Exhibit 1

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Trident Medical Center, LLC, d/b/a Trident Medical Center, Petitioner, v. South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center - Berkeley County, Respondents.	Docket No. 18-ALJ-07-0100-CC ORDER GRANTING PETITIONER'S MOTION FOR JUDGMENT AS A MATTER OF LAW AND DENYING CERTIFICATE OF NEED ON OTHER GROUNDS

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on the Motion of Trident Medical Center, LLC, d/b/a Trident Medical Center (Petitioner or Trident) for Judgment as a Matter of Law.[1] The Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center - Berkeley County (Respondent or MUSC)[2] opposes the Motion.

As a matter of procedural background, on January 24, 2019, Trident made the Motion before the Court after the conclusion of several days of testimony in a hearing contesting the approval of an application for a Certificate of Need (CON) issued to Respondent by the South Carolina Department of Health and Environmental Control (DHEC or Department).[3]

[1] During the hearing, attorneys for Trident referred to the Motion as a request for "Judgment as a Matter of Law." (Trial Tr. 1209:3-4; 1220:1-5). Filings with the Court caption the Motion as one for "Directed Verdict." Since the Court cannot grant a Motion for Directed Verdict, the Motion will be treated as one for Judgment as a Matter of Law.

[2] The Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center - Berkeley County was referred to during trial as "MUSC." This naming convention continues in this Order, except when use of "Medical University Hospital Authority" or "MUHA" is necessary for clarity.

[3] The hearing was scheduled, and conducted, to resolve several other matters raised by Petitioner with respect to the approval of the CON Application. However, because the assertion set forth in the Motion could be dispositive in either reversing DHEC and denying the CON or resolving the issue in favor of MUSC, which would then leave the Court to decide the remaining matters set forth during the hearing, the Court and the parties agreed post-hearing to initially address and brief only the issue set forth in the Motion in the interest of judicial economy.

In its Motion, Trident contends that MUSC Cancer Care Network, LLC, (the entity identified in the application as the manager/operator of the proposed project) is an unlawful joint venture and, therefore, the CON Application as presented to DHEC does not comply with the CON standards and criteria and must be denied. Trident asserts that the management company is unlawful because the state constitution prohibits political subdivisions from being joint owners or stockholders of companies and because the enabling statutes of MUSC and MUHA do not permit either to form or own for-profit entities. Therefore, Trident asks the Court to overturn DHEC's decision to approve the Certificate of Need in its request for relief.

On May 22, 2017, MUSC filed a CON Application (Application) seeking DHEC's approval to establish a radiation therapy center in Berkeley County, South Carolina. As a state entity, MUSC provides comprehensive cancer care with multidisciplinary treatments that include surgery, radiation oncology, medical oncology, and other patient care needs at its main campus located on the peninsula in downtown Charleston. To better serve its cancer patients in and around the growing areas of Berkeley and Dorchester counties (North Area), the proposed radiation therapy center in Berkeley County will benefit the roughly 30% of MUSC cancer patients who live in the North Area and currently travel to the main MUSC campus in downtown Charleston for treatment. The planned center is slated to include a linear accelerator, a CT scanner, examination rooms, offices, and other space for planning, storage, and clerical and administrative support.

DHEC deemed the Application complete for purposes of review on July 10, 2017. A project review meeting in which all parties participated was held on September 20, 2017. On October 4, 2017, Petitioner filed a written reply to address Respondent's arguments. DHEC approved the CON Application by letter dated November 22, 2017. Petitioner timely filed a Request for Board Review on December 15, 2017; that request was denied, thereby making the decision granting the CON final. On March 1, 2018, Petitioner sought administrative review as an affected person with standing to challenge DHEC's decision. After conducting discovery, a contested case hearing was held before the ALC over the course of five days in January 2019.

During the hearing, the Court heard testimony from several witnesses, including Margaret Murdock, the Director of the CON Program at DHEC who reviewed and approved the Application, and Dr. Patrick Cawley who, as well as being a practicing physician, holds numerous executive positions within MUSC and its affiliated organizations.

The Court also heard testimony from Daniel Sullivan on behalf of Trident and David Levitt on behalf of MUSC. Both of these witnesses were qualified to testify as experts in healthcare planning and healthcare finance pursuant to Rule 702, SCRE.

Having observed the aforementioned witnesses, as well as others before the Court, and considering the evidence presented at the hearing along with the post-trial memorandums and exhibits submitted by both parties, the Court makes the following Findings of Fact by a preponderance of the evidence:[4]

FINDINGS OF FACT

A. CON Review

Under the State Certificate of Need and Health Facility Licensure Act (CON Act), S.C. Code Ann. § 44-7-110, *et seq.* (2018 & Supp. 2017), DHEC is the agency charged with implementing the South Carolina CON Program through the granting of CONs and the licensing of healthcare facilities. To effectuate this obligation, DHEC is required to publish a biennial South Carolina Health Plan (State Health Plan) to establish the need for medical facilities and services. The State Health Plan includes an inventory of existing services, the projections of need for additional services and facilities, and the standards for distributing the facilities and services across designated multi-county regions referred to as "service areas". S.C. Code Ann. § 44-7-180(B).

In determining whether to grant or deny a CON, the Department evaluates a proposed project under the review criteria found in the CON Regulations, S.C. Code Ann. Regs. 61-15 (Supp. 2017), and under the policies and standards set forth in the applicable State Health Plan. Pursuant to the CON Act, the Department may not issue a CON to an applicant "unless the application complies with the South Carolina Health Plan, Project Review Criteria, and other regulations." S.C. Code Ann. § 44-7-210(B) (2018); *see also MRI at Belfair, LLC v. S.C. Dep't of Health and Envtl. Control,* 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008) (holding that compliance with the State Health Plan and the Project Review Criteria are independent requirements for approval of a CON). Even if an application complies with the State Health Plan, the Department can refuse to issue a CON based

[4] To the extent that any Findings of Fact set forth herein shall be considered not to be Findings of Fact but Conclusions of Law, they may be deemed as such.

on the Project Review Criteria and other regulations it identifies. S.C. Code Ann. § 44-7-210(B). However, no project can be approved unless it is consistent with the State Health Plan. S.C. Code Ann. Regs. 61-15 § 307(1).

In regard to the Application at issue, the State Health Plan that applies to the proposed project is the 2015 Health Plan, enacted August 13, 2015. Chapter IX of the State Health Plan sets forth the CON standards for the addition of a linear accelerator (LINAC), the device that administers radiation treatment, in the service area. The Department reviewed the Application for consistency with Standard 7 because it was considered an expansion of the services MUSC already offered in the service area at its main campus, rather than an application to establish new services to be reviewed under Standard 6. The service area consists of Berkeley, Charleston, Colleton, and Dorchester counties (Service Area). The Department identified the following Project Review Criteria (PRC) as relevant to the proposed project and used them to review the CON Application:

a. Compliance with Need outlined in the State Health Plan (Chapter IX)
b. Community Need Documentation
c. Distribution (Accessibility)
d. Medically Underserved Groups; and
e. Financial Feasibility

(DHEC Ex. 1, p. 370). These PRCs were ranked according to their relative importance, with the most important listed first. All other relevant criteria were considered to be of equal import.

B. The Entities Involved

The Motion before the Court requires a determination of the constitutionality of the entity identified in the Application as the operator and manager of the proposed facility. As such, it is first necessary to analyze the organizational structure of the Medical University of South Carolina and its relevant affiliated entities.

MUSC: In 1913, the General Assembly accepted a transfer of private property and established the Medical University of South Carolina as a state agency, now governed by S.C. Code Ann. § 59-123-10, *et seq.* MUSC is run by a board with specified authorities and powers established through its enabling legislation in S.C. Code Ann. § 59-123-60(A). While the majority of functions take place in Charleston, MUSC is increasingly forming strategic alliances with other hospitals and hospital systems across South Carolina, extending its reach into other areas of the state.

MUSC has received numerous designations and awards for providing high levels of healthcare in many areas of disease, including cancer care. In fact, as stated in the Application, the MUSC Hollings Cancer Center (Hollings Cancer Center) is one of the leading cancer treatment centers in the Southeast and one of fewer than 70 cancer centers in the nation – and the only one in South Carolina – to receive a designation from the National Cancer Institute (NCI). (DHEC Ex. 1, p. 7).

MUHA: MUSC consists of three main bodies: the medical school, the hospital, and the physician practice group.[5] In 2000, the General Assembly established the Medical University Hospital Authority (MUHA) as a separate state agency to be run by a board comprised of the same members that serve on the MUSC board. (Trial Tr. 678:14-18). Through powers enumerated in its enabling legislation, MUHA is granted the authority to manage, regulate, and operate the healthcare functions of MUSC. MUHA is also specifically authorized to establish not-for-profit corporations or entities as the board finds necessary to facilitate the healthcare operations of MUSC. S.C. Code Ann. § 59-123-60(E)(13).

