
5 didn't the Department tell someone prior to May
6 the 30th, 2006 that they couldn't -- any of the
7 three competing applicants, they couldn't meet the
8 bed need methodology?

9 A. Those applicants chose to apply. It was
10 their decision to apply, and we -- the
11 Department's position, we're open. We reviewed
12 them competitively. And in that competitive
13 review we chose the best applicant. We could have
14 chosen not to address the Health Plan at all. I'm
15 the one that put reason 4 in.

16 But I think you have to realize you
17 never, in my opinion, in life and in business you
18 never -- you leave things -- you look at them
19 carefully, don't make a decision prematurely and
20 cut someone out. You never know how it's going to
21 ultimately end up. A lot of the variations can
22 occur.

23 It was their decision to apply. We
24 reviewed them competitively. It ended up we chose
25 in our opinion the one that best met the criteria,

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1 including the -- specifically met the standards in
2 the Health Plan. So, you know, certainly many
3 other things could have happened in the review
4 process, but this is the way it turned out.

5 So, in my opinion, we don't tell someone
6 up front -- you know, oftentimes applicants will
7 meet with us and might propose a project that is
8 absolutely impossible, and we would tell them
9 that. We don't tell them they can't apply. Many
10 of them don't. But in this situation, you know,
11 the applicants wanted to apply, and we did review
12 them competitively.

13 Q. My question was not whether you told them
14 they couldn't apply, but whether or not you ever
15 told anyone and why you didn't tell anyone that
16 they didn't meet the State Health Plan bed need
17 methodology.

18 MS. LAYMAN: Object to the form.

19 THE WITNESS: They are intelligent people
20 with intelligent attorneys and they're able to
21 read and tell for themselves.

22 BY MS. CRUM:

23 Q. So it is up to us, to the applicants, to
24 interpret the State Health Plan and not up to the
25 Department to interpret the State Health Plan?

1 Is that what you're telling me?

2 A. I think all applicants interpret the Plan
3 as they see fit. We made our best decision to
4 review it and review it competitively, and the
5 Health Plan said what it said. It never changed.
6 It said what it said all along.

7 Q. Mr. Grice, you also just testified that
8 you could have made the decision without
9 addressing the State Health Plan.

10 A. Yes.

11 Q. How could you do that when the State
12 Health Plan is the number one criteria without
13 which no one can be approved unless they meet it?

14 A. There have been many competing
15 applications that we have made decisions on and
16 not address the Health Plan because the compelling
17 reason that we would approve one applicant over
18 another had to do with other criteria.

19 You can have an application, as I
20 mentioned earlier, let's say for competing home
21 health agencies. In 1995 we had 86 competing home
22 health agencies in the state, over 13 counties.
23 Every one of those applications was consistent
24 with the Health Plan, every one. But our decision
25 was that we approve only one, and it was the one

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1 applicants, all applicants meet the consistency of
2 the Health Plan and they're competing. Any one
3 meets, they're competing, but we have to base the
4 decision on which better meets the other project
5 review criteria. That is what occurred in this
6 case. You can take the Health Plan out of it all
7 together and the decision would have been the
8 same.

9 Q. Mr. Grice, when did you come to that
10 conclusion?

11 A. Came to that conclusion before we made
12 the decision -- at the time we made the decision.

13 Q. When you made the decision, did you meet
14 with the commissioner prior to publishing your
15 decision on May the 30th?

16 A. No, I did not.

17 Q. Did you talk to the commission?

18 A. I did not.

19 Q. Did you talk to Mr. Frishman?

20 A. I think he knew what was happening
21 exactly. Ms. Fechtel and I sat down and did this
22 ourselves.

23 Q. My question was, did you talk to him?

24 A. I think the Deputy Commissioner Leon
25 Frishman and I did not talk to the commissioner at

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1 and most general hospitals have various services,
2 not just one service..

3 Q. Look on Roman numeral II-6 of the 2004-5
4 plan.

5 A. Okay.

6 Q. Under paragraph 4, narrative, general
7 hospital beds.

8 A. Yes.

9 Q. It says the general acute hospital bed
10 need methodology. Am I incorrect in that?

11 A. It uses that term, that's correct.

12 Q. Under 4, Roman numeral II-6, II-7, that
13 talks about calculating the bed need methodology
14 for the general acute care hospital beds; is that
15 correct?

16 A. That's correct.

17 Q. My question to you is, under this bed
18 need calculation, am I correct that the Department
19 has interpreted the Plan that the general acute
20 hospital bed need is hospital specific to the
21 hospital that generated the need, and that the
22 hospital that generated the need is the only one
23 that would meet the bed need methodology?

24 MS. LAYMAN: Object to the form.

25 THE WITNESS: It is done specific to

1 hospitals and the hospital would generate a
2 need -- would see that as a need that is their
3 need. That's correct. That they would have
4 control over or be able to apply for.

5 MS. CRUM: When we take a break, I'll
6 make a clean copy of the 2004-5 plan and make that
7 Exhibit 16.

8 MR. ANDREWS: What pages are you going to
9 include?

10 MS. CRUM: Starting on the general
11 hospital, G(1)(a) on page Roman numeral II-4
12 through --

13 MR. ANDREWS: Can we take it through 9?

14 MS. CRUM: I don't have any problem with
15 that. I mean, some of that doesn't have anything
16 to do with need calculation. I don't have a
17 problem if you want to do that. If I don't y'all
18 can.

19 MR. ANDREWS: Would you have any
20 objection to including the whole chapter through
21 19? Otherwise, I'll want to add that later.

22 MS. CRUM: No problem.

23 Off the record.

24 (Off-the-record discussion.)

25 (A lunch recess was taken at this time.)

1 It's a batch of newspaper articles. Mr. Grice,
2 when did you make a determination in your mind
3 that Fort Mill Medical Center, the AMISUB Fort
4 Mill Medical Center was the only applicant that
5 could meet the bed need methodology for general
6 acute beds -- hospital beds in the State Plan?

7 A. There were many issues we looked at and
8 we were open and we reviewed them competitively,
9 but in the final analysis in the decision-making
10 process they were reviewed competitively, and we
11 looked at the criteria. Now, the Health Plan, we
12 always knew, you know, the issues involved there,
13 but reviewed them competitively.

14 We saw certain health planning reasons
15 that we saw Piedmont as the forerunner of these,
16 and that was the decision. It was my decision
17 because I knew no matter what decision we make we
18 would probably -- it would be appealed and go to a
19 hearing. I decided I wanted to make it as strong
20 as possible. And so in this case I added that
21 reason in with the Plan. We locked it in which --
22 certainly, the Plan says what it says, and I added
23 that as No. 4.

24 Q. My question was not why did you add it
25 but when did you make the decision that Fort Mill

1 Medical Center, the AMISUB application was the
2 only applicant that would meet the bed need
3 methodology set out -- for general hospital beds
4 set out in the 2004-2005 Plan?

5 A. Well, probably the last couple of weeks
6 before the letter was issued is when I really was
7 focusing on this and we were developing the
8 findings and basically, you know, trying to
9 prepare the letters. And that's when I really
10 focused on it.

11 Q. Mr. Grice, you testified that you had
12 issued the memorandum of January 25 giving your
13 interpretation, reviewed by others, that under
14 part 3 other applicants could apply for that bed
15 need. Then you also testified that you made the
16 decision to withdraw that interpretation on
17 February 1, 2005, and you announced that you were
18 withdrawing that interpretation and you would
19 review them to see which best met "the public
20 need" on March the 3rd, 2005.

21 When you made the determination to
22 withdraw the interpretation, the January 25, 2005,
23 interpretation, had you made the determination
24 that only Fort Mill Medical Center could meet the
25 bed need methodology for general hospitals in the

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1 you still believe that the State Plan could be
2 interpreted so as to provide that Presbyterian,
3 Charlotte-Mecklenburg, and Hospital Partners could
4 meet the bed need methodology of the Plan?

5 A. Let me say this. We had not had any
6 meetings, I think, and I'm trying to think of the
7 Health Planning Committee. Something could have
8 happened there too. I mean, I was trying to be
9 open. What I said was true that day. We reviewed
10 them competitively. Potentially we looked at them
11 as if any of them could have been approvable.

12 Q. The last sentence down here says, "I
13 think any one of these applications is
14 approvable."

15 Is that what you believed as of March 19,
16 2006?

17 A. That's what I said that day, yes.

18 Q. Then did you believe as of March 19,
19 2006, that it was possible to interpret the State
20 Health Plan so that Presbyterian,
21 Charlotte-Mecklenburg, or Hospital Partners could
22 meet the bed need methodology under the Plan?

23 A. Well, we had focused on that issue more
24 towards the decision time. You can't predict the
25 future. Anything could have happened prior to our

1 care facilities and services, at best meet public
2 need, ensure there are high quality services
3 provided in facilities, and to try to, I think --
4 I guess there's one more. I can't remember the
5 other one exactly, but it's got -- I guess try to
6 ensure that -- let me look here a second.

7 Prevent unnecessary duplication of health
8 facilities and services is the fourth one. And
9 these are stated in Section 101 of Regulation
10 61-15.

11 Q. Assume for me a minute, Mr. Grice, that
12 in fact the AMISUB Fort Mill Medical Center
13 hundred bed hospital is built, it would be -- it
14 would have to have a separate hospital license
15 from Piedmont, wouldn't it?

16 A. Yes. Every hospital is licensed
17 separately.

18 Q. The thing would be they would have a
19 common ownership?

20 A. They would. The licensee would be
21 identical just like Greenville Hospital Systems
22 has four or five hospitals separate licensed under
23 the same licensee.

24 Q. But that the hospital should be
25 separately licensed and would be distinct

1 facilities?

2 A. That's correct.

3 Q. Let me ask you to look again at 74-R.

4 Not again. I haven't asked you to look at that
5 one yet. It's Exhibit 15, page 74-R.

6 A. Okay.

7 Q. Would it be fair to say that the
8 sentiment in York County was that they wanted
9 competition?

10 MR. ANDREWS: Object to the question.
11 Moving beyond the bounds of the discovery order.

12 MS. CRUM: I'm asking the question -- I
13 think that goes to the intent as to whether or not
14 the CON Act itself envisions competition.

15 MR. ANDREWS: What does that have to do
16 with this case?

17 BY MS. CRUM:

18 Q. Let me address you to the second column,
19 Mr. Grice, the second paragraph, the first full
20 paragraph and the second paragraph. Just read
21 them into the record, please.

22 A. That's the second column?

23 Q. Starting at the right with "Piedmont
24 Medical Center."

25 A. "Piedmont Medical Center has 471 pages of

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1 saying it possibly could, and that's why I think
2 the Health Plan does have -- it does have
3 standards but there are times that you have to
4 make interpretations. And that's why I would
5 rather wait to make the final decision to look at
6 the situation that we have. And that's what I
7 did.

8 Q. Then the interpretation you made here is
9 that only the specific hospital that generated the
10 need could use it; is that right?

11 A. Yes, No. 4. That's what it says.

12 (EXH. 19, Letter to Lisa M. Longshore
13 from Richard Cooke dated 8/18/06, was marked for
14 identification.)

15 BY MS. CRUM:

16 Q. Mr. Grice, have you seen this letter from
17 the Department of Justice?

18 A. Yes, I have.

19 Q. Does the one I handed you, does it also
20 have the Hospital Association letter behind it?

21 A. It does.

22 Q. Let's pull that off. I'm not going to
23 ask you about that. Mr. Grice, look at the second
24 page of Mr. Cooke's letter, the last sentence, the
25 first paragraph. Could you read that, please.

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1 A. I'm sorry. Last sentence in the first
2 paragraph?

3 Q. Yes, sir.

4 A. "Our study identified no state CON law
5 that appeared to be so restrictive as to prohibit
6 new competitors from entering the state."

7 Q. Tell me, Mr. Grice, with the
8 interpretation that you gave in reason 4 to the
9 Plan in this case, how could a competitor enter
10 into York County?

11 A. In my opinion there could be a
12 situation --

13 Q. Let me rephrase it. With regard to the
14 64 new hospital beds, given the interpretation
15 under paragraph 4 of the decision letter that the
16 bed need methodology is to the specific
17 institution, how could a new competitor enter the
18 market in York County?

19 A. Well, certainly you can make the argument
20 that it couldn't. Someone could also make the
21 argument they could, and sometimes --

22 Q. I want your argument, Mr. Grice, that
23 they could.

24 A. My argument would be that if for some
25 reason the provider decided they for whatever

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1 A. The Plan doesn't go into that detail, but
2 it's certainly an idea.

3 Q. But what the Plan does say, according to
4 your statement here, is that the Plan uses the
5 individual facilities to calculate need, right?

6 A. That's correct.

7 Q. So absent approval from Piedmont Medical
8 Center nobody else could compete for those beds,
9 could they?

10 A. That's correct.

11 Q. Let me ask you one more question about
12 this last sentence here. The State Health Plan,
13 the way bed need methodology has been interpreted
14 in this decision does not take into account the
15 entire medical patient population of York County,
16 does it?

17 A. Yes. That's what it says because it's
18 related to -- many patients may go somewhere else
19 so we don't really know what their utilization
20 would be in another facility. Could be
21 out-of-state.

22 Q. We do know that people have chosen to go
23 out-of-state, don't we, in this particular need
24 competing application scenario?

25 A. Yes.

1 mean, there are parties that are going to submit
2 regardless. We've had that experience. They know
3 that for whatever reason their application may be
4 inconsistent with the Health Plan. They're going
5 to submit it anyway. Fine.

6 I try to tell most people that, indeed,
7 if an application is inconsistent with the Health
8 Plan we don't have the authority to approve it,
9 nor does the court system, the appeals process.
10 But at times people may decide they're going to go
11 forward anyway.

12 Q. When in this review process did you make
13 the determination that the applicants that were
14 identified as competing with Piedmont could not be
15 approved in a way that was consistent with the
16 State Health Plan?

17 A. It was focused on towards the end,
18 towards the last month or so. Really, when
19 studying all of this, as I mentioned earlier, I
20 wanted to review them competitively, and we did,
21 and we did find the application we approved to be
22 more -- to better meet certain important criteria.
23 We also put the Health Plan issue in the letter
24 also.

25 Q. Let me focus you on the fourth paragraph

1 institution, although no new entity could submit
2 an application while another new entity has not
3 yet been developed and operational for at least a
4 year.

5 Now, gastrointestinoscopy rooms are a
6 little bit stricter. They cannot be added by
7 anyone until all such rooms have been operational
8 and licensed for a year.

9 MR. ANDREWS: Give me just a moment. I
10 think I'm through. Nothing further.

11 MS. LAYMAN: The Department has no
12 questions.

13 REEXAMINATION

14 BY MS. CRUM:

15 Q. Mr. Grice, I just wanted to make sure in
16 response to a question that Mr. Andrews asked you,
17 when you made the decision regarding the acute bed
18 need methodology and the fact that it was the
19 hospitals -- I'm sorry. I want to quote the exact
20 language so I don't mess it up. That the bed need
21 was calculated by the individual facilities
22 identified in the Plan. I think you said in the
23 last couple of months of the decision. But in
24 response to my question you had said in May, the
25 last couple of weeks of the decision process.

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1 Which one was it when you focused on the
2 actual approval process?

3 A. I think the decision was May 30 and it
4 was my -- most efforts went into the last month of
5 May when we really got down to work on the words
6 and all, but during all of that period of time, I
7 mean, nothing had changed.

8 The Plan was what it was. It was just a
9 matter, in my mind, we had to resolve and get a
10 decision, have the summary sheets ready and the
11 wording. So in reviewing the process, reviewing
12 the applications, we did review them competitively
13 during that time and determined which one we
14 thought was the best one from a competitive
15 standpoint.

16 We also looked at the Plan issue, and I
17 thought of that -- not even addressing it, but I
18 decided to do it and add that in as a fourth
19 reason because I thought it was important and it
20 was something that would be argued in a hearing
21 probably and we knew that it would get appealed.
22 But it was really the last month that I really
23 focused on all of this.

24 If I had had time I could have really
25 written all these words more thoroughly, but we

1 just, you know, a matter of placing the effort at
2 the time it's needed. We had the decision during
3 May, and that was it.

4 Q. So that was May of 2005, right?

5 A. I think it was 2006.

6 Q. I'm sorry. You're right.

7 A. May 2006.

8 Q. But nothing changed from the time you
9 wrote your January 25, 2005, memo to May of 2006,
10 correct?

11 A. That's correct. Nothing changed in the
12 Plan. It was just a process where the Health
13 Planning Committee thought about this issue, you
14 know, and no action was taken at that point.
15 Certainly things could have changed. I mean, we
16 could have had applicants withdraw and other
17 things happen. But nothing really changed, you're
18 right. The fourth competing applicants ended up
19 May 30 for a decision.

20 Q. And nothing changed within the state, the
21 2004-2005 Health Plan?

22 A. No, it did not.

23 Q. Then the Health Planning Committee made
24 its decision in November of 2005 that it would not
25 make any changes and would leave it, quote, status

1 quo, correct?

2 A. That's correct.

3 Q. And it was still not until May of 2006
4 that you came to the conclusion that the general
5 acute hospital bed methodology was -- bed need was
6 made for the individual facilities identified in
7 the Plan, right?

8 A. Not that I came to the conclusion. I
9 guess it was that the decisions were issued,
10 drafted, and reviewed, you know. I'm sure if our
11 decision date had been probably January 2006, I
12 mean, we'd have looked at the same information.
13 But it was just a matter of my sitting down and
14 determining what the reasons are going to be and
15 how we're going to handle this.

