STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair, Petitioner, vs. South Carolina Department of Health and Environmental Control and St. Joseph's/Candler Imaging Center – Bluffton, Respondents.	)	Docket No.: 17-ALJ-07-0144-CC **ORDER DENYING 3T MRI AT BELFAIR'S MOTION FOR SUMMARY JUDGMENT OR FOR REMAND**

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STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or court) pursuant to a Motion for Summary Judgment or For Remand filed with the Court on February 2, 2018 by the Petitioner MRI at Belfair, LLC (hereinafter the Petitioner). The Petitioner moves for summary judgment and for an order denying the Respondent St. Joseph's/Candler Imaging Center's (hereinafter the Respondent) Certificate of Need (CON) application for a 1.2T open MRI unit because the Respondent's application is fraught with false certifications, incomplete data, and incorrect assumptions, and the application underwent substantial changes during the course of project review. Alternatively, the Petitioner moves this court to remand the matter to the South Carolina Department of Health and Environmental Control (hereinafter the Department or DHEC) for another project review. As a further basis for remand, the Petitioner asserts that it was not given proper notice of the project by the Department as required by statutes and regulations.

The Respondent filed a Response to the Petitioner's Motion for Summary Judgment on February 9, 2018, asserting that none of its data submitted in its application was false, that any changes made in its application were not substantial, that, at a minimum, any argument about incorrect assumptions are matters in dispute and not appropriate for summary judgment, and that the Department did not fail to provide notice of the project, that the Petitioner had notice of the project, that the Petitioner failed to submit matters to the Department during the project review

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period in a timely manner, that it failed to exhaust its administrative remedies in addressing any asserted lack of notice, and that a remand would be prejudicial to the Respondent.

A hearing was held in this matter on February 12, 2018. On February 21, 2018, the court held a telephone conference with the parties, during which the court informally ruled on the parties' motions to allow them to better prepare for the scheduled March 5, 2018 date for the commencement of the merits hearing in this case. This order follows.

BACKGROUND

On August 9, 2016, St. Joseph's filed a CON application with the Department, in which it sought to add a 1.2T open MRI unit to its existing imaging center in Bluffton, South Carolina. On August 26, 2016, the Department published notice in the South Carolina State Register, as required by South Carolina Code §44-7-200(D), that the Respondent's CON application had been "accepted for filing." The State Register further contained the notice that "after the application is deemed complete, affected persons will be notified that the review cycle has begun." On October 28, 2016, the Department again published notice in the State Register that the Respondent's CON application had been "deemed complete" in accordance with CON Act §44-7-210(A). The notice provided the following: "(T)he review cycle has begun. A proposed decision will be made as early as 30 days, but no later than 120 days." 'Affected persons' have 30 days from the above date to submit requests for a public hearing." The notice further provided instructions on how affected persons could request a public hearing. On November 8, 2016, eleven days after the Department published the "deemed complete" notice regarding the Respondent's CON application, the Petitioner's counsel notified the Department in writing that Belfair was to be "considered and notified" as an "affected person" and requested "all notices" be sent to counsel for the Petitioner. The letter contained the following: "This request includes, but is not limited to, notice of all DHEC staff decisions regarding the above referenced CON application." The letter also provided that "once the CON application is deemed complete, that the DHEC Staff allow MRI at Belfair, LLC an opportunity to present additional written information to DHEC in support of the grounds in opposition set forth in the letter." The letter did not request a public hearing.

On November 10, 2016, DHEC sent a letter to the Respondent notifying it that its CON application was complete and that the project review cycle had begun. A copy of this letter was not sent to the Petitioner or its counsel. The Department did not acknowledge receipt of the Petitioner's November 8, 2016 "affected person" letter until January 13, 2017. On February 22,

2017, the Department approved the Respondent's CON application. On March 9, 2017, the Petitioner's counsel sent a written "Request for Final Review" to the Department. In that document, the Petitioner listed numerous errors in the CON application. However, nowhere in the letter did the Petitioner allege that it had not been properly notified of the review process or that it had been denied its due process rights.

After the Department denied the Petitioner's request for final review, the Petitioner filed a Petition for Administrative Review and Request for Contested Case Hearing with this court on May 17, 2017.