UMA: University Medical Associates (UMA) is MUSC's physician practice plan that also operates as a 501(c)(3) entity. (Trident Ex. 56, p. 2). According to MUSC's 2018 Comprehensive Annual Financial Report that contains the organizational chart of MUSC and its affiliates, UMA is a "non-profit corporation established to promote and support the educational, medical, scientific, and research purposes of the University." *Id.*

MUSC SV: The same organizational chart also states that MUSC Strategic Ventures (MUSC SV)[6] was "formed in September 2015 to allow affiliation with tax exempt entities to support the missions and programs of The Medical University of South Carolina, UMA and MUHA." *Id.* As described in the Application, MUSC SV was "established at the direction, and for the support and benefit, of [MUSC], an agency and political subdivision, and public university, of the State of South Carolina that works in close collaboration with [MUHA], also an agency and political subdivision of the State of South Carolina." (DHEC Ex. 1, p. 9). Governed by an eight-member

[5] "MUSC and its affiliates, Medical University Hospital Authority and University Medical Associates, collectively known as MUSC, is both a teaching hospital and referral center and is South Carolina's only academic medical center...[achieving] international recognition and national acclaim as a premier biomedical research, educational, and clinical institution." (DHEC Ex. 1, p.7) (CON Application).

[6] According to the Certificate of Incorporation and Articles of Amendment, MUSC SV was first formed under the name "MUSC Health" in September 2015 and became MUSC Strategic Ventures in December 2015. (MUSC Memo., Ex. 2 and 3) (Trial Tr. 680:17-22 (Dr. Cawley)).

Board of Directors, "MUSC SV functions for charitable, scientific and educational purposes in support of MUSC (including MUHA) and [UMA], and to lessen their burdens, by conducting activities that otherwise would be conducted by one or more of such entities." *Id.* at 10. MUSC SV's "main function is to joint venture with other companies or entities to help fulfill [MUSC's] mission. (Trial Tr. 680:9-12 (Dr. Cawley)).

MUSC Cancer Care Network, LLC: The MUSC Cancer Care Network, LLC (The Network) is a for-profit Delaware limited liability company that was formed in January of 2016 and is authorized to do business in South Carolina. (DHEC Ex. 1, p. 10). The Network is owned 51% by Alliance Oncology, LLC (Alliance), a for-profit Delaware company headquartered in California, and 49% by MUSC SV, the 501(c)(3) entity previously described. (Trident Ex. 14, Schedule I).

The company's Management Agreement states that The Network was "organized to form a strategic relationship between Alliance and [MUSC SV] for the development, operation and management of the oncology service line for certain hospitals in South Carolina, in order to extend [MUSC's] reputation for academic excellence to various communities and Alliance's operations and marketing expertise with respect to oncology services[.]" (Trident Ex. 13, p. 1).

According to the Management Agreement, The Network is to form individual limited liability companies (Contractors) as joint ventures between The Network and hospitals. *Id.* Each Contractor and hospital will form its own Service Agreement for each site. *Id.* The Network Management Agreement outlines what both Alliance and MUSC SV are obligated to do with respect to the services to be provided by the Contractors to the hospitals pursuant to the Service Agreements. *Id.* All of the services to be performed by The Network for the sites will be in exchange for fair market value charges that are expected to be based upon a percentage of collections from oncology services provided to each site. The Network Management Agreement also provides that each site shall pay a management fee to The Network in the amount of 5% of net revenues. *Id.*

Under the company's Management Agreement, Alliance agrees to: (a) assist The Network in procuring and obtaining financing for all equipment and office space associated with a particular facility site; (b) employ all administrative and technical personnel for each site; (c) provide marketing services related to each site; (d) provide billing and collections services to each site, subject to the parties' choice that the hospital entity at that site may choose to perform such services

itself; and (e) provide, in its discretion, working capital advances (capped at $500,000 for each advance) to The Network to be repaid with interest. (Trident Ex. 13, p. 2-3).

MUSC SV agrees to: (a) provide The Network with clinical standards developed by the Hollings Cancer Center and with the quality metrics to be met for each facility; and (b) provide telemedicine services to the sites.[7] Alliance and MUSC SV agree jointly to: (a) share personnel and costs related to information technology at the sites, with Alliance being responsible for managing the services themselves; and (b) establish a research database, with a central Institutional Review Board and a tumor board, in order to support clinical trial participation at all sites. (Trident Ex. 13, p. 3-4).

While the Operating Agreement states that Alliance will control all billing, it also states that it is the intention of the parties to operate The Network in such a manner as to preserve the tax-exempt status of MUSC SV so long as MUSC SV or one of its affiliates remains a member, by "promoting health for a broad cross-section of the community, especially those persons who are poor." (Trident Ex. 14, p. 7). In setting out that The Network will provide services to all patients, including individuals covered by Medicare or Medicaid, without expectation of payment in order to further MUSC SV's tax-exempt purposes, the Operating Agreement provides the following:

> All Members are aware of the limitations on the actions of [The Network] due to the tax-exempt status and charitable purpose of [MUSC SV], and each Member agrees that any decision of [The Network] (i) to forego an action which would be inconsistent with the tax-exempt status of [MUSC SV] or (ii) to take an action which furthers the charitable purposes over any profit-making motives of [The Network], shall not be a breach of the duty of loyalty or a breach of any fiduciary duty to [The Network], notwithstanding that any such decision is not in the best interests of [The Network].

Id. at 7-8.

[7] MUSC received millions of dollars in grants from the General Assembly in 2018 to develop its telemedicine program. (Trial Tr. 1081:23-1082:7 (Dr. Jenrette)). "MUSC has gotten heavily into telemedicine in the last five to six years. I think we have over 80 different types of programs right now. When it comes to cancer care, we do tele-cancer consultations remotely. We also do what we call virtual tumor boards. And there's dietary follow up, things like that...Just about everything we're doing anymore heavily involves telemedicine." (Trial Tr. 711:21-712:7 (Dr. Cawley)).

Additionally, under the terms of the Operating Agreement, MUSC SV also agrees to allow each center to use the name "Hollings Cancer Center" as part of a separate licensing agreement to be negotiated with each facility. (Trident Ex. 14, p. 16).[8]

MUSC Health: Dr. Cawley informed the Court that MUSC Health is not a legal entity but "really a brand construct in which we encompass all things clinical across all of MUSC and all of its related entities[.]" (Trial Tr. 681:11-14). Dr. Cawley described his role as CEO of MUSC Health as "a way to portray and talk about how I have the authority to go across any of those related entities when it becomes a clinical issue." *Id.* at 681:18-21.

Dr. Cawley serves as the Vice President of Health Affairs for MUSC and is the Executive Director of MUHA.[9] (Trial Tr. 677:5; 678:4-5). Dr. Cawley also sits on the Executive Committee of the board of UMA and is the Chief Executive Officer of MUSC Health. (Trial Tr. 678:25; 680:14-16). He is the Chief Executive Officer of MUSC SV and is one of the two MUSC members appointed to the board that governs The Network. (Trial Tr. 681:7; DHEC Ex. 1, p. 16).

According to the testimony of Dr. Cawley, the MUSC radiation program functions under MUHA. (Trial Tr. 682:5-8). The Hollings Cancer Center is the brand name for the MUSC cancer system. *Id.* at 700:17-18. Radiation oncology is a sub-entity of the Hollings Cancer Center. *Id.* at 687:8-9. Given his positions at MUHA, MUSC Health, and MUSC SV, Dr. Cawley testified that his role in terms of the radiation oncology program is to simply move forward in a strategic direction. *Id.* at 682:14-17.

Dr. Cawley also testified that the joint venture with Alliance provides MUSC with access to capital because Alliance is responsible for buying the relatively expensive equipment for the proposed facility. (Trial Tr. 764:9-18; 705:14-20). In addition, the set-up of The Network is also advantageous to MUSC from a financial perspective because the joint venture means that neither the assets nor liabilities of The Network will appear on MUSC's balance sheets. (Trial Tr. 764:19 – 765:11).

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[8] Additional Findings of Fact relating to the business structure of The Network will be discussed *infra.* (*See* Conclusions of Law, Section C, pp. 26-30).

[9] While these entities are technically run by two different boards, the same people sit on both boards and both boards include Dr. Cawley. (Trial Tr. 677:14-18).

C. The CON Application

Dr. Cawley signed the CON Application on behalf of MUHA under the titles of CEO of MUSC Health and Vice President of Health Affairs at MUSC. (DHEC Ex. 1, p. 1, 6; Trial Tr. 761:20-23).

The CON Application identifies MUHA as the organization responsible for the Application and as the licensee. (DHEC Ex. 1, p. 1, 3) Under the "Management" section of the Application, Greg Spurlock, who is the President of Alliance Oncology, is listed as the Administrator of the facility in his capacity as the Managing Member of The Network. *Id.* at 3.

