

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. SUPREME COURT

Appellate Case No. 2018-001701
Lower Court Docket No. 11-ALJ-07-0575-CC

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

v.

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

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

APPENDIX – VOLUME V OF V

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC Court of Appeals

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

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

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 23, 2017.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that Carolinas failed to preserve its dormant Commerce Clause argument for appellate review?
2. Whether the Administrative Law Court violated the dormant Commerce Clause by granting the Certificate of Need to Piedmont for the purpose of protecting an incumbent hospital and reducing the amount of South Carolina patients receiving care out of state?
3. Whether the Court of Appeals erred in denying Carolinas relief from the appeal bond when it is unconstitutional under the South Carolina and United States Constitutions?

STATEMENT OF THE CASE

This case began over twelve years ago, in March 2005, when Petitioner The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill (“Carolinas”), Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center (“Piedmont”), and a third applicant¹, Presbyterian Healthcare (“Presbyterian”), filed certificate of need (“CON”) applications with the South Carolina Department of Health and Environmental Control (“DHEC”) pursuant to the 2004-2005 State Health Plan (“2004-2005 Plan” or “State Health Plan”) to construct and operate a general acute care hospital in Fort Mill, York County, South Carolina (“Fort Mill CON”). (R. p. 75). Carolinas, a North Carolina-based hospital system, proposed to construct and operate Carolinas Medical Center-Fort Mill, a 64-bed general acute care hospital, consistent with the bed need recognized in the 2004-2005 Plan. (*Id.*) Piedmont initially proposed a 64-bed hospital but later amended its application by seeking to transfer 36 beds from its existing hospital in Rock Hill, Piedmont Medical Center, to its proposed new facility, the

¹ A fourth applicant also applied for a 64-bed hospital but did not file a contested case when its application was denied.

Fort Mill Medical Center, and thereby construct and operate a 100-bed hospital. (R. pp. 75-76).

Piedmont's hospital in Rock Hill is the sole hospital in York County. (R. p. 3069).

On May 30, 2006, DHEC denied the Fort Mill CON applications of Carolinas and Presbyterian and issued the CON to Piedmont. (R. p. 76). At the time, Piedmont argued and DHEC agreed that only an existing hospital in a county was entitled to apply for a CON to build a new hospital in the county. (R. pp. 1-28). On June 12, 2006, Carolinas and Presbyterian filed a contested case (the "First Contested Case") to challenge DHEC's decision with the South Carolina Administrative Law Court ("ALC").

In September 2009, Judge Matthews presided over a three week hearing in the First Contested Case. After Carolinas and Presbyterian concluded their cases, Judge Matthews granted their Motions for Summary Judgment on the grounds that DHEC had erroneously adopted Piedmont's legal argument that only Piedmont, as the existing hospital in York County, was eligible to apply for a new hospital in York County. (R. p. 10). As a result, Judge Matthews remanded the Fort Mill CON applications to DHEC for further review consistent with her instructions to determine "which of the applications, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by [DHEC]." (R. p. 27).²

After DHEC regained jurisdiction over the Fort Mill CON matter, it reviewed the updated CON applications submitted on October 4, 2010, by Carolinas, Presbyterian, and Piedmont under the CON Act (S.C. Code Ann. § 44-7-160, *et seq.*), the 2004-2005 Plan, and the applicable Project

² Piedmont appealed Judge Matthews' Order, and Carolinas and Presbyterian cross-appealed. The consolidated appeals went first to the South Carolina Court of Appeals, which referred them for disposition to the South Carolina Supreme Court. In a decision dated April 8, 2010, the South Carolina Supreme Court dismissed the appeal and remanded to DHEC because Judge Matthews's Order was not a "final decision" immediately appealable under S.C. Code Ann. § 1-23-610, which limits appellate review to final decisions of the ALC. (R. pp. 29-33).

Review Criteria (S.C. Regs. 61-15 § 802.1, *et seq.*). (R. p. 77). On September 9, 2011, DHEC awarded the CON to Carolinas and denied a CON to Piedmont and Presbyterian. (R. pp. 2173-2185, 3030-3044). DHEC's findings supported the following conclusions: (1) Carolinas most fully complies with the Project Review Criteria; (2) Carolinas best justified the implementation of its project because of its current significant level of market share and utilization in Northern York County; (3) Carolinas' project is financially feasible; and (4) Carolinas' project would increase accessibility and availability of services by shifting its current market share to a facility in South Carolina, resulting in less adverse impact to existing facilities. (*Id.*)

On November 15, 2011, Presbyterian and Piedmont requested a contested case with the ALC to review DHEC's award of the CON to Carolinas (the "Second Contested Case").³ The Second Contested Case was assigned to Judge S. Phillip Lenski and progressed through a hearing on the merits conducted over fifteen days in March and April of 2013. Approximately a year after the hearing, the ALC issued a Final Order dated March 31, 2014, reversing DHEC's decision, issuing the CON to Piedmont instead, and denying the CON to Carolinas (the "Final Order"). (R. pp. 34-72).

On April 9, 2014, Carolinas filed a Motion to Alter or Amend the Final Order ("Motion to Reconsider"). (R. pp. 227-249). In the Motion to Reconsider, Carolinas argued, among other issues, that the ALC's Final Order violated the dormant Commerce Clause because it ordered DHEC to award the CON to Piedmont to protect Piedmont from competition from an out-of-state hospital system and to reverse outmigration of patients from South Carolina to North Carolina, thereby interfering with and burdening interstate commerce. (*Id.*) In the First Contested Case, Presbyterian and Carolinas argued that an interpretation of the CON Act and State Health Plan that

³ Presbyterian subsequently withdrew from the Second Contested Case.

excluded out-of-state health care providers violated the dormant Commerce Clause, and Carolinas presented that argument to the ALC at the conclusion of the Second Contested Case by proffer. (App. pp. 387-1498).

On May 2, 2014, the ALC vacated the Final Order. (R. p. 73). Over seven months later, on December 15, 2014, the ALC issued the Amended Final Order, maintaining its previous ruling reversing DHEC's decision, granting the CON to Piedmont, and denying the CON to Carolinas. (R. pp. 125-126). In the Amended Final Order, the ALC expressly ruled upon and rejected Carolinas' as-applied challenge to the ALC's ruling under the dormant Commerce Clause. (R. p. 75). Nevertheless, the ALC maintained that its purpose and rationale for awarding the CON to Piedmont was to protect Piedmont from perceived adverse effects of competition from an out-of-state hospital and to reduce the number of South Carolinians who voluntarily seek healthcare from Carolinas at its North Carolina hospitals. (R. pp. 121-122, 124-125).

On January 14, 2015, Carolinas filed its Notice of Appeal of the Amended Final Order with the South Carolina Court of Appeals. Subsequently, Carolinas filed a cash bond pursuant to S.C. Code Ann. § 44-7-220(B) with the Clerk of the Court of Appeals in the sum of one million five hundred thousand dollars, which is the maximum amount payable under that statute. On March 17, 2015, Carolinas filed a Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process ("Motion for Relief and Petition for Supersedeas"). (App. pp. 1-84). On March 27, 2015, in accordance with the Court's Order of March 19, 2015, Carolinas filed a Supplemental Brief and Amendment of Motion for Relief and Petition for Supersedeas ("Supplemental Brief"). (App. pp. 85-106). In the Motion for Relief and Petition for Supersedeas and Supplemental Brief, Carolinas argued that the bond required by § 44-7-220(B) violated the Equal Protection Clause and separation of powers doctrine and unconstitutionally burdened the

right to judicial review. The Court of Appeals filed an Order on September 8, 2015, denying Carolinas' Motion for Relief and Petition for Supersedeas. (App. pp. 356-361).

Carolinas' appeal challenged the ALC's grant of the CON to Piedmont on the ground, among others, that it violated the dormant Commerce Clause. Piedmont and DHEC opposed Carolinas' as applied dormant Commerce Clause challenge on its merits, but neither party argued that the issue had not been preserved for appeal. As such, no party raised issue preservation in their briefs submitted to the Court of Appeals or included information related to issue preservation in the Record on Appeal.

The Court of Appeals held oral argument on Carolinas' appeal on November 8, 2016.⁴ During oral argument, the Court of Appeals, *sua sponte*, questioned for the first time whether Carolinas had preserved its as-applied dormant Commerce Clause challenge on appeal, despite the fact that no party had previously raised issue preservation during the appeal.

On January 11, 2017, the Court of Appeals filed Opinion No. 2017-UP-013 (the "Opinion"), which affirmed the Amended Final Order of the ALC, ordering DHEC to issue a CON to Piedmont. In affirming the ALC's Amended Final Order, the Court of Appeals made three rulings: (1) Carolinas' dormant Commerce Clause argument was not preserved for appellate review; (2) Carolinas' bed transfer provision argument was not preserved for appellate review; and (3) the ALC's Amended Final Order was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious.

⁴ After briefing was completed, the Court of Appeals attempted to refer this appeal to the Supreme Court. In a letter dated April 14, 2016, the Supreme Court declined to certify the appeal as requested by the Court of Appeals. The parties were not provided with a copy of the Court of Appeals' request to the Supreme Court to certify this appeal and only became aware that the Court of Appeals had made such a request when the Supreme Court issued its letter declining to certify the appeal.

On January 26, 2017, Carolinas filed a Petition for Rehearing as to the Court's rulings in the Opinion regarding the preservation of Carolinas' dormant Commerce Clause argument and the application of the arbitrary and capricious standard based on the Court's misapprehension and misapplication of the arguments Carolinas raised, the applicable law, and the Record on Appeal. Also, on January 26, 2017, Carolinas filed a Motion to Supplement the Record on Appeal in support of Carolinas' argument set forth in its Petition for Rehearing relating to the preservation of its dormant Commerce Clause argument. On March 23, 2017, the Court of Appeals denied Carolinas' Petition for Rehearing and Motion to Supplement the Record on Appeal.

The issues before this Court concern the Court of Appeals' rulings in its Order filed September 8, 2015, on Carolinas' request for relief from the bond requirement, and on the Court of Appeals' rulings in the Opinion regarding the dormant Commerce Clause.

STANDARD OF REVIEW

Rule 242 of the South Carolina Appellate Court Rules sets forth certain circumstances which weigh in favor of this Court issuing a writ of certiorari to review a decision of the Court of Appeals. Among those circumstances are novel questions of law, dissent in the decision of the Court of Appeals, conflict with a prior decision of the Supreme Court, the presence of substantial constitutional issues, and where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR; *State v. Lyles*, 381 S.C. 442, 443-44, 673 S.E.2d 811, 812 (2009) (outlining reasons for granting certiorari and standards for this Court to grant the same). Rule 242(b), SCACR, makes clear that the Court is not limited by the stated reasons within the rule as those reasons do not fully measure this Court's discretion or power to grant review of a case.

ARGUMENT

I. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE NOVEL QUESTIONS OF LAW REGARDING WHETHER CAROLINAS PRESERVED ITS CONSTITUTIONAL ARGUMENT THAT THE ALC VIOLATED THE DORMANT COMMERCE CLAUSE IN GRANTING THE CON TO PIEDMONT.

A. *The Court should review the decision of the Court of Appeals because its application of issue preservation rules conflicts with the ripeness doctrine.*

This case presents the novel question of whether an appellant challenging the constitutionality of the ALC's reversal of an administrative agency licensing decision in a contested case under the Administrative Procedures Act must raise such constitutional issue during the contested case prior to the ALC's final decision in order to preserve the issue for appeal. In the decision below, the Court of Appeals effectively ruled that a party must preserve its ability to appeal the ALC's unconstitutional decision by arguing prior to the final order of the ALC that the ALC's adoption of the opposing party's position would violate the constitution. The ruling by the Court of Appeals has no supporting judicial precedent and conflicts with well-established authority that as applied challenges in the administrative context must be ripe before they can be asserted.

In *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 108-09, 705 S.E.2d 28, 38-39 (2011), the South Carolina Supreme Court clarified that the ALC, as part of the executive branch, cannot pass on the constitutional validity of a statute or regulation but may hear "as applied" constitutional challenges to statutes and regulations. *Travelscape* involved a party challenging the constitutionality of the agency's application of the statute or regulation in question in a contested case before the ALC. *Id* at 96, 705 S.E.2d at 31-32. In that case, the Court made clear that all "preservation and exhaustion of remedies rules apply before the ALC" in cases where the ALC has jurisdiction to hear an as applied constitutional challenge. *Id* at 109, 705 S.E.2d at 39.

Travelscape, however, does not address the issue in this case, which is whether and when an as applied challenge must be raised for issue preservation purposes when the challenge arises from the ALC's decision, rather than the administrative agency's decision. Unlike the appeal in *Travelscape*, Carolinas' appeal does not arise from a contested case involving an as applied challenge to an agency's application of statutes or regulations. Here, Piedmont – not Carolinas – initiated the contested case, and neither party challenged DHEC's granting of the CON to Carolinas as violative of the United States Constitution under the dormant Commerce Clause or otherwise. Because Carolinas obviously supported DHEC's decision, it had no reason or basis to argue that DHEC applied the CON Act and implementing regulations in an unconstitutional manner. Instead, the alleged constitutional violation did not occur until the ALC reversed the underlying agency decision.

Nevertheless, the Court of Appeals' decision below would have required Carolinas to affirmatively present an anticipatory defense to the ALC that "Piedmont's positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause." (App. pp. 362-367). Thus, the rule adopted by the Court of Appeals requires a party defending an agency decision in a contested case to make an as applied challenge to a hypothetical decision of the ALC prior to such decision being ripe for challenge.

The Court of Appeals decision puts the proverbial cart before the horse by requiring a litigant to lodge an anticipatory challenge to an ALC's decision despite the fact that no constitutional issue has been presented to the ALC. In other words, the Court of Appeals requires a prevailing party at the agency level to raise an as applied constitutional challenge before there has been an unconstitutional application of the applicable statute or regulation. This approach conflicts with well-established authority requiring that as applied constitutional challenges be ripe

before they can be asserted. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (recognizing the ripeness doctrine applies to administrative determinations).

Generally, a “claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998). In the administrative context, the ripeness doctrine is “designed to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies” and to “shield agencies from judicial interaction until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Temple B’Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1356 (11th Cir. 2013).

The Court of Appeals’ decision below upends the ripeness doctrine by requiring a party to engage the ALC in abstract arguments about the hypothetical application of the statutes and regulations in question despite the fact that the administrative agency avoided an unconstitutional application thereof. Due to the conflict between the Court of Appeals’ application of issue preservation rules and the ripeness doctrine, the Court should review the decision of the lower court.

B. The Court should review the Court of Appeals’ Opinion because its application of issue preservation rules conflicts with the Court’s well established issue preservation rules.

The Court should also issue a writ of certiorari to review the decision below because the Court of Appeals failed to resolve all doubt regarding whether Carolinas’ dormant Commerce Clause argument was preserved in favor of preservation. The ruling is at odds with the principle that any doubts as to whether an appellant has preserved an argument should be resolved in favor of finding the argument preserved, *see State v. Jenkins*, 408 S.C. 560, 568 n.7, 759 S.E.2d 759, 763 n.7 (Ct. App. 2014) (resolving doubt about issue preservation in favor of appellant) (citing *Atl.*

Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012)) (recognizing “it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful”), and the South Carolina Supreme Court’s more expansive interpretation of Rule 59, SCRCP. As the Supreme Court stated in *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004):

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

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

The Court of Appeals’ decision conflicts with the principle articulated in *Elam* that issues and arguments are preserved for appellate review when they are raised to and ruled upon by the trial judge. *Id.* at 23, 602 S.E.2d at 779-80. After Carolinas reasserted its dormant Commerce Clause argument in the Motion to Reconsider, the ALC expressly ruled upon and rejected that argument in the Amended Final Order, thereby preserving the issue for appeal. The liberal application of issue preservation rules found under *Elam* and other cases is even more applicable in this case because Carolinas was defending DHEC’s agency decision, which found in favor of Carolinas, and Carolinas’ position was such that it was not arguing that DHEC’s underlying agency decision was unconstitutional. See *In re Estate Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (providing when a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issues for appeal).

In addition, Carolinas, prior to submitting the Motion to Reconsider, raised objections and arguments relating to its dormant Commerce Clause challenge during the hearing in the Second Contested Case and in its post-hearing proffer.⁵ (App. pp. 387-1498). Because no party had argued that the dormant Commerce Clause argument had not been preserved, Carolinas did not include matter in the Record on Appeal evidencing these attempts to raise the issue. After the Court of Appeals ruled, *sua sponte*, that the dormant Commerce Clause issue had not been preserved, Carolinas filed the Petition for Rehearing and Carolinas' Motion to Supplement the Record on Appeal to demonstrate that the issue had been raised at the trial court level.

Rather than consider the supplemental materials, the Court of Appeals refused to permit Carolinas to supplement the record. In so doing, the Court of Appeals ruled that Carolinas had fair notice that the Court of Appeals could enforce error preservation *sua sponte* and should have included materials in the record indicating that the issue had been presented to the trial court. (App. pp. 1504-1506). This ruling of the Court of Appeals cannot be squared with Rule 209(b)-(c), SCACR, which prohibits parties from designating matters to be included in the record on appeal which are not relevant to the appeal. The Court of Appeals' approach unfairly forces parties to guess whether the appellate court will address matters not raised by the parties in the briefs. Accordingly, the Court should resolve the apparent conflict between the Court of Appeals' determination that the record on appeal must contain all material which could be addressed by the

⁵ In the Opinion, the Court of Appeals ruled that Carolinas' attempt to preserve the issue was ineffective because the dormant Commerce Clause arguments raised in the proffer were different than those raised in the Motion to Reconsider and on appeal. This ruling was in error because it is inconsistent with federal law governing the manner in which constitutional challenges can be presented and preserved. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (providing once a constitutional claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below); *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (holding although SCDOT did not phrase its objection in the exact terms used in issues on appeal, it was sufficient to preserve it for appellate review).

appellate courts, *sua sponte*, or whether the record must be limited to only those materials which are relevant to the issues raised on appeal by the parties, as required by Rule 209, SCACR.

Because Carolinas had previously raised the dormant Commerce Clause challenge at the hearing and in its proffer, the ALC had expressly ruled upon that challenge, and federal law does not limit the manner in which constitutional arguments can be raised on appeal once they have been properly presented to the trial court, the Court should grant Carolinas' Petition for Writ of Certiorari to address whether the Court of Appeals wrongfully resolved any doubts against issue preservation.

II. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE NOVEL QUESTIONS OF LAW AND SUBSTANTIAL CONSTITUTIONAL ISSUES REGARDING WHETHER THE ALC VIOLATED THE DORMANT COMMERCE CLAUSE IN GRANTING THE CON TO PIEDMONT.

Carolinas' appeal raises important constitutional issues as to whether the ALC's issuance of the CON to Piedmont violated the dormant Commerce Clause. As argued to the Court of Appeals, the purpose and effect of the ALC decision is to discriminate against interstate commerce in health care by attempting to protect an incumbent provider from out-of-state competition and prevent or reduce patients from traveling to North Carolina to receive health care. Thus, this appeal raises important and complex constitutional issues that need resolution for DHEC and health care providers to address the future health care needs of the state.