16 It happened at the decision date month,
17 which was May 2006, but no other information
18 changed. I mean, we did get information from the
19 applicants and, you know, and there were public
20 hearings, etc. But, you know, that was the
21 decision date when we had to issue the reasons,
22 and that's when I was forced to really study it.

23 Q. When you issued the memo giving the
24 Department's policy interpretation in January
25 2005, you did that as the bureau chief responsible

EXHIBIT B

1 STATE OF SOUTH CAROLINA

2 ADMINISTRATIVE LAW COURT

3 CHARLOTTE-MECKLENBURG HOSPITAL
4 AUTHORITY D/B/A CAROLINAS
5 HEALTHCARE SYSTEM,

6 Petitioner(s),

7 vs. Case No. 06-ALJ-07-0489-CC

8 SOUTH CAROLINA DEPARTMENT
9 OF HEALTH AND ENVIRONMENTAL
10 CONTROL AND AMISUB OF SOUTH
11 CAROLINA, INC., D/B/A PIEDMONT
12 HEALTHCARE SYSTEM D/B/A
13 FORT MILL MEDICAL CENTER,

COPY

14 Respondent(s),

15 PRESBYTERIAN HEALTHCARE SYSTEM, D/B/A
16 PRESBYTERIAN HOSPITAL - YORK, LLC,

17 Intervener(s).

-----X

18 CHARLOTTE-MECKLENBURG HOSPITAL
19 AUTHORITY D/B/A CAROLINAS
20 HEALTHCARE SYSTEM,

21 Petitioner(s),

22 vs. Case No. 06-ALJ-07-0490-CC

23 SOUTH CAROLINA DEPARTMENT
24 OF HEALTH AND ENVIRONMENTAL
25 CONTROL,

Respondent(s),

AMISUB OF SOUTH CAROLINA, INC. D/B/A
PIEDMONT HEALTHCARE SYSTEM D/B/A
FORT MILL MEDICAL CENTER AND
PRESBYTERIAN HEALTHCARE SYSTEM D/B/A
PRESBYTERIAN HOSPITAL - YORK, LLC,

Intervenor(s).

-----X

1 PRESBYTERIAN HEALTHCARE SYSTEM,
2 D/B/A PRESBYTERIAN YORK, LLC,

3 Petitioner(s),

4 vs.

Case No. 06-ALJ-07-0713-CC

5 SOUTH CAROLINA DEPARTMENT OF
6 HEALTH AND ENVIRONMENTAL CONTROL
7 AND AMISUB OF SOUTH CAROLINA, INC.
8 D/B/A PIEDMONT HEALTHCARE SYSTEM
9 D/B/A FORT MILL MEDICAL CENTER,

10 Respondent(s).

11 CHARLOTTE-MECKLENBURG HOSPITAL
12 AUTHORITY D/B/A CAROLINAS
13 HEALTHCARE SYSTEM,

14 Intervenor(s).

-----X

15 PRESBYTERIAN HEALTHCARE SYSTEM,
16 D/B/A PRESBYTERIAN YORK, LLC,

17 Petitioner(s),

18 vs.

Case No. 06-ALJ-07-0712-CC

19 SOUTH CAROLINA DEPARTMENT OF
20 HEALTH AND ENVIRONMENTAL CONTROL,

21 Respondent(s),

22 AMISUB OF SOUTH CAROLINA, INC. D/B/A
23 PIEDMONT HEALTHCARE SYSTEM D/B/A
24 FORT MILL MEDICAL CENTER AND
25 CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY
D/B/A CAROLINAS HEALTHCARE SYSTEM,

 Intervenor(s).

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D E P O S I T I O N

WITNESS: F. DEL MURPHY, JR.

DATE: Wednesday, April 25, 2007

TIME: 11:06 a.m.

LOCATION: Moore & Van Allen
100 North Tryon Street, 47th Floor
Charlotte, North Carolina

TAKEN BY: Attorneys for the Respondent(s)

REPORTED BY: SHERI L. BYERS
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1 ability, when would have been the first time you would
2 have met with them on this particular project or
3 application? Would it have been before you filed or
4 after you filed? Do you recall?

5 A. It would have been after.

6 Q. All right. So after Carolinas filed its
7 application would be the first time?

8 A. The first time I meet face to face with them.

9 Q. All right. And when would have been the last
10 time you met with them? Would it have been before
11 Joel's decision letter denying your application or
12 afterwards?

13 A. We met with Joel and Mary and Sally, I
14 believe she attended. They came up and did site visits
15 towards the end of the review, and I believe it was
16 early May, and they met with us at CMC Pineville.

17 Q. And that would have been the last time?

18 A. That was the last time.

19 Q. And was that Sally Cheek who was with them?

20 A. Yes.

21 Q. So in between that first visit and the last
22 visit, I think -- what did you say, your estimate is
23 you're talking about a total of four or five maybe?

24 A. Yeah. I mean, five sounds too high.

25 Probably three to four.

1 Q. Okay. When you met with Mr. Grice and
2 Ms. Fechtel, who were you with, who came with you from
3 Carolinas?

4 A. Dennis Phillips.

5 Q. Was it always you and Mr. Phillips?

6 A. I believe so.

7 Q. Was anybody else present at those meetings
8 besides yourself, Mr. Phillips, Mr. Grice and
9 Ms. Fechtel?

10 A. Sally Cheek attended, I think, most of the
11 meetings.

12 Q. Okay. Anybody else you can think of?

13 A. No.

14 Q. All right. Now, can you tell me the purpose
15 and nature of these meetings and discussions you had
16 with the DHEC folks?

17 A. I believe during the course of this, there
18 were often responses for additional information from
19 us. And the primary purpose of those meetings was to
20 clarify exactly what they needed and to make sure that
21 they understood, you know, that, one, we understood
22 what they were asking for and then that they understood
23 how we were supplying that information back to them.
24 We always felt like it was best to meet with them and
25 go over it with them, and that was the primary intent

1 of those meetings.

2 Q. Okay. Let's go back to this document you
3 have in front of you, which is Exhibit 34. And let's
4 look at that language again.

5 It says, "Mr. Murphy may have knowledge of
6 the manner in which CHS was treated as an applicant and
7 about CHS's interaction with South Carolina DHEC with
8 respect to its CON application."

9 Is anything other than what you've already
10 testified about CHS's interaction with DHEC with
11 respect to its CON application that is intended here?

12 MR. MULLER: Object to the form of the
13 question. You can answer it.

14 MS. CRUM: I'm also going to object to the
15 fact that it's beyond the scope of the bifurcated
16 discovery. I don't see how it fits in any one of the
17 four categories.

18 MR. WESTBROOK: I may agree with you on that,
19 Ms. Crum, to tell you the truth, but since this is
20 listed as the scope of his testimony, I'm going to ask
21 him about it and then, you know, we'll see whether it
22 fits within the scope later on perhaps. But I think
23 since this is -- the intention is that he's going to
24 testify about these areas, I think I have the right to
25 ask him about that.

1 A. Yes.

2 Q. Okay. If you will go up towards the top of
3 the page, it's the second paragraph, the first
4 sentence, do you see where it says, "The needs for
5 hospital beds are based on the utilization of
6 individual facilities"?

7 A. Yes.

8 Q. Do you recall ever discussing that sentence
9 or that concept with Mr. Grice -- excuse me, Mr. Grice
10 or Ms. Fechtel or anybody else at DHEC?

11 A. No.

12 Q. Okay. And if you will turn over to page
13 Roman numeral II-7, and again sort of towards the top
14 of the page you see that in parenthesis, there's the
15 lower case "a" and it says, "Calculations of bed need
16 are made for individual facilities."

17 Do you ever discuss -- do you ever recall
18 discussing that sentence with anybody at DHEC?

19 A. I don't recall.

20 Q. Okay. Let me ask you now to look at
21 something else, and this is going to be Exhibit 10.
22 And Exhibit 10, just so everybody will know what we're
23 talking about, is the January 25th, 2005, memorandum
24 from Joel Grice to licensed healthcare providers.

25 Mr. Murphy, do you recall seeing this

1 document before?

2 A. Yes.

3 Q. Do you recall when you first saw this?

4 A. Based on the date, it was probably sometime
5 February maybe.

6 Q. Okay. Do you --

7 A. February of '05.

8 Q. I'm sorry. February of '05?

9 A. That would be my assumption.

10 Q. Okay. Do you remember seeing it back during
11 that period of time?

12 A. I can't remember if I -- I can't remember
13 exactly when I saw it. I remember this document.

14 Q. Okay. Did you ever discuss this document
15 with anybody at DHEC?

16 A. I don't remember discussing specific, you
17 know, line items in this memo. I recall talking to
18 Joel and Mary about us applying, and my recollection is
19 that we could apply and we proceeded to apply.

20 Q. All right. Look at the bottom of the page,
21 number 3, down there, please. And you will see it
22 says, "A CON for the net hospital bed need in a county
23 may be requested and approved for any existing hospital
24 located in the county or for any other entity/applicant
25 for the development of a new hospital or an addition to

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1 the existing hospital within that county."

2 Do you recall discussing with Joel or Mary or
3 anybody else at DHEC that particular sentence?

4 A. I don't recall, you know, calling them on the
5 phone and asking about this particular sentence. I
6 recall prior to filing our application, calling them
7 and confirming that we could apply. And I was told,
8 yes, we could.

9 Q. All right.

10 A. I don't recall going over these particular
11 words in this sentence with them.

12 Q. Okay. Let's look at Exhibit 11. Mr. Murphy,
13 Exhibit 11, as you see, is a March 3rd, 2005,
14 memorandum from Joel Grice, and if you will take just a
15 minute or two to familiarize yourself with that.

16 A. Okay.

17 Q. Okay. Do you recall seeing this before?

18 A. I do.

19 Q. And when would that have been?

20 A. I'm assuming sometime in March, I'm not sure.

21 Q. All right. Do you understand that this
22 memorandum that we're looking at now, the March 3rd
23 memorandum, that Mr. Grice's intent is to rescind the
24 earlier memorandum that we just looked at of
25 January 25th?

1. MS. CRUM: Object to the form.

2 MR. MULLER: Same objection. You can answer
3 it.

4 THE WITNESS: The memo says that this is to
5 advise that it's to rescind the departmental policy
6 dated the day of this other letter.

7 BY MR. WESTBROOK:

8 Q. All right. And do you have any reason to
9 doubt that's the purpose of this memorandum?

10 A. No, I do not. No.

11 Q. All right. So I believe you said earlier
12 that you assumed that you first saw this memorandum
13 sometime in March of 2005 or roughly that time period,
14 would that -- did I understand you to say that?

15 A. Yes. My assumption is I saw it in March and
16 this is, I'm guessing, is what prompted me to call and
17 ask Joel if we could apply and should we proceed with
18 our application and that's -- we were told yes, to
19 proceed. And that's really all I really remember about
20 this memo.

21 Q. Okay. So you called Mr. Grice after seeing
22 this memo and asking -- asked him if you could apply;
23 is that correct?

24 A. I can't really say that I called right after
25 I saw this memo. I just remember calling and, you

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1 know, I can't remember if it was before or after this
2 particular memo. It was more than likely, I would
3 assume, after, but I can't -- you know, I don't have
4 the date committed to memory.

5 Q. But you do have a specific memory, it sounds
6 like, of calling Mr. Grice and asking him whether
7 Carolinas could apply?

8 A. Yes.

9 Q. And he told you that you could?

10 A. Yes.

11 Q. And that was in a telephone conversation?

12 A. Yes.

13 Q. Do you recall any other conversations after
14 that by phone or in person in which that question was
15 asked again or discussed further between you and
16 Mr. Grice or between you and anybody else at DHEC?

17 A. I don't recall specific dates, but it seems
18 like we asked, you know, maybe more than once, but it
19 didn't seem to be an issue for us with DHEC.

20 Q. And what didn't seem to be an issue was the
21 question of whether you could apply or not?

22 A. Right.

23 Q. Do you recall anything else about that
24 discussion or those discussions that you had with
25 Mr. Grice other than whether you could apply or not?

1 A. Not really, no.

2 Q. Okay. Was there some reason that you were
3 concerned that you could not apply, is that the reason
4 that you called him, to ask the question?

5 A. I don't -- you know, when Fort Mill Medical
6 Center filed the application, you know, we -- I believe
7 we called DHEC to ask if we could apply. It's pretty
8 unusual, you know, new hospitals aren't built that
9 often, so that's really what prompted it. You know,
10 this was a -- you know, like I say, in South Carolina,
11 new hospitals and bed need is not generated that often,
12 it's pretty unusual. So that's what prompted us to
13 call.

14 Q. Okay. This is a -- what I'm about to hand
15 out now is part of Exhibit 32, but because Exhibit 32
16 is kind of thick, I just ask Doug to make copies of
17 this and just to make this one-page letter a separate
18 exhibit.

19 And, Mr. Murphy, you will see when you get it
20 this is a letter dated May 27, 2005, from you to Albert
21 Whiteside. Take a look at that for a minute, please.

22 I'm sorry, let's make this Exhibit 35.

23 (RESPONDENT'S EXH. 35, Letter Dated
24 5-27-2005, was marked for identification.)

25 BY MR. WESTBROOK:

1 Q. Okay. Mr. Murphy, do you recall writing this
2 letter?

3 A. Yes.

4 Q. Look at the second paragraph, first sentence
5 that says, "We have reviewed the DHEC staff comments
6 provided at the public hearing in Columbia on May 23rd,
7 2005."

8 You did not attend that public hearing, I
9 take it, from your earlier --

10 A. I don't believe I did, no.

11 Q. But somebody from Carolinas did?

12 A. I believe so.

13 Q. Do you recall who it was?

14 A. My recollection was it was Greg Bass, and I'm
15 vague on it, it could have been someone from our system
16 in Charleston, the Roper St. Francis system. I
17 remember it was either Greg or someone from there
18 attended on our behalf.

19 Q. Okay. Do you recall whether you, yourself,
20 personally looked at the DHEC staff comments?

21 A. Yes, I did.

22 Q. All right. And do you remember what they
23 said?

24 A. I remember there were some clarifying
25 language on the application -- on bed need and, you

1 know, this last -- this last sentence, "We are
2 supportive of the efforts to allow any entity to apply
3 for new hospital beds when a need for additional beds
4 is indicated." And I think we felt it provided clarity
5 on the issue.

6 Q. All right. Now, you've been -- you've
7 already testified that you talked with Mr. Grice about
8 whether Carolinas could apply or not, and had you
9 already been given that assurance by the time you wrote
10 this letter?

11 A. Yes.

12 Q. Okay. And the -- let me pass out Exhibit 30.
13 It's already been marked as Exhibit 30 to these
14 depositions.

15 Take a look at this, if you will, Mr. Murphy.
16 Are these the DHEC staff comments that you reference in
17 your May 27 letter?

18 A. I believe so.

19 Q. Just take your time and read through them to
20 yourself, satisfy yourself.

21 A. Okay.

22 Q. Okay. Do these appear to be the staff
23 comments that you reference in your May 27 letter?

24 A. Yes.

25 Q. And do these comments appear to you to be

1 consistent with the January 25th memo from Mr. Grice
2 that we looked at a minute ago?

3 And in particular, I'd ask you to look at
4 number 3 at the bottom of the page.

5 MR. MULLER: Object to the form of the
6 question, but you can answer it.

7 THE WITNESS: So your question was: Are
8 these comments consistent with number 3?

9 MR. WESTBROOK: Correct, that's my question.

10 MR. MULLER: Same objection, but you can
11 answer it.

12 THE WITNESS: They seem to be. They seem to
13 be clarifying the application in terms of who could
14 apply when there's a bed need.

15 BY MR. WESTBROOK:

16 Q. All right. Now, going back to your May 27
17 letter, which is Exhibit 35, the first sentence of that
18 letter begins on March 31, 2005, "The South Carolina
19 State Health Planning Committee voted to seek public
20 comment on the hospital bed need section of the
21 2004-2005 State Health Plan."

22 Do you see where it says that?

23 A. Yes.

24 Q. Okay. And this seems obvious, but my
25 question is, this May 27th letter, is this your

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1 and I appreciate it. But do you have an independent
2 memory at that time of realizing that was going on?

3 A. You know, at the initial -- at the initial,
4 these comments -- excuse me for a minute.

5 We sent the letter in Exhibit 35 was dated
6 May and then our application was filed in March prior
7 to that. You know, I have a recollection that this was
8 going on, but, you know, it went through the summer, I
9 guess, this letter came out looks like in November. I
10 was aware that that was going on, yes.

11 Q. Okay. So let me just make sure I understand,
12 and correct me if I'm misstating anything here.

13 So it sounds like that you were aware at the
14 time during from -- during this, say, roughly from the
15 time you submitted your application until through
16 November when this Exhibit 13 memo came out, that some
17 changes were being considered to the State Health Plan;
18 is that correct?

19 A. I do remember the memo. I do remember the
20 solicitation of comments. I remember the letter we
21 submitted.

22 Q. Okay. All right. Now, let me go back, if I
23 can, to the statement you made a couple of times that
24 Mr. Grice told you that Carolinas could apply. And
25 again, correct me if I'm wrong, my memory is you said

1 you're sure he told you that at least once and maybe
2 more than once?