In a subsection captioned "Ownership or Control of the Facility," the applicant is instructed to "[a]ttach a list of names and addresses of the owners of the facility, indicating percent of ownership of each owner" and to "[c]ircle the appropriate information regarding ownership." *Id.* at 4. The box designating the owner as a "Government – State" entity is circled under this section.[10] *Id.* The provided attachment goes into further detail stating: "[MUHA] is the licensee. MUSC Cancer Care Network, LLC [The Network] is the management company and is a Delaware limited liability company licensed to do business in South Carolina. Alliance Oncology, LLC is the majority owner of [The Network] with a 51% membership interest. MUSC Strategic Ventures is the minority owner of [The Network] with a 49% interest." *Id.* at 5-6. The attachment section goes on to provide the mailing addresses for Alliance and MUSC SV as well as the address for Equity, LLC who is identified as the sole owner of the building where the facility will be located under the terms of a lease. *Id.* at 6.

In another section of the Application and per Reg. 61-15 § 202, the applicant is instructed to "provide the following ownership information." Specifically, item (b) reads:

> Name and address of licensee or prospective licensee. (Note: The licensee is defined as the legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or service; **the owner of the business. The licensee must be the entity to whom the Certificate of Need is issued.**)

Id. at 13; Reg. 61-15 § 202(2)(b)(8)(b). (emphasis added).

[10] The designations that could have been circled in this section include: Individual, Partnership, Corporation, Proprietary, Non-Profit, Government – State, and Other (Specify). (DHEC Ex. 1, p. 4).

The licensee is again identified as MUHA under this section and the title of the licensee's governing body is listed as Medical University Hospital Authority Board of Trustees with Donald R. Johnson, II, MD as the presiding officer of the governing body. *Id.* at 14. A list of the entire MUHA Board is provided to identify all Officers of the Licensee in Attachment D of the Application. *Id.* at 103. A diagram of the officers of MUSC Health is provided as the requested Organizational Chart of the licensee.[11] *Id.* at 105-6. MUHA and the building owner are also identified as the only "persons and/or legal entities claiming liabilities of the licensee or of the facility or service for which the Certificate of Need is requested[.]" *Id.* at 14-15; Reg. 61-15 § 202(2)(b)(8)(f).

As required, two documents were also submitted with the Application in order to verify approval of the project by the licensee's governing body. The first showed that the MUHA Hospital Operations, Finance and Quality Committee approved a measure by Dr. Cawley to move forward on a CON application to establish a radiation therapy center in North Charleston on December 11, 2014.[12] (DHEC Ex. 1, p. 220-1). The other document attached to the Application establishing governing body approval was submitted in the form of a record of The Network's Board Meeting Minutes from March 7, 2017, representing that Dr. Cawley made a motion to move forward with the CON application for the Berkeley County LINAC project. *Id.* at 222-3. This motion was seconded by Greg Spurlock, the President of Alliance and the Managing Member of The Network, and unanimously approved by the other members of The Network's board. *Id.* The Application was submitted to DHEC shortly after on May 22, 2017. It is curious that the board of the supposed management company, contracted only to operate a healthcare facility, would need to vote to move forward on the submission of a CON application to establish the facility in the first place.

The Application also contains documentation, such as quotes from vendors for medical and office equipment, addressed to The Network or Alliance and not to MUHA. (DHEC Ex. 1, p. 53, 85). To prove the project's Financial Feasibility as a requirement of the Application, MUHA submitted a letter from Greg Spurlock, President of Alliance and the Managing Member of The Network, stating, "I am responsible for the organization's financial operations and to secure funding for large capital projects. The total capital costs of the project for CON purposes is $9.8M." *Id.* at 160.

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[11] Dr. Cawley testified that MUSC Health was not actually a legal entity but more of a brand construct.

[12] MUSC SV, the MUSC affiliate that jointly owns The Network with Alliance, was not established until September 2015.

The letter further assures that the project will be financed by an affiliate of The Network or by an outside third party, depending on the interest rates available. *Id.* at 60.

Despite the fact that The Network or Alliance is clearly funding the project and voting to move forward to establish the facility, the Application identifies The Network as only the management company engaged by the licensee to manage or operate the facility. *Id.* at 15. The details provided for the Network include: an address in California; a Board of Managers as the title of the governing body; Greg Spurlock, Managing Member of The Network as the Presiding Officer of the governing body; the respective Alliance and MUSC SV ownership interests in The Network; and five informally named Board Members (3 from Alliance and 2 from MUSC Health). *Id.* at 15-16.

Because MUHA was the applicant and identified as the licensee, Maggie Murdock of DHEC reviewed the Application for consistency with Standard 7, as an expansion of the services MUSC already offered in the Service Area, as opposed to an application to establish new services that would have been reviewed under Standard 6. Standard 7 only requires that the applicant provide internal data for the previous two years as evidence that the licensee's already existing facility has met the minimum utilization threshold in order to establish the need for expansion to comply with the State Health Plan. (Trial Tr. 565:16-566:4). Standard 6 requires a much more stringent review of the utilization data for the entire Service Area. *Id.* at 566:19-567:15.

Murdock also relied on MUSC/MUHA's historical records and reputation in other areas of the Application. (DHEC Ex. 1, p. 376-7). In fact, Regulation 61-15 directs that certain criteria can be met through a provider's service history. Certainly, as referenced in the Application, MUSC has a reputation and pattern for serving patients in South Carolina and a history of following both South Carolina and federal laws. Other answers in the Application directed Murdock to refer to information already on file at DHEC with regards to MUHA's policies on patient access, patient's rights, patient quality and safety policies, billing practices, and history, or lack thereof, of citations from DHEC for deficiencies, complaints, failure to follow procedure, and the like. (DHEC Ex. 1, p. 17; 36-37; 40; 38-39).

As to the PRC of Service to Medically Underserved Groups, Murdock relied solely on MUHA's history of service to indigent patients. Specifically, the Application provides MUHA's historical figures of indigent care treatment from 2011-2016 and projections of that treatment from 2017-2020. As to MUHA's policies on indigent care, the Application provides:

> The level of indigent care provided by MUHA reflects a tradition of commitment to helping the entire population of South Carolina and the Lowcountry. MUHA will continue its historical tradition of working with all governmental levels to address the issues of indigent care and secure adequate funding for the future.
>
> ....
>
> MUHA is an operating and approved disproportionate share medical facility. Due to this funding, Medicaid contractual adjustments and indigent care costs are offset, allowing for the continued support of health care for all South Carolina citizens.

(DHEC Ex. 1, p. 40-41). Additionally, as an attachment entitled "Indigent Care Commitment Letters," Dr. Cawley included a letter to DHEC in his capacity as the CEO of MUSC Health and as the VP of Health Affairs at MUSC stating, "MUHA, the applicant ... commits that the facility will accept Medicare and Medicaid patients and the services that are not likely to be reimbursed for indigent and charity patients will be provided at a percentage that is comparable to all other existing outpatient services, if any in the services area." *Id.* at 167-8. A copy of the "Assurances" page contained earlier in the Application is also included in the attachment. *Id.* at 169. There are no mentions of Alliance's policies or historic treatment with respect to medically underserved groups. However, The Network Operating Agreement makes clear that Alliance will be in charge of all billing for the proposed project.

In all, the Application provides various answers to multiple questions regarding ownership and/or control of the facility. While those answers provide a somewhat murky picture of the overall organizational structure of the proposed project, it is clear from Murdock's testimony that she believed that MUHA was the licensee and that the facility was going to be run according to the standards that DHEC has come to expect from other MUSC/MUHA facilities. In fact, with respect to the proposed project, when asked what she knew about the entity of Alliance, if anything, Murdock responded, "I don't recall specifically sitting here today." (Trial Tr. 650:11-13).

Perhaps that was the intended effect of this particular Application. However, having reviewed the information provided by MUSC in the CON Application and in considering all testimony along with the evidence presented in the Operating and Management agreements of The Network, the

Court finds that MUHA is not the actual licensee of the proposed project as represented in the Application.[13]

Issues

In the Motion, Trident claims that the proposed project, as planned and submitted to DHEC for approval, constitutes a joint venture that violates S.C. Const. art. X, § 11 as well as MUSC and MUHA's enabling legislation. If the answer to that claim is affirmative, then Trident contends, as a matter of law, that the Department's decision to approve the CON Application must be reversed.

The Court finds the issue presented in Trident's Motion requires a two-step analysis:

1. Is The Network a joint venture created and operating in violation of the constitutional prohibition on political subdivisions being joint owners or stockholders of companies, and is The Network illegal or *ultra vires* because the enabling statutes of MUSC and MUHA do not permit ownership of for-profit entities?

2. If The Network is unconstitutional or *ultra vires*, does that render the Application, as presented to DHEC, not in compliance with the CON standards and criteria so as to require the Court to overturn DHEC's approval and issuance of the CON?

Additionally, the Court finds that as the trier of fact in the *de novo* hearing, a third issue concerning the validity of the CON should also be addressed at this juncture:

3. Is the Certificate of Need correctly issued to the actual licensee?

Standard of Review

The ALC has jurisdiction over this matter pursuant to S.C. Const. art. I, § 22; S.C. Code Ann. §§ 1-23-320, -600(B), 44-1-60(F), and 44-7-210(E); S.C. Code Ann. Regs. 61-15; and Rule 11 of the SCALC Rules. Trident timely filed its request for a contested case hearing regarding DHEC's decision. *See* S.C. Code Ann. Regs. 61-15 § 401. Because Trident is an existing provider of radiation therapy services in the service area, it is an "affected person" for the purposes of

[13] *See* discussion *infra* pp. 29-33.

participating in a contested case related to DHEC's decision. *See* S.C. Code Ann. § 44-7-130(1) (2018); S.C. Code Ann. Regs. 61-15 § 103(1).

