THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Case No. 18-ALJ-07-0100-CC
Appellate Case No. 2019-001159

Trident Medical Center, LLC d/b/a Trident Medical Center,..... Petitioner/ Respondent,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County, ... Respondents,

Of Which, Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County is the..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT[1]

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[1] Appellant submits this brief in reply to both Respondents' briefs.

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INTRODUCTION

Trident Medical Center, LLC ("Trident") advocates for an overly broad, nearly unlimited view of the Administrative Law Court's ("ALC") statutory authority and the *de novo* standard that the ALC applies in contested cases. This Court should reject Trident's attempt to expand the ALC's authority, and the Court should reverse the ALC's rulings that exceed its limited authority and fail to comply with the limitations imposed by section 44-7-210(E) of the South Carolina Code.

The ALC exceeded its statutory authority in finding that the Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County ("MUHA") is not the "actual licensee" and that MUSC Strategic Ventures ("MSV") and MUSC Health Cancer Care Network, LLC (the "Network") are invalid or unconstitutional entities, and it failed to comply with section 44-7-210(E) by considering issues that were not presented to, or considered by, the South Carolina Department of Health and Environmental Control ("DHEC"). The ALC's ruling also improperly affects the rights of nonparties MSV, the Network, and Alliance Oncology, LLC ("Alliance") in this case and in other certificate of need ("CON") cases by creating harmful uncertainty about whether those entities may own, manage, or otherwise participate in a proposed healthcare facility that requires a CON. Finally, the ALC's ruling is wrong on the merits—neither MSV nor the Network is an invalid or unconstitutional entity. This Court should reverse the ALC's denial of MUHA's CON application.[2]

[2] MUHA agrees with the positions taken by DHEC in its brief.

ARGUMENT

I. Trident misconstrues the *de novo* standard and the ALC's statutory authority.

A. By finding MUHA is not the actual licensee, the ALC failed to comply with section 44-7-210(E), exceeded its authority, and made a finding unsupported by substantial evidence.

The ALC erred in ruling that MUHA is not the "actual licensee." *See* (ALC Or. of Judgment 29–35). First, the ALC determined an issue not considered by DHEC. Second, the ALC denied MUHA's CON application based on considerations that are not specified by the CON Act or the CON Regulations and, therefore, exceeded its statutory authority. Finally, in the alternative, the ALC's finding that MUHA is not the licensee is not supported by substantial evidence.

i. Section 44-7-210(E) prohibited the ALC from finding MUHA is not the actual licensee.

The ALC found MUHA is not—and Alliance is—the "actual licensee" despite the fact that no party raised this issue to DHEC or to the ALC. Although it failed to raise this issue, Trident now argues "the issue of the correct licensee was properly before the ALC because the ownership of the Proposed Project, including the identity of the licensee, was an issue that was presented to DHEC and considered by DHEC." (Trident Br. 36).

The basis for Trident's contention that DHEC considered this issue is simply that MUHA filled out a CON application in which it identified itself as the applicant and licensee, and identified the Network as the entity it engaged to manage the facility.[3] *See* (CON App. at 3, 15–16, R. ___). Contrary to Trident's contention, DHEC in fact did not consider—and no party asked it to consider—whether the "actual licensee" should be Alliance, the entity holding a 51% ownership

[3] The CON application asks, "Has the licensee engaged an entity other than an employee of the licensee to manage or operate the facility or service?" (CON App. at 15, R. ___); *see also* S.C. Code Ann. Regs. 61-15 § 202.2.b.(8)(i). If the licensee answers "yes," the application asks for details about the management company. *Id.*

interest in the Network, the management company hired by MUHA to manage the proposed facility. Consequently, the ALC did not have the power to consider this issue. *See* S.C. Code Ann. § 44-7-210(E); *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) (noting an ALC applying a *de novo* standard may receive new *evidence*, but repeating the statutory limitation that "the **issues** considered at the contested case hearing are limited to those presented or considered during the staff review and decision process"); *see also* (MUHA App. Br. 22–26). Trident's argument that merely completing a CON application results in DHEC considering this unusual issue would undermine the limits imposed by section 44-7-210(E) and reinforced by *Marlboro Park*.

ii. The ALC exceeded its authority in finding MUHA is not the actual licensee.

