

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

APPELLATE CASE No.: 2019-000358
ADMINISTRATIVE LAW COURT CASE No.: 16-ALJ-07-0386-CC

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

v.

South Carolina Department of Health and Environmental Control,
and Roper St. Francis Hospital – Berkeley, Inc., d/b/a Roper St.
Francis Hospital – Berkeley,.....Respondents below,

Of Which South Carolina Department of Health and Environmental
Control is a.....Respondent,

And Roper St. Francis Hospital – Berkeley, Inc., d/b/a
Roper St. Francis Hospital – Berkeley is the.....Appellant.

RECORD ON APPEAL
VOLUME 2 OF 6
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January 15, 2020
Columbia, South Carolina

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Trident Medical Center, LLC, d/b/a,
Trident Medical Center,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control and Roper St.
Francis Hospital-Berkeley, Inc., d/b/a
Roper St. Francis Hospital-Berkeley,

Respondents.

Docket No. 16-ALJ-07-0386-CC

**SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL
CONTROL'S PREHEARING STATEMENT**

Pursuant to the Order for Prehearing Statements issued by the South Carolina Administrative Law Court ("ALC" or "Court") on November 28, 2016, Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC"), by and through its undersigned counsel, hereby submits the following prehearing statement.

1. The nature of this proceeding:

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to request for a contested case hearing filed by Petitioner Trident Medical Center, LLC, d/b/a, Trident Medical Center ("Trident"), challenging the Department's decision to approve the Certificate of Need ("CON") application of Respondent Roper St. Francis Hospital-Berkeley, Inc., d/b/a Roper St. Francis Hospital-Berkeley ("Roper), for the addition of Cardiac Catheterization services at a total project cost of \$2,873,366.

2. Statutory provision(s) conferring subject matter jurisdiction on the Court and other applicable statutes and regulations:

The statutory provisions conferring subject matter jurisdiction on the ALC include S.C. Code Ann. Sections 1-23-600 (Supp. 2015), 44-1-60 (Supp. 2015), 44-7-210 (Supp. 2015), and 44-7-220 (Supp. 2015).

Other applicable statutes and regulations include: *State Certification of Need and Health Facility Licensure Act* ("the CON Act"), S.C. Code Ann. Sections 44-7-110, *et seq.* (2002 and Supp. 2015); *Certification of Need for Health Facilities and Services* ("the CON Regulation"), 3 S.C. Code Ann. Regs. 61-15 (Supp. 2015); and the *South Carolina Health Plan* adopted August 13, 2015 ("the Plan").

3. The issues to be presented for determination, including any claims or defenses expected to be raised:

The issue presented for determination by the Court is whether the Department's decision to approve Roper's CON application for the establishment of a new cardiac catheterization laboratory is consistent with the CON Act, the CON Regulation, and the Plan.

4. The action requested of the Court and a detailed statement of the law, including statutory and/or case citations, that support the action requested:

The Department requests the Court uphold its decision to approve Roper's CON application as consistent with the CON Act, the CON Regulation, applicable project review criteria, and the Plan.

5. A brief summary of the facts to be presented at the hearing:

Roper submitted a CON application to the Department in May of 2016 for the addition of cardiac catheterization services at its new Berkeley County hospital at a total project cost of \$2,873,366 ("Project"). Trident submitted written opposition to the Project.

By letter dated May 26, 2016, the Department notified Roper that the application was deemed complete and listed the relative importance of the project review criteria to be used in

reviewing the application as follows: Compliance with the State Health Plan (Section 802(1)); Community Need Documentation (Section 802(2)); Distribution (Accessibility) (Section 802(3)); Financial Feasibility (Section 802(15)); and Cost Containment (Section 802(16)). After consideration of the entire administrative record, Department staff concluded that Roper presented substantial evidence that the Project complies with the Plan and with the Relative Importance Criteria.

Based upon the above, staff issued its decision granting the CON on July 25, 2016. Trident filed a request for final review ("RFR") with the Board of Health and Environmental Control ("Board") on August 9, 2016. By letter dated September 21, 2016, the Board notified the parties that it had decided not to conduct a final review conference. Trident subsequently filed this contested case with the ALC.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority for the motion:

The Department has not yet determined what motions it may file but reserves the right to do so.

7. A list of proposed witnesses and exhibits:

Witnesses:

Louis Eubank, Director, CON Program

Exhibits:

The CON application file for Roper's Project
Excerpts from the Plan

The Department reserves its right to supplement its witness and exhibit list as may prove necessary.

8. Whether discovery is necessary and, if so, a proposed schedule:

The Department anticipates discovery will be necessary as provided for in S.C. Code Ann. Section 44-7-210(F) and Rule 21(B), SCRALC. The Department believes it would be beneficial for counsel for all parties to confer regarding a proposed scheduling order.

9. The estimated length of the hearing:

The Department anticipates the contested case hearing will last approximately five (5) days.

10. Any dates in the next 120 days when you will not be available for a hearing:

The undersigned are not available for hearing on the following dates: February 6-10, 2017, March 13-24, 2017, and May 8-17, 2017.

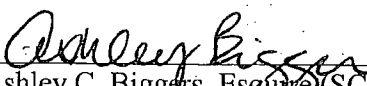
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December 20, 2016

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Trident Medical Center, LLC, d/b/a Trident
Medical Center,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control and Roper St. Francis
Hospital - Berkeley, Inc., d/b/a Roper St.
Francis Hospital - Berkeley,

Respondents.

Docket No.: 2016-ALJ-07-0386-CC

**RESPONDENT ROPER ST. FRANCIS
HOSPITAL – BERKELEY’S PRE-TRIAL
MEMORANDUM ON STATUTORY
CONSTRUCTION AND AGENCY
DEFERENCE DOCTRINE**

Respondent Roper St. Francis Hospital – Berkeley, Inc. d/b/a Roper St. Francis Hospital – Berkeley (“Roper Berkeley”) hereby respectfully submits this Pre-Trial Memorandum addressing the statutory construction principles applicable to this proceeding and the agency deference doctrine.

BACKGROUND

In order to provide diagnostic cardiac catheterizations in the State of South Carolina, a health care provider must have a Certificate of Need (“CON”) for the provision of those services in a catheterization laboratory. The South Carolina Health Plan (“Health Plan”) contains CON Standards for diagnostic and mobile catheterization services in Chapter VIII (Cardiovascular Care) of the 2015 South Carolina Health Plan (the Health Plan applicable to this contested case proceeding). The Cardiovascular Care Chapter also provides definitions relevant to the provision of cardiac services in South Carolina at Pages VII-2 and VII-3. In addition to the Standards for the addition or expansion of diagnostic catheterization services found in the Cardiovascular Care Chapter, the 2015 South Carolina Health Plan allows for the transfer of services pursuant to

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specific Service Area Exception Criteria found at Pages II-2 and II-3 in Chapter II of the Health Plan.

Roper Berkeley's CON Application was filed as an application for a new diagnostic catheterization laboratory to be established at the hospital currently under construction in Carnes Crossroads, Berkeley County. At the time the CON Application was filed and approved, the applicable Standards contained in the 2015 South Carolina Health Plan read as follows:

CERTIFICATE OF NEED STANDARDS

1. The capacity of a fixed catheterization laboratory shall be 1,200 diagnostic equivalents per year. Adult diagnostic catheterizations shall be weighted as 1.0 equivalents, while therapeutic catheterizations shall be weighted as 2.0 equivalents. For pediatric and adult congenital catheterization labs, diagnostic catheterizations shall be weighted as 2.0 equivalents, therapeutic catheterizations shall be weighted as 3.0 equivalents, electrophysiology (EP) studies shall be weighted as 2.0 equivalents, and biopsies performed after heart transplants shall be weighted as 1.0 equivalents. The capacity of mobile cardiac catheterization labs will be calculated based on the number of days of operation per week.
2. The service area for a diagnostic catheterization laboratory is defined as all facilities within 45 minutes/ one way automobile travel time; for comprehensive cardiac catheterization laboratories the service area is all facilities within 60 minutes' one way automobile travel time; a pediatric cardiac program should serve a population encompassing at least 30,000 births per year, or roughly two million people.

Diagnostic and Mobile Catheterization Services¹

3. New diagnostic catheterization services, including mobile services, shall be approved only if all existing labs in the service area have performed a minimum of 500 diagnostic catheterization procedures per laboratory during the most recent year.
4. An applicant for a fixed diagnostic service must project that the proposed service will perform a minimum of 500 diagnostic equivalent procedures annually within three years of initiation of services, without reducing the utilization of the existing diagnostic catheterization services in the service area below 500 diagnostic cardiac catheterization procedures per laboratory.

¹ It is undisputed that Standards 5 and 6 do not apply to the Roper Berkeley CON Application, as the project is neither an expansion of an existing service nor a mobile diagnostic catheterization laboratory.

The parties do not dispute that the Roper Berkeley Application satisfies Standards 1, 2, and 4, and that Standards 5 and 6 do not apply. Petitioner Trident Medical Center, LLC, d/b/a Trident Medical Center ("Trident") has abandoned all other bases for appeal other than the Application's compliance with Health Plan, taking the position that because the Application does not satisfy Standard 3, it was not consistent with the Health Plan. Thus, the question before the Court is whether the Respondent South Carolina Department of Health and Human Services ("DHEC" or "Department") erred in finding that Roper Berkeley's Application satisfied Standard 3, and resultantly, whether the Application complied with the Health Plan as is necessary to be approved. Roper Berkeley respectfully submits this Memorandum of Law addressing the legal precedent relevant to the Court's evaluation of this issue.

REGULATORY BACKGROUND

This proceeding arises under the regulatory program by which Certificates of Need are issued by the State of South Carolina for the development of health care facilities and services. The regulatory framework consists of the State Certification of Need and Health Facility Licensure Act ("CON Act"), codified at South Carolina Code § 44-7-110, *et seq.*; the regulations promulgated thereunder, found at 24A South Carolina Code of Regulations 61-15; and a Health Plan, which is revised at least biannually. The purpose of the CON Act and thus the regulatory program itself is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure high quality services are provided in health facilities in this State." See S.C. Code Ann. § 44-7-120. DHEC is the state agency charged with, among other things, implementing South Carolina's CON program. S.C. Code Ann. § 44-7-140. By statute, DHEC is "the sole state agency for control and administration of the granting of [CONs] and licensure of

health facilities and other activities necessary to be carried out under this article.” *Id.*

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(C). The Department, along with the state health planning committee, is statutorily charged with preparing a Health Plan at least once every two years. The Department, however, is the final arbiter of the plan, without legislative overview. S.C. Code Ann. § 44-7-180. As the agency charged not only with the creation of the Health Plan but the overall responsibilities for the operation and control of the CON program, it is the Department’s intent that prevails in interpreting the meaning of the Health Plan, including the meaning of the Standards set forth therein. *See* S.C. Code Ann. § 44-7-140; *see also Marlboro Park Hosp. v. S.C. Dept. of Health and Envtl. Control*, 358 S.C. 573, 578-79, 595 S.E.2d 851, 854 (Ct. App. 2004). Where a dispute arises between the Department’s interpretation of the Health Plan and that of an applicant or opponent, deference to the Department’s interpretation and implementation of the Health Plan’s provisions may be appropriate. *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014); *Murphy v. S.C. Dept. of Health and Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012); *see also* S.C. Code Ann. § 44-1-60(F)(2).

STANDARD OF REVIEW

As the party challenging DHEC’s decision, Trident bears the burden of proof in this contested case to reverse the Department’s determination that Roper Berkeley’s CON Application was in compliance with the 2015 South Carolina Health Plan. *See* S.C. Code Ann. § 44-7-210(E) (Rev. 2002); 24A S.C. Code Ann. Regs. 61-15 § 403(1); *see also Leventis v. S.C. Dept. of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the

affirmative of an issue); *cf.* 2 Am. Jur. 2d *Administrative Law* § 360 (1994). The burden requires a showing by a preponderance of the evidence. *See Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding that the standard of proof in an administrative proceeding is generally the preponderance of the evidence); *Nat'l Health Corp. v. S.C. Dept. of Health and Envtl. Control*, 298 S.C. 373, 379, 380 S.E.2d 841, 844 (Ct. App. 1989) (holding that the preponderance of the evidence standard applies in CON disputes).

RELEVANT FACTUAL BACKGROUND

The service area for Standard 3 is “all facilities within 45 minutes’ one way automobile travel time.” 2015 South Carolina Health Plan at VIII-4. It is undisputed that “all facilities” as defined in Standard 2 includes comprehensive catheterization laboratories at Trident Medical Center, Medical University of South Carolina, and Roper Hospital. “All facilities” as defined at the time the CON Application was filed and reviewed also included a diagnostic catheterization laboratory at Bon Secours St. Francis Xavier Hospital.

Roper Berkeley’s CON Application to establish a diagnostic catheterization laboratory at Roper St. Francis Hospital – Berkeley in Berkeley County proposed that upon approval of the laboratory at Berkeley Hospital, “the diagnostic catheterization laboratory at its sister hospital, Bon Secours St. Francis Xavier Hospital, will close and the room will continue to be used as a special procedures lab.” (Roper Berkeley DHEC Record at 0006; *see also* pages 0017, 0024, 0030-0031). The Department’s decision approving the Roper Berkeley CON Application referenced and required the closure of the Bon Secours St. Francis Xavier laboratory, regardless of the timing of the new laboratory’s installation or any potential opposition to the approval. (Roper Berkeley DHEC Record at 0207). The Bon Secours St. Francis Xavier diagnostic catheterization laboratory was closed on August 1, 2016. (Roper Berkeley DHEC Record at 0227).

INTERPRETATION OF THE SOUTH CAROLINA HEALTH PLAN

When interpreting a regulation, the ALC employs the same rules that govern the construction of statutes. *See Murphy v. S.C. Dept. of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). Likewise, statutory construction principles apply to the interpretation of the Health Plan. *Trident Med. Ctr., LLC v. S.C. Dept. of Health & Envtl. Control*, 412 S.C. 341, 355, 772 S.E.2d 177, 184 (Ct. App. 2015) (“[W]e may interpret the State Health Plan using the rules of statutory construction applied to regulations with one caveat, each section of the State Health Plan must be read as a whole.”) Accordingly, it is clear that the ALC should use the principles of statutory construction to review the Department’s interpretation of the Health Plan.

Though interpreted using the same principles, the Health Plan is not a regulation or a statute, it is a planning document prepared by DHEC staff and approved by the DHEC Board at least every two years. *See* S.C. Code Ann. § 44-7-180. Therefore, unlike a regulation or statute, the Health Plan is not approved by the General Assembly but is an agency-promulgated document approved by the agency’s Board. While the CON Act requires the issuance of the Health Plan, the CON Act simply requires that the Plan include an inventory, projections of need, standards for distribution, and a statement as to the most important project review criteria. *See* S.C. Code Ann. § 44-7-180(B). It is important to realize that the CON Act does not mandate a narrow or strict interpretation of the Health Plan. Section 44-7-210(C) merely states that “[t]he Department may not issue a Certificate of Need unless an application complies with the State Health Plan, Project Review Criteria, and other regulations.” S.C. Code Ann. § 44-7-210(C). Section 44-7-180(B) states that “nothing in this provision shall be construed as requiring the department to approve any project which is inconsistent with the South Carolina Health Plan.” *Id.* at § 44-7-180(B). Therefore, the question for the Department was whether the Application complies with the Health Plan or is

inconsistent with the Health Plan, and for the ALC the question is whether the Department erred in that decision. Determining compliance requires judgment from the Department in its review of the application. Thus, so long as the Department interprets its Health Plan in a reasonable manner, consistent with the plain language of the Health Plan, and considering the entire section of Health Plan, the Department retains the authority to find that an application complies with the Health Plan.

REASONABLE AND CONSISTENT WITH PLAIN LANGUAGE

Standard 3 sets forth that an application for a new diagnostic catheterization laboratory can be “approved only if all existing labs in the service area have performed a minimum of 500 diagnostic catheterization procedures per laboratory during the most recent year.” 2015 South Carolina Health Plan at Page VIII-5. It is undisputed that the Bon Secours St. Francis Xavier laboratory did not perform 500 diagnostic catheterization procedures in the most recent year. The crux of Trident’s claim is that the Bon Secours St. Francis Xavier’s laboratory was an “existing lab” for purposes of Standard 3, such that Roper Berkeley’s CON Application could not be approved as being in compliance with the 2015 South Carolina Health Plan regardless of the proposal to close the laboratory in conjunction with an approval. The Department and Roper Berkeley contend that the stated condition that the underutilized laboratory would close upon approval allowed the Department to evaluate Standard 3 without including the laboratory at Bon Secours St. Francis Xavier Hospital. As documented in the record, the diagnostic catheterization laboratory at Bon Secours St. Francis Xavier has been closed since August 1, 2016.

The presence in Standard 3 of the word “existing,” which is not defined in the Health Plan, has some meaning and is subject to the Department’s reasonable interpretation and application. The case of *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C.

633, 723 S.E.2d 191 (2012), is instructive to the particular issues before the Court. In *Murphy*, a resident challenged DHEC's approval of a water quality certification project that provided for the filling of a portion of a stream as part of renovations to alleviate overcrowding at Chapin High School. The proceeding raised challenges to the Department's interpretation and application of relevant regulations, and specifically addressed DHEC's interpretation of the word "vicinity" when evaluating the impact of the proposed activity "in the vicinity of the project." 396 S.C. at 637-38, 723 S.E.2d 193-94. The Department testified that the applicable "vicinity" was determined on a case-by-case basis, taking into consideration the project at issue because every project was different. *See id.* at 640, 723 S.E.2d at 195. The petitioner argued that "vicinity" meant the portion of the stream to be filled. *See id.* at 638, 723 S.E.2d at 194. The word "vicinity" was not defined in the regulation. *See id.* at 640, 723 S.E.2d at 195. The Supreme Court explained, "we interpret an undefined term in accordance with its usual and customary meaning." *Id.* at 640, 723 S.E.2d at 195. Turning to Merriam-Webster Dictionary, the Supreme Court determined that the accepted meaning of vicinity "clearly includes more than the just the project; it logically incorporates the surrounding area." *Id.* The Supreme Court then proceeded to address the deference due to the agency's interpretation of the undefined term and held "[b]ecause this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." *Id.* at 640-41, 723 S.E.2d at 195.