A contested case hearing conducted before this Court in a CON matter is a trial *de novo,* in which "the whole case is tried as if no trial whatsoever had been had in the first instance," and the administrative law judge conducting the hearing is the sole finder of fact, who "must make sufficiently detailed findings supporting the denial or grant of a permit application." *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) (quoting *Blizzard v. Miller*, 306 S.C. 373, 412 S.E.2d 406 (1991) and *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002)). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). The trier of fact may also give an expert's testimony the weight he or she determines it deserves, *Florence Cty. Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 425 S.E.2d 61 (Ct. App. 1992), and may accept the testimony of one expert over that of another. *S.C. Cable Television Ass'n, supra.*

Jurisdiction

The Administrative Procedures Act (APA) authorizes the ALC to conduct contested case hearings regarding agency decisions and to hear the appeals of agency decisions. S.C. Code Ann. §§ 1-23-380, 505(3), and 600. In contested cases involving agency licenses, permits, and other approvals, the ALC's jurisdiction is limited to claims arising from the application of the requirements, standards, and criteria in the relevant agency statutes and regulations.

In its Motion, Trident claims that the proposed project, as planned and submitted to DHEC for approval, constitutes a joint venture that violates S.C. Const. art. X, § 11 as well as MUSC and MUHA's enabling legislation; therefore, the Application does not comply with CON standards and criteria.

MUSC argues that the Motion should be denied because the Court does not have proper jurisdiction over Trident's claims that The Network is an illegal entity as (a) these claims are not based upon the application of the standards and criteria in the relevant DHEC statutes and

regulations; (b) these claims are not "as-applied" constitutional challenges to the application of the standards and criteria in the relevant DHEC statutes and regulations; and (c) Trident failed to raise these claims during the DHEC review process.

A. Subject Matter Jurisdiction

MUSC contends that the ALC does not have subject matter jurisdiction to address Trident's claim that The Network is illegal because that claim does not arise from the application of the relevant DHEC statutes or regulations. More specifically, MUSC contends that claims of The Network's illegality are based upon the Court's application of the state constitution and the enabling statutes for MUSC and MUHA and not from DHEC or the ALC's application of the CON standards in the State Health Plan and the PRCs.

MUSC also argues that even if Trident's claims are valid, they "have no meaningful nexus to MUSC's CON application or the proposed facility at all." (MUSC Memo., p. 7). MUSC posits that should The Network have to be dissolved, "such a result would have no material effect on MUSC's CON application or the proposed facility." *Id.* MUSC suggests that as the licensee of the facility, MUHA would just contract with Alliance to manage the facility or would manage the facility itself. *Id.* "That Trident's claims of illegality – even if meritorious – would have no material effect upon MUSC's CON application or the proposed facility further demonstrates that these claims are not properly part of a CON contested case." *Id.* The Court disagrees. Should a determination be made that The Network is illegal or *ultra vires,* then the necessary dissolution of that entity would affect many aspects of the proposed project, the CON Application, and the Department's review thereof.

By regulation, a CON application specifically requires certain information regarding the ownership and management of a proposed project. S.C. Code Ann. Reg. 61-15 § 202(2)(b)(8). The information provided is of necessary import when DHEC reviews an application to determine a project's compliance with the State Health Plan and the relevant PRC and regulations.

For example, in this instance MUHA is identified as the applicant and licensee. At the very outset, that one identification shaped the scope of all DHEC (and ALC) review because the Application was reviewed under Standard 7, as an expansion of existing services already provided by MUSC, as opposed to an application to establish new services that would have been reviewed under Standard 6. (Trial Tr. 565:15-566:4 (Murdock)). Had the Application identified The Network or Alliance as the applicant and licensee, as the Court finds should have been the case, the direction

and scope of DHEC review and the application of the CON standards in the State Health Plan and the PRCs would have been significantly altered.

Similarly, Reg. 61-15 § 802 sets forth a list of thirty-three criteria that are to be addressed by the applicant in the CON application and considered by DHEC during its review, including: (13) Record of the Applicant (Owner and/or Administrator); (14) Ability to Complete the Project; (15) Financial Feasibility; and (31) Medically Underserved Groups.[14] If the proposed manager/operator of the project - The Network - is an unconstitutional and, as such, illegal entity, then the project's ability to comply with any of these CON criteria and standards, as submitted to DHEC, can certainly be called into question.

In the aforementioned instances, and in others to be discussed herein, the determination of the legality of the project as presented to DHEC does arise from the application of the agency standards and regulations because such a determination would necessarily result in multiple changes to the Application. It could be reviewed under another standard altogether or, at the very least, review of the project using the relevant PRCs would be substantially redirected. Stated differently, MUSC submitted the Application for review with a constitutionally suspect joint venture company as the management entity and MUHA as the licensee. In doing so, the Application heavily, and inextricably, relies on the beneficial aspects of each entity as strategically presented to DHEC to render a more favorable application of the CON standards and criteria. For this reason, and in this case, a very meaningful nexus does, in fact, exist between the determination of The Network's constitutionality and the agency's application of the CON standards in the State Health Plan and the PRC.

Because the claim arises from the information provided by MUSC to facilitate the Department's application of the CON standards in the State Health Plan and the PRCs in Regulation 61-15, the ALC does have subject matter jurisdiction. Further, the remedy requested by Trident, to overturn DHEC's approval of the Application and deny the CON, is a remedy authorized to be granted by the ALC as relief.

[14] As previously discussed, the Application as submitted is set up so that MUHA is the point of reference for DHEC review of the Record of the Applicant and service to Medically Underserved Groups while The Network, through the assurances of the CEO of Alliance, is provided as the reference point to determine Financial Feasibility.

B. "As-Applied" Constitutional Claim

MUSC argues that the question of the constitutionality of The Network is not an "as applied" constitutional claim so the Court again lacks subject matter jurisdiction to consider the issue. The constitutional challenge raised by Trident is to the joint venture arrangement proposed by MUSC as set forth in the Application and considered by DHEC in its application of the CON standards and PRC. The Motion does not require the Court to determine the constitutionality of any statute or law, which would not be within the jurisdiction of the ALC.[15] Nor does the claim include allegations that DHEC applied a CON standard or criterion in a manner that violates the state or federal constitution.

Rather, Trident's Motion involves the statutory authority granted to MUSC through its enabling legislation and the applicability of the joint ownership prohibition set forth in S.C. Const. art. X, § 11 to the proposed project *as submitted to and reviewed by DHEC*. The Court agrees with MUSC that this matter does not involve an "as applied" constitutional claim. Because the issue to be determined does not require the ALC to invalidate a law or regulation passed by the General Assembly, the Court has the authority to consider the facts and determine whether particular conduct or arrangements before it violate constitutional and statutory restrictions. If a party were to challenge as unconstitutional the enabling statute's prohibition against MUHA's forming a business partnership with a for-profit entity, that challenge might well exceed the jurisdictional limits imposed on this Court by the South Carolina Supreme Court. However, the issue is whether the facts show that MUSC has crossed a constitutional and/or statutory line, not whether the line as drawn or applied is constitutional.

C. Procedural Jurisdiction

MUSC further contends that even if the ALC has subject matter jurisdiction over Trident's claim that The Network is unconstitutional, illegal, or *ultra vires*, the ALC still cannot adjudicate the claim because Trident did not raise the issue during DHEC review of the Application. As support for this argument, MUSC points to S.C. Code Ann. § 44-7-210(E) which provides that "[a] contested case hearing of the final agency decision must be requested in accordance with Section

[15] "Allowing ALJs to rule on the constitutionality of a statute would violate the separation of powers doctrine." *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000).

44-1-60(G). The issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during staff review."

MUSC's argument misapprehends the limitations set forth in § 44-7-210(E) and interpreted by the Court of Appeals in *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004) (holding that the law limits a contested case hearing to the issues presented or considered by DHEC staff but does not limit evidence concerning those issues).

As previously discussed, Regulation 61-15 required MUSC to address in its CON Application certain specifics involving the licensee, the ownership of the proposed manager/operator of the facility, the record of the applicant (including both the licensee and the manager/operator), the ability to complete the project, the financial feasibility of the proposed project, and the applicant's history of and projections for service to medically underserved groups. Also, under Regulation 61-15 § 202(d), MUSC was required to, and did, assure DHEC that the facility would be operated in accordance with the law through the attestation of Dr. Cawley. (DHEC Ex. 1, p. 43). Thus, the ownership of the manager/operator of the proposed project and its effect on the project's ability to comply with the CON standards and criteria was presented to DHEC staff as an issue for consideration. Further, because DHEC is required by law to determine whether a proposed project complies with the State Health Plan, PRCs, and other regulations before it can recommend approval (S.C. Code Ann. § 44-7-201(C)), DHEC also considered the ownership, management, and other issues discussed above. Under § 44-7-210(E), the Court has the authority to consider the issues raised in Trident's Motion.