The Court of Appeals avoided these questions by incorrectly ruling, *sua sponte*, that Carolinas' dormant Commerce Clause challenge had not been preserved for appeal.⁶ Because of the public importance of the constitutional issues raised by Carolinas' appeal, the Court should

⁶ It is noteworthy that the Court of Appeals initially attempted to certify this appeal to the Supreme Court.

grant Carolinas' Petition for Writ of Certiorari and resolve these issues for the benefit of DHEC, health care providers, and the public.

III. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE NOVEL QUESTIONS OF LAW AND SUBSTANTIAL CONSTITUTIONAL ISSUES REGARDING WHETHER REQUIRING AN APPEAL BOND FOR A CON APPEAL IS UNCONSTITUTIONAL UNDER THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS.

S.C. Code Ann. § 44-7-220(B) required Carolinas to post a \$1.5 million dollar bond to perfect its appeal of the ALC's denial of the CON. In its Motion for Relief and Petition for Supersedeas and in its Supplemental Brief, Carolinas sought relief from the appeal bond because it is unconstitutional under the South Carolina and United States Constitutions.

A. The bond requirement of S.C. Code Ann. § 44-7-220(B) is unconstitutional as a violation of the Equal Protection Clause.

This case presents a novel and substantial constitutional issue regarding whether the appellate bond required pursuant to S.C. Code Ann. § 44-7-220(B) is unconstitutional as a violation of the Equal Protection Clause. In the decision below, the Court of Appeals ruled that there is a rational basis for the statute requiring a forfeiture of the appellate bond to a respondent if the ALC's decision is upheld because this forfeiture requirement is related to a legitimate government interest of compensating a party whose CON had been approved by the ALC and who incurred delay costs as a result of the appeal. This ruling by the Court of Appeals has no supporting judicial precedent and is in conflict with other state and federal courts who have held that similar statutory bond penalties violate the Equal Protection Clauses.

In *Lindsey v. Normet*, 405 U.S. 56, 79 (1971), the United States Supreme Court invalidated an Oregon law that imposed a double bond on tenants bringing an appeal under the state's Forcible Entry and Wrongful Detainer ("FED") statute. Under that statute, a tenant appealing an adverse decision was required to post a bond for twice the amount of rent during the pendency of the

appeal, which was automatically forfeited to the landlord without proof of actual damage. *Id.* at 74-76. The purpose of the double bond requirement was to deter frivolous appeals. *Id.* at 76.

The Supreme Court ruled that the double bond requirement was unconstitutional under the Equal Protection Clause because no other appellant was subject to the automatic assessment of unproved damages:

The impact on FED appellants is unavoidable: if the lower court decision is affirmed, the entire double bond is forfeited; recovery is not limited to costs incurred by the appellee, rent owed, or damage suffered. No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination.

Id. at 78. Thus, the Court held that double bond requirement was discriminatory, arbitrary, and irrational and, therefore, in violation of the Equal Protection Clause. *Id.* at 79.

Relying on *Lindsey*, other courts have declared appeal bonds and penalties to be unconstitutional under the Equal Protection Clause because of their discriminatory effect on unsuccessful appellants. For example, in *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 857 (9th Cir. 1976), the Ninth Circuit Court of Appeals invalidated a double-bond requirement under the federal Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(c). Although the court recognized that the statute was intended to deter frivolous appeals, it refused to uphold the requirement, observing that "*Lindsey* expressly held that there is no rational relationship between this admittedly legitimate purpose and a double bond requirement." *O'Day*, 536 F.2d at 860.

In *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 421 (Ky. 2005), the Kentucky Supreme Court ruled that the appeal penalty imposed on money judgment appellants violated the Equal Protection Clause under *Lindsey*. The court held that the penalty was

discriminatory because it only applied to a small number of appellants without advancing the purported state interest of deterring frivolous appeals: “And, because it applies to such a narrow class. . . it violates *Lindsey*’s command that an appeal right ‘cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.’” *Elk Horn*, 163 S.W.3d at 421 (quoting *Lindsey*, 405 U.S. at 77).

Lindsey and its progeny instruct that the bond requirement under § 44-7-220(B) violates the Equal Protection Clauses of the South Carolina and United States Constitutions. The statute imposes an appeal bond on one narrow class of appellants. Unlike nearly every other appellant, an unsuccessful CON applicant must post a substantial appeal bond to obtain judicial review of a lower decision. And although the appeal bond can be so substantial that it will deter frivolous appeals, it will similarly deter non-frivolous appeals. Moreover, the amount of bond is not rationally tied to any injury suffered by a successful respondent as a result of the appeal because such respondent is automatically awarded the entire amount of the bond regardless of whether it suffered an injury.⁷ As a result, the bond requirement is not rationally related to any legitimate state interest, and even if it is, it would nevertheless be unconstitutional because it arbitrarily and irrationally imposes a penalty on unsuccessful CON appellants. Therefore, the Court should review of the Court of Appeals’ decision because the bond requirement violates the Equal Protection Clauses and is invalid.

B. The bond requirement of S.C. Code Ann. § 44-7-220(B) is unconstitutional as a violation of the separation of powers doctrine.

This case presents a novel and substantial constitutional issue regarding whether the legislature’s enactment of the bond requirement for CON appeals under S.C. Code Ann. § 44-7-

⁷ Significantly, no stay arises from Carolinas’ appeal of the ALC’s decision, and Piedmont is permitted to proceed with construction of the new hospital while this appeal is pending. It is possible that Piedmont could suffer no monetary damage as a result of the appeal and receive a windfall if it is awarded the bond.

220(B) constitutes an unconstitutional violation of the separation of powers doctrine by making rules of the court for the perfection of an appeal from an administrative decision and for an appeal bond, which is the exclusive domain of the judicial branch. In the decision below, the Court of Appeals ruled that the CON appeal bond requirement does not infringe on the constitutional mandate of separation of powers. This ruling has no supporting judicial precedent and is in conflict with other jurisdictions who have declared similar statutory appellate procedures to be constitutionally infirm under the separation of powers doctrine emanating from their respective state constitutions.⁸

The most notable decision voiding a similar bond or penalty requirement is found in *Elk Horn* which is discussed above. *Id.* at 421. In addition to declaring the penalty requirement unconstitutional under the Equal Protection Clauses of the United States and Kentucky Constitutions, the Kentucky Supreme Court also ruled that it violated Kentucky's separation of powers doctrine. *Id.* at 421-24.

In *Elk Horn*, the court noted that the Kentucky Constitution delegates exclusively to the Kentucky Supreme Court the authority to adopt rules of practice and procedure governing the state's courts and that a constitutional violation of separation of powers occurs when the legislature promulgates rules of practice and procedure for the Kentucky courts. *Id.* at 422-23. Recognizing it had established rules to deter frivolous discretionary appeals, the Kentucky Supreme Court found that the penalty imposed on an unsuccessful appellant under the statute involved in that case "deters discretionary review motions – both frivolous and meritorious – and it thereby limits or

⁸ In addition to the cases discussed below, several jurisdictions have recognized that their judiciaries have the inherent authority to promulgate rules of practice and procedure before their courts under the separation of powers doctrine. See *Sands v. Albert Pike Motor Hotel*, 245 Ark. 755, 434 S.W.2d 288 (1968); *Holliman v. State*, 175 Ga. 232, 165 S.E. 11 (1932); *People ex rel. Stamos v. Jones*, 40 Ill. 2d 62, 237 N.E.2d 495 (1968); *Waite v. Burgess*, 69 Nev. 230, 245 P.2d 994 (1952); *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922); *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990); *In re Grady*, 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

restricts the Kentucky Supreme Court in exercising its jurisdiction to review cases from lower courts.” *Id.* at 424. Accordingly, the *Elk Horn* court held that the statutory appeal penalty invaded the Kentucky Supreme Court’s exclusive power to prescribe its own rules for exercising appellate jurisdiction. *Id.*

Similarly, the Illinois Court of Appeals invalidated a statutory method for perfecting an appeal from an administrative decision that conflicted with the Illinois Supreme Court’s rules for appellate procedure under the separation of powers doctrine in *Consumers Gas Co. v. Illinois Commerce Com.*, 144 Ill. App. 3d 229, 235-36, 493 N.E.2d 1148, 1151-52 (1986). In that case, a public utility sought appellate review of the Illinois Commerce Commission’s administrative decision denying its application for a rate increase. *Id.* at 231, 493 N.E.2d at 1149. The statutory scheme enacted by the legislature for appealing decisions of the commission conflicted with the Illinois Supreme Court’s procedure for pursuing direct appellate review. *Id.* at 233, 493 N.E.2d at 1150. In deciding which appellate procedure governed the appeal, the court invoked the separation of powers doctrine to declare “judicial administration” to be one of the judiciary’s “inherent powers worthy of protection against legislative encroachment.” *Id.* at 236, 493 N.E.2d at 1152. According to the court, the separation of powers doctrine “prohibited [the legislature] from establishing procedures for obtaining an appeal bond from an administrative decision where a supreme court rule is already in place for that purpose.” *Id.* at 237, 493 N.E.2d at 1153.

Like the statutes invalidated in *Elk Horn* and *Consumers Gas*, the CON bond requirement violates the separation of powers doctrine by encroaching upon the judicial department’s exclusive authority to promulgate rules of appellate practice and procedure. Just as the Kentucky and Illinois Constitutions vest the authority to establish rules and procedure exclusively in their respective supreme courts, the South Carolina Constitution vests the same authority in the South Carolina

Supreme Court. See S.C. Const. art. 1, § 8 and art. V, § 4; see also *Rutherford v. Rutherford*, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992) (invalidating a statute that limited the Supreme Court's appellate scope of review in family court cases because the judiciary – not the legislature – has the authority to make rules for the court's practice and procedure). Pursuant to such power, the South Carolina Supreme Court has promulgated rules of procedure for the perfection of an appeal from an administrative decision⁹ and for the issuance of an appeal bond to protect a prevailing litigant from injury resulting from the delay of an appeal in appropriate circumstances¹⁰, which are similar to the rules of court adopted by the Kentucky and Illinois Supreme Courts that superseded the statutory procedures in *Elk Horn* and *Consumers Gas*.

The mandatory provisions of § 44-7-220(B) limit the courts' inherent authority to determine the terms and conditions of the bond imposed on a CON appellant. Also, this bond requirement, if not satisfied, conflicts with the existing Supreme Court rules for perfecting an appeal from an administrative decision by depriving the appellate courts' of jurisdiction over CON appeals. Therefore, the Court should grant a writ of certiorari to review whether the CON bond requirement violates of the separation of powers doctrine.

⁹ Rule 203(b)(6), (d)(2), and (e)(2), SCACR, prescribe the method for a party to appeal a CON decision from the ALC. The procedure and manner for perfecting an appeal from the ALC under Rule 203 do not require an appellant to file a bond for the Court of Appeals to exercise jurisdiction over a CON appeal.

¹⁰ The Supreme Court has established the procedure governing appeal bonds in Rule 241, SCACR. Rule 241 provides as a general rule that a notice of appeal automatically stays matters decided in the decision on appeal with certain exceptions, including appeals from an administrative tribunal. Under Rule 241(c), a party may move for a lifting of the automatic stay, or in cases subject to an exception of the automatic stay requirement, move for the imposition of supersedeas, and the appellate court may condition the granting of supersedeas or lifting of the automatic stay upon the filing of a bond as it deems appropriate. Thus, Rule 241(c) grants the appellate courts considerable discretion in determining whether an appeal bond is appropriate and, if so, what the terms, conditions, and amount of such bond should be.

C. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) unconstitutionally burdens the right to judicial review.

The bond requirement under S.C. Code Ann. § 44-7-220(B) raises novel and substantial constitutional issues regarding a CON appellant's due process rights. Article I, § 22 of the South Carolina Constitution guarantees a person appealing from an administrative or quasi-administrative agency the right to judicial review without limitation in all instances. Section 44-7-220(B) interferes with that right by requiring a substantial appeal bond as a pre-condition to any judicial review of a CON decision involving a competing applicant by the ALC. The bond requirement, thus, effectively prevents an unsuccessful CON applicant from appealing an adverse decision if it cannot afford the bond or does not want to risk the forfeiture of the bond – regardless of the merits of the prospective appeal. In other words, § 44-7-220(B) deters the exercise of the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution. Under § 44-7-220(B), there is no right to judicial review; rather, judicial review is a legislatively created privilege available only to those who are able and willing to purchase it. Therefore, the Court should grant review of the Court of Appeals' decision because the subject bond requirement constitutes an unconstitutional infringement on the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution and should be invalidated accordingly. *See Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (declaring constitutionally invalid fees and costs requirements that interfered with access to state judicial system).

CONCLUSION

For the reasons stated, Carolinas respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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April 21, 2017

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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APR 25 2018

SC Court of Appeals

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

v.

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

Of whom The Charlotte-Mecklenburg Hospital Authority,
d/b/a Carolinas Medical Center-Fort Mill is the Petitioner,
and

Amisub of South Carolina, Inc. d/b/a Piedmont Medical
Center d/b/a Fort Mill Medical Center and South Carolina
Department of Health and Environmental Control are the
Respondents.

Appellate Case No. 2017-000984

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 27792
Submitted February 14, 2018 – Filed April 25, 2018

REVERSED IN PART AND REMANDED

Douglas M. Muller, Trudy Hartzog Robertson, and E. Brandon Gaskins, of Moore & Van Allen, PLLC, all of Charleston, for Petitioner.

Stuart M. Andrews, Jr., Susanna Knox and Daniel J. Westbrook, of Nelson, Mullins, Riley & Scarborough, LLP, all of Columbia; and Ashley Caroline Biggers and Vito Michael Wicevic, both of Columbia, all for Respondents.

PER CURIAM: Petitioner seeks a writ of certiorari to review the court of appeals' decision in *Amisub of South Carolina, Inc. v. South Carolina Department of Health & Environmental Control*, Op. No. 2017-UP-013 (S.C. Ct. App. filed Jan. 11, 2017). We deny the petition for a writ of certiorari as to question III, but grant the petition as to questions I and II, dispense with further briefing, and reverse the court of appeals' finding that the dormant Commerce Clause issue was not preserved for appellate review. We remand the case to the court of appeals to issue a ruling on whether the decision of the Administrative Law Court (ALC) "interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation" in violation of the dormant Commerce Clause. See *McBurney v. Young*, 569 U.S. 221, 234-37, 133 S. Ct. 1709, 1719-20, 185 L. Ed. 2d 758, 771-72 (2013) (explaining the concept of the "dormant Commerce Clause" (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806, 96 S. Ct. 2488, 2496, 49 L. Ed. 2d 220, 229 (1976))).

To explain our ruling that the issue is preserved, we recite portions of the procedural history of this case. In 2005, four hospitals—Petitioner, Respondent Amisub, Presbyterian Healthcare System, and Hospital Partners of America—applied for a certificate of need (CON) to construct and operate an acute-care hospital in Fort Mill. In May 2006, the Department of Health and Environmental Control (DHEC) determined the acute-care hospital was necessary, and granted a CON to Amisub, but denied a CON to Petitioner and the others. DHEC's decision to award the CON to Amisub was based in part on its interpretation of the language of the South Carolina Health Plan¹ that only existing health care providers in York County were eligible for additional hospital beds. Petitioner filed a contested case at the ALC, contending DHEC had erroneously interpreted the language of the Health Plan.

¹ See generally S.C. Code Ann. § 44-7-180 (2018) (providing for the development of the South Carolina Health Plan).

Alternatively, Petitioner argued that if DHEC's interpretation was correct, the Health Plan violated the dormant Commerce Clause because it improperly restricted interstate commerce. The ALC found DHEC's interpretation of the Health Plan was not correct, reversed, and remanded to DHEC.² The ALC's determination that the Health Plan did not require the CON to be awarded to an existing York County provider made it unnecessary for the ALC to reach the alternative dormant Commerce Clause claim.

On remand, DHEC granted a CON to Petitioner, but denied a CON to the others. Amisub filed a second contested case at the ALC, which again reversed, this time ordering a CON be granted to Amisub and denied to Petitioner. Petitioner appealed to the court of appeals. The court of appeals affirmed, finding Petitioner's dormant Commerce Clause argument as to the ALC's ruling in the second contested case was unpreserved for appellate review.

Petitioner's theory that the dormant Commerce Clause issue is preserved begins with the fact that any potential violation arising from the language of the Health Plan was resolved in Petitioner's favor by the ALC in the first contested case. We find this was a reasonable interpretation of the ALC's order in the first contested case. In the second contested case, therefore, Petitioner reasonably believed the dormant Commerce Clause was not an issue. However, Petitioner contends the ALC's ruling in the second case improperly restricted interstate commerce—and thus violated the dormant Commerce Clause—not because of the language of the Health Plan, but because the ALC ruled partially on the basis that the hospital Amisub was already operating in South Carolina should be protected from out-of-state competition like Petitioner, a North Carolina entity. In other words, Petitioner contends the ALC reversed DHEC's award of a CON to Petitioner, and awarded a CON to Amisub, based on the ALC's improper desire to protect Amisub from out-of-state competition, even though the Health Plan does not provide for such protection. Petitioner argues it had no reason to anticipate this basis for the ruling, and thus it had no reason to renew its dormant Commerce Clause challenge before or during the second contested case trial. Rather, Petitioner argues it was only after it received the ALC's ruling that it realized the dormant Commerce Clause had again become an issue. At that time—Petitioner argues—it made the argument of a dormant Commerce Clause violation with clarity in a timely Rule 59(e) motion.

² We dismissed Petitioner's appeal from this decision on the ground the order was not immediately appealable. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010).

The court of appeals found "the record does not show [Petitioner] presented to the ALC any argument that [Amisub]'s positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause. [Petitioner] waited until filing its Rule 59(e) motion to present this argument, which is too late." If Petitioner had reason to believe this issue was actually being litigated before the ALC in the second contested case, and yet remained silent, we would agree with the court of appeals.³ However, the dormant Commerce Clause issues arising out of the language of the Health Plan were resolved in Petitioner's favor in the first contested case. Thus, Petitioner could not reasonably have foreseen the ALC would craft its order in a fashion to revive those issues. Therefore, Petitioner had no reason to raise the dormant Commerce Clause challenge in the second contested case until the ALC issued its order. No party should be penalized for not addressing an issue as to which it had previously prevailed, and which it did not reasonably contemplate would yet be the basis of the court's ruling. See *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (finding appellate courts should remain "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner"); *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCF, to alter or amend the judgment in order to preserve the issue for appeal.").

³ While not dispositive, we find it important that Respondents did not raise issue preservation in their briefs to the court of appeals. We also note the court of appeals specifically recognized the dormant Commerce Clause issue before it presented a different question from the one presented in the first contested case. The court of appeals stated,

[Petitioner] does not challenge the constitutionality of the CON Act itself. Further, [Petitioner] does not challenge the constitutionality of the State Health Plan or the Project Review Criteria. Rather, [Petitioner] argues the purpose and effect of the ALC's application of the CON Act, the State Health Plan, and the Project Review Criteria are to protect [Amisub] from out-of-state competition, and, therefore, such an application violates the dormant Commerce Clause.

Amisub, slip op. at 5.

Accordingly, we reverse the court of appeals' finding that the dormant Commerce Clause issue was not preserved for appellate review, and remand the case to the court of appeals for a ruling on the merits of the issue.