As in *Murphy*, the term "existing" is not defined in the Health Plan. Notably, Merriam-Webster Dictionary, the same source used by the Supreme Court in *Murphy* to define "vicinity," defines "existing" as "to continue to be." Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/existing>. Using this usual and customary meaning, it is entirely reasonable and consistent with the plain language of "all existing labs" that DHEC did not include the Bon

Secours St. Francis Xavier diagnostic catheterization laboratory as an “existing” lab for purposes of applying Standard 3 to the Roper Berkeley CON Application. Because the stated condition in the Application was that the Bon Secours St. Francis Xavier laboratory would close upon approval of the Application, that laboratory would not “continue to be” for purposes of the Standard evaluating capacity and need in the service area.

In contrast to the Department’s reasonable interpretation of the Standard in its own planning document, Trident’s interpretation of Standard 3 requires the Court to ignore the word existing and read the Standard as “all labs”, as in all labs in the service area are existing labs. This interpretation violates the well-known canon of statutory construction, *inclusion unius est exclusion alterius*, which is to say that including one excludes another. *See e.g. Hodges v. Rainey*, 341 S.C. 79, 86; 533 S.E.2d 578, 581 (2000) (*citing Black’s Law Dictionary* 602 (7th ed. 1999)). In addressing the service area applicable to the CON Standards for catheterization services, Standard 2 defines the service area as “all facilities” within the applicable distance. 2015 South Carolina Health Plan at Page VIII-4. For the utilization requirement at Standard 3, however, the Health Plan limits the requirement to “all existing labs” in order for new diagnostic services to be approved. *See id.* at Page VIII-5. Roper Berkeley submits that the inclusion of the word “existing” excludes a reading of the Standard that the plain meaning could be “all labs.” Moreover, the absence of a definition of “existing” is strong evidence that the intent of the Department is to allow flexibility in evaluating utilization and capacity in a service area in a circumstance such as this, where a highly underutilized laboratory will be closed. This flexibility to address a closing laboratory is entirely consistent with the purposes of the CON Act and the intent of the Health Plan, namely to best serve public needs and ensure high quality services.

Under Trident’s interpretation and inflexibility, providers would be required to wait for as

long as two years after a service is discontinued before another provider can apply to perform the service, which application and review process itself takes several months (or longer if challenged). Such an unwieldy and unnecessary delay to the provision of high quality health services is contrary to the needs of the public and the purposes of the CON Act. It is entirely reasonable, logical and consistent for the Health Plan Standards to be interpreted and applied so as to permit the approval a new laboratory contemporaneously with the closure of an underutilized laboratory, particularly for such a necessary service where the remainder of the service area shows high volumes for remaining providers.

In *Berkebile v. Outen*, 311 S.C. 50, 55, 426 S.E.2d 760, 763 (1993), the Supreme Court stated “We cannot construe a statute without regard to its plain and ordinary meaning, and we will not resort to subtle or forced construction in an attempt to limit or expand the scope of a statute.” 311 S.C. at 55, 426 S.E.2d at 763. In *Berkebile*, the Supreme Court considered the interpretation of South Carolina Code Section 32-1-10, a statute that allowed a person to seek recovery for a gambling loss over a certain threshold. The crux of the appeal was whether the statute required that the gambling loss arise from an “illegal” game. *See id.* at 52, 426 S.E.2d at 761. The Supreme Court held that it did not for the basic reason that the statutory language did not include language limiting it to an illegal game. Thus, the Supreme Court stated it will “not judicially engraft extra requirements to legislation which is clear on its face.” *Id.* at 55-56, 426 S.E.2d at 763. Unlike the absence of a limitation in the statutory text in *Berkebile*, the threshold requirement at issue in Standard 3 is limited to “existing” labs, which the Department determined did not include a laboratory being closed upon the approval of the application. Trident argues that the Department erred because all existing labs means all labs, that there cannot be a consideration of the fact of the laboratory’s pending closure. This Court should not adopt the forced and hyper technical

construction presented by Trident that seeks to ignore a specific limitation that is contained in the Health Plan.

DEFERENCE TO AGENCY INTERPRETATION

In denying Trident's Motion for Summary Judgment as to Roper Berkeley's compliance with Standards 3 and 4 of the South Carolina Health Plan, this Court addressed the statutory construction principles applicable to the Health Plan. *See* Order at 4. The Order acknowledged that deference to an agency's interpretation and application of a statute may be appropriate. *See id.* at 5. The matter of agency deference, and particularly the deference to DHEC with respect to its own regulations, was discussed at length in *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014). In *Kiawah II*, the Supreme Court identified the two-step process for determining when agency deference is appropriate. "First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation is silent or ambiguous with respect to the specific issue, the court must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Id.* at 32-33, 766 S.E.2d at 717 (internal quotations omitted) (citing *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) and *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The South Carolina Supreme Court further reiterated, "our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ." *Kiawah II* at 34, 766 S.E.2d at 718 (internal quotation omitted). Compelling reasons to differ exist only if the interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 36, 766 S.E.2d at 718 (quoting *Chevron*, 467 U.S. at 844).

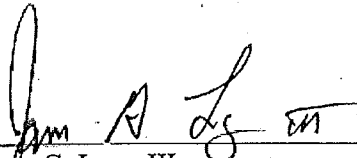
In *Kiawah II*, DHEC's interpretation of the "area" to be considered in whether to permit the construction of a bulkhead and reventment along the shoreline of Kiawah Island pursuant to a Department regulation was rejected by the ALC as being contrary to the meaning of "area" within the regulation. *Kiawah II* at 32, 766 S.E.2d at 717. In reversing the ALC, the Supreme Court held that "DHEC's interpretation is neither arbitrary, capricious, nor manifestly contrary to the statute. To the contrary, DHEC's interpretation is reasonable and consistent with its statutory authority." *Id.* at 35, 766 S.E.2d at 719. The *Kiawah II* Court considered all of the authority vested in the agency to enforce and administer the coastal zone management program, as well as the stated policies behind the empowering Act to conclude the agency interpretation was sound. *See id.*

Our Supreme Court has repeatedly stated that the well-settled deference doctrine requires that there must be a compelling reason to differ with the agency's interpretation of its regulation. *Murphy*, 396 S.C. at 640-41, 723 S.E.2d at 195 (affirming deference to DHEC with no reason to deviate from its construction and application where interpretation was reasonable and consistent with regulation). The most common, if only, circumstance when our courts have refused to defer to the interpretation or application of the agency is when the agency interpretation was refuted by the plain language of the statute or regulation (*i.e.*, manifestly contrary to the statute) or the interpretation renders the interpreted provision meaningless or futile (*i.e.*, arbitrary or capricious). *See Savannah Riverkeeper v. S.C. Dept. of Health and Envtl. Control*, 400 S.C. 196, 206, 733 S.E.2d 903, 908 (2012) (J. Toal, concurring).

The inclusion of the word "existing" in Standard 3 must have some meaning, as otherwise the drafters would have not included the term and simply required that "all labs in the service area" meet the stated threshold, similar to the use of "all facilities" when defining the service area in Standard 2. To interpret "all existing labs" to mean "all labs" renders the word "existing"

meaningless. This construction offered by Trident violates the maxim and rules thoroughly addressed herein. The Department's interpretation and application of Standard 3 to allow for the approval of the Roper Berkeley diagnostic catheterization laboratory as consistent with the Health Plan is reasonable and consistent with the plain language of the Standards. Moreover, there is no compelling reason offered by Trident dictating rejection of the Department's decision. The interpretation of the Department is not manifestly contrary to the Health Plan nor is it arbitrary or capricious. In evaluating deference to DHEC in the interpretation and application of Standard 3, the Court "must be mindful of the General Assembly's entrustment of South Carolina's health care marketplace to DHEC for cost containment, prevention of unnecessary duplication of services, serving public needs, and ensuring high quality of healthcare services." *Trident Med. Ctr.* at 355, 772 S.E.2d at 184 (citing S.C. Code Ann. § 44-7-120). Roper Berkeley respectfully submits that affirmance of the Department's decision is appropriate in the instant case.

RESPECTFULLY SUBMITTED,



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 Hospital - Berkeley*

July 23 2018
 Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Trident Medical Center, LLC, d/b/a Trident
Medical Center,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control and Roper St. Francis
Hospital - Berkeley, Inc., d/b/a Roper St.
Francis Hospital - Berkeley,

Respondents.

Docket No.: 2016-ALJ-07-0386-CC ✓

STIPULATION OF FACTS

The Petitioner, Trident Medical Center, LLC d/b/a Trident Medical Center ("Trident"), and the Respondents Roper St. Francis Hospital – Berkeley, Inc. d/b/a Roper St. Francis Hospital – Berkeley ("Roper Berkeley") and the South Carolina Department of Health and Environmental Control ("DHEC") hereby stipulate to the following facts:

1. Roper Berkeley filed a Certificate of Need Application on May 9, 2016 ("CON Application") to construct a catheterization laboratory and provide diagnostic cardiac catheterization services at the Roper Berkeley Hospital under construction in Berkeley County. The Hospital is located at Carnes Crossroads near Goose Creek in Berkeley County. The CON Application states that upon approval, the diagnostic catheterization laboratory at Bon Secours St. Francis Xavier Hospital will be permanently closed.

2. The applicable South Carolina Health Plan is the Health Plan enacted August 13, 2015 ("Health Plan").

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SC ADMIN LAW COURT

3. By decision letter dated July 25, 2016, DHEC approved the CON Application. On August 17, 2016, Bon Secours St. Francis Xavier notified the Department that it permanently closed its diagnostic cardiac catheterization lab effective August 1, 2016.

4. Trident timely filed a Request for Board Review with the DHEC Board that was denied without review on September 21, 2016.

5. Trident timely filed a contested case in the Administrative Law Court and is an affected person with standing to challenge DHEC's decision.

6. Chapter VIII of the Health Plan is the Chapter addressing cardiovascular care services. Pages VIII-4 and VIII-5 contain the Standards for establishing a new diagnostic catheterization laboratory. Standards 1, 2, 3, and 4 apply to the CON Application. Standards 5 and 6 do not apply the CON Application.

(a) Standard 1 sets forth the capacity for cardiac catheterization laboratories in South Carolina based on the complexity of the services provided.

(b) Standard 2 sets forth the service area for cardiac catheterization laboratories based on the complexity of the services provided.

(c) Standard 3 sets forth the historical utilization threshold for approval of a new diagnostic catheterization laboratory in a service area.

(d) Standard 4 sets forth the minimum projected utilization for approval of a new diagnostic catheterization laboratory in a service area.

7. The facilities in the relevant service area with cardiac catheterization laboratories at the time of the CON Application's submission were Trident Medical Center, Roper Hospital, Medical University of South Carolina and Bon Secours St. Francis Xavier Hospital. All the catheterization laboratories except Bon Secours St. Francis Xavier Hospital were comprehensive catheterization laboratories. In 2014, Bon Secours St. Francis reported in its Joint Annual Report to DHEC that 4 diagnostic catheterization procedures had been performed in its catheterization

lab. In 2015, Bon Secours St. Francis reported in its Joint Annual Report to DHEC that 2 diagnostic catheterizations had been performed.

8. The catheterization laboratories at Trident, Roper Hospital, and the Medical University satisfy the historical utilization threshold under Standard 3. The parties dispute whether the CON Application satisfies Standard 3 and therefore whether it complies with S.C. Regulation 61-15 § 802.1.

9. Initially, Trident challenged many aspects of the CON Application, but for efficiency and judicial economy, it has decided to withdraw its challenge to the CON Application in every respect with the exception of challenging whether the CON Application satisfies Standard 3. Trident asserts that unless the CON Application satisfies Standard 3, the Application does not comply with the South Carolina Health Plan, and the CON Application cannot be found to be consistent with the South Carolina Health Plan per Regulation 61-15 §801.3 and S.C. Code Ann. § 44-7-210(B); therefore, Trident asserts that DHEC erred in approving the CON Application.

10. The parties recognize that Trident has withdrawn its challenges to the CON Application save the challenge concerning Standard 3, and that Trident may not agree with the following conclusions, but so stipulates to effectuate the contested case hearing for purposes of limiting the issues in dispute.

- (a) The CON Application satisfies Standard 4.
- (b) Regulation 61-15 is applicable to the CON Application.
- (c) The CON Application sufficiently projects Community Need to satisfy Section 802.2 of the Project Review Criteria.
- (d) The CON Application sufficiently meets the requirements for Distribution (Accessibility) set forth in Section 802.3 of the Project Review Criteria.

(e) The CON Application establishes financial feasibility set forth in Section 802.15 and related financial sections of the Project Review Criteria.

(f) The CON Application sufficiently meets the requirements of cost containment set forth in Section 802.16 of the Project Review Criteria.

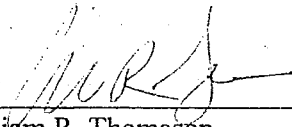
(g) The CON Application will not have an adverse effect on other facilities as defined by Section 802.23 and 802.24 of the Project Review Criteria.

(h) Any additional Project Review Criteria applicable to the CON Application have been satisfied with the exception of 802.1, which relates to the parties' dispute as to Standard 3.

(i) Section 500 of the Regulation is not applicable to the CON Application.

18. Dan Sullivan is qualified to testify as an expert witness pursuant to Rule 702, SCRE, under the designations of healthcare planning and the Health Plan.

19. Kathy Platt is qualified to testify as an expert witness pursuant to Rule 702, SCRE, under the designations of healthcare planning and the Health Plan.


William R. Thomason

Walter H. Cartin

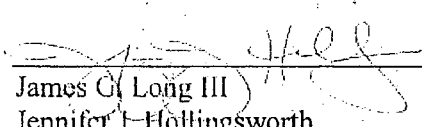
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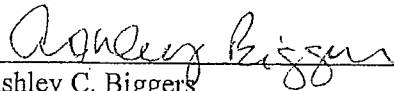
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July 24, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA
 ADMINISTRATIVE LAW COURT
 Docket No. 16-ALJ-07-0386-CC

Trident Medical Center, LLC, d/b/a)
 Trident Medical Center,)
)
 Petitioner,)
)
 v.)
)
 SC DHEC and Roper St. Francis)
 Hospital - Berkeley, Inc., d/b/a)
 Roper St. Francis Hospital -)
 Berkeley,)
)
 Respondents.)
 -----)

ADMINISTRATIVE HEARING

Tuesday, July 24, 2018
 10:02 a.m. - 4:43 p.m.

AND

Wednesday, July 25, 2018
 9:34 a.m. - 4:04 p.m.

The administrative hearing before the Honorable William Funderburk was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 24th day of July, 2018 before Travis McLeod, Court Reporter and Notary Public in and for the State of South Carolina.



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Ashley C. Biggers, Esquire

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 Attorney for the Respondent DHEC

Also Present:**Colleen Quillen,**

paralegal for Mr. Thomas;

David Lever,

technical support for Mr. Thomas

Vanessa Isherwood,

technical support for Ms. Hollingsworth and Mr. Long

Daniel Sullivan,

witness for petitioner

Louis Eubank,

witness for DHEC

Catherine Platt,

witness for Roper

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Joint Exhibit Number 1	70
(Roper Berkeley CON Record 001-0259)	
Joint Exhibit Number 2	99
(East Cooper CON Record 0001-0067, 0353-0398)	
Joint Exhibit Number 4	64
(2015 South Carolina State Health Plan)	
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(The original exhibits were retained by The Court.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.



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CALL TO ORDER:

THE COURT: Please be seated. We're on the record for Case No. 16-ALJ-07-0386, contested case, brought by Trident Medical Center, LLC. I'll leave out the DBA's and Roper St. Francis Hospital, Berkeley, Inc., and South Carolina Department of Health and Environmental Control. It's a challenge of Certificate of Need for a diagnostic cardiac catheterization lab at the new hospital. It's still being built, right?

MS. HOLLINGSWORTH: Yes, Your Honor.

THE COURT: All right. So, representing Trident is Will Thomas?

MR. THOMAS: Yes, sir.

THE COURT: Walter Carton. Mr. Carton.

MR. THOMAS: He's not here.

THE COURT: He's not here. So, just you?

MR. THOMAS: He's getting ready for another case that we have in August in this Court.

THE COURT: Okay. All right. And, Ms. Hollingsworth.

MS. HOLLINGSWORTH: Yes, Your Honor.

THE COURT: And, Mr. Long.

MR. LONG: Yes, Your Honor.

THE COURT: And, Ms. Biggers.



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1 MS. BIGGERS: Yes, Your Honor.

2 THE COURT: That everybody?

3 MS. HOLLINGSWORTH: It is, Your Honor.

4 THE COURT: All right. We'll begin with opening
5 statements and proceed to presentation of
6 witnesses and exhibits and finish with closing
7 arguments and, I guess, you know how other
8 things work. I understand there are some
9 stipulations and we're going to take those as
10 a Court's Exhibit?

11 MS. HOLLINGSWORTH: Yes, Your Honor. We thought
12 that might be the most convenient.

13 THE COURT: All right. So, we will at this point on
14 the joint motion of the parties ...

15 MS. BIGGERS: Yes, Your Honor.

16 THE COURT: We will take the stipulations of fact as
17 a Court Exhibit Number 1, I believe it's
18 probably going to be the only Court Exhibit.

19 (Court's Exhibit Number 1 was admitted into the
20 record.)

21 THE COURT: We've got that. All right. Is there
22 anything else before we begin?

23 MR. THOMAS: I don't think so, Your Honor.

24 MS. HOLLINGSWORTH: No, Your Honor.

25 THE COURT: All right.



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TRIDENT MEDICAL CENTER V. SC DHEC

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1 **MR. THOMAS:** Well, one thing we may have just for,
2 kind of, ease of admitting the exhibits, one of
3 the things that we had discussed was, and we've
4 done this before, rather than going through the
5 formal process of each exhibit of getting
6 admitted, that we could stipulate or by
7 consent, stipulate that the exhibit once it is
8 referenced by one of the parties, that it is
9 automatically admitted, unless objected to.

10 **MS. HOLLINGSWORTH:** Yes, Your Honor, so that when a
11 witness it on the stand and we're discussing an
12 exhibit, that, that is, unless objected to,
13 that we are agreeing that's the foundation that
14 would be necessary to admit that document. So
15 we would stand up and advise The Court if we
16 objected to ---

17 **THE COURT:** All right, so if I don't hear an
18 objection, I can assume that you've consented
19 to the admission of that document.

20 **MR. THOMAS:** Yes, Your Honor.

21 **MS. HOLLINGSWORTH:** That's right, Your Honor. And
22 at the end of the day, we confer with the court
23 reporter and make sure that everybody is in
24 agreement.

25 **THE COURT:** And we have one or two, right?



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1 MR. THOMAS: Right.