Furthermore, as discussed in its Motion, Trident did not have a complete picture of The Network's structure and its integral role in the operation and financing of the proposed project until the completion of discovery and the testimony presented by MUSC during the hearing.[16] In discovery, MUSC presented for the first time organizational and operational documents that more fully described The Network's ownership and its interests and responsibilities with regard to the proposed project. In discovery, Trident took the deposition of Dr. Cawley as to The Network's ownership and role in the proposed project. Further evidence on the ownership issue was revealed and elaborated on during the testimony of Dr. Cawley and David Levitt in the hearing. It is clear

[16] Ms. Murdock's testimony shows that DHEC did not have a complete picture of this set-up, either. *See supra*, pp. 12.

that Trident heavily relied on such evidence and testimony in moving the Court to determine that the proposed project, as presented to and reviewed by DHEC, cannot meet the standards and criteria of the CON law when those specific requirements are proposed to be met by an entity that is unconstitutional, illegal, or *ultra vires.*

Under the *Marlboro Park* doctrine, the Court has the authority to consider evidence on the issues even when the evidence is first revealed after the completion of the DHEC staff review. After all, the majority of the hearing was premised on a mistake pertaining to the minimum utilization threshold that MUSC submitted in the CON Application to satisfy Standard 7. That mistake was not discovered until after the review and approval of the Application and, therefore, was not and could not have been specifically raised as an "issue" by Trident during DHEC's review of the Application. MUSC did not contest the Court's procedural jurisdiction or authority to hear that issue. Trident has asked the Court to consider the evidence of The Network's unconstitutional ownership in connection with its review and consideration of whether MUSC's CON Application meets the requirements of the applicable CON law. Consideration of the evidence and issues raised in the Motion is consistent with the law as interpreted by the court in *Marlboro Park.*

Finally, the Court is cognizant that Trident must raise the issue before the ALC in order to preserve it for appeal. As the venue best suited to make the factual determinations specific to this case in relation to this Application, and as a matter of judicial economy, particularly as the term relates to contested CON cases before the ALC,[17] the issue is properly before the Court. To raise the issue before DHEC, assuming it was discoverable during DHEC review, would have been futile. To raise the issue for the first time on appeal to the Court of Appeals would be misguided. Procedure and judicial economy dictate that the issue be decided here rather than forcing the parties to litigate the matter further.

Conclusions of Law

To clarify, MUSC SV was established by, and is an affiliate of, MUSC and UMA, the physician practice plan affiliate of MUSC. MUSC SV is a non-member, nonprofit entity established to further the missions and programs of MUSC and UMA "including their collaboration with MUHA,

[17] The General Assembly has set specific time parameters on the ALC in contested cases and other matters involving CONs. (*See* S.C. Code Ann. § 44-7-210 (G)).

a subdivision of the State of South Carolina." (DHEC Ex. 1, p. 9; MUSC Memo., Ex. 4 (MUSC SV Articles of Incorporation at 1-2)). MUSC SV was not established by, and is not an affiliate, of MUHA.

The Network was incorporated as a for-profit Delaware LLC and is a joint venture between MUSC SV and Alliance Oncology, also a for-profit company. (DHEC Ex. 1, p.10) MUSC SV owns 49% of The Network while Alliance owns 51%. *Id.* at 5-6. The Network is identified in the CON Application as the operator/management company of the proposed project. *Id.* at 5, 10. MUHA is identified as the applicant and licensee of the project. *Id.* at 1, 3.

A. Is The Network illegal or *ultra vires* because the enabling statutes of MUSC and MUHA do not permit ownership of for-profit entities? Is The Network an unlawful joint venture formed in violation of the constitutional prohibition on political subdivisions being joint owners or stockholders of companies?

MUSC disputes the merits of Trident's position that the use of MUSC SV to create and jointly own an interest in a private, for-profit entity (The Network) is contrary to MUSC and MUHA's enabling statutes and violates the prohibition against joint ownership set forth in S.C. Const. art. X, § 11.

1. Enabling Statutes

In 1913, the South Carolina General Assembly accepted the transfer of property from the private Medical College of South Carolina and established the renamed "Medical University of South Carolina" as a state agency. In its current form, MUSC is governed by S.C. Code Ann. § 59-123-10, *et seq.* In its enabling legislation, MUSC's governing board is given the authority to elect officers and to appoint professors and fix their compensation. The statute further provides that the MUSC board has the following powers:

> (1) to make bylaws and regulations considered expedient for the management of its affairs and its own operations not inconsistent with the constitution and laws of this State or of the United States;
>
> (2) to confer the appropriate degrees in medicine, dental medicine, pharmacy, nursing, health-related professions, and graduate studies in related health fields upon students and other persons as in the opinion of the board of trustees may be qualified to receive them; and
>
> (3) to make contracts and to have, to hold, to purchase, and to lease real estate property for corporate purposes; and to sell and dispose of personal property and any buildings that are considered by it as surplus

> property or no longer needed and any buildings that it may need to do away with for the purpose of making room for other construction. These powers must be exercised in a manner consistent with Chapter 35 of Title 11 [the South Carolina Procurement Code].

S.C. Code Ann. § 59-123-60(A).

Finally, S.C. Code Ann. § 59-123-30 confirms MUSC's original 1832 charter and recognizes all of the rights and privileges granted therein. The original charter provides no authority for MUSC to create subsidiary or affiliated corporate entities. (Trident Motion, Ex. C (Original Charter)). The law specifically requires all revenue earned by MUSC to be expended for a public purpose and makes MUSC subject to the Freedom of Information Act and to state ethics laws. S.C. Code Ann. § 59-123-60(B)(C)(D).

In addition to creating MUSC and its board, in a 2000 amendment to the same legislation, the General Assembly established MUHA as a separate state agency to be governed by a board composed of the same persons that sit on the MUSC board. As conceived by the General Assembly, "[w]henever the board functions in its capacity as the governing body of the hospital,[18] the board of trustees is constituted and designated as the Medical University Hospital Authority, an agency of the State of South Carolina[.]" S.C. Code Ann. § 59-123-60(E). MUHA is granted the sole authority to manage, regulate, and operate the healthcare, as opposed to the educational, functions of MUSC, including the power to:

> establish such not-for-profit corporations as the board considers necessary to assist the authority in carrying out its functions; provided, that any entity created pursuant to this subsection is considered to be an entity of the authority and subject to all laws and regulations applicable to the authority under this section. The formation of for-profit corporations by the authority is strictly prohibited.

S.C. Code Ann. § 59-123-60(E)(13).

The language of these enabling statutes makes two things clear: (a) MUSC has no statutory authority to create a subsidiary or affiliated corporation of any kind to perform the educational functions it is charged with performing; and, (b) MUHA is granted only the authority to establish not-for-profit entities to carry out its functions with regard to the healthcare operations of MUSC,

[18] "Hospital" is defined in the enabling legislation to mean "the Medical University hospitals, clinics, and other health care and related facilities." S.C. Code Ann. § 59-123-60(E). Under § 59-123-60(L), all real and personal property, tangible and intangible, relating to the hospital is deemed to be the property of MUHA.

with the limitation that any such nonprofit entities are subject to all laws and regulations applicable to MUHA. Neither MUSC nor MUHA is given any authority to form for-profit corporations. *See Medical Soc. of S.C. v. Medical Univ. of S.C.*, 334 S.C. 270, 513 S.E.2d 352 (1999) ("An agency created by statute has only the authority granted it by the legislature.").

Trident asserts that because MUSC's enabling statutes do not explicitly vest any authority in MUSC to create subsidiary or affiliated entities, MUSC SV and The Network are illegal or *ultra vires*. MUSC argues that since it is a public university, MUSC has the implied powers to undertake actions "necessary and proper for the achievement of the ends for which the university was founded." *Moe v. Bd. of Trustees of Univ. of S.C.*, 255 S.C. 46, 54, 177 S.E.2d 137, 140 (1970). Because MUSC SV was established by MUSC and UMA to further their missions and programs, and because the MUSC board has the implied power to undertake actions necessary to further its mission, MUSC argues that it can establish MUSC SV and that Trident's claims that MUSC SV and The Network are illegal or *ultra vires* are without merit.

The Court does not find MUSC's argument of implied power to be persuasive. While it is true that MUSC's enabling statutes do not explicitly vest any authority in MUSC to create subsidiary or affiliate entities, MUHA, which is established and addressed in the exact same legislation as MUSC, is granted the explicit authority to create non-profit subsidiaries. MUHA's grant of this authority is limited by the requirement that any nonprofit subsidiary or affiliated entity it creates is subject to all of the laws applicable to MUHA; MUHA is specifically prohibited from creating for-profit entities.