The parties have stressed to us the obvious point that it has been almost twelve years since DHEC made the determination an acute-care hospital was necessary in York County. For this reason, we order the court of appeals to expedite consideration of this case.

REVERSED IN PART AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

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THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

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

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

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

v.

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

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

PETITION FOR REHEARING

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Pursuant to Rules 221(a) and 240, SCACR, Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") files this Petition for Rehearing as to Opinion No. 5568 of the Court filed on June 6, 2018.

STATEMENT OF THE CASE

Carolinas filed its Notice of Appeal of the Amended Final Order of the Administrative Law Court ("ALC") with this Court on January 14, 2015. On January 11, 2017, the Court filed Opinion No. 2017-UP-013, which affirmed the Amended Final Order of the ALC, ordering Respondent South Carolina Department of Health and Environmental Control ("DHEC") to issue a Certificate of Need ("CON") to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"). In affirming the ALC's Amended Final Order, the Court made three rulings with respect to the findings made by the ALC: (1) Carolinas' dormant Commerce Clause argument was not preserved for appellate review; (2) Carolinas' bed transfer provision argument was not preserved for appellate review; and (3) the ALC's Amended Final Order was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious.

Carolinas petitioned the South Carolina Supreme Court for writ of certiorari to review the Court's decision in Opinion No. 2017-UP-013. On April 25, 2018, the Supreme Court granted Carolinas' Petition for Writ of Certiorari, reversed the Court of Appeals' finding that the dormant Commerce Clause issue was not preserved for appellate review, and remanded the case to the Court of Appeals to issue a ruling on whether the decision of the ALC violated the dormant Commerce Clause.

On June 6, 2018, the Court issued Opinion No. 5568, affirming the ALC's ruling below and concluding that the ALC's application of the CON Act and Project Review Criteria did not violate the dormant Commerce Clause. Carolinas now moves this Court for a rehearing on the Court's ruling in Opinion No. 5568.

REHEARING STANDARD

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

ARGUMENT

I. The Court failed to analyze the dormant Commerce Clause challenge under strict scrutiny.

In affirming the decision of the ALC, the Court mistakenly employs the incorrect analysis for determining whether the ALC's decision violated the dormant Commerce Clause. As recognized by the Court, a two-tiered analysis is utilized under the dormant Commerce Clause to determine whether state action is impermissibly discriminatory or unduly burdensome on interstate commerce:

The first tier of analysis is also referred to as "strict scrutiny analysis[.]" *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013) (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001)). "[A] 'less strict scrutiny' applies under the undue burden tier." *Id.* at 545 (quoting *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005)). "The putative benefits of a challenged law are evaluated under the rational basis test, . . . though 'speculative' benefits will not pass

muster[.]” *Id.* (quoting *Medigen of Ky., Inc. v. Pub. Serv. Comm’n*, 985 F.2d 164, 167 (4th Cir. 1993)).

Amisub v. S.C. Dep’t of Health & Envtl. Control, Op. No. 5568, p. 7 (S.C. Ct. App. filed June 6, 2018) (Shearhouse Adv. Sh. No. 24 at 38). Despite recognizing the two-tiered analysis, the Court incorrectly utilizes only the undue burden tier and eschews its obligation to review the ALC’s decision with strict scrutiny as required under the discrimination tier.

As the Court states, under the first tier, “a virtually *per se* rule of invalidity,” applies when a state law discriminates facially, in its practical effect, or in its purpose. *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). In order for a law to survive such scrutiny, the state must prove that the discriminatory law “is demonstrably justified by a valid factor unrelated to economic protectionism,” *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988), and that there are no “nondiscriminatory alternatives adequate to preserve the local interests at stake,” *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (quoting *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 353 (1977)). Thus, the first tier, strict scrutiny analysis employs a burden shifting framework.

In its decision, the Court acknowledges that the ALC’s application of the CON Act and Project Review Criteria had a discriminatory effect.¹ As a result, it should have

¹ See *Amisub*, Op. No. 5568 at p. 14 (“We acknowledge that the proper application of these criteria may have the effect of protecting competing providers who already have a presence in the service area, regardless of whether these providers represent in-state or out-of-state interests.”); *Id.* at p. 20 (“To the extent that the proper application of these criteria may have a discriminatory effect, Carolinas has failed to carry its burden of ‘proving that the burdens placed on interstate commerce outweigh the . . . local benefits’ of these criteria. *Colon Health*, 813 F.3d at 157 (quoting *LensCrafters*, 403 F.3d at 805).”); *Id.* at p. 21 (“To the extent that the proper application of the Project Review Criteria may have a discriminatory effect, “[c]ourts are afforded some latitude to determine for themselves the practical impact of a state law, but in doing so they must not cripple the States’ ‘authority under their general

engaged in the strict scrutiny burden shifting analysis and required Respondents to prove that the CON Act and Project Review Criteria served a legitimate local interest and that there were no nondiscriminatory alternatives available to preserve that interest. Instead, the Court incorrectly maintains the burden on Carolinas to prove that the burdens of the CON Act and Project Review Criteria placed on interstate commerce outweigh their local benefits.² By imposing this burden on Carolinas, the Court clearly applies only the rational basis undue burden tier and not the strict scrutiny tier, which is in error.

The Court's failure to conduct the strict scrutiny analysis is demonstrated most clearly by the absence of any discussion relating to whether nondiscriminatory alternatives were available to serve the putative local interests recognized by the Court. In affirming the ALC's rationale, the Court articulates various local interests advanced by the ALC's application of the CON Act and Project Review Criteria, such as reducing patient travel time and continuing provision of specialty services. However, after identifying these local interests, the Court concludes its analysis without assessing whether such interests could be served through other nondiscriminatory measures. And by failing to conduct the final part of the strict scrutiny test, the Court misapplies the dormant Commerce Clause analysis.

Rather than completing the proper strict scrutiny analysis, the Court repeatedly invokes one sentence from the United States Supreme Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), to conclude that the ALC's application of the CON Act and Project

police powers to regulate matters of legitimate local concern.” *Colon Health*, 813 F.3d at 152 (quoting *Taylor*, 477 U.S. at 138).”).

² See *Amisub*, Op. No. 5568 at p. 20 (“To the extent that the proper application of these criteria may have a discriminatory effect, Carolinas has failed to carry its burden of “proving that the burdens placed on interstate commerce outweigh the . . . local benefits” of these criteria. *Colon Health*, 813 F.3d at 157 (quoting *LensCrafters*, 403 F.3d at 805)”).

Review Criteria did not violate the dormant Commerce Clause. Specifically, the Court, quoting *Taylor*, states on multiple occasions in its decision that “[a]s long as a State does not needlessly obstruct interstate trade . . . , it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.” *Amisub*, Op. No. 5568 at pp. 6, 14, & 17. According to the Court, the ALC’s stated purpose of reducing outmigration of patients from York County into North Carolina and other areas was not violative of the dormant Commerce Clause because it was not “needless”. *Amisub*, Op. No. 5568 at p. 17.

The Court’s reliance on one statement from *Taylor*, divorced from the other considerations of the Supreme Court, oversimplifies the dormant Commerce Clause analysis. In *Taylor*, the United States Supreme Court ruled that a Maine law prohibiting the importation of live baitfish from other states did not violate the dormant Commerce Clause, but it did so only after conducting the full strict scrutiny analysis and determining that the local purposes of the prohibition “could not adequately be served by available nondiscriminatory alternatives.” *Taylor*, 477 U.S. at 151. Significantly, the Supreme Court found the evidentiary record developed at the trial court level “amply” supported this conclusion. *Id.* As such, the Supreme Court deferred to the district court’s determination that the State of Maine had proven a lack of nondiscriminatory alternatives.

Taylor demonstrates that the dormant Commerce Clause strict scrutiny test requires analysis of whether nondiscriminatory alternatives exist to serve the legitimate local purposes of discriminatory state action. Contrary to the Supreme Court in *Taylor*, though, this Court fails to assess whether other nondiscriminatory alternatives were available to serve the purported legitimate local interests. If it does so, the Court should necessarily

concluded that, based on the record before it, no nondiscriminatory alternatives were available because the ALC refused to identify any such alternatives.³ And as a result, the Court incorrectly concludes that the ALC's decision did not violate the dormant Commerce Clause.

II. Carolinas' reply brief did not raise new issues.

The Court also errs by refusing to consider certain arguments made by Carolinas in its reply brief. According to the Court, Carolinas did not raise in its main appellate brief the argument that there was not sufficient evidence to justify the ALC's purported purpose of maintaining certain healthcare services in York County under the strict scrutiny analysis. Therefore, the Court does not consider this argument. However, the Court misapprehends the nature of Carolinas' arguments made in the reply brief, which were directly in rebuttal to Piedmont's arguments in its initial brief and an elaboration of its larger argument that the ALC did not engage in the proper analysis required under the dormant Commerce Clause.

In its main appellate brief, Carolinas argued that the dormant Commerce Clause requires a two-tiered analysis: (1) the strict scrutiny discrimination test and (2) the rational basis undue burden test. Carolinas further argued in its main appellate brief that the ALC dismissed Carolinas' dormant Commerce Clause challenge in conclusory fashion with a mere footnote without conducting any analysis under the applicable legal standard, i.e. the two-tiered analysis. Because the ALC did not conduct any analysis under the strict scrutiny discrimination test, it did not make any conclusions regarding whether its application of

³ As explained in more detail in Section II below and in Carolinas' previous appellate briefs, the ALC dismissed Carolinas' dormant Commerce Clause challenge in a one-paragraph footnote, which contained no analysis under the discrimination or undue burden tests.

the CON Act and Project Review Criteria served a legitimate local interest or whether such interest could be adequately served through nondiscriminatory alternatives. As such, Carolinas could not address these elements of the discrimination test beyond noting that the ALC did not conduct the proper analysis.

In its main appellate brief, Piedmont was faced with the ALC's lack of analysis under the discrimination test. As a result, Piedmont attempted to correct the ALC's failure to engage in such analysis by arguing that the ALC's ruling served legitimate state purposes connected to the CON Act as required to survive constitutional muster under the discrimination tier. Piedmont also argued that "those purposes could not be served as well by other available means" and then suggested that it was Carolinas' burden to demonstrate that other nondiscriminatory alternatives existed to serve those purposes, which is incorrect.

Piedmont's main appellate brief identified for the first time the local interests which were supposedly served by the ALC's discriminatory application of the CON Act and Project Review Criteria and argued that Carolinas had not shown that nondiscriminatory alternatives existed. In its reply brief, Carolinas directly rebutted Piedmont's arguments by demonstrating how the ALC's decision did not serve any legitimate local purpose and that the ALC had failed to consider reasonable nondiscriminatory alternatives to its discriminatory application of the CON Act and Project Review Criteria. These arguments in the reply brief, which this Court refuses to consider, are directly responsive to Piedmont's arguments and entirely consistent with Carolinas' previous argument that the ALC failed to conduct the appropriate dormant Commerce Clause analysis.

In applying the rule prohibiting an appellant from raising an argument in a reply brief that presents a new issue, the Court overlooks the fact that Piedmont had raised the issues of legitimate local interest and nondiscriminatory alternatives in its initial brief. Although South Carolina courts have not explained how a “new issue” is determined under this rule, decisions from other jurisdictions show that a new issue does not include rebuttal arguments made in reply to the respondent or arguments elaborating on previously raised issues. *See, e.g., Guadagni v. N.Y.C Transit Auth.*, 387 Fed.App’x. 124, 125-26 (2nd Cir. 2010) (“[R]eple papers may properly address new material issues raised in the opposition papers so as to avoid giving unfair advantage to the answering party.”) (quoting *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 226-27 (2nd Cir. 2000)); *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258, 275-76, 173 Cal. Rptr. 3d 544, 558 (2014) (“An issue is new if it does more than elaborate on issues raised in the opening brief or rebut arguments made by the respondent in respondent’s brief.”); *Spring v. Wick*, 2014 Ohio 2879, ¶ 13 (Ohio Ct. App. 11th App. Dist. 2014) (providing reply briefs are to be used “to rebut arguments raised in an appellee’s brief”); *State v. Tucker*, 145 N.H. 723, 725, 765 A.2d 1058, 1061 (2001) (stating that an argument in rebuttal to a responding brief “is appropriate for a reply brief”).⁴ The rule as applied in other jurisdictions appears to be consistent with the import of the language used to state the rule in this case, which only prohibits new issues – as distinguished from new arguments – from being raised in a reply brief.

⁴ Additionally, courts should be reluctant to disregard separate arguments in support of a single constitutional claim. *See Yee v. Escondido*, 503 U.S. 519, 534-35 (1992) (rejecting contention that new argument in support of a constitutional claim was not preserved because parties are generally permitted to frame constitutional questions as they desire).

Because Carolinas' arguments directly rebut Piedmont's arguments that the ALC's application of the CON Act and Project Review Criteria satisfied the strict scrutiny test as well as elaborate on the argument made in its initial brief that the ALC did not conduct the appropriate dormant Commerce Clause analysis, they do not raise any new issues. As a result, these arguments should be considered by the Court.

III. The ALC's decision discriminatorily interfered with interstate commerce, regardless of Piedmont's relationship with out-of-state corporate affiliates and Carolinas' in-state business activities.

In affirming the ALC's decision, the Court also misapprehends the import of the ALC's stated purpose of limiting patients who would receive care at Carolinas' hospitals in North Carolina. The Court disregards Carolinas' argument that the ALC discriminatorily sought to limit the number of York County residents who would seek hospital care in North Carolina by stating:

As to Carolinas' argument that the ALC's application of the community need criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market," we disagree. Carolinas' characterization of Piedmont as an "in-state" or local interest is disingenuous. Both parties own multiple hospitals in multiple states, including South Carolina.

Amisub, Op. No. 5568 at p. 19. In so doing, the Court misconstrues the applicable dormant Commerce Clause jurisprudence as well as South Carolina law that generally prevents courts from disregarding corporate entities.

First, Carolinas' existing physician network in York County and small ownership interest in another hospital in Charleston, South Carolina, has little – if any – relevance to the dormant Commerce Clause analysis in this case. Carolinas' business activities in South Carolina do not negate the fact that the stated purpose of the ALC's decision was to reduce the number of patients engaging in interstate commerce by obtaining healthcare in North

Carolina. *See, e.g.*, Am. Final Order, Conclusions of Law ¶ 45 (“This Court concludes that the establishment of FMMC will best serve the needs by reducing outmigration of York County residents to hospitals beyond York County.”); (R. p. 124). Put simply, Carolinas desires to expand its business activities in York County, and the ALC restricted Carolinas’ ability to do so on the alleged basis that its new hospital would potentially result in more York County patients being referred to North Carolina hospitals. This is *per se* discriminatory, and Carolinas’ existing business activities in South Carolina do not alter that conclusion.

The Eleventh Circuit Court of Appeals decision in *Florida Transp. Servs. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012), illustrates this point aptly. In that case, Florida Transportation Services (“FTS”), a stevedoring firm, challenged Miami-Dade County’s stevedoring licensing ordinance under the dormant Commerce Clause. The county argued that FTS lacked standing under the dormant Commerce Clause because FTS was a resident of Florida and performed stevedoring services in a neighboring county. The Eleventh Circuit rejected this argument, declaring that FTS’s residency in Florida did not preclude it from making a dormant Commerce Clause challenge because “the courts have reached the merits of numerous dormant Commerce Clause cases involving in-state parties, and an entire body of dormant Commerce Clause jurisprudence reflects the disposition of such cases on the merits.” *Id.* at 1256 (citations omitted). In addition, the *Florida Transp. Servs.* court recognized that “the dormant Commerce Clause may bar municipal laws that protect local economic interests and squelch outside competition, even where in-state and out-of-state companies are affected.” *Id.* (citations omitted). Yet despite citing *Florida Transp. Servs.* in its opinion, the Court mistakenly relied on Carolinas’ business activities

in South Carolina to justify as nondiscriminatory the ALC's attempt to restrict the flow of patients in interstate commerce.

Second, in its attempt to minimize the discriminatory nature of the ALC's decision, the Court disregards Piedmont's corporate form in disregard of South Carolina law. Under applicable law, a corporation is an entity that is separate and distinct from its officers and stockholders, and courts should be reluctant to disregard the integrity of the corporate entity. *Hunting v. Elders*, 359 S.C. 217, 223-24, 597 S.E.2d 803, 806 (Ct. App. 2004). Nevertheless, the Court disregards these principles and considers Piedmont's relationship with its parent corporation and affiliated hospitals in other states to reject Piedmont's status as an in-state or local interest.

According to the Court, the fact that Piedmont is a subsidiary of an out-of-state company, which owns hospitals in other states, renders Carolinas' argument that Piedmont is an "in-state" or local interest as disingenuous. However, the Court overlooks that it was Piedmont – not Carolinas – which utilized a litigation strategy of depicting Piedmont as the local provider under siege from Carolinas, which Piedmont's attorney referred to as a "big, rich, powerful, aggressive hospital system right over the state line." (R. p. 295). According to Piedmont, Carolinas "has been taking patients, paying patients out of the Fort Mill area over into North Carolina and providing them, steering them for hospital services." (R. p. 296). Thus, Piedmont focused on its presence in York County and Carolinas' status as a North Carolina provider to convince the ALC to award the CON to Piedmont. The ALC obviously adopted Piedmont's arguments by expressly seeking to keep York County patients in-state at Piedmont and out of North Carolina. *See, e.g.*, Final Order, Conclusions of Law ¶ 43 ("This Court concludes that the establishment of FMMC will best serve the

needs by reducing outmigration of York County residents to North Carolina hospital.") (emphasis added); (R. p. 71). Therefore, Carolinas' argument that Piedmont is an in-state or local interest is legally correct and accurately reflects Piedmont's and the ALC's characterization of Piedmont as a local provider needing protection from competition from an out-of-state healthcare system.

CONCLUSION

For the aforementioned reasons, Carolinas requests that the Court order a rehearing as prayed above, reverse the Court's decision in Opinion No. 5568 filed on June 6, 2018, and reverse the ALC's Amended Final Order.

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June 21, 2018

COPY

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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SC Court of Appeals

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

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

v.

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

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
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June 21, 2018
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Of whom The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas
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**RESPONDENT AMISUB OF SOUTH CAROLINA, INC.'S RETURN TO
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I. INTRODUCTION

Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center (“Piedmont”) submits this Return to the Petition for Rehearing filed by Appellant, Charlotte-Mecklenberg Hospital Authority (“CHS” or “Carolinas”). In its Petition, CHS identifies three general arguments it believes this Court overlooked or misapprehended, justifying a rehearing under Rule 221, SCACR. To put these arguments in context, it is important to re-emphasize two points. First, CHS has not challenged any findings of fact by the Administrative Law Court (“ALC”). Second, CHS has not challenged state law, only what it believes is the ALC’s misapplication of state law. In particular, CHS contends that the ALC misapplied the law with respect to the health planning concept of adverse impact. The principle of adverse impact, however, permeates the South Carolina CON Act, regulations, and State Health Plan. *See* Amisub Final Brief at 8-14. In this case, the ALC applied the principle of adverse impact in a manner completely consistent with the requirements of state law, which, as noted, CHS has not challenged.

