STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Trident Medical Center, LLC, d/b/a Berkeley Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and Roper St. Francis Hospital - Berkeley d/b/a Roper St. Francis Hospital, Respondents.	Docket No.: 09-ALJ-07-0332-CC **FINAL ORDER AND DECISION**
Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	Docket No.: 09-ALJ-07-0333-CC (consolidated)
CareAlliance Health Services and Roper St. Francis Hospital - Berkeley, Petitioners, vs. South Carolina Department of Health and Environmental Control and Trident Medical Center, LLC, Respondents.	Docket No.: 09-ALJ-07-0336-CC (consolidated)

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SC ADMIN. LAW COURT

APPPEARANCES

David B. Summer, Jr and William R. Thomas	for Petitioner Trident Medical Center
James G. Long, III and Jennifer J. Hollingsworth	for Respondent Roper St. Francis
Ashley C. Biggers and Kristin L. Pawlowski	for Respondent South Carolina Department of Health and Environmental Control

STATEMENT OF THE CASE

The above-captioned matters come before the Court upon the requests of Petitioner/Respondent Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center ("Trident") and Respondents/Petitioners CareAlliance Health Services and Roper St. Francis Hospital – Berkeley (collectively "Roper St. Francis") for a contested case hearing to review the decision of the Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") to issue Certificates of Need ("CON") to Trident and Roper St. Francis for the establishment of two 50-bed acute care hospitals in Berkeley County, South Carolina. The three separately filed matters were consolidated by Consent Order dated January 7, 2010. Trident challenges the Department's finding that the applications are not competing applications and further asserts that Roper St. Francis' application should not have been approved. Roper St. Francis supports the decision of the Department that the applications were not competing but challenges the approval of Trident's application.

Prior to a hearing on the merits, the parties conducted discovery and this Court heard a number of motions on discovery issues and other pre-trial matters. After timely notice to the parties, a contested case hearing on the merits was held from January 30, 2012, through February 16, 2012, for a total of fourteen days of trial. During the hearing, all three parties presented witnesses and offered exhibits in support of their respective positions. A total of fifteen witnesses testified at the hearing, with an additional six witnesses offered through deposition

designations, and the Court admitted two hundred and seven exhibits in evidence, in addition to receiving three proffers of evidence. The following witnesses were designated as experts in the noted areas of expertise: Richard Baehr in the areas of healthcare planning and finance on behalf of Trident; Mark Richardson in the area of healthcare planning on behalf of Roper St. Francis; Richard Knapp in the area of healthcare finance on behalf of Roper St. Francis; and Michael Ridgeway in the area of travel time studies on behalf of Trident.

Having reviewed all of the documentary evidence and heard the testimonial evidence presented at the hearing, having considered the arguments of the parties made at the hearing, and having followed the applicable law, I find that DHEC properly approved the applications of Trident and Roper St. Francis for the establishment of two 50-bed acute care hospitals in Berkeley County, South Carolina, because the applications are not competing applications as defined by the applicable law and both applications satisfy the State Health Plan, the Project Review Criteria, and the purposes of the Certificate of Need Act.

It cannot be denied that, on its face, Section II(G)(1)(A)(4)(j) of the 2008-2009 State Health Plan (the bed transfer provision) appears to anticipate the existence of an existing facility. However, as will appear within, I have concluded that approval of the Certificate of Need for Roper St. Francis was proper.

FINDINGS OF FACT

Having carefully considered all testimony, exhibits, and arguments presented at the hearing, and taking into account the credibility and accuracy of the evidence, I make the following Findings of Fact by a preponderance of the evidence:

A. The Parties.[1]

1. Trident operates as Trident Health System, a for-profit subsidiary of Hospital Corporation of America, and consists of a single licensee doing business as Trident Medical Center, a 296-bed tertiary care facility in Charleston County, South Carolina; Summerville Medical Center, a 94-bed acute care facility in Dorchester County, South Carolina; and Moncks Corner Medical Center, a freestanding emergency department in Berkeley County, South Carolina. (Rardin Trial Tr. 86:16-87:17).

2. Roper St. Francis is a non-profit healthcare system anchored by three inpatient facilities: Roper Hospital, a 316-bed tertiary care facility in Charleston County, South Carolina;Bon Secours St. Francis, a 204-bed acute care facility in Charleston County, South Carolina; and Roper St. Francis Mount Pleasant Hospital, an 85-bed acute care facility in Charleston County, South Carolina. (Joint Ex. #5 at III-16). Roper St. Francis also operates a freestanding Emergency Department and Ambulatory Surgery Facility in Berkeley County and other physician offices and facilities throughout the Lowcountry region of South Carolina, including Berkeley, Dorchester, and Charleston Counties. (Resp. Ex. #15; Pet. Ex. #235; Johnson Trial Tr. 2172:1-2173:25; Bowling Trial Tr. 2471:5-16).

3. DHEC is a state agency charged with, among other things, implementing South Carolina's CON regulatory program, which includes licensing standards for the establishment of acute care hospitals. S.C. Code Ann. § 44-7-140 (Rev. 2002). By statute, DHEC is "the sole agency for control and administration of the granting of [CONs] and licensure of health facilities." *Id.*

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[1] For clarity of the record, the trial exhibits referenced herein will be labeled "Pet." for Petitioner/Respondent Trident Medical Center and "Resp." for Respondents/Petitioners Roper St. Francis. The Department shall be referred to as DHEC or the Department. The three parties introduced sixteen joint exhibits.

B. Regulatory Background.

4. This matter arises under the regulatory program by which Certificates of Need are issued by the State of South Carolina for the development of health care facilities and services in this State. The regulatory scheme consists of the State Certification of Need and Health Facility Licensure Act ("CON Act"), S.C. Code Ann. § 44-7-110, *et seq.* (Rev. 2002); the regulations promulgated thereunder, 24A S.C. Code Ann. Regs. 61-15 (2003); and a State Health Plan which is revised at least biannually. The purpose of the CON Act and thus the regulatory program itself are to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure high quality services are provided in health facilities in this State." *See* S.C. Code Ann. § 44-7-120.

5. The primary vehicle by which the CON program is implemented, and its stated goals achieved, is the requirement that a health care provider apply for, and receive, a CON from DHEC prior to undertaking certain major projects or providing certain new services. *See* S.C. Code Ann. §§ 44-7-120, -160. In determining whether to grant or deny an application for a CON, the Department evaluates the proposed project under the review criteria found in the CON regulations and under the policies and standards set forth in the applicable State Health Plan. *Seeid.*at § 210(C). The project review criteria set forth in Regulation 61-15 include thirty-three separate criteria that fall into five general categories: (1) criteria related to the need for the proposed project; (2) criteria related to the economic considerations of the project; (3) criteria related to the project's impact on the resources of the health care system; (4) criteria related to the suitability of the site of the project; and (5) criteria related to certain special circumstances, such as the project's ability to serve medically underserved groups. *See* 24A S.C. Code Ann.

Regs. 61-15 §§ 801, 802. As required by the CON Act, the State Health Plan contains the following statistics, standards, and findings with regard to the various facilities and services regulated by the CON Act:

> (1) an inventory of existing health care facilities, beds, specified health services, and equipment; (2) projections of need for additional health care facilities, beds, health services, and equipment; (3) standards for distribution of health care facilities, beds, specified health services, and equipment including scope of services to be provided, utilization, and occupancy rates, travel time, regionalization, other factors relating to proper placement of services, and proper planning of health care facilities; and (4) a general statement as to the project review criteria considered most important in evaluating Certificate of Need applications for each type of facility, service, and equipment, including a finding as to whether the benefits of improved accessibility to each such type of facility, service, and equipment may outweigh the adverse affects caused by the duplication of any existing facility, service, or equipment.

S.C. Code Ann. § 44-7-180(B).

6. Pursuant to the CON Act, the Department may not issue a CON to an applicant "unless the application complies with the South Carolina Heath Plan, Project Review Criteria, and other regulations." S.C. Code Ann. § 44-7-210(C); *see also MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (holding that compliance with the State Health Plan and the Project Review Criteria were independent requirements for approval of a CON).

<u>C.</u> <u>The Applications Under Review.</u>

7. Trident's application proposes to construct a 50-bed hospital to be located on a separate parcel of vacant land adjacent to its existing Moncks Corner Medical Center in Moncks Corner, South Carolina. (Joint Ex. #1). Trident's application was filed on August 12, 2008, and is governed by the then-effective *2004-2005 State Health Plan.*

8. Roper St. Francis' application proposes to construct a 50-bed hospital to be located in the Carnes Crossroads development of Goose Creek, South Carolina. (Joint Ex. #2).

Roper St. Francis' application was filed on December 9, 2008, and is governed by the then-effective *2008-2009 State Health Plan.*

9. Since the filing of both applications, and the Department's decision to approve both applications on June 26, 2009, the current *2010-2011 State Health Plan* was implemented. The three State Health Plans are Joint Exhibits 3, 4 and 5, respectively.

10. In both the *2004-2005 State Health Plan* and the *2008-2009 State Health Plan*, the section and standards applicable to the establishment of acute care hospitals is found at Chapter II, beginning at pages II-2 in each State Health Plan.

11. Both applicants propose to establish acute care hospitals. (Joint Ex. #1 at 8; Joint Ex. #2 at 5).

12. Hospitals are generally classified as general acute care hospitals or tertiary care hospitals. Acute care hospitals, also referred to as community hospitals, focus on treating patients from the community where the hospital is located for general medical conditions such as surgery, obstetrics, emergency care, and general diseases. (Gallati Trial Tr. 283:3-22; Bowling Trial Tr. 2499:1-6). Tertiary hospitals are larger facilities that treat patients from a larger geographic area and have the ability to treat complex diagnoses and provide specialized medical care and surgery. (Bowling Trial Tr. 2552:20-2553:21). Tertiary care is higher acuity care for complex diagnoses and procedures such as open heart surgery and neurosurgery. (Bowling Trial Tr. 2492:7-14). Patients will often be transferred from a general acute care hospital to a tertiary hospital if the patient's condition worsens or becomes more complex or severe. (Gallati Trial Tr. 283:3-22).

13. I find that each application proposes to establish a community hospital that will only treat non-tertiary, non-specialty patients.

14. I find that the primary ways in which patients present to a general acute care hospital such as those proposed by both applicants are through an emergency department admission and by physician referral. (Baehr Trial Tr. 1537:19-1538:4; Bowling Trial Tr. 3134:5-18).