Under the doctrine of statutory construction "*expression unius est exclusio alterius,*" the grant of authority to MUHA to create nonprofit subsidiaries and affiliates compels the conclusion that the absence of such grant of authority to MUSC in the same statute means that the General Assembly did not intend for MUSC to have such authority. Therefore, no such authority can be implied. (*See, e.g., Nelson v. Ozmint,* 390 S.C. 432, 702 S.E.2d 369 (2010) (holding that inclusion of an early release provision for second offenders but not including such provision for third offenders in the same statute compelled the conclusion that the General Assembly intended that no early release would apply for third offenses). Accordingly, because MUSC's enabling statutes do not explicitly vest any authority in MUSC to create subsidiary or affiliated entities, the Court finds that MUSC SV and The Network are illegal or *ultra vires*.

Moreover, it should be noted that the Court cannot find that a state agency has the implied authority to engage in conduct that violates the South Carolina Constitution.

2. S.C. Const. art. X, § 11

Trident further asserts that the use of MUSC SV to create and jointly own an interest in a private, for-profit entity (The Network) violates the constitutional prohibition against joint ownership. The S.C. Const. art. X, § 11 provides, in relevant part, that "neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation."

In *Nichols v. South Carolina Research Authority*, 290 S.C. 415, 421, 351 S.E.2d 155, 158 (1986), the South Carolina Supreme Court (Supreme Court) considered whether the South Carolina Research Authority (the Authority), which it determined was an agency of the State, could engage in joint ventures "by receiving some degree of ownership in high technology firms" as part of its mission to promote research and development and to enhance the research capacities of the state's public and private universities. In invalidating the joint venture transactions entered into by the Authority, the Supreme Court found that "[t]he Constitution clearly prohibits public agencies, such as the Authority, from engaging in joint ownership with private parties." *Id.* The Supreme Court held that the Authority was prohibited from entering any joint venture with a private business based on (a) the absence of any express enabling legislation and (b) the plain language of Article X, § 11.

Nichols involved the direct participation by a state agency in joint ventures in which the agency itself would have an ownership interest in a private company. In this case, MUSC is not the direct owner of The Network, the entity that will lease the facility space, employ all of the administrative and technical clinical staff, own all of the equipment, and manage and operate the proposed radiation therapy center. Instead, MUSC has chosen to establish and utilize MUSC SV, an MUSC-controlled non-profit affiliate, to jointly own the private, for-profit company. (Trident Ex. 56; MUSC Ex. 63). As specifically acknowledged by Dr. Cawley, MUSC SV's purpose is to "predominately joint venture[] with for-profit companies that we otherwise couldn't work with as part of MUHA or MUSC." (Trident Motion, Ex. A (Cawley Dep. 37:11-18)). In other words, with respect to the proposed project, MUSC SV is being used by MUSC to joint venture with a private, for-profit company (Alliance) and to hold an ownership interest in another private, for-profit

company (The Network) because MUHA and MUSC, as state agencies, are prohibited under the law and the South Carolina Constitution from holding these interests directly.[19]

This attempt by MUSC to circumvent the restrictions placed on it as a governmental entity and to do indirectly what it cannot do directly is exactly the type of conduct condemned by the Supreme Court in *O'Brien v. S.C. ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008). In the *ORBIT* case, the Supreme Court examined whether the City of Charleston's investment of retirement benefits in a newly created trust that included equity securities violated the Article X, § 11 prohibition against joint ownership in any company, association, or corporation. Although recognizing that the City's actions were "laudable and well-intended," the Supreme Court held:

> It is troubling that the City attempted to avoid the constitutional prohibition on investing in equity securities, thereby using government funds to jointly own a company with other investors, by merely setting up a trust. Although ORBIT is set up as a trust, it functions as an investment manager for the City and, as such, is no different than any other investment house (Merrill Lynch, Oppenheimer, etc.). The veneer of a trust does not change that. More importantly, the status of ORBIT as a trust is irrelevant. Article X, § 11 concerns the *investing* of government funds. The investment takes place when the City transfers money to the trust to be used for the express purchase of equity securities. It is abundantly clear from the record that the City's investment in ORBIT is for the expressed purpose of circumventing the constitution. The City's investments violated the constitutional prohibition.

Id. at 43, 668 S.E.2d at 398-399.

In this case, MUSC is using MUSC SV to joint venture with a private, for-profit entity to establish a radiation center that MUHA, by its own admission, cannot adequately finance alone. As part of the joint venture, MUSC SV will have a minority ownership interest in a private, for-profit corporation (The Network) that is majority owned and controlled by another private, for-profit company (Alliance). Under Article X, § 11, neither MUSC nor MUHA can hold such an ownership

[19] It should be noted that in this case the structure of the proposed project is fundamentally different from the arrangements approved by the courts in cases such as *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982) and *Gilbert v. Bath*, 267 S.C. 171, 227 S.E.2d 177 (1976), which involved long-term leases of assets and management arrangements between governmental entities and private companies. *See also, Taylor v. Richland Memorial Hosp.*, 329 S.C. 47, 495 S.E.2d 431 (1998) (approving a joint venture between Richland Memorial and Baptist Hospital reasoning, in part, that all parties were governmental and/or non-profit so as to alleviate concerns that any interest in profits would supersede the public mission or even incidentally benefit a private party).

interest. The use of MUSC SV to circumvent the joint ownership prohibition mirrors the conduct condemned and invalidated by the Supreme Court in *ORBIT* using the "veneer of a trust."[20]

In response, MUSC relies on *Brashier v. S.C. Dep't of Transp.*, 327 S.C. 179. 490 S.E.2d 8 (1997), *overruled on other grounds by I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000), to support its contention that MUSC's affiliation with MUSC SV does not violate the joint ownership prohibition and, therefore, MUSC SV's ownership in a private, for-profit company does not violate the constitution.

In *Brashier*, the Supreme Court considered the claim that the Department of Transportation's (SCDOT) plan to finance, develop, and operate the Southern Connector, a toll road in the Upstate, violated, *inter alia*, the Article X, § 11 prohibition on political subdivisions jointly owning companies. *Id.* at 187-88, 490 S.E.2d at 13. SCDOT's plan included establishing a nonprofit, public benefit corporation without members, the Southern Connector 2000 Association, Inc. (Association). The Association would then pay a developer to construct the Southern Connector (through the Association's issuance of tax-exempt bonds), would manage and operate the toll road, and would eventually dissolve and distribute any assets directly to SCDOT upon the repayment of the bonds. *Id.* at 183, 490 S.E.2d at 10.

In reaching the conclusion that SCDOT's establishment and involvement with the Association did not violate the constitutional prohibition against joint ownership, the Supreme Court noted that SCDOT had a certain amount of control over the Association and its directors. Further, upon dissolution of the Association, its assets would be distributed to SCDOT. *Id.* at 187-188, 490 S.E.2d at 13-14. The Supreme Court determined:

> SCDOT is not a stockholder in Association. The agreements make it clear the Southern Connector will be owned by SCDOT but operated by Association. "[T]his Court has never held a public entity's naked title to property operated by a private entity resulted in unconstitutional joint ownership." *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 355, 287 S.E.2d 476, 481 (1982) (also noting public entity had acquired neither stock nor any other form of ownership in private company). At no time will SCDOT and Association jointly own anything. *Nichols v. South Carolina*

[20] MUSC argues that the *ORBIT* holding is inapposite to this case because it is based on "very specific provisions" limiting investment in the stock market. The Court does not agree with that limited interpretation. The Article X, § 11 provision that prevents investment in the stock market is also the very same provision that prevents joint ownership in a private entity, stating that "neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation."

> *Research Auth.*, 290 S.C. 415, 351 S.E.2d 155 (1986), cited by Appellant, is clearly distinguishable. In *Nichols,* a state agency admitted that in carrying out joint ventures, it planned to procure ownership interests in private entities. *Id.* at 421, 351 S.E.2d at 158.

327 S.C. at 188, 490 S.E.2d at 13.

The Court finds that SCDOT's involvement with the Association in *Brashier* is quite different from MUSC's "once-removed" ownership of The Network in this case. MUSC SV, the nonprofit affiliate created by MUSC, will absolutely have an ownership interest in a private, for-profit entity. It will share this ownership interest in The Network with another private, for-profit entity, Alliance. Per the Operating Agreement, the Managing Member, who is the CEO of Alliance, along with the Alliance-majority board, maintain greater control over The Network in almost every aspect. (Trident Ex. 14; *see* discussion *infra* pp. 31-32). Moreover, upon dissolution of The Network, assets will be distributed to both Alliance and MUSC SV, and any other subsequent members, in accordance with their respective capital account balances. (Trident Ex. 14, p. 22). MUSC argues that once MUSC SV is dissolved, its assets will be distributed to MUSC, the political subdivision that established it. (MUSC Memo., p. 14). While that may be the case, MUSC neglects to take that analysis one level deeper to recognize that it is the dissolution (or, perhaps more importantly, the profit distribution) of The Network, not MUSC SV, that is of crucial import. The profits from The Network flow through to both MUSC SV **and** Alliance. In *Brashier*, only one entity stood to profit – the public entity of SCDOT.