2 MS. HOLLINGSWORTH: Right, Your Honor.

3 THE COURT: All right. That's fine with me. Ms.
4 Biggers, you don't have any objection to that,
5 do you?

6 MS. BIGGERS: No, Your Honor. I'm in agreement with
7 that.

8 THE COURT: Very good. All right. You, petitioner,
9 want to go first?

10 MR. THOMAS: Yes, sir.

11 THE COURT: All right.

12 MR. THOMAS: I'll try to get the slides up on the
13 screen for Your Honor.

14 THE COURT: All right. I appreciate this is my
15 first time with the new technology. We'll all
16 learn together.

17 PETITIONER'S OPENING STATMENT:

18 MR. THOMAS: May it please The Court, Your Honor.
19 My name is Will Thomas for the Petitioner,
20 Trident Medical Center and joining me today is
21 my paralegal, Colleen Quillen, who is
22 indispensable, as you know from your former
23 practice, Mr. David Lever, who is helping us
24 with the technical aspects of the hearing.
25 Caitlin Bobo's here, she's, Director of



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TRIDENT MEDICAL CENTER V. SC DHEC

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1 Support Operations at Trident Medical Center,
2 on behalf of the client. Your Honor, the issue
3 in dispute is whether The Department's decision
4 to award Roper Berkeley a CON for a new
5 diagnostic cardiac cath unit to be located at
6 Berkeley Roper Medical Center, that is
7 currently under construction in Berkeley
8 County, whether this satisfies Standard 3 of
9 the South Carolina Health Plan. And, I'll
10 probably refer to that as the State Health Plan
11 from time to time. So, it's whether it
12 satisfies Standard 3 and is therefore compliant
13 and consistent with the South Carolina Health
14 Plan. Before I jump into the law, you may
15 remember, Your Honor, gosh, it's been over a
16 year ago that Trident filed a Motion for
17 Summary Judgment on this very issue and, you
18 know, so we basically per the stipulations, we
19 boiled everything down to this issue.
20 Hopefully, it will save us a lot of time and
21 just, kind of, it will focus The Court on one
22 issue rather than maybe, you know, 10 or 15.
23 But the law at issue is pretty much what it was
24 at the time that we submitted the Motion for
25 Summary Judgment. So, The Department may not



TRIDENT MEDICAL CENTER V. SC DHEC

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1 issue a Certificate of Need unless an
2 application complies with the South Carolina
3 Health Plan, project review criteria and the
4 other regulations, per 44-7-210(b), and the
5 South Carolina Health Plan must address and
6 include projections and standards for specific
7 health services and equipment which have the
8 potential to substantially impact health care
9 costs and accessibility. And then, there's a
10 portion of the statute that says, nothing in
11 this provision shall be construed as requiring
12 The Department to approve any project which is
13 inconsistent with the South Carolina Health
14 Plan. And there are a couple of regulations at
15 issue, hence, Regulation 61-15, which is the
16 CON regulation, Your Honor. Essentially a
17 project does not have to satisfy every criteria
18 in order to be approved, but no project may be
19 approved unless it is consistent with the South
20 Carolina Health Plan, and that's 61-15-801-3.
21 And then, 61-15 Section 802-1 states that, the
22 proposal shall not be approved unless it is in
23 compliance with the South Carolina Health Plan.
24 And the particular section that we are dealing
25 with is the cardiac cath section, obviously.

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TRIDENT MEDICAL CENTER V. SC DHEC

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1 And there are 10 actual project review criteria
2 that are stated for cardiac cath services, and
3 the number one, the most important, is
4 compliance with the need outlined in this
5 section of The Plan. And that's the only one
6 we're challenging today because we don't
7 believe that this section has been satisfied or
8 this project review criteria, The Court must
9 actually reverse The Department's decision. In
10 sticking with the State Health Plan, Your
11 Honor, the actual standard at issue, and I have
12 added emphasis in this paragraph, is that new
13 diagnostic catheterization services, including
14 mobile services, shall be approved only if all
15 existing labs in the service area have
16 performed a minimum of 500 diagnostic
17 catheterization procedures per laboratory
18 during the most recent year. And that's the
19 Standard 3 of the 2015 South Carolina Health
20 Plan. I would -- if referenced Standard 3
21 doesn't state, may be approved and it uses the
22 term only, so we've got shall and only, some
23 mandatory terms there. We're not aware of any
24 exception in the statute, the regulation or the
25 Health Plan that indicates some type of low



TRIDENT MEDICAL CENTER V. SC DHEC

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1 volume program can be discounted to approve a
2 CON application for a lab. Your Honor, as you
3 stated in your Order denying Trident's Motion
4 for Summary Judgment back in 2017, the Health
5 Plan is an enforceable document and therefore
6 The Court must interpret it using the rules of
7 statutory construction. Now, Trident's
8 position, Your Honor, is that DHEC improperly
9 approved Roper Berkeley's diagnostic cath lab
10 in violation of Standard 3, because at the time
11 there was an existing diagnostic cath lab in
12 the service area that performing less than 500
13 procedures during the most recent year, which
14 DHEC -- you will hear evidence that DHEC
15 considers the year for which The Department has
16 available JAR data. And so, the diagnostic
17 cath lab that was in existence at the time but
18 was underperforming per Standard 3 was the cath
19 lab at Roper St. Francis Hospital in the West
20 Ashley section of Charleston. Now, St.
21 Francis's cath lab volumes, they haven't been
22 high, Your Honor. Trident doesn't take issue
23 with the volumes, they are what they are, but
24 in 2011 it's seven, in 2012, nine, 2013, three,
25 '14, four and '15, two. And these are straight

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1 from either the Health Plan or the joint annual
2 reports that St. Francis is required to file
3 with The Department. Now, it bears mentioning
4 that DHEC never during any of these years took
5 any enforcement action against St. Francis due
6 to these low volumes. And we believe the
7 evidence will show that in 2010, The Department
8 concluded that couldn't take enforcement action
9 unless the Health Plan was amended. You'll
10 actually see statements from The Department to
11 that effect. DHEC should not have approved the
12 CON application per Standard 3 because the
13 decision doesn't comply with the applicable
14 Health Plan, and therefore is not consistent
15 with the Health Plan. So, you can't comply
16 with all four applicable standards in the
17 Health Plan or you -- let me start over, Your
18 Honor. You're not allowed to not comply with
19 one, but maybe the others and still be
20 consistent with the State Health Plan or be in
21 compliance with the State Health Plan, Your
22 Honor. That's Trident's position and I don't
23 think there's a lot of controversy to that. We
24 believe that DHEC and Roper got together and,
25 kind of, created an end-run around this



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1 standard, which we consider to be the law in
2 this case and adhere to a plan that Roper
3 devised without the knowledge of effected
4 persons. And we would also say that even if we
5 somehow had knowledge of the plan before hand,
6 that Roper and DHEC, that you'll see, that
7 they, kind of, entered into -- that DHEC's
8 actions would still arbitrary and capricious.
9 I don't think it would have changed the way we
10 approached -- Trident approached this case and
11 I don't think necessarily that The Department
12 would have changed it's position. But Trident
13 believes that The Department should have to
14 adhere to the technical requirements and
15 standards of the Health Plan so that everybody
16 is essentially playing on the same surface.
17 We're all on the same field. We don't believe
18 that special exceptions should be made when it
19 comes to the standards in the Health Plan and
20 again, I've said it once but we're not aware of
21 any laws or regulations of the Health Plan that
22 allows The Department to, kind of, make a
23 special exception. You're gonna hear from DHEC
24 and Roper but we understand The Department's
25 position it to be is that they approved Roper

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1 Berkeley's CON application on the basis that
2 the CON director didn't consider St. Francis to
3 have an existing lab for purposes of the State
4 Health Plan, but particularly for Standard 3 of
5 the Health Plan, and that's acknowledged. The
6 Department believes that because the lab was
7 operating at such low volumes they can simply
8 discount the lab, and I think that's the phrase
9 actually used in the decision letter, so that
10 the CON application could then, somewhat, be in
11 compliance with Standard 3 and they could
12 approve the application. But I think what
13 you're gonna see the overwhelming evidence in
14 the form of emails, submissions to The
15 Department and, you know, filings with DHEC in
16 the form of joint annual reports and DHEC's own
17 documents, the State Health Plan, which
18 includes an inventory, you're gonna see
19 overwhelming evidence that there clearly was an
20 existing lab for purposes of Standard 3 and
21 that DHEC's approval was therefore in
22 derogation of the Health Plan. It was
23 arbitrary and capricious, Your Honor. Now,
24 DHEC may argue, not sure because we hadn't seen
25 this in a while but, they may argue that the



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1 term approved in Standard 3 means the final
2 agency decision and that there was no lab
3 existing at the time of the final agency
4 decision. I think that was the position that
5 was, kind of, taken late in the game at the
6 summary judgment hearing in 2017 but I haven't
7 really seen Roper, kind of, harp on that
8 position as of late but the fact of the matter
9 is was that Roper represented that it would
10 close its lab upon approval of the project.
11 You're gonna see evidence that statement is
12 used over and over again in filings by Roper
13 St. Francis and Roper Berkeley. You know, and
14 The Department sent St. Francis a letter
15 requesting proof of closure the day after the
16 staff approval and you'll see evidence that St.
17 Francis didn't wait until that staff approval
18 became the final agency decision to close its
19 cath lab. It closed it very soon after The
20 Department sent its staff approval letter and
21 another letter saying, hey you need to close
22 your lab. And by the way, we don't know how
23 you close something that is not existing, Your
24 Honor. Regardless of that fact, even, you
25 know, closing the lab does not allow an

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1 applicant to simply ignore this phrase in
2 Standard 3, which during the most recent year,
3 even if the lab was closed prior to the staff
4 approval in this case or prior to the final
5 agency decision. It doesn't matter. Roper St.
6 Francis was an existing cath lab during the
7 most recent year. It had volume. It was open
8 and operating and Roper submitted documents to
9 that effect, including in the form of their CON
10 application stating that they were an existing
11 lab. So, I just want to quickly go over the
12 timeline because it's, kind of, interesting.
13 This whole thing, kind of, evolved with the --
14 you'll see evidence that the -- how this
15 decision, kind of, unfolded Your Honor. It
16 unfolded over, you know, a couple of months,
17 maybe actually three or four months. It wasn't
18 just that Roper submitted an application, DHEC
19 looked at it, looked at its volume, said
20 they're not really an existing lab, let's
21 approve it. That's not how this unfolded.
22 There was a lot more. And what you'll see is
23 that East Cooper submitted a CON for a
24 diagnostic cath lab in February of 2016, early
25 February. And then right after that, agents



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1 for Roper St. Francis had conversations or
2 either met with folks at DHEC to discuss that
3 cath lab, the St. Francis cath lab, operation
4 and the very low volumes that it was doing,
5 because there was a concern there. On March
6 16th, DHEC officials and agents for Roper had
7 another discussion about the Bon Secours St.
8 Francis cath lab. And on March 25th, East
9 Cooper's CON application is deemed complete.
10 You'll see another document that on April 14th,
11 2016 that the director of the CON program, the
12 then director, sent counsel for Roper an email
13 stating, among other things, and I quote, the
14 continued operation of the St. Francis Xavier
15 cath lab at such a low volume prohibits the
16 entry of any additional cath labs in the
17 service area as outlined in South Carolina
18 Health Plan standards for such services,
19 emphasis added, Your Honor. So, you know, in
20 that same email there was an enforcement action
21 that was referenced and Roper was actually
22 invited to come up with a proposal, you know,
23 to solve this issue dealing with the low
24 volumes. On April 20th, you gonna see that
25 Roper's counsel actually sent in a letter

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1 indicating effected person status with respect
2 to the East Cooper cath lab that was filed back
3 in February, wherein it stated, if Roper St.
4 Francis' application is approved, Roper St.
5 Francis intends to close its cath lab at Bon
6 Secours St. Francis Hospital. That's a quote
7 from the letter. And the letter goes on to
8 state, until Roper St. Francis' CON application
9 is approved, Roper St. Francis intends to
10 continue to operate the cath lab at Bon Secours
11 St. Francis. And this is the same cath lab
12 that they're claiming didn't exist. So, on May
13 5th, 2016, the CON director sent an email to
14 Roper's legal counsel stating, everything is
15 still looking good for the process you and
16 Ashley and I discussed previously. Four days
17 later, Roper Berkeley submits its CON
18 application for a new diagnostic cath lab
19 service to DHEC at the Roper Berkeley campus
20 that's under construction. This cath lab is
21 not a competing cath lab. It can't be deemed
22 competing with East Cooper's because it was
23 filed after a 15 day period after East Cooper's
24 lab had been deemed complete and we'll, kind
25 of, get into that obviously with the witnesses.



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1 But, on May 27th, 2016, Roper's CON application
2 is published in The State Register as being
3 accepted for filing and is deemed complete.
4 What you're gonna see, Your Honor, testimony's
5 gonna show that's pretty quick time from filing
6 to being, not only accepted for filing and
7 published in the State Register, but also at
8 the same time being deemed complete. That time
9 frame is very quick. And so, the CON review
10 period for a CON application like that is 120
11 days from the date the project is published in
12 The Register as being deemed complete. On June
13 24th, 2016, counsel for Trident sent an
14 effected person letter asking The Department
15 for a project review meeting and these are
16 fairly standard, the project review meetings
17 for CON applications that are under review by
18 The Department. And on July 13th, Trident
19 actually sent a letter saying, we're not giving
20 you the opportunity for a project review
21 meeting and so that was a little strange in
22 Trident's eyes. Roper's -- and what they did
23 was Trident was told, just send us a letter
24 detailing your opposition and that was done on
25 July 21st, 2016. And Roper didn't send in

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1 anything in response, which we believe the
2 evidence will show is also odd. On July 25th,
3 2016, Roper's CON application is approved on
4 the same exact day as East Cooper's CON
5 application. And on the very next day, DHEC
6 actually sent Roper a letter reminding it to
7 close its cath lab, that non-existing cath lab,
8 to close it. And on August 15th, 2016, East
9 Cooper is issued an actual physical CON, so
10 their decision -- their staff approval had
11 become a final agency decision at that time.
12 And on August 17th, Roper St. Francis sent
13 DHEC, Mr. Eubank, at DHEC a letter indicating
14 the cath lab was closed effective August 1st,
15 2016, roughly six days after their application
16 was approved. So it was closed after approval,
17 Your Honor. And then, on September 21st, the
18 DHEC Board declines to hear Trident's request
19 for final review of the agency's staff decision
20 and therefore it becomes a final agency
21 decision. So again, Your Honor, there's
22 correspondence that your gonna see that's
23 gonna, kind of, really show this and provide
24 you, The Court, with insight of how this all
25 unfolded and how there was really no discussion



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1 of or indication that hey, we're not gonna
2 consider this an existing lab. And I have no
3 doubt that The Department probably thought that
4 it was doing the right thing, but it seems from
5 every indication that before even Roper had
6 submitted its CON application that the
7 application was gonna be approved, under this
8 arrangement that The Department and Roper had,
9 kind of, come up with. And so, I think you're
10 gonna hear some things of justification
11 standpoint that, you know, oh that this lab was
12 not existing even though, you know, they were
13 doing some volumes they really weren't enough
14 volumes for us to consider this to be an
15 existing operational lab. You may hear things
16 -- I know there is a document that states that
17 if the approval complied with the spirit of the
18 South Carolina Health Plan, although we're not
19 aware of any spirit exceptions. That you, know
20 you, you're even gonna hear that Trident should
21 have preserved its rights by somehow FOIAing
22 all the emails between The Department and Roper
23 and any other parties so that it could have
24 more fully understood the arrangement between
25 The Department and Roper, which again, I think

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1 that's a red herring that doesn't really
2 matter. At the end of the day, whether or not
3 we would have known the full extent, it's
4 certainly, you know, wouldn't have -- I don't
5 think it would have changed anything. Our
6 position is it didn't comply with Standard 3,
7 it can't therefore be consistent with the State
8 Health Plan. So what the evidence will not
9 show, Your Honor, is one single instant where
10 The Department claims in writing that the lab
11 did not exist for purposes of Standard 3. In
12 fact, there's only really one party that ever
13 contended that and that was East Cooper
14 Regional Medical Center. In their CON
15 application, you're gonna see that they stated,
16 we don't consider St. Francis to be
17 operational, therefore we have discounted their
18 utilization. Everybody's above 500, you can
19 approve us. In fact, the only writing by The
20 Department that acknowledges the existence of
21 the lab -- what there is in writing that
22 acknowledges the existence of the lab and that
23 the lab was actually foreclosing other
24 hospitals from applying for a new diagnostic
25 lab because of that threshold volume issue in



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1 Standard 3. And it's very clear. That
2 language is very clear. DHEC did not comply
3 with the Health Plan and it appears to have
4 gone out of its way to accommodate some
5 applicants. And the fact of the matter is,
6 Your Honor, we believe that any other effected
7 person should be able to rely on the Health
8 Plan and the standards and the inventory in the
9 Health Plan when challenging a CON application
10 without having to FOIA The Department's email
11 correspondence, which may not even be available
12 in certain circumstances. Even if it had, as
13 I say, DHEC's internal emails, Roper's internal
14 emails the position doesn't change. So, this
15 Court's inquiry back in -- as I've already
16 alluded to, in March of 2017, this court issued
17 an order denying summary judgment. And I'm
18 gonna quote from that order. An agency's long
19 standing interpretation of a statute is usually
20 entitled to be given deference and should not
21 be overruled by a reviewing court in the
22 absence of cogent reasons, but the
23 interpretation will not be sustained if it
24 contradicts the statutes of plain language. As
25 I've said before, the same issues that were in

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1 dispute then are somewhat in dispute now, maybe
2 have been refined a bit, but what we didn't
3 have back then was discovery. We do now. And,
4 you know, at that time The Court basically
5 said, you know, we need more. We're bringing
6 you more. But what we also know about now is
7 that there was somewhat of a similar situation
8 back in 2010 involving, believe it or not, the
9 same exact parties, East Cooper and St. Francis
10 but not Trident. And in that time The Court,
11 excuse me, DHEC actually concluded that it
12 could not discount the existence of St.
13 Francis' cath lab for purposes of determining
14 the utilization of the service area. That
15 standard was Standard 3 and although it was a
16 little different, it was more of an aggregate
17 standard back in 2010, while today it's more of
18 a individual per lab standard. It's still
19 similar in terms of when an application can be
20 approved for a new cath lab and we'll get into
21 that a little bit. The ALC's inquiry was
22 whether all existing labs, meaning existing at
23 the time of application or at the time the CON
24 was granted and whether DHEC has a reasonable,
25 consistent interpretation has been applied over



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1 an extensive period, whether the most recent
2 years, the most recent year for which data is
3 available, the most recent rolling 12 months
4 with the most recently completed calendar year.
5 And I think the parties all agree that under
6 any of those, kind of, situations or scenarios,
7 St. Francis never had volume, that it came
8 anywhere close to 500 procedures. So, you
9 know, the 12 months, doesn't -- we don't think
10 it matters. We don't think St. Francis is
11 gonna say, well, we were actually producing at
12 above the threshold. But, we believe that the
13 other issue that you've identified is whether
14 this year is determined in reference to the
15 application or decision may also depend on
16 DHEC's interpretation of historic application.
17 That was the award in your Order on page five.
18 But, we believe that the evidence is gonna show
19 that DHEC and Roper's positions aren't
20 reasonable or consistent with any past
21 interpretations. That this really is -- if
22 you're just looking at Standard 3 as it exist
23 now, and the various phrases that we're gonna
24 be looking at, what does the word approved
25 mean, what does during the most recent year

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1 mean, what does existing mean. You know, The
2 Department dealt with the term, existing or
3 existed back in 2010 to some degree where they
4 said, we can't discount the existence of the
5 lab for purposes of the inventory. But
6 perhaps, -- and what you're gonna see is they
7 say, perhaps we can amend the State Health Plan
8 and we can deal with it that way. But that was
9 -- no amendments to the State Health Plan ever
10 took place. So Your Honor, in terms of
11 compliance with the law, you're gonna hear from
12 two experts, Mr. Sullivan and Ms. Platt, and
13 the CON director all about Standard 3 today.
14 I mean, I think you're gonna hate this standard
15 by the end of this proceeding. And, you know,
16 how it should be interpreted and applied and
17 its purpose. And we believe that Roper and
18 DHEC are gonna ask this Court to sustain an
19 interpretation that does contradict the plain
20 meaning of Standard 3. And that you, kind of,
21 got to torture the language to get to where
22 they want to be. So, we believe and we're
23 asking this Court to overturn DHEC's decision
24 and declare The Department and the applicants
25 must adhere to the mandatory requirements of



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1 the Health Plan. Thank you, Your Honor.