LEGAL STANDARD AND DISCUSSION

ALC Rule 68 provides that "[t]he South Carolina Rules of Civil Procedure may, where practicable, be applied in proceedings before the Court to resolve questions not addressed by these rules." Rule 56(c), SCRCP, provides that summary judgment shall be granted if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *Young v. South Carolina Dep't of Disabilities & Special Needs*, 374 S.C. 360, 649 S.E.2d 488 (2007); *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007).

In determining whether any material issue of fact exists, the evidence and all inferences that can reasonably be drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Summary judgment should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *R.J. Hendricks, II v. Clemson Univ.*, 353 S.C. 449, 455, 578 S.E.2d 711, 714 (2003).

This court also has the authority to remand contested cases to the agency at issue for further proceedings. *See Karen Shuler v. S.C. Budget and Control Board*, 06-ALJ-30-0900-CC (Mar. 21, 2007) (remanding case for further review of the petitioner's application for disability retirement benefits instead of proceeding with a contested case hearing). Remand is proper when the agency failed to follow the applicable statutory and/or regulatory procedures in making its. *See, e.g.*, *Lacy v. S.C. Dep't of Empl. & Workforce*, 15-ALJ-22-0427-AP, 2015 SC ALJ LEXIS 458 (Nov. 17, 2015) (remanding case to DEW for failure to give proper notice of hearing); *Supervac of Jacksonville PLM, Inc. v. S.C. Dep't of Transp.*, 04-ALJ-19-0380-CC, 2004 SC ALJ LEXIS 576 (July 22, 2005) (remanding case to DOT for failure to utilize application form required by regulation).

The court first addresses the Petitioner's argument that this matter should be remanded to the Department for another project review because the Department failed to notify the Petitioner that the Respondent's CON application was deemed complete before issuing the CON. S.C. Code Ann. §44-7-210(A) provides that once a CON application is deemed complete "affected persons must be notified in accordance with departmental regulations." The corresponding regulation, S.C. Code Regs. 61-15 Section 305(1) provides "Upon determination by the Department that the application is complete, and receipt of the application fee, the Department shall publish in the State Register a notice that the review cycle for the project has begun. Any affected person who has notified the Department in writing that they desire to be notified of the beginning of the review period be sent a copy of the notification." In this case, the Department published notice that the Respondent's application was deemed complete and that the review process had begun in the State Register on October 28, 2016. That notice further provided that affected parties had 30 days to request a public hearing, and that the Department would make a decision on the application between 30 and 120 days from October 28, 2016. Despite having received notice from the Petitioner's counsel that the Petitioner was an interested party who wanted to receive "all notices," the Department failed to provide the Petitioner or its counsel with a copy of the State Register notice. However, the failure of the Department to send a copy of the notification to the Petitioner does not mean that the Department did not comply with the notice requirements of the CON Act. The Department complied with the notice requirement when it published notice in the State Register on October 28, 2016 that the Respondent's application was "deemed complete," and that affected parties had thirty days to request a public hearing. Forwarding a copy of the notice to the

Petitioner, while required under the Department's regulation, was distinct from the notice requirement. The requirement to send a copy of the notice to affected parties who contact the Department ensures that affected parties receive the notice that is published in the State Register. However, in this case, it is clear the Petitioner and its counsel were aware of the "deemed complete" determination and the notice. The Petitioner's counsel, a seasoned CON litigator[1], sent notification to the Department 11 days after the Department published its "deemed complete" notice in the State Register. That notification letter referenced the CON application, it's Department generated case number, general objections to the application, and all relevant statutes and regulations pertaining to CON notification [including S.C. Code Regs. § 61-15-305(1)]. Other than through the State Register, there was no way for the Petitioner to know that the Respondent had a pending application.