The ALC ignored the purpose of the CON Act, the CON Regulations, and the project review criteria, all of which require it to approve or deny a CON application based upon considerations involving public healthcare needs. *See* S.C. Code Ann. § 44-7-120; S.C. Code Ann. Regs. 61-15 §§ 101, 802. Instead, it found MUHA is not the "actual licensee" because Alliance is proposed to have ancillary, business responsibilities related to the proposed facility and based upon collateral matters like the fact that Alliance may receive a financial benefit from its investment in the project's management company, the Network. *See* (ALC Or. of Judgment at 30, R. ___). Alliance's role as one of the two owners of the management company—and the fact that it may benefit financially from its role—does not make it the licensee. The CON Act and CON Regulations do not provide any substantive standards or criteria addressing management companies. In fact, if MUHA decided to use a different management company following the issuance of the CON, such a decision would not even constitute a substantial change that requires a new CON. *See Carolina Reg'l Cancer Ctr., LLC v. S.C. Dep't of Health & Envtl. Control*,

Docket Nos. 11-ALJ-07-0629-CC, 11-ALJ-07-0639-CC, 2015 WL 2159497, at *25 n.17 (S.C. Admin. Law. Ct. Apr. 30, 2015) ("Even if the change in the management that was considered had been implemented, the Court agrees . . . that such a change would not be a substantial change for CON purposes.").

The ALC's erroneous finding that the Network might "change the purpose or mission of the proposed project" shows how far the ALC strayed from its statutory authority. The ALC stated,

> 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.

(ALC Or. of Judgment at 32, R. ___). The ALC's findings ignore the purpose and requirements of the CON Act and CON Regulations, the roles of the entities, and the evidence presented at trial. Nothing in the CON Act or CON Regulations permits the ALC to deny a CON application based on consideration of which entity has voting control over the entity engaged to manage a facility. Moreover, the effect of the ALC's ruling is to preclude a management company from making decisions about the "regular business" of the facility—thus hampering its ability to effectively manage the facility.

Trident and the ALC rely on a list of Alliance's obligations under the Network Management Agreement, which provides that Alliance will assist with financing for equipment and office space, employ all administrative and technical personnel, provide marketing services,

provide billing and collection services, and provide working capital advances to the Network. (Trident Br. 36–37; ALC Or. of Judgment at 30–31, R. ___). The CON Act and CON Regulations exist "to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and *ensure that high quality services are provided in health facilities in this State*." S.C. Code Ann. § 44-7-120 (emphasis added); S.C. Code Ann. Regs. 61-15 § 101. The CON Act does not mandate the means by which a healthcare facility proposes to obtain equipment, office space, or billing and marketing services. The ALC's finding that the entity charged with performing these ancillary, business functions should be the "actual licensee," rather than the entity responsible for the healthcare functions specified by the CON Act, exceeded the ALC's authority and is an error of law. The ALC failed to decide this case within the parameters of the CON Act and CON Regulations, and this Court should reverse the denial of MUHA's CON application. *See* (MUHA App. Br. 16–21).

iii. In the alternative, the ALC's finding is not supported by substantial evidence.

Even if the ALC properly considered this issue, it erred in finding MUHA is not the "actual licensee." *See* (MUHA App. Br. 37–38). The CON application identifies MUHA as the licensee and MUHA's Board of Trustees as the governing body of the licensee. (CON App. at 3, 13–14, R. ___). MUHA has "ultimate responsibility and authority for the conduct of the facility or service," and is thus the proper licensee. *See* S.C. Code Ann. Regs. 61-15 § 202.2.b.(8)(b).