15. The State Health Plan uses the occupancy of a licensed hospital bed to determine need for hospital services. The CON Act identifies beds as one of the items for the State Health Plan to maintain an inventory, projection, standards, and project review criteria. S.C. Code Ann. § 44-7-180(B). There are two primary justifications to use the occupancy of a hospital bed as the measurement for need. First, it is a rational yardstick to determine when or if to expand an existing hospital as opposed to when and if to construct a new hospital. Use of the bed occupancy approach allows the Department to have flexibility to help guide the establishment of hospitals and maintain quality – two major purposes of the CON Act. (Shelton Trial Tr. 1173:2-1174:22, 1154:8-1155:3). The second reason is that a licensed hospital bed is required for an overnight inpatient stay, which is what makes a hospital unique from other healthcare facilities. (Bowling Trial Tr. 2460:24-2461:11).

16. The utilization of hospital beds needed to reach "capacity" as defined by the State Health Plan increases based on the number of licensed beds approved for the hospital. (Joint Ex. #4 at II-6). Smaller community hospitals like those proposed by these applicants are considered at capacity when occupancy reaches 65%. (*Id.*). Larger hospitals with 175 to 349 beds are considered at capacity with 70% occupancy, and the largest hospitals with more than 350 beds are considered at capacity with 75% occupancy. (*Id.*).

17. Under the *2008-2009 State Health Plan*, a need for additional beds may be shown for a facility and/or for a service area – meaning, a specific facility may have a need for

additional beds based on its own utilization data or a service area may show a need for additional beds based on the aggregate utilization of all of the beds in the service area. (Joint Ex. #4 at II-7). Regardless of whether a facility or service area has a need or an excess, existing beds can be redistributed through the bed transfer provision set forth in the State Health Plan. (*Id.* at II-9).

18. Trident's application to establish its acute care facility in Moncks Corner proposes to use a facility-specific bed need published in the *2004-2005 State Health Plan* for Trident Medical Center in North Charleston, South Carolina. Under that Plan, Trident Medical Center had a facility-specific need of 17 beds,[2] which it then sought to increase to 50 beds to allow for the construction of a cost-effective addition pursuant to Section II.G.1(A)(4)(d) of the Health Plan. (Joint Ex. #3 at II-7 and II-17).

19. Roper St. Francis' application to establish its acute care facility in Goose Creek proposes to transfer 50 existing licensed acute care beds from Roper Hospital in Downtown Charleston and place them in the Carnes Crossroads development of Goose Creek, primarily to serve the patients currently traveling downtown to the Charleston Peninsula or West Ashley for healthcare services. (Joint. Ex. #2 at 17). The applicable bed transfer provision in the *2008-2009 State Health Plan* is found at Section II.G.1(A)(4)(j), pages II-9 to II-10. (Joint Ex. #4).

20. An important distinction is made here. Roper St. Francis is not applying to add any additional beds to the Tri-County Service Area. Under the *2008-2009 State Health Plan*, the Tri-County Service Area has an excess of beds. (Joint Ex. #4 at II-19). Under the Plan, Roper St. Francis could not apply to <u>add</u> beds to the Tri-County Service Area and has not done so. (Brandt Trial Tr. 924:20-23). I find that Roper St. Francis' application to establish its Berkeley County hospital is properly made by way of the bed transfer provision in the *2008-2009 State*

[2] The *2004-2005 State Health Plan* inventory shows a bed need of 42 beds for Trident's North Charleston campus; however, Trident obtained a CON to convert 25 skilled nursing beds to general acute beds prior to these applications under review, leaving only 17 to be added under the Plan. (Baehr Trial Tr. 1205:22-1206:4).

Health Plan because Roper St. Francis proposes to physically relocate existing beds. (Joint Ex. #4 at II-9 to II-10; Shelton Trial Tr. 1142:10-21). In contrast, Trident proposes to relocate future bed need not actual existing licensed beds. (Joint Ex. #3 at II-7; Shelton Trial Tr. 1142:10-1143:24).

21. As 50-bed hospitals, the State Health Plan considers these hospitals "full" at 65% occupancy. The importance of using 65% as opposed to a higher percentage to determine optimal occupancy is that a hospital with fewer licensed beds cannot withstand large fluctuations in capacity like a hospital with a greater number of beds can, thus, greater flexibility is needed in smaller hospitals to handle variations in patient admissions. (Shelton Trial Tr. 1060:6-1061:8; Richardson Trial Tr. 3132:9-3134:4).Capacity varies based on the size of the hospital because the average daily census of a hospital is not consistent and flexibility to admit patients is critical. Hospitals typically have a higher census in the winter months compared to the summer months, and have a higher census during the middle of the week as compared to the weekend. (Baehr Trial Tr. 1570:20-1571:7; Richardson Trial Tr. 3132:15-3133:22; Severance Trial Tr. 2800:22-2802:18). Therefore, I find that hospitals must have flexibility in capacity to handle changes in census.

22. This target occupancy standard for a 50 bed hospital equates to an average daily census of 32.5. (Baehr Trial Tr. 1585:3-7). Average daily census is the average number of patients within the hospital, also explained as the number of heads on a pillow at midnight. (Rardin Trial Tr. 138:12-16; Severance Trial Tr. 2799:22-2800:1). Hospital utilization can also be reported as patient days, representing the total number of days patients were in the hospital during the year. (Shelton Trial Tr. 1057:18-1058:1). The "capacity" average daily census of

32.5 for the proposed hospitals equates to 11,863 patient days (32.5 x 365 days = 11,863 patient days).

23. Trident projected in its application that by year three, using 100% redirection of Trident-aligned patients, it would experience 12,317 patient days at Berkeley Medical Center, its hospital in Moncks Corner, equating to an average daily census of 33.7 or 67.5% occupancy. (Joint Ex. #1 at 36). Roper St. Francis projected in its application that by year three, using 50% redirection of Roper St. Francis-aligned patients, it would experience 12,775 patient days at the Roper St. Francis hospital in Goose Creek, equating to an average daily census of 35 or 70% occupancy. (Joint Ex. #2 at 30-31).

24. Both applicants presented substantial data showing where their patient base is located and each made projections of utilization at the proposed hospitals after the hospitals were opened and licensed. The data and projections were initially set forth in each application. (Joint Ex. #1 at 23-128; Joint Ex. #2 at 15-38). At trial, each hospital system presented updated data, including utilization from 2007 through the present, and offered updated projections based on updated population information from the 2010 U.S. Census.(Resp. Exs. #36, 38, 53, 59, 82; Pet. Exs. #166, 202).

25. The evidence at trial established that the projected non-tertiary patient days for Berkeley County admissions in 2017 to the Trident system and the Roper St. Francis system are well above the number of patients needed for each applicant's project to be at target occupancy, with the Trident system projected to have 36,418 patient days and the Roper St. Francis system projected to have 16,934 patient days. (Pet. Ex. #221). The applicants both projected their hospitals as effectively full with 70% occupancy, which equates to an average of 35 people in the hospital every day or 12,775 patient days. (Richardson Trial Tr. 3135:3-19). Therefore, I find

that non-tertiary admissions from Berkeley County alone are more than sufficient to sustain both hospitals.

D. The Service Area.

26. The State Health Plan identifies four Inventory Regions for hospitals and each region is further divided into service areas. (*See e.g.* Joint Ex. #4 at II-3 to II-4). Most of the service areas consist of individual counties; however, two service areas combine multiple counties: Orangeburg/Calhoun and Berkeley/Charleston /Dorchester. Under both the *2004-2005 State Health Plan* and the *2008-2009 State Health Plan*, Berkeley County is part of the Tri-County Service Area of Berkeley, Charleston, and Dorchester Counties for purposes of general hospitals and hospital beds. (Joint Ex. #3 at II-3 to II-4, II-17; Joint Ex. #4 at II-2, II-18 to II-20).

27. While the service area is a three-county service area, each applicant projects that the vast majority of the patients at its proposed hospital will be residents of Berkeley County. (Joint Ex. #1 at 24; Joint Ex. #2 at 18). I find that Berkeley County is one of five counties in South Carolina with zero hospital beds. (Resp. Ex. #75). A comparison of Berkeley County to other counties with hospitals show that a substantial number of counties in South Carolina have a much smaller population than Berkeley County and have well over 100 beds. I find that there are eight counties in South Carolina with less than 100,000 in population that have over 100 beds. (Resp. Ex. #75 at 4702). In addition, the following seven counties have substantially more than 100 beds with similar populations to Berkeley County's population of 177,843:

(a) Florence – 831 beds for 136,885 people
(b) Sumter – 283 beds for 107,456 people
(c) Anderson[3] – 485 beds for 187,126 people

[3]Anderson County, an obvious comparison to Berkeley County, has a population of approximately 10,000 people more than Berkeley County but it has 495 hospital beds. Like Berkeley County, it is adjacent to an urban populous county with a substantial number of beds. (Resp. Ex. #75 at 4703, 4705).

(d) Pickens – 164 beds for 119,224 people
(e) Aiken – 183 beds for 160,099 people
(f) Calhoun/Orangeburg – 247 beds for 107,676 people

(Resp. Ex. #75 at 4703).

28. The lack of hospital beds or general acute care services in Berkeley County is especially surprising given the explosive population growth of the county in the last four decades. (Richardson Trial Tr. 3115:4-3116:21; Resp. Ex. #70; Resp. Ex. #75). In 1970, Berkeley County had a population of 56,199. (Resp. Ex. #70 at 683). In the 2010 Census, the population had increased to 177,843. (*Id.*). The communities in Berkeley County, Dorchester County, and Northern Charleston County have likewise grown in population. Nearly half of the growth in Charleston County since 1980 has occurred in the city of North Charleston, which is where Trident Medical Center is located. (Richardson Trial Tr. 3118:1-18). The City of Goose Creek has nearly doubled in population since 1980. (Resp. Ex. #70 at 683).

29. These applications were filed in 2008. (Joint Ex. #1 and #2). The population projections for Berkeley County were based on the 2000 Census and projected a 2010 population of 170,000. (Richardson Trial Tr. 3096:5-3097:7; Baehr Trial Tr. 1237:23-1238:18). The actual 2010 population according to the U.S. Census Bureau was 177,843. (Baehr Trial Tr. 3643:13-14; Resp. Ex. #59). Berkeley's population growth was one of the highest growth rates in the state. This additional population projects to an even greater population in Berkeley County after these facilities are constructed than was projected in the CON applications. (Richardson Trial Tr. 3172:2-18).Based on the substantial population growth in the 2010 Census and the historical growth since 1970, I find that Berkeley's population size is well able to support two 50-bed hospitals.

30. Of the 1,739 existing licensed acute care beds in the Tri-County Service Area, 95% of those beds are located in Charleston County. (Joint Ex. #4 at II-19, Richardson Trial

Tr.3108:17-3110:15; Resp. Ex. #75). Given that under the 2010 U.S. Census data only 53% of the Tri-County Service Area's population lives in Charleston County, I find that there is a significant maldistribution of beds in the service area. (Richardson Trial Tr. 3109:16-3112:1).