2 **THE COURT:** Ms. Hollingsworth. The legal teams have
3 expanded.

4 **RESPONDENT, ROPER ST. FRANCIS' OPENING STATEMENT:**

5 **MS. HOLLINGSWORTH:** Well, you know, I'd sit there and
6 think there was a little advantage over there
7 having the cords very close. That's pretty
8 slick. And Your Honor, while she sets up I'd
9 be happy to introduce, of course, I'm Jennifer
10 Hollingsworth on behalf of Roper St. Francis
11 Berkeley. I have with me, Mr. Long, who is my
12 co-counsel. Also, Mr. Porter is here. He's
13 the CEO for Roper Downtown and acting on behalf
14 of the CEO for Roper Berkeley. Ms. Platt is
15 with us. You'll hear from her later and Ms.
16 Isherwood is the one that keeps the show
17 running for us. We appreciate the time this
18 morning. And Your Honor, of course, we as
19 well, we have a PowerPoint presentation and
20 some of it will roll through even more quickly
21 of course because Mr. Thomas has addressed a
22 fair amount. In addition to the stipulation of
23 facts that's now the court's Exhibit Number 1,
24 we do want to be sure that The Court is aware
25 that we filed a Memorandum yesterday afternoon



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1 that just sets forth, sort of, a pre-trial
2 discussion of some of the case law that we
3 think is relevant to what The Court will be
4 evaluating from the perspective of statutory
5 construction and agency deference. So, Roper
6 St. Francis Berkeley Hospital, Your Honor, as
7 you know and discussed early this morning, we
8 are constructing a 50 bed community hospital in
9 Berkeley County in the area of Carnes
10 Crossroads and Goose Creek. That application
11 was filed a very long time ago, December 12th,
12 2008, is the underlying Berkeley Hospital
13 application. We filed a CON to move beds from
14 Roper Downtown to Berkeley County and at the
15 same time, Trident Medical Center applied to
16 develop their Berkeley Medical Center in Monks
17 Corner. And there was a contested case between
18 Trident Medical Center, Roper St. Francis
19 Berkeley and The Department over The
20 Department's decision to approve both
21 hospitals. That was taken all the way through
22 the Court of Appeals and resulted in a decision
23 that Your Honor, in fact that Mr. Thomas
24 referenced this morning in his discussion. But
25 the result was, through the Court of Appeals,



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1 that The Department was correct and the ALC was
2 correct in affirming The Department that both
3 hospitals should be approved. Back in 2008,
4 I'm sorry -- at that time Berkeley County was,
5 and I think still, remains one of the fastest
6 growing counties in South Carolina and they had
7 no hospital beds. And so, what Roper sought to
8 do with that application, and we continue to do
9 today, is serve the needs of those patients in
10 Berkeley County that are driving all the way
11 down to the Peninsula to see us. So, for just
12 a little bit of background, construction did
13 finally commence in the fall of 2017 on that
14 2008 application, again because of the time of
15 litigation so it is slated to be done next
16 year. And I know our folks are very excited to
17 have that coming to fruition. Roper St.
18 Francis has cared for a commanding share of
19 Berkeley County for many, many years and so
20 this community hospital is meant to bring those
21 services closer to that population. As Mr.
22 Thomas mentioned, this application is about
23 cardiac cauterization services. Roper Hospital
24 has offered those services in the Charleston
25 peninsula location for many years and as was

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1 discussed, we have a diagnostic lab at Bon
2 Secours St. Francis Xavier, which is just West
3 of the Ashley. Downtown we have three
4 comprehensive labs, which meant that those labs
5 could do both therapeutic and diagnostic
6 procedures, but Bon Secours St. Francis Xavier
7 was a diagnostic only lab. And on May 9, 2016,
8 the underlying application was filed and this
9 is another one that time has past for a variety
10 of reasons between the parties and of course
11 there was a Summary Judgment Motion filed so,
12 it's been several years once again. So, now
13 rather than this application deemed as services
14 many years down the road, this -- you know, our
15 intention is that we would be providing those
16 services, hopefully, next Fall to heart
17 patients in Berkeley County. So, I will not
18 belabor the point here, Your Honor, because Mr.
19 Thomas did a good job of providing you some of
20 that regulatory background. But, it's in the
21 act what the purposes are, that The Department
22 is the sole state agency to implement and
23 control sumo program and that applying for CON
24 is the way that Roper Berkeley can add the
25 diagnostic services at Berkeley Hospital. The



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1 Department looks at a variety of things in
2 determining whether to approve a CON and that
3 includes project review criteria that Mr.
4 Thomas did reference down in the regulation.
5 They have general categories, such as need,
6 economic considerations, impact on the
7 healthcare system, site suitability and other
8 circumstances and in the factual stipulations,
9 Your Honor, we want to make clear that Trident,
10 for purposes of reducing the issues contested,
11 does agree at paragraph 10 in the stipulations
12 that the Roper St. Francis Berkeley application
13 otherwise satisfies all of the necessary
14 project review criteria, save for the criteria
15 as Mr. Thomas discussed related to compliance
16 with The Health Plan and that provision related
17 to need. But, in terms of the other criteria,
18 802-2 through 802-24, it is agreed among the
19 parties and the record will reflect that we
20 sufficiently projected and met everything we
21 needed to meet to be approvable. So, but for
22 diagnostic caths though, the CON process is
23 what we had to go through, and we did so. In
24 January, 2016, it was the 2015 South Carolina
25 Health Plan, so my reference is to the Health

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1 Plan, Your Honor, would be that 2015 version of
2 the plan, although it has been updated several
3 times since then. There are four standards
4 applicable to the provision of diagnostic
5 services but as -- and I have the first two
6 here, Your Honor. The first two, of course,
7 applies to catheterization more generally and
8 the first standard talks to about how to weigh
9 and determine capacity and utilization of a
10 lab. Standard 2 defines the service area for
11 the various types of lab. And for our case,
12 the service area for diagnostic catheterization
13 lab is all facilities within 45 minutes, one
14 way, automobile travel time. That standard
15 changes a little bit for comprehensive labs and
16 pediatric labs. Standard 3 though, Your Honor,
17 is the one you will hear about, a lot over the
18 next day or two. Standard 4 relates to
19 utilization projections and that is a standard
20 that is not disputed in this case. It does
21 boil down to Standard 3. There's a map here of
22 the service area and we have a larger one to
23 the extent it will be helpful as we, kind of,
24 discuss geography throughout the trial but this
25 information is contained within our



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1 application. And what it tells you at the time
2 that we filed our application within that
3 service area that was defined in Standard 2,
4 you had existing and operating labs in the
5 inventory of MUSC Medical Center, Trident
6 Medical Center and Roper Hospital. And then
7 the issue of the Bon Secours St. Francis Xavier
8 Hospital, they are included in the inventory
9 and we have not disputed that in the 2015 South
10 Carolina Health Plan, Bon Secours St. Francis
11 Xavier had a diagnostic cath lab. What you
12 also know from the Health Plan when you look
13 further into it, is that the volumes as
14 reported in the inventory for 2011, we have up
15 on the screen, Your Honor, that MUSC's four
16 adult labs there. Of course, MUSC is also
17 unique. There are unique circumstances that
18 the Health Plan deals with and MUSC is the only
19 provider that is approved to provide pediatric
20 catheterization services. So, they do have two
21 labs in the Children's Hospital but they have
22 four labs that address and handle adult cases.
23 And so, the 2011 volumes are as noted, Your
24 Honor, and then there were seven total caths
25 performed in the Bon Secours St. Francis lab in

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1 2011. In 2012, the Bon Secours St. Francis lab
2 reports nine total volume or nine total
3 diagnostic cases in that same Health Plan and
4 then we have, Your Honor, 2013. And what I've
5 provided up here for purposes of how the Health
6 Plan defines capacity using equivalents, MUSC
7 was operating at 90 percent, Trident was a
8 little over 81 percent and Roper was a little
9 over 96 percent of capacity. Bon Secours St.
10 Francis Xavier was at .25 percent capacity.
11 So, Mr. Thomas mentioned it very briefly, Your
12 Honor, but it's very important, I think, to
13 talk about the East Cooper CON application
14 because it's that application that really
15 started this entire timeline and process in
16 this case. And we will receive evidence about
17 that application that was filed on February
18 4th, 2016. In that application, East Cooper
19 took the position that the Bon Secours St.
20 Francis Xavier diagnostic lab was quote non-
21 operational. And as a result of that, that Bon
22 Secours St. Francis was required to obtain a
23 CON to be included in the inventory. So, the
24 position of East Cooper again was that we were
25 non-operational and we needed to go get a CON



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1 in order to provide our services. And so, The
2 Department in reviewing East Cooper's
3 application you're gonna hear about the
4 engagement of Roper St. Francis in discussions
5 about our lab and the under utilization of that
6 lab. You're gonna -- the April 14th, 2016
7 email, you will hear about it over and over.
8 Everyone will talk about it, Your Honor. And
9 we look forward to talking about it and
10 actually looking at the words that are used and
11 then what it said. In that email, Your Honor,
12 Roper St. Francis was notified by The
13 Department of the intent to pursue enforcement
14 action. It didn't happen to mention the
15 purpose of the email was to advice Roper St.
16 Francis of the intent to pursue enforcement
17 against our Bon Secours St. Francis lab. And
18 we were provided 10 business days to submit a
19 proposal that might avoid enforcement action.
20 That proposal, Your Honor, is in an April 20th,
21 2016 letter that is found within the CON
22 application for East Cooper because it's part
23 of our effected person letter. And you will
24 see and hear about that April 20th response of
25 Roper St. Francis, the proposal we made and the



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1 background and supporting information on how
2 and why we got there. Trident's challenge
3 though as we all agree here today, that the
4 standard, the only standard identified by
5 Trident as forming the basis of the challenge
6 is Standard 3. And the language again, just
7 restating it and I haven't bolded or emphasized
8 anything in particular, that the language is
9 new diagnostic cauterization services,
10 including local services, shall be approved
11 only if all existing labs in the service area
12 have performed a minimum of 500 diagnostic
13 catheterization procedures per laboratory
14 during the most recent year. And so, that is
15 the standard that Trident takes the position
16 because our application didn't satisfy that
17 standard, we were not in compliance with the
18 Health Plan. So, as I would describe the crux
19 of where we are, Your Honor, it would be
20 whether or not DHEC's interpretation of
21 Standard 3 was reasonable and appropriate. And
22 yes, that Trident is right, we claim that it
23 was reasonable and that the interpretation and
24 application of Standard 3 to the application,
25 we believe that was within the authority of The



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1 Department. And I think that we're gonna hear
2 from the experts, that all agree, that DHEC had
3 the authority to interpret the standards. And
4 we believe that authority included determining
5 that the Bon Secours St. Francis' lab was not
6 a quote, existing lab for purposes of reviewing
7 Standard 3 in the application. I believe that
8 we are going to get evidence that everyone
9 agrees that the State Health Plan is a planned
10 document and that everyone would agree that
11 DHEC is the keeper of the regulations and it is
12 their job to interpret and apply the Health
13 Plan, and that everyone will agree that
14 Standard 3 requires the number of labs in the
15 service area have sufficient volumes before
16 looking to whether a new lab should be
17 developed. Trident's position has been that
18 DHEC ignored the Bon Secours St. Francis lab in
19 reviewing the standard for purpose of approving
20 the application. And I think what we will hear
21 is that The Department told Roper St. Francis,
22 we're pursuing enforcement action to address the
23 lab. Your Honor, we're gonna obviously take
24 the position that enforcement action is not
25 ignoring a lab. We also say you'll hear that

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1 everyone would agree that the approval of the
2 lab is conditional on closure of the St.
3 Francis laboratory. Again, ignoring is
4 different that actually addressing the issue
5 and it is, of course, undisputed there is no
6 diagnostic cauterization laboratory at Bon
7 Secours St. Francis today. So, we believe the
8 evidence will show DHEC did not ignore the lab.
9 And in fact, ignore means to refuse to take
10 notice of and it is our position they
11 absolutely took notice of it and they said
12 you're gonna do something about it. And in
13 fact, we say when whether it was existing in
14 planning for the addition of services in
15 service area, The Department reasonably is
16 looking to see what will continue to be. Roper
17 St. Francis Berkeley and Bon Secours St.
18 Francis Xavier would never have diagnostic cath
19 labs at the same time, so the one would not
20 continue to be if there was the other. So,
21 where we are is we believe it is reasonable and
22 consistent with the plain language. We believe
23 that existing is when considered to be
24 continued to be, there was no way that Bon
25 Secours St. Francis needed to be included in



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1 Standard 3. And even if we'll hear another
2 definition that existing is all labs in the
3 community approved or existing that would be
4 serving the need that we would be serving, well
5 once again, Bon Secours's wouldn't meet that
6 definition of existing for purposes of Standard
7 3. So, in challenging our proposal to close
8 Bon Secours St. Francis if approved, Trident
9 even this morning claimed that it lacked the
10 information about discussions between The
11 Department and Roper St. Francis and we believe
12 that the evidence is gonna show you that all
13 aspects of the proposal regarding the lab were
14 both made public or publicly available and that
15 Trident knew, or could have known, everything
16 about these discussions, be it through the East
17 Cooper CON application and/or the Roper
18 Berkeley application. You know, Mr. Thomas,
19 discussed DHEC is subject to FOIA and what
20 we'll hear and know is, you know, while The
21 Department is not obligated to publish all
22 activities, all activities of the agency are
23 publicly available. And so, we believe when
24 you consider that the basis for the staff
25 decision, it's in Regulation Section 308,

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1 they're looking at all of the information, both
2 through the application as well as comments and
3 information from effected persons and
4 opponents. And so, The Department looks to
5 people in the community if they believe they
6 have important reasons why an application
7 should not be approved. The burdens on them to
8 bring that information to The Department as
9 well. And The Department that way can consider
10 that when they're making their decision of how
11 they would interpret and apply the Health Plan.
12 And you will hear from -- or you will see some
13 information from East Cooper's health planner
14 and of course you're gonna hear from Roper
15 Berkeley and Trident's health planners here
16 today and tomorrow. And we're gonna read about
17 the opinions expressed by Trident's expert to
18 The Department in the opposition letter that
19 was provided and the date Mr. Thomas told you
20 was July 21, prior to the decision. And his
21 statements to The Department included that
22 there is currently no legitimate cath lab at
23 Bon Secours St. Francis Hospital. And he also
24 said The Department should not recognize Bon
25 Secours St. Francis Hospital's diagnostic



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1 catheterization program as an existing service
2 and he also said that the proposed closure of
3 the lab has no relevance from a health planning
4 standpoint. So in reviewing reasonableness in
5 agency deference, Your Honor, and Mr. Thomas
6 did provide you and remind you of the quote
7 that it's in the Order from the Media General
8 Communications opinion from 2010. In that case
9 there was a challenge to the Department of
10 Revenue's use of separate entity apportionment.
11 And, Your Honor, what I think is really
12 important about the Media General case is Media
13 General involved an agency interpretation of a
14 legislative enactment. It was a statute that
15 was being applied and evaluated and in terms of
16 determining who's intent was to prevail, it was
17 the intent of the legislature. That was not an
18 agency probligated document. And so, that
19 Media General does say an agency's long
20 standing interpretation of a statute is usually
21 entitled to deference and not overruled, absent
22 cogent reasons, so long as it's not
23 contradictory to the plain language. But, Your
24 Honor, as we provided The Court in our
25 Memorandum yesterday, we believe that there are

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1 two cases since Media General that are very
2 helpful to your consideration. Of course, they
3 also are since the Media General case and
4 that's Murphy verses South Carolina DHEC from
5 2012, actually included the issue of an
6 undefined word in a regulation that was applied
7 by The Department and interestingly The
8 Department -- the reminder there it's the
9 agency's interpretation that's entitled to
10 deference where reasonable and consistent with
11 the plain language. There's no requirement in
12 Murphy that it had been longstanding and what
13 we'll see too, when you have a chance to review
14 that case, interestingly in Murphy before you
15 even got to agency deference, we just looked at
16 well, what does the word mean if it's not
17 defined, then what's the usual and customary
18 meaning. And, Your Honor, usual and customary
19 meaning using the same source that the Supreme
20 Court used in Murphy, existing means to
21 continue to be and so we think that is
22 something very informative about Murphy. But
23 Kiawah Development Partners, Your Honor, is
24 also an instructive case from 2014. In that
25 case, it was a Supreme Court case as well and

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1 it goes through an extensive review of the
2 deference doctrine, Your Honor. It goes back
3 to Chevron and it talks through the variety of
4 cases where we've looked at when and how and
5 agency is entitled to deference. And it talks
6 about a two part process when looking for
7 deference. First, looking at the clear meaning
8 if it speaks directly to the issue but if it's
9 silent or ambiguous, then you give deference to
10 the agency interpretation unless there's a
11 compelling reason to differ. And, Your Honor,
12 the Court said a compelling reason to differ
13 from the agency's interpretation is where it's
14 arbitrary and capricious or manifestly
15 contrary to the regulation. So, we think, Your
16 Honor, that there is not evidence of a
17 compelling reason to differ with the agency's
18 interpretation, that Trident bears that burden
19 and we do not believe that the record will show
20 that burden has been met. We don't believe
21 that Trident will establish by a preponderance
22 of the evidence that DHEC's interpretation and
23 application of Standard 3 was arbitrary and
24 capricious or manifestly contrary to the law.
25 We think in fact that the interpretation and

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1 application of Standard 3 under the Health Plan
2 was reasonable and consistent and we will be
3 asking The Court, once you receive all of the
4 information and hear from the witnesses, that
5 you affirm the decision of The Department.