The delineation of activities for which Alliance and MUHA are each responsible shows that MUHA is the proper applicant and licensee because MUHA is the entity responsible for providing healthcare services to patients in the new facility. *See* (MUHA App. Br. 9–10, 37–38). MUHA will control all clinical aspects of the proposed facility. (Trial Tr. 707, R. ___) ("[T]he

clinical and quality standards will be set by MUSC in the Hollings Cancer Center."); (Trial Tr. 710, R. ___) ("The Clinical Standards Committee is a committee that's underneath the overall Board [of MUSC] that we delegate all clinical decision making to, that the Board delegates clinical decision making to."); (Trial Tr. 1019–20, R. ___) (testifying that MUSC's radiation oncologists will staff the proposed facility); (Trial Tr. 720–21, R. ___) (explaining MUSC residents or medical students will have the same involvement at the proposed facility as they have in the Hollings Cancer Center in downtown Charleston); (MUSC Project Review Slides at 20, MUSC Trial Ex. 9, R. __) (noting the proposed facility was intended to serve *MUSC's* patients).

The ALC also erred in giving weight to its own speculative, counterfactual hypothetical—set forth in detail above—that the Network's board might change the mission of the proposed facility. *See* (ALC Or. of Judgment at 32, R. ___). The ALC cannot make a factual finding in a CON case based on speculation that an event could "conceivably" happen in the future. *See Fowler v. Abbott Motor Co.*, 236 S.C. 226, 235, 113 S.E.2d 737, 742 (1960) (quoting *Radcliffe v. S. Aviation Sch.*, 209 S.C. 411, 418, 40 S.E.2d 626, 629 (1946)). Moreover, the ALC's ruling is incorrect as a matter of fact. The ALC expressed concern about a possible supermajority vote of a board purportedly based out of state. A "supermajority of The Network's board," however, requires at least one of MUHA's appointed board members based in Charleston to vote to change the purpose or mission. (CON App. at 15–16, R. ___). Thus, the ALC's implication that out-of-state business people could change the mission of a facility owned by Hollings Cancer Center is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

S.C. Code Ann. § 1-23-380(5); *see also* S.C. Code Ann. § 1-23-610(B). This Court should reverse the ALC's ruling.[4]

B. By finding MSV and the Network invalid or unconstitutional, the ALC misapplied the *de novo* standard and exceeded its statutory authority.

Trident argues that because the ownership of the project is part of the information required in the CON application, all potential ownership-related issues were presented to and considered by DHEC and thus were properly before the ALC, and all potential ownership-related issues are within the ALC's statutory authority to adjudicate. *See generally* (Trident Br. 12–22). Trident is mistaken, and this error infects its arguments regarding whether it raised the validity of MSV and the Network in a timely manner and whether the ALC exceeded its statutory authority.

i. The ALC erred by considering issues Trident did not raise to DHEC and DHEC did not consider.

It is undisputed that DHEC did not consider the validity or constitutionality of MSV and the Network. Trident does not argue that it raised these issues to DHEC—because it did not—or that DHEC considered these specific issues—because DHEC did not, as it confirmed in its brief. (DHEC Br. 3) ("At no point during [DHEC]'s review of the CON application did Trident raise or [DHEC] consider any issues regarding the legality or constitutionality of MSV or the Network."); *see generally* (Trident Br. 12–22). Instead, Trident argues (1) it was not required to raise the validity or constitutionality of MSV and the Network to DHEC because DHEC *could not have* considered these issues; (2) it lacked sufficient information to raise these issues until it completed discovery during the ALC proceedings and therefore could not have raised the issue to DHEC; and

[4] Trident argues MUHA did not object to its expert's testimony that "he did not believe that MUHA was the owner of the Proposed Project and that Alliance would be the proper licensee." (Trident Br. 35–36). MUHA's decision not to object to the subjective belief of Trident's expert witness does not establish as a matter of law that MUHA is not the proper licensee.

(3) although DHEC did not analyze the constitutionality or validity of MSV or the Network, DHEC "considered" all potential ownership-related issues because MUHA filled out a CON application. (Trident Br. 13, 17–18, 20–22). These arguments fail to relieve Trident of its timeliness problem.