3 A. I believe he told me more than once, but I
4 think over the course of this process, it would seem to
5 be continually validated that we could apply because we
6 met with them often. There was never any discussion,
7 that I recall, about this topic really once we filed
8 our application. I just don't recall any real
9 discussion about these matters with Joel and Mary
10 during the whole course of the review. And during the,
11 you know, request for additional information, there was
12 never really any question whether we could apply. It's
13 kind of a given.

14 Q. Okay. When you say "these matters," you're
15 referring to the exhibits that we've just been going
16 over --

17 A. Yeah.

18 Q. -- and these issues of -- related to Joel's
19 January 25th memo and the public comment that you
20 submitted to the health planning committee and those
21 issues related to changing the plan, is that what
22 you're referring to?

23 A. That is correct. You know, during the course
24 of this, you know, there was a project review meeting
25 held that was very official with different members of

1 DHEC there. There was a panel of representatives. It
2 was a very intense process. And I don't recall any --
3 any discussion of this after -- you know, during this
4 period here where this was solicitation of comments.
5 During the course of the review, it never came up.

6 Q. So you don't recall the issue ever coming up
7 of whether or not Carolinas could apply? That's I
8 believe --

9 A. I remember at the beginning, again, just
10 calling down there again because it was a new bed need
11 in York County, pretty rare kind of deal in terms of,
12 you know, an opportunity like this calling. You say,
13 hey, we're going to submit an application, and there
14 was never really any question about it.

15 Q. Did -- do you ever recall Mr. Grice or
16 anybody at DHEC telling you that Carolinas' application
17 would be approved?

18 A. No, they never told us it would be approved.

19 Q. Do you ever recall them telling you, anybody
20 at DHEC telling you that it complied with the State
21 Health Plan?

22 A. I don't recall that specifically. I don't --
23 you know, I don't really remember them telling me we
24 couldn't be approved, and I believe they deemed our
25 application complete and they deemed them competing but

1 I don't -- you know, that's my recollection.

2 Q. All right. Do you ever recall them telling
3 you that it could be approved?

4 A. I believe my interpretation that the
5 applications were deemed complete and ready for review
6 and the whole process certainly led me to believe that
7 it could be approved. It was a very competitive
8 process, and I was under the belief that we were all
9 available -- you know, approvable.

10 Q. But do you have a specific memory of anybody
11 at DHEC telling you that?

12 A. Not specifically that we complied with the
13 health plan or that we would be approved. I'm certain
14 no one told me that, you know, we were going to win
15 this thing. But I know we were deemed complete and --
16 you know.

17 Q. So you were deemed complete, you were told
18 that you could apply, you were part of the review
19 process, they accepted the application -- excuse me,
20 the additional information that you submitted to your
21 application, but did they ever tell you that you could
22 be approved, that you were -- had an approvable, if
23 there is such a word, approvable application?

24 A. I interpreted there once we, you know, I --
25 once we were deemed complete, I interpreted that to

1 mean that we had an approvable application.

2 Q. Okay.

3 A. We met all their questions and, you know, we
4 would go back and forth to make sure we had the right
5 information to them, and once they would actually tell
6 us, okay, you've given us what we need, that type
7 conversation.

8 MR. WESTBROOK: Unfortunately, I don't have
9 copies of this, but this is -- maybe you all do. This
10 is Exhibit 23, which is the decision letter from Joel
11 to Carolinas.

12 Do you all have copies of that by any chance?

13 MS. CRUM: We did not bring that but it's
14 okay.

15 MR. WESTBROOK: Doug, do you have a copy?

16 MR. MULLER: I have a copy in front of me,
17 yes.

18 MR. WESTBROOK: Can you share that with
19 Mr. Murphy, if you don't mind? And I'll share mine
20 with Liz.

21 MS. CRUM: Is that Exhibit 23?

22 MR. WESTBROOK: This is Exhibit 23.

23 BY MR. WESTBROOK:

24 Q. If you look, Mr. Murphy, on page -- I believe
25 it's page 2, number 4 at the bottom of the page and

1 read that language. You can just read it to yourself,
2 if you don't mind.

3 A. Okay.

4 Q. First of all, this Exhibit 23 is a letter
5 from Mr. Grice to you; is that correct?

6 A. Yes, that's correct.

7 Q. What's the date of the letter, please?

8 A. May 30th, 2006.

9 Q. And this is the letter announcing Mr. Grice's
10 decision to deny Carolinas' application; is that right?

11 A. Yes.

12 Q. And I just asked you to look at paragraph 4
13 there on page 2. I think we've talked about most of
14 that already in this deposition but just in case we
15 haven't, is there anything in that paragraph 4 that you
16 discussed with Mr. Grice prior to this decision letter?

17 A. No, I don't believe so.

18 Q. Okay. Or Ms. Fechtel or anybody else at
19 DHEC; is that correct?

20 A. No.

21 Q. Okay. Mr. Murphy, do you feel like Mr. Grice
22 or DHEC misled you?

23 A. This letter and particularly this paragraph
24 was a shock to me. When I got this letter and read the
25 reason, I didn't understand it and it was quite frankly

1 a shock.

2 Q. Okay. I understand it was a shock, but let
3 me go back to my question.

4 Do you feel Mr. Grice, whether intentionally
5 or not, misled you?

6 MR. MULLER: Object to the form of the
7 question, but you can answer.

8 THE WITNESS: I don't really know how I can
9 answer the question, to be honest with you, because I
10 don't know what someone's intentions might or might not
11 be. If I was a mind reader, I might could but I'm not.

12 During the course of this review -- I believe
13 during the process we were, you know, available to
14 apply, we were welcome to apply and we applied. Then
15 we got this letter and it seemed to say that we really
16 couldn't apply, that only Piedmont Medical Center could
17 apply. And in fact, Piedmont Medical Center didn't
18 apply, a different Fort Mill Medical Center applied and
19 it was a new hospital. And it was my understanding
20 that if there was going to be a new hospital built,
21 anyone could apply based on our belief at the time
22 and --

23 You know, your question was did Joel mislead
24 us, I really can't answer. He -- like I said earlier,
25 he was always accommodating, told us we could apply.

1 And did I feel misled? I felt, again, shocked that
2 this was the reason that none of the other applicants
3 were found to be, you know, a winning applicant.

4 BY MR. WESTBROOK:

5 Q. Right. Now, in paragraph 4 there that you
6 read, does it say in there anywhere that Carolinas
7 could not apply?

8 A. I don't believe so. I would to read it
9 again.

10 Q. Why don't you read it again.

11 A. You know, as I read it, it doesn't say that
12 we couldn't apply; but, again, our belief was again
13 talking with the DHEC, Joel and Mary, is that we could
14 apply and there was no reason that we couldn't have won
15 and been the prevailing applicant.

16 Q. Let me ask you to go back. Earlier, you
17 looked at Exhibit 16, which was a portion of the
18 2004-2005 health plan. Do you still have that over
19 there with you?

20 A. I believe so.

21 Q. It's the one with the map on the front.

22 A. Yeah.

23 Q. If you look again, please, on page Roman
24 numeral II-2, I think I asked you before to look at the
25 second paragraph, first sentence, where it says, "The

1 questions about this, let me go back over this one more
2 time and see if -- see if you have anything to add.

3 It says, "Mr. Murphy may have some knowledge
4 of the manner in which CHS was treated as an applicant
5 and about CHS's interaction with DHEC with respect to
6 its CON application in the 2004-2005 State Health
7 Plan."

8 Do you recall anything significant that we
9 haven't discussed today about the manner in which you
10 were treated -- CHS was treated as an applicant and
11 about these other topics, CHS's interaction with DHEC
12 with respect to the application and health plan?

13 MR. MULLER: Object to the form of the
14 question. You can answer it.

15 THE WITNESS: If you don't mind, the first
16 part of your question, if you could restate that.

17 BY MR. WESTBROOK:

18 Q. Okay. Now that we've gone back -- excuse me,
19 now that we've had a lot of questions and discussion in
20 this deposition, I'd like to go back to this sentence
21 again, which is supposed to summarize the testimony
22 that you might be offering. And I want to ask you, do
23 you have anything else significant that comes to your
24 mind that we haven't discussed today about the manner
25 in which CHS was treated as an applicant or about CHS's

1 interaction with DHEC with respect to its CON
2 application or about CHS's interaction with DHEC about
3 the 2004-2005 State Health Plan?

4 MR. MULLER: Object to the form, but you can
5 answer it.

6 THE WITNESS: I think that the statement here
7 is accurate in terms of my knowledge and of the manner
8 in which we were treated. And we had interaction
9 during the course of the review. The only thing I'm
10 thinking of is that, you know, we were -- I was led to
11 believe or I believe during the process that we had an
12 application that could be approved. There was never
13 any discussions during the process by Mary or Joel that
14 they said we could not be approved.

15 And we felt, you know, during the entire
16 process, up until getting that letter, we were fully
17 approvable and during the course of the events believed
18 we could be. They never pointed out any reason we
19 could not be approved.

20 BY MR. WESTBROOK:

21 Q. And the reason that you felt that way, you've
22 already testified about today, haven't you?

23 A. The reason I felt that way, we've talked
24 about here.

25 Q. Yeah. There's nothing else that comes to

1 mind that led you to believe that that we haven't
2 talked about today, right?

3 A. I don't believe so.

4 MR. WESTBROOK: Okay. All right. I don't
5 have any other questions. Thanks.

6 MS. CRUM: I've got just a few questions,
7 Mr. Murphy. I'm Liz Crum and I'm here on behalf of
8 Presbyterian.

9 EXAMINATION

10 BY MS. CRUM:

11 Q. Mr. Westbrook has asked you a series of
12 questions with regard to whether or not you, and when I
13 say "you," I'm talking about Charlotte-Mecklenburg,
14 believed it could apply for the CON application. Do
15 you remember those lines of questions?

16 A. Yes.

17 Q. Okay. Now, isn't the only reason an
18 applicant would ever apply for a CON is so that they
19 could be approved?

20 A. Absolutely.

21 Q. Okay. And inherent in the ability to apply
22 for a CON application is the ability to be approved for
23 it, isn't it?

24 A. Absolutely.

25 Q. Okay. Now, any time during the review

1 process after the CON applications of
2 Charlotte-Mecklenburg, Presbyterian and Hospital
3 Partners were filed on March 11th of '05, did DHEC ever
4 tell you that you were not eligible to be approved
5 because of a State Health Plan provision?

6 A. No.

7 Q. Do you remember conversations with Mr. Grice
8 or others from DHEC where they stated that it was the
9 Department's intent to approve the application that
10 best met the needs of the public?

11 A. Yes.

12 Q. Okay. And do you remember those
13 conversations occurring after the November 3rd, 2005,
14 memo was sent out? And that's Exhibit 13, if you want
15 to refer to Exhibit 13.

16 A. This memo was November, and the last time we
17 met with Joel and Mary and Sally was when they came up
18 and we again went through the different review criteria
19 and talked to them about, you know, our application,
20 why we felt we should be approved and, you know, they
21 sat and listened. So we did have discussion after this
22 November 3rd.

23 I don't remember other than that May visit,
24 there was probably another visit sometime between
25 November and that final May visit they made up here to

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1 Charlotte.

2 Q. The memo that you're referring to, Exhibit
3 13, was November 2005, and was the May visit 2006?

4 A. If I'm remembering correctly, the decision
5 was May of '06, and their visit was early that month.
6 And that -- the purpose of that visit, they wanted to
7 come up and look at the -- you know, do site visits to
8 the Presbyterian campus in Huntersville, I believe, and
9 they wanted to do a site visit at our CMC Pineville
10 campus and get a feel for our facilities and that type
11 thing.

12 Q. Mr. Murphy, do you remember at or about the
13 time of the project review hearing in March of 2006,
14 that Mr. Grice publicly stated that the applicant that
15 would be awarded the CON was the one that best met the
16 needs of the public?

17 MR. WESTBROOK: Object.

18 THE WITNESS: Yes.

19 MS. CRUM: Okay. Thank you, Mr. Murphy. I
20 don't have any additional questions.

21 MR. WESTBROOK: I just have a couple of
22 follow-ups.

23 REEXAMINATION

24 BY MR. WESTBROOK:

25 Q. Ms. Crum asked you whether you recall DHEC

EXHIBIT C



2600 Bull Street
Columbia, SC 29201-1708

January 25, 2005

MEMORANDUM

To: Licensed Health Care Providers

From: Joel C. Grice, Director

Bureau of Health Facilities and Services Development

Re: Departmental Policy Interpretation Relative to Determination of General Hospital Bed Need as Indicated in the 2004-2005 South Carolina Health Plan

The continued growth of outpatient hospital services during the past decade has resulted in minimal need for additional general acute care hospital beds in South Carolina. As a result, the South Carolina Health Planning Committee (Committee) and the South Carolina Board of Health and Environmental Control Board (Board) supported a planning policy, initiated by approval of the 1999 SC Health Plan (SHP), that allowed any individual hospital with a small positive bed need projection of less than fifty (50) acute care beds to submit a Certificate of Need (CON) application for a maximum of fifty (50) additional beds. The rationale for the foregoing is to develop a cost effective hospital addition. Any hospital projecting a need of more than fifty (50) additional beds could apply and receive approval for the specific projected need calculated in the SHP for that hospital. This policy was beneficial to many hospitals, including those located in counties with multiple hospitals, where the net hospital bed need could show little or no net hospital bed need for the County. As a result, neither the 2003 nor the Draft 2004-2005 SHP specified any county bed need for hospital beds, but rather a specific projected bed need for each hospital in the state. Upon approval of the 2004-2005 SHP, the Committee recommended, with Board approval, that all bed needs be updated, using the most recent utilization data prior to the printing of the current SHP. Due to substantial population growth and greater hospital utilization in several South Carolina counties, some hospital projected bed need calculations increased, including some hospital needs increasing above fifty (50) beds.

In order to allow potential CON applicants to participate in the South Carolina health planning process equitably, general hospital bed needs indicated in the current 2004-2005 SC Health Plan will be determined as follows:

- (1) Should an individual hospital show a positive bed need calculation of less than 50 additional beds, it may apply and receive CON approval for a maximum of 50 additional beds.
- (2) Any hospital projecting a need of more than fifty (50) additional beds may apply and receive approval for the specific projected need calculated in the SHP for that hospital.
- (3) A CON for the net hospital bed need in a county may be requested and approved for any existing hospital located in the county, or for any other entity/applicant, for the development of a new hospital or an addition to an existing hospital within that county.

Should there be any questions concerning this memorandum, please contact me at (803) 545-4200.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

EXHIBIT D



2600 Bull Street
Columbia, SC 29201-1708

March 3, 2005

MEMORANDUM

TO: Licensed Health Care Providers

FROM: Joel C. Grice, Director *Joel C. Grice*
Bureau of Health Facilities and Services Development

RE: Notice of Rescission of Departmental Policy Interpretation dated
January 25, 2005, relative to Determination of General Hospital Bed Need
as indicated in the 2004-2005 South Carolina Health Plan.

This is to advise that a decision was made on February 1, 2005, to rescind the Departmental Policy Interpretation issued by this Office on January 25, 2005. The aforementioned decision to rescind the policy was determined after further study and discussion relating to hospital bed need planning issues with the Department's Office of General Counsel. As an alternative to such a policy at this time, the staff of the Department's Division of Planning and Certification of Need will schedule a meeting of the South Carolina State Health Planning Committee in the near future in order to seek their recommendations as to the most beneficial method to resolve and clarify any future issues that may occur regarding hospital bed need methodology interpretation.

Should there be any questions concerning this action, please feel free to contact me at (803) 545-4200.

EXHIBIT

11

RECEIVED

MAR 07 2005

Willoughby & Hoefler, P.A.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

EXHIBIT E

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

CHARLOTTE-MECKLENBURG HOSPITAL
AUTHORITY D/B/A CAROLINAS
HEALTHCARE SYSTEM,

Petitioner(s),

vs Case No. 06-ALJ-07-0489-CC

SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL
CONTROL AND AMISUB OF SOUTH
CAROLINA, INC., D/B/A PIEDMONT
HEALTHCARE SYSTEM D/B/A
FORT MILL MEDICAL CENTER,

Respondent(s),

PRESBYTERIAN HEALTHCARE SYSTEM D/B/A
PRESBYTERIAN HOSPITAL - YORK, LLC,

COPY

Intervenor(s).

-----X
CHARLOTTE-MECKLENBURG HOSPITAL
AUTHORITY D/B/A CAROLINAS
HEALTHCARE SYSTEM,

Petitioner(s),

vs. Case No. 06-ALJ-07-0490-CC

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL,

Respondent(s),

AMISUB OF SOUTH CAROLINA, INC. D/B/A
PIEDMONT HEALTHCARE SYSTEM D/B/A
FORT MILL MEDICAL CENTER AND
PRESBYTERIAN HEALTHCARE SYSTEM D/B/A
PRESBYTERIAN HOSPITAL - YORK, LLC,

Intervenor(s).