6 **THE COURT:** Ms. Biggers.

7 **RESPONDENT, DHEC'S OPENING STATMENT:**

8 **MS. BIGGERS:** Thank you, Your Honor.

9 **THE COURT:** You're not bringing an IT staff with
10 you?

11 **MS. BIGGERS:** I am not and I do not have a slide
12 show presentation to show you. I do believe
13 that Ms. Hollingsworth has presented a lot of
14 what I would have wanted to say myself other
15 than she probably worded it better than I could
16 have. So, I'm just going to add a few things
17 from The Department's perspective to that.
18 First of all, I would like to say and express
19 on behalf of both myself as legal staff for The
20 Department and also The Department staff at
21 CON, that we are very much appreciative of how
22 both parties have worked together to reduce the
23 issues in this case and to make it a more
24 efficient, less time consuming case. That they
25 have really focused and worked together on what



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1 are the issues that we think are most important
2 for Your Honor to decide. We do appreciate
3 that. And I also appreciate that everyone has
4 worked together on stipulations which give you,
5 I think, some background so I'll try not to be
6 repetitive of either in my opening or when I
7 bring my Department witness up to the stand.
8 And so, I think for now basically what we come
9 down to is that the primary issue before Your
10 Honor is whether The Department erred in
11 finding that the Bon Secours St. Francis Xavier
12 Hospital cardiac diagnostic cath lab was not an
13 existing lab in terms of Standard 3 in the
14 applicable State Health Plan when The
15 Department applied that provision to Roper St.
16 Francis Berkeley Hospital's CON application.
17 This -- I know that Your Honor had a question
18 when this came up before in a Summary Judgment
19 Motion early on in this case about wanting to
20 hear The Department's longstanding
21 interpretation of the provision. I'm gonna go
22 ahead and just, kind of, set it out there for
23 you now that this provision has changed over
24 the years in different state health plans. The
25 standard has not always been worded the same

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1 and that we do not have a written policy that
2 exactly addresses this for a history of cases
3 where I think any of us could have found where
4 it was raised as an issue or challenged and
5 where an interpretation necessarily was
6 therefore expressed. As so for those reasons,
7 I do believe -- and by the way I will take this
8 opportunity to go ahead and say that DHEC joins
9 in Roper's pre-trial brief on the statutory
10 interpretation and deference doctrine. We
11 think they've set it out very well and we'd
12 like to just join in that. And so that's where
13 I do think that the case law that they have set
14 forth in that pre-trial brief regarding agency
15 discretion or deference, I apologize, and also
16 statutory interpretation come into play.
17 Because we are looking at a place where a
18 particular term the fact that there is the word
19 existing in this particular standard in the
20 Health Plan has apparently both sides of this
21 case having differing opinions on it. To me
22 that means that other people must disagree with
23 it if we're here in court because they see it
24 different than we see it. Even if we think
25 it's clear, if they believe it's different, it

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1 must be subject to statutory interpretation for
2 that reason. And because it is, then you do
3 apply statutory rules and interpretation, I
4 think there's case law there that says that
5 even though it's not a statute or a regulation,
6 in the past courts including Appellant Courts,
7 I believe the Supreme Court, have said that
8 they will apply rules of statutory
9 interpretation to the State Health Plan. And
10 so, once you have evidence, as you do I believe
11 in this case, just from seeing both sides
12 positions, that clearly different people are
13 reading this differently, then I think the
14 rules of statutory interpretation kick in.
15 And then, I think that the line of cases
16 establish in particular by the Supreme Court in
17 the past five or so years, particular the
18 Kiawah Development case, where they have
19 expressed if we are going apply statutory
20 interpretation rules and it is a Department
21 document, here are the circumstances under
22 which we would give The Department deference
23 regarding their interpretation. I think that
24 they made it broad but they did put limits on
25 it. And I do not believe that the petitioners

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1 in this case are gonna be able to prove that we
2 violated those limits. That word existing
3 applies -- it is in Standard 3 of the State
4 Health Plan. It is not in other areas or
5 paragraphs within the same cardiovascular
6 cardiac cath section of the plan, so I think it
7 must have meaning. It is not defined term in
8 the statute but I do think than then you would
9 look at has The Department applied it in a way
10 that is consistent with the common language
11 with the common understanding of the definition
12 of that word and have they applied it in a way
13 that is not arbitrary or capricious. You know,
14 can The Department explain for you the reasons
15 why they apply it that way. And I think it
16 will also be important for your consideration
17 to hear whether The Department can, in that
18 explanation, tie it back to the purposes of the
19 CON Act and what it is that they are tasked by
20 the legislature with doing. But I think as a
21 state health planning document, even though it
22 is subject to those rules about statutory
23 construction, it does not go to the General
24 Assembly so I do not think the question of what
25 is the General Assembly's intent is a question



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1 here. I think that Kiawah cases does give the
2 appropriate guidance for determining whether or
3 not what you hear from The Department regarding
4 how they interpreted and applied it meets those
5 standards set forth by article reports. I
6 think you will hear through our testimony we're
7 going to offer that our interpretation and
8 application of that word in the standard is
9 consistent with the general definition of that
10 term. It is tied to the goals and purposes of
11 the CON. It makes sense. It was not applied
12 arbitrarily or capriciously. As I said at the
13 beginning, we unfortunately could not go back
14 and find a history to be able to provide you
15 because simply I could not find where this has
16 come up specifically challenged in the past to
17 where I could offer you something, however I do
18 believe that the fact that there was the East
19 Cooper application for a diagnostic cardiac
20 cath or ground pinning it around the same time
21 as Roper's application and that it was applied
22 consistently to both applications is evidence
23 of, you know, that this was not arbitrary or
24 capricious. I think there is also evidence
25 that there was no, as the petitioner had at

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1 least implied that there was some agreement or
2 understanding between Roper and DHEC that was
3 somehow kept, you know, just between them and
4 somehow kept secret from the general public.
5 And I think that East Cooper's CON application
6 support and show that because Trident did not
7 contest East Cooper's approval. They did not
8 oppose it. They did not contest it. Roper
9 made in this pending, this CON application
10 before you today, Roper did make an attestation
11 that as a condition of CON approval by staff,
12 they would agree to in their words, close the
13 diagnostic cath lab at the Bon Secours St.
14 Francis Xavier Hospital, the one in West
15 Ashley. That was not a condition in the East
16 Cooper CON application for East Cooper's
17 diagnostic cath lab. So, The Department
18 treated them both the same despite the fact
19 that, you know, The Department had questions
20 for Roper specifically because Roper as an
21 entity, as a parent entity, and as a healthcare
22 organization, healthcare system, had both
23 hospitals, both the Roper Downtown -- well
24 actually, several hospitals, sorry, for
25 purposes of this particular application, the



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1 Bon Secours St. Francis Xavier West Ashley with
2 its diagnostic cath lab and the recently
3 approved, not yet built Roper St. Francis
4 Berkeley Hospital. They belong to the same
5 system. For that reason, it was appropriate,
6 meaning The Department had questions to go
7 ahead and pose questions to Roper as a
8 applicant. It did not mean that we reached any
9 agreement, where there's were no promise of, if
10 you close this, it can be approved and will be
11 approved. There's no statement of, this is the
12 only way it could be approved. You will hear
13 from our witness, his understanding and
14 testimony, regarding The Department's
15 enforcement provisions in looking at existing
16 cath labs. And this relates to that word
17 existing because the ceiling statute itself
18 requires -- there's several different specific
19 items that would require someone to apply for
20 a CON. One of those is, any healthcare
21 facility that has not -- that would like to
22 provide a health service as defined with
23 standards in the plan, that they have not
24 provided in the previous 12 months, they must
25 obtain a new CON in order to provide that. Our

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1 testimony that we plan to present to you will
2 include testimony regarding review once this
3 application came to our decision makers
4 attention of that history and the fact that had
5 occurred in the past. So, it was not only was
6 it a low utilization cath lab, and not only did
7 we have East Cooper's own opinion from their
8 healthcare expert on behalf of East Cooper
9 saying that a cath lab at such low utilization
10 should not be deemed existing for purposes of
11 applying Standard 3 in the State Health Plan,
12 and if we're going to consider that we're going
13 to consider them for both, applying them
14 consistently. We also were aware of this past
15 history of this particular cardiac cath lab
16 having gone for more than 12 months in the past
17 without providing a single cardiac diagnostic
18 cath procedure, which under the CON statute
19 requires that you obtain a new CON before you
20 provide that service again. You will, of
21 course, see and hear about today in this case
22 correspondence between The Department under a
23 previous employee who was for a period of time
24 the interim director of the CON program before
25 our witness today came on board to DHEC who



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1 expressed and over email in response to a posed
2 question questioning whether, you know, knew of
3 perhaps he did not have authority actually
4 order a cath lab to close under very low
5 utilization. I think that frankly should be
6 considered as a red herring because I do not
7 believe that, first of all, that it establishes
8 any historical precedence of Department's
9 enforcement. It was an email exchange. It
10 does not -- that particular person -- that
11 email has not been called in as a witness, is
12 not going to be able to testify as to their
13 belief as to that reason or not and frankly the
14 law is what the law is. And to the extent that
15 any attempt to rely on that past email actually
16 calls in the equitable argument of governmental
17 estoppel, governmental estoppel does not apply
18 when the laws of different states and the seal
19 and statutory is clear on its face, that any
20 healthcare facility must apply for CON to
21 provide a health service as defined in the
22 statute if they have not complied in the past
23 12 months. So, there are multiple reasons that
24 you're going to hear about from our witness as
25 to why Bon Secours St. Francis Xavier's



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1 diagnostic cath lab in West Ashley was not,
2 even though it was considered as in he was
3 aware of it, he did not ignore it, he did not
4 ignore the standard. He considered the
5 standard, he considered the cath lab, you will
6 hear, I believe, the reasons that explain why
7 then it was not considered an existing lab for
8 purposes of the application, of Standard 3,
9 either to Roper's application that we're here
10 about or to the East Cooper one that Trident
11 chose for whatever reason not challenging the
12 notes also in Trident's service area. Also, it
13 is very common for either for Department staff
14 to initiate phone calls or emails or for
15 representatives of CON applicants to initiate
16 telephone conversations or emails to address
17 questions as they come up. That's not an
18 attempt to be secretive. It's a routine
19 practice. It happens all the time with our
20 Department staff, and I do believe that while
21 the petitioner may choose words that give an
22 implication that it would be burdensome on them
23 to have to submit FOIA requests to obtain
24 information such as emails that's not in the
25 record, you know, I will just say that DHEC is



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1 a government agency subject to South Carolina
2 FOIA law and any FOIA requests we receive we
3 will respond to with the responsive documents
4 and those are obtainable. And we are dealing
5 with sophisticated parties here, represented by
6 sophisticated and experienced lawyers and law
7 firms and they're aware of that process. There
8 was no secrecy and there were available means
9 to obtain any emails they felt they might want
10 to see. And, Your Honor, so I think that even
11 though it's a limited issue, there are a few
12 nuances here that we won't have to work
13 through, but I do believe that after you hear
14 from us that we will have established that
15 applying the consistent case law on statutory
16 interpretation and deference to agency
17 interpretation that Trident is not going to be
18 able to meet its burden to overturn DHEC's
19 decision.

20 **MR. THOMAS:** Your Honor, at this time Trident would
21 call Daniel Sullivan to the stand.

22 **DANIEL J. SULLIVAN**, having ben duly sworn, testifies
23 as follows:

24 **MR. SULLIVAN - DIRECT EXAMINATION BY MR. THOMAS:**

25 **MR. THOMAS:** Your Honor, just quickly we stipulated

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1 as to the expertise of the witnesses, however
2 I think both Ms. Hollingsworth and myself plan
3 to move that the expert be qualified by The
4 Court and so there may be a little bit of
5 preliminary testimony there so it's not just a
6 perfunctory thing that The Court does, if
7 that's okay.

8 Q: Mr. Sullivan, could you please state your name
9 for record?

10 A: Sure, it's Daniel J. Sullivan.

11 Q: And state your occupation, please.

12 A: I'm a healthcare management consultant.

13 Q: Okay. And do you own your own business?

14 A: I do.

15 Q: Okay. Can you tell The Court a little bit
16 about the work you do in the area of health
17 planning?

18 A: Sure. I'm involved in doing a variety of
19 different, sort of, planning analyses for
20 health organizations. We get involved in
21 analyzing markets for new services and
22 sometimes for existing services where a client
23 is considering an expansion or the introduction
24 of a new service. Get involved in, from time
25 to time, doing strategic planning for



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1 organizations. And the reason we're here
2 today, we get involved in the preparation of
3 Certificate of Need applications and in some
4 cases reviewing Certificate of Need
5 applications filed a parties. And in the
6 course of that work, we do a lot of analytical
7 analysis regarding demographics, historical
8 utilization, a variety of different things in
9 order to come up with conclusions and
10 recommendations for various projects.

11 Q: And how long have you, kind of, been working as
12 a health planner?

13 A: 37 -- 38 years.

14 Q: And just briefly, I probably should have asked
15 you this before, tell The Court briefly about
16 your education and background.

17 A: I received an undergraduate degree in Economics
18 and Public Policy Studies from Duke University
19 and a Masters in Health Administration from
20 Duke University.

21 Q: Okay. As a healthcare planner, are you
22 familiar with the South Carolina Health Plan
23 and the standards therein?

24 A: I am. I been working in South Carolina for
25 most of the time that I've been in health



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1 planning.

2 Q: And just for the record, can you explain to The
3 Court what the South Carolina Health Plan is?

4 A: Sure. It's a document that's prepared by the
5 DHEC staff. It sets forth specific standards
6 for the evaluation of certain services that
7 under the Certificate of Need law are required
8 to obtain a CON before those services can be
9 offered. And so, it establishes some broad
10 objectives for the State of South Carolina as
11 then it specifically sets forth standards.
12 They usually cover a number of different areas,
13 like, it might cover the need for the service,
14 issues related to quality of the services and
15 some cases reporting of data related to that
16 particular service. And then, it provides
17 historical utilization data so that parties who
18 are interested in evaluating whether or not to
19 get involved in a particular service have some
20 context in terms of what's happened
21 historically and then it also in certain
22 circumstances contains projections of need in
23 the future. That's not true for cardiac
24 catheterization services but it is true for
25 some other services. So, it's a fairly



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1 comprehensive document that DHEC, I think, is
2 required to update every two years. They have
3 a process where the public can offer comments,
4 suggests amendments to the document, sometimes
5 DHEC accepts those, sometimes they don't. And
6 then, ultimately a new plan is developed and
7 then, I believe, is sent to the DHEC Board for
8 final approval and then it becomes the basis
9 for reviewing applications during pendency of
10 that plan, you know, being in existence.

11 Q: How often does the type of work that you do
12 involve the South Carolina Health Plan through
13 your South Carolina health planning work?

14 A: I mean, I refer to it many, many times a year.
15 I mean, it's a -- every CON project in South
16 Carolina that would be my starting point to
17 look at the South Carolina Health Plan. And
18 then, often I'm referring to it for other
19 reasons as well.

20 Q: Okay. Have you ever worked with the Health
21 Plan in the context of cardiac cath prior to
22 this hearing in this matter?

23 A: I have, yes.

24 Q: Okay. How many times would you say you've been
25 qualified as an expert in healthcare planning

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1 in a court of law?

2 A: More than 100.

3 Q: Okay. How about in South Carolina?

4 A: Probably, 20 times. I don't know the exact
5 number.

6 Q: Okay.

7 MOVE TO QUALIFY WITNESS:

8 MR. THOMAS: Your Honor, at this time I'd like to
9 ask The Court to qualify Mr. Sullivan as an
10 expert in the areas of healthcare planning and
11 the South Carolina Health Plan.

12 MS. HOLLINGSWORTH: No objection.

13 MS. BIGGERS: No objection.

14 WITNESS QUALIFIED:

15 THE COURT: All right. Without object, Mr.
16 Sullivan, you're qualified as an expert in
17 health planning.

18 MR. THOMAS: And the State Health Plan, Your Honor?

19 THE COURT: And the State Health Plan.

20 MR. SULLIVAN - DIRECT EXAMINATION BY MR. THOMAS
21 (CONT.):

22 Q: Mr. Sullivan, can you explain to The Court how
23 you became involved in this particular case?

24 A: Sure. I received a call from -- I don't
25 remember exactly who it was that called me. It



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1 may have been your firm or it may have been a
2 representative from Trident, and asked me to
3 take a look at the applications that was filed
4 by Roper Berkeley to add a cardiac cath lab.
5 That's Berkeley County is part of Trident's
6 historical primary service area for a whole
7 range of services, including cardiac cath
8 services. And so, they asked me to review the
9 application to determine whether or not I saw
10 any problems there and be available perhaps to
11 assist if they determined they were going to
12 oppose the project.

13 A: Okay. And did you ever review the East Cooper
14 CON application?

15 Q: I did not at that point in time. I mean, I've
16 reviewed it subsequent to the decision of Roper
17 Berkeley, but I had not reviewed it prior to
18 the time of the Roper Berkeley application or
19 the decision for Roper Berkeley application.

20 Q: And I think you heard in opening statements
21 that East Cooper would be in Trident Medical
22 Center's service area, but do you agree with
23 that statement?