Trident argues it was not required to raise the validity or constitutionality of MSV and the Network to DHEC because DHEC could not have considered those issues. (Trident Br. 21–22). MUHA agrees that DHEC could not consider the validity or constitutionality of MSV and the Network in deciding whether to approve MUHA's CON application. (MUHA App. Br. 17–21) (explaining the issues are not a permissible consideration in reviewing MUHA's CON application). However, DHEC and the ALC have the same task under the CON Act and the Administrative Procedures Act: apply the CON standards and criteria to CON applications to approve or deny those applications. *See* S.C. Code Ann. § 44-7-210(E) ("The issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during the staff review."); S.C. Code Ann. §§ 1-23-505(3) & -600; *Marlboro Park*, 358 S.C. at 577, 595 S.E.2d at 853. If DHEC cannot approve or deny a CON application based on its interpretation of the validity or constitutionality of the management company and the minority owner of the management company, then the ALC has no authority to consider those issues during a contested case hearing. The ALC therefore exceeded its statutory authority, and this argument is not a basis for excusing Trident from the limitations in section 44-7-210(E).

Trident also attempts to navigate its timeliness problem by arguing it lacked sufficient information to raise these issues until it completed discovery during the ALC proceedings, and it therefore could not have raised the issues to DHEC. *See* (Trident Br. 7, 20–21). Trident also claims its understanding of MSV's role "morphed from 'collaboration with health care providers'

to 'affiliation with tax exempt entities' to 'joint venturing with for-profit companies' to circumvent the limitations placed on MUHA and MUSC, as governmental bodies." (Trident Br. 7).

Trident had sufficient information from the CON application to raise these issues to DHEC. The CON application discloses that the Network is a joint venture between Alliance and MSV: "Alliance Oncology, LLC strategically partnered with MUSC Strategic Ventures, a support organization for The Medical University of South Carolina, to create a Joint Venture to operate The Network." (CON App. at 10, R. ___). The application also discloses that MSV is a nonprofit corporation "established at the direction, and for the support and benefit, of" MUSC, (CON App. at 9, R. ___), and that Alliance owns 51% of the Network and MSV owns 49%, (CON App. at 15, R. ___). It even discloses that the Network's board of directors consists of three directors from Alliance and two from MSV. (CON App. at 15–16, R. ___). The CON application belies Trident's claim that it did not have sufficient information to raise these arguments to DHEC. If Trident's understanding of the entities "morphed" over time, it did not do so because Trident lacked complete information at the beginning. Regardless of whether Trident had sufficient information to raise the issue to DHEC, however, it acknowledges it obtained the information during discovery in the ALC proceedings,[5] yet it still failed to raise the issues in its prehearing brief or opening statement describing the issues for trial.

Trident's arguments are a misapplication of the *de novo* standard under section 44-7-210(E) and *Marlboro Park*. Trident argues the issues of the validity or constitutionality of MSV and the Network were considered by DHEC because "[b]asic information concerning the

[5] *See* (Trident Br. 20) ("In discovery, MUHA produced for the first time organizational and operational documents that fully described [the Network]'s ownership and its interests and responsibilities with regard to the Proposed Project. In discovery, Trident was able to take the deposition of Dr. Patrick Cawley, who elaborated on [the Network]'s role in the Proposed Project.").

ownership and management of the Proposed Project was presented to DHEC in MUHA's own CON application." (Trident Br. 13). The inclusion of "basic information" about ownership and management in the application does not authorize the ALC to consider all issues that may relate to ownership and management. Allowing the ALC to exercise such a broad review would violate well-settled rules of statutory interpretation by reading the limitations in section 44-7-210(E) out of the CON Act. *See Marlboro Park*, 358 S.C. at 579, 595 S.E.2d at 854 ("[T]he **issues** considered at the contested case hearing are limited to those presented or considered during the staff review and decision process." (citing S.C. Code Ann. § 44-7-210(E))); *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017) (providing a statute must be "so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous," and rejecting a circuit court's interpretation of a statute because it rendered words in the statute meaningless (citation omitted)).

Trident failed to raise the validity or constitutionality of MSV and the Network in a timely manner, and the ALC therefore erred in considering these issues.

ii. Trident's arguments expand the scope of the ALC's analysis far beyond its statutory authority.