Further, in this case, Trident is not asserting MUSC's affiliation with MUSC SV is the unconstitutional joint ownership at issue. Instead, Trident maintains that MUSC's attempt to use its wholly-owned subsidiary, MUSC SV, to circumvent the joint ownership prohibition fails under *O'Brien v. S.C. ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008), a case decided ten years after *Brashier*. As previously discussed, in *ORBIT* the Supreme Court found that a governmental entity could not use an affiliated entity to do indirectly what it was forbidden to do directly - have an ownership interest in a private, for-profit entity.

In this case, MUSC's use of MUSC SV to create and jointly own an interest in a private, for-profit entity (The Network) violates the constitutional prohibition against joint ownership in S.C. Const. art. X, § 11 as espoused in *Nichols, ORBIT, and Brashier*. The Court finds that The Network is an entity formed in violation of the state constitution and, as previously discussed, outside of the

authority enumerated in MUSC and MUHA's enabling legislation. As such, The Network is an unconstitutional and, therefore, illegal or *ultra vires* entity.

B. If The Network is unconstitutional or *ultra vires*, does that render the Application, as presented to DHEC, not in compliance with the CON standards and criteria so as to require the Court to overturn DHEC's approval of the Application and deny the CON?

Because of the specifics laid out in the Application by MUSC, the ultimate dissolution of The Network requires a second inquiry as to whether the CON standards in the State Health Plan along with the relevant DHEC criteria and PRC can still be satisfied in order to approve the CON. The Court finds that the necessary dissolution of The Network substantially alters the Application and materially affects the proposed project, as presented to and approved by DHEC, in several ways.

MUSC argues that a determination of The Network to be unconstitutional or *ultra vires* has "no meaningful nexus" to the Application or the CON and posits that should The Network need to be dissolved, "such a result would have no material effect on MUSC's CON application or the proposed facility." (MUSC Memo., p. 7). Rather, MUSC suggests that as the licensee of the facility, MUHA would just contract with Alliance to manage the facility or would manage the facility itself. *Id.*

While changes in management companies have not always been considered "substantial" so as to warrant DHEC review under Reg. 61-15 § 605,[21] in this case, because of the nature of the Application as submitted by MUSC, a change in the management company is not just an administrative adjustment.

For instance, in the Application submitted to DHEC, the ability to obtain financing for the project is established through the assurances of the CEO of Alliance, not MUSC, MUHA or any of the related MUSC affiliates. (DHEC Ex. 1, p. 160). Further, The Network Management Agreement provides that Alliance agrees to assist The Network in procuring and obtaining financing for all equipment and office space and provide, in its discretion, working capital advances (capped at $500,000 for each advance) to be repaid with interest. (Trident Ex. 13, p. 2-3).

[21] *See also Carolina Regional Cancer Center, LLC v. S.C. Dep't of Health and Envtl. Control* (2015 WL 2159474).

In reference to Alliance's duty to procure and obtain financing, MUSC representatives testified that, as an international provider of cancer care, Alliance is able to secure advantageous prices on LINACs and other costly equipment to be used in the operation of the proposed project because they buy in high volume, as opposed to a single-purchase buyer like MUSC. (*See* Trial Tr. 905:16-22; 705:14-20; 764:9-18). If Alliance, as 51% majority owner (retaining 51% of the profits) of The Network is unable to participate in the joint venture as planned, then financing for the project *as presented to and reviewed by DHEC* would likely be completely different. When the opportunity to share in the profits of a project carrying the name of an NCI-designated cancer treatment center is foreclosed, the feasibility of funding that project is likely also foreclosed.[22]

Considering that Financial Feasibility of the project is one of the five PRC deemed by the Department to be important in this matter, such an alteration fundamentally and substantially changes the Department's application and review of the relevant PRC. In *MRI at Belfair, LLC v. S.C. Dep't of Health and Envtl. Control*, the South Carolina Court of Appeals determined it was proper for the ALC to consider the important PRCs in its substantial change analysis during a contested case. 394 S.C. 567, 716 S.E.2d 111 (2011). The Court of Appeals found the ALC conducted a permissible comparison of the original project's compliance with the PRCs to the amended project's compliance with the same criteria. *Id.* at 574; 716 S.E.2d at 114. "[I]f satisfaction of the project review criteria is a statutory prerequisite to obtaining a CON, we find any change that would impact the applicant's ability to comply with the same criteria as relevant evidence on whether the change is substantial enough to create a new project." *Id.* at 574-5; 716 S.E.2d at 114-5.

Following that reasoning, this Court finds that upon the necessary dissolution of The Network, the project's ability to satisfy the PRC of Financial Feasibility, as submitted to, reviewed, and approved by DHEC through the attestations in the CON Application, is no longer present. In this case, Alliance is more than just a manager/operator of the proposed project. Alliance is the key to the financial feasibility of the project, as submitted to DHEC, and of The Network, as provided in

[22] "They [Alliance] know how to operate these centers, they do it well, they make money." (Trial Tr. 905:2-4 (Levitt)).

the Management and Operating Agreements. Without Alliance, the change in Financial Feasibility is substantial. It is enough to create a new project.[23]

C. Is the CON correctly issued to the actual licensee?

In considering the evidence and testimony presented in this case, the Court has previously found that MUHA is not the actual licensee of the proposed project as represented in the Application. As discussed, the Application provides various answers to multiple questions regarding ownership and/or control of the facility.[24]

Specifically, in one section of the Application and per Reg. 61-15 § 202, the applicant is instructed to "provide the following ownership information." Item (b) reads:

> Name and address of licensee or prospective licensee. (Note: The licensee is defined as the legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or service; **the owner of the business. The licensee must be the entity to whom the Certificate of Need is issued.**)

Id. at 13; Reg. 61-15 § 202(2)(b)(8)(b). (emphasis added).

The licensee is again identified as MUHA under this section and the title of the licensee's governing body is listed as Medical University Hospital Authority Board of Trustees with Donald R. Johnson, II, MD as the presiding officer of the governing body. *Id.* at 14. A list of the entire MUHA Board is provided to identify all Officers of the Licensee in Attachment D of the Application. *Id.* at 103. MUHA and the building owner are also identified as the only "persons and/or legal entities claiming liabilities of the licensee or of the facility or service for which the Certificate of Need is requested[.]" *Id.* at 14-15; Reg. 61-15 § 202(2)(b)(8)(f).

Additionally, item (k) in the ownership section of the Application reads:

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[23] While there was testimony as to MUSC's negative financial statement and supposed inability to adequately fund the project without Alliance, the Court does not find that a detailed analysis of MUSC's current financial situation is necessary. Although applicants are required to provide a current annual budget under Regulation 61-15 and in Question (B)(16) of the application, for reasons unknown, MUSC failed to include MUHA's current annual budget to show financial feasibility in the Application. (Trial Tr. 643:4-25). While DHEC may have assumed that MUHA was financially able to support the project without the necessary documentation to justify that assumption, the Court does not. If MUSC now wishes to divulge what it previously chose to conceal through the assurances of Alliance, it is free to do so upon re-application.

[24] *See supra* Findings of Fact, The Application, pp. 8-12.

> Is there any agreement, contract, option, understanding, intent or other arrangement that will effect a change in any of the information requested and/or provided in (b) through (g) above. YES NO. If yes, provide information similar to that required in (b) through (g) above.

Id. at 16.

While "NO" is circled and the Application continues to represent that MUHA, as the licensee, is "the legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or service," it is clear from the underlying formation agreements of The Network that it is, in fact, The Network that intends to own and control almost every aspect of this radiation therapy center and others it plans to develop in South Carolina. The Network is run by a Managing Member, Greg Spurlock who is the President of Alliance, and the 3-Alliance/2-MUSC-member Board of Directors.[25] While the Management Agreement of The Network is replete with references of "with input from MUSC"[26] it is also clear from the details of the Operating Agreement that, in almost every respect, Alliance is in control of this operation, carries the rights of first refusals, owns 51% of the company, and will carry away at least 51% of the profits from this joint venture.

The Network Management Agreement provides that Alliance agrees to: (a) assist The Network in procuring and obtaining financing for all equipment and office space associated with a particular facility site; (b) employ all administrative and technical personnel for each site; (c) provide marketing services related to each site; (d) provide billing and collections services to each site, subject to the parties' choice that the hospital entity at that site may choose to perform such services itself; and (e) provide, in its discretion, working capital advances (capped at $500,000 for each advance) to The Network to be repaid with interest. (Trident Ex. 13, p. 2-3). All personnel, to include physicists, dosimetrists, anyone operating equipment, and any necessary administrative staff, will all be employees of Alliance and all are to be selected by Alliance. *Id.* at 2. They are only to report to MUSC with respect to quality assurance. *Id.* These undertakings by Alliance as

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[25] A third community member appointed by MUSC will also be added to the board to purportedly even things out but, upon reading the Operating Agreement, that member does not have any actual voting rights and is more of an observer.

[26] Alliance has control but "subject to MUSC's input" in the following areas: Capital Expenditures, Marketing Strategy, and Information Technology (as it relates to connectivity between site and medical records interfacing). MUSC is to control Quality Assurance and provide Telemedicine from its doctors to the sites. Alliance has sole control over every other aspect of the business.

the majority owner of The Network constitute more than just managerial or operational logistics within the proposed facility.