II. ARGUMENT

A. The Court Correctly Found that the ALC Order Was Neither Discriminatory nor Unduly Burdensome.

CHS mistakenly assumes that a court must fully analyze a dormant Commerce Clause case under *both* the discrimination test and the undue burden test. In fact, what a court must do is first determine a threshold question: is the challenged law – or, in this case, the alleged misapplication of law – discriminatory. If so, the discrimination test applies. If not, the discrimination test is irrelevant, and the undue burden test applies. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986) (“*Once a state law is shown to discriminate against interstate commerce*” the discrimination test is applied.).

While that seems to be a clear and simple analytical framework, its application requires flexibility. Although worded differently, the two tests “are not separated by a bright line.” *Colon Health Centers of America, LLC v. Hazel*, 2014 WL 5430973 at *5 (E.D.Va. 2014) (“*Colon Health Ctrs. II*”). “While these rules are easy to recite, their application to a particular factual setting is often difficult.” *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). As a result, “the Supreme Court has cautioned that the dormant Commerce Clause inquiry should be undertaken by ‘eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects.’” *Walgreen* at 55 (quoting *West Lynn Creamery v. Healy*, 512 U.S. 186 201 (1994)). Both the discrimination and undue burden tests are “fact-based.” *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (“*Colon Health Ctrs. I*”).

In its Petition for Rehearing, CHS mistakenly argues that this Court, in its June 6, 2018, Order affirming the ALC decision (the “June 6 Order” or “Op. No. 5568”), made a threshold finding of discrimination, yet failed to apply the discrimination test. In support of its conclusion that this Court made a finding of discrimination, CHS relies on two sentences from the June 6 Order:

- 1) “We acknowledge that ***the proper application*** of these criteria ***may*** have the effect of protecting competing providers who already have a presence in the service area, ***regardless of whether these providers represent in-state or out-of-state interests.***” Pet. for Rehearing at 4, citing *Amisub*, Op. No. 5568 at 14 (emphasis added).
- 2) “***To the extent that the proper application*** of these criteria ***may*** have a discriminatory effect, Carolinas has failed to carry its burden of ‘proving that the burdens placed on interstate commerce outweigh the...local benefits’ of these criteria.” *Id.*, citing *Amisub*, Op. No. 5568 at 20 (emphasis added).

Neither of the statements quoted above reflects a finding of discrimination by the ALC in its application of state law. Both statements speak to the “proper” application of state law. But CHS has not challenged the *proper* application of state law, only its *improper* application.

Moreover, both quoted statements are qualified: the proper application of certain criteria “may” (or may not) have an effect. The first statement is qualified even further: the “proper” application of certain criteria “may” have an effect, but that effect is without regard (or indiscriminate) to whether the affected providers represent “in-state or out-of-state interests.” This cannot be a finding of discrimination, a term which, in the context of the dormant Commerce Clause, is defined as the “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 99 (1994). *See also* June 6 Order at 15 (“Carolinas first argues that the goal of reducing patient outmigration to North Carolina discriminates against and burdens interstate commerce. We disagree.”); Amisub Final Brief at 19-29 (discussing whether the ALC’s application of state law was discriminatory).

Since this Court did not make a finding of discrimination, the appropriate test to employ was the undue burden test. That test is set forth in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970): where a law or its application by a court “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Under the undue burden test, CHS has failed to show that the incidental effects on interstate commerce of the ALC’s proper application of state law outweigh the putative health benefits to the public. *See* Amisub Final Brief at 31-32 (discussing application of undue burden test).¹

In analyzing undue burden, a court must bear in mind that the Constitution “never intended to cut the States off from legislating on all subjects relating to the health, life, and safety

¹ Even if the Court had made a finding of discrimination, which it did not, the ALC’s application of state law in this case would also pass the discrimination test. *See* Amisub Final Brief at 29-30.

of their citizens, though the legislation might indirectly affect the commerce of the country.” *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960). Indeed, “incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). Consequently, “when evaluating state health and safety regulations, courts ‘must give deference to the State’s choice to protect its citizens in [a certain] way’ when evaluating the putative local benefits of the law.” *Yakima Valley Mem. Hosp. v. Washington State Dept. of Health*, 2012 WL 2720874 at *3-4 (E.D. Wash. 2012) (quoting *Nat’l Ass’n of Optoms. & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009)).

The deference courts give the states in matters of health regulation is not limited to the undue burden test. In *Maine v. Taylor*, a dormant Commerce Clause case in which the Supreme Court upheld a state law under the discrimination test, the Court reasoned that “[a]s long as a State does not *needlessly* obstruct interstate trade...it retains broad regulatory authority to protect the health and safety of its citizens.” *Maine v. Taylor*, 477 U.S. at 151 (emphasis added). This Court’s reliance on the sentence quoted above is entirely consistent with Supreme Court guidance that courts must give states deference in all Commerce Clause challenges involving the regulation of public health.

B. This Court Considered and Rejected Arguments Untimely Raised in CHS’s Reply.

In its reply brief, CHS raised at least two arguments for the first time:

- 1) “The ALC’s ruling fails to demonstrate that [the] purpose [of maintaining needed healthcare services in York County] is supported by sufficient evidence under the strict scrutiny analysis.”
- 2) “Piedmont presented no specific evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON.”

CHS Reply at 9.

In the June 6 Order, the Court correctly noted: “Because Carolinas did not raise these arguments in its main appellate brief, we need not consider them.” June 6 Order at 17, n.11. CHS criticizes the Court for “refusing to consider” these arguments and cites several cases from other jurisdictions for the proposition that arguments raised first in reply are not the same as new issues and are therefore preserved for appeal. *See* Pet. for Rehearing at 9, citing *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (2001). *See also* *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (“An appellant may not use...the reply brief as a vehicle to argue issues not argued in the appellant’s brief.”).

Whether CHS raised its arguments in a timely fashion, however, is a moot point. Although the Court found it “need not consider them,” it did so, anyway. After summarizing the trial testimony of Piedmont witness Arun Adlakha, M.D., the Court concluded that “Carolinas’ allegations are simply unfounded.” June 6 Order at 17, n.11.

C. The Court Appropriately Considered the In-State and Out-of-State, Local and Non-Local Interests of CHS and Piedmont.

CHS contends that because the ALC decision discriminated against interstate commerce, the in-state and out-of-state, local and non-local economic interests of the parties are irrelevant. Pet. for Rehearing at 10. As previously noted, however, the Court found that the ALC’s application of state law did *not* discriminate against interstate commerce. *See supra* at 3-4. In reaching that conclusion, it was necessary for the Court to consider benefits and burdens the ALC decision places on in-state, out-of-state, local, and non-local interests. *See Oregon Waste Sys. Inc.*, 511 U.S. at 99 (defining “discrimination” as the “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter”). Under such an analysis, it was completely appropriate for the Court to consider that the parties hardly fit the typical models of insider and outsider. Piedmont’s corporate parent is a national

healthcare system based in Texas. Carolinas, based in Charlotte, has ownership and management interests in several South Carolina health care facilities, including one in York County. Amisub Final Brief at 23. Such facts are obviously relevant to an analysis related to discrimination against interstate commerce.

The “fulcrum” of a dormant Commerce Clause analysis is whether the law “erects a special barrier to market entry by non-domestic entities.” *Colon Health Ctrs. I* at 546. The ALC order erects no such barriers. CHS could have been awarded the CON if it had convinced the ALC it would: (a) provide specialized, tertiary services at its new hospital, or (b) ensure that Piedmont would be able to continue providing such services. CHS did neither. Had there been a third competing applicant, its application would have been reviewed under state law in the same manner. Regardless of its location, headquarters, or state of incorporation, under the South Carolina CON Act, regulations, and State Health Plan, a third applicant would not have been approved if, like CHS, its impact would have been to decrease or eliminate local healthcare services. This would be true even if the third applicant were a major, South Carolina hospital system. *See* June 6 Order at 17, n.10; *see also Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473, n. 17 (1981) (upholding state law against a dormant Commerce Clause challenge, in part because “[t]he existence of major in-state interests adversely affected by [a state law] is a powerful safeguard against legislative abuse”).

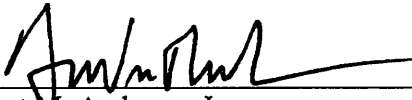
CHS repeatedly mischaracterizes the purpose of the ALC decision as reducing the number of patients obtaining health care services in North Carolina. “Put simply,” writes CHS, “the ALC restricted Carolinas’ [business activities in York County] on the alleged basis that its new hospital would potentially result in more York County patients being referred to North Carolina hospitals. This is *per se* discriminatory.” Pet. for Rehearing at 11. Put simply, CHS is

wrong. The ALC denied CHS's CON application on the basis of uncontested factual findings that approval of the application would jeopardize Piedmont's continuing ability to provide high-quality, specialized health services in York County; that the new CHS hospital would restrict admissions of Medicaid and indigent patients; and that the result would be decreased access to services for county residents, especially the medically underserved. R. pp. 96-99, 110, see June 6 Order at 15-18.² Such a result is entirely inconsistent with the purposes of the CON Act.

III. CONCLUSION

The CON applications at issue were filed with DHEC in 2005. York County is still without a new hospital. For all reasons set forth above, Piedmont respectfully requests this Court to deny the Petition for Rehearing.

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July 26, 2018

² CHS argues that the Court failed to consider *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012), but that decision has virtually no relevance to the case at hand. *Florida Transportation* did not involve the provision of healthcare services but rather the provision of stevedore permits under a county ordinance, which the court invalidated. Nothing in the decision suggested invalidation of the ordinance would result in the loss or reduction of stevedore or any other local services. See Amisub Final Brief at 28.

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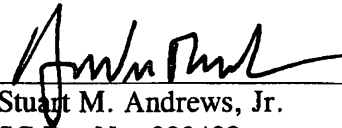
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**RESPONDENT AMISUB OF SOUTH CAROLINA, INC.'S AMENDED RETURN TO
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Center.*

I. INTRODUCTION

Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center (“Piedmont”) submits this Return to the Petition for Rehearing filed by Appellant, Charlotte-Mecklenberg Hospital Authority (“CHS” or “Carolinas”). In its Petition, CHS identifies three general arguments it believes this Court overlooked or misapprehended, justifying a rehearing under Rule 221, SCACR. To put these arguments in context, it is important to re-emphasize two points. First, CHS has not challenged any findings of fact by the Administrative Law Court (“ALC”). Second, CHS has not challenged state law, only what it believes is the ALC’s misapplication of state law. In particular, CHS contends that the ALC misapplied the law with respect to the health planning concept of adverse impact. The principle of adverse impact, however, permeates the South Carolina CON Act, regulations, and State Health Plan. *See* Amisub Final Brief at 8-14. In this case, the ALC applied the principle of adverse impact in a manner completely consistent with the requirements of state law, which, as noted, CHS has not challenged.

II. ARGUMENT

A. The Court Correctly Found that the ALC Order Was Neither Discriminatory nor Unduly Burdensome.

CHS mistakenly assumes that a court must fully analyze a dormant Commerce Clause case under *both* the discrimination test and the undue burden test. In fact, what a court must do is first determine a threshold question: is the challenged law – or, in this case, the alleged misapplication of law – discriminatory. If so, the discrimination test applies. If not, the discrimination test is irrelevant, and the undue burden test applies. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986) (“*Once a state law is shown to discriminate against interstate commerce*” the discrimination test is applied.).

While that seems to be a clear and simple analytical framework, its application requires flexibility. Although worded differently, the two tests “are not separated by a bright line.” *Colon Health Centers of America, LLC v. Hazel*, 2014 WL 5430973 at *5 (E.D.Va. 2014) (“*Colon Health Ctrs. II*”). “While these rules are easy to recite, their application to a particular factual setting is often difficult.” *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). As a result, “the Supreme Court has cautioned that the dormant Commerce Clause inquiry should be undertaken by ‘eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects.’” *Walgreen* at 55 (quoting *West Lynn Creamery v. Healy*, 512 U.S. 186 201 (1994)). Both the discrimination and undue burden tests are “fact-based.” *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (“*Colon Health Ctrs. I*”).

In its Petition for Rehearing, CHS mistakenly argues that this Court, in its June 6, 2018, Order affirming the ALC decision (the “June 6 Order” or “Op. No. 5568”), made a threshold finding of discrimination, yet failed to apply the discrimination test. In support of its conclusion that this Court made a finding of discrimination, CHS relies on two sentences from the June 6 Order:

- 1) “We acknowledge that ***the proper application*** of these criteria ***may*** have the effect of protecting competing providers who already have a presence in the service area, ***regardless of whether these providers represent in-state or out-of-state interests.***” Pet. for Rehearing at 4, citing *Amisub*, Op. No. 5568 at 14 (emphasis added).
- 2) “***To the extent that the proper application*** of these criteria ***may*** have a discriminatory effect, Carolinas has failed to carry its burden of ‘proving that the burdens placed on interstate commerce outweigh the...local benefits’ of these criteria.” *Id.*, citing *Amisub*, Op. No. 5568 at 20 (emphasis added).

Neither of the statements quoted above reflects a finding of discrimination by the ALC in its application of state law. Both statements speak to the “proper” application of state law. But CHS has not challenged the *proper* application of state law, only its *improper* application.

Moreover, both quoted statements are qualified: the proper application of certain criteria “may” (or may not) have an effect. The first statement is qualified even further: the “proper” application of certain criteria “may” have an effect, but that effect is without regard (or indiscriminate) to whether the affected providers represent “in-state or out-of-state interests.” This cannot be a finding of discrimination, a term which, in the context of the dormant Commerce Clause, is defined as the “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994). *See also* June 6 Order at 15 (“Carolinas first argues that the goal of reducing patient outmigration to North Carolina discriminates against and burdens interstate commerce. We disagree.”); Amisub Final Brief at 19-29 (discussing whether the ALC’s application of state law was discriminatory).

Since this Court did not make a finding of discrimination, the appropriate test to employ was the undue burden test. That test is set forth in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970): where a law or its application by a court “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Under the undue burden test, CHS has failed to show that the incidental effects on interstate commerce of the ALC’s proper application of state law outweigh the putative health benefits to the public. *See* Amisub Final Brief at 31-32 (discussing application of undue burden test).¹

In analyzing undue burden, a court must bear in mind that the Constitution “never intended to cut the States off from legislating on all subjects relating to the health, life, and safety

¹ Even if the Court had made a finding of discrimination, which it did not, the ALC’s application of state law in this case would also pass the discrimination test. *See* Amisub Final Brief at 29-30.

of their citizens, though the legislation might indirectly affect the commerce of the country.” *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960). Indeed, “incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). Consequently, “when evaluating state health and safety regulations, courts ‘must give deference to the State’s choice to protect its citizens in [a certain] way’ when evaluating the putative local benefits of the law.” *Yakima Valley Mem. Hosp. v. Washington State Dept. of Health*, 2012 WL 2720874 at *3-4 (E.D. Wash. 2012) (quoting *Nat’l Ass’n of Optoms. & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009)).

The deference courts give the states in matters of health regulation is not limited to the undue burden test. In *Maine v. Taylor*, a dormant Commerce Clause case in which the Supreme Court upheld a state law under the discrimination test, the Court reasoned that “[a]s long as a State does not *needlessly* obstruct interstate trade...it retains broad regulatory authority to protect the health and safety of its citizens.” *Maine v. Taylor*, 477 U.S. at 151 (emphasis added). This Court’s reliance on the sentence quoted above is entirely consistent with Supreme Court guidance that courts must give states deference in all Commerce Clause challenges involving the regulation of public health.

B. This Court Considered and Rejected Arguments Untimely Raised in CHS’s Reply.

In its reply brief, CHS raised at least two arguments for the first time:

- 1) “The ALC’s ruling fails to demonstrate that [the] purpose [of maintaining needed healthcare services in York County] is supported by sufficient evidence under the strict scrutiny analysis.”
- 2) “Piedmont presented no specific evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON.”

CHS Reply at 9.

In the June 6 Order, the Court correctly noted: “Because Carolinas did not raise these arguments in its main appellate brief, we need not consider them.” June 6 Order at 17, n.11, citing *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (2001). See also *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (“An appellant may not use...the reply brief as a vehicle to argue issues not argued in the appellant’s brief.”). CHS criticizes the Court for “refusing to consider” these arguments and cites several cases from other jurisdictions for the proposition that arguments raised first in reply are not the same as new issues and are therefore preserved for appeal. See Pet. for Rehearing at 9.

Whether CHS raised its arguments in a timely fashion, however, is a moot point. Although the Court found it “need not consider them,” it did so, anyway. After summarizing the trial testimony of Piedmont witness Arun Adlakha, M.D., the Court concluded that “Carolinas’ allegations are simply unfounded.” June 6 Order at 17, n.11.

C. The Court Appropriately Considered the In-State and Out-of-State, Local and Non-Local Interests of CHS and Piedmont.

CHS contends that because the ALC decision discriminated against interstate commerce, the in-state and out-of-state, local and non-local economic interests of the parties are irrelevant. Pet. for Rehearing at 10. As previously noted, however, the Court found that the ALC’s application of state law did *not* discriminate against interstate commerce. See *supra* at 3-4. In reaching that conclusion, it was necessary for the Court to consider benefits and burdens the ALC decision places on in-state, out-of-state, local, and non-local interests. See *Oregon Waste Sys. Inc.*, 511 U.S. at 99 (defining “discrimination” as the “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter”). Under such an analysis, it was completely appropriate for the Court to consider that the parties hardly

fit the typical models of insider and outsider. Piedmont's corporate parent is a national healthcare system based in Texas. Carolinas, based in Charlotte, has ownership and management interests in several South Carolina health care facilities, including one in York County. Amisub Final Brief at 23. Such facts are obviously relevant to an analysis related to discrimination against interstate commerce.

The "fulcrum" of a dormant Commerce Clause analysis is whether the law "erects a special barrier to market entry by non-domestic entities." *Colon Health Ctrs. I* at 546. The ALC order erects no such barriers. CHS could have been awarded the CON if it had convinced the ALC it would: (a) provide specialized, tertiary services at its new hospital, or (b) ensure that Piedmont would be able to continue providing such services. CHS did neither. Had there been a third competing applicant, its application would have been reviewed under state law in the same manner. Regardless of its location, headquarters, or state of incorporation, under the South Carolina CON Act, regulations, and State Health Plan, a third applicant would not have been approved if, like CHS, its impact would have been to decrease or eliminate local healthcare services. This would be true even if the third applicant were a major, South Carolina hospital system. See June 6 Order at 17, n.10; see also *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473, n. 17 (1981) (upholding state law against a dormant Commerce Clause challenge, in part because "[t]he existence of major in-state interests adversely affected by [a state law] is a powerful safeguard against legislative abuse").

CHS repeatedly mischaracterizes the purpose of the ALC decision as reducing the number of patients obtaining health care services in North Carolina. "Put simply," writes CHS, "the ALC restricted Carolinas' [business activities in York County] on the alleged basis that its new hospital would potentially result in more York County patients being referred to North

Carolina hospitals. This is *per se* discriminatory.” Pet. for Rehearing at 11. Put simply, CHS is wrong. The ALC denied CHS’s CON application on the basis of uncontested factual findings that approval of the application would jeopardize Piedmont’s continuing ability to provide high-quality, specialized health services in York County; that the new CHS hospital would restrict admissions of Medicaid and indigent patients; and that the result would be decreased access to services for county residents, especially the medically underserved. R. pp. 96-99, 110, see June 6 Order at 15-18.² Such a result is entirely inconsistent with the purposes of the CON Act.