Trident incorrectly argues that any topic which affects compliance with the CON requirements—such as any topic related to "ownership and management"—may be considered by the ALC within its statutory authority. *See* (Trident Br. 13) (arguing MUHA's CON application "did not comply with the standards and criteria established by CON Law because MUHA identified as the facility's operator an entity which is unlawfully owned jointly by a state agency and a private for-profit corporation in violation of the agency's enabling statutes and the South Carolina Constitution"). Trident identifies three aspects of the CON application that it contends justify the ALC's expansive review of any issue related to ownership or management: (1) "Basic

information concerning the ownership and management of the Proposed Project was presented to DHEC in MUHA's own CON application"; (2) the Section 202 Part D Assurances contained in the CON application required MUHA to affirm that 'the facility will be operated and maintained in accordance with the standards prescribed by law and regulations for the maintenance and operation of such facilities'"; and (3) the project review criteria addressing the "Record of the Applicant (Owner and/or Administrator)" "directly address[ed] the ownership and management of the Proposed Project." (Trident Br. 13–14). These categories of information do not empower the ALC to consider the validity or constitutionality of MSV and the Network.

The mere inclusion of "basic ownership information" in the CON application does not entitle the ALC to examine the validity or constitutionality of every entity involved in a proposed facility or to deny an application based on a purported issue in the formation of a management company. Trident's arguments would expand the ALC's authority beyond the CON Act, the CON Regulations, and the project review criteria, and would allow the ALC to deny a CON application based on circumstances impacting any person mentioned in the application, regardless of whether those circumstances relate to healthcare planning or public healthcare needs. *See* (MUHA App. Br. 18–21). Such an expansive view of the ALC's authority does not comport with the CON Act.

The Section 202 Part D Assurances do not open the door for the ALC to consider the validity or constitutionality of MSV or the Network. The assurances require a CON applicant to affirm "[t]hat the facility will be operated and maintained in accordance with the standards prescribed by law and regulations *for the maintenance and operation of such facilities*." S.C. Code Ann. Regs. 61-15 § 202.2.d.(6) (emphasis added). This assurance is not a criteria or standard for granting or denying a CON application; it is merely a routine affirmation required to submit a CON application. *See* (CON App. at 43, R. ___). Moreover, it refers to laws and regulations for

the operation of *healthcare* facilities—i.e., the CON Act, CON Regulations, and hospital licensing standards, *see, e.g.*, S.C. Code Ann. Regs. 61-16 §§ 101 *et seq.*, none of which address the constitutionality or validity of an entity retained to manage a proposed facility. It is not an assurance that all the entities involved in the project are properly formed and constitutional or that they comply with all laws in existence. Trident's interpretation of the assurance would give the ALC unlimited power to consider all legal issues in reviewing a CON application, regardless of whether those issues related to the CON Act, the CON Regulations, or the project review criteria. Such an interpretation improperly broadens the ALC's authority.

Trident also attempts to use the "Record of Applicant" criterion to establish the ALC's jurisdiction over the constitutionality or validity of MSV and the Network.[6] (Trident Br. 14); *see also* S.C. Code Ann. Regs. 61-15 § 802(13). The elements of the "Record of the Applicant" do not invite the ALC to examine the validity of a management company and its owners. Instead, the criterion lists four potential considerations related to the *applicant* (in this case, MUHA): (1) whether the *applicant* has record of "successful operation with adequate management experience"; (2) whether the *applicant* has a "demonstrated ability to obtain necessary capital financing"; (3) sources of assistance if the *applicant* has no prior experience; and (4) the *applicant's* "record of cooperation and compliance with State and Federal regulatory programs." S.C. Code Ann. Regs. 61-15 § 802(13). MUHA is the applicant, and its CON application addressed its record. *See generally* (CON App., R. ___). This section of the CON application does not empower the ALC to determine the constitutionality or validity of every entity mentioned in the application.