31. The proposed locations for each project, Moncks Corner and Goose Creek, are approximately twenty minutes travel time apart. (Ridgeway Trial Tr. 590:10-20). The evidence at trial showed that the two communities are separate and distinct geographies within Berkeley County. (West Trial Tr. 973:16-974:9, 985:3-7; Brandt Trial Tr. 822:8-823:1; Bowling Trial Tr. 2610:11-22). As evidenced by the numerous letters of support gathered by each applicant, both projects have the support of their proposed communities and local community and government leaders. (Joint Ex. #1, Joint Ex. #2).

E. Existing Market Conditions and Proposed Utilization.

32. Trident's project is based on primarily serving the population in Berkeley County around Lake Moultrie. (Joint Ex. #1 at 76; Resp. Ex. #76 at 4714-4715). Trident Health System's inpatient market share in Berkeley County was approximately 53% at the time it filed its application. (Joint Ex. #1 at 23). In constructing its need analysis, Trident performed a zip code analysis of where its patients were likely to originate. (*Id.* at 35-36). Trident projected that its hospital in Moncks Corner would have no impact on the market share of the existing providers. (*Id.*). In other words, Trident assumed that it would not increase its market share after the new hospital opened in Moncks Corner. Further, Trident projects that in the third year of operation it will capture 50% of the Trident-aligned patients in the following 8 zip codes around Lake Moultrie: 29461, 29434, 29431, 29476, 29479, 29468, 29436, and 29469. (Joint Ex. #1 at 76; Resp. Ex. #76 at 4715). It also projects that it will capture 25% of the Trident-aligned patients in two zip codes to the east, 29450 and 29453, and 20% of the Trident-aligned

patients in the zip code to the west, 29483. (*Id.*). Trident estimated its new hospital would only capture either 2% or 1% of the Trident-aligned patients in southern Berkeley County and in Charleston County. (*Id.*). It is important to note that these estimates only project the capture of Trident-aligned patients solely from Trident's future patient base. I find that Trident's analysis is a very conservative estimate of the patient base for the Moncks Corner Hospital. (Brandt Trial Tr. 858:12-20). With only its Trident-aligned patients, Trident estimates that its facility will reach more than 65% occupancy in the third year of operation. (Joint Ex. #1 at 36).

33. The Roper St. Francis project is based primarily on serving patients that are already aligned with and use Roper St. Francis facilities. (Joint Ex. #2 at 24-26). At the time its application was prepared, Roper St. Francis had a 23% market share in Berkeley County based on 2006 discharge data. (*Id.* at 26). Despite the Trident Health System facilities in North Charleston and Summerville being located considerably closer to Berkeley County residents than the Roper St. Francis facilities, 23% of the patients in Berkeley County drive the longer distance to seek treatment at Roper St. Francis hospitals in Charleston County. In constructing its need analysis, Roper St. Francis used the State's population projections and considered the entire Berkeley County area in its analysis. (Joint Ex. #2 at 18; Resp. Ex. #7). Roper St. Francis forecast that one-half of the Roper St. Francis-aligned patient base in Berkeley County would be redirected to the new facility in Goose Creek. (Joint Ex. #2 at 28). Roper St. Francis additionally assumed that it would capture 10% of its volume from non-aligned patients as a result of the construction of its new hospital and that a small percentage of patients would be from outside Berkeley County. (*Id.*). Evidence introduced by Trident at trial shows that Roper St. Francis could fill its proposed facility using less than 70% of the projected patient days for Roper St. Francis-aligned patients from Berkeley County in 2017. (Pet. Ex. #221).

34. I find that the focus by each applicant on serving system-aligned patients is well supported by the evidence and further supports the Department's decision that there is sufficient need for both hospitals. (Brandt Trial Tr. 825:19-826:8).

35. In addition to each hospital system having a substantial market share in Berkeley County, each hospital system has distinct medical staffs. Trident Medical System has a medical staff of over 500 physicians. (Gallati Trial Tr. 437:13-15). Roper St. Francis has a medical staff of over 800 physicians. (Bowling Trial Tr. 2478:9-12). Very few physicians are on both medical staffs and what little overlap exists is in areas of sub-specialties. (Gallati Trial Tr. 437:16-23; Bowling Trial Tr. 2478:21-2479:13). Physician referrals are one of the two main sources for admissions to acute care hospitals. (Bowling Trial Tr. 2479:14-23). Therefore, I find that the separate and distinct medical staffs support the Department's finding that there is a sufficient need for both hospitals.

36. It is undisputed that neither party amended or refiled their applications to address the other applicant's project. While Trident filed its application first, Trident had knowledge of Roper St. Francis' purchase of 66 acres at the Carnes Crossroads location and its plans to construct a hospital at the Carnes Crossroads site. Trident's Vice President of Development testified to Trident's knowledge of Roper St. Francis' plans to build a hospital in Berkeley County as early as 2007. (Rardin Trial Tr. 187:5-8). The internal communications introduced at trial and the timeline of the parties' activities proved that Trident was well aware of Roper St. Francis' plans to build a hospital in Berkeley County. (Resp. Ex. #138; Resp. Ex. #77). I find that the decision of each party not to address the application or plans of the other party is not relevant to any contested issues before the Court and is not a deficiency in either application.

F. The DecisionsUnder Review.

37. Trident's application was deemed complete on January 9, 2009. (Joint Ex. #1 at 727). Roper St. Francis' application was deemed complete on March 31, 2009. (Joint Ex. #2 at 1107). The Department identified the following project review criteria as the most important criteria for review: compliance with the State Health Plan, community need documentation, distribution (accessibility), financial feasibility, acceptability, adverse effects on other facilities, and distribution.[4] (Joint Ex. #1 at 726; Joint Ex. #2 at 1107).

38. All parties participated in a project review meeting in Columbia, South Carolina, on May 21, 2009, after the projects were deemed complete. (Brandt Trial Tr. 782:24-783:8). On June 26, 2009, the Department notified both parties of its decision to approve both applications, including its finding that the applications were not competing applications as defined by the CON Regulations. (Joint Ex. #1 at 871; Joint Ex. #2 at 1262).

39. In addition to finding that the applications were not competing, the Department further determined that both applications met the standards and criteria set forth in the applicable State Health Plan, as well as the criteria contained in the CON Regulations. (Joint Ex. #1 at 871-872; Joint Ex. #2 at 1262-1263).

40. The Department conducted a thorough review process for the applications.(Brandt Trial Tr. 747:18-751:17). DHEC staff asked numerous questions of both applicants seeking additional information and held a project review meeting to thoroughly discuss and understand the projects proposed by both parties.(Joint Ex. #1 at 659-661, 714-715, 738-739; Joint Ex. #2 at 1082-1083, 1111-1112). I find that the Department properly reviewed and analyzed both applications.

[4] "Distribution" is included in Reg. 61-15 in two different contexts. See Criteria for Project Review, S.C. Code Regs 61-15 §§ 802(3) and (22), *Criteria for Project Review*.

41. Under the CON Act and Regulations, when two or more health care entities file applications for similar services or facilities in the same service area in a specified time window, the Department must undertake an analysis to determine whether those applications are competing. Competing applicants are defined as follows:

> [T]wo or more . . . health care facilities . . . who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities.

S.C. Code Ann. § 44-7-130(5); *see also* 24A S.C. Code Ann. Regs. 61-15 § 103(6).

42. Therefore, to be deemed competing CON applications, the two or more CON applications must satisfy four elements:

(a) The CON applications must be filed within the time period established by the regulations; and
(b) The CON applications must be for same or similar services or facilities; and
(c) The projects must be located in the same service area; and
(d) The approval of both CON applications must exceed the need for the services or facilities.

See, e.g., Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC, 387 S.C. 79, 90, 690 S.E.2d 783, 789 (2010).

43. I find that the two CON applications at issue in this case meet the first three elements of the definition of competing applications: *i.e.*, the CON applications were filed within the time period set forth in the Regulations, the CON applications are for the same or similar facilities, and the two proposed facilities will be located in the same service area. (Brandt Trial Tr. 639:10-22). Therefore, the crux of this dispute is whether the approval of both CON applications will exceed the need for the facilities, which is a fact-intensive inquiry dependent upon the evidence submitted by the parties. If Trident as Petitioner fails to establish by a preponderance of the evidence that the approval of both facilities will exceed the need for the

facilities, the CON applications are not competing and both may be approved. *See Spartanburg Reg'l Med. Ctr.*, 387 S.C. at 91, 690 S.E.2d at 789 (finding abundant factual evidence within the record to support the contention that the approval of both applications would not exceed the need for the services). Roper St. Francis and the Department assert that the approval of both applications will not exceed the need. (Bowling Trial Tr. 2547:20-2548:6; Brandt Trial Tr. 824:23-828:9).

44. Beverly Brandt, Chief of the Bureau of Health Facilities and Services Development for DHEC, testified to a number of facts that supported her conclusion that the applications were not competing, including the following:

(a) Roper St. Francis' bed transfer is not adding beds to the service area;
(b) The applicants' proposed locations are a good distance apart;
(c) The applicants each proposed to serve a different community and different geographies of Berkeley County;
(d) Both applicants proposed to serve primarily their own currently aligned patient bases in Berkeley County;
(e) That going from zero beds in Berkeley County to 100 beds in Berkeley County is not a dramatic change given the size of Berkeley County compared to the other counties with zero hospital beds; and
(f) That the population is growing and moving into Berkeley County.

(Brandt Trial Tr. 633:1-6, 824:12-828:9).

45. From the testimony and exhibits taken as a whole and as further explained below, I find that there is abundant factual evidence to support the finding that the approval of both applications will not exceed the need for the facilities in the service area. Therefore, I find that based on a preponderance of the evidence the applications are not competing.

46. As explained and confirmed through testimony and other evidence, I find Roper St. Francis is not adding beds to the existing inventory of licensed beds in the Tri-County Service Area. (Brandt Trial Tr. 646:18-23). Roper St. Francis' project is a repositioning of existing licensed beds within the service area. (Richardson Trial Tr. 3119:19-3120:5). This significant

fact strongly supports my finding that the approval of both applications will not exceed the need in the service area.

47. Moreover, I find that the two proposed projects are located a sufficient distance from each other to support DHEC's decision that the applications are not competing. While Trident argues that the proposed projects are too close to each other and other existing facilities, I find this argument is not persuasive in light of the existing distribution of hospitals in the Tri-County Service Area. (Resp. Ex. #163). Trident Health System's two existing hospitals, Trident Medical Center and Summerville Medical Center, are located approximately six miles from each other. (Gallati Trial Tr. 513:11-16). Roper Downtown and The Medical University of South Carolina are located in the same block of downtown Charleston. (Severance Trial Tr. 2794:8-13). The proposed hospitals will be approximately 12 miles from each other and the average travel time between them is just over 20 minutes. (Ridgeway Trial Tr. 590:10-20; Pet. Ex. #169). I find that the locations of the proposed projects, in light of the existing distribution of hospital beds in the Tri-County Service Area, are appropriate.