III. CONCLUSION

The CON applications at issue were filed with DHEC in 2005. York County is still without a new hospital. For all reasons set forth above, Piedmont respectfully requests this Court to deny the Petition for Rehearing.

[SIGNATURE ON FOLLOWING PAGE]

² CHS argues that the Court failed to consider *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012), but that decision has virtually no relevance to the case at hand. *Florida Transportation* did not involve the provision of healthcare services but rather the provision of stevedore permits under a county ordinance, which the court invalidated. Nothing in the decision suggested invalidation of the ordinance would result in the loss or reduction of stevedore or any other local services. See Amisub Final Brief at 28.

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Columbia, South Carolina
July 26, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM THE ADMINISTRATIVE LAW COURT JUL 26 2018
The Honorable S. Phillip Lenski, Administrative Law Judge

SC Court of Appeals

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

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

v.

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

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

PROOF OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter
with a copy of the foregoing *Amended Return to Petition for Rehearing* by U.S. Mail,
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July 26, 2018

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
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and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill Respondents,

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

**RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL'S
RETURN TO APPELLANT'S PETITION FOR REHEARING**

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I. INTRODUCTION

Respondent South Carolina Department of Health and Environmental Control (“Department”) submits this Return to the Petition for Rehearing filed by Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (“Carolinas”). Carolinas seeks review of the Court of Appeals’ Opinion No. 5568, filed June 6, 2018, finding no dormant Commerce Clause violation and affirming the Amended Final Order of the Administrative Law Court (“ALC”). Carolinas did not challenge the law itself, only the ALC’s application of the law to the facts. The Court of Appeals properly found the ALC applied the law correctly and without a discriminatory purpose. The Court of Appeals applied the appropriate test in its dormant Commerce Clause analysis based on its finding of no discrimination. Carolinas’ Petition for Rehearing should be denied.

II. ARGUMENTS

A. The Court appropriately analyzed the dormant Commerce Clause challenge.

After reciting a concise primer on the dormant Commerce Clause, the Court of Appeals correctly applied the two-tiered analysis to Carolinas’ challenge. Carolinas confuses this Court’s answer to the first question of the analysis – i.e., did the ALC’s application of the Certificate of Need (“CON”) Act, Health Plan, and project review criteria “discriminate[] facially, in its practical effect, or in its purposes” against interstate commerce. *Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996). In correctly answering that question, the Court found in the negative.

Specifically, the Court found the ALC’s application of the CON Act and project review criteria was “proper,” “thoughtful and correct,” and “without any discriminatory purpose.” See *Amisub*, Op. No. 5568 at pp. 5, 14, 20, and 21. Further, the Court “disagree[d]” with Carolinas’

argument that the ALC's application of the Need criteria (2(a), 2(b), 2(C), and 2(e)) discriminates against interstate commerce. *Id.* at p. 19. Carolinas erroneously relies upon the Court's heavily *qualified* discussion of the potential effects that proper application of the project review criteria *may* have on interstate commerce.¹

In correctly concluding the ALC's application of the CON Act, Health Plan, and project review criteria did not discriminate facially, in its practical effect, or in its purposes, the Court appropriately moved to the second tier of the dormant Commerce Clause analysis – i.e., whether the ALC's application “unjustifiably . . . burden[s] the interstate flow of articles of commerce.” *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality of Oregon*, 511 U.S. 93, 98 (1994). Under this tier, where application of a law “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). Further, “[a]s long as a State does not needlessly obstruct interstate trade . . . it retains broad regulatory authority to protect the health and safety of its citizen.” *Main v. Taylor*, 477 U.S. 131, 151 (1986).

The Court correctly found that any potential incidental effects of the ALC's evenhanded application of applicable law was not “clearly excessive in relation to the putative local benefits.” *See Pike*, 397 at 142. In pointing out the various putative local benefits, the Court recognized the ALC's identification of the various purposes and goals of the CON Act, Health Plan, and project review criteria as they related to the competing applications, which included:

¹ *See Amisub*, Op. No. 5568 at p. 14 (“We acknowledge that the proper application of these criteria *may* have the effect of protecting competing providers who already have a presence in the service area *regardless of whether these providers represent in-state or out-of-state interests.*”) (emphasis added); *Id.* at p. 20 (“*To the extent that the proper application of these criteria may have a discriminatory effect . . .*”) (emphasis added); and *id.* at p. 21 (“*To the extent that the proper application of the Project Review Criteria may have a discriminatory effect . . .*”) (emphasis added).

“balancing the distribution of health system resources”; taking account of “the needs of citizens in the western part of York County”; “guid[ing] the establishment of health facilities and services [that] will best serve public needs”; “promot[ing] cost containment”; considering “patient travel time, which obviously can affect health outcomes in an emergency”; “reducing the volume necessary for Piedmont’s continued provision of its specialty services”; determining “Piedmont’s proposed facility was better designed for expansion”; and, in sum, “looking at the big picture for all of York County, i.e., how to preserve the quality of care and the larger complement of services Piedmont’s existing facility provides to York County residents who do not live in the more affluent northern part of the county.” *Amisub*, Op. No. 5568 at pp. 13, 14, 17, 18, 20 and 21. Accordingly, the Court’s analysis was consistent with the dormant Commerce Clause jurisprudence.

B. The untimely raised issues were disposed of by the Court.

In a footnote, the Court identifies arguments raised by Carolinas for the first time in its reply brief. While it is established that “an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief,” *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001), the Court considered these untimely arguments anyways. In doing so, the Court rejected the arguments as “unfounded” and cited testimony in the record that demonstrate Carolinas’ project would reduce Piedmont’s marketshare, thereby reducing the volume necessary for continued provision of specialty services.

C. The Court’s consideration of the parties’ in-state and out-of-state interests was proper and in accordance with the established dormant Commerce Clause analysis.

The Court remarks that Carolinas’ characterization of Piedmont as an in-state interest was disingenuous and acknowledges both parties own hospitals in multiple states, including South

Carolina. *Amisub*, Op. No. 5568 at p. 19. Carolinas argues its existing physician network in York County and its ownership in a hospital in Charleston have little to no relevance to the dormant Commerce Clause analysis. Further, Carolinas complains that the Court disregarded the parties' corporate forms in violation of South Carolina law. The Court's consideration of the involved parties' interests was entirely appropriate.

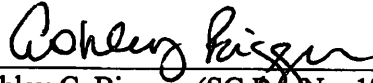
Carolinas' as-applied challenge to the ALC's application of CON Act, Health Plan, and project review criteria necessarily involves a review of the parties' interests. In the end, the Court determined the ALC's application of the applicable law was even-handed and proper. The ALC applied the CON Act, Health Plan, and project review criteria equally to Piedmont and Carolinas, regardless of the parties' localities. There was no special barrier to out-of-state CON applicants. Ultimately, the ALC denied Carolinas' CON application and approved Piedmont's based upon Piedmont more fully complying with the CON Act, Health Plan, and project review criteria.

III. CONCLUSION

The Court of Appeals correctly found no discrimination and no dormant Commerce Clause violation. The Department respectfully requests the Court deny the Petition for Rehearing.

(SIGNATURE PAGE TO FOLLOW)

Respectfully submitted,



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August 6, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

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

AUG 07 2018
SC Court of Appeals

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

v.

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

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

PROOF OF SERVICE

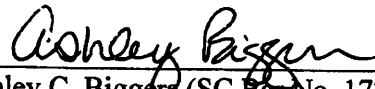
I certify that I have, on this 6th day of August 2018, served the Respondent South Carolina Department of Health and Environmental Control's Return to Appellant's Petition for Rehearing on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid and addressed as follows:

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August 6, 2018

Columbia, South Carolina

The South Carolina Court of Appeals

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

v.

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

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

Appellate Case No. 2015-000056

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, Opinion Number 5568, filed June 6, 2018, is withdrawn and the attached opinion is substituted.

H. B. W. Lee J.
Paula M. Thomas J.
John D. Besten J.

FILED
August 22, 2018

Columbia, South Carolina

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The Honorable S. Phillip Lenski

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

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

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

Appellate Case No. 2015-000056

ON REMAND FROM THE SUPREME COURT

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 5568
Submitted May 14, 2018 – Filed June 6, 2018
Withdrawn, Substituted and Refiled August 22, 2018

AFFIRMED

Douglas M. Muller, Trudy Hartzog Robertson, and E.
Brandon Gaskins, of Moore & Van Allen PLLC, of
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Stuart M. Andrews, Jr. and Daniel J. Westbrook, of
Nelson Mullins Riley & Scarborough LLP, of Columbia,
for Respondent Amisub of South Carolina.

Ashley Caroline Biggers and Vito Michael Wicevic, of
Columbia, for Respondent South Carolina Department of
Health and Environmental Control.

GEATHERS, J.: Appellant Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (Carolinas), challenges a decision of the South Carolina Administrative Law Court (ALC) ordering Respondent South Carolina Department of Health and Environmental Control (DHEC) to issue a Certificate of Need (CON) to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center (Piedmont). Carolinas argues the purpose and effect of the ALC's application of the CON Act, the Project Review Criteria, and the 2004-2005 State Health Plan is to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause.¹ We affirm.

FACTS/PROCEDURAL HISTORY

Piedmont Medical Center in Rock Hill is the sole hospital in York County. It provides standard community hospital services as well as specialized services such as open heart surgery, neurosurgery, neonatal intensive care, and behavioral health. Amisub of South Carolina, Inc., which is a subsidiary of Tenet Healthcare

¹ This court's previous opinion in this appeal addressed Carolinas' challenge to the ALC's approval of Piedmont's proposal to transfer beds from its existing hospital in Rock Hill to its proposed hospital in Fort Mill and Carolinas' argument that ALC's application of certain Project Review Criteria was arbitrary and capricious. *Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 2017-UP-013 (S.C. Ct. App. filed January 11, 2017). Carolinas did not challenge our disposition of those two issues in its Petition for Writ of Certiorari to the South Carolina Supreme Court. Rather, Carolinas challenged our conclusion that its Dormant Commerce Clause argument was unpreserved for review. The supreme court agreed with Carolinas, reversed our conclusion, and remanded the case to this court for a ruling on the merits of the issue. *Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27792 (S.C. Sup. Ct. filed April 25, 2018) (Shearouse Adv. Sh. No. 17 at 33).

Corporation, operates Piedmont Medical Center. Tenet Healthcare Corporation is headquartered in Dallas, Texas, and owns forty-nine hospitals in ten states.

Carolinas, which is headquartered in Charlotte, North Carolina, owns multiple hospitals in North Carolina with a large network of employed physicians, the Carolinas Physician Network (CPN), many of whom have practices in York County. As of the date of the final contested case hearing, Carolinas employed between seventy and ninety York County physicians. Additionally, Carolinas owns and operates Roper Hospital in downtown Charleston.

In 2005, Piedmont, Carolinas, Presbyterian Healthcare System (Presbyterian), and Hospital Partners of America, Inc. submitted applications to DHEC for a CON to build a sixty-four-bed hospital near Fort Mill based on the 2004-2005 State Health Plan's identification of a need for sixty-four additional acute care hospital beds in York County. Subsequently, Piedmont withdrew its application and submitted a new application for a one-hundred-bed hospital, which would include thirty-six beds transferred from Piedmont's Rock Hill facility to its proposed Fort Mill facility. In 2006, DHEC approved Piedmont's new application and denied the other three applications. Carolinas and Presbyterian filed separate requests for a contested case hearing before the ALC, which took place in September 2009.

The ALC concluded DHEC misinterpreted the 2004-2005 State Health Plan to allow only existing providers to obtain a CON. The ALC remanded the case to DHEC for a determination of which applicant most fully complied with the CON Act, the State Health Plan, Project Review Criteria,² and applicable DHEC regulations. By October 2010,³ the three remaining applicants submitted to DHEC additional information to supplement their respective applications.

In September 2011, DHEC granted Carolinas' application and denied the applications of Piedmont and Presbyterian. Piedmont and Presbyterian submitted their respective requests for a contested case hearing before the ALC, and the ALC

² There are thirty-three criteria for DHEC's review of a project under the CON program. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). Throughout this opinion, we cite to the version of a statute or regulation that was in effect when the parties submitted their respective CON applications.

³ The remaining three applicants appealed the ALC's remand order; however, our supreme court dismissed the appeal because the remand order was interlocutory. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

consolidated the cases. Presbyterian later withdrew its request, and the ALC dismissed Presbyterian as a party. The ALC ultimately ordered DHEC to award the CON to Piedmont. Carolinas filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, and the ALC issued an Amended Final Order denying the motion. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review on appeal from a decision of the ALC, allowing this court to

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

S.C. Code Ann. § 1-23-380(5) (Supp. 2017).

LAW/ANALYSIS

Carolinas does not challenge the constitutionality of the CON Act itself. Further, Carolinas does not challenge the constitutionality of the 2004-2005 State Health Plan or the Project Review Criteria. Rather, Carolinas argues the purpose and effect of the ALC's application of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria is to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause. Carolinas essentially challenges the ALC's conclusions of law concerning adverse impact and outmigration.

On this record,⁴ we hold the ALC properly applied the provisions of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria in considering

⁴ Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence. *See Spartanburg Reg'l Med. Ctr. v. Oncology &*

the needs of residents in *all* areas of York County and, therefore, did not violate the Dormant Commerce Clause. The ALC placed appropriate significance on adverse impact, as required by the Project Review Criteria, and outmigration, as we explain herein.

We will address each criterion Carolinas references in turn. But first, we will provide a primer on the general principles surrounding the Dormant Commerce Clause and the general provisions of South Carolina's CON law.

Dormant Commerce Clause

The Commerce Clause of the United States Constitution grants Congress the power to regulate commerce among the several states. U.S. Const. art. I, § 8, cl. 3. "The [United States Supreme] Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093–94 (2018). "Although the Commerce Clause is written as an affirmative grant of authority to Congress, [the United States Supreme] Court has long held that in some instances it imposes limitations on the States absent congressional action." *Id.* at 2089.

The Court's "[D]ormant Commerce Clause jurisprudence 'significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce.'" *McBurney v. Young*, 569 U.S. 221, 235 (2013) (quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986)). "It is driven by a concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state

Hematology Assocs. of S.C., LLC, 387 S.C. 79, 89, 690 S.E.2d 783, 788 (2010) ("On appeal from a contested CON case, the reviewing court 'may not substitute its judgment for the judgment of the [finder of fact] as to the weight of the evidence on questions of fact.'" (quoting § 1-23-380(5))); *id.* ("The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact."); *Bursey v. S.C. Dep't of Health & Envtl. Control*, 360 S.C. 135, 144, 600 S.E.2d 80, 85 (Ct. App. 2004) (holding that under the "'substantial evidence' standard of review, the factual findings of the [administrative] agency are presumed correct and will be set aside only if unsupported by substantial evidence"); *id.* ("Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side, but is evidence [that], when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached in order to justify its action.").

economic interests by burdening out-of-state competitors." *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)). "The 'common thread' among those cases in which the [United States Supreme] Court has found a [D]ormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.'" *Id.* (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)).

In other words, two primary principles mark the boundaries of a State's authority to regulate interstate commerce. "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2091. When a state law discriminates on its face or has a discriminatory effect or purpose, the law must be "demonstrably justified by a valid factor unrelated to economic protectionism," and there must be an absence of "nondiscriminatory alternatives adequate to preserve the local interests at stake." *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (quoting *New Energy*, 486 U.S. at 274 and *Chem. Waste Mgmt, Inc. v. Hunt*, 504 U.S. 334, 342 (1992)). On the other hand, "[s]tate laws that 'regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Wayfair*, 138 S. Ct. at 2091 (second alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). "Although subject to exceptions and variations, these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause." *Id.* (citations omitted).

Here, Carolinas argues that the ALC's application of South Carolina's CON law to the present case discriminates against interstate commerce in its purpose and effect. "[A] state or local law discriminates by restricting market participation or curtailing the movement of articles of interstate commerce based on whether a market participant or article of commerce is in-state versus out-of-state, or local versus non-local." *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012). In conducting the discrimination inquiry, a court should focus on discrimination against *interstate commerce*—not merely discrimination against the specific parties before it." *Colon Health Ctrs. of Am., LLC v. Hazel (Hazel I)*, 733 F.3d 535, 543 (4th Cir. 2013).

Focusing exclusively on discrimination against individual firms . . . improperly narrows the scope of the judicial inquiry and has the baneful effect of precluding certain meritorious claims. For while the burden on a single firm

may have but a negligible impact on interstate commerce, the effect of the law as a whole and in the aggregate may be substantial.

Id. Further, in applying the discrimination test, "[c]ourts are afforded some latitude to determine for themselves the practical impact of a state law, but in doing so they must not cripple the States' 'authority under their general police powers to regulate matters of legitimate local concern.'" *Colon Health Ctrs. of Am., LLC v. Hazel (Hazel II)*, 813 F.3d 145, 152 (4th Cir. 2016) (quoting *Taylor*, 477 U.S. at 138). Moreover, "[t]he burden to show discrimination rests on the party challenging the validity of the statute, but '[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (second alteration in original) (quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)). In order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce." *Hazel II*, 813 F.3d at 153 (quoting *Hazel I*, 733 F.3d at 543).

Nonetheless, the Commerce Clause

does not elevate free trade above all other values. As long as a State does not *needlessly* obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Taylor, 477 U.S. at 151 (emphasis added) (citation omitted) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)). "The Supreme Court has consistently held that a state's power to regulate commerce is at its zenith in areas traditionally of local concern." *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995) (citing *Hunt*, 432 U.S. at 350). "In addition, regulations that touch on safety are those that the Court has been most reluctant to invalidate." *Id.* (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978)). While "a bald assertion that laws are directed toward legitimate health and safety concerns is not enough to withstand a [D]ormant Commerce Clause challenge, . . . [courts] must give some deference to states' decisions regarding

health and safety." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 526 (9th Cir. 2009) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 307 (1997)).

South Carolina CON Law

The purpose of the CON Act is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] will best serve public needs, and ensure that high quality services are provided in health facilities in this [s]tate." S.C. Code Ann. § 44-7-120 (2002). To achieve these purposes, the CON Act requires (1) the issuance of a CON before undertaking a project prescribed by the CON Act, (2) the adoption of procedures and criteria for submitting a CON application and for review before issuing a CON, (3) the preparation and publication of a State Health Plan, and (4) the licensing of health care facilities. *Id.* DHEC is designated the sole state agency for control and administration of the CON program and licensing of health facilities. S.C. Code Ann. § 44-7-140 (2002). A person or health care facility must obtain a CON before, among other things, establishing a new health care facility or changing the existing bed complement of a health care facility. S.C. Code Ann. § 44-7-160 (2002) (amended 2010).