1 PRESBYTERIAN HEALTHCARE SYSTEM
2 D/B/A PRESBYTERIAN YORK, LLC,
3 Petitioner(s),
4
5 vs Case No. 06-ALJ-07-0713-CC

6 SOUTH CAROLINA DEPARTMENT OF
7 HEALTH AND ENVIRONMENTAL CONTROL
8 AND AMISUB OF SOUTH CAROLINA, INC.
9 D/B/A PIEDMONT HEALTHCARE SYSTEM D/B/A
10 FORT MILL MEDICAL CENTER,
11 Respondent(s),

12

11 CHARLOTTE-MECKLENBURG HOSPITAL
12 AUTHORITY D/B/A CAROLINAS
13 HEALTHCARE SYSTEM,

13 Intervenor(s)
-----x

14

14 PRESBYTERIAN HEALTHCARE SYSTEM D/B/A
15 PRESBYTERIAN YORK, LLC,

16 Petitioner(s),

17

17 vs. Case No. 06-ALJ-07-0712-CC

18

19 SOUTH CAROLINA DEPARTMENT OF
20 HEALTH AND ENVIRONMENTAL CONTROL,

21

21 Respondent(s),

22

22 AMISUB OF SOUTH CAROLINA, INC.
23 D/B/A PIEDMONT HEALTHCARE SYSTEM
24 D/B/A FORT MILL MEDICAL CENTER AND
25 CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY
D/B/A CAROLINAS HEALTHCARE SYSTEM,

25 Intervenor(s).

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D E P O S I T I O N

WITNESS: MARY FECHTEL

DATE: Friday, February 16, 2007

TIME: 9:38 a.m.

LOCATION: 1777 St. Julian Place
Heritage Building
Columbia, South Carolina

TAKEN BY: Attorneys for the Petitioner(s)

REPORTED BY: SUSAN M. VALSECCHI,
Certified Realtime Reporter

COMPUSCRIPTS, INC.
A Full-Service Court Reporting Agency
Post Office Box 7172
Columbia, SC 29202
803-988-0086
1-800-988-0086

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1 A. I don't think we discussed the exact
2 language, per se. We discussed consistency and
3 non-consistency.

4 Q. You discussed the concept of whether --

5 A. That is correct.

6 Q. You know, we know each other too well.
7 You're anticipating my questions too well.

8 A. I'm sorry.

9 Q. But for our court reporter's sake, let
10 me finish and then you'll answer, okay?

11 A. Okay.

12 Q. Thanks.

13 You discussed the concept of whether one
14 or more of the applicants was consistent with the
15 bed need methodology in the 2004/2005 State Plan
16 for general hospital beds; is that correct?

17 A. That is correct.

18 Q. When did y'all discuss that? And I'm
19 not asking the exact date.

20 A. Not more than a week before we actually
21 made the decision.

22 Q. During the entire review process, had
23 y'all ever discussed that concept of whether one or
24 more of the applicants was consistent with the
25 general acute bed need methodology for the State

1 Plan?

2 A. I don't think he and I did.

3 Q. Did you discuss it with anyone else?

4 A. No, ma'am, not me.

5 Q. Okay. Why not?

6 A. Well, when I review an application,
7 usually I'm only concerned with the application
8 that it is being reviewed under. I don't usually
9 go back and look at other State Health Plans,
10 because they're usually not germane to the
11 situation at the time.

12 Because, usually, you know, we've got to
13 make it under -- in the summary sheet it says this
14 application is reviewed under thus and such plan,
15 whatever the one is at the moment. And this was
16 the 2004/2005 plan; and that's the one I was
17 looking at.

18 And until I heard the issue raised, I
19 did not go back and really look at the other plans,
20 until I heard the issue raised.

21 Q. When you say look at the other plans,
22 what are you talking about?

23 A. The 2001, the 2003 -- I think it was
24 2001, 2003 -- plans that we cited in the summary
25 sheet in the findings of fact.

1 I had heard some rumblings, but I was
2 not involved with the plan or any of -- I was not
3 privy to any of those meetings or conversations, if
4 there was any.

5 So when Joel raised the issue, I went
6 back and researched these plans, went back and
7 researched the prior two plans -- 2003 and I
8 believe it was the 2001 plan -- and what the
9 evolution had been from a county unit to an
10 individual hospital unit, the verbiage in the
11 plans, how that had evolved.

12 Q. And after you did that, what conclusion
13 did you reach?

14 A. I reached the conclusion that I didn't
15 think that under the current plan we could approve
16 anybody, that none of the others would have been
17 consistent except Fort Mill.

18 Q. And this was sometime towards the end of
19 May 2006?

20 A. Yes, ma'am; that's when we made the
21 decision, yes.

22 Q. And the Presbyterian Hospital - York,
23 Charlotte-Mecklenburg Hospital Authority, and the
24 Hospital Partners of America applications had been
25 pending since March the 11th, 2005, correct?

1 for a second?

2 MS. CRUM: Sure.

3 (A brief recess was held.)

4 BY MS. CRUM:

5 Q. Ms. Fechtel, you've now got the C.O.N.
6 files -- application files, I guess -- for all of
7 the parties or just the --

8 A. I did not bring HPA.

9 Q. Can you tell me now whether or not the
10 applications were all received on March the 11th
11 for each of the three competing applicants to Fort
12 Mill Medical Center?

13 A. They were received by the Department on
14 March the 11th, 2006, all three.

15 Q. Okay. Now --

16 A. I'm sorry. What did I say?

17 Q. 2006.

18 A. But what date did I say?

19 Q. March 11th.

20 MR. WESTBROOK: You said '06 or '05?

21 BY MS. CRUM:

22 Q. You said '06 but you mean '05?

23 A. Good question. Let me see if the other
24 one is clearer.

25 '05. Sorry.

1 Q. Now, Ms. Fechtel, when was each one of
2 those applicants deemed complete and notice sent to
3 effected parties in the state register that the
4 applications had been deemed complete?

5 A. Okay. You're asking me a date that the
6 complete letter was --

7 Q. The date the first complete letter --

8 A. From the Department.

9 Q. Right.
10 -- completeness letter.

11 A. In the case of Carolinas, the letter
12 from the Department that the application had been
13 deemed complete was August 5th, 2005, and it was
14 placed in the notification of effected persons on
15 September 23rd, 2005.

16 Q. What about the other two applicants, did
17 they also receive their completeness letters on
18 August the 5th and were they placed in the state
19 register on September the 28th?

20 A. I know for a fact they were placed in
21 the state register at the same time. I don't know
22 about the complete letters. I would have to look
23 in each of the files.

24 Q. So you had Presbyterian Hospital - York,
25 Charlotte-Mecklenburg Hospital Authorities, and

1 methodology in the state plan?

2 MS. LAYMAN: Object to the form.

3 THE WITNESS: Not particularly, because
4 everybody sends letters. I mean, we've got so many
5 letters. It's just his opinion at that point in
6 time. And whether or not I agreed with him at that
7 point in time is -- I don't get into that until I
8 do my summaries. I go back and read these letters.

9 Just because he thinks he has a good
10 argument, you know, a lot of times these letters
11 sound great, sound like good arguments, and then I
12 might get a letter from the other competing
13 applicant that just tears the argument in my mind
14 all apart.

15 BY MS. CRUM:

16 Q. So I believe you've testified it was not
17 until the last week of May that you made your own
18 determination that Presbyterian,
19 Charlotte-Mecklenburg, and Hospital Partners did
20 not meet the bed need methodology in the State
21 Plan.

22 A. I didn't really get down to the
23 nitty-gritty until writing that portion thereon
24 until about a week before.

25 Q. So the answer is yes.

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1 A. State it again and I'll agree or
2 disagree.

3 Q. Okay. You didn't make your
4 determination that Presbyterian,
5 Charlotte-Mecklenburg, and Hospital Partners didn't
6 meet the State Health Plan acute general hospital
7 bed need methodology until approximately the last
8 week of May.

9 A. Yes, ma'am; that is correct.

10 Q. Were you involved at all in any of the
11 discussions between the Department and the
12 Department of Justice regarding the interpretation
13 of the 2004/2005 State Health Plan vis-a-vis this
14 project?

15 A. No, ma'am.

16 Q. Did anybody ever talk to you about the
17 Department of Justice's concerns?

18 A. I knew that they called or a letter had
19 been written or something, but I don't even know
20 what. I have not been privy to that conversation.

21 Q. What role did you play in the
22 reconsideration request, if any?

23 A. I don't think I played any specific
24 role, except put the files together.

25 Q. Did Mr. Grice ask you to give your

1 Ms. Crum, except for who the letter is addressed
2 to?

3 A. That, and I can't recall without
4 comparison, but some of the services in the three
5 besides Piedmont differed. I can't recall unless I
6 compare those. But other than the services,
7 everybody had 64 beds.

8 Q. Right, right.

9 And particularly Paragraph 4 in the
10 findings, that would be identical to Exhibit Number
11 2 which is the Presbyterian denial letter; is that
12 correct?

13 A. It should be, again, unless the services
14 differ.

15 Q. Could you just look at Exhibit Number
16 2 -- it should be right in front of you -- and give
17 those a quick glance and let's see if they're
18 identical.

19 A. Okay. They appear to be identical.

20 Q. Okay, thank you.

21 Your role in the development of the
22 Carolinas Healthcare System denial letter, I
23 assume, would be identical to the role that you
24 described to Ms. Crum with relation to Exhibit
25 Number 2, the Presbyterian denial letter. Is that

1 two of the decision letter?

2 A. Yes.

3 Q. Do these conclusions still represent
4 your opinion? Has your opinion changed at all?

5 A. No.

6 Q. With respect to reason number 4,
7 Paragraph Number 4 in the decision letters that
8 Mr. Grice wrote, do you agree with Paragraph Number
9 4 and his conclusion there?

10 If I could ask you to look at Exhibit 2
11 or Exhibit 3 for Paragraph Number 4.

12 A. Yes.

13 MR. WESTBROOK: I don't have any other
14 questions. Thank you.

15 RE-EXAMINATION

16 BY MS. CRUM:

17 Q. I've just got one very brief
18 clarification. I believe I understood you to say
19 that you were talking about Piedmont's application.

20 In fact, that's an application from
21 Amisub of South Carolina, Inc., doing business as
22 Fort Mill Medical Center, that's at issue here;
23 isn't it?

24 A. That is correct.

25 Q. Okay. Amisub South Carolina, Inc. d/b/a

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1 Piedmont Medical Center is a separate and distinct
2 licensed health care facility; is it not?

3 A. Yes, ma'am.

4 Q. And Amisub, Inc., Fort Mill Medical
5 Center, if it were built, would be a separate and
6 distinct licensed acute care hospital; would it
7 not?

8 A. I believe it would be, yes.

9 MS. CRUM: Thank you. I don't have any
10 other questions.

11 MR. WESTBROOK: None from me.

12 MS. LAYMAN: I don't have any questions.

13 (The deposition concluded at 11:23 a.m.)

14 (EXH. 23, a letter to CHS Management
15 Company from Joel C. Grice dated 5/30/06, was
16 marked for identification.)

17

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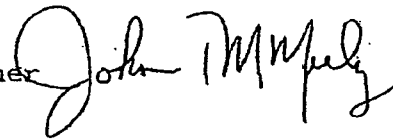
EXHIBIT F

March 7, 1995

MEMORANDUM

TO: Hospital Administrators

FROM: John T. McNeely, Deputy Commissioner
Health Regulation



SUBJECT: Consolidation of hospital licenses where separate and distinct buildings are involved

In certain circumstances there are significant financial incentives and other advantages in the consolidation of multiple hospital buildings under one license. In light of many recent requests from the hospital provider community to consolidate certain hospitals under one license (which hospitals had previously been licensed separately or where one of the units is new construction) and in order to clarify our position on this subject, the following guidelines for when consolidation will be permitted are established:

1. The licensee of the individual facilities must be identical.
2. The facilities must be located on the same premises (or campus.) In order to be considered as "on the same premises" structures must be located on contiguous or adjoining property. Unlimited access roads and/or local streets will not be considered as dividing otherwise adjoining property.

This policy will not affect the licensure of existing hospitals as they are currently licensed, but will be applied whenever future licensure changes are requested.

JTM

cc: Douglas E. Bryant
Alice Truluck
Bill Yates, SC Hospital Association

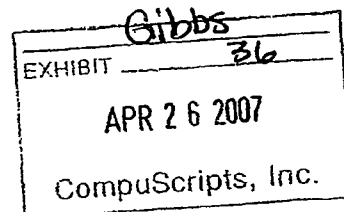


EXHIBIT G

1 STATE OF SOUTH CAROLINA
2 ADMINISTRATIVE LAW COURT

3 CHARLOTTE-MECKLENBURG HOSPITAL
4 AUTHORITY, D/B/A CAROLINAS
5 HEALTHCARE SYSTEM,

6 PETITIONER(S),

7 VS. CASE NO. 06-ALJ-07-0489-CC

8 SOUTH CAROLINA DEPARTMENT
9 OF HEALTH AND ENVIRONMENTAL
10 CONTROL AND AMISUB OF SOUTH
11 CAROLINA, INC., D/B/A PIEDMONT
12 HEALTHCARE SYSTEM, D/B/A
13 FORT MILL MEDICAL CENTER,

COPY

14 RESPONDENT(S),

15 PRESBYTERIAN HEALTHCARE SYSTEM, D/B/A
16 PRESBYTERIAN HOSPITAL-YORK, LLC,

17 INTERVENER(S)

-----X

18 CHARLOTTE-MECKLENBURG HOSPITAL,
19

20 PETITIONER(S)

21 VS. CASE NO. 06-ALJ-07-0490-CC

22 SOUTH CAROLINA DEPARTMENT
23 OF HEALTH AND ENVIRONMENTAL
24 CONTROL,

25 RESPONDENT(S),

26 AMISUB OF SOUTH CAROLINA, INC., D/B/A
27 PIEDMONT HEALTHCARE SYSTEM, D/B/A
28 FORT MILL MEDICAL CENTER AND
29 PRESBYTERIAN HEALTHCARE SYSTEM, D/B/A
30 PRESBYTERIAN HOSPITAL-YORK, LLC,

31 INTERVENER(S) .

-----X

1 PRESBYTERIAN HEALTHCARE SYSTEM, D/B/A
2 PRESBYTERIAN YORK, LLC,

3 PETITIONER(S)

4 VS.

CASE NO. 06-ALJ-07-0713-CC

5 SOUTH CAROLINA DEPARTMENT OF
6 HEALTH AND ENVIRONMENTAL CONTROL
7 AND AMISUB OF SOUTH CAROLINA, INC.,
8 D/B/A PIEDMONT HEALTHCARE SYSTEM,
9 D/B/A FORT MILL MEDICAL CENTER,

10 RESPONDENT(S),

11 CHARLOTTE-MECKLENBURG HOSPITAL
12 AUTHORITY, D/B/A CAROLINAS
13 HEALTHCARE SYSTEM,

14 INTERVENER(S)

15 -----X

16 PRESBYTERIAN HEALTHCARE SYSTEM,
17 D/B/A PRESBYTERIAN YORK, LLC,

18 PETITIONER(S),

19 VS.

CASE NO. 06-ALJ-07-0712-CC

20 SOUTH CAROLINA DEPARTMENT OF
21 HEALTH AND ENVIRONMENTAL CONTROL,

22 RESPONDENT(S),

23 AMISUB OF SOUTH CAROLINA, INC., D/B/A
24 PIEDMONT HEALTHCARE SYSTEM, D/B/A
25 FORT MILL MEDICAL CENTER AND
CHARLOTTE-MECKLENBURG HOSPITAL
AUTHORITY D/B/A CAROLINAS HEALTHCARE
SYSTEM,

INTERVENER(S) .

-----X

D E P O S I T I O N

WITNESS: ALBERT N. WHITESIDE
DATE: Wednesday, February 28, 2007
TIME: 9:55 a.m.
LOCATION: Department of Health and
Environmental Control
1777 St. Julian Place
Heritage Building
Second Floor Conference Room
Columbia, South Carolina
TAKEN BY: Attorney for Presbyterian
REPORTED BY: LAURA S. DECILLIS
Certified Court Reporter

APPEARANCES:

ATTORNEYS FOR PRESBYTERIAN HEALTHCARE
SYSTEM, D/B/A PRESBYTERIAN YORK, LLC:

MCNAIR LAW FIRM

BY: ARIAIL BURNSIDE KIRK, ESQUIRE
M. ELIZABETH CRUM, ESQUIRE

The Tower at 1301 Gervais Street
Columbia, South Carolina 29201

ATTORNEY FOR SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL CONTROL:

BY: NANCY S. LAYMAN, ESQUIRE
2600 Bull Street

Columbia, South Carolina 29201

ATTORNEY FOR CHARLOTTE-MECKLENBURG
HOSPITAL AUTHORITY, D/B/A CAROLINAS
HEALTHCARE SYSTEM:

MOORE & VAN ALLEN, P.L.L.C.

BY: DOUGLAS M. MULLER

40 Calhoun Street, Suite 300
Charleston, South Carolina 29413

1 Shelton.

2 Q. Okay. Did you review this before it was
3 included in the Draft Plan?

4 A. Yeah. I'm sure I did.

5 Q. Okay. Once you prepared the 2003 Draft
6 Plan, what did you do in the planning process?

7 A. Once we have a Draft Plan developed, we
8 schedule a meeting with the State Health Planning
9 Committee for the State Health Planning Committee to
10 review the Draft. And, at that time, they can modify
11 it or make changes to the Draft and then public
12 hearings are held on the Draft Plan.

13 Q. Okay. Do you recall receiving any public
14 comment on the bed-need section that's included here?

15 A. I mean, I don't know. That's three years
16 ago.

17 Q. Okay. Would you look at that and see if
18 it refreshes your recollection on some of the comments
19 you may have received?

20 A. (Views document.) Okay.

21 Q. Does that refresh your recollection of any
22 comments you may have received?

23 A. Not really. I mean, I see it's a letter
24 sent to me in 2003, but it doesn't refresh my memory.

25 Q. Will you read the section on general

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1 hospitals?