48. I find that the geographic size of Berkeley County and the two population centers within Berkeley County support the decision that the approval of both applications will not exceed the need. Berkeley County is one of the largest counties in South Carolina in geographic size. (West Trial Tr. 960:24-961:9). In addition, I find that Berkeley County has two population centers: Moncks Corner in the center of the county and Goose Creek in the southwest. (Richardson Trial Tr. 3391:17-3392:3). Each applicant proposes to locate its hospital in a different population center: Trident in the community of Moncks Corner and Roper St. Francis in the community of Goose Creek. (Resp. Ex. #74).

49. As evidenced by the updated population data provided by the parties, Berkeley County's population as of 2010 according to the U.S. Census has increased to 177,843. (Resp. Ex. #65). The evidence establishes that the population of the Tri-County Service area has nearly doubled since 1970. (*Id.*; Resp. Ex. #70; Richardson Trial Tr. 3115:4-24). In 1970, approximately 26-27% of the service area population was in Berkeley or Dorchester Counties, with the remainder and majority in Charleston County.(Richardson Trial Tr. 3115:25-3116:10). Today, those numbers have changed dramatically, with nearly half the service area population residing in Berkeley or Dorchester Counties. (Richardson Trial Tr. 3116:2-15). I find that this significant movement and increase in population in Berkeley County supports the decision that approval of both applications will not exceed the need for these facilities.

50. Trident contended throughout the trial and in statements to the community that the construction of two hospitals in Berkeley County will result in the financial failure of both hospitals. Mr. Gallati, CEO for Trident Medical Center, testified that it was a prudent business decision not to build in Moncks Corner if both hospitals were approved because of his responsibility to make money for his shareholders. (Gallati Trial Tr. 359:13-360:2). Trident's expert Mr. Baehr submitted to the Department that the approval of both hospitals would result in the financial failure of both. (Joint Ex. #1 at 841). Mr. Baehr's calculation of the alleged loss if both hospitals are approved and constructed is not credible. I find the overwhelming evidence admitted at trial proved that both hospitals are needed and both hospitals in Berkeley County will be financially successful.

51. I find that both applicants are successful hospital systems that can afford the proposed projects. (Rardin Trial Tr. 227:19-228:11; Knapp Trial Tr. 2916:20-2917:6; Resp. Ex. #160; Pet. Ex. #162). Trident's position that both hospitals will financially fail if both are

approved is inconsistent with Trident's financials and its application. Trident's CON application projects a successful hospital in Moncks Corner based on the redirection of Trident-aligned patients primarily residing in Moncks Corner and around Lake Moultrie. (Joint Ex. #1 at 76; Resp. Ex. #76 at 4715). I find that the Roper St. Francis' hospital in Goose Creek will draw patients from the southwestern portion of Berkeley County, an area where Trident projects to draw very few patients to its Moncks Corner hospital. (Resp. Ex. #76 at 4713, 4715). I reject Trident's contention that a hospital in Goose Creek will have a material adverse impact on the utilization at a hospital in Moncks Corner, and I find that the establishment of each hospital will have little effect on the utilization or operations of the other hospital.

52. There was significant testimony about the anticipated profitability of the two projected hospitals. By comparing Trident's actual financials provided in discovery with the pro forma contained in the application, Roper St. Francis' healthcare finance expert, Mr. Knapp, presented compelling evidence that Trident's proposed hospital at Moncks Corner will be more successful than what is set forth in the application. (Resp. Ex. #73). Specifically, Mr. Knapp projected that the actual pre-tax profit for the Moncks Corner hospital would be $6,672,901 in year three of operation. (Resp. Ex. #73 at 461). I find Mr. Knapp's calculation to be credible and persuasive. His calculations show that the Moncks Corner facility will be financially successful even if the hospital underperforms the projections in the CON application. (*Id.* at 465). Further, the 2010 earnings of Trident in excess of $92 million dollars gives the Court confidence that the Moncks Corner hospital is financially feasible and will succeed. (Resp. Ex. #160).

53. During the same time period that Trident has publicly contended that Berkeley County can only support one 50-bed hospital, it applied to add 30 beds to its campus at

Summerville Medical Center, which is located in neighboring Dorchester County and is in the same Tri-County Service Area as Berkeley County and Charleston County. (Joint Ex. #9). In the Summerville application, Trident relies on increasing its market share in Dorchester County with the additional beds. (Joint Ex. #9 at 37). Trident's filing of its application to add 30 additional licensed beds in the Tri-County Service Area at Summerville Medical Center is contradictory to its position in these proceedings regarding the need for acute care services in the service area.

54. Roper Mount Pleasant Hospital opened on November 1, 2010. (Bowling Trial Tr. 2511:18-23). Trident contends that the utilization of Roper Mount Pleasant Hospital during the first eight months of its operations shows that the proposed hospital in Goose Creek will not be successful. (Pet. Ex. #163-10).I find that the utilization of a new hospital is initially hindered by many factors such as the time necessary to change physician and patient patterns, accreditation delays, and securing specialized services. (Bowling Trial Tr. 2518:22-2519-10, 2521:1-2523:6; Johnson Trial Tr. 2348:16-2349:14). The initial utilization at Mount Pleasant Hospital offered at trial is too small a sample from which to make a factual finding regarding any potential relationship to the future utilization of the Goose Creek hospital.

55. Trident's expert, Mr. Baehr, projected that the Trident Health System would experience 36,418 patient days for Berkeley County residents in 2017, which equates to an average daily census of 99.8 patients. (Pet. Ex. #221; Richardson Trial Tr. 3145:8-22). Since both applicants agree that full capacity for a 50-bed hospital is an average daily census of 35 patients per day, Trident-aligned patients in Berkeley County alone would support between 140 and 150 beds. (Richardson Trial Tr. 3145:23-3146:19).

56. Trident's project calls for the addition of 50 new beds to the Tri-County Service Area and uses a facility-specific bed need published in the *2004-2005 State Health Plan* to apply for the beds. (Joint Ex. #3 at II-17; Brandt Trial Tr. 756:9-757:4; Rardin Trial Tr. 114:21-115:4). Roper St. Francis' project utilizes the bed transfer provision in the *2008-2009 State Health Plan* to transfer 50 existing licensed beds within the service area from Roper Hospital downtown to Roper St. Francis-Berkeley. (Joint Ex. #4 at II-9 to II-10; Brandt Trial Tr. 787:4-789:24). Based on the applications, projections, and evidence received by the Court, I find by the greater weight of the evidence that both hospitals will be well-utilized and financially successful, and the approval of both hospitals will not exceed the need. I further find that Trident failed to prove by a preponderance of the evidence that the approval of both applications will exceed the need for the facilities. *See, e.g.,*S.C. Code Ann. § 44-7-130(5); *see also* 24A S.C. Code Ann. Regs. 61-15 § 103(6).

G. Bed Transfer Provision.

57. Trident challenges Roper St. Francis' application on the grounds that the State Health Plan does not allow an applicant to transfer beds to establish a hospital. DHEC and Roper St. Francis contend that the bed transfer provision, found on pages II-9 and II-10 of the *2008-2009 State Health Plan*, allows Roper St. Francis to transfer beds to construct Roper St. Francis-Berkeley in Goose Creek. The bed transfer provision allows affiliated hospitals "to transfer beds between themselves in order to serve their patients in a more efficient manner." (Joint Ex. #4 at II-9). Trident contends that the language of the bed transfer provision requires that a bricks and mortar existing facility be the receiving facility under the bed transfer provision. The Department Board has held that the receiving facility need not be an existing facility in order to receive beds under the bed transfer provision. (Joint Ex. #16).

58. The State Health Plan is promulgated by the Department pursuant to the mandate set forth in S.C. Code Ann. § 44-7-180. The rules of statutory construction apply to the interpretation of the meaning of regulations. *Converse Power Corp. v. S.C. Dept. of Health and Envtl. Control*, 350 S.C. 39, 47-49, 564 S.E.2d 341, 345-47 (Ct. App. 2002)); *see also, MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 379 S.C. 1, 7, 664 S.E.2d 471, 474 (2008) (applying rules of statutory construction to determine the MRI standards in State Health Plan were not violative of the mandates set forth in the CON Act).

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.

Marlboro Park Hosp. v. S.C. Dept. of Health and Envtl.Control, 358 S.C. 573, 578-79, 595 S.E.2d 851, 854 (Ct. App. 2004) (internal citations omitted).

59. The Department, along with the state health planning committee, is statutorily charged with creating the State Health Plan on a biennial basis. The Department, however, is the final arbiter of the plan, without legislative overview. S.C. Code Ann. § 44-7-180. As the agency charged not only with the creation of the State Health Plan but the overall responsibilities for the operation and control of the CON program, it is the Department's intent that prevails in interpreting the meaning of the State Health Plan, including the bed transfer provision. *See* S.C. Code Ann. § 44-7-140; *see also Marlboro Park Hosp.* at 578-79, 595 S.E.2d at 854. *Monroe v. Livingston*, 251 S.C. 214, 217, 161 S.E. 2d 243, 244 (1968) (standing for the proposition that has long applied to administrative construction "... affords no basis for the perpetuation of a patently erroneous application of the statute."). That case involved an action by a poultry farmer to recover sales and use taxes paid.

Monroe, id., does not indicate a "tipping point" after which the rule on deference to agency interpretation no longer applies. Suffice it to say that we are in an entirely different arena here, i.e. one in which the agency interpreting the State Health Plan is the final arbiter of the same at the administrative level and, moreover, is interpreting the same in accord with the overall design of the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110, et seq. (Rev. 2002) one of the primary aims of which is to " ... guide the establishment of health facilities and services which will best serve public needs. ...". S.C. Code Ann. § 44-7-120. One would be hard pressed to find that the transfer of existing licensed beds to make them more easily accessible to an existing patient base was other than consummate good sense. And, I find that this rationale applies whether the transfer is across the street or across the county or service area.

60. The word "existing" or a similar iteration is not contained in the language of the bed transfer provision. (Joint Ex #4 at II-9 to II-10). Therefore, I find that the plain language of the Plan does not require that the facility receiving the transfer of beds be an existing facility.