24 A: Well, I mean, technically it's within a 45
25 minute drive time of Trident on a good day.

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1 But, Trident does not really draw very many
2 patients from the Mount Pleasant area and so,
3 that's the primary -- I also do work for East
4 Cooper so I'm familiar with their service area.
5 That's the area from which East Cooper draws
6 the vast majority of its patients is Mount
7 Pleasant and the areas on the east side of
8 downtown Charleston. I think Trident felt that
9 project really had very little impact on them
10 whether it was approved or not.

11 Q: If you had reviewed that application on which
12 you know now, would that have affected your
13 analysis of the Standard 3 application that
14 we'll get in to?

15 A: I don't believe it would have because, you
16 know, the Trident application just basically
17 was asking DHEC to ignore the presence of the
18 Bon Secours St. Francis cath lab. You know, my
19 view that's not something you can do is just
20 ignore it from the standpoint of looking at
21 historical utilization of cardiac cath
22 services.

23 Q: Okay. So, you understand this contested case
24 hearing is -- I'll use the words of The Court
25 from March, 2017, this isn't really a shotgun,



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1 it's more of a riffle shot regarding Standard
2 3 of The Health Plan.

3 A: Correct, that's all that I'm planning to offer
4 testimony on the day, is just Standard 3.

5 Q: Okay. And would you go to your notebook there.
6 You should have one that says, Joint Exhibits,
7 J01 through J08.

8 A: I have that.

9 **MR. THOMAS:** And can we have The Court switch over
10 for us here?

11 Q: And if you would turn to, I've got it listed as
12 J04-047 and so there's little page numbers at
13 the bottom of the page.

14 **(Joint Exhibit Number 4 was admitted into evidence.)**

15 A: Yes, I'm there.

16 Q: Okay. And is Standard 3 for diagnostic and
17 mobile catheterization services here?

18 A: It is.

19 Q: Could you read it into the record?

20 A: Sure. New diagnostic catheterization services,
21 including mobile services, shall be approved
22 only if all existing labs in the service area
23 have performed a minimum of 500 diagnostic
24 heart catheterization procedures per laboratory
25 during the most recent year.



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1 Q: Okay. Now, there is an inventory associated
2 with the state, excuse me, with cardiac cath,
3 correct?

4 A: There is.

5 Q: All right. Could you turn to J04-120 for me?

6 A: I will. I am there.

7 Q: Okay. And can you explain for The Court what
8 this document is, what this page in Exhibit
9 J04.

10 A: Okay.

11 Q: Oh, 120, I'm sorry.

12 A: Got it. I didn't see cath there. This is an
13 inventory of existing cardiac catheterization
14 providers in South Carolina, divided up by the
15 various regions of the state. The state is
16 divided up into four regions for this
17 particular service and the relevant region for
18 this particular review would be Region 4. And
19 this shows the number of cath labs that each
20 provider operates and then the historical
21 utilization of those labs for 2011, '12 and
22 '13, broken down into different categories of
23 adult and pediatric. And then, it looks at
24 diagnostic verses therapeutic cath.

25 Q: Okay. And does Bon Secours St. Francis Xavier



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1 -- are they registering volumes in 2011, 2012,
2 and 2013?

3 A: They did.

4 Q: Okay.

5 A: Low volumes but they did register volumes.

6 Q: Okay. So, Mr. Sullivan, what is the purpose
7 first of all in your opinion, what is the
8 purpose of Standard 3?

9 A: Standard 3 is, what I would consider to be, a
10 community need standard. Some of the standards
11 that are in the Health Plan are specific to the
12 applicant. The applicant has to determine that
13 it can meet a certain threshold of procedures
14 in the future. It has to provide certain
15 staffing and other things that are required by
16 the plan. But this is the only standard in the
17 plan that actually looks at the community as a
18 whole and says, what's going on in the service
19 area. In this case, the service area is
20 defined as a 45 minute drive time around the
21 proposal. And it says, are existing labs in
22 the service area being well utilized. And in
23 health planning, I mean, that's an important
24 consideration. To, you know, one measure of
25 whether we need another cardiac cath laboratory

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1 or program would be whether existing labs are
2 being reasonably utilized. And so, I think,
3 you know, in my view of all the standards this
4 is probably the most important standard in
5 terms of the determination of need for a
6 project because it considers what's going on,
7 not only within the applicant, but within the
8 broader healthcare market that the applicant
9 proposes to serve.

10 Q: Do you consider this to be an objective measure
11 or a subjective measure standard?

12 A: I mean, it's a fairly straight forward
13 objective measure of utilization.

14 Q: And in terms of the inventory we just looked
15 at, what's the purpose of having the inventory
16 in the State Health Plan?

17 A: Well, the inventory allows interested parties,
18 for example, a hospital that was considering
19 applying for cardiac cath services to look at
20 what's out there now. Who are the providers?
21 As it relates to this particular standard, the
22 inventory provides a reference point for a
23 potential applicant to go and look and see if
24 existing providers are consistent with the
25 standard. So, you would have to know which



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1 providers fall within your service area and
2 that would be the preliminary analysis you
3 would do. And then, you would look at the
4 existing providers and you'd look at what their
5 historical utilization has been. And in this
6 case, the most recent 12 months that was
7 presented in the application was 2013, so you
8 would focus on 2013. You would also probably
9 do some other things but, I mean, the purpose
10 of the inventory is to give you a starting
11 point to say, does there appear to be a need
12 for a new cardiac cath laboratory and would an
13 application that was filed under the State
14 Health Plan, be consistent with criteria 3,
15 looking at the historical utilization data that
16 was presented in the plan.

17 Q: So, the application that's at issue here, was
18 filed in what year?

19 A: It was filed in 2016.

20 Q: So, you mentioned some other things you might
21 do in addition to looking at the inventory.
22 What might that be?

23 A: Well, you would probably get -- because the
24 State Health Plan lags a little bit because
25 it's put together the year prior to its



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1 adoption, there may be additional joint annual
2 reports filed by hospitals. And so, you would
3 go out and gather up the joint annual reports
4 for the hospital if a more recent period was
5 available.

6 Q: And just for the record, can you explain for
7 The Court what a joint annual report is?

8 A: Sure. It's a fairly detailed survey that DHEC
9 require hospitals and some other organizations
10 to file on an annual basis. And it provides,
11 among other things, a listing of how many of
12 certain things you have, how many cath
13 laboratories, how many beds, how many MRI units
14 and so forth. It requires you to report
15 utilization of those particular services. Then
16 it provides a lot of other information, sort
17 of, general information about what the hospital
18 is doing operationally.

19 Q: And without necessarily going into the exhibit
20 right now, I think we'll look at it later, but
21 do you recall if St. Francis reported a volume
22 for diagnostic cath services in the 2014 JAR?

23 A: It did. Their 2014 JAR, which I believe would
24 have been the most recent JAR available at the
25 time that the Roper Berkeley application was



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1 under review, did show Bon Secours St. Francis
2 reporting a small number of procedures during
3 2014 as well.

4 Q: Okay. But not 500?

5 A: No. It was no where close to 500.

6 Q: In that same Joint Exhibit notebook, you could
7 go to Joint Exhibit 1, which is a DHEC record
8 for this matter.

9 **(Joint Exhibit Number 1 was admitted into evidence.)**

10 A: Yes.

11 Q: And go to page 190.

12 A: Okay.

13 Q: All right. And do you recognize this document,
14 Mr. Sullivan?

15 A: Yes. This is a letter that I prepared.

16 Q: Okay. Now, without getting -- and I'm really
17 trying to keep us out of the merits of the
18 case, there have already been, as you've heard
19 this morning, a lot of stipulation, can you
20 explain to The Court -- can you indicate what
21 your letter stated with respect to the issues
22 before The Court today?

23 A: Sure. After finding that the application was
24 filed, you know, what I had available to me was
25 the record, which was the original application



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1 and any correspondence subsequent to the filing
2 of the application between DHEC and the
3 applicant. And so, what I was aware of at that
4 time, as it related to Standard 3, is that
5 Roper Berkeley's position was because it was
6 proposing to close the cath lab at Bon Secours
7 St. Francis, which it described as an existing
8 cath lab in its application, you know,
9 contingent on the approval of the application,
10 and it would not be closed until after the
11 decision was rendered, that just created for me
12 a very bizarre situation, something I've never
13 really encountered before in my 38 years of
14 reviewing applications.

15 Q: And why was that?

16 A: Well, typically if a party is going to close a
17 cath lab or close any service, that would be
18 something that would be done that would not be
19 contingent upon the approval of a particular
20 project unless it was going to be a transfer of
21 a lab, in this case from one facility to the
22 other. Roper Berkeley did not address the
23 specific transfer standards in the State Health
24 Plan, which was confusing to me because it
25 seemed to me that was, sort of, what they were



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1 proposing, though even that wasn't exactly a
2 transfer because it wasn't an iron clad
3 statement that when Roper Berkeley opens up, we
4 will close the cath lab -- it was if we get
5 approved we're going to close the cath lab but
6 yet it was applying for a new cath lab. So, it
7 just created a very odd fact circumstance. And
8 so, I was not aware of the discussions that had
9 gone on prior to the filing of this application
10 between DHEC and Roper's representatives. And
11 so, I wasn't quite sure what to make of this
12 project and so I attempted to address a number
13 of things, one of which was the transfer
14 standards but, you know, in addition, you know,
15 looked at the new facilities and standards as
16 well.

17 Q: Okay. So if you turn to your letter Joint 1-
18 194.

19 A: Sure.

20 Q: Explain to The Court what you did here.

21 A: I looked at the Standard 3 and again, I was a
22 little confused by what the applicant presented
23 because the applicant seemed to be focused on
24 an average number of diagnostic procedures per
25 lab rather than looking at individual

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1 procedures per lab. But I clearly recognized
2 on the top of page six of this document or J01-
3 195 that Bon Secours St. Francis was not at 500
4 diagnostic procedures per lab in the most
5 recent year. And so, that, you know, led me to
6 believe that the project was not consistent
7 because it was an existing lab and it was not
8 providing 500 procedures per lab. There was
9 another analysis done in here about what the
10 appropriate numerical basis for that
11 calculation was, and I'm not gonna go there
12 because that's not an issue in this case.

13 Q: And so you've talked a little bit about also
14 the transfer issue, could you go to Joint 1-
15 198?

16 A: Sure.

17 Q: And explain to The Court what you were trying
18 to do with respect to the service area
19 standard, why you included it in your letter.

20 A: Well, because it appeared to me this was some
21 hybrid of a transfer that was being proposed,
22 not recognizing the discussions that had gone
23 on before, and so the service area standards
24 talk generally about what you have to do in
25 order to comply when you're transferring



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1 services from one facility to the other. And
2 so, I wanted to at least look at those
3 standards to see whether or not it would make
4 sense for this application to be approved under
5 these particular provisions.

6 Q: Okay. And what was your conclusion there?

7 A: My conclusion was that the applicant did not
8 satisfy the transfer standards, you know, in
9 part because I did not believe that there was
10 really a whole lot to transfer. You know, from
11 a Standard 3 perspective, I think there was
12 little question that Bon Secours St. Francis
13 was an existing provider that provided volume
14 during the year, the 12 months most recent to
15 the application. But I did not believe that
16 for purposes of transferring, that this was
17 really a program that merited transferring
18 because it had been one that had been kept
19 alive by performing only a handful of
20 procedures every year. And so, I made a number
21 of comments in here, which I saw quoted in the
22 opening about it's not a legitimate cath lab
23 program 'cause it really was not operating as
24 a full-time cath lab program. And so, I didn't
25 believe it really warranted The Department

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1 approving a transfer of a program, particularly
2 under criteria 3 of the transfer provisions,
3 which says that the facility receiving the
4 service must demonstrate the need for the
5 additional capacity based on both historical
6 and projected utilization patterns. Under that
7 analysis, historical utilization patterns
8 certainly did not indicate that there was a
9 need and this wasn't really functioning as a
10 full-time cardiac cath program. So, I didn't
11 think that it merited approval as a transfer.

12 Q: Do you believe that St. Francis was offering
13 the service at the time?

14 A: They clearly were offering the service. They
15 reported actual patients who received
16 catheterization there.

17 Q: Okay. And did you make any similar statements
18 about it's not a legitimate lab under the
19 actual Standard 3 analysis of the plan?

20 A: I did not.

21 Q: Okay. In the actual Standard 3, there's a
22 reference -- I know you've read it into the
23 record, but there's a reference to -- well,
24 it's a phrase, during the most recent year.
25 What does during the most recent year mean to



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1 you, in your opinion, with respect to Standard
2 3?

3 A: In my experience, typically DHEC would look at
4 the most recent tri-annual report that was
5 filed, you know, the reports that were filed
6 for existing providers in an area. In some
7 instances, they may look specifically at the
8 utilization data that's in the State Health
9 Plan that we looked at earlier but I think in
10 this case, the most recent in the State Health
11 Plan was 2013. I believe that the 2014, and I
12 believe that maybe the 2015 JAR's have just
13 come out at the time of this review. So, it
14 doesn't really matter what which one you use
15 because there was reported utilization at Bon
16 Secours St. Francis at any 12 month period that
17 you looked at prior to the filing of the
18 application.

19 Q: Okay. Now, do you have an opinion -- and again
20 back to Standard 3, there is a reference to
21 shall be approved only if all existing labs in
22 the service area performed a minimum of 500
23 diagnostic catheterization, of whether or not
24 St. Francis' cath lab was an existing lab for
25 purposes of Standard 3?

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1 A: I do have an opinion.

2 Q: Would you share that with us and the basis for
3 the opinion?

4 A: Sure. Well, I think based on a common
5 understanding as a health planner, existing
6 means a lab that is actually open and providing
7 services. It has the capability of serving
8 patients and in fact in this case, it did serve
9 patients. And, I can't think of any
10 interpretation of existing that would not
11 include a lab that during the prior 12 months
12 offered cardiac cath services reported a volume
13 greater than zero. That would seem to fly in
14 the face of logic to say that was not an
15 existing lab.

16 Q: Okay. And, we just looked at the St. Francis
17 cath lab was in the Health Plan inventory,
18 wasn't it?

19 A: It was. It was.

20 Q: Okay. And, in terms of the JAR reports, I
21 think you testified earlier that there were --
22 did you state that there were reported
23 procedures in 2015?

24 A: There were, yes.

25 Q: Okay. Are there any other documents that you



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1 reviewed that would provide a basis for the
2 existence of this cath lab?

3 A: In addition to the inventory and the JARs,
4 there was correspondence in 2016 between DHEC
5 and Roper in which DHEC talked about the fact
6 that it was an existing lab and that it created
7 a potential bar to the approval of another
8 provider. There was correspondence that was
9 provided, I believe, by Roper's attorney that
10 went back to 2010 and looked at the fact that
11 East Cooper had raised the same argument back
12 in 2010 about let's not consider the Bon
13 Secours project and the two different
14 individuals at DHEC at that time, Mr. Shelton
15 and Ms. Brant, both addressed that in saying
16 that, it hasn't had volume in some years prior
17 to that but we don't have the authority or the
18 mechanism to shut down that lab. There was a
19 letter that -- well, I guess it was an email
20 exchange, from Mr. Eubank to Roper saying that
21 they were considering some sort of enforcement
22 action to close down the lab. I mean, you
23 can't close down something that's not existing
24 and operating and then there was information
25 provided by Roper itself, in particularly in



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1 its letter to become an effected party in the
2 East Cooper case that said, this is an existing
3 lab. You know, East Cooper took the position
4 of just ignore Bon Secours St. Francis, it is
5 an existing lab. You know, we've had some
6 discussions with DHEC and we may close down if
7 we get approved or we will close it down if we
8 get approved, but, you know, no guarantee it
9 was going to be closed down otherwise. And,
10 there was also a letter from Roper's attorneys
11 subsequent to the approval on August 17th, 2016
12 that said that, we just wanted to inform you
13 that it has been closed down, you know, that
14 this lab that was operating has been closed
15 down. So, you know, the record seems replete
16 with statements that this is an existing lab.

17 Q: Okay. I have to go an unpack a little bit of
18 what you've talked about and maybe look at some
19 of the documents you referred to. We've
20 already, I believe, looked at the inventory in
21 the State Health Plan that's applicable to this
22 case. Could you turn in another notebook --
23 start the notebook shuffle here, Petitioner's
24 Exhibit 1 ---

25 A: Okay.



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1 Q: --- for me. And, let's see here, I believe
2 it's -- just go to the front page and identify
3 the document.

4 (Petitioner's Exhibit Number 1 was admitted into
5 evidence.)

6 A: Sure. This is Bon Secours St. Francis Xavier
7 2015 Joint Annual Report of Hospitals.

8 Q: Okay. And if would turn over to P1-017.

9 A: I'm there.

10 Q: Okay. And, can you just explain to The Court
11 what this chart is?

12 A: Sure. This report is about the cardiac cath
13 program at Bon Secours St. Francis and if you
14 look at the, sort of, top part of it, it has
15 number of mobile labs, number of fixed labs.
16 It reports one fixed lab. And then, it then
17 reports on the number of procedures that it
18 performed and it shows that in 2014 it
19 performed four diagnostic caths, all of which
20 were inpatient caths. And in 2015, it
21 performed two diagnostic caths, both of which
22 were inpatients.

23 Q: If you could turn over to -- I believe you
24 referenced some internal correspondence of The
25 Department. Could you turn over to

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1 Petitioner's 5?

2 (Petitioner's Exhibit Number 5 was admitted into
3 evidence.)

4 A: Sure.

5 Q: And could you identify the document?

6 A: Yes. This is a -- the first page of this is an
7 email from Ralph Barbier to Lewis Eubank and
8 then copied to several other folks.

9 Q: And who is Lewis Eubank?

10 A: He is the director of the CON program at DHEC.

11 Q: It's okay. Well, and at least at the time, he
12 was the director of the CON.

13 A: That's correct.

14 Q: I think he's received a promotion since then.

15 A: That's true, yes.

16 Q: And so, you've reviewed this letter or this --
17 I apologize, you reviewed the email. What did
18 you take away from it?

19 A: Well that there were discussions underway
20 between Roper and DHEC about the lab and it's
21 referred on page P05-001, it's the last
22 paragraph on the bottom. Mr. Eubank is talking
23 about his intentions regarding the under
24 utilized cath lab at St. Francis Xavier at West
25 Ashley. So, not that it was a non-existing



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1 cath lab, but it was an under utilized cath
2 lab. And this is where he discusses the
3 potential to take enforcement action against
4 Bon Secours regarding this particular lab.

5 Q: Okay. And, kind of, if you go on to P5 --
6 well, first of all, Mr. Sullivan, if you could
7 just for the record state the date of the
8 email.