With the advice of a health planning committee, of which most of the members are appointed by the Governor, DHEC must prepare a State Health Plan for use in administering the CON program. S.C. Code Ann. § 44-7-180(A), (B) (2002) (amended 2010). The State Health Plan has designated four regions of the state for the purpose of keeping an inventory of health facilities and services. Chapter II.A, 2004-2005 State Health Plan. Each region is further divided into service areas. *Id.* In the 2004-2005 State Health Plan, most service areas consist of individual counties, as is the case with York County.

DHEC may not issue a CON unless an application complies with the State Health Plan, Project Review Criteria, and other regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010); *see also* S.C. Code Ann. Regs. 61-15 § 801.3 (2011) (amended 2012) ("[N]o project may be approved unless it is consistent with the State Health Plan."); S.C. Code Ann. Regs. 61-15 § 802.1 (2011) (amended 2012) ("The proposal shall not be approved unless it is in compliance with the State Health Plan."). Further, there are thirty-three criteria for DHEC's review of a project. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). The criteria are grouped under the following categories:

Need for the Proposed Project (Section 802.1 through 802.4)
 Economic Consideration (Section 802.5 through 802.19)
 Health System Resources (Section 802.20 through 802.25)
 Site Suitability (Section 802.26 through 802.30)
 Special Consideration (Section 802.31 through 802.33)

S.C. Code Ann. Regs. 61-15 § 801.1 (2011). Each section of Chapter II of the State Health Plan designates the most important project review criteria for the particular type of facility or service addressed in that section. Chapter I.I, 2004-2005 State Health Plan. "The relative importance assigned to each specific criterion is established by [DHEC] depending upon the importance of the criterion applied to the specific project." § 801.2 (2011). Further, "[t]he relative importance must be consistent for competing projects." *Id.*

When DHEC is considering *competing* applications, it must award a CON on the basis of which applicant most fully complies with the CON Act, the State Health Plan, Project Review Criteria, and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010). However, if neither application complies with these requirements, DHEC may not issue a CON. *Id.* Further, DHEC may refuse to issue a CON based on identified project review criteria and other regulations even if an application complies with the State Health Plan. *Id.*

In the present case, DHEC established the relative importance of the Project Review Criteria for the competing CON applications, "listing the most important criteria first, as follows:

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

The ALC's Application of Project Review Criteria

1. Adverse Impact

Carolinas first challenges the ALC's application of criteria 16(c), 22, and 23(a).⁵ With regard to these criteria, Carolinas argues the ALC's adverse impact analysis was one-sided and, thus, discriminatory. In other words, the ALC assessed whether awarding a CON to Carolinas would have an adverse impact on Piedmont without assessing whether awarding the CON to Piedmont would have an adverse impact on Carolinas. Carolinas maintains the purpose underlying the ALC's analysis was to protect Piedmont from non-local competition and to reduce the number of South Carolinians seeking healthcare in North Carolina.

a. Criterion 16(c)

Criterion 16 is entitled "Cost Containment (Minimizing Costs)" and is grouped under the general category "Economic Consideration." §§ 801.1, 802.16. Criterion 16(c) states, "The impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of *other* providers of similar services should be considered if the data are available." § 802.16 (emphasis added). Carolinas asserts (1) the ALC incorrectly included Criterion 16(c) in its adverse impact analysis and (2) the intent and effect of the ALC's application of this criterion was "to protect the local hospital's profitability from being harmed by a new market entrant."

In its conclusions of law regarding adverse impact, the ALC stated, "The most heavily disputed application of the Project Review Criteria relates to DHEC's analysis of the Project Review Criteria on adverse impact." The ALC identified Criterion 16(c) as being included in the adverse impact criteria, and explained its conclusion that Piedmont best met Criterion 16(c) as follows:

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

⁵ §§ 802.16(c), .22, .23(a) (2011).

Carolinas is correct in its observation that Criterion 16(c) is not grouped together with the criteria entitled "Adverse Effects on Other Facilities," which falls under the general category of "Health System Resources." See S.C. Code Ann. Regs. 61-15 §§ 801.1, 802.23. However, the ALC was obviously aware of this when it recounted DHEC's establishment of the relative importance of the Project Review Criteria, which includes "Cost Containment (16a-16c)" in the group of the third-most-important criteria and "Adverse Effects on Other Facilities (23a, 23b)" in the group of the fourth-most-important criteria. Yet, when presented with the task of choosing "which applicant most fully complies with"⁶ Criterion 16(c), the ALC focused on the second part of this criterion, which requires consideration of "the impact of the project upon the cost and charges of other providers of similar services." § 802.16. Here, the ALC determined Carolinas' proposed facility would have an adverse impact on the cost and charges of Piedmont's existing facility. Therefore, it was logical for the ALC to include its application of Criterion 16(c) within its discussion of adverse impact generally. Further, the protection of *existing* providers' patients from increased costs is an obvious objective of Criterion 16(c), which Carolinas does not challenge.

b. Criterion 22

Criterion 22 states, "The existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population." § 802.22. This criterion falls under the general category of Health System Resources. §§ 801.1, 802.22. Carolinas maintains the ALC concluded Piedmont best met Criterion 22 "because increased competition from [Carolinas' proposed facility] would negatively impact Piedmont's ability to retain its staff physicians and receive their referrals." Carolinas argues the ALC applied Criterion 22 for the purpose of "protecting an existing local hospital from competition from a non-local hospital."

The ALC explained its conclusion that Piedmont best met Criterion 22 as follows:

[T]he operation of [Carolinas' proposed facility] would have an adverse effect on the distribution of services provided by existing healthcare providers to the residents

⁶ § 44-7-210(C).

of York County. Section 802.22 calls for an evaluation of the effect of the proposed facility or service not only on Piedmont but also on other healthcare providers. Letters from over forty (40) physicians to DHEC during its staff review as well as the testimony of . . . three physicians is compelling evidence that the ability of existing York County healthcare providers to serve residents of the county would be jeopardized by the operation of [Carolinas' proposed facility].

Carolinas states that despite the ALC's reference to the adverse effects on physicians, the ALC's findings of fact "demonstrate that the ALC's primary concern was the extent to which changes in the physician market arising from the establishment of [Carolinas' proposed facility] would affect Piedmont."

First, an adverse effect on Piedmont's existing facility alone would be sufficient to warrant the conclusion that Piedmont, rather than Carolinas, better meets Criterion 22 because of the specialized services the existing facility offers. In its findings of fact, the ALC stated, "In addition to standard community hospital services, Piedmont Medical Center provides specialized services not usually offered by a hospital its size, including open heart surgery, neurosurgery, cardiac catheterization, vascular surgery, neonatal intensive care, specialized women's and pediatric services, and behavioral health." Notably, Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence.

Further, the ALC's findings discussing the adverse impact on Piedmont that would result from physicians shifting their patient referrals from Piedmont's existing facility to Carolinas also referenced the likely adverse impact on physicians themselves. The ALC highlighted the testimony of a cardiology physician concerning the effect of awarding the CON to Carolinas:

Dr. Singhi recognized the challenges that would exist if [Carolinas' proposed facility] was approved that would not permit his practice to maintain its present status (e.g.,] *being able to refer and admit patients to any facility [of] his choosing at which he has privileges*). . . . If the Carolina Cardiology Physicians become employed by [Carolinas], Dr. Singhi acknowledged that [Carolinas] would expect his group to comply with the CPN physician

network referral policy and transfer patients from Piedmont to [Carolinas'] facilities.

(emphasis added). The ALC also discussed the testimony of a pulmonologist illustrating the impact Carolinas' proposed facility would have on not only Piedmont's existing specialty services but also specialty physicians' ability to maintain their proficiency as to certain skills due to the decline in the demand for those skills. The ALC found that the "[l]oss or paring of Piedmont's specialty programs would be detrimental to York County citizens, *especially those living in the western, more rural part of the county farther away from [Carolinas'] specialty facilities in North Carolina.*" (emphasis added). Again, Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence.

The ALC properly identified the "existing distribution of the health service(s)," as required by Criterion 22, by referencing Piedmont and physician providers in York County. Further, the ALC properly considered the impact Carolinas' proposed facility would have on that distribution in order "to functionally balance the distribution to the target population." The ALC implicitly recognized that, in balancing the distribution of health system resources, DHEC may not ignore the needs of citizens in the western part of York County now being served by Piedmont and physicians practicing in that area.

c. Criterion 23(a)

Criterion 23 is entitled "Adverse Effects on Other Facilities" and falls under the general category of Health System Resources. §§ 801.1, 802.23. Criterion 23(a) states, "The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services."

Carolinas argues the ALC focused solely on the adverse financial impact that Carolinas' proposed facility would have on Piedmont's existing facility, and the "sole purpose and practical effect of the ALC's ruling in this regard was to protect Piedmont's market share from competition." While the ALC did not address the increased accessibility offered by Carolinas' proposed facility in its conclusions of law concerning Criterion 23(a), the ALC recognized the increased accessibility offered by *both* Carolinas' and Piedmont's respective proposed facilities in its findings of fact. Nevertheless, the ALC found Piedmont's proposed 100-bed facility would provide superior accessibility to meet the rapid population growth in northern

York County. The ALC further found Carolinas would provide inferior accessibility to medically underserved patients due to the restrictions York County physicians in the CPN had placed on accepting these patients.⁷ Therefore, the Amended Final Order as a whole reflects the ALC's proper balancing of the impact of Carolinas' proposed facility on the occupancy rates of Piedmont's existing facility against the increased accessibility offered by Carolinas' proposed facility as required by Criterion 23(a).

Based on the foregoing, the ALC properly applied Project Review Criteria 16(c), 22, and 23(a) without any discriminatory purpose. We acknowledge that the proper application of these criteria in any case may have the effect of protecting competing providers who already *have a presence* in the service area, but this particular group of providers is not limited to in-state interests.⁸ See *Hazel II*, 813 F.3d at 154 ("The [D]ormant Commerce Clause is exclusively designed to address the 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005))); *id.* (rejecting the appellants' argument that Virginia's CON requirement "discriminates in favor of incumbent health care providers at the expense of new, predominantly out-of-state firms" because "incumbency bias in this context is not a surrogate for the 'negative[] impact [on] interstate commerce' with which the [D]ormant Commerce Clause is concerned" (first and second alterations in original) (quoting *Hazel I*, 733 F.3d at 543)). We find nothing in the record showing a discriminatory effect on interstate commerce from the proper application of these

⁷ The ALC highlighted the evidence showing that those CPN primary care practices representing eighty percent of the York County patient referrals to Carolinas' facilities were either "not accepting new uninsured, Medicaid, or Medicare patients" or were "not accepting new uninsured patients unless the patient paid in advance [seventy] percent of a new patient charge" ranging from \$290 to \$800. Approximately nineteen months later, these practices were "still not scheduling appointments for new Medicaid or Medicare patients." Further, Carolinas' records showed "relatively low percentages of Medicaid and uninsured care by" York County CPN physicians. Recognizing that the CPN primary care physicians "would function as the gatekeepers for" Carolinas' proposed Fort Mill facility, the ALC stated, "If the flow of medically underserved patients into [the CPN] primary care offices is restricted, the referrals and ultimate admissions of those individuals into [Carolinas' proposed Fort Mill facility] would be restricted as well." Carolinas has not challenged these findings of fact.

⁸ For example, Carolinas owns and manages Roper Hospital in Charleston and, thus, has an existing presence in the corresponding service area.

criteria. *See id.* at 153 (stating that in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce" (quoting *Hazel I*, 733 F.3d at 543)). Likewise, there is nothing in the record showing that the ALC's application of these criteria places an undue burden on interstate commerce. *See id.* at 157 (holding that those asserting a Dormant Commerce Clause violation "'bear[] the burden of proving that the burdens placed on interstate commerce outweigh' [a law's] local benefits." (quoting *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 805 (6th Cir. 2005))). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.

2. Need

Carolinas next challenges the ALC's application of criteria 2(a), 2(b), 2(c), and 2(e).⁹ With regard to these criteria, Carolinas argues (1) the ALC applied these criteria to reduce patient outmigration to North Carolina, which discriminates against, and burdens, interstate commerce, (2) the ALC's application of these criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market," and (3) the ALC provided Piedmont with an advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility and Piedmont's resulting superior ability to accommodate population growth—Carolinas contends that it could not lawfully transfer beds from its North Carolina facilities pursuant to the Bed Transfer Provision of the 2004-2005 State Health Plan—and this advantage discriminates against out-of-state hospital systems. We will address these arguments in turn. But first, we will set forth the pertinent provisions in Criterion 2.

Criterion 2 is entitled "Community Need Documentation" and falls under the general category of "Need for the Proposed Project." §§ 801.1, 802.2. Criterion 2 states, in pertinent part,

- a. The target population should be clearly identified as to the size, location, distribution, and socioeconomic status (if applicable).
- b. Projections of anticipated population changes should be reasonable and based upon accepted demographic or

⁹ §§ 802.2(a), (b), (c), (e) (2011). Subpart (d) of Criterion 2, which addresses the reduction, relocation, or elimination of a facility or service, does not apply to either CON application in the present case. *See* § 802.2(d) (2011).

statistical methodologies, with assumptions and methodologies clearly presented in the application. The applicant must use population statistics consistent with those generated by the state demographer, State Budget and Control Board.

c. The proposed project should provide services that meet an identified (documented) need of the target population. The assumptions and methods used to determine the level of need should be specified in the application and based on a reasonable approach as judged by the reviewing body. Any deviation from the population projection used in the South Carolina Health Plan should be explained.

....

e. Current and/or projected utilization should be sufficient to justify the expansion or implementation of the proposed service.

§§ 802.2.

As to the ALC's application of these criteria, Carolinas first argues the goal of reducing patient outmigration to North Carolina discriminates against and burdens interstate commerce. We disagree.

Patient outmigration data is typically used in the CON application process to demonstrate the need for an additional provider or service in a particular service area, and the outmigration from one service area to another usually occurs intrastate. In other words, need can be shown by evidence of residents traveling to a provider located outside the service area. *See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 578, 595 S.E.2d 851, 853 (Ct. App. 2004) (stating evidence considered by the ALC "undisputedly related to core issues addressed during [DHEC's staff review] hearing"); *id.* at 578 n.2, 595 S.E.2d at 853 n.2 (identifying two core issues in DHEC's staff review hearing as the need for the proposed outpatient surgical center and the project's adverse impact on existing providers and listing 1997 outmigration data compiled by the Budget and Control Board as among the evidence that "dealt squarely with the issues before the [ALC]"). While some of these residents may live in close proximity to a provider outside the

service area, many would experience a significant reduction in travel time by the addition of a service or provider within the service area.

Therefore, the goal of reducing outmigration reflects a legitimate concern regarding patient travel time, which obviously can affect health outcomes in an emergency. While the reduction of outmigration may reduce patient travel to a neighboring state when the service area happens to border another state, the very purpose of this case is the issuance of a CON to build a hospital to be located in *South Carolina*. Therefore, the analysis must focus on participation in South Carolina's healthcare market rather than "the flow of patients in interstate commerce" as suggested by Carolinas. Further, reduction of patient travel to a neighboring state does not limit participation in South Carolina's healthcare market to only those providers with in-state interests. *See Hazel II*, 813 F.3d at 153 (stating that in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce" (quoting *Hazel I*, 733 F.3d at 543)).

As to community need, presumably, either Piedmont's proposed facility or Carolinas' proposed facility would meet the need for sixty-four more general hospital beds in York County. However, the ALC's analysis of which proposal would best meet community need as set forth in criteria 2(a), 2(b), 2(c), and 2(e) was more complex:

In addition to meeting the need for new hospital services, Piedmont's application was specifically intended to strengthen the York County healthcare system by reducing outmigration from York County. While patients have sought medical services outside of York County for years, primarily in the Charlotte area, the outmigration accelerated from 2005 to 2011. The effects of the outmigration, which are detailed in the relevant Findings of Fact and are incorporated herein, reduced the ability of Piedmont and many of the independent physicians on Piedmont's medical staff to meet the healthcare needs of York County residents. Piedmont demonstrated by a preponderance of the evidence that the establishment of [its proposed facility] would strengthen the capacity of existing York County providers to meet those needs. For these reasons, Piedmont best meets § 802.2(a, b, c, e).

The ALC also concluded,

One of the principal differences between the applicants is that the approval of [Carolinas' proposed facility] would have the effect of causing the erosion of quality of care at Piedmont and among specialists practicing there as a result of the diminution in the volume of patients and the degradation of the payor mix of the patients who would continue to be seen at Piedmont. Consequently, there would be no hospital in York County providing many of the high quality and tertiary services that Piedmont has added. Alternatively, the establishment of [Piedmont's proposed facility] will ensure that high quality services continue to be provided and added within York County.

The ALC's unchallenged findings of fact support these conclusions. The ALC found outmigration would continue if Carolinas' proposed facility was built in Fort Mill because Carolinas would refer its Fort Mill patients needing specialty care to one of Carolinas' North Carolina facilities providing these types of services rather than to Piedmont's existing facility in Rock Hill.¹⁰ The ALC also found that if Carolinas' proposed facility was built in Fort Mill, Carolinas would further reduce Piedmont's market share, thereby reducing the volume necessary for Piedmont's continued provision of its specialty services to residents of Rock Hill and western York County.¹¹ Piedmont had already lost a significant volume of complex cases

¹⁰ Carolinas' proposed Fort Mill facility would provide only primary and secondary care. One of Piedmont's experts, Joel Grice, testified that even if the competing CON applicant had been a provider's hospital offering specialty services and located within South Carolina but outside of York County, outmigration from York County would still be a concern.

¹¹ In its reply brief, Carolinas argues, "The ALC's ruling fails to demonstrate that [the] purpose [of maintaining needed healthcare services in York County] is supported by sufficient evidence under the strict scrutiny analysis." Carolinas also alleges "Piedmont presented no concrete evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON." Carolinas' allegations are simply unfounded. Piedmont presented the testimony of Arun Adlakha, M.D., who had requested Piedmont to acquire an instrument that would allow him to perform navigational bronchoscopies. Piedmont acquired the instrument, which was the first of its kind in the greater Charlotte area. When it was

from 2005 to 2011, forcing one of its physicians to terminate use of a new invasive technology acquired by Piedmont in 2009, due to the referral patterns of physicians aligned with Carolinas. In contrast, Piedmont's proposed facility in Fort Mill would strengthen Piedmont's ability to serve residents "throughout York County by increasing the number of patients treated at Piedmont's Rock Hill facility."

While Carolinas would have the court believe the ALC was simply looking out for Piedmont's bottom line, the ALC was looking at the big picture for all of York County, i.e., how to preserve the quality of care and the larger complement of services Piedmont's existing facility provides to York County residents who do not live in the more affluent northern part of the county. These objectives are consistent with the Project Review Criteria, which Carolinas has not challenged, and serve as an additional justification for the goal of reducing outmigration.

As to Carolinas' argument that the ALC's application of the community need criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market," we disagree. As we previously stated, the proper application of the Project Review Criteria may have the effect of protecting competing providers who already have a presence in the service area, but this particular group of providers is not limited to in-state interests.