61. The DHEC Board issued an Order on May 8, 2009, interpreting the same bed transfer provision at issue in this case, and specifically held that the bed transfer provision "allows for approval of a CON application for the transfer of licensed general acute care hospital beds to establish a new hospital." (Joint Ex. #16). The Department staff further testified to a long-standing policy of the Department, applied consistently for a number of years, that allows the construction of new hospitals through the transfer of existing licensed beds from affiliated entities. This policy has been used to create new hospitals in Anderson, Charleston, Georgetown, Greenville and Spartanburg. (Joint Exhibit #16, Page 7, Brandt Trial Tr. 693:20-694:7, 804:22-805:15; Shelton Trial Tr. 1132:16-1134:20). I find that the DHEC Board's

decision, along with a consistent long-standing interpretation by the Department staff, is the best evidence of the intent of the bed transfer provision in the State Health Plan.[5]

62. Further, I find that as the agency charged by the legislature with the creation of the State Health Plan and the overall responsibility for the operation and control of the CON program, deference to the Department's interpretation and implementation of the Plan's provisions is appropriate. *Murphy v. S.C. Dept. of Health and Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012); *see also* S.C. Code Ann. § 44-1-60(F)(2).

63. In summary, I find that the language in the *2008-2009 State Health Plan* does not require that the receiving facility be an existing facility when the application to transfer beds is made, and that the language allows a facility to transfer beds to establish a new hospital provided the bed transfer criteria are satisfied.

64. The State Health Plan requires that an applicant must obtain a CON and comply with eight criteria identified in the State Health Plan in order to transfer licensed beds. (Joint Ex. #4 at II-9 to II-10). The transfer of existing licensed beds from Roper Downtown to construct a hospital at Carnes Crossroads will not increase the number of beds in the service area; Roper St. Francis has acknowledged in writing that this transfer is a permanent transfer and that Roper St. Francis cannot use this transfer as justification to seek additional beds. (Brandt Trial Tr. 838:1-6; Joint Ex. #2 at 975; Severance Trial Tr. 2823:8-2824:2).

65. The bed transfer criteria require that the receiving facility document with historical and projected utilization the need for the transfer. Trident contends that the criteria requiring historical utilization can only be satisfied if there is an existing facility at the proposed site for the receiving facility. I find that Trident's interpretation is overly narrow. It is clear that

[5] It is interesting to note that Trident Medical Center transferred existing licensed beds in Charleston County to Dorchester County to create Summerville Medical Center in the early 1990's, which at the time of the transfer Summerville was not an existing hospital. (Shelton Trial Tr. 1144:16-1145:10).

a substantial number of patients in the vicinity of the proposed hospital at Carnes Crossroads currently travel many miles to seek service at Roper St. Francis facilities. (Pet. Ex. #166 at 11-33). The evidence at trial and the documentation in the application show the historical utilization of Roper St. Francis in Berkeley County and the southern part of the County near Goose Creek. (Brandt Trial Tr. 805:24-806:19; Resp. Ex. #53; Resp. Ex. #76 at 4713). Roper St. Francis has demonstrated with adequate documentation that there is a sizeable and growing population in southern Berkeley County that will benefit from additional acute care beds. (Resp. Ex. #76 at 4710-4711; Resp. Ex. #59; Bowling Trial Tr. 2643:19-2644:3; Richardson Trial Tr. 3109:16-3110:9).

66. Prior to filing its application, Roper St. Francis analyzed the impact on Roper Downtown Hospital, located on the Charleston peninsula, after the transfer of 50 beds to Berkeley County was complete. (Resp. Ex. #25). That analysis was prepared prior to the filing of the CON application. Based on this analysis, I find that the 266 beds remaining at Roper Downtown are sufficient to meet the needs of the community that Roper Downtown will serve after construction of the hospital in Berkeley County. (*Id.*; Severance Trial Tr. 2807:1-20). While Roper Downtown has had some days with a census greater than 266, I find that the redistribution of patients to the Carnes Crossroads hospital in Goose Creek will more than offset any impact from the loss of these beds at Roper Downtown.

67. I find that Roper St. Francis' CON application complies with the bed transfer provision in the State Health Plan. I find that as required by the bed transfer provision, Roper Hospital Downtown is the transferring facility and Roper St. Francis-Berkeley is the receiving facility. (Brandt Trial Tr. 805:12-18). Finally, I find that the criteria set forth on page II-10 of the *2008-2009 State Health Plan* have been satisfied by Roper St. Francis.

H. Transfer of Facility Bed Need to Build a New Facility.

68. Roper St. Francis challenges Trident's ability to establish its new acute care facility in Moncks Corner using the facility-specific bed need assigned to Trident Medical Center in the *2004-2005 State Health Plan*. (Joint Ex. #3 at II-7, II-17). The Moncks Corner location for Trident's proposed hospital is vacant land on which Trident holds an option to purchase, but does not currently own. (Resp. Ex. #126).

69. Under the *2004-2005 State Health Plan*, the provision by which Trident seeks to add its 50 beds to the service area is found at Chapter II.G.1(A)(4)(d) and provides as follows:

> Should there be a need shown for additional beds for a hospital, then an increase may be approved. In order to provide for a cost-effective addition, up to the greater of 50 beds or the actual projected number of additional beds may be approved, provided the hospital can document and demonstrate the need for additional beds.

(Joint Ex. #3 at II-7).

70. The *2008-2009 State Health Plan* section regarding facility-specific bed need was revised to include that the bed need may be used to construct "an economical unit at either the existing hospital site or another site." (Joint Ex. #4 at II-7; Baehr Trial Tr. 3726:5-3727:22).

71. DHEC has interpreted this section to allow hospitals with a facility-specific bed need to use that facility-specific bed need to construct a satellite facility at a different location. (Shelton Trial Tr. 1148:4-1149:6).

72. I find that the Department's interpretation of Chapter II.G.1(A)(4)(d) in the *2004-2005 State Health Plan* to allow the transfer of facility-specific bed need to construct a satellite hospital is reasonable and consistent with the goals, purposes and intent of the CON Act. *See* S.C. Code Ann. § 44-7-120. I further find that Trident's application complies with Chapter II.G.1(A)(4)(d) in the *2004-2005 State Health Plan*. (Joint Ex. #3 at II-7).

73. The positions taken by Trident in its interpretations of the State Health Plans applicable to these applications have been inconsistent. Trident opposes Roper St. Francis' application, arguing that the "plain language" of the bed transfer provision found at Chapter II.G.1(A)(4)(j) in the *2008-2009 State Health Plan* does not specifically allow a facility to transfer beds to establish a hospital at a new location. (Baehr Trial Tr. 1393:8-25). At the same time, Trident seeks to transfer facility-specific bed need at Trident Medical Center in North Charleston to vacant land to establish a new hospital in Berkeley County, despite the fact that the applicable provision at Chapter II.G.1(A)(4)(d) of the *2004-2005 State Health Plan* is silent about whether facility-specific bed need can be transferred to a new site. (Baehr Trial Tr. 3729:16-3730:10). As a result, Trident criticizes the Department for relying on prior practice to approve Roper St. Francis' application while it relies on prior practice of the Department to request approval of its project.

74. Consistent with my finding as to the bed transfer provision, I find that the Department's previous interpretation of the facility-specific bed need provision allowing for the establishment of a new hospital by transferring facility-specific bed need is entitled to deference from this Court. *See, e.g., Murphy*, 723 S.E.2d at 195; *see also* S.C. Code Ann. § 44-1-60(F)(2).

I. Approvability of Roper St. Francis.

75. Trident asserts that the Department erred in approving Roper St. Francis' project. Specifically, Trident submits through its expert, Mr. Baehr, that Roper St. Francis' application should not have been approved for the following reasons: (1) adverse impact of the project outweighs access improvement; (2) failure to identify the served communities; (3) errors on the financial pro formas resulting in the project's failure to meet the feasibility test by year three; and

(4) lack of acceptability from competing hospitals. (Baehr Trial Tr. 1534:20-1535:25; Pet. Ex. #46).

76. The *2008-2009 State Health Plan* requires that when evaluating a CON for general hospitals, the Department must equally weigh the benefits of improved accessibility with the adverse effects of duplication. (Joint Ex. #4 at II-11). The Department specifically found that Roper St. Francis' CON "will increase accessibility and availability of services for residents of Berkeley County" and that "there should be minimal impact upon other facilities in the proposed service area." (Joint Ex. #2 at 1263).

77. As to adverse impact, the CON Regulations require adverse impact be evaluated by considering "(a) [t]he impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services" and "(b) [t]he staffing of the proposed service should be provided without unnecessarily depleting the staff of existing facilities or services or causing an excessive rise in staffing costs due to increased competition." 24A S.C. Code Ann. Regs. 61-15 § 802(23).

78. The 2007 inpatient market share for Berkeley County was divided primarily among four providers: Trident Health System at 52.3%, Roper St. Francis at 24.1%, MUSC Medical Center at 18.0%, and East Cooper Regional Medical Center at 3.5% – in total accounting for 97.9% of the inpatient discharges in Berkeley County. (Pet. Ex. #231). The 2010 inpatient market share remained relatively stable at 52.0%, 23.6%, 18.1% and 3.6% respectively – in total accounting for 97.3% of the inpatient discharges in Berkeley County. (*See id.*).

79. First, both applicants justified the need for acute care services in Berkeley County in part on the growing population and the increasingly difficult travel conditions for residents having to travel outside the county to obtain inpatient hospital services. Trident's application

states: "As Berkeley and Dorchester Counties continue to grow, it will become progressively less feasible and less fair to expect their residents to make long automobile drives to access routine acute care services at facilities that are distant from their homes." (Joint Ex. #1 at 24). Roper St. Francis submitted testimony explaining that the increased congestion in Charleston and continued growth makes it increasingly difficult for Roper St. Francis' patients to access their healthcare services in downtown Charleston and even in West Ashley. (Bowling Trial Tr. 2477:6-10). Trident's application agrees with this concept, stating that with the vast majority of the Tri-County Service Area beds being located in downtown Charleston, services are not conveniently accessible to Berkeley County residents and are becoming less so as the population moves north and west. (Joint Ex. #1 at 31; Resp. Ex. #75). I find that both of these projects satisfy the need for increased accessibility to inpatient services, which minimizes the adverse impact for the existing providers.

80. In its application, Trident discusses the potential impact of its hospital in Moncks Corner on the existing providers, including the Trident hospitals of Trident Medical Center in North Charleston and Summerville Medical Center in Dorchester County. Trident projects that its proposed hospital in Moncks Corner will reach capacity without having any effect on the market share of any existing provider.(Joint Ex. #1 at 36-37). In other words, Trident's new hospital in Moncks Corner will not cause any patients currently aligned with other providers such as Roper St. Francis or MUSC to switch their alliance to Trident thereby increasing Trident's market share in Berkeley County. (Brandt Trial Tr. 861:2-8). As a result of this lack of shift in market share, Trident states the following about adverse impact in its application:

> In some Certificate of Need applications, applicants contend that if total service area growth is sufficient to maintain existing providers at their existing levels of service while at the same time permitting the proposed facility to achieve needed volume, then the issue of adverse impact can be dismissed. The existing

> providers will not, under this scenario, experience a material adverse impact. The proposed project [in Moncks Corner] passes an even more rigorous adverse impact test. As shown above, existing providers will maintain their current market shares and they will be able to enjoy the same benefits of service area population growth that they historically have done.