9 A: Sure. The first email from Mr Barbier is dated
10 April 20th, 2016.

11 Q: Okay.

12 A: And then the email from Mr. Eubank that he was
13 responding to was dated April 14th, 2016.

14 Q: Okay. And we'll get to Mr. Barbier's email
15 'cause there's an attachment to it as well, but
16 if you turn to P5-002.

17 A: Yes.

18 Q: And there's a statement that I'd like you to
19 read, kind of, starting at the top where,
20 first, kind of, full sentence, in either case.
21 If you could read that the next two sentences
22 after in either case.

23 A: In either case, the performance of zero
24 procedures in that lab during 2008 and 2009 is
25 violative of the South Carolina Code Annotated

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1 Regulation 6-15, Section 102-1(e), which states
2 in summary that a CON shall be obtained before
3 offering any health service which was not
4 offered during the proceeding 12 month period.

5 Q: Okay. And then the next sentence.

6 A: Furthermore, the continued operation of the St.
7 Francis Xavier cath lab at such low utilization
8 volume prohibits the entry of any additional
9 cath labs in the service area as outlined in
10 South Carolina Health Plan standards for such
11 services.

12 Q: Okay. As an expert in health planning and the
13 State Health Plan, what standard do you believe
14 Mr. Eubank is referring to in that last
15 sentence you read.

16 A: I mean, the only one that would apply to is
17 Standard 3 of the cath services.

18 Q: Okay. And would you read the sentence directly
19 after that one starting with the low volume.

20 A: The low volume would also likely prohibit the
21 transfer of that cath lab from one of the
22 operators facilities to another under the
23 service transfer criteria, which requires
24 adequate historical utilization figures.

25 Q: Going back to your letter in opposition, does



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1 that comport with your understanding?

2 A: It does. You know, that was what I was
3 conveying in my letter that the low utilization
4 made it, I thought, a poor health planning
5 decision to transfer a program that had
6 operated only at a minimum level of volume to
7 another provider when there was not indication
8 that there was actually a need for that
9 program.

10 Q: Okay. And then, with respect to the sentence
11 starting with furthermore, and the continued
12 operation, did you agree with Mr. Eubank's
13 conclusion there?

14 A: I do.

15 Q: Okay, and why?

16 A: Because I think a plain reading of Standard 3
17 is that if there was an existing provider
18 operating below 500 catheterization procedures
19 annually, then another one could not be
20 approved under the South Carolina Health Plan.

21 Q: Okay. And let's go back to P5-001 at the top,
22 and to just, kind of, move things along, this
23 is the email from Mr. Barbier to Lewis Eubank
24 in response to, I believe, the earlier email
25 and he references here an attachment, correct?



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1 A: He does.

2 Q: Okay. And, let's see if we can go -- that
3 attachment starts on P5-003.

4 A: It does.

5 Q: Okay. What do you understand this letter to be
6 and what's the date of the letter?

7 A: The date of the letter is April 20th, 2016. In
8 this case, it appeared that Mr. Barbier writing
9 on behalf of Carolinas Health Services, doing
10 business as both, Roper St. Francis Healthcare,
11 Bon Secours St. Francis Hospital and Roper St.
12 Francis Berkeley Hospital, they're requesting
13 to be considered effected parties or persons
14 with regard to the East Cooper application for
15 a new diagnostic cath lab.

16 Q: Okay. And were there any statements in this
17 letter to The Department that stood out to you?

18 A: Yes. I mean, at the bottom of the first page
19 of this letter, which is P05-003, they're
20 specifically addressing the statement in the
21 East Cooper application that the St. Francis
22 cath lab is considered non-operational and
23 requires a CON application if it is to be
24 included in the inventory. At the top of the
25 next page, Roper sets forth, I think, its



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1 position with respect to whether or not the Bon
2 Secours program is in fact a non-operational
3 program or whether it's one that should be
4 considered.

5 Q: And what was that position?

6 A: It says that -- let me find the exact language,
7 it says that, East Cooper's position regarding
8 the St. Francis cath lab is inconsistent with
9 the applicable CON laws and the South Carolina
10 Health Plan. And so, in that case, Roper has
11 taken the position that it was not a non-
12 operational program and to not consider that
13 program would be inconsistent with the
14 applicable CON laws and the Health Plan.

15 Q: Okay. And if you get down, I guess, five or
16 six lines after that, I'll read this into the
17 record. It states if Roper St. Francis
18 application is approved, Roper St. Francis
19 intends to close its cath lab in Bon Secours
20 St. Francis Hospital. Is that what was
21 represented in St. Francis' CON application?

22 A: Yes.

23 Q: Okay. And then, could you read the last line
24 in Mr. Barbier's letter in that paragraph,
25 please?

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1 A: It says, until Roper St. Francis's CON
2 application is approved, Roper St. Francis
3 intends to continue to operate the cath lab at
4 Bon Secours St. Francis Hospital.

5 Q: Okay. What does that mean to you in terms of
6 healthcare planner and Standard 3?

7 A: It means that it's an existing program now and
8 that Roper St. Francis intends to continue to
9 operate it as an existing program until such
10 time as they receive CON approval. And I
11 guess, alternatively, if they did not receive
12 CON approval, it would just continue to operate
13 after that.

14 Q: Is there any representation in the letter that
15 St. Francis would close its lab if it was not
16 approved?

17 A: There is not, nor with any other document that
18 I saw.

19 Q: Okay. And up at the top of the page, I
20 believe, in this letter at P5, there's a
21 reference to East Cooper took the same position
22 in 2010. What's your understanding of what the
23 DHEC staff did in fact in 2010?

24 A: Back in 2010, I think, East Cooper had made
25 inquiries to the DHEC staff about can we simply



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1 ignore the Roper St. Francis program at St.
2 Francis and there was correspondence that Mr.
3 Barbier attached from the DHEC staff that
4 specifically addressed that issue.

5 Q: Well, could you go to P5-015 for me?

6 A: Okay.

7 Q: I believe we heard in opening statements
8 something about emails. What is your
9 understanding of -- well, first of all, what
10 are we looking at here at P5-015?

11 A: This is the Chief of the Bureau of Health
12 Facilities and Services Development, Beverly
13 Brandt, who was overseeing the Certificate of
14 Need program at that time, responding to a
15 letter from Mr. Ray, who is the Chief Operating
16 Officer at East Cooper. Specifically
17 responding to East Cooper's request that you
18 request a determination as to whether the Bon
19 Secours St. Francis cath lab should be included
20 in the utilization calculations for the
21 Charleston area. And then Ms. Brandt sets
22 forth in the second paragraph, you know, what
23 her position is on that.

24 Q: And what is your understanding of what her
25 position was?



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1 A: She said that, we've determined that we do not
2 currently have a mechanism in place that would
3 allow The Department to discount existence of
4 St. Francis cardiac cath lab when computing the
5 average utilization for the area.

6 Q: Okay. And how does that situation -- I know --
7 was there a different Standard 3 back then?

8 A: Yeah. Back then, it was a higher threshold and
9 the utilization was calculated in the aggregate
10 rather than on an individual facility basis.
11 And so, I believe what Ms. Brandt was saying is
12 that she didn't believe that The Department had
13 the authority to not consider the Roper, I'm
14 sorry, the St. Francis cath lab in the
15 calculation of need. It's essentially the same
16 issue that, you know, we're talking about here
17 today.

18 Q: Okay. Really quickly, let's just turn so for
19 The Court's edification to Joint Exhibit 7.

20 **(Joint Exhibit Number 7 was admitted into evidence.)**

21 A: Okay.

22 Q: And I'll represent that this is the 2008, 2009
23 South Carolina Health Plan and if you could go
24 to Joint 7-006 for me.

25 A: Okay.



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1 Q: And, the -- I guess the Standard 3 back then,
2 could you read that into the record?

3 A: Sure. New diagnostic cardiac catheterization
4 services, including mobile, shall be approved
5 only if all existing labs in the service area
6 have performed at a combined use rate of 80
7 percent (960 equivalents per laboratory) for
8 the most recent year.

9 Q: Okay. And so, how does this standard compare
10 to the standard at issue in this case?

11 A: Well, the first part of the standard is, pretty
12 much, the same but it talks about shall be
13 approved only if all existing cath labs, so, I
14 mean, that's the same language that's in the
15 State Health Plan that is at issue here. What
16 is different is the particular numerical
17 standard that the applicant had to comply with.

18 Q: Okay. Well, what was your understanding based
19 on the correspondence in Petitioner's 5 from
20 The Department, -- what was East Cooper
21 attempting to do back in 2010?

22 A: To basically do that calculation by dropping
23 out the program Bon Secours St. Francis.

24 Q: Okay. And so, how does that compare with the
25 current situation?



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1 A: It seems to be, pretty much, the same thing.
2 The analysis that DHEC ultimately did concluded
3 that if you do not consider the historical
4 utilization of Bon Secours St. Francis, then we
5 can conclude that all existing labs in the
6 service area weren't above 500 procedures per
7 year.

8 Q: Okay. And just for the record, P5-015, that's
9 not an email is it?

10 A: That's actually a letter from Ms. Brandt
11 responding, you know, to the specific request
12 from East Cooper.

13 Q: Okay. Now, can you just read into the record
14 from P5-015 what Ms. Brandt stated in the first
15 sentence of the second paragraph in that
16 letter?

17 A: Sure. Sorry, I closed it.

18 Q: Yeah, I know I'm skipping around.

19 A: Based on our review of the standards from the
20 2008, 2009 South Carolina Health Plan and the
21 CON law and regulations, we have determined
22 that we do not currently have a mechanism in
23 place that would allow The Department to
24 discount the existence of the St. Francis
25 cardiac cath lab when computing the average



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1 utilization in the service area.

2 Q: Okay. In terms of the -- what kind of solution
3 did Ms. Brandt offer?

4 A: What she suggested, something that I think is
5 an appropriate way to deal with this is to
6 consider amending the South Carolina Health
7 Plan, to put language in The Health Plan that
8 would say that if a provider did not offer
9 services for a period of time that, that
10 provider could be ignored or discounted in
11 terms of these calculations of utilization.
12 And alternatively, that you put language in
13 there if a provider didn't provide utilization,
14 you know, for a period of time that they would
15 be considered no longer operational.

16 Q: And do such threshold type standards exist in
17 the State Health Plan today?

18 A: They do. For example, for therapeutic cardiac
19 cath programs, if you don't hit certain
20 utilization targets within three years, then
21 you lose your Certificate of Need to operate
22 that program.

23 Q: Okay. And are you aware of any amendments to
24 the State Health Plan since this letter was
25 drafted to Mr. Ray back in 2010?



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1 A: I am not. I mean, not specifically related to
2 this issue.

3 Q: Well, that's -- I'm sorry, I should have
4 clarified that for the record, thank you. All
5 right. Let's go back to the actual CON
6 application to Joint Exhibit 1, if we could,
7 Mr. Sullivan, and I'd like to direct your
8 attention to page 30, J01-030.

9 A: Okay. I'm there.

10 Q: All right. And you would have reviewed this
11 page when you reviewed the application?

12 A: I would.

13 Q: Okay. And what's the heading, kind of, the
14 bold underlined heading on the page?

15 A: Diagnostic and Mobile Catheterization Services.

16 Q: Okay. And then, Standard 3, which you read
17 into the record is stated there, correct?

18 A: Correct.

19 Q: And, in terms of -- can you just read the first
20 sentence there in Roper Berkeley's CON
21 application starting with cardiac cath?

22 A: Cardiac catheterization utilization per lab has
23 remained strong in the overall service area and
24 the existing labs within the defined service
25 area are performing on average almost 900



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1 diagnostic equivalents per lab, per year.

2 Q: Okay. And what is the -- there's an Exhibit 14
3 here. What's the title of Exhibit 14?

4 A: Historical Utilization of Existing Labs in the
5 Service Area.

6 Q: Okay. And is St. Francis included in the
7 chart?

8 A: They are.

9 Q: Okay. And is their volume included in the
10 chart for purposes of the diagnostic
11 equivalence per lab calculation?

12 A: There is, for all three years.

13 Q: Okay. And then, beneath that could you read
14 the sentence into the record beneath the chart
15 in Exhibit 14?

16 A: Yes. While Bon Secours St. Francis Xavier
17 Hospital is operating below 500 diagnostic
18 equivalents per year, the lab will be closed
19 upon the approval of this project.

20 Q: Okay. And that's -- is that, pretty much, the
21 representation of Roper Berkeley throughout the
22 application?

23 A: It is. I think it's cited in there several
24 times.

25 Q: Okay. Good. And in the same Joint Exhibit 1,



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1 could you turn over to 226 and 227 for me?

2 A: Sure. I'm there.

3 Q: Okay. And what do you understand this letter
4 on 226 to be?

5 A: This was a letter that was sent out by Mr.
6 Eubank from DHEC the day after the decision was
7 issued, approving both the East Cooper and the
8 Roper Berkeley cath lab projects. And he's
9 basically reminding Roper St. Francis of their
10 commitment and that he expects proof of closure
11 of the laboratory at Bon Secours St. Francis
12 within no later than 30 days of the date of
13 this letter.

14 Q: Okay. And what's your understanding -- when
15 did this letter issue from The Department in
16 relation to the actual decision?

17 A: The day after.

18 Q: Okay. And so, The Department didn't wait
19 until, you know, the staff approval became the
20 final agency decision, did it?

21 A: Right. I mean, they did not wait for The DHEC
22 Board to decide whether or not it was going to
23 except an appeal from Trident. It was done
24 immediately after the approval.

25 Q: And in Joint 1-227, the very next page. What



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1 do you understand that letter to be?

2 A: That's a letter from the chief executive
3 officer at Bon Secours St. Francis certifying
4 to Mr. Eubank at DHEC that in fact the lab at
5 Bon Secours St. Francis was closed on August
6 1st, 2016.

7 Q: Okay. So, did St. Francis wait until the staff
8 approval became a final agency decision to
9 close?

10 A: Did not.

11 Q: Okay. Now, I believe Roper stated that, kind
12 of, like, this word existing has to mean
13 something. It can not mean, all labs. Are you
14 aware of this position?

15 A: I am.

16 Q: Would you have an opinion on that position
17 that's been taken by Roper?

18 A: I do. I mean, I think most people understand
19 what existing means. And in this case, the
20 only labs that are in the area are existing
21 labs. Labs that reported utilization in
22 whatever 12 month period you want to look at
23 prior to the filing of the application. And
24 so, all existing labs would encompass all of
25 the labs that were in the inventory in the



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1 State Health Plan. And so, I'm not quite sure
2 what distinction they're trying to make when
3 they say that existing labs means all labs, but
4 in this case, as it relates to this particular
5 decision, there were no approved labs, there
6 were no labs that were non-operational, as far
7 as I know. All there were, were labs that
8 were, open providing services to patients. And
9 so, I think DHEC should have included all of
10 the labs that were reported in the inventory in
11 its evaluation of Standard 3.

12 Q: Okay. And, in terms of the decision letter,
13 can you turn over to Joint 1-206 for me?

14 A: Sure. Okay.

15 Q: What do you understand this letter to be, Mr.
16 Sullivan?

17 A: This is the staff's decision letter that
18 outlines the basis by which it's granting
19 approval the Roper St. Francis Berkeley
20 application.

21 Q: Okay. And, what opinion do you have about the
22 letter?

23 A: I mean, essentially, you know, as it relates to
24 Standard 3, which is the bottom of page 206, it
25 talks about should that all diagnostic cath



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1 labs, not even all existing, just all
2 diagnostic cath labs in the service area
3 exceeded the 500 procedure threshold outlined
4 in The Plan, with one notable exception. So,
5 I think here DHEC is acknowledging that the Bon
6 Secours St. Francis lab is an existing lab,
7 because it's saying that all of the labs that
8 it evaluated, except for one, met the 500
9 standard. And so, then it goes on to say
10 talking about the fact that it was a low
11 utilization provider and Roper has agreed to
12 shutter the program, subsequent to the approval
13 of the application.

14 Q: And in terms of this idea of shuttering, I
15 understood is that what happened in --
16 subsequently?

17 A: Yes.

18 Q: Okay. Is there any specific reference in this
19 approval letter to the lab not existing during
20 the most recent year?

21 A: No. I mean, in fact I didn't see any
22 discussion in this letter or any the other
23 emails or other correspondence between Roper
24 and DHEC that ever concluded that the lab was
25 nonexistent.

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1 Q: Okay. In fact, who or what is the only entity
2 that has actually indicated that the labs not
3 existing in writing?

4 A: East Cooper.

5 Q: Okay. And just for the record, let's turn over
6 to Joint Exhibit 2, page 33, if you could.

7 **(Joint Exhibit Number 2 was admitted into evidence.)**

8 A: Okay.

9 Q: I believe at the bottom of the page there,
10 there's a reference to a section in Regulation
11 61-15, what does that reference?

12 A: It talks about, basically setting forth the
13 regulation that if a person or healthcare
14 facility is required to obtain a Certificate of
15 Need from The Department before undertaking the
16 following. The offering of a health service,
17 and I think they were focusing on that it had
18 not been offered in the preceding 12 months or
19 for which specific standards or criteria are
20 prescribed in the South Carolina Health Plan.
21 So, I think the -- even though it doesn't say
22 it, the top of the next page, I think East
23 Cooper's position is that because of the low
24 utilization and at some point seven or eight
25 years before this, the Bon Secours St. Francis



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1 lab provided no volume, that it was simply
2 going to discount the presence of that lab.

3 Q: Okay. And, what was Roper's response to that?

4 A: They objected to that. They said that, in fact
5 this lab does exist and it will only be closed
6 if we get approved.

7 Q: Okay. Do you recall on the record for this
8 matter, the DHEC record, DHEC sending any type
9 of written response to Roper's effected person
10 letter?

11 A: I saw none.

12 Q: Okay. Was there ever a response from Roper to
13 your opposition letter that you filed on behalf
14 of Trident in this matter?

15 A: There was none.

16 Q: Did that surprise you?

17 A: It did. I mean, typically whenever I get
18 involved in a situation where opposition
19 letters are filed, typically the applicant
20 would submit something in writing just so it
21 would be in the record why DHEC should not
22 accept the positions taken by the opponent.

23 Q: And there wasn't one here?

24 A: It is was not.

25 Q: Okay. Let's go to Joint Exhibit 1 at 80. I

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1 just want to reference some documents for
2 purposes of the timeline.