[6] Trident did not challenge MUHA's compliance with the "Record of Applicant" criterion before DHEC or in its prehearing brief or opening statement before the ALC. Trident therefore failed to timely raise this argument under section 44-7-210(E).

Trident's arguments are an effort to gain a jurisdictional footing for the ALC to declare MSV and Network illegal in order to support its argument that their removal from the project would cause other project review criteria not to be satisfied. *See* (Trident Br. 20) (arguing the issue is the "ownership of the Proposed Project and its effect on the Project's ability to comply with CON criteria and standards"). CON cases require consideration of State Health Plan standards and project review criteria—not whether corporate entities involved in the project are "legal" under enabling statutes or the Constitution. *See* (MUHA App. Br. 18–21). The mere fact that Trident or the ALC can hypothesize ways the CON criteria could be impacted by deleting certain entities from the CON application does not create authority for the ALC to do so.

Finally, Trident improperly states that "MUHA's Proposed Project constitutes an unlawful and unconstitutional joint venture, which *by its nature* cannot comply with the standards and criteria applicable to it under the Certificate of Need laws." (Trident Br. 2) (emphasis added). MSV and the Network relate to only one element of this linear accelerator project—the management company—and neither Trident nor the ALC cite any evidence in support of their claim that MUHA admitted it cannot finance the proposed facility without Alliance.[7] *See* (Trident Br. 33; ALC Or. of Judgment at 24). MUHA, the applicant and licensee, is not unlawful or unconstitutional, and MUHA could establish and operate this facility without the Network. Trident's statement exposes the flaws in its position. It does not apply CON standards and criteria; instead, it advocates for a broad test of "the nature" of the project *before* applying the CON standards and criteria to whatever remains after the test of "the nature" eliminates certain elements of the project. Trident's position is too broad and creates an absurd result. It provides the ALC

[7] Even if this Court affirms the ALC's ruling as to MSV and the Network, it must reverse the denial of MUHA's CON application and remand so the ALC may consider evidence regarding whether MUHA can finance the proposed facility without MSV and the Network.

vast authority to decide whether any potential issue might interfere with the CON Act and CON Regulations. This expansive view of the ALC's power, which the ALC adopted and exercised in this case, is an abuse of discretion and an error of law. *See* S.C. Code Ann. §§ 1-23-380(5); S.C. Code Ann. § 1-23-610(B). This Court should reverse the denial of MUHA's CON application.

II. The ALC's ruling improperly affects the rights of MSV, Alliance, and the Network to participate in CON applications and operate or manage healthcare facilities in South Carolina.

Trident argues this Court should consider only the ALC's ultimate decision to deny MUHA's CON application and should ignore any other consequences of the ALC's ruling. (Trident Br. 23–24). However, contrary to Trident's arguments, the ALC's order improperly affects the rights of entities over which it has no jurisdiction—MSV, Alliance, and the Network.

First, Trident argues this issue is unpreserved. (Trident Br. 22–23). This issue is jurisdictional and can be raised at any time. *See Murdock v. Murdock*, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999) ("It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard *a court has no jurisdiction* to adjudicate such personal rights. *A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity* and must be so treated by the courts whenever and for whatever purpose it is presented and relied on." (emphases added) (quoting *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972))); *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 489 n.7, 536 S.E.2d 892, 896 n.7 (Ct. App. 2000) (providing a jurisdictional requirement "may be raised at anytime by either party or *sua sponte* by this Court"). The issue is therefore properly before this Court.

Second, Trident attempts to minimize the effect of the ALC's ruling by narrowing the ruling to a finding that MUHA is not entitled to a CON. (Trident Br. 23–24). Accordingly, Trident argues the ALC adjudicated only MUHA's rights and did not adjudicate the rights of MSV, Alliance, or the Network. (*Id.*). Trident's argument ignores the effect and intent of the ALC's ruling. The ALC ruled that MSV and the Network are invalid or unconstitutional entities *and therefore cannot own or manage the proposed facility*. *See* (ALC Or. of Judgment at 22, R. ___). Regardless of whether the ALC expressly ordered the dissolution of the Network or granted Trident any affirmative relief against MSV, Alliance, or the Network—all of which it lacks the power to do—it suggested that MSV and the Network cannot be part of a CON application. This ruling is prejudicial to MSV, Alliance, and the Network in this case and may be prejudicial in future cases.[8] The ALC exceeded its authority and improperly adjudicated the rights of nonparties, and this Court should reverse the ALC's ruling.