Carolinas next argues the ALC provided Piedmont with an advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility when Carolinas could not lawfully transfer beds from its North Carolina facilities and this advantage discriminates against "out-of-state hospital systems." However, even if Piedmont had not proposed to transfer beds from its Rock Hill facility, the ALC's findings support its conclusion that Piedmont best meets criteria 2(a, b, c, e)—these findings indicate Piedmont's proposed facility would better preserve the quality of care and the larger complement of services that Piedmont's Rock Hill facility provides to York County residents who live in Rock Hill or the western, rural part of the county. Therefore, the ALC's approval of Piedmont's proposed bed transfer does not constitute reversible error. *See Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) ("Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

first placed in operation, Dr. Adlakha performed enough procedures to maintain his proficiency. However, after the patient volume for this service significantly declined, Dr. Adlakha decided "to terminate the use of the instrument as he found it 'very difficult to maintain [his] proficiency and justify keeping it for so long.'" Dr. Adlakha attributed the decrease in patient volume to CPN's referral practices.

Further, the ALC also took into account the capacity to expand, i.e., "shell space," that each respective proposed facility would possess in order to accommodate population growth. The ALC concluded Piedmont had the superior capacity to expand, and Carolinas has not presented any authorities or evidence indicating it was unfairly prevented from competing with Piedmont on this basis.

Based on the foregoing, the ALC properly applied Project Review Criteria 2(a), 2(b), 2(c), and 2(e) without any discriminatory purpose. Further, there is nothing in the record of this case showing that the ALC's application of these criteria has a discriminatory effect on interstate commerce. *See Hazel I*, 733 F.3d at 546 (stating the two tests for determining a violation of the Dormant Commerce Clause are both "fact-bound"); *Hazel II*, 813 F.3d at 153 (stating that in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce" (quoting *Hazel I*, 733 F.3d at 543)). Likewise, there is nothing in the record supporting Carolinas' argument that the ALC's application of these criteria places an undue burden on interstate commerce. *See Hazel II*, 813 F.3d at 157 (holding that those asserting a Dormant Commerce Clause violation "'bear[] the burden of proving that the burdens placed on interstate commerce outweigh [a law's] local benefits.'" (quoting *Robinson*, 403 F.3d at 805)). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.

3. Efficiency

Criterion 17 is entitled "Efficiency" and falls under the general category of "Economic Consideration." §§ 801.1, 802.17. Criterion 17 states, "The proposed project should improve efficiency by avoiding duplication of services, promoting shared services[,] and fostering economies of scale or size." § 802.17. The ALC concluded, "Piedmont better satisfies this criterion because its proposal fosters economies of scale by spreading costs over a greater number of beds. Not only will [Piedmont's proposed facility's] 100 beds better accommodate future growth, [Piedmont's proposed facility] is better designed for expansion than is [Carolinas' proposed facility]."

As with criteria 2(a, b, c, e), Carolinas argues the ALC's application of Criterion 17 provided Piedmont with an unfair advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility. However, Piedmont's bed transfer proposal was not the sole reason for the ALC's determination

that Piedmont best met Criterion 17. The ALC also concluded Piedmont's proposed facility was better designed for expansion than Carolinas' proposed facility, and this factor alone allows Piedmont to best meet Criterion 17.

Again, Carolinas does not challenge the constitutionality of any of the Project Review Criteria or the purposes of the CON Act served by these criteria. We find no discriminatory purpose behind the ALC's thoughtful and correct application of these criteria to the complex facts of this case. Further, there is nothing in the record showing that the ALC's application of these criteria has a discriminatory effect on interstate commerce. *See Hazel I*, 733 F.3d at 546 (stating the two tests for determining a violation of the Dormant Commerce Clause are both "fact-bound"); *Hazel II*, 813 F.3d at 153 (stating that in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the state law, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce" (quoting *Hazel I*, 733 F.3d at 543)). Likewise, there is nothing in the record showing that the ALC's application of these criteria places an undue burden on interstate commerce. *See Hazel II*, 813 F.3d at 157 (holding that those asserting a Dormant Commerce Clause violation "'bear[] the burden of proving that the burdens placed on interstate commerce outweigh' [a law's] local benefits." (quoting *Robinson*, 403 F.3d at 805)). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.¹²

CONCLUSION

Accordingly, we affirm the ALC's Amended Final Order.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

¹² Carolinas also argues the ALC erred in failing to conduct the proper Dormant Commerce Clause analysis because the ALC stated, "The same plan, criteri[a,] and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers." Carolinas asserts that this is the incorrect standard for a Dormant Commerce Clause analysis. Because the ALC properly applied the provisions of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria without any discriminatory purpose or effect, we find no reversible error. *See Judy*, 384 S.C. at 646, 682 S.E.2d at 842 ("Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

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

Appellate Case No. 2015-000056

ON REMAND FROM THE SUPREME COURT

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 5568
Submitted May 14, 2018 – Filed June 6, 2018

AFFIRMED

Douglas M. Muller, Trudy Hartzog Robertson, and E.
Brandon Gaskins, of Moore & Van Allen PLLC, of
Charleston, for Appellant.

Stuart M. Andrews, Jr. and Daniel J. Westbrook, of
Nelson Mullins Riley & Scarborough LLP, of Columbia,
for Respondent Amisub of South Carolina.

Ashley Caroline Biggers and Vito Michael Wicevic, of
Columbia, for Respondent South Carolina Department of
Health and Environmental Control.

GEATHERS, J.: Appellant Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (Carolinas), challenges a decision of the South Carolina Administrative Law Court (ALC) ordering Respondent South Carolina Department of Health and Environmental Control (DHEC) to issue a Certificate of Need (CON) to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center (Piedmont). Carolinas argues the purpose and effect of the ALC's application of the CON Act, the Project Review Criteria, and the 2004-2005 State Health Plan is to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause.¹ We affirm.

FACTS/PROCEDURAL HISTORY

Piedmont Medical Center in Rock Hill is the sole hospital in York County. It provides standard community hospital services as well as specialized services such as open heart surgery, neurosurgery, neonatal intensive care, and behavioral health. Amisub of South Carolina, Inc., which is a subsidiary of Tenet Healthcare

¹ This court's previous opinion in this appeal addressed Carolinas' challenge to the ALC's approval of Piedmont's proposal to transfer beds from its existing hospital in Rock Hill to its proposed hospital in Fort Mill and Carolinas' argument that ALC's application of certain Project Review Criteria was arbitrary and capricious. *Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Env'tl. Control*, Op. No. 2017-UP-013 (S.C. Ct. App. filed January 11, 2017). Carolinas did not challenge our disposition of those two issues in its Petition for Writ of Certiorari to the South Carolina Supreme Court. Rather, Carolinas challenged our conclusion that its Dormant Commerce Clause argument was unpreserved for review. The supreme court agreed with Carolinas, reversed our conclusion, and remanded the case to this court for a ruling on the merits of the issue. *Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Env'tl. Control*, Op. No. 27792 (S.C. Sup. Ct. filed April 25, 2018) (Shearouse Adv. Sh. No. 17 at 33).

Corporation, operates Piedmont Medical Center. Tenet Healthcare Corporation is headquartered in Dallas, Texas, and owns forty-nine hospitals in ten states.

Carolinas, which is headquartered in Charlotte, North Carolina, owns multiple hospitals in North Carolina with a large network of employed physicians, the Carolinas Physician Network (CPN), many of whom have practices in York County. As of the date of the final contested case hearing, Carolinas employed between seventy and ninety York County physicians. Additionally, Carolinas owns and operates Roper Hospital in downtown Charleston.

In 2005, Piedmont, Carolinas, Presbyterian Healthcare System (Presbyterian), and Hospital Partners of America, Inc. submitted applications to DHEC for a CON to build a sixty-four-bed hospital near Fort Mill based on the 2004-2005 State Health Plan's identification of a need for sixty-four additional acute care hospital beds in York County. Subsequently, Piedmont withdrew its application and submitted a new application for a one-hundred-bed hospital, which would include thirty-six beds transferred from Piedmont's Rock Hill facility to its proposed Fort Mill facility. In 2006, DHEC approved Piedmont's new application and denied the other three applications. Carolinas and Presbyterian filed separate requests for a contested case hearing before the ALC, which took place in September 2009.

The ALC concluded DHEC misinterpreted the 2004-2005 State Health Plan to allow only existing providers to obtain a CON. The ALC remanded the case to DHEC for a determination of which applicant most fully complied with the CON Act, the State Health Plan, Project Review Criteria,² and applicable DHEC

² There are thirty-three criteria for DHEC's review of a project under the CON program. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). Throughout this opinion, we cite to the version of a statute or regulation that was in effect when the parties submitted their respective CON applications.

regulations.³ By October 2010,⁴ the three remaining applicants submitted to DHEC additional information to supplement their respective applications.

In September 2011, DHEC granted Carolinas' application and denied the applications of Piedmont and Presbyterian. Piedmont and Presbyterian submitted their respective requests for a contested case hearing before the ALC, and the ALC consolidated the cases. Presbyterian later withdrew its request, and the ALC dismissed Presbyterian as a party. The ALC ultimately ordered DHEC to award the CON to Piedmont. Carolinas filed a motion for reconsideration pursuant to Rule 59(e), SCRPC, and the ALC issued an Amended Final Order denying the motion. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review on appeal from a decision of the ALC, allowing this court to

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

³ When DHEC is considering competing applications, it must award a CON on the basis of which applicant most fully complies with the CON Act, the State Health Plan, Project Review Criteria, and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010). However, if neither application complies with these requirements, DHEC may not issue a CON. *Id.* Further, DHEC may refuse to issue a CON based on identified project review criteria and other regulations even if an application complies with the State Health Plan. *Id.*

⁴ The remaining three applicants appealed the ALC's remand order; however, our supreme court dismissed the appeal because the remand order was interlocutory. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

LAW/ANALYSIS

Carolinas does not challenge the constitutionality of the CON Act itself. Further, Carolinas does not challenge the constitutionality of the 2004-2005 State Health Plan or the Project Review Criteria. Rather, Carolinas argues the purpose and effect of the ALC's application of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria is to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause. Carolinas essentially challenges the ALC's conclusions of law concerning adverse impact and outmigration.

On this record,⁵ we hold the ALC properly applied the provisions of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria in considering the needs of residents in *all* areas of York County and, therefore, did not violate the Dormant Commerce Clause. The ALC placed appropriate significance on adverse impact, as required by the Project Review Criteria, and outmigration, as we explain herein.

We will address each criterion Carolinas references in turn. But first, we will provide a primer on the general principles surrounding the Dormant Commerce Clause and the general provisions of South Carolina's CON law.

⁵ Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence. See *Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. 79, 89, 690 S.E.2d 783, 788 (2010) ("On appeal from a contested CON case, the reviewing court 'may not substitute its judgment for the judgment of the [finder of fact] as to the weight of the evidence on questions of fact.'" (quoting § 1-23-380(5))); *id.* ("The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact."); *Bursey v. S.C. Dep't of Health & Envtl. Control*, 360 S.C. 135, 144, 600 S.E.2d 80, 85 (Ct. App. 2004) (holding that under the "'substantial evidence' standard of review, the factual findings of the [administrative] agency are presumed correct and will be set aside only if unsupported by substantial evidence"); *id.* ("Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side, but is evidence [that], when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached in order to justify its action.").

Dormant Commerce Clause

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, grants Congress the power to regulate commerce among the several states. "However, 'the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well.'" *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 103–04, 705 S.E.2d 28, 36 (2011) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992)). "Even in the absence of Congressional regulation, the negative implications of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly burdens interstate commerce." *Id.* at 104, 705 S.E.2d at 36 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)). "The 'common thread' among those cases in which the [United States Supreme] Court has found a [D]ormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.'" *McBurney v. Young*, 569 U.S. 221, 235 (2013) (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)). Nonetheless, the Commerce Clause

does not elevate free trade above all other values. As long as a State does not *needlessly* obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Maine v. Taylor, 477 U.S. 131, 151 (1986) (emphasis added) (citation omitted) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

We apply a two-tiered analysis to state actions allegedly violating the [D]ormant Commerce Clause. The first tier, "a virtually *per se* rule of invalidity," applies [when] a state law discriminates facially, in its practical effect, or in its purpose. *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 . . . (1992) (quoting *Philadelphia [v. New Jersey]*, 437 U.S. [617,] 624 [(1978)]). In order for a law to survive such scrutiny, the state must prove that the discriminatory law "is demonstrably justified by a valid factor unrelated to economic protectionism," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 . . . (1988), and that there are

no "nondiscriminatory alternatives adequate to preserve the local interests at stake," [*Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)] (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 . . . (1977)). . . .

The second tier applies if a statute regulates evenhandedly and only indirectly affects interstate commerce. In that case, the law is valid unless the burdens on commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 . . . (1970).

Env'tl. Tech. Council v. Sierra Club, 98 F.3d 774, 785 (4th Cir. 1996).

The first tier of analysis is also referred to as "strict scrutiny analysis[.]" *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013) (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001)). "[A] 'less strict scrutiny' applies under the undue burden tier." *Id.* at 545 (quoting *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005)). "The putative benefits of a challenged law are evaluated under the rational basis test, . . . though 'speculative' benefits will not pass muster[.]" *Id.* (quoting *Medigen of Ky., Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 (4th Cir. 1993)).

"[A] state or local law discriminates by restricting market participation or curtailing the movement of articles of interstate commerce based on whether a market participant or article of commerce is in-state versus out-of-state, or local versus non-local." *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012). Further, "[i]n conducting the discrimination inquiry, a court should focus on discrimination against *interstate commerce*—not merely discrimination against the specific parties before it." *Colon Health*, 733 F.3d at 543.

Focusing exclusively on discrimination against individual firms . . . improperly narrows the scope of the judicial inquiry and has the baneful effect of precluding certain meritorious claims. For while the burden on a single firm may have but a negligible impact on interstate commerce, the effect of the law as a whole and in the aggregate may be substantial.

Id.

In any event, "[t]he Supreme Court has consistently held that a state's power to regulate commerce is at its zenith in areas traditionally of local concern." *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995) (citing *Hunt*, 432 U.S. at 350). "In addition, regulations that touch on safety are those that the Court has been most reluctant to invalidate." *Id.* (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978)). While "a bald assertion that laws are directed toward legitimate health and safety concerns is not enough to withstand a [D]ormant Commerce Clause challenge, . . . [courts] must give some deference to states' decisions regarding health and safety." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 526 (9th Cir. 2009) (citing *Gen. Motors Corp.*, 519 U.S. at 307). In fact, those asserting a Dormant Commerce Clause violation "'bear[] the burden of proving that the burdens placed on interstate commerce outweigh [a law's] local benefits.'" *Colon Health*, 813 F.3d 145, 157 (4th Cir. 2016) (quoting *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 805 (6th Cir. 2005)).

South Carolina CON Law

The purpose of the CON Act is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] will best serve public needs, and ensure that high quality services are provided in health facilities in this [s]tate." S.C. Code Ann. § 44-7-120 (2002). To achieve these purposes, the CON Act requires (1) the issuance of a CON before undertaking a project prescribed by the CON Act, (2) the adoption of procedures and criteria for submitting a CON application and for review before issuing a CON, (3) the preparation and publication of a State Health Plan, and (4) the licensing of health care facilities. *Id.* DHEC is designated the sole state agency for control and administration of the CON program and licensing of health facilities. S.C. Code Ann. § 44-7-140 (2002). A person or health care facility must obtain a CON before, among other things, establishing a new health care facility or changing the existing bed complement of a health care facility. S.C. Code Ann. § 44-7-160 (2002) (amended 2010).

With the advice of a health planning committee, of which most of the members are appointed by the Governor, DHEC must prepare a State Health Plan for use in administering the CON program. S.C. Code Ann. § 44-7-180(A), (B) (2002) (amended 2010). The State Health Plan has designated four regions of the state for the purpose of keeping an inventory of health facilities and services.

Chapter II.A, 2004-2005 State Health Plan. Each region is further divided into service areas. *Id.* In the 2004-2005 State Health Plan, most service areas consist of individual counties, such as York County.

DHEC may not issue a CON unless an application complies with the State Health Plan, Project Review Criteria, and other regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010); *see also* S.C. Code Ann. Regs. 61-15 § 801.3 (2011) (amended 2012) ("[N]o project may be approved unless it is consistent with the State Health Plan."); S.C. Code Ann. Regs. 61-15 § 802.1 (2011) (amended 2012) ("The proposal shall not be approved unless it is in compliance with the State Health Plan."). Further, there are thirty-three criteria for DHEC's review of a project. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). The criteria are grouped under the following categories:

- Need for the Proposed Project (Section 802.1 through 802.4)
- Economic Consideration (Section 802.5 through 802.19)
- Health System Resources (Section 802.20 through 802.25)
- Site Suitability (Section 802.26 through 802.30)
- Special Consideration (Section 802.31 through 802.33)

S.C. Code Ann. Regs. 61-15 § 801.1 (2011). Each section of Chapter II of the State Health Plan designates the most important project review criteria for the particular type of facility or service addressed in that section. Chapter I.I, 2004-2005 State Health Plan. "The relative importance assigned to each specific criterion is established by [DHEC] depending upon the importance of the criterion applied to the specific project." § 801.2 (2011). Further, "[t]he relative importance must be consistent for competing projects." *Id.*

In the present case, DHEC established the relative importance of the Project Review Criteria for the competing CON applications, "listing the most important criteria first, as follows:

Rank 1	Compliance with the State Plan (1)
Rank 2	Community Need Documentation (2a-2e)
	Distribution (Accessibility) (3a-3g)
	Distribution (22)
Rank 3	Projected Revenues (6a, 6b)
	Projected Expenses (7)
	Net Income (9)
	Financial Feasibility (15)

	Cost Containment (16a-16c)
	Efficiency (17)
Rank 4	Record of the Applicant (13a, 13b, 13d)
	Acceptability (4a-4c)
	Adverse Effects on Other Facilities (23a, 23b)

The ALC's Application of Project Review Criteria

1. Adverse Impact

Carolinas first challenges the ALC's application of criteria 16(c), 22, and 23(a).⁶ With regard to these criteria, Carolinas argues the ALC's adverse impact analysis was one-sided and, thus, discriminatory. In other words, the ALC assessed whether awarding a CON to Carolinas would have an adverse impact on Piedmont without assessing whether awarding the CON to Piedmont would have an adverse impact on Carolinas. Carolinas maintains the purpose underlying the ALC's analysis was to protect Piedmont from non-local competition and to reduce the number of South Carolinians seeking healthcare in North Carolina.

a. Criterion 16(c)

Criterion 16 is entitled "Cost Containment (Minimizing Costs)" and is grouped under the general category "Economic Consideration." §§ 801.1, 802.16. Criterion 16(c) states, "The impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of *other* providers of similar services should be considered if the data are available." § 802.16 (emphasis added). Carolinas asserts (1) the ALC incorrectly included Criterion 16(c) in its adverse impact analysis and (2) the intent and effect of the ALC's application of this criterion was "to protect the local hospital's profitability from being harmed by a new market entrant."

In its conclusions of law regarding adverse impact, the ALC stated, "The most heavily disputed application of the Project Review Criteria relates to DHEC's analysis of the Project Review Criteria on adverse impact." The ALC identified Criterion 16(c) as being included in the adverse impact criteria, and explained its conclusion that Piedmont best met Criterion 16(c) as follows:

⁶ §§ 802.16(c), .22, .23(a) (2011).