2 A. (Views document.)

3 Q. Okay. And what was the concern of
4 Georgetown Hospital?

5 A. From this letter, it appears that both
6 Georgetown, Memorial, and Waccamaw, that we had lumped
7 them together as one hospital because they didn't have
8 any patient days for Waccamaw Community Hospital, even
9 though Georgetown system owns both facilities.

10 Q. Okay. And the second paragraph of the
11 general hospital section, what was the concern?

12 A. Well, the concern appears that -- let me
13 see. The Plan allows for up to 50 beds to be approved
14 for an efficient addition should need be identified.
15 And this practice has occurred where the beds are
16 added to an existing provider.

17 One may interpret the language to allow a
18 third-party not currently licensed in the planning
19 area, in this case the County, to seek up to 50 beds
20 if a positive need is published. We would request
21 this language be clarified to express the intent.
22 Specifically, only those currently licensed to perform
23 such services would be considered for the efficient
24 addition exception.

25 Q. Is this one of the comments that you

1 considered in making comments to the State Health
2 Planning Committee?

3 A. Yes. I'm sure it is.

4 Q. Okay.

5 MS. KIRK: Could you mark that as 25.

6 (EXH. 25, Letter 3/4/03, was marked for
7 identification.)

8 BY MS. KIRK:

9 Q. Mr. Whiteside, I've got another letter
10 received from Tuomey Hospital. Would you review it,
11 too, and see if that was one of the comments you
12 relied on in making changes to the Draft 2003 State
13 Health Plan?

14 A. Okay. (Views document.) All right.

15 Yeah. I'm sure we considered these comments.

16 Q. And was Tuomey Hospital's concern with
17 clarification of the bed-need section of the Plan,
18 also?

19 A. That's what it appears. That's what they
20 say, is offered only as a clarification. So,
21 apparently, that's what they want.

22 Q. And was their clarification related to the
23 50-bed cost-effective addition or was it related to
24 general funding?

25 MR. ANDREWS: Object to the form.

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1 BY MS. KIRK:

2 A. They may have been concerned about the
3 whole thing.

4 Q. What does it say --

5 A. I mean, you're asking me to read into what
6 their concern was.

7 Q. Well, just read their concern.

8 A. Well, what they've done, apparently, is
9 struck through one section. Now, what this says is
10 the possible allocation of hospital beds, and it says
11 the county(s) as the basic unit for planning. Then
12 they struck through the term institution, or somebody
13 did, and put hospitals located within the county are
14 listed for purposes of applying the variable occupancy
15 rates so that total county needs can be developed.
16 Should there be a need shown for additional beds for
17 an individual hospital located within the county, an
18 increase may be approved.

19 Q. And in the 2003 Draft Plan, was the county
20 the basic unit for planning?

21 A. You know, and the reason I have trouble
22 remembering this is because we do so many of these
23 things. That's why I can't just say --

24 Q. No. I understand how it can all blur
25 together.

1 A. I can't just say, oh, yeah, that's
2 exactly. I mean, I don't know. I have to look at
3 these things and see.

4 Q. Sure. Take your time.

5 A. Where are the -- let me see here. (Views
6 documents.) And this says the possible allocation of
7 hospital beds considers the county, and plural, as the
8 basic unit for planning.

9 MS. KIRK: Okay. Can we mark that as
10 Exhibit 26. ✓

11 (EXH. 26, Letter 4/4/03, was marked for
12 identification.)

13 BY MS. KIRK:

14 Q. Mr. Whiteside, if you could look at this,
15 it's a memo to the State Health Planning Committee
16 from you, dated April 17th, 2003. Do you recognize
17 that?

18 A. Yeah. It looks like what I sent them.

19 MS. KIRK: Can we mark that Exhibit 27,
20 please.

21 (EXH. 27, Memo 4/17/03, was marked for
22 identification.)

23 BY MS. KIRK:

24 Q. What comments did you let the State Health
25 Planning Committee know about related to the general

1 bed-need calculation?

2 A. We let them know about all of the
3 comments.

4 Q. Did anybody comment that they thought the
5 bed need should be modified to allow monopolies?

6 MS. LAYMAN: Object to the form.

7 MR. ANDREWS: The same objection.

8 BY MS. KIRK:

9 A. I don't have any idea.

10 Q. Okay. Well, would you walk me through all
11 of the comments you received on bed need? They start
12 on page two under number 3, subject, general hospital
13 beds.

14 A. Say that again?

15 Q. If you'd turn to page two, and then you've
16 got it numbered 3, subject, general hospital beds?

17 A. Yes.

18 Q. You've got a comment that Georgetown
19 requested that the provision to allow for the addition
20 of up to 50 beds for an economical unit to be
21 clarified.

22 A. Okay.

23 Q. And then you've got, Greenville Hospital
24 also supports the provision that up to the greater of
25 50 beds or the actual projected number of beds may be

1 approved, provided the hospital can demonstrate need.

2 Do both of those relate just to the 50-bed addition?

3 A. That's what it appears.

4 Q. You prepared this document, correct?

5 A. Well, I prepared this document, and where
6 that thing says comment is my summation of what
7 Georgetown and Greenville said. I don't know what
8 they meant, other than this is what I think they
9 meant.

10 Q. Okay. So would it be your opinion that
11 they commented on the 50-bed economical unit provision
12 of the Plan?

13 A. Yes.

14 Q. Did Providence Hospital also comment on
15 the 50-bed economical unit?

16 A. That's what this says, yes.

17 Q. Did Tuomey Hospital?

18 A. That's what this says, yes. And that's
19 what their letter we looked at earlier said.

20 Q. Are you aware of any comments that --
21 well, strike that.

22 Would you read your staff response on page
23 three?

24 A. Staff response, the 50-bed provision
25 discussed above should be clarified by eliminating the

1 reference to the county as this provision applies to
2 individual existing hospitals. This provision was
3 developed because it allowed a hospital showing a
4 small need to construct a more cost-effective
5 addition.

6 Q. Would you read the next two paragraphs,
7 also?

8 A. On page two, 7, paragraph C, the following
9 paragraph should replace existing language. Should
10 there be a need shown for additional beds for a
11 hospital, then an increase may be approved in order to
12 provide a cost-effective addition up to the greater of
13 50 beds, or the actual projected number of additional
14 beds may be approved, provided the hospital can
15 document or demonstrate the need for additional beds.
16 This would also require some other minor changes to
17 eliminate references to the county instead of the
18 facility.

19 Q. Did you intend for that staff response to
20 relate to the 50-bed addition portion of the Plan?

21 A. Repeat that again?

22 Q. For your staff response on page three,
23 does it relate to anything other than the 50-bed, I
24 think it's called the cost-effective addition portion
25 of the Plan?

1 MR. ANDREWS: Object to the form.

2 BY MS. KIRK:

3 A. This -- I mean, it's all revolving around
4 the 50-bed addition topic, the way I'm understanding
5 this or what I'm thinking.

6 Q. At this meeting, did you discuss with the
7 State Health Planning Committee the 50-bed addition
8 topic?

9 A. I guess. I mean, this was certainly
10 presented to the Committee and they reviewed it at a
11 meeting.

12 Q. Do you recall how the Committee received
13 this information, if they were in support of the
14 changes?

15 A. They approved it, yes.

16 Q. For paragraph three, you've got, this
17 would also require some other minor changes to
18 eliminate references to the county instead of the
19 facility.

20 A. Uh-huh.

21 Q. What minor changes are you referring to?

22 A. Well, it was designed so there wouldn't be
23 inconsistencies anywhere, so that's the reason we
24 would have done that. I'm not really sure right
25 offhand where that is, but the whole purpose of that

1 Attachment I that's changes for inclusion in the final
2 '03 State Health Plan, what does this document
3 summarize?

4 A. This document summarizes, basically, what
5 the Planning Committee did.

6 Q. And that would have been at your meeting
7 in April?

8 A. That's correct.

9 Q. Okay. Will you read number one under the
10 subject, general hospital beds?

11 A. Add a new paragraph that reads,
12 calculations of bed need are made for individual
13 facilities. That's in quotations.

14 Q. Sure.

15 A. I might have read that wrong. Add a new
16 paragraph (a) that reads, calculations of bed need are
17 made for individual facilities. Then it says, revise
18 paragraph (c) to read, should a hospital show a need
19 for additional beds, then an increase may be approved.
20 In order to provide for a cost-effective addition, up
21 to the greater of 50 beds or the actual projection of
22 additional beds may be approved, provided the hospital
23 can document and demonstrate the need for additional
24 beds.

25 Q. Would you just finish that section?

1 A. Oh, I'm sorry.

2 Q. Sure.

3 A. The numbering system also needs to be
4 revised to reflect this change and other references to
5 the county as the basic unit of planning need to be
6 deleted from the Plan.

7 Staff comment, this change clarifies the
8 need for individual hospital beds and this will help
9 prevent misunderstandings.

10 Q. What misunderstandings were you trying to
11 prevent?

12 A. I think the way -- basically, the way that
13 the calculation of bed need were prepared.

14 Q. What specifically within bed need?

15 A. Where is the entire Plan?

16 Q. Do you want the Draft '03 Plan?

17 A. That will work.

18 Q. We've got just the bed need portion of it
19 was marked as Exhibit 24.

20 A. Where are the calculations? Do you have
21 those?

22 Q. Do you want the actual, like the number of
23 beds needed for each one? I don't think that's part
24 of the exhibit.

25 MR. ANDREWS: Exhibit 23 would have them.

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1 MS. KIRK: It does.

2 MR. MULLER: I'm not sure it has the
3 calculations, does it?

4 MR. ANDREWS: Look under tab E.

5 MS. KIRK: Do you mean Exhibit 21?

6 MR. ANDREWS: I'm sorry. Yes. Exhibit
7 21.

8 MS. KIRK: Thank you.

9 BY MS. KIRK:

10 A. (Views documents.) Okay. Yeah. What it
11 is, is we took out, I think -- and this document here,
12 which is the 2003 Plan which is section E of whatever
13 this thing is --

14 Q. Exhibit 21.

15 A. We took out the summation by county and
16 it's only now by hospital.

17 Q. Why did you take out the summation by
18 county?

19 A. Because to correlate with this change that
20 we had approved right under the -- that the Board had
21 approved.

22 Q. Tell me exactly which change you're
23 referring to when you say this change.

24 A. It says calculations of bed need are made
25 for individual facilities, that number right here.

1 Q. Okay. And why did you make that change?
2 What was the goal?

3 MR. ANDREWS: Object to the form.

4 BY MS. KIRK:

5 A. I think the entire goal was to make things
6 consistent throughout the Plan. Because it talks
7 about, the policy is the county is the basic unit and
8 then it talks about, should there be a need for an
9 individual and increase, it can be approved up to 50
10 or the actual need. So I think what we were trying to
11 do was get everything consistent.

12 Q. And the second paragraph under number one,
13 you've got other references to the county as the basic
14 unit of planning need to be deleted from the plan.

15 A. Correct. Which would be in these
16 calculations, probably.

17 Q. That's just related to the calculations or
18 related to some of the narratives, too?

19 A. It may be related to anything where that
20 would have been -- where it would have shown that.

21 Q. Okay. And what is the intended new basic
22 unit of planning?

23 A. It was by facility. And that's what that
24 paragraph (a) says: Calculation of bed need are made
25 for individual facilities.

1 Q. And what are the implications of that, of
2 making the facility the basic unit of planning?

3 MR. ANDREWS: Object to the form.

4 BY MS. KIRK:

5 A. Well, the implications are that if a need
6 is shown for an individual facility, then additional
7 beds could be approved, even if a county may have
8 shown an overall excess of beds. And there's been a
9 lot of people that have even talked about the
10 so-called Florence Rule years ago.

11 Q. What is the so-called Florence Rule?

12 A. Florence County. And, as an example,
13 McLeod Hospital over there has always been very full
14 and had a lot of need for beds. There's another
15 hospital in the county, Lake City, and the name has
16 changed two or three times but it's in Lake City as a
17 small rural hospital in Florence County. And then you
18 have Carolinas Hospital System in Florence that
19 doesn't operate as full as McLeod. And so what would
20 happen if you did these calculations of bed need, it
21 would show no need in the county, even though McLeod,
22 for example, is at 95 percent occupancy rate. But
23 then we have lower Florence Hospital or Lake City, or
24 whatever it's called, with a very low occupancy rate.

25 And so, basically, what you're saying is,

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1 well, we can't add beds here at this hospital that's
2 really using them because we've got this other
3 hospital twenty miles away that's empty. That's why
4 we kind of always talked about the Florence Rule. And
5 so the implications were where DHEC would have
6 more -- DHEC staff would have more discretion when
7 reviewing hospital bed need instead of it being locked
8 into county.

9 Q. Did you have any discussions with anybody
10 at the Department about this section of the Plan?

11 A. Anybody at where? The Department?

12 Q. Yes.

13 A. What department?

14 Q. DHEC.

15 A. I mean, I talk with people here all the
16 time. What do you mean?

17 Q. Well, in the first half of April '03 when
18 the Draft Plan was being reviewed, did anybody assist
19 you in developing these changes listed on page one of
20 Exhibit 28?

21 A. I'm sure Les Shelton did and Vernon
22 Schroeder did.

23 Q. And Mr. Grice?

24 A. Probably not. He might, I don't know.

25 Q. Was there any consideration of new

1 A. Garbage collected on Mount Pleasant, tons
2 of garbage.

3 Q. To establish need?

4 A. Yes.

5 Q. Was there a need for beds in the Plan?

6 A. We didn't show a need for beds, if I
7 recall. See, we had -- the Plan hasn't shown a lot of
8 need for additional hospital beds, so that's one of
9 the reasons we haven't had new providers. And
10 hospital utilization has been somewhat low in most
11 cases due to changes in DRGs and things.

12 Actually, until relatively recent times
13 has the utilization started going back up. Because
14 ambulatory surgery facilities took a lot of patients
15 out of hospitals, some owned by the hospital and some
16 owned by other entities. So the utilization hasn't
17 been real high until, actually, just recent years.

18 So that's basically why there haven't been
19 any new hospitals. There have been replacement ones,
20 like ACA came in and built the replacement in
21 Chesterfield and Marlboro and places like that.

22 Q. Under the Draft 2003 Plan, could a new
23 provider have come into the market in South Carolina?

24 MR. ANDREWS: Object to the form.

25 BY MS. KIRK:

1 A. I guess so. I mean, it certainly wasn't
2 written and designed to exclude a new provider.

3 Q. Was the final 2003 Plan written and
4 designed to exclude a new provider?

5 A. No.

6 Q. Would you look at Exhibit 2, I believe.

7 A. (Views documents.) Okay.

8 Q. Have you seen that letter before? It's
9 the decision letter for Presbyterian Hospital dated
10 May 30th, 2006.

11 A. I've seen it, yes.

12 Q. Would you review page Bates number 22R,
13 paragraph four?

14 A. Number four?

15 Q. Yes, sir.

16 A. Okay.

17 Q. Well, first, let me ask you, were there
18 any dramatic differences between the '03 State Health
19 Plan and the '04 in terms of how bed need is derived?

20 A. I don't think there were any dramatic
21 differences. Not that I recollect.

22 Q. Was the '04/'05 Plan designed to keep out
23 new providers?

24 MR. ANDREWS: Object to the form.

25 BY MS. KIRK:

1 A. No.

2 Q. Okay. In paragraph four, the last two
3 sentences say, the aforementioned Plan, which is the
4 '04/'05, uses individual facilities as the unit
5 calculation of bed need instead of county.

6 A. Okay.

7 Q. Do you agree with that?

8 A. I agree with that sentence.

9 Q. Okay. Therefore, the bed need for York
10 County as indicated in the 2004/2005 South Carolina
11 Health Plan is based on Piedmont Medical Center as the
12 planning unit and not York County. Do you agree with
13 that sentence?

14 A. I wouldn't have worded it that way, but --

15 Q. How would you -- well, that's okay. The
16 final sentence says, the number of beds needed is
17 based on the service area and market share of Piedmont
18 Medical Center, not the entire patient population of
19 York County. Do you agree with that sentence?

20 A. I wouldn't have worded it that way,
21 either.

22 Q. Do you agree with that, though? Need is
23 only based on patients currently at a facility?

24 A. I won't agree with what you just said,
25 either.

1 have said it, but --

2 Q. Okay. Great. Would you --

3 A. I'm not saying that's wrong. I'm just
4 saying that's a little bit --

5 Q. You're saying it could be more clear?

6 MR. ANDREWS: Objection.

7 MS. KIRK: Okay. I'll withdraw that
8 question.

9 BY MS. KIRK:

10 Q. Do you agree that the proposal submitted
11 by Fort Mill Medical Center was the only project that
12 was consistent with the bed-need methodology for the
13 York County facilities?

14 A. I probably wouldn't agree to that, no.

15 Q. What would you say?

16 A. Well, I would say that we would review any
17 of them that came in, no matter from where, period.

18 Q. And why would you be willing to consider
19 any of them?

20 A. Well, I think we've got to consider any
21 application by any provider. I don't think we could
22 limit it to one potential person or --

23 Q. Do you believe the Presbyterian
24 application was consistent with the '05 Health Plan?

25 MR. ANDREWS: Object to the form.

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1 BY MS. KIRK:

2 A. Do I believe they were consistent? Do you
3 mean their application of 64 beds?

4 Q. Yes, sir.

5 A. Was the number 64? I mean, if the number
6 was 64, I'd say, yeah, that would be okay. But I
7 don't know what the number was.