III. Trident fails to refute MUHA's explanation that MSV and the Network are valid, constitutional entities.

MSV and the Network are valid, constitutional entities. (MUHA App. Br. 28–37). If this Court reaches this issue, it should reject Trident's arguments and find MSV and the Network are valid, constitutional entities for the reasons explained in MUHA's primary brief.

Trident fails to refute MUHA's arguments. Trident's reliance on *State v. Heyward*, 3 Rich. 389 (1832), for the proposition that only the legislature could create corporations at that time is misplaced. The court in *Heyward* did not recite any principle of law not in existence today. The

[8] In fact, counsel for Trident has cited the ALC's ruling in support of its argument that the ALC should deny a CON application in another case, *Trident Medical Center, LLC d/b/a Trident Medical Center & Summerville Medical Center v. S.C. Dep't of Health & Envtl. Control & Medical University Hospital Authority, d/b/a MUSC Health Emergency Services*, 17-ALJ-07-0441-CC (S.C. Admin. Law Ct.).

court's statement that the "right to grant a corporate franchise belongs to Legislative power, as being, in this respect, the entire representative of the sovereignty of the people," 3 Rich. at 411, was merely an acknowledgement that a corporate entity must be recognized by the government. The court said nothing about the *power* to form a corporation. Although the creation of a corporation no longer requires a charter from the legislature,[9] modern law—in effect—is the same: a group of persons forming a corporate body must obtain recognition from the Secretary of State. *See* S.C. Code Ann. § 33-2-103 (providing "the corporate existence begins when the articles of incorporation are filed" by the Secretary of State, and "[t]he Secretary of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation"). Trident cites no law that prohibited MUSC from creating corporations in 1832 nor any law clarifying that a corporation like MUSC—which is a "person" under the law—was not a "person" for purposes of incorporation. MUSC has had the power to create corporations since 1832, and its power survives today. *See* (MUHA App. Br. 28–33). MSV is therefore a valid entity.

Trident's reliance on the "*expression unius est exclusion alterius*" concept is similarly misplaced. The granting of a specific power to MUHA in section 59-123-60(E) does not compel a conclusion that the General Assembly implicitly repealed MUSC's preexisting power to create affiliates. MUSC's enabling legislation is silent as to whether MUSC may create corporations. The law applicable at the time of MUSC's charter, however, empowered it to do so. MUSC retains that power today. The ALC erred in finding MUSC lacked the power to create affiliates. MSV and the Network are lawful, valid entities, and this Court should reverse the ALC's ruling.

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[9] *See* S.C. Code Ann. § 33-1-102, South Carolina Reporter's Comments (noting the "adoption of the Constitution of 1868 . . . eliminated the need for special chartering of corporations by the Legislature").

CONCLUSION

MUHA respectfully requests that the Court reverse the ALC's denial of MUHA's application for a CON to expand its radiation therapy services.

(signature page attached)

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February 3, 2020

CERTIFICATE OF SERVICE

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for MUSC Radiation Therapy Center-Berkeley Center, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by electronic mail and United States Mail, postage prepaid, to the following address(es):

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February 3, 2020

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Trident Medical Center, LLC, d/b/a Trident Medical Center vs. South Carolina Department of Health and Environmental Control, Medical University Hospital Authority, d/b/a MUSC Radiation Therapy Center-Berkeley County, and Roper St. Francis Hospital – Berkeley, Inc. d/b/a Roper St. Francis Hospital – Berkeley
Docket No. 18-ALJ-07-0100-CC
Appellate Case No. 2019-001159
Our File No. 019243/01524

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Initial Reply Brief in the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of the brief.

Very truly yours,

Matt Bog

A. Mattison Bogan

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