Furthermore, the Operating Agreement of The Network fully spells out the company's intentions to **own – not just manage – this and other radiation therapy centers** all under the MUSC SV-licensed name "Hollings Cancer Center:"

> Whereas, the Members desire for [The Network], either directly or indirectly through separate facility-specific entities in which it owns an interest, to provide oncology equipment, space, staffing (including a regional director for administrative services and physicists and dosimetrists), physician recruitment, integrated clinical services, marketing services, billing protocols, clinical standards, research support, related information technology solutions and all other technology used in cancer treatment for the facilities in the network.
>
> ....
>
> Whereas, the Members intend for [The Network] to identify opportunities to develop, acquire or hold ownership interests in, and hold ownership interests in facility-specific entities which own and operate cancer programs, including oncology centers, as determined and agreed to pursuant to the terms of this Agreement[.]

(Trident Ex. 14, p. 2).

> 4.1 General Business Purpose. The business to be conducted by [The Network] shall be to hold, directly or through one or more of the Operating Companies, ownership interests in Centers, to provide services for the entire oncology service line for the Centers and to carry on any and all activities necessary, proper, convenient, or advisable in connection therewith.

Id. at 7.

Finally, as MUSC's expert, Dan Levitt, testified when describing the management of The Network: "they recognize from a business perspective [Alliance] ha[s] a majority on the Board, but from a clinical perspective, MUSC has majority on the clinical standard." (Trial Tr., p. 800:20-21). In describing the governing powers granted to Alliance and MUSC SV through The Network agreement, Levitt pointed out, "this says that four members of the board have to agree to this – of these different elements of operating the facility or the organization. So, this would prevent Alliance's three board members from outvoting MUSC on matters specifically identified [under certain provisions]..." (Trial Tr., p.799:5-8) In going on to describe the circumstances and nuances of a supermajority vote as provided for in the Agreement, Levitt stated:

> ...relocating the center, there would have to be a supermajority vote. So, at least one of the MUSC board members would have to agree that moving it makes sense. And then on the next page, any material change to the business, purpose or mission of the corporation that would adversely impact [MUSC's] tax-exempt status. So, the mission of MUSC or MUHA would have to – you know, if we're changing something that would impact the mission, it has to be done under a supermajority vote.

(Trial Tr. 799:12-23). If MUHA were the actual licensee/owner of the proposed project as stated in the Application, then it would be the MUHA board voting on the regular business and clinical matters of the facility. MUHA would decide on a relocation or a material change to the business, not a supermajority of The Network. In essence, Levitt implied that a supermajority of The Network's board could change the purpose or mission of the proposed project from the MUSC/MUHA mission to something else entirely. Thus, it is completely conceivable that even the basic mission of a cancer treatment center located in South Carolina, operating through a Certificate of Need issued to a public hospital in South Carolina under the name "Hollings Cancer Center," a name recognized and touted as part of that public hospital, could be changed by the supermajority vote of the California-based board of a company registered in Delaware.

In fact, one of the documents in the CON Application used to verify approval of the project by the licensee's governing body was submitted in the form of the record of The Network's Board Meeting Minutes from March 7, 2017, roughly 2.5 months before the Application was submitted. It simply does not follow logically that the management company hired only to run or operate a facility would be the entity to vote to move forward in the application process to establish the facility in the first place. Even more confounding, the only board verification pertaining to MUHA or MUSC's approval of the project was a 2014 vote by the MUHA Hospital Operations, Finance and Quality Committee to move forward on a radiation center in North Charleston.[27]

While the CON Application is replete with listings of MUSC's accolades, achievements, and good intentions to bring cancer treatment closer to the people of the Service Area, very little is divulged about the actual intent of The Network: to establish the first in a statewide franchise of private radiation therapy centers operating under the name associated with a public hospital while remaining majority owned and controlled by a for-profit company. The intent to better serve the

[27] MUHA submitted a CON application for a radiation therapy center in the Service Area in 2015 but it was denied. (Trial Tr. 594:18-25).

citizens of South Carolina is admirable. The business plan by which to accomplish that objective is not. Factually, it is evident that The Network is not simply the management company contracted by MUHA to run the proposed project.[28] Under Regulation 61-15 §202, the "ultimate responsibility and authority for the conduct of the facility or service" as "the owner of the business" lies in the hands of The Network, not MUHA. And, the ultimate control of The Network lies with its 51% owner Alliance, not MUSC SV.

Furthermore, the Court finds the language found in S.C. Code Ann. § 44-7-230(A)&(E) concerning the limitations and non-transferability of Certificates of Need to be particularly instructive on the issue of ownership and the actual licensee:

> (A) The Certificate of Need, if issued, is valid only for the project described in the application[.]
>
> ....
>
> (E) A Certificate of Need is nontransferable. A Certificate of Need or rights thereunder may not be sold, assigned, leased, transferred, mortgaged, pledged, or hypothecated, and any actual transfer or attempt to make a transfer of this sort results in the immediate voidance of the Certificate of Need. **The sale or transfer of controlling interest or majority ownership in a corporation, partnership, or other entity holding, either directly or indirectly, a Certificate of Need, results in the transfer and voidance of a Certificate of Need.**

Id. (emphasis added).

If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Id.*

Regulation 61-15 § 202 states that "[t]he licensee must be the entity to whom the Certificate of Need is issued." The language of S.C. Code Ann. § 44-7-230(E) is unambiguous and evidences

[28] In the pro forma for the facility that was submitted with the Application, there is no management fee line item to be paid to anyone for operating the proposed project. (DHEC Ex. 1, p. 165).

the General Assembly's intent to make a CON void should the controlling interest or majority ownership of the licensee change. Inversely, it only makes sense that the General Assembly also intended that the Certificate of Need be issued in the first place to the entity that maintains the controlling interest or majority ownership in the project that is the subject of the CON Application. In this case, with a 51% ownership and controlling interest in The Network, it is evident that Alliance Oncology, LLC, should have been identified as the true licensee, not MUHA.

In *Carolina Regional Cancer Center, LLC v. S.C. Dep't of Health and Envtl. Control* (2015 WL 2159474), one entity increased its minority ownership in the LLC that owned the healthcare facility holding the CON. In that case, the ALJ agreed with the conclusions of two experts who opined that the change in ownership was not substantial for CON purposes because it did not change the original licensee's position as the majority owner with a controlling interest in the facility. The assurances attested to under Reg. 61-15 §202(2)(d)(9) in the CON application remained true -- the controlling interest in the healthcare facility was not sold or leased or otherwise disposed of.

In this case, the same assurance was given in MUSC's CON Application by Dr. Cawley. (DHEC Ex. 1, p. 43). Unfortunately, the facts and circumstances in this case indicate that the attestation that MUHA held the controlling interest in the proposed project was false. Under the definition of "licensee," The Network is the "owner of the business." Because Alliance is the majority owner with a controlling interest in the LLC that owns the healthcare facility, it is Alliance who is the actual licensee and it is Alliance who must have been issued the CON in order for the CON to remain valid under S.C. Code Ann. § 44-7-230(A)&(E). As such, the Court finds the Application to be improperly approved and the CON previously issued to be void.[29]

Order

The proposed project is not an expansion of existing MUSC services as presented in the Application and approved by DHEC. It is the beginning of a for-profit cancer treatment franchise that is majority-owned, financed, and run by Alliance in exchange for the patients and reputation

[29] In recognizing that Alliance Oncology, LLC is the actual licensee of the proposed project, the CON Application should have been submitted and reviewed under Standard 6 as an application to establish new services, rather than a Standard 7 application to expand MUSC's existing services. Because Standard 6 has a different method of evaluating minimum utilization thresholds, the rounding issue still before the Court is of no consequence since the CON was invalidly issued and void under S.C. Code Ann. § 44-7-230(A)&(E).

of MUSC. While the idea of broadening the scope of MUSC Hollings Cancer Center's outreach to patients across South Carolina is well-intentioned, it must be executed in accordance with the South Carolina Constitution, the enabling statutes of MUSC and MUHA, and with the transparency that should be fundamental to a public, nonprofit state agency.

The Court finds that the proposed project, as submitted to and approved by the Department, constitutes an unlawful joint venture in violation of S.C. Const. art. X, §11 and the enabling statutes of MUSC and MUHA, S.C. Code Ann. § 59-123-60(13). As such, the CON Application cannot comply with the State Health Plan or the PRCs and the Application must be denied. The Court **GRANTS** Petitioner's Motion for Judgment as a Matter of Law.

Additionally, the Court finds that the CON was improperly and invalidly issued to MUHA as the licensee of the proposed facility and is thereby void under S.C. Code Ann. § § 44-7-230(A)&(E).

IT IS THEREFORE ORDERED that the Certificate of Need for MUSC/MUHA's proposed project for a radiation therapy center in Berkeley County, South Carolina is **DENIED.**

AND IT IS SO ORDERED.

May 14, 2019
Columbia, South Carolina

H.W. Funderburk, Jr.
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Emily B. Howard, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, to the address provided by the party(ies) and/or their attorney(s).

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