8 Q. Here you go. Look at that, Mr. Whiteside.

9 A. The number is 64 and I'm assuming that's
10 the Plan they applied under, the 2004/five.

11 Q. I think that's in --

12 A. Yeah. That's what this letter says. So,
13 in my opinion, yeah, they could certainly have applied
14 and they potentially could have been approved.

15 MS. KIRK: Could you mark this as an
16 exhibit.

17 (EXH. 29, '04/05 State Health Plan, was
18 marked for identification.)

19 BY MS. KIRK:

20 Q. Excuse me for just a minute. I'm trying
21 to make sure which documents I've gotten in and which
22 I haven't.

23 A. It's easy to get confused with all of them
24 looking alike.

25 Q. I'm going to hand you a document,

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1 recommendations from the Planning Committee, the
2 Committee voted for the following: That no changes
3 should be made to the Plan.

4 Certificate of Need staff should be
5 receiving applications for additional general hospital
6 beds and/or facilities utilizing the current bed-need
7 methodology of the 2004/2005 South Carolina Health
8 Plan in conjunction with the project (b) criteria as
9 outlined in Regulation 6115 in order to make CON
10 decisions that are in the best interest of the
11 public.

12 In addition, the staff will review this
13 section of the Plan in detail to recommend any
14 modifications for future considerations by the South
15 Carolina State Health Planning Committee as the new
16 calculations and bed-need section of the Draft Plan
17 are formulated during the coming year. As we've
18 stated, the staff will be revising the Plan during the
19 coming year and hopefully be able to reach a consensus
20 after the public hearing process on the best planning
21 approach to follow statewide.

22 Q. Okay. The second sentence of paragraph
23 two says that CON staff should review the applications
24 utilized in the current bed-need methodology.

25 Under the current bed-need methodology

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1 referred to in Exhibit 13, do you believe that any
2 entity could have applied for and potentially been
3 approved for the 64-published beds needed in York
4 County?

5 A. I think they could have been.

6 Q. Were you consulted on making the decision
7 who to award the York County CON to?

8 A. Not really.

9 Q. When I say York County CON, do you
10 understand --

11 A. Do you mean the three or four applications
12 we had for York County?

13 Q. That all applied to build a new facility.

14 A. Correct.

15 Q. Great. Okay. Did anyone solicit your
16 opinion in determining who to award the CON to?

17 A. Probably not.

18 Q. Do you recall anybody asking you?

19 A. No.

20 Q. Were you aware of the decision to award
21 the Certificate of Need to Fort Mill Medical Center
22 before it was awarded?

23 A. I don't know if I was or not.

24 Q. Okay. Is one of your job responsibilities
25 to assign Certificate of Needs as they are received to

1 introduced.

2 A. Correct.

3 Q. When you look at the bed-need methodology
4 in the 2003 Health Plan, the formula that we've been
5 talking about, has the formula changed at all?

6 A. I don't think it did, unless the occupancy
7 factors were changed, because we changed those
8 somewhere. But the gist of the formula has not
9 changed.

10 Q. Okay. But other than the occupancy factor
11 which appears to have changed, the formula itself is
12 identical?

13 A. That's right.

14 Q. So back in 2001, you know, presumably you
15 have this county concept. The formula was identical
16 to what it was in 2003?

17 A. Correct.

18 Q. The only --

19 A. Unless the occupancy factor changed.

20 Q. Right. But, basically, the formula is
21 identical.

22 A. That's correct.

23 Q. Is it identical today to what it was in
24 2001?

25 A. Yes.

1 Q. Okay. So when you have these letters from
2 the South Carolina Hospital Authority suggesting that
3 the bed-need methodology has been drastically changed
4 by your recommendations, was it changed at all?

5 A. Well, what they're really referring to is
6 not just the way -- not the numerical calculations.
7 They're referring to any policy implications of going
8 from county to facility-specific. That's really what
9 they're referring to. Not whether or not a formula of
10 $X \text{ divided by } Y \text{ multiplied times } Z$ changed. But
11 they're referring to all of the policy implications.
12 And, once again, you can't look at all of this as one
13 sentence here and one sentence there. You've got to
14 take everything as a whole.

15 Q. In 2001, you used the formula, you
16 calculate the bed need?

17 A. Correct.

18 Q. In the 2004/2005 State Health Plan, you
19 used that same formula to calculate the bed need,
20 correct?

21 A. Correct. And in one we had the county
22 total and in the other one we did not.

23 Q. Is there any difference in York County
24 between the 2001 -- other than the fact that the
25 numbers have changed, is there any difference in how

1 that looks in the 2001 State Health Plan than there is
2 in the '04/'05 Health Plan in terms of the formula?

3 A. There's probably not any difference in how
4 it looks.

5 Q. It looks the same? You've got --

6 A. It's how it's applied is the key.

7 Q. And what do you mean by that?

8 A. Whether or not you're looking at
9 individual facilities or are you looking at the
10 county.

11 Q. Well, in York County, it's one and the
12 same, right?

13 A. That's the only facility in York County.

14 Q. So with respect, York County is unchanged
15 from '01 to '04/'05?

16 A. For the most part, yeah.

17 Q. With respect to facility use rates, and
18 let's assume for a second that we're no longer on
19 county-wide planning, we're on facility-only planning,
20 is there any facility in Fort Mill, South Carolina
21 called the Fort Mill Medical Center that has shown a
22 bed need?

23 A. Not at present.

24 Q. There's no facility use rate for that
25 facility, I take it?

1 A. That's correct.

2 Q. Because the facility has never been built
3 and it's in a different location than the Piedmont
4 Medical Center in Rock Hill.

5 A. Correct.

6 Q. So, I mean, is it consistent if you're
7 going to assume that only a facility, only a facility
8 that has demonstrated a need can apply under the State
9 Health Plan, the '04/'05 State Health Plan, would the
10 Fort Mill Medical Center in Fort Mill qualify?

11 MR. ANDREWS: Object to the form.

12 BY MR. MULLER:

13 A. Well, I've never said that nobody could
14 apply.

15 Q. Right.

16 A. And I've never said nobody could be
17 approved.

18 Q. Is there anywhere in the State Health Plan
19 that suggests that there's a demonstrated bed need for
20 Fort Mill Medical Center in Fort Mill, South Carolina?

21 A. Is there anywhere in the Plan that says
22 there's identified need?

23 Q. Yeah. For that facility.

24 A. No.

25 Q. So just to recap, from the 2001 State

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1 Health Plan to the 2004/2005 State Health Plan, the
2 bed-need methodology, the formula used to determine
3 how bed need is calculated has essentially remained
4 unchanged, although the variables may have changed?

5 MR. ANDREWS: Object to the form.

6 BY MR. MULLER:

7 A. I would agree with that, yeah. It's
8 basically the same.

9 Q. The only thing that has changed is the
10 added language that references the facility as we
11 discussed earlier?

12 A. The county and the facility, yes.

13 Q. Is there anything in the 2004/2005 State
14 Health Plan that suggests that a new entity cannot
15 apply for a CON for an identified bed need?

16 A. No.

17 Q. Let me ask you, and this is more in the
18 nature of housekeeping, but I was just curious about
19 it. When you look at Exhibit 31, if you have it in
20 front of you, when you look at Exhibit 31, on the very
21 first page, and this is your memo dated March 14, 2005
22 and it references the two earlier memoranda from Joel
23 Grice in January and March, and then it schedules a
24 meeting of the State Health Planning Committee on
25 March 31 of 2005.

1 introduced.

2 A. Correct.

3 Q. When you look at the bed-need methodology
4 in the 2003 Health Plan, the formula that we've been
5 talking about, has the formula changed at all?

6 A. I don't think it did, unless the occupancy
7 factors were changed, because we changed those
8 somewhere. But the gist of the formula has not
9 changed.

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11 which appears to have changed, the formula itself is
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7 They're referring to any policy implications of going
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12 And, once again, you can't look at all of this as one
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10 county.

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20 Fort Mill Medical Center in Fort Mill, South Carolina?

21 A. Is there anywhere in the Plan that says
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23 Q. Yeah. For that facility.

24 A. No.

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22 and it references the two earlier memoranda from Joel
23 Grice in January and March, and then it schedules a
24 meeting of the State Health Planning Committee on
25 March 31 of 2005.

EXHIBIT H



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

MEMORANDUM

Date: November 3, 2005

To: State Health Planning Committee Members

From: 
Albert N. Whiteside, Director
Division of Planning and Certification of Need

Re: Consensus Recommendation of the Planning Committee as a result of the mailed staff recommendation

After receiving the mailed recommendations from the State Health Planning Committee members, the Committee voted for the following:

No changes should be made to the *2004-2005 South Carolina Health Plan*. Certificate of Need (CON) staff should review CON applications for additional general hospital beds and/or facilities utilizing the current bed need methodology of the *2004-2005 South Carolina Health Plan* in conjunction with the Project Review Criteria as outlined in *Regulation No. 61-15, Certification of Need for Health Facilities and Services*, in order to make CON decisions that are in the best interest of the public. In addition, the staff will review this section of the Plan in detail to recommend any modifications for future considerations by the South Carolina State Health Planning Committee as the new calculations and bed need section of the Draft Plan are formulated during the coming year.

As we stated, staff will be revising the Plan during the coming year and hopefully be able to reach a consensus after the Public Hearing process on the best planning approach to follow statewide.

If you have any questions, please let me know at 803-545-4200 or by e-mail at whitesan@dhec.sc.gov

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Health Regulation

2600 Bull Street • Columbia, SC 29201 • www.scdhsc.gov DHEC FOIA 2/13/07 001244

EXHIBIT I



C. Earl Hunter, Commissioner
Promoting and protecting the health of the public and the environment.

Certified Mail

August 5, 2005

Re: Construction of a 64 bed acute care hospital to include a Magnetic Resonance Imaging (MRI) unit, a Computed Tomography (CT) Scanner and one diagnostic cardiac catheterization laboratory located west of I-77 at Exit 83, South of Sutton Road in York County, South Carolina.
Carolinas Medical Center – Fort Mill
Fort Mill, South Carolina

Mr. F. Del Murphy, Vice President
Carolinas HealthCare System
1000 Blythe Boulevard
Charlotte, NC 28203

Dear Mr. Murphy:

This is to notify you that the above referenced project has been determined to be complete for purposes of review by the Office of Certification of Need. Enclosed is an invoice for the required Certificate of Need application fee.

The Department will notify affected persons, which begins the review period, only after the appropriate application fee is paid by valid check made payable to the S.C. Department of Health and Environmental Control. Should the application fee not be received within 15 days from receipt of the Department's invoice by the applicant, the Certificate of Need application will be considered withdrawn.

Should the application fee be received within 15 days, a proposed decision will be made by this Department within 60 days from the date of notification of affected persons unless a public hearing is held. In cases where a public hearing is conducted, the Department will render a proposed decision within 60 days from the date of such public hearing.

In accordance with Section 304 of Regulation No. 61-15, Certification of Need for Health Facilities and Services, the following project review criteria are considered more important in the review of this application. These criteria are ranked according to their relative importance with the most important being listed first. All other relevant criteria will be given equal importance.

000595

Mr. F. Del Murphy
August 5, 2005
Page 2

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

If you wish to provide any information regarding the relative importance of the project review criteria, you must provide written comments within thirty (30) days of your receipt of this letter. However, any supplementary information relative to your application will be accepted until a proposed decision is made regarding this project by Department staff.

Should you require further information, please contact me at (803) 545-4200.

Sincerely,

Jallie Check for:

Mary W. Fechtel
Division of Planning and Certification of Need

Enclosure: Invoice

cc: Ms. M. Elizabeth Crum
Mr. David Levitt
Mr. Terry H. Linn

000596

EXHIBIT J

Hospital race hits crucial stretch

Fort Mill facility likely won't open for years

By Jason Foster
The Herald

No matter what happens in the race to build a hospital in Fort Mill, the doors aren't likely to open anytime soon.

Although a decision from the S.C. Department of Health and Environmental Control

INSIDE

Details on Thursday's meetings in Columbia and Fort Mill • 8A

Why? It's just the nature of the process, they say.

More than a year of letter writing, newspaper ads and campaigning by the four companies comes to a conclusion of sorts Thursday in Columbia when the applicants will make their case before DHEC during a project review meeting.

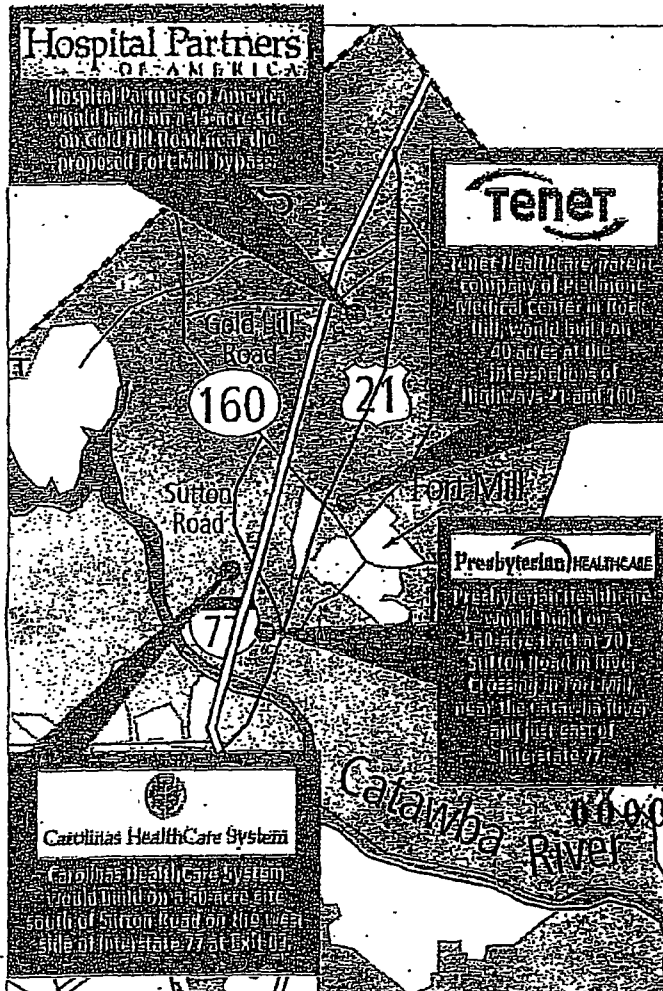
Another forum that day in Fort Mill, sponsored by the Fort Mill Times, will give the public another chance to listen and offer comments, which will then be sent to DHEC for review.

Experts agree DHEC's decision is almost certain to be appealed by at least one of the three losing applicants. And whichever company is on the losing end of an appeal is likely to sue.

Such actions are typical in the "certificate of need process," experts say.

"This will drag on for years," said Dave Burda, editor of Modern

See HOSPITAL • 8A



PHY RECON 000019

Hospital from 1A

Healthcare magazine, which covers the hospital industry. "You're really looking at maybe five to 10 years before something's fully functional."

Piedmont Medical Center, Carolinas HealthCare System, Presbyterian Healthcare and Hospital Partners of America have been involved in an intense battle to get the state's OK to build a hospital in the fast-growing Fort Mill area, now home to more than 30,000 residents and expected to have more than 110,000 residents by 2025.

A second York County hospital is needed because of this population explosion, they say, but also because too many York County residents near the state line choose to go to Charlotte for their health needs.

With a DHEC decision in sight, the race may seem to be winding down. But this could be only the beginning.

A long process

The time it's taken to get to this point is normal for certificate of need cases, experts say. Following DHEC's decision on who gets to build and any appeals or lawsuits, the winning company still likely will need two or three years for construction. By any measure, it's not a quick process.

But state health officials say the certificate of need process is needed to ensure quality health care. Without the system, proponents say, communities could see lots of specialty clinics and hospitals pop up, offering services that could be found elsewhere and creating "a lot of duplication, a lot of unneeded services," said Jim Walker, vice president of the S.C. Hospital Association.

"The more services that are available out there, then the more providers are competing for a limited supply of well-trained health care professionals," Walker said.

That can translate into weaker overall health care, he said.

"Yes, there can be a decrease in

Thursday's meetings

■ Project review meeting, 9 a.m. to 1 p.m., Columbia — Carolinas HealthCare System, Hospital Partners of America, Piedmont Medical Center and Presbyterian Healthcare will give 30-minute presentations on their proposals to state regulators. The 10-member Department of Health and Environmental Control panel will get to ask questions for 15 minutes after each presentation. At the end of the meeting, the panel will have an hour to ask any remaining questions about the applications.

The project review will be held in the Peoples Auditorium at DHEC's main

office at 2600 Bull St. in Columbia. The public can attend but will not be permitted to comment.

■ Public meeting, 6 to 9 p.m., Fort Mill — All the hospital companies have committed to participate in a public meeting from 6 to 9 p.m. at the Fort Mill High School auditorium, where they will present their proposals and answer questions from the public.

One hour will be devoted to comments and questions.

The comments collected at the forum will be submitted to DHEC for consideration in the decision-making process.

"This will drag on for years. You're really looking at maybe five to 10 years before something's fully functional."

— Dave Burda, editor of Modern Healthcare Magazine, on when the proposed hospital in Fort Mill could be operational

quality," Walker said. "Nationally, there's been a lot of research done that shows there is a clear correlation between volume of procedures done and the quality of care."