(Joint Ex. #1 at 38-39).

81. Before I address the experts' analysis of lost cases, I note that the vast majority of findings that I have made herein indicate that the 50-bed hospital at Carnes Crossroads in Goose Creek will not cause much, if any, change in market share, and that the adverse impact upon Trident Medical Center and Summerville Medical Center will be minimal. Some of those findings are the following: the substantial growth in population that has occurred in Berkeley County and that is expected to continue; that each applicant has designed its project to serve patients that are already aligned with its system; the Carnes Crossroads hospital in Goose Creek is a small acute care hospital that even if the hospital operates at capacity, it will have little impact on a large system such as Trident; the medical staffs of Trident and Roper St. Francis are separate and loyal to their system of choice; and redirecting a sizeable portion of the Roper St. Francis-aligned patients to Carnes Crossroads in Goose Creek will cause the new hospital to operate at near capacity. *See, e.g.,* Findings of Fact **#23, 25, 28, 32, 33, 34, 35, 49**, *supra.*

82. At trial, both applicants presented projections of the number of lost cases to be sustained by Trident Health System from the opening of the Roper St. Francis hospital at Carnes Crossroads. Initially, I note that during the review process, Trident's attempt to quantify and justify adverse impact upon its existing facilities was minimal. Trident presented to the Department no estimates of lost cases or financial loss until three days before the Department was to make its decision and the estimates contained little explanation. (Brandt Trial Tr. 867:2-24; Joint Ex. #1 at 900).

83. At trial, Trident presented a calculation of lost cases and the financial impact to Trident Health System from these lost cases to be $14 million by year three. (Pet. Ex. #46 at 38; Baehr Trial Tr. 1377:2-5). Mr. Baehr's calculated financial loss overstates the impact to Trident because he includes loss from tertiary cases and fails to consider the significant redirection of Roper St. Francis-aligned patients to the hospital in Goose Creek, having told the Department that Roper St. Francis' proposal to redirect patients was "arbitrary" and "speculation." (Baehr Trial Tr. 1501:11-1502:17; Joint Ex. #1 at 902). At the same time, Trident's application projects 100% redirection of Trident-aligned patients to support its proposed Moncks Corner hospital. (Brandt Trial Tr. 869:13-19). This contradiction in position weakens the analysis and is not supported by the evidence, which leads me to find that the redirection of aligned patients is probable for both projects. *See, e.g.,* Findings of Fact **#32, 33 and 34**, *supra.*

84. I find Mr. Richardson's analysis of the lost cases to Trident to be most persuasive. Mr. Richardson, Roper St. Francis' expert in healthcare planning, testified to a "likely" and "worst case" scenario in testing the impact upon Trident from the Roper St. Francis hospital in Goose Creek. (Resp. Ex. #70). Mr. Richardson testified that the likely scenario, as assumed in the application, is that Trident may lose its proportionate share of Roper St. Francis' small market share gain to equal about 897 discharges; however, this impact is entirely offset by the growth in the Trident system during the same period of time, resulting in no adverse impact. (*See id.*; Richardson Trial Tr. 3219:18-3222:18). For <u>any</u> adverse impact to occur, Trident would have to bear 100% of the small market share shift to Roper St. Francis, meaning MUSC and East Cooper would not be impacted at all by the shift. I find this scenario highly unlikely. I find that even under the worst case scenario set forth by Mr. Richardson, the potential adverse impact

upon Trident does not outweigh the substantial benefit of increased accessibility to Berkeley County residents from the hospital in Goose Creek.

85. Trident elicited substantial testimony about the Roper St. Francis Physician Network. I find that the healthcare industry is changing and many primary care physicians are seeking employment with hospital systems. (Bowling Trial Tr. 2577:21-2578:17; Severance Trial Tr. 2819:10-2821:13). Some of the circumstances driving physicians to seek employment include the desire for younger physicians to work within a system, the cost of mandated technology infrastructure, and declining reimbursement. (Bowling Trial Tr. 2572:22-2574:23). As a result, systems like Trident and Roper St. Francis are employing physicians.(Gallati Trial Tr. 371:17-372:1; Gunn Trial Tr. 2042:23-2043:2; Bowling Trial Tr. 2443:9-16). There was no evidence that the employment of physicians has had a direct impact on the market shares of the existing providers in the service area, which have remained stable. (Pet. Ex. #231).Because both systems seek to employ physicians and each system has a separate and distinct medical staff, any finding regarding impact of the possible future employment of physicians in Berkeley County would be highly speculative and not supported by the evidence received by this Court.

86. Trident offered the expert opinion of Mr. Baehr that Roper St. Francis' CON application was deficient because it used the entire county of Berkeley as its target population rather than use zip code level data. (Baehr Trial Tr. 1233:16-1235:2). Mr. Baehr acknowledged, however, that the Department did not indicate it needed zip code level analysis from Roper St. Francis. (*Id.*) Mr. Baehr also admitted that he has participated in need analyses based on county projections as opposed to zip code level analyses and that use of types of analysis other than zip code may be appropriate. (Baehr Trial Tr. 1638:14-1639:1).

87. Roper St. Francis' expert, Mr. Richardson, testified that the State of South Carolina's population projections only look to county level data as opposed to zip code level data as some private data providers may offer. (Richardson Trial Tr. 3097:12-3099:12). Mr. Richardson further testified that the smaller the geographic area a planner uses when forecasting, the less precise the results will be. (*Id.* at 3194:17-3195:24).

88. The CON Regulations require that an applicant's projections of population changes must be "reasonable and based upon accepted demographic or statistical methodologies" and that the applicant must "use population statistics consistent with those generated by the State Demographer, State Budget and Control Board." 24A S.C. Code Ann. Regs. 61-15 § 801(2)(b). Roper St. Francis used the population data published by the State of South Carolina's very own State Budget and Control Board data for its application. (Joint Ex. #2 at 20-23). I find that Roper St. Francis' CON application is not deficient for failing to use zip code level analysis for its need projections.

89. Trident's expert propounded that errors in the financial pro formas contained in Roper St. Francis' CON application resulted in a failure to meet the year three feasibility standard for the project. (Baehr Trial Tr. 1535:4-16). Despite this statement claiming defect, Mr. Baehr testified that he believed the Roper St. Francis-Berkeley Hospital project is financially feasible. (*Id.* at 1617:16-1618:15).

90. Roper St. Francis' healthcare finance expert, Mr. Rick Knapp, submitted an incremental pro forma which does not include the revenues and expenses associated with the redirected patients. (Knapp Trial Tr. 2907:7-21). Using an incremental, as opposed to full venue, pro forma is a more rigorous financial feasibility analysis because it ignores a sizeable amount of the revenue of the hospital, namely the revenue and expenses associated with the

redirected patients. (Knapp Trial Tr. 2915:16-22). A full venue pro forma captures all revenue and all expenses associated with the facility. (Knapp Trial Tr. 2907:4-2908:3). Trident's pro forma was primarily a full venue pro forma so it considered revenue and expenses of all inpatients, whether or not the patient was redirected from Trident Medical Center or Summerville Medical Center. (Baehr Trial Tr. 1619:1-8). The Department accepted either approach.

91. While there was disputed testimony about Mr. Knapp's calculation of incremental cases, I find that this issue has no effect on whether the Roper St. Francis hospital is financially feasible. I find that the hospital is financially feasible as both experts testified that using a full venue approach, the Carnes Crossroads hospital in Goose Creek is financially feasible. (Baehr Trial Tr. 1617:14-16; Knapp Trial Tr. 2917:7-13).

92. Trident alleges that the Roper St. Francis application is deficient for failing to have documented support from other hospitals. (Baehr Trial Tr. 1535:17-23). The CON Regulations require as evidence of acceptability that the "proposal and applicant should have the support of 'affected persons' (including local providers and the target population)." 24A S.C. Code Ann. 61-15 § 801(4)(1). The criteria further provides that "[w]here documented opposition exists to a proposal, such opposition will be considered along with the application." *Id.* at § 801(4)(b).

93. Roper St. Francis' CON application contained hundreds of letters of support from affected persons, including local physician providers and residents of Berkeley County. (Joint Ex. #2). Trident is the only affected person whose opposition to the Roper St. Francis-Berkeley project has been documented for the Department or the Court. The CON Regulations do not require that an applicant have documented support from hospitals and Trident did not present any

evidence of documented opposition by any other hospital. (Baehr Trial Tr. 3572:8-22). Therefore, I find that Roper St. Francis satisfies the acceptability criteria as set forth in the CON Regulations.

94. Finally, I find by a preponderance of the evidence that the Roper St. Francis application complies with the *2008-2009 State Health Plan* and Project Review Criteria and that Trident failed to prove by a preponderance of the evidence that the Department erred in finding Roper St. Francis' application complied with the *2008-2009 State Health Plan* and the Project Review Criteria.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude the following as a matter of law:

1. This tribunal has jurisdiction over this contested case pursuant to S.C. Code Ann. § 44-1-60(F) (Supp. 2006) and S.C. Code Ann. §§ 1-23-310 *et seq.* (2002). As a statewide administrative tribunal authorized to hear evidence and adjudicate this contested case, this tribunal is the finder of fact in a contested case challenging the Department's decision on a CON application. *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C.*, 387 S.C. 79, 89, 690 S.E.2d 783, 788 (2010) (*citing* S.C. Code Ann. § 1-23-600).

2. "On the basis of staff review of the record established by the Department, including but not limited to, the application, comments from affected persons and other persons concerning the application, data, studies, literature, and other information available to the Department, the staff of the Department shall make a proposed decision to grant or deny the Certificate of Need." 24A S.C. Code Ann. Regs. 61-15 § 308(1). DHEC's initial staff decision on a CON application is a proposed decision that becomes a final agency decision unless a request for final review is timely filed by the applicant or by an affected person. S.C. Code Ann.

§ 44-1-60(E) (Supp. 2006). If the Department Board does not hold a final review conference, the staff decision becomes the final agency decision unless an applicant or affected person timely requests a contested case hearing before the Administrative Law Court. *Id.* at § 60(F). For these decisions, each party timely requested a final review conference, which the DHEC Board declined to hold, thereby affirming the staff decisions to approve both CON applications. *See* Pet.'s Req. for Contested Case Proceed'g at Ex. B, filed Aug. 7, 2009; Resp.'s Req. for Contested Case Proceed'g at Ex. C, filed Aug. 7, 2009.