3 A: Okay.

4 Q: What do you understand Joint Exhibit 1 at 80 to
5 be?

6 A: This is an affidavit from the Charleston
7 newspaper certifying that there was a public
8 notice published on the dates that are showing
9 on this document, the final one, which was
10 April 29th, 2016 about Roper St. Francis's
11 attempt to file the application for a cath lab
12 at Roper Berkeley.

13 Q: Okay. So, that's the first public notice with
14 respect to the application to any other
15 effected parties.

16 A: Right. I guess the last date is actually the
17 30th of April, over in the next column.

18 Q: Got you. And, what was the date of Roper's
19 actual, kind of, filed and stamped copy, for,
20 excuse me, Roper Berkeley CON application?

21 A: I believe it was May the 4th, I'm sorry, May
22 the 9th, 2016.

23 Q: Okay. So, published on the first public notice
24 on the 28th and then application submitted on
25 the 9th?

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1 A: That's right.

2 Q: All right. And, if you go to Joint Exhibit 1
3 of 221.

4 A: Okay.

5 Q: Let me know when you're there.

6 A: I'm there.

7 Q: What do you understand, kind of, these
8 documents to be?

9 A: This is an excerpt from the South Carolina
10 State Register and DHEC submits public notices
11 in the State Register each month showing the
12 applications and then what the status is at
13 this point in time.

14 Q: Okay. What was your understanding of the
15 status of Roper St. Francis Hospital Berkeley's
16 cath lab in terms of the State Register
17 publication?

18 A: As I understand it, if you look at page 2,
19 Joint 01-222, towards the top of the page, it
20 says affecting Berkeley County and at this
21 point is appears that the application was both
22 accepted for review and deemed complete
23 simultaneously.

24 Q: Okay. And what date is that at the bottom of
25 the page there?



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1 A: May 27th, 2016.

2 Q: Okay. In terms of that as a health planner, do
3 you often see CON applications are deemed
4 complete in 17, 18 days from publication or
5 from, I'm sorry, submission to The Department?

6 A: That's unusual, I mean, if you even looked at
7 the East Cooper application in this instance,
8 it was a much longer time period between when
9 the application was received and when it was
10 deemed complete.

11 Q: Do you recollect -- well, turn to Joint 2-112
12 for me, if you would.

13 A: Okay. Okay.

14 Q: Okay. And, at the top of the page there, do
15 you see East Cooper Community Hospital?

16 A: I do.

17 Q: And I believe that's under the deemed complete
18 section, what was the date there in the South
19 Carolina State Register?

20 A: March 25th, 2016.

21 Q: Okay. And, I believe we may -- if you turn to
22 Joint 2-001, what's the date that the East
23 Cooper application was submitted?

24 A: February 4th, 2016.

25 Q: Okay. Comparing the East Cooper application



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1 and the St. Francis application, what is has
2 been more your normal experience in terms of
3 submission to publication as deemed complete?

4 A: So, East Cooper would the, in my experience,
5 the more typical time frame.

6 Q: Okay. And if you go back to Joint Exhibit 1
7 for me, page 187.

8 A: Yes.

9 Q: You understand -- well, I'll give you a second
10 to get there.

11 A: I'm there.

12 Q: What do you understand this document to be?

13 A: This is the letter from Parker Poe on behalf of
14 Trident Medical Center requesting effected
15 person status and indicating opposition to the
16 Roper Berkeley cath lab project.

17 Q: Okay. And is it your understanding that
18 Trident requested a project review meeting.

19 A: They did.

20 Q: Was one held by The Department?

21 A: It was not.

22 Q: Okay. What did that mean to you as a health
23 planner?

24 A: It was somewhat unusual, I think, since that
25 time I found there have been other instances

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1 but in the past, typically when there was a
2 contested situation where there were opposition
3 to a project, there would be a project review
4 meeting, which would give opponents the
5 opportunity to, sort of, express in person
6 their concerns about the project, the applicant
7 to explain why they felt the project should be
8 approved. And for the DHEC staff to be there
9 and have the opportunity to ask questions and
10 so forth. So, that was routinely done
11 previously but it was not done in this case and
12 subsequently, I think, DHEC has been less open
13 to having project review dates.

14 Q: Okay. Now, I want to look quickly, let's go to
15 Joint Exhibit 4. And go to page 47 for me,
16 where the diagnostic cath lab standards begin.

17 A: Okay.

18 Q: In terms of -- while I understand it is not at
19 issue in this case, and I'm not trying to
20 contend that it is, have you ever seen an
21 application, Mr. Sullivan, that's been approved
22 that was say, 12 or 15 diagnostic equivalent
23 procedures shy of the standard in Standard 4?

24 A: I have not.

25 Q: Okay. Would you expect to see something like



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1 that?

2 A: I would not. I mean, typically these minimum
3 volume levels, I mean, they're set for a
4 reason. I mean, from a health planning
5 perspective you want to make sure that a
6 project being approved is gonna achieve a
7 reasonable level of utilization both for
8 quality and for economic feasibility purposes.
9 And so, you know, this isn't a particularly
10 high standard in terms of volume but I've not
11 seen DHEC approve projects before that did not
12 comply with at least a minimum level of
13 utilization required in The Plan.

14 Q: Okay. And to this idea that Roper closed
15 thereafter, you know, a few days thereafter,
16 I'm sorry, St. Francis closed its cath lab a
17 few days after the approval and therefore there
18 weren't two in existence at the same time, but
19 do you have an opinion with respect that
20 position taken by St. Francis project for
21 Berkeley?

22 A: I do. And that is, I think that's really
23 irrelevant to the issue with Standard 3. The
24 issue on Standard 3 is whether or not the
25 capacity that exists now allows for existing



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1 labs to be well utilized. And whether or not
2 you're not going to increase the number of
3 labs, that still doesn't answer the question of
4 do we need all the labs that we have right now.
5 And Standard 3 really addresses that question.
6 It's do we have enough capacity, too much
7 capacity and simply saying, well we're not
8 going to add anymore labs doesn't really get to
9 the community need aspect of Standard 3.

10 Q: Okay. And was there a one for one trade in the
11 service area in terms of diagnostic cath labs?

12 A: Yeah, I mean, in terms of inventory the count
13 is the same. But, it's not the same because in
14 one case, there was a lab that was effectively
15 providing a minimum level of utilization and
16 it's proposed to be a lab that's going to
17 operate above 500 procedures a year. So, it's
18 not an equivalent swap, if you will, in terms
19 of how the lab was actually going to be
20 utilized.

21 Q: Was there another diagnostic cath lab approved
22 on the same day?

23 A: There was, East Cooper. And you know, that
24 also calls in, you know -- I was not involved
25 in reviewing the East Cooper application, but



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1 also calls into question the wisdom of
2 approving two new cath labs when there's
3 historical data that says that the one existing
4 diagnostic cath lab in the area -- all the
5 other can do both therapeutic and diagnostic.
6 The cath lab at Bon Secours St. Francis was the
7 only one that was limited to diagnostic only,
8 and so that one was not well utilized and
9 that's too common when you can't do both type
10 of procedures at one place to have low
11 utilization. And yet, DHEC approved two at the
12 same time that were going to be limited to
13 doing diagnostic only procedures. So, in
14 looking at Standard 3, you would think that
15 information about the Bon Secours cath lab
16 would give some pause to the decision to
17 approve two more.

18 Q: What if St. Francis had closed its lab the day
19 before the decision? Does that effect how you
20 would analyze this case or your opinions in
21 this matter?

22 A: It would not.

23 Q: Why?

24 A: Well, because as it related to Standard 3, you
25 will still need to look back at how well labs

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1 had been utilized historically prior to the
2 filing of the application. In this case, if
3 you wanted to close the St. Francis lab, it
4 would seem that the appropriate way to do that
5 would be to close it, allow that to be
6 reflected in the DHEC inventory and the South
7 Carolina Health Plan and then apply for another
8 project..

9 Q: Are you ever aware of Standard 3 being
10 interpreted or treated in the way that The
11 Department has done here?

12 A: Not in my experience, no.

13 Q: Okay. In terms of this whole idea of
14 enforcement, the enforcement provision arising
15 out of the regulation regarding the offering of
16 services within the past 12 months, was an
17 enforcement action taken back in the, I guess,
18 2008, 2009 time frame when St. Francis wasn't
19 doing any volume?

20 A: It was not.

21 Q: Okay. And are you aware that would have
22 necessarily -- if enforcement action would have
23 been taken, that would have necessarily solved
24 the problem?

25 A: I'm sorry, which problem?



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1 Q: I'm sorry. Solved the issue that DHEC was
2 dealing with, with a low volume lab at St.
3 Francis.

4 A: Well, sure. I mean, that would be one way to
5 deal with it. It would be to -- if they had
6 the authority to close the lab and do it at
7 that point and then in subsequent South
8 Carolina Health Plan, it would have been taken
9 from the inventory and calculations would have
10 been done without the St. Francis lab.

11 Q: Okay. And in terms of the State Health Plan or
12 the Regulation 61-15, are you aware of any
13 exceptions in the State Health Plan and
14 Regulation 61-15 or otherwise that would give
15 DHEC the authority to do what it did?

16 A: I am not. In my experience, that the applicant
17 has to comply with each of the standards in the
18 State Health Plan. And the standard that we're
19 talking about here today, number 3, in my view
20 is the most important standard in the
21 diagnostic catheterization section of the
22 State Health Plan. And so, certainly I am not
23 aware of any exceptions but if you were going
24 to make an exception and you could argue that
25 there was some reason to do that, you certainly

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1 wouldn't want to do it as it related to the
2 community needs standard.

3 Q: Okay. Let me just the question. If you had
4 known about any of the email correspondence, if
5 Trident had FOIA everything that they could
6 possibly FOIA, would that have changed your
7 analysis in this case?

8 A: No. I mean, it would have probably changed the
9 way I wrote the letter, but the conclusions
10 would have been exactly the same, that the
11 project not be approved because there was an
12 under utilized lab in the service area.

13 Q: And should the application been approved in
14 your opinion, Mr. Sullivan?

15 A: In my opinion, it should not have.

16 Q: Why not?

17 A: Because it's clearly inconsistent with the
18 South Carolina Health Plan, the 2015 Health
19 Plan. And, from the standpoint of applying the
20 standards, I think in a straight forward and
21 common sense way, it makes no sense to ignore
22 the presence of a lab that's been operating for
23 many years, albeit at low volume. And, I think
24 it creates a, you know, a very concerning
25 precedent in terms of how this would be applied



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1 in the future. There's all kinds of situations
2 one could come up with, you know, there might
3 be other planning areas other than the
4 Charleston area where circumstances, you know,
5 we can't have standards that are situational
6 where we're gonna apply it this way in
7 Charleston, or apply it a different way in
8 Greenville. I think there has to be a straight
9 forward application of it and that is to adhere
10 to the specific letter of the standard.

11 Q: Do you believe that DHEC, kind of, changed the
12 inventory in this case, post, kind of, post
13 facto after the approval?

14 A: Well, they did. I mean, as far as I know, up
15 until the time of the approval the inventory
16 was the same as presented in the South Carolina
17 Health Plan. It was only subsequent to the
18 approval that the inventory was changed by
19 Roper's actions to shut the program, the Bon
20 Secours St. Francis.

21 Q: Okay. And, what affect does that, kind of,
22 have generally in, kind of, for purposes of
23 health plan.

24 A: Well, in my view it creates a chaotic
25 situation. If, I mean, one if you allow

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1 applicants to, sort of, circumvent the specific
2 language of the State Health Plan by saying,
3 okay, if you approve us, we'll do this, that
4 will, sort of, set that concern aside. If you
5 don't approve us, situation is gonna remain the
6 same. We're still gonna have an under utilized
7 cath lab there. I think it just creates an un-
8 level playing field if you will for other
9 potential applicants who might want to apply.
10 They look at the South Carolina Health Plan,
11 they look at the inventory and see there's an
12 under utilized provider. This provider comes
13 in now and says well, if you approve us, we'll
14 go ahead and shut this thing down. In my view,
15 the appropriate way to do that is if Roper
16 wanted to close that lab, I mean, they have
17 every right to do that, but that ought to be
18 something that's reflected in the State Health
19 Plan and all potential applicants have an
20 opportunity to apply.

21 Q: Mr. Sullivan, what is your understanding of the
22 date that DHEC's decision became the final
23 agency decision for Roper Berkeley's cath lab?

24 A: It was, I believe after September 17th, if I
25 remember that date correctly. It was when the



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1 DHEC Board refused to accept the request from
2 Trident for final review.

3 Q: In Petitioner's 13, if you turn to that and get
4 this right for the record.

5 (Petitioner's Exhibit Number 13 was admitted into
6 evidence.)

7 A: Sure. I'm sorry, it's September 21st.

8 Q: Okay. And also, just for the record, what is
9 your understanding of when the DHEC staff
10 became concerned about the low volume
11 utilization at Bon Secours St. Francis's cath
12 lab?

13 A: It appears to have been triggered by the filing
14 of the East Cooper application and the
15 statements we read earlier about that East
16 Cooper was claiming that it was not operational
17 and pointed out the fact that they have had low
18 utilization for a long period of time and may
19 not have been providing services for some
20 period of time.

21 Q: As a health planner, why would it be important
22 to know what St. Francis is doing if you're
23 evaluating East Cooper's application?

24 A: Well, if you're not sure what St. Francis is
25 gonna do with their cath lab, that makes it

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1 very hard to review an application but more
2 importantly I think is that the State Health
3 Plan sets forth all of the information that's
4 needed to do the evaluation of the East Cooper
5 application. And so, you know, knowing what
6 St. Francis might do in the future should not
7 really change the outcome of the decision on
8 the East Cooper application.

9 Q: Well, what about what St. Francis has done in
10 the past?

11 A: It's interesting, but it doesn't change the
12 fact that DHEC has continued to recognize that
13 as an existing program and continued to include
14 it in its inventory.

15 Q: Do you think DHEC felt like it could have
16 approved the application for St. Francis
17 without dealing at least with the situation at
18 St. Francis -- I'm sorry, I think I butchered
19 that. Could they have approved the application
20 at East Cooper while St. Francis remained an
21 open lab?

22 A: I don't believe they could have approved the
23 East Cooper application. In fact, I think Mr.
24 Eubank said that in one of his emails that this
25 presents a problem for us in terms of being



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1 able to approve East Cooper because this
2 presents a bar to the approval of any big
3 project.

4 Q: And do you believe that Roper's solution that
5 Roper Berkeley came up with was a proper
6 solution?

7 A: I do not.

8 Q: Okay. That's all the questions I have for Mr.
9 Sullivan.

10 **THE COURT:** We're at 12:30, more or less, mostly
11 more. What's your feeling on taking up cross-
12 examination after lunch?

13 **MR. THOMAS:** Yes.

14 **MS. HOLLINSWORTH:** Yes.

15 **THE COURT:** What would be your preference for lunch?
16 An hour and a half, two hours?

17 **MR. THOMAS:** Hour and a half.

18 **MS. HOLLINSWORTH:** An hour and a half for me, an
19 hour to an hour and a half, yeah.

20 **THE COURT:** Okay. So, let's say roughly 2:00
21 o'clock.

22 **MS. HOLLINSWORTH:** Yes, Your Honor.

23 **THE COURT:** We'll be adjourned until then.

24 **MS. HOLLINGSWORTH:** And Your Honor, if I may just
25 again, what time typically would you go into

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1 the evening?

2 **THE COURT:** I would like to get to a witness break -

3 --

4 **MS. HOLLINGSWORTH:** Okay.

5 **THE COURT:** And if we're close to finishing, I'd
6 stay a few extra minutes to finish, 30 minutes,
7 40 minutes an hour. But if we're gonna leave
8 a witness or even two for tomorrow, we'll stop
9 around 5:00.

10 **MS. HOLLINGSWORTH:** Okay. Perfect, Your Honor,
11 thank you.

12 **THE COURT:** All right.

13 (Off the record from 12:33 p.m. until 2:02 p.m.)

14 **THE COURT:** Please be seated. Mr. Sullivan, we'll
15 welcome you back to the hot seat.

16 **MR. SULLIVAN:** Thank you, very much.

17 **THE COURT:** All right. I hope everybody had a good
18 lunch and settled the case while you were out.
19 But, if you didn't, Mr. Sullivan, I believe you,
20 are really on the hot seat. Ms. Hollingsworth
21 and Ms. Biggers, who wants to start?

22 **MS. HOLLINGSWORTH:** I think I'll go next, Your
23 Honor.

24 **THE COURT:** All right.

25 **MS. HOLLINGSWORTH:** Thank you.



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1 THE COURT: We're back on the record, and just one
2 second while we, we're good? Okay.

3 MR. SULLIVAN - CROSS-EXAMINATION BY MS.

4 HOLLINGSWORTH:

5 Q: Mr. Sullivan, it's nice to see you again.

6 A: You too.

7 Q: Now, I appreciate your time this morning and
8 informing The Court about the opinions you have
9 in this, what should be very narrow but still
10 ends up taking us a few days to get through.
11 And of course, you and I have already sat and
12 spoken about this case at your deposition, is
13 that right?

14 A: That's right.

15 Q: And, at the time of your deposition, you
16 provided me various opinions and discussions
17 and so I will try not to belabor them but
18 obviously that will be a lot of what I need to
19 try to explore with you this afternoon. Now,
20 of course, you've been doing this, I think you
21 actually said 38 years, is that right?

22 A: That's right.

23 Q: Healthcare claim. And you've had your own
24 consulting group since '89, is that right?

25 A: Yeah, I think we formed at the end of '89,

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1 actually started providing services right after
2 the first of the year in '90.

3 Q: Okay. And in fact, I think you said over the
4 last decade, probably 80 percent of your
5 consulting work is actually CON work, right?

6 A: Right. Either preparing or CON litigation.

7 Q: Okay. And of that work, maybe 30 percent of
8 it, give or take each years, South Carolina
9 CON?

10 A: Sounds about right.

11 Q: Okay. All right. So, Trident Medical Center,
12 that is part of a larger system, is that right?

13 A: Yes, it's part of HCA.

14 Q: Okay. What other hospitals in South Carolina
15 do you do work for, for HCA?

16 A: Summerville Medical Center, which is really
17 part of Trident Medical Center and Grand Strand
18 Medical Center.

19 Q: Okay. And, have you done some work for
20 Colleton Medical Center?

21 A: Just a tiny bit, I think there was one small
22 project I worked on a few years ago.

23 Q: Okay. But, as it relates to HCA, the client,
24 is it fair to say that, that's a large
25 percentage of your South Carolina CON work?



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1 A: Yes, today that's true.

2 Q: Okay. So, in that same