But opponents of the certificate of need process argue the system is anti-business and hurts competition.

"It's usually a war between consultants and attorneys," said Burda, editor of Modern Healthcare magazine, which is editorially opposed to the process.

Nationwide, though, 37 states use the certificate of need system, according to the American Health Planning Association's Web site. States that have abolished the system have stayed that way, while states that use the system now are finding ways to make it better.

In South Carolina, for example, a

bill making its way through the General Assembly is aimed in part at speeding up the process and allowing projects of \$5 million or less to proceed without having to get state approval.

This would reserve the process for larger, higher-impact projects.

For now, though, the bill is in committee and, "It doesn't look right now like it's moving anywhere," Walker said.

What to expect Thursday

This week's project review meeting in Columbia looks to put the four applicants under the most intense scrutiny they've seen since this process began as they present their proposals verbally for the first time to state regulators. A 10-member DHEC panel will hear a 30-minute presentation from each

company, then have 15 minutes to ask questions after each. At the end of the meeting, the panel will have an hour to ask any remaining questions about the applications.

"There are times where it can get very heated, but most of the time it's just good open debate," Walker said.

Hospital officials will draw numbers for the order of presenting and will not be allowed to comment on anything said by the other companies. They have until April 7 to submit follow-up comments in writing to DHEC.

The public meeting Thursday night in Fort Mill will serve as a forum for more public input, one element DHEC will study when making its decision.

"It's not the most important," said Joel Grice of DHEC, the man who makes the decision on who builds the new hospital. "We're looking at a number of criteria."

DHEC already has received around 1,300 letters about the four proposals, and Thursday's input session will supplement that, Grice said.

After the project review meeting in Columbia, DHEC may take up to 60 days to make a decision. But it probably won't take that long, Grice said. Most likely, he said, the decision will come by the end of April.

So four companies, each waiting to do the same thing, head into this week knowing their case must be compelling. The process has lasted more than a year so far, and after Thursday, the wait will only continue.

Who builds and how long it takes are the two unknowns.

At this point, Grice said, it's still anybody's game.

"I think any one of these applications is approvable," he said.

Jason Foster • 329-4966
jfoster@heraldonline.com

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PHY RECON 000020

EXHIBIT K

Grice 2
MAY 15 2007
E



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

RECEIVED

JUN 02 2006

McNair Law Firm, P.A.

Certified Mail

May 30, 2006

Re: Presbyterian Healthcare System d/b/a Presbyterian Hospital - York
Fort Mill, South Carolina

M. Elizabeth Crum, Esquire
McNair Law Firm
P.O. Box 11390
Columbia, South Carolina 29211

Dear Ms. Crum:

This is to advise that the Department has reviewed four (4) competing Certificate of Need applications for the addition of general acute care hospital beds to be located in York County, South Carolina as outlined in the 2004-2005 South Carolina Health Plan. The 2004-2005 South Carolina Health Plan allows the Department to approve only sixty-four (64) additional general acute care beds at this time. State statute requires that in the case of competing applications, the Department shall award a Certificate of Need on the basis of the application that more fully complies with the requirements, goals, and purposes of the statute, State Health Plan, Project Review Criteria, and regulations adopted by the Department.

Therefore, it is the decision of this Department that the Certificate of Need application submitted by Presbyterian Healthcare System, Charlotte, North Carolina be denied for the construction of a 64-bed acute care hospital to include a Magnetic Resonance Imaging (MRI) unit, a Computed Tomography (CT) scanner and a diagnostic cardiac catheterization laboratory to be located off of I-77 at Sutton Road in Fort Mill, South Carolina.

The decision is based on the following:

1. After careful and thorough review of each of the four (4) competing Certificate of Need (CON) applications for a new, additional general acute care hospital to be located in York County, Department staff have determined that the Fort Mill Medical Center proposal best demonstrates the compelling, definitive, characteristics to be most beneficial to the current and future citizens of York County during the coming decades. Specifically, the Fort Mill Medical Center, which will function under the same licensee, Amisub of South Carolina, Inc., as Piedmont Medical Center (PMC), must operate within all parameters of an existing contract between PMC and York County. The aforementioned contract

0000218

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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PHY RECON EXHIBIT

was amended in recent years, and requires the facility to maintain charges that are consistent with peer group hospitals or be subject to substantial monetary penalties by York County Council. The Contract also requires: establishment of a local governing board and advisory committees for PMC, submission of quarterly financial reports to York County, maintenance of a county-wide EMS with contractually established response times and equipment, maintenance of the urgent care center in western York County, and maintenance of substantial required capital investments by the hospital along with community support through scholarships and donations. This Contract, which no other applicant is bound by, will ensure that charges remain reasonable at both PMC and the proposed new hospital in Fort Mill. The Contract will continue to remain in effect for an additional 39 years.

2. The development of a 100-bed general acute care hospital in York County by Fort Mill Medical Center will result in economies of scale and operating efficiencies that cannot be achieved in smaller facilities, such as the 64-bed facilities proposed by the competing applicants. The initial construction of the larger increment of 100 beds is much more cost effective in that it will alleviate the likely need for follow-up construction for additional beds over a relatively short period of time.
3. The applicant, PMC, has operated an existing hospital in York County for more than two decades and has demonstrated a commitment to the community. The addition of a satellite facility by PMC to serve the Fort Mill area will continue that commitment and will not only enhance the health care delivery system for patients in the Fort Mill area, but benefit York County as a whole.
4. Although each of the four (4) competing CON applications is consistent with standards for both Diagnostic Cardiac Catheterization and Magnetic Resonance Imaging (MRI) services as outlined in the current 2004-2005 S.C. Health Plan, the proposal submitted for the Fort Mill Medical Center is the only project of the competing CON applications that is consistent with the hospital bed need methodology as specifically outlined in the 2004-2005 S.C. Health Plan. The aforementioned Plan uses individual facilities as the unit calculation of bed need instead of the county. Therefore, the bed need for York County, as indicated in the 2004-2005 S.C. Health Plan, is based on Piedmont Medical Center as the planning unit, not York County. The number of beds needed is based on the service area and market share of Piedmont Medical Center, not the entire medical patient population in York County.

0000227

Ms. Elizabeth Crum
May 30, 2006
Page 3

This Proposed Decision becomes the final agency decision ten (10) days after the receipt of this notice unless one of the following occurs:

1. Pursuant to Section 44-7-210 (D)(1) of the amended Code of Laws of South Carolina, 1976, any persons showing "good cause" as defined in Regulation No. 61-15 may request reconsideration of this Department's decision. Such request must be made in writing to this office within ten (10) days from the date of receipt of this notice by an applicant or his agent and must state the specific reasons for such request.
2. Pursuant to Section 44-7-210 (D)(2) of the amended Code of Laws of South Carolina, 1976, an appeal may be submitted by any affected person or the applicant, within a ten (10) day period, from the date of receipt of this notice by an applicant or his agent. Such an appeal may be submitted to the Administrative Law Court (ALC) by complying with the following requirements of the ALC:
 - (a) File a request for a contested case hearing with the Clerk of the Administrative Law Court at the following address within 10 days after receipt of notice of this decision as specified in No. 2 above:

Clerk's Office
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Edgar A. Brown Building
Columbia, South Carolina 29201
(803) 734-0550

The ALC has a Notice of Request for Contested Case Hearing form that may be used, but is not required. The form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>.

A request for a contested case hearing must contain the following information pursuant to ALC Rule 11:

- (1) The name of the party requesting the hearing and the issue(s) for which the hearing is requested;
- (2) The caption or other information sufficient to identify the decision, order, letter, determination, action, or inaction which is subject to the hearing;
- (3) A copy of the written agency decision, order, letter or determination, if any, which gave rise to the request; and

0000238

Ms. Elizabeth Crum
May 30, 2006
Page 4

- (4) The relief requested.
- (b) Submit a filing fee to the Administrative Law Court in the amount of \$250. The filing fee is required by ALC Rule 71.
- (c) Serve a copy of the request for a contested case hearing on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the following address:

Clerk of the Board
S.C. Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

The above information is provided as a courtesy; parties before the Administrative Law Court are responsible for complying with all applicable requirements of the Court.

A copy of the correspondence must also be forwarded to the Director of the Bureau of Health Facilities and Services Development. Should there be no response within the ten (10) day period, this decision will be final; however, note that the Rules of Procedure for the Administrative Law Court (May 2005) enlarge by five (5) days the time period for service by mail. Therefore, no CON will be issued, nor will the absence of a request for a contested case hearing be confirmed until the expiration of fifteen (15) days.

Should you have any questions, please feel free to contact us at (803) 545-4200.

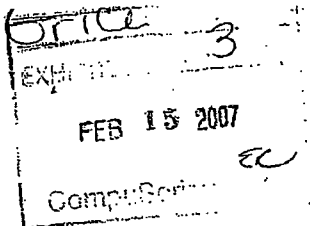
Sincerely,



Joel C. Grice, Director
Bureau of Health Facilities and Services Development

Cc: Mr. David S. Levitt
Mr. Terry Linn, Chief Development Officer
Mr. F. Del Murphy, Jr., Vice-President

0000248



C. Ed Hunter, Commissioner
Promoting and protecting the health of the public and the environment.

RECEIVED

JUN 02 2006

McNair Law Firm, P.A.

Certified Mail

May 30, 2006

Re: Piedmont Healthcare System d/b/a Fort Mill Medical Center
Fort Mill, South Carolina

Mr. David S. Levitt
Mitretck Healthcare - Gill-Balsano
6525 The Corners Parkway
Suite 450
Norcross, Georgia 30092

Dear Mr. Levitt:

This is to advise that the Department has reviewed four (4) competing Certificate of Need applications for the addition of general acute care hospital beds to be located in York County, South Carolina as outlined in the 2004-2005 South Carolina Health Plan. The 2004-2005 South Carolina Health Plan allows the Department to approve only sixty-four (64) additional general acute care beds at this time. State statute requires that in the case of competing applications, the Department shall award a Certificate of Need on the basis of the application that more fully complies with the requirements, goals, and purposes of the statute, State Health Plan, Project Review Criteria, and regulations adopted by the Department.

Therefore, it is the decision of this Department that a Certificate of Need be issued to Piedmont Healthcare System d/b/a Fort Mill Medical Center, Rock Hill, South Carolina for the construction of a 100 bed acute care hospital (including 64 beds shown as needed in the Health Plan in addition to 36 existing beds transferred from Piedmont Medical Center) to include one diagnostic cardiac catheterization laboratory, one Magnetic Resonance Imaging (MRI) unit and a sixty-four slice Computed Tomography (CT) scanner to be located at the intersection of SC Highway 160 and Highway 21 Bypass.

The decision is based on the following:

1. After careful and thorough review of each of the four (4) competing Certificate of Need (CON) applications for a new, additional general acute care hospital to be located in York County, Department staff have determined that the Fort Mill Medical Center proposal best demonstrates the compelling, definitive, characteristics to be most beneficial to the current and future citizens of York

PHY RECON EXHIBIT

0000258

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SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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County during the coming decades. Specifically, the Fort Mill Medical Center, which will function under the same licensee, Arnisub of South Carolina, Inc., as Piedmont Medical Center (PMC), must operate within all parameters of an existing contract between PMC and York County. The aforementioned contract was amended in recent years, and requires the facility to maintain charges that are consistent with peer group hospitals or be subject to substantial monetary penalties by York County Council. The Contract also requires: establishment of a local governing board and advisory committees for PMC, submission of quarterly financial reports to York County, maintenance of a county-wide EMS with contractually established response times and equipment, maintenance of the urgent care center in western York County, and maintenance of substantial required capital investments by the hospital along with community support through scholarships and donations. This Contract, which no other applicant is bound by, will ensure that charges remain reasonable at both PMC and the proposed new hospital in Fort Mill. The Contract will continue to remain in effect for an additional 39 years.

2. The development of a 100-bed general acute care hospital in York County by Fort Mill Medical Center will result in economies of scale and operating efficiencies that cannot be achieved in smaller facilities, such as the 64-bed facilities proposed by the competing applicants. The initial construction of the larger increment of 100 beds is much more cost effective in that it will alleviate the likely need for follow-up construction for additional beds over a relatively short period of time.
3. The applicant, PMC, has operated an existing hospital in York County for more than two decades and has demonstrated a commitment to the community. The addition of a satellite facility by PMC to serve the Fort Mill area will continue that commitment and will not only enhance the health care delivery system for patients in the Fort Mill area, but benefit York County as a whole.
4. Although each of the four (4) competing CON applications is consistent with standards for both Diagnostic Cardiac Catheterization and Magnetic Resonance Imaging (MRI) services as outlined in the current 2004-2005 S.C. Health Plan, the proposal submitted for the Fort Mill Medical Center is the only project of the competing CON applications that is consistent with the hospital bed need methodology as specifically outlined in the 2004-2005 S.C. Health Plan. The aforementioned Plan uses individual facilities as the unit calculation of bed need instead of the county. Therefore, the bed need for York County, as indicated in the 2004-2005 S.C. Health Plan, is based on Piedmont Medical Center as the planning unit, not York County. The number of beds needed is based on the service area and market share of Piedmont Medical Center, not the entire medical patient population in York County.

000026 P

Mr. David Levitt
May 30, 2006
Page 3

The Department makes the following findings pursuant to Section 501, Regulation No. 61-15. Certification of Need for Health Facilities and Services:

1. The capital and operating costs of the proposal and their potential impact on patient charges are reasonable;
2. Superior alternatives to such services in terms of cost, efficiency, or appropriateness do not exist and that the development of such alternatives is not practicable;
3. In the case of new construction, alternatives to new construction have been considered; and
4. Patients will experience serious problems in terms of costs, availability or accessibility, or such other problems as may be identified by the Department, in obtaining care of the type proposed in the absence of the project.

The additional finding required by Section 501.5 of Regulation No. 61-15. Certification of Need for Health Facilities and Services is not applicable to this project.

This Proposed Decision becomes the final agency decision ten (10) days after the receipt of this notice unless one of the following occurs:

1. Pursuant to Section 44-7-210 (D)(1) of the amended Code of Laws of South Carolina, 1976, any persons showing "good cause" as defined in Regulation No. 61-15 may request reconsideration of this Department's decision. Such request must be made in writing to this office within ten (10) days from the date of receipt of this notice by an applicant or his agent and must state the specific reasons for such request.
2. Pursuant to Section 44-7-210 (D)(2) of the amended Code of Laws of South Carolina, 1976, an appeal may be submitted by any affected person or the applicant, within a ten (10) day period, from the date of receipt of this notice by an applicant or his agent. Such an appeal may be submitted to the Administrative Law Court (ALC) by complying with the following requirements of the ALC:
 - (a) File a request for a contested case hearing with the Clerk of the Administrative Law Court at the following address within 10 days after receipt of notice of this decision as specified in No. 2 above:

0000272

Mr. David Levitt
May 30, 2006
Page 4

Clerk's Office
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Edgar A. Brown Building
Columbia, South Carolina 29201
(803) 734-0550

The ALC has a Notice of Request for Contested Case Hearing form that may be used, but is not required. The form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>.

A request for a contested case hearing must contain the following information pursuant to ALC Rule 11:

- (1) The name of the party requesting the hearing and the issue(s) for which the hearing is requested;
 - (2) The caption or other information sufficient to identify the decision, order, letter, determination, action, or inaction which is subject to the hearing;
 - (3) A copy of the written agency decision, order, letter or determination, if any, which gave rise to the request; and
 - (4) The relief requested.
- (b) Submit a filing fee to the Administrative Law Court in the amount of \$250. The filing fee is required by ALC Rule 71.
- (c) Serve a copy of the request for a contested case hearing on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the following address:

Clerk of the Board
S.C. Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

The above information is provided as a courtesy; parties before the Administrative Law Court are responsible for complying with all applicable requirements of the Court.

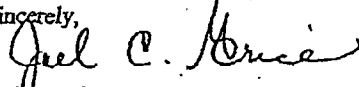
000028B

Mr. David Levitt
May 30, 2006
Page 5

A copy of the correspondence must also be forwarded to the Director of the Bureau of Health Facilities and Services Development. Should there be no response within the ten (10) day period, this decision will be final; however, note that the Rules of Procedure for the Administrative Law Court (May 2005) enlarge by five (5) days the time period for service by mail. Therefore, no CON will be issued, nor will the absence of a request for a contested case hearing be confirmed until the expiration of fifteen (15) days.

Should you have any questions, please feel free to contact us at (803) 545-4200.

Sincerely,



Joel C. Grice, Director
Bureau of Health Facilities and Services Development

CC: Ms. M. Elizabeth Crum, Esquire
Mr. F. Del Murphy, Jr., Vice-President
Mr. Terry Linn, Chief Development Officer

0000297

File



C. Easj Hunter, Commissioner
Promoting and protecting the health of the public and the environment.

Certified Mail

May 30, 2006

Re: Carolinas HealthCare System d/b/a Carolinas Medical Center – Fort Mill
Fort Mill, South Carolina

Mr. F. Del Murphy, Jr., Vice President
CHS Management Company
P.O. Box 32861
1000 Blythe Boulevard
Charlotte, North Carolina 28232-2861



Dear Mr. Murphy:

This is to advise that the Department has reviewed four (4) competing Certificate of Need applications for the addition of general acute care hospital beds to be located in York County, South Carolina as outlined in the 2004-2005 South Carolina Health Plan. The 2004-2005 South Carolina Health Plan allows the Department to approve only sixty-four (64) additional general acute care beds at this time. State statute requires that in the case of competing applications, the Department shall award a Certificate of Need on the basis of the application that more fully complies with the requirements, goals, and purposes of the statute, State Health Plan, Project Review Criteria, and regulations adopted by the Department.