3. Trident and Roper St. Francis timely filed their requests for a contested case hearing regarding DHEC's approval of the two CON applications. *See* 24A S.C. Code Ann. Regs. 61-15 § 403(1) (2003). Because Trident and Roper St. Francis are existing providers of patients in the Tri-County Service Area, they are "affected persons" for the purposes of participating in a contested case related to DHEC's decisions to approve the CONs. *See* S.C. Code Ann. § 44-7-130(1) (Rev. 2002); 24A S.C. Code Ann. Regs. 61-15 § 103(1).

4. Trident and Roper St. Francis each have standing as required to participate in these contested case proceedings. S.C. Code Ann. § 44-7-210(D) (Rev. 2002). "To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (*citing Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999). Trident and Roper St. Francis each have a personal stake and interest in the approval or denial of the applications under review and would be substantially prejudiced if unable to challenge or defend the decisions of the Department.

5. In light of Trident's challenge to DHEC's decision to approve both applications, Trident, as the moving party, bears the burden of proof in this contested case to reverse the Department's finding that the applications are not competing and to reverse the approval of the Roper St. Francis CON application. *See* S.C. Code Ann. § 44-7-210(E) (Rev. 2002); 24A S.C. Code Ann. Regs. 61-15 § 403(1); *see also Leventis v. S.C. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue); *cf.* 2 Am. Jur. 2d *Administrative Law* § 360 (1994). Therefore, Trident must prove by a preponderance of the evidence that the Department erred in approving both applications under the applicable statutes and regulations or that the Department erred in finding that the Roper St. Francis CON application complied with the State Health Plan and Project Review Criteria. *See Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding that the standard of proof in an administrative proceeding is generally the preponderance of the evidence); *Nat'l Health Corp. v. S.C. Dept. of Health and Envtl. Control*, 298 S.C. 373, 379, 380 S.E.2d 841, 844 (Ct. App. 1989) (holding that the preponderance of the evidence standard applies in CON disputes). Similarly, as to Roper St. Francis' challenge to Trident's compliance with the *2004-2005 State Health Plan*, Roper St. Francis must prove by a preponderance of the evidence that the Department erred in finding that Trident's application complied with the *2004-2005 State Health Plan*.

6. A contested case hearing on a CON application is conducted as a contested case under the Administrative Procedures Act (APA). S.C. Code Ann. § 44-7-210(E) (Rev. 2002). The issues to be considered at the contested case hearing are limited to those presented to or considered by DHEC during the staff review and decision-making process. *Id.*; 24A S.C. Code

Ann. Regs. 61-15 § 403(1). As long as no new issues are considered in these contested case proceedings, any evidence pertinent to the issues considered by DHEC staff may be considered by this tribunal. *Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573,578-79, 595 S.E.2d 851,854 (Ct. App. 2004).

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

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

9. "[E]xpert testimony is essential in cases which involve a subject of special technical science, skill, or occupation of which the members of the jury or the trial court are not presumed to be specially informed." 32A C.J.S. *Evidence* § 729, at 85 (1996). For example, the South Carolina Supreme Court has held that, in medical malpractice cases, "the plaintiff must use expert testimony . . . unless the subject matter lies within the ambit of common knowledge

and experience, so that no special learning is needed to evaluate the conduct of the defendant." *Pederson v. Gould*, 288 S.C. 141, 143, 341 S.E.2d 633, 634 (1986).

10. In general, "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence . . . [;] the triers of fact cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding to the contrary of the opinion." 32A C.J.S. *Evidence* § 727, at 82-83 (1996). However, the trier of fact may give an expert's testimony the weight he or she determines it deserves. *Florence Cnty. Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). Further, the trier of fact may accept the testimony of one expert over that of another. *See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992).

11. Prior to trial, this Court ruled that in the event that I found that the applications are competing, this matter would be remanded to the Department. *See* Order Granting Resp.'s Mot. Partial Summ. J. dated Feb. 10, 2012. As a result, these applications have not been compared against each other and must be evaluated independently.

12. The "State Certification of Need and Health Facility Licensure Act," S.C. Code Ann. §§ 44-7-110 *et seq.*(Rev. 2002), requires DHEC to establish a certificate of need program to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in South Carolina. S.C. Code Ann. § 44-7-120. The CON Act was revised by Act 278 effective July 1, 2010; however, those revisions are expressly limited to matters filed on or after the effective date of the legislation and therefore are not applicable to these proceedings filed August 7, 2009.

13. CON applications are reviewed by the Department under the thirty-three project review criteria listed in Section 802 of S.C. Code Ann. Regs. 61-15. The State Health Plan outlines the need for medical facilities and services in the State and compliance with the Plan is one criterion for reviewing projects under the CON program. S.C. Code Ann. Regs. 61-15 § 802(1). While a project does not have to satisfy every project review criteria in order to be approved, no project may be approved unless it is consistent with the State Health Plan. *Id.* at § 801(3). Even if a project complies with the State Health Plan, however, the project may be denied if DHEC determines that the project does not sufficiently meet one or more of the review criteria. *See id.* § 307(1), § 801(3); *see also* S.C. Code Ann. § 44-7-210(C).

14. In conducting this review, DHEC must determine the relative importance of the project review criteria to be used in evaluating the CON application, and the relative importance of these criteria must be tailored to suit the specific project under review. 24A S.C. Code Ann. Regs. 61-15 §§ 304, 801(2). With regard to the instant applications, DHEC determined that the most important project review criteria were: compliance with the State Health Plan (1), community need documentation (2a, 2b, 2c, 2e), distribution (accessibility) (3a, 3b, 3c, 3d, 3e, 3f), financial feasibility (15), acceptability (4a, 4b, 4c), adverse effects on other facilities (23a), and distribution (22). (Joint Ex. #1 at 727; Joint Ex. #2 at 1108).

15. The establishment and expansion of hospitals in South Carolina are subject to review under the State's CON program. S.C. Code Ann. § 44-7-160(1). In each State Health Plan, a hospital is defined as a "facility organized and administered to provide overnight medical or surgical care or nursing care . . . by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy." (Joint Ex. #4 at II-4). The distinguishing factor for a

hospital is the overnight stay. As a result, the methodology to measure capacity and need is through the use of a licensed hospital bed. (*Id.* at II-6).

16. Trident attempted to elicit testimony at trial to show that the State Health Plan does not have standards for the establishment of new hospitals, which is inconsistent with the statutory mandate for the CON program according to S.C. Code Ann. § 44-7-180(B). As a threshold matter, I find that Trident failed to present this issue to the Department below as required by S.C. Code Ann. § 44-7-210(E) and 24A S.C. Code Ann. Regs. 61-15 § 403(1) and therefore the issue is not properly before the Court.[6] In the interests of judicial economy, were the issue properly before the Court, I find that the State Health Plan, although it does not have a "step by step" provision for the creation of all possible categories of hospitals, does have standards for the establishment of new hospitals.

17. Both the *2004-2005 State Health Plan* and the *2008-2009 State Health Plan* contain an entire chapter with standards and criteria for General Hospitals. (Joint Ex. #3 at II-4; Joint Ex. #4 at II-4; Shelton Trial Tr. 1118:5-12). In fact, the very first category under "Categories of Facilities and Services: General Medical Facilities and Services" is "General Hospitals." (*Id.*). The general hospitals section includes an inventory, need methodology and projections, standards for distribution, and a statement as to the project review importance. (*Id.*). I find that Trident's reference to S.C. Code Ann. § 44-7-180(B) and the allegation that the Plans fail to satisfy the requirements of subsection 180(B)(3) is not supported by the language of the State Health Plan. (Joint Ex. #3 at II-4; Joint Ex. #4 at II-4; Shelton Trial Tr. 1118:5-1122:11; Brandt Trial Tr. 846:16-849:13).

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[6] In addition to its application, Trident presented a thirty-nine page powerpoint presentation at the project review meeting and presented four letters to the Department setting forth its position for approval of its application and opposition to Roper St. Francis-Berkeley's application. (Joint Ex. #1 at 754-792, 830-855, 856-869, 893-898, 900-903). At no time did Trident contend that the State Health Plan was deficient because it did not include standards for the establishment of a hospital.

18. Under the State Health Plan, the determination of whether additional licensed beds are needed in a service area is based on a methodology set forth in the General Hospitals section of the State Health Plan, referred to as the bed need methodology. (Joint Ex. #4 at II-7). The calculation looks at the individual utilization of each hospital along with the need for beds at each hospital and the service area as a whole,[7] calculating a sum total bed need or bed excess for each facility and service area. (*Id.*; Shelton Trial Tr. 1054:9-24). The underlying formula is based on historical utilization, projected population, capacity, and occupancy percentage to project the number of future licensed beds needed for each existing facility and service area. (Joint Ex. #4 at II-7). As a result, under the formula, each facility and service area will show either excess licensed beds or a licensed bed need. (*Id.* at II-10 to II-19).

19. The *2008-2009 State Health Plan* sets forth minimum requirements before a hospital will be approved, including a 24-hour emergency department, inpatient medical services for both surgical and non-surgical patients, and medical and surgical services for at least six diagnostic categories. (Joint Ex. #4 at II-8). In addition, the State Health Plan provides for redistributing beds through a transfer of beds and for the modernization of facilities. (*Id.* at II-9 to II-10).

20. The bed need methodology and other provisions in the General Hospitals section of the State Health Plan contain the standards and guidelines for the establishment and expansion of hospitals and satisfy the requirements mandated by section 44-7-180(B) of the CON Act.

21. Roper St. Francis' application complies with the bed transfer provision found at Chapter II.G(A)(4)(j) of the *2008-2009 State Health Plan.* (Joint Ex. #4 at II-9). It is my finding that Trident's reading of the word "existing" before "receiving facility" is not supported by the

[7]Under the *2004-2005 State Health Plan*, bed need was only calculated based on individual facilities, there was no calculation for the service area as a whole. (Joint Ex. #3, II-7). This distinction is not relevant to any disputed issues before the Court.

Department Board's interpretation of the provision, or the DHEC staff's longstanding policy in applying the provision. *See Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 468 636 S.E.2d 598, 606 (2006); Joint Ex. #16; Brandt Trial Tr. 693:20-694:7, 804:4-805:6; Shelton Trial Tr. 1132:16-1134:20. Roper St. Francis adequately documented compliance with all the required criteria to transfer hospital beds which includes the following:

(a) There will be no increase in the number of beds in the service area as a result of the transfer.
(b) The historical utilization of Berkeley County residents at Roper St. Francis facilities.
(c) The benefits of the transfer for Berkeley County residents and the impact, if any, on the health care delivery system of Charleston County as a result of the transfer.
(d) The acknowledgement by Roper Hospital Downtown of the permanence of the bed transfer.
(e) The approval by the Board of Directors for Roper St. Francis of the proposed transfer.

(Joint Ex. #3 at II-9 to II-10; Joint Ex. #2).

22. I conclude that the State Health Plan allows Roper St. Francis to transfer licensed beds from Roper Downtown to establish the proposed hospital in Goose Creek and that Trident failed to present evidence sufficient to meet its burden of proving by a preponderance of the evidence that the Department erred in finding that Roper St. Francis' application complies with the *2008-2009 State Health Plan*.

23. Trident's application complies with the *2004-2005 State Health Plan* in that Trident may use the facility-specific bed need reserved to Trident Medical Center under the Plan to establish the 50-bed facility in Moncks Corner. (Joint Ex. #3 at II-7). I conclude that the State Health Plan allows Trident to transfer facility-specific bed need to establish the proposed hospital in Moncks Corner and that Roper St. Francis failed to prove by a preponderance of the

evidence that the Department erred in finding that Trident's application complies with the *2004-2005 State Health Plan*.

24. A determination of "need," for CON purposes, is generally made by considering existing resources in the community along with documentation suggesting how the existing resources are not adequate to meet the needs of the community. *See Spartanburg Reg'l*, 387 S.C. at 85-91, 690 S.E.2d at 786-89 (finding substantial evidence in the record to support lower court's ruling where both applicants presented projections of future cases based on population data and incidence rates for cancer). Beyond this general statement of need, Section 802(2)(e) of Regulation 61-15, which the Department has identified as an important review criteria in this case, requires a CON applicant to provide documentation establishing that "[c]urrent and/or projected utilization . . . [is] sufficient to justify the expansion or implementation of the proposed service."

25. Both parties' experts in healthcare planning agreed that a need exists for general acute care inpatient services in Berkeley County. (Baehr Trial Tr. 1222:15-1223:3; Richardson Trial Tr. 3104:18-3106:16). Further, both experts offered trial exhibits showing that the Berkeley County population and existing market shares of each provider are sufficient to support the 100 beds proposed to be located in Berkeley County. (Pet. Ex. #221; Resp. Ex. #70). Moreover, Trident's project is based on a facility-specific bed need in the *2004-2005 State Health Plan* and Roper St. Francis' project is a transfer of existing licensed service area beds. Thus, there is a net increase of only 50 new licensed beds for the service area which results from Trident's project.

26. Competing applicants are defined as follows:

> [T]wo or more . . . health care facilities . . . who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame

as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities.

S.C. Code Ann. § 44-7-130(5); *see also* 24A S.C. Code Ann. Regs. 61-15 § 103(6). As the Supreme Court has explained, where abundant factual evidence supports a finding that the approval of two applications would not exceed the need for the facilities or services, the applications are not competing. *See Spartanburg Reg'l Med. Ctr.*, 387 S.C. at 91, 690 S.E.2d at 789.

27. I have found herein that there is abundant evidence and testimony to support that the approval of both applications will not exceed the need for the facilities, and therefore, the applications are not competing as defined by S.C. Code Ann. § 44-7-130(5) and 24A S.C. Code Ann. Regs. 61-15 § 103(6). Further, based on the findings of fact herein, there is need for each proposed hospital and both hospitals will have high utilization and should be financially successful. Accordingly, as to Project Review Criteria #1, each party has satisfied the criteria.

28. As to Project Review Criteria #2, the Court is not persuaded by Trident's argument that Roper St. Francis' use of the State's demographic data and county-level analysis rendered the application deficient for purportedly failing to properly identify the target population, a level of analysis Trident's own expert has used in his past work as a healthcare consultant. *See* 24A S.C. Code Ann. Regs. 61-15 § 802(2). Accordingly, Roper St. Francis' application complies with Project Review Criteria #2. Likewise, Trident's application complies with Project Review Criteria #2.

29. As to Project Review Criteria #3, Trident failed to prove that Roper St. Francis' project unnecessarily duplicates existing services or fails to adequately increase access to health care services. The evidence shows that several of the existing acute care facilities are within short distances from each other, including Trident's two existing inpatient facilities – Trident

Medical Center and Summerville Medical Center. (Resp. Ex. #76). I conclude that the geographic distance between a proposed facility and existing facilities alone is not determinative of unnecessary duplication. As to increased access, the Carnes Crossroad hospital in Goose Creek will significantly decrease travel times for the nearly one-quarter of Berkeley County residents who are Roper St. Francis patients that travel from Berkeley County to downtown Charleston or West Ashley to obtain care. (Bowling Trial Tr. 2476:19-2477:10). Moreover, Mr. Baehr, Trident's expert, documented that both projects would improve access for over 2,000 low income households not presently within seven miles of an existing hospital. (Pet. Ex. #222-001).

30. I find that any duplication of services as proposed by Roper St. Francis is justified and is more than outweighed by the increased access the project offers to a substantial portion of Berkeley County residents. Accordingly, Roper St. Francis' application complies with Project Review Criteria #3. Roper St. Francis did not contend that Trident failed to comply with Project Review Criteria #3.

31. As to Project Review Criteria #4, both projects have more than adequate public support and the lack of documented support of the Roper St. Francis project by other hospitals is not evidence of lack of acceptability. *See* 24A S.C. Code Ann. Regs. 61-15 § 802(4). Accordingly, both Roper St. Francis' application and Trident's application comply with Project Review Criteria #4.

32. As to Project Review Criteria #15, both parties agreed that both projects are financially feasible. (Baehr Trial Tr. 1617:17-19; Knapp Trial Tr. 2916:20-2917:6). The issues raised regarding the Roper St. Francis incremental pro forma are irrelevant as to whether the Roper St. Francis hospital projects immediate and long-term financial feasibility. Both applicants relied upon reasonable and generally accepted accounting principles. A venue-based

pro forma shows that the Roper St. Francis hospital will have more than sufficient income to be financially feasible. (Knapp Trial Tr. at 2917:7-13). Finally, both applicants are successful and large health systems with substantial revenue and earnings to support a 50-bed hospital.(Resp. Ex. #160, Pet. Ex. #162). Accordingly, Roper St. Francis' application and Trident's application comply with Project Review Criteria #15.

33. As to Project Review Criteria #22, the existing hospital beds in the Tri-County Service Area are clustered in Charleston County and there exists a maldistribution of beds in the service area. Roper St. Francis' application to transfer 50 licensed beds from the Charleston peninsula to Berkeley County, a location with explosive growth, is an appropriate and beneficial distribution of services to the target population. (Resp. Ex. #75, Resp. Ex. #76; Richardson Trial Tr. 3110:16-3111:14). Accordingly, Roper St. Francis' application complies with Project Review Criteria #22. Likewise, Trident's decision to transfer bed need from its hospital in Charleston County north to Moncks Corner complies with Project Review Criteria #22.

34. As to Project Review Criteria #23, Trident submitted evidence and testimony from Mr. Baehr claiming the impact on Trident Health System from the Roper St. Francis-Berkeley hospital would be fourteen million dollars by year three. (Baehr Trial Tr. 1377:2-5). "An 'adverse impact,' for CON purposes, can generally be construed to mean a material decrease in the present or future use or occupancy rates of existing providers for like procedures." *See Marlboro Park Hosp.*, 358 S.C. at 580, 595 S.E.2d at 854; *see also* 24A S.C. Code Ann. Regs. 61-15 § 802(23)(a) (Supp. 2001)). I have rejected the adverse impact analysis from Mr. Baehr as overstating the impact from the Roper St. Francis hospital in Goose Creek. I have found that the adverse impact analysis offered by Roper St. Francis more accurately reflects the likely impact

of the Roper St. Francis hospital on Trident and, therefore, there will be no material adverse impact on Trident as a result of the approval of the applications.

35. Project Review Criteria #23 also speaks to staffing to determine whether an applicant will adversely impact other facilities. *See* 24A S.C. Code Ann. Regs. 61-15 § 801(23)(b). I find no credible evidence that the approval of the Roper St. Francis project will adversely impact Trident's staffing levels or costs. (Baehr Trial Tr. 1715:10-14). Accordingly, Roper St. Francis' application complies with Project Review Criteria #23.

36. Roper St. Francis did not contend that Trident's proposed hospital in Moncks Corner would have a material adverse impact on Roper St. Francis in regards to lost cases or staffing. Accordingly, Trident's application complies with Project Review Criteria #23.

37. As to Project Review Criteria #31, both applicants clearly showed that their proposed hospital will serve medically underserved groups. (Resp. Ex. #164; Pet. Ex. #222). As explained in this Court's Order Granting Partial Summary Judgment to Roper St. Francis dated February 10, 2012, in light of the Department's determination that the underlying applications are not competing, the Department never compared the applications to determine "which, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by the department." S.C. Code Ann. § 44-7-210(B); (Brandt Trial Tr. 726:10-24). It is not this Court's role to compare the applications to determine which may be superior to the other in any respect. I find no credible evidence that Roper St. Francis' application does not comply on its own merit with Criteria #31. (Baehr Trial Tr. 1671:15-1672:17). Roper St. Francis provides a substantial amount of indigent care and will continue to do so at this hospital; plus, a substantial number of low income households will have increased access to healthcare as a result of the application. (Resp. Ex.

#164; Pet. Ex. #222; Johnson Trial Tr. 2185:21-2188:7). Accordingly, Roper St. Francis' application complies with Project Review Criteria #31. Likewise, there is no credible evidence that Trident's application does not comply with Project Review Criteria #31.

38. As to the remaining Project Review Criteria, no other criteria were raised as issues in this case and therefore neither party established that either applicant failed to comply with any other Project Review Criteria.

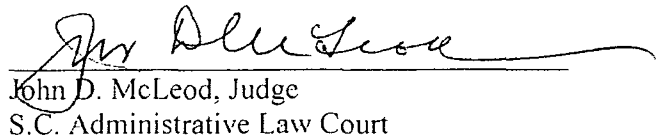
39. In conclusion, the two CON applications are not competing applications and therefore must be evaluated individually on the merits of each. Both applications comply with the applicable State Health Plan, the Project Review Criteria, and the purposes of the CON Act. Accordingly, I hereby affirm the decisions of the Department in approving both applications.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law stated above,

IT IS HEREBY ORDERED that the Department's decision to approve the CON applications filed by Trident Medical Center, LLC, and Roper St. Francis Healthcare for the establishment of two 50-bed acute care hospitals in Berkeley County, South Carolina, is **SUSTAINED**. The Department shall issue a CON to each applicant forthwith.

IT IS SO ORDERED.



John D. McLeod, Judge
S.C. Administrative Law Court

September 26, 2012
Columbia, SC

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 26 day of September, 2012

By: Anthony R. Goldman
Judicial Law Clerk