Additionally, after the Petitioner received notice that the Respondent's CON application was approved in early 2017, it never protested to the Department that it had not received adequate notice that the review cycle had commenced. The Petitioner's counsel sent a detailed letter to the Department on March 9, 2017 listing numerous errors in the CON application. However, the letter made no mention of not receiving adequate notice of the Department's process nor did it seek redress for an alleged flawed notification process. Had lack of notice been an issue, the court cannot imagine a time when this would have been more apparent to the Petitioner, or a better time for it to be addressed and remedied. And even after the case was filed with this court, the Petitioner failed to allege any lack of notice or other due process violation in its Pre-Hearing Statement filed with the court on June 26, 2017.[2] It is difficult for this court to understand how this issue is only now manifesting itself.

The court finds that the Department complied with the statutory and regulatory notice requirements when it published the "deemed complete" determination in the State Register on October 28, 2016. The court further finds that while the Department failed to send a copy of the State Register notice to the Petitioner, as required by S.C. Code Regs. 61-15 Section 305(1), the error does not mandate remand of the matter because the Petitioner had notice of the status of the Respondent's CON application. And, even if the Petitioner did not have notice, its failure to address this matter with the Department contemporaneous with its occurrence precludes it from

[1] Both the Petitioner and its counsel have participated in numerous CON hearings in this court over the last decade.
[2] ALC Rule 14 requires the parties to set forth with particularity the issues in a contested case.

doing so now. *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994) ["(A)dministrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule."].

The Petitioner also seeks summary judgment or remand of this matter because it alleges that the Respondent provided materially incorrect financial entries and assumptions in excess of $310,000 that required fixing and that resulted in an at least 90% increase in the expenses and depreciation, and it failed to use an accountant. S.C. Code Reg. §§61-15-202(1)(b)(16), 61-15-802(5). The Petitioner asserts that all of this represents a substantial change in the application and merits summary judgment or a remand back to the Department for further review.

The Respondent counters that while there were errors on the pro forma data it initially submitted, they were characteristic of mistakes on initial CON applications, that nothing submitted was falsely certified, and that the person who prepared the data was an accountant with Masters level training in accounting who has developed many pro forma documents for CON applications, and that the Department routinely accepts financial documents in CON applicants that were prepared by individuals with accounting backgrounds but who are not certified public accounts.[3] The Respondent asserts that its health planning expert and finance expert will testify that the post review changes to the pro forma documents do not constitute a substantial change.

The court is unprepared to hold as matter of law that the changes made to the pro forma documents constituted a substantial change and therefore denies the motion for summary judgment on this ground.

The Petitioner further argues that because the need analysis submitted during the licensing phase had errors it was therefore falsely certified and that it should be held a substantial change and a basis for summary judgment. The Respondent disputes the Petitioner's assertion that it falsely certified anything, and further disputes that anything it has done since project review constitutes a substantial change. It points out that there have been numerous CON projects where there were large changes, financial and otherwise, that were not held to be substantial. Furthermore, that new evidence is introduced in a contested case that may alter what was included in an application does not mean that there was a substantial change. *Marlboro Park Hosp. v. South*

[3] Neither of the provisions cited by the Petitioner regarding accountants requires that the accountant be a certified public accountant.

Carolina Dept. of Health and Envt'l Control, 358 S.C. 573, 595, 595 S.E.2d2d 851 (S.C. Ct. App. 2004).

The Petitioner then asserts that the Respondent's changes to the project, from a full time MRI unit to a part time unit, its "wholesale" changes to the three-year budget, and its "wholesale" changes to the need analysis are all substantial changes and require that summary judgment be granted or that the project be remanded to the Department for further review. The Respondent disagrees with the characterization of "wholesale" and argues that whether the changes it has made to its application constitute substantial changes are a question that must be resolved by the court at a hearing, and not subject to summary dismissal or remand to the Department. The court agrees. While it is clear that the Respondent has made alterations to a number of aspects of its application, changes are both expected and allowed in CON applications if they are not substantial. The issue of whether a change is substantial is a question for the court. Clearly, in determining that, a court must weigh many facts and factors. *Providence Hospital v. S.C. DHEC*, 2002 WL 31423801 at 13 (S.C. Administrative Law Judge Division); *MRI at Belfair, LLC v. S.C. Dep't of Health and Envt'l Control, et al* 394 S.C. 567, 716 S.E.2d 111 (Ct. App. 2011). At this time, the court cannot say that there are not material facts in issue as to whether the changes identified by the Petitioner constitute substantial changes, and therefore, the court is unwilling to grant summary judgment on those matters or to remand the issue.