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

Carolinas is correct in its observation that Criterion 16(c) is not grouped together with the criteria entitled "Adverse Effects on Other Facilities," which falls under the general category of "Health System Resources." See S.C. Code Ann. Regs. 61-15 §§ 801.1, 802.23. However, the ALC was obviously aware of this when it recounted DHEC's establishment of the relative importance of the Project Review Criteria, which includes "Cost Containment (16a-16c)" in the group of the third-most-important criteria and "Adverse Effects on Other Facilities (23a, 23b)" in the group of the fourth-most-important criteria. Yet, when presented with the task of choosing "which applicant most fully complies with"⁷ Criterion 16(c), the ALC focused on the second part of this criterion, which requires consideration of "the impact of the project upon the cost and charges of other providers of similar services." § 802.16. Here, the ALC determined Carolinas' proposed facility would have an adverse impact on the cost and charges of Piedmont's existing facility. Therefore, it was logical for the ALC to include its application of Criterion 16(c) within its discussion of adverse impact generally. Further, the protection of *existing* providers' patients from increased costs is an obvious objective of Criterion 16(c), which Carolinas does not challenge.

b. Criterion 22

Criterion 22 states, "The existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population." § 802.22. This criterion falls under the general category of Health System Resources. §§ 801.1, 802.22. Carolinas maintains the ALC concluded Piedmont best met Criterion 22 "because increased competition from [Carolinas' proposed facility] would negatively impact Piedmont's ability to retain its staff physicians and receive their referrals." Carolinas argues the ALC applied Criterion 22 for the purpose of "protecting an existing local hospital from competition from a non-local hospital."

⁷ § 44-7-210(C).

The ALC explained its conclusion that Piedmont best met Criterion 22 as follows:

[T]he operation of [Carolinas' proposed facility] would have an adverse effect on the distribution of services provided by existing healthcare providers to the residents of York County. Section 802.22 calls for an evaluation of the effect of the proposed facility or service not only on Piedmont but also on other healthcare providers. Letters from over forty (40) physicians to DHEC during its staff review as well as the testimony of . . . three physicians is compelling evidence that the ability of existing York County healthcare providers to serve residents of the county would be jeopardized by the operation of [Carolinas' proposed facility].

Carolinas states that despite the ALC's reference to the adverse effects on physicians, the ALC's findings of fact "demonstrate that the ALC's primary concern was the extent to which changes in the physician market arising from the establishment of [Carolinas' proposed facility] would affect Piedmont."

First, an adverse effect on Piedmont's existing facility alone would be sufficient to warrant the conclusion that Piedmont, rather than Carolinas, better meets Criterion 22 because of the specialized services the existing facility offers. In its findings of fact, the ALC stated, "In addition to standard community hospital services, Piedmont Medical Center provides specialized services not usually offered by a hospital its size, including open heart surgery, neurosurgery, cardiac catheterization, vascular surgery, neonatal intensive care, specialized women's and pediatric services, and behavioral health." Notably, Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence.

Further, the ALC's findings discussing the adverse impact on Piedmont that would result from physicians shifting their patient referrals from Piedmont's existing facility to Carolinas also referenced the likely adverse impact on physicians themselves. The ALC highlighted the testimony of a cardiology physician concerning the effect of awarding the CON to Carolinas:

Dr. Singhi recognized the challenges that would exist if [Carolinas' proposed facility] was approved that would not

permit his practice to maintain its present status (e.g.,] *being able to refer and admit patients to any facility [of] his choosing at which he has privileges*). . . . If the Carolina Cardiology Physicians become employed by [Carolinas], Dr. Singhi acknowledged that [Carolinas] would expect his group to comply with the CPN physician network referral policy and transfer patients from Piedmont to [Carolinas'] facilities.

(emphasis added). The ALC also discussed the testimony of a pulmonologist illustrating the impact Carolinas' proposed facility would have on not only Piedmont's existing specialty services but also specialty physicians' ability to maintain their proficiency as to certain skills due to the decline in the demand for those skills. The ALC found that the "[l]oss or paring of Piedmont's specialty programs would be detrimental to York County citizens, *especially those living in the western, more rural part of the county farther away from [Carolinas'] specialty facilities in North Carolina.*" (emphasis added). Again, Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence.

The ALC properly identified the "existing distribution of the health service(s)," as required by Criterion 22, by referencing Piedmont and physician providers in York County. Further, the ALC properly considered the impact Carolinas' proposed facility would have on that distribution in order "to functionally balance the distribution to the target population." The ALC implicitly recognized that, in balancing the distribution of health system resources, DHEC may not ignore the needs of citizens in the western part of York County now being served by Piedmont and physicians practicing in that area.

c. Criterion 23(a)

Criterion 23 is entitled "Adverse Effects on Other Facilities" and falls under the general category of Health System Resources. §§ 801.1, 802.23. Criterion 23(a) states, "The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services."

Carolinas argues the ALC focused solely on the adverse financial impact that Carolinas' proposed facility would have on Piedmont's existing facility, and the "sole purpose and practical effect of the ALC's ruling in this regard was to protect

Piedmont's market share from competition." While the ALC did not address the increased accessibility offered by Carolinas' proposed facility in its conclusions of law concerning Criterion 23(a), the ALC recognized the increased accessibility offered by *both* Carolinas' and Piedmont's respective proposed facilities in its findings of fact. Nevertheless, the ALC found Piedmont's proposed 100-bed facility would provide superior accessibility to meet the rapid population growth in northern York County. The ALC further found Carolinas would provide inferior accessibility to medically underserved patients due to the restrictions York County physicians in the CPN had placed on accepting these patients.⁸ Therefore, the Amended Final Order as a whole reflects the ALC's proper balancing of the impact of Carolinas' proposed facility on the occupancy rates of Piedmont's existing facility against the increased accessibility offered by Carolinas' proposed facility as required by Criterion 23(a).

Based on the foregoing, the ALC properly applied Project Review Criteria 16(c), 22, and 23(a) without any discriminatory purpose. We acknowledge that the proper application of these criteria may have the effect of protecting competing providers who already have a presence in the service area, regardless of whether these providers represent in-state or out-of-state interests. However, this serves the purposes of the CON Act to ensure the quality of care in health facilities, "guide the establishment of health facilities and services [that] will best serve public needs," and promote cost containment. § 44-7-120. "As long as a State does not *needlessly* obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Taylor*, 477 U.S. at 151 (emphasis added)

⁸ The ALC highlighted the evidence showing that those CPN primary care practices representing eighty percent of the York County patient referrals to Carolinas' facilities were either "not accepting new uninsured, Medicaid, or Medicare patients" or were "not accepting new uninsured patients unless the patient paid in advance [seventy] percent of a new patient charge" ranging from \$290 to \$800. Approximately nineteen months later, these practices were "still not scheduling appointments for new Medicaid or Medicare patients." Further, Carolinas' records showed "relatively low percentages of Medicaid and uninsured care by" York County CPN physicians. Recognizing that the CPN primary care physicians "would function as the gatekeepers for" Carolinas' proposed Fort Mill facility, the ALC stated, "If the flow of medically underserved patients into [the CPN] primary care offices is restricted, the referrals and ultimate admissions of those individuals into [Carolinas' proposed Fort Mill facility] would be restricted as well." Carolinas has not challenged these findings of fact.

(citation omitted) (quoting *Baldwin*, 294 U.S. at 527); *cf. Colon Health*, 813 F.3d at 154 (rejecting the appellants' argument that Virginia's CON requirement "discriminates in favor of incumbent health care providers at the expense of new, predominantly out-of-state firms" because "incumbency bias in this context is not a surrogate for the 'negative[] impact [on] interstate commerce' with which the [D]ormant Commerce Clause is concerned" (alterations in original) (quoting *Colon Health*, 733 F.3d at 543)). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.

2. Need

Carolinas next challenges the ALC's application of criteria 2(a), 2(b), 2(c), and 2(e).⁹ With regard to these criteria, Carolinas argues (1) the ALC applied these criteria to reduce patient outmigration to North Carolina, which discriminates against, and burdens, interstate commerce; (2) the ALC's application of these criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market;" and (3) the ALC provided Piedmont with an advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility and Piedmont's resulting superior ability to accommodate population growth—Carolinas contends that it could not lawfully transfer beds from its North Carolina facilities pursuant to the Bed Transfer Provision of the 2004-2005 State Health Plan—and this advantage discriminates against out-of-state hospital systems. We will address these arguments in turn. But first, we will set forth the pertinent provisions in Criterion 2.

Criterion 2 is entitled "Community Need Documentation" and falls under the general category of "Need for the Proposed Project." §§ 801.1, 802.2. Criterion 2 states, in pertinent part,

- a. The target population should be clearly identified as to the size, location, distribution, and socioeconomic status (if applicable).
- b. Projections of anticipated population changes should be reasonable and based upon accepted demographic or statistical methodologies, with assumptions and methodologies clearly presented in the application. The

⁹ §§ 802.2(a), (b), (c), (e) (2011). Subpart (d) of Criterion 2, which addresses the reduction, relocation, or elimination of a facility or service, does not apply to either CON application in the present case. *See* § 802.2(d) (2011).

applicant must use population statistics consistent with those generated by the state demographer, State Budget and Control Board.

c. The proposed project should provide services that meet an identified (documented) need of the target population. The assumptions and methods used to determine the level of need should be specified in the application and based on a reasonable approach as judged by the reviewing body. Any deviation from the population projection used in the South Carolina Health Plan should be explained.

....

e. Current and/or projected utilization should be sufficient to justify the expansion or implementation of the proposed service.

§§ 802.2.

As to the ALC's application of these criteria, Carolinas first argues the goal of reducing patient outmigration to North Carolina discriminates against and burdens interstate commerce. We disagree.

Patient outmigration data is typically used in the CON application process to demonstrate the need for an additional provider or service in a particular service area, and the outmigration from one service area to another usually occurs intrastate. In other words, need can be shown by evidence of residents traveling to a provider located outside the service area. *See Marlboro Park Hosp. v. S.C. Dep't of Health & Env'tl. Control*, 358 S.C. 573, 578, 595 S.E.2d 851, 853 (Ct. App. 2004) (stating evidence considered by the ALC "undisputedly related to core issues addressed during [DHEC's staff review] hearing"); *id.* at 578 n.2, 595 S.E.2d at 853 n.2 (identifying two core issues in DHEC's staff review hearing as the need for the proposed outpatient surgical center and the project's adverse impact on existing providers and listing 1997 outmigration data compiled by the Budget and Control Board as among the evidence that "dealt squarely with the issues before the [ALC]"). While some of these residents may live in close proximity to a provider outside the service area, many would experience a significant reduction in travel time by the addition of a service or provider within the service area.

Therefore, the goal of reducing outmigration reflects a legitimate concern regarding patient travel time, which obviously can affect health outcomes in an emergency. Even if the reduction of outmigration negatively affects interstate trade when the service area happens to border another state, this reduction can hardly be characterized as needless for Dormant Commerce Clause purposes. *See Taylor*, 477 U.S. at 151 ("As long as a State does not *needlessly* obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." (emphasis added) (citation omitted) (quoting *Baldwin*, 294 U.S. at 527)).

Presumably, either Piedmont's proposed facility or Carolinas' proposed facility would meet the need for sixty-four more general hospital beds in York County. However, the ALC's analysis of which proposal would best meet community need as set forth in criteria 2(a), 2(b), 2(c), and 2(e) was more complex:

In addition to meeting the need for new hospital services, Piedmont's application was specifically intended to strengthen the York County healthcare system by reducing outmigration from York County. While patients have sought medical services outside of York County for years, primarily in the Charlotte area, the outmigration accelerated from 2005 to 2011. The effects of the outmigration, which are detailed in the relevant Findings of Fact and are incorporated herein, reduced the ability of Piedmont and many of the independent physicians on Piedmont's medical staff to meet the healthcare needs of York County residents. Piedmont demonstrated by a preponderance of the evidence that the establishment of [its proposed facility] would strengthen the capacity of existing York County providers to meet those needs. For these reasons, Piedmont best meets § 802.2(a, b, c, e).

The ALC also concluded,

One of the principal differences between the applicants is that the approval of [Carolinas' proposed facility] would have the effect of causing the erosion of quality of care at Piedmont and among specialists practicing there as a result of the diminution in the volume of patients and the

degradation of the payor mix of the patients who would continue to be seen at Piedmont. Consequently, there would be no hospital in York County providing many of the high quality and tertiary services that Piedmont has added. Alternatively, the establishment of [Piedmont's proposed facility] will ensure that high quality services continue to be provided and added within York County.

The ALC's unchallenged findings of fact support these conclusions. The ALC found outmigration would continue if Carolinas' proposed facility was built in Fort Mill because Carolinas would refer its Fort Mill patients needing specialty care to one of Carolinas' North Carolina facilities providing these types of services rather than to Piedmont's existing facility in Rock Hill.¹⁰ The ALC also found that if Carolinas' proposed facility was built in Fort Mill, Carolinas would further reduce Piedmont's market share, thereby reducing the volume necessary for Piedmont's continued provision of its specialty services to residents of Rock Hill and western York County.¹¹ Piedmont had already lost a significant volume of complex cases

¹⁰ Carolinas' proposed Fort Mill facility would provide only primary and secondary care. One of Piedmont's experts, Joel Grice, testified that even if the competing CON applicant had been a provider's hospital offering specialty services and located within South Carolina but outside of York County, outmigration from York County would still be a concern.

¹¹ In its reply brief, Carolinas argues, "The ALC's ruling fails to demonstrate that [the] purpose [of maintaining needed healthcare services in York County] is supported by sufficient evidence under the strict scrutiny analysis." Carolinas also alleges "Piedmont presented no concrete evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON." Because Carolinas did not raise these arguments in its main appellate brief, we need not consider them. See *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

Further, Carolinas' allegations are simply unfounded. Piedmont presented the testimony of Arun Adlakha, M.D., who had requested Piedmont to acquire an instrument that would allow him to perform navigational bronchoscopies. Piedmont acquired the instrument, which was the first of its kind in the greater Charlotte area. When it was first placed in operation, Dr. Adlakha performed enough procedures to maintain his proficiency. However, after the patient volume for this service

from 2005 to 2011, forcing one of its physicians to terminate use of a new invasive technology acquired by Piedmont in 2009, due to the referral patterns of physicians aligned with Carolinas. In contrast, Piedmont's proposed facility in Fort Mill would strengthen Piedmont's ability to serve residents "throughout York County by increasing the number of patients treated at Piedmont's Rock Hill facility."

While Carolinas would have the court believe the ALC was simply looking out for Piedmont's bottom line, the ALC was looking at the big picture for all of York County, i.e., how to preserve the quality of care and the larger complement of services Piedmont's existing facility provides to York County residents who do not live in the more affluent northern part of the county. These objectives are consistent with the Project Review Criteria, which Carolinas has not challenged.

As to Carolinas' argument that the ALC's application of the community need criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market," we disagree. Carolinas' characterization of Piedmont as an "in-state" or local interest is disingenuous. Both parties own multiple hospitals in multiple states, including South Carolina.¹²

Carolinas next argues the ALC provided Piedmont with an advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility when Carolinas could not lawfully transfer beds from its North Carolina facilities and this advantage discriminates against "out-of-state hospital systems." However, even if Piedmont had not proposed to transfer beds from its Rock Hill facility, the ALC's findings support its conclusion that Piedmont best meets criteria 2(a, b, c, e)—these findings indicate Piedmont's proposed facility would better preserve the quality of care and the larger complement of services that Piedmont's Rock Hill facility

significantly declined, Dr. Adlakha decided "to terminate the use of the instrument as he found it 'very difficult to maintain [his] proficiency and justify keeping it for so long.'" Dr. Adlakha attributed the decrease in patient volume to CPN's referral practices.

¹² As previously stated, Piedmont's ultimate owner, Tenet Healthcare Corporation, is headquartered in Dallas, Texas and owns forty-nine hospitals in ten states. Carolinas, which is headquartered in Charlotte, North Carolina, owns multiple hospitals in North Carolina as well as a large network of employed physicians, the CPN, many of whom have practices in York County, South Carolina. Further, Carolinas owns and manages at least one hospital in South Carolina, i.e., Roper Hospital in Charleston.

provides to York County residents who live in Rock Hill or the western, rural part of the county. Therefore, the ALC's approval of Piedmont's proposed bed transfer does not constitute reversible error. *See Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) ("Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

Further, the ALC also took into account the capacity to expand, i.e., "shell space," that each respective proposed facility would possess in order to accommodate population growth. The ALC concluded Piedmont had the superior capacity to expand, and Carolinas has not presented any authorities or evidence indicating it was unfairly prevented from competing with Piedmont on this basis.

Based on the foregoing, the ALC properly applied Project Review Criteria 2(a), 2(b), 2(c), and 2(e) without any discriminatory purpose. To the extent that the proper application of these criteria may have a discriminatory effect, Carolinas has failed to carry its burden of "proving that the burdens placed on interstate commerce outweigh the . . . local benefits" of these criteria. *Colon Health*, 813 F.3d at 157 (quoting *LensCrafters*, 403 F.3d at 805). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.

3. Efficiency

Criterion 17 is entitled "Efficiency" and falls under the general category of "Economic Consideration." §§ 801.1, 802.17. Criterion 17 states, "The proposed project should improve efficiency by avoiding duplication of services, promoting shared services[,] and fostering economies of scale or size." § 802.17. The ALC concluded, "Piedmont better satisfies this criterion because its proposal fosters economies of scale by spreading costs over a greater number of beds. Not only will [Piedmont's proposed facility's] 100 beds better accommodate future growth, [Piedmont's proposed facility] is better designed for expansion than is [Carolinas' proposed facility]."

As with criteria 2(a, b, c, e), Carolinas argues the ALC's application of Criterion 17 provided Piedmont with an unfair advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility. However, Piedmont's bed transfer proposal was not the sole reason for the ALC's determination that Piedmont best met Criterion 17. The ALC also concluded Piedmont's proposed facility was better designed for expansion than Carolinas' proposed facility, and this factor alone allows Piedmont to best meet Criterion 17.

Again, Carolinas does not challenge the constitutionality of any of the Project Review Criteria or the purposes of the CON Act served by these criteria. We find no discriminatory purpose behind the ALC's thoughtful and correct application of these criteria to the complex facts of this case.¹³ To the extent that the proper application of the Project Review Criteria may have a discriminatory effect, "[c]ourts are afforded some latitude to determine for themselves the practical impact of a state law, but in doing so they must not cripple the States' 'authority under their general police powers to regulate matters of legitimate local concern.'" *Colon Health*, 813 F.3d at 152 (quoting *Taylor*, 477 U.S. at 138).

Based on the foregoing, we find no Dormant Commerce Clause violation.

CONCLUSION

Accordingly, we affirm the ALC's Amended Final Order.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

¹³ Carolinas also argues the ALC erred in failing to conduct the proper Dormant Commerce Clause analysis because the ALC stated, "The same plan, criteri[a,] and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers." Carolinas asserts that this is the incorrect standard for a Dormant Commerce Clause analysis. Because the ALC properly applied the provisions of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria without any discriminatory purpose, we find no reversible error. *See Judy*, 384 S.C. at 646, 682 S.E.2d at 842 ("Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