Therefore, it is the decision of this Department that a Certificate of Need submitted by Carolinas HealthCare System, Charlotte, North Carolina be denied for the **construction of a 64-bed acute care hospital to include a Magnetic Resonance Imaging (MRI) unit, a Computed Tomography (CT) scanner, and one diagnostic cardiac catheterization laboratory to be located off of I-77, Exit 83, South of Sutton Road in York County, South Carolina.**

The decision is based on the following:

1. After careful and thorough review of each of the four (4) competing Certificate of Need (CON) applications for a new, additional general acute care hospital to be located in York County, Department staff have determined that the Fort Mill Medical Center proposal best demonstrates the compelling, definitive, characteristics to be most beneficial to the current and future citizens of York County during the coming decades. Specifically, the Fort Mill Medical Center, which will function under the same licensee, Amisub of South Carolina, Inc., as Piedmont Medical Center (PMC), must operate within all parameters of an

00099

existing contract between PMC and York County. The aforementioned contract was amended in recent years, and requires the facility to maintain charges that are consistent with peer group hospitals or be subject to substantial monetary penalties by York County Council. The Contract also requires: establishment of a local governing board and advisory committees for PMC, submission of quarterly financial reports to York County, maintenance of a county-wide EMS with contractually established response times and equipment, maintenance of the urgent care center in western York County, and maintenance of substantial required capital investments by the hospital along with community support through scholarships and donations. This Contract, which no other applicant is bound by, will ensure that charges remain reasonable at both PMC and the proposed new hospital in Fort Mill. The Contract will continue to remain in effect for an additional 39 years.

2. The development of a 100-bed general acute care hospital in York County by Fort Mill Medical Center will result in economies of scale and operating efficiencies that cannot be achieved in smaller facilities, such as the 64-bed facilities proposed by the competing applicants. The initial construction of the larger increment of 100 beds is much more cost effective in that it will alleviate the likely need for follow-up construction for additional beds over a relatively short period of time.
3. The applicant, PMC, has operated an existing hospital in York County for more than two decades and has demonstrated a commitment to the community. The addition of a satellite facility by PMC to serve the Fort Mill area will continue that commitment and will not only enhance the health care delivery system for patients in the Fort Mill area, but benefit York County as a whole.
4. Although each of the four (4) competing CON applications is consistent with standards for both Diagnostic Cardiac Catheterization and Magnetic Resonance Imaging (MRI) services as outlined in the current 2004-2005 S.C. Health Plan, the proposal submitted for the Fort Mill Medical Center is the only project of the competing CON applications that is consistent with the hospital bed need methodology as specifically outlined in the 2004-2005 S.C. Health Plan. The aforementioned Plan uses individual facilities as the unit calculation of bed need instead of the county. Therefore, the bed need for York County, as indicated in the 2004-2005 S.C. Health Plan, is based on Piedmont Medical Center as the planning unit, not York County. The number of beds needed is based on the service area and market share of Piedmont Medical Center, not the entire medical patient population in York County.

This Proposed Decision becomes the final agency decision ten (10) days after the receipt of this notice unless one of the following occurs:

000997

Mr. Del Murphy
May 30, 2006
Page 3

1. Pursuant to Section 44-7-210 (D)(1) of the amended Code of Laws of South Carolina, 1976, any persons showing "good cause" as defined in Regulation No. 61-15 may request reconsideration of this Department's decision. Such request must be made in writing to this office within ten (10) days from the date of receipt of this notice by an applicant or his agent and must state the specific reasons for such request.
2. Pursuant to Section 44-7-210 (D)(2) of the amended Code of Laws of South Carolina, 1976, an appeal may be submitted by any affected person or the applicant, within a ten (10) day period, from the date of receipt of this notice by an applicant or his agent. Such an appeal may be submitted to the Administrative Law Court (ALC) by complying with the following requirements of the ALC:
 - (a) File a request for a contested case hearing with the Clerk of the Administrative Law Court at the following address within 10 days after receipt of notice of this decision as specified in No. 2 above:

Clerk's Office
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Edgar A. Brown Building
Columbia, South Carolina 29201
(803) 734-0550

The ALC has a Notice of Request for Contested Case Hearing form that may be used, but is not required. The form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>.

A request for a contested case hearing must contain the following information pursuant to ALC Rule 11:

- (1) The name of the party requesting the hearing and the issue(s) for which the hearing is requested;
- (2) The caption or other information sufficient to identify the decision, order, letter, determination, action, or inaction which is subject to the hearing;
- (3) A copy of the written agency decision, order, letter or determination, if any, which gave rise to the request; and
- (4) The relief requested.

000998

Mr. Del Murphy
May 30, 2006
Page 4

- (b) Submit a filing fee to the Administrative Law Court in the amount of \$250. The filing fee is required by ALC Rule 71.
- (c) Serve a copy of the request for a contested case hearing on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the following address:

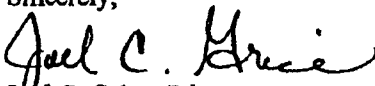
Clerk of the Board
S.C. Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

The above information is provided as a courtesy; parties before the Administrative Law Court are responsible for complying with all applicable requirements of the Court.

A copy of the correspondence must also be forwarded to the Director of the Bureau of Health Facilities and Services Development. Should there be no response within the ten (10) day period, this decision will be final; however, note that the Rules of Procedure for the Administrative Law Court (May 2005) enlarge by five (5) days the time period for service by mail. Therefore, no CON will be issued, nor will the absence of a request for a contested case hearing be confirmed until the expiration of fifteen (15) days.

Should you have any questions, please feel free to contact us at (803) 545-4200.

Sincerely,



Joel C. Grice, Director
Bureau of Health Facilities and Services Development

CC: Ms. M. Elizabeth Crum, Esquire
Mr. David S. Levitt
Mr. Terry Linn, Chief Development Officer

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EXHIBIT L

1 STATE OF SOUTH CAROLINA
2 ADMINISTRATIVE LAW COURT

3 CHARLOTTE-MECKLENBURG HOSPITAL
4 AUTHORITY D/B/A CAROLINAS
5 HEALTHCARE SYSTEM,

6 Petitioner(s),

7 vs. Case No. 06-ALJ-07-0489-CC

8 SOUTH CAROLINA DEPARTMENT
9 OF HEALTH AND ENVIRONMENTAL
10 CONTROL AND AMISUB OF SOUTH
11 CAROLINA, INC., D/B/A PIEDMONT
12 HEALTHCARE SYSTEM D/B/A
13 FORT MILL MEDICAL CENTER,

14 Respondent(s),

15 PRESBYTERIAN HEALTHCARE SYSTEM, D/B/A
16 PRESBYTERIAN HOSPITAL - YORK, LLC,

17 Intervener(s).

-----X

18 CHARLOTTE-MECKLENBURG HOSPITAL
19 AUTHORITY D/B/A CAROLINAS
20 HEALTHCARE SYSTEM,

21 Petitioner(s),

22 vs. Case No. 06-ALJ-07-0490-CC

23 SOUTH CAROLINA DEPARTMENT
24 OF HEALTH AND ENVIRONMENTAL
25 CONTROL,

Respondent(s),

AMISUB OF SOUTH CAROLINA, INC. D/B/A
PIEDMONT HEALTHCARE SYSTEM D/B/A
FORT MILL MEDICAL CENTER AND
PRESBYTERIAN HEALTHCARE SYSTEM D/B/A
PRESBYTERIAN HOSPITAL - YORK, LLC,

Intervenor(s).

-----X

COPY

1 PRESBYTERIAN HEALTHCARE SYSTEM,
2 D/B/A PRESBYTERIAN YORK, LLC,

3 Petitioner(s),

4 vs.

Case No. 06-ALJ-07-0713-CC

5 SOUTH CAROLINA DEPARTMENT OF
6 HEALTH AND ENVIRONMENTAL CONTROL
7 AND AMISUB OF SOUTH CAROLINA, INC.
8 D/B/A PIEDMONT HEALTHCARE SYSTEM
9 D/B/A FORT MILL MEDICAL CENTER,

10 Respondent(s).

11 CHARLOTTE-MECKLENBURG HOSPITAL
12 AUTHORITY D/B/A CAROLINAS
13 HEALTHCARE SYSTEM,

14 Intervenor(s).

-----X

15 PRESBYTERIAN HEALTHCARE SYSTEM,
16 D/B/A PRESBYTERIAN YORK, LLC,

17 Petitioner(s),

18 vs.

Case No. 06-ALJ-07-0712-CC

19 SOUTH CAROLINA DEPARTMENT OF
20 HEALTH AND ENVIRONMENTAL CONTROL,

21 Respondent(s),

22 AMISUB OF SOUTH CAROLINA, INC. D/B/A
23 PIEDMONT HEALTHCARE SYSTEM D/B/A
24 FORT MILL MEDICAL CENTER AND
25 CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY
D/B/A CAROLINAS HEALTHCARE SYSTEM,

Intervenor(s).

-----X

D E P O S I T I O N

WITNESS: DENNIS GIBBS

DATE: Thursday, April 26, 2007

TIME: 10:05 a.m.

LOCATION: South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina

TAKEN BY: Attorneys for the Petitioner(s)

REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

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1 A. I'm the director of the Division of Health
2 Licensing.

3 Q. And what does that position -- what duties
4 and responsibilities do you have?

5 A. We're responsible for the regulatory
6 oversight of numerous facilities and services as
7 authorized in statute for us to license and regulate.
8 There's a -- we use about 18 regulations to license
9 about 24 or 25 different kinds of facilities or
10 services.

11 Q. One of the facilities that you license is
12 hospitals, isn't it?

13 A. Yes, ma'am.

14 Q. Okay. And hospitals are licensed pursuant to
15 Regulation 61-16?

16 A. That's correct.

17 Q. Okay. Your division is responsible for
18 licensing all healthcare facilities in South Carolina
19 that require licensing, correct?

20 A. By the Department of Health and Environmental
21 Control, yes.

22 Q. Right. Are there other healthcare facilities
23 that are licensed by someone else?

24 A. Well, there are -- arguably there might be
25 Department of Social Services licenses group homes

1 they would be required to be licensed separately.

2 Q. Okay. Did you attend the project review for
3 the four competing applicants or for the four
4 applicants at York County in York County?

5 A. Yes, ma'am.

6 Q. I was there and I couldn't remember.

7 Assume for me that the CON for Fort Mill
8 Medical Center -- let me drop back a minute.

9 You understand that Amisub of South Carolina,
10 Inc. is the parent company for Piedmont Medical Center,
11 correct?

12 A. Yes, ma'am.

13 Q. And you understand that Amisub of South
14 Carolina will be -- has proposed to be also the parent
15 company for Fort Mill Medical Center, correct?

16 A. I'm not specifically aware of that, no,
17 ma'am.

18 Q. Okay. Well, would you assume that for me for
19 purposes of my question?

20 MR. ANDREWS: Object to the form.

21 THE WITNESS: Okay.

22 BY MS. CRUM:

23 Q. Okay. Fort Mill Medical Center is proposed
24 to be located in Fort Mill, South Carolina, correct?

25 A. I don't know that for a fact. One might a

1 assume.

2 Q. Well, do you know whether or not it is to be
3 located contiguous to Piedmont Medical Center in Rock
4 Hill?

5 A. Is that the facility by name, the d/b/a of
6 the facility that would be operated by Piedmont Medical
7 Center?

8 Q. Yes, sir.

9 A. Then my recollection is that that would not
10 be contiguous to the existing hospital in Rock Hill.

11 Q. And so it would have to have a separate
12 license, wouldn't it?

13 MS. LAYMAN: Object to the form.

14 THE WITNESS: Yes, ma'am.

15 BY MS. CRUM:

16 Q. Wouldn't Fort Mill Medical Center have to
17 have a separate hospital license, Mr. Gibbs?

18 A. Yes.

19 Q. Any new hospital that is built in South
20 Carolina, Mr. Gibbs, that is not contiguous to an
21 existing hospital, would it have to have a separate
22 medical staff?

23 A. Yes.

24 Q. Would it have to have a separate hospital
25 administrator?

1 A. No, not necessarily.

2 Q. Okay. But separate medical staff?

3 A. Yes.

4 Q. Okay. Would it -- and it would have to have
5 a separate license?

6 A. Yes.

7 Q. Okay. Mr. Gibbs, did you participate at all
8 in the decision with regard to whom to approve in York
9 County?

10 A. No.

11 Q. Did Mr. Grice consult with you with regard to
12 whether or not Fort Mill Medical Center and Piedmont
13 would have to be separately licensed hospital
14 facilities?

15 A. No.

16 MS. CRUM: Okay. Just a moment, please.

17 (Off the record.)

18 MS. CRUM: I have no further questions.

19 MR. ANDREWS: I have none.

20 MS. ROBERTSON: I have none.

21 MS. LAYMAN: I have none.

22 (The deposition concluded at 10:20 a.m.)

23

24

25

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charlotte-Mecklenburg Hospital)
 Authority d/b/a Carolinas Healthcare)
 System and)
 Presbyterian Healthcare System, d/b/a)
 Presbyterian Hospital-York, LLC,)

Petitioners,)

Y.

South Carolina Department of Health
and Environmental Control and Amisub
of South Carolina, Inc. d/b/a Piedmont
Healthcare System d/b/a Fort Mill
Medical Center.

Civil Action No. 06-ALJ-07-0713-CC

**PRESBYTERIAN HOSPITAL YORK,
LLC'S MOTION FOR
SUMMARY JUDGMENT**

Respondents.

Petitioner Presbyterian Hospital York, LLC ("Presbyterian"), by and through its undersigned counsel, hereby moves this honorable Court for summary judgment in the above-captioned action pursuant to Rules 19 and 68, RPALC, and Rule 56, SCRCP. The grounds for this motion are:

1. Amisub of South Carolina, Inc., d/b/a Fort Mill Medical Center ("FMMC") was not a competing applicant as defined by the State Certificate of Need and Health Facilities Licensure Act, S.C. Code Ann. §§ 44-7-110, *et seq.* (Rev. 2002) ("CON Act") in the same review cycle with Presbyterian, and FMMC was not eligible for award and could not be awarded the certificate of need ("CON") as a competing applicant in the review cycle with Presbyterian, Charlotte Mecklenburg Hospital Authority ("CMHA") and Hospital Partners of America ("HPA").

2. The South Carolina Department of Health and Environmental Control's

("DHEC" or "Department") interpretation that Fort Mill Medical Center is the only applicant whose application is consistent with the *2004-2005 South Carolina Health Plan* ("Plan") is erroneous and not in accordance with the intent of the Plan or the State Certificate of need and Health Facilities Licensure Act, S.C. Code Ann. § 44-7-110, et seq. (Rev. 2002).

3. DHEC erred in finding that Presbyterian did not comply with the Plan additional bed need methodology and FMMC did comply with the Plan additional bed need methodology.

4. Alternatively, if DHEC correctly interpreted the Plan, then DHEC's award of the CON to FMMC is contrary to law, in excess of the agency's statutory authority and, as applied, is unconstitutional.

5. Alternatively, as applied by DHEC, the Plan violates the Commerce Clause of the United States Constitution.

This motion is based on the RPALC, the SCRCP, and applicable case, statutory and common law. In support of this motion Presbyterian relies upon, and has filed with the Court, a memorandum of law in support of its motion for summary judgment and accompanying exhibits.

[Signature block of next page]

Respectfully submitted,

M. Elizabeth Crum, SC Bar No. 001486

lcrum@mcnair.net

Arial B. Kirk, SC Bar No. 71101

akirk@mcnair.net

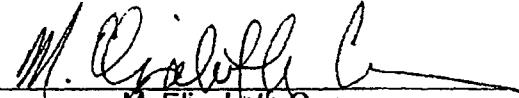
McNAIR LAW FIRM, P.A.

Post Office Box 11390

Columbia, South Carolina 29211

(803) 799-9800

By:


M. Elizabeth Crum

Attorney for Presbyterian Hospital—York, LLC

May 18, 2007

Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charlotte-Mecklenburg Hospital Authority)
d/b/a Carolinas Healthcare System and)
Presbyterian Healthcare System, d/b/a)
Presbyterian Hospital-York, LLC,)

Petitioners,)

v.)

South Carolina Department of Health and)
Environmental Control and Amisub of South)
Carolina, Inc. d/b/a Piedmont Healthcare)
System d/b/a Fort Mill Medical Center,)

Respondents.)

Civil Action No. 06-ALJ-07-0713-CC

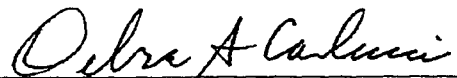
CERTIFICATE OF SERVICE

I, Debra A. Carlucci, do hereby certify that I have on this date served one (1) copy of the Petitioner Presbyterian Hospital York, LLC's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment to the following counsel of record by causing said copy to be delivered by U.S. Mail to:

Ashley C. Biggers, Esquire
Nancy S. Layman, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708

Stuart M. Andrews, Esquire
Daniel J. Westbrook, Esquire
Jennifer I. Cooke, Esquire
Nelson Mullins, et al.
PO Box 11070
Columbia, South Carolina 29211

Douglas M. Muller, Esquire
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Charleston, South Carolina 29401-3535



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May 18, 2007
Columbia, South Carolina