The Petitioner next seeks summary judgment because the CON application does not document a community need. The Petitioner asserts that the Respondent's application does not demonstrate that the proposed project meets an identified, documented need of the target population. S.C. Code Reg Section 61-15-802(2). The Petitioner asserts that the Respondent's application fails to demonstrate a need for another MRI unit in the service area, and does not demonstrate a need for an open MRI unit. It argues that the Respondent presented no data concerning the need for an open MRI unit in the application, and that the Respondent's expert did not have data concerning the need for an open unit. The Petitioner states that the Respondent's own Director of Imaging states that he does not track the number of patients the Respondent refers to open MRI units. The Respondent's expert has no opinion on whether there is a medical need for an open MRI unit in Blufton and testifies that he has few patients in his practice who have difficulty completing MRI scans on closed units due to claustrophobia or obesity, and those that do can normally complete their scans under sedation.

In its response the Respondent disputes virtually every assertion by the Petitioner. The Respondent asserts that its application stated it would be providing "the only high field open MRI in Southern Beaufort County," and that the application provided that its open MRI unit could accommodate heavy-set or claustrophobic patients. The Respondent does not dispute that there is no need for another closed MRI unit in the service area, but the machine it seeks to install is an open MRI unit and meets a specific need for people in the service area who cannot or will not undergo a scan on a closed MRI unit. The Respondent asserts that between its medical expert and technician who can establish the existence of patients who experience anxiety or have other difficulties with closed bore machines and their health planning expert who will establish that open bore MRI units have been proven to produce less patient anxiety, they have established a medical need for the unit. Additionally, the Respondent disputes the characterizations of its witnesses' testimony in the Petitioner's brief and identifies areas where the Petitioner fails to include complete statements of its witnesses.

Based upon a review of both arguments, the court cannot find as a matter of law that the Respondent has failed to establish community need for its open MRI unit, and that there is not a genuine issue of material fact regarding this matter. Therefore, the court declines to grant the Petitioner's motion on this ground.

Finally, the Petitioner seeks summary judgment because the Respondent failed to account for a substantially reduced reimbursement rate from Medicare Patients. The Petitioner asserts that because of changes in federal law, the Respondent's facility will no longer be entitled to receive larger reimbursement rates for Medicare patients under the Hospital Outpatient Prospective Payment System (HOPPS). Much of the Petitioner's argument centers around its assertion that because the Respondent's outpatient facility is moving or expanding, that act will disqualify it from being entitled to the higher reimbursement rate. Because the Respondent's financial projections in its CON application were based on calculating reimbursement at the higher rate, then the financial feasibility aspect of the application are substantially incorrect, and the application needs to either be dismissed or remanded to the Department for further review.

In its brief, the Respondent disputes every aspect of the Petitioner's assertions regarding the reimbursement issue. It disputes that it will not be reimbursed at the higher rate. It disputes the accuracy of the testimony of the witness that the Petitioner relies upon to assert that the Respondent will not be entitled to the higher reimbursement rate, and asserts that it has other

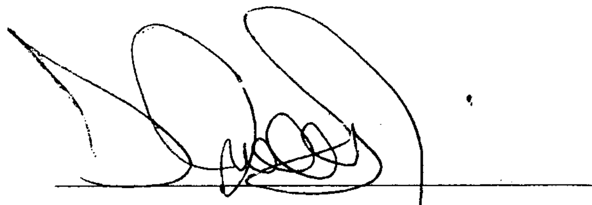
witnesses who are experts who will testify to the contrary. It asserts that pursuant to the language of 81 F.R. 79704, because it is not both "purchasing and expanding" into another unit, it will still qualify for the higher reimbursement rate.

From this, it is clear that the reimbursement issue is one where there are genuine issues of material fact that are unresolved. Therefore, this is not a proper basis for granting summary judgment, and the court sees no reason to remand the matter.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petitioner's Motion for Summary Judgment or for Remand is **DENIED**.

AND IT IS SO ORDERED.



March 3, 2018
Columbia, South Carolina

S. Phillip Lenski
S.C. Administrative Law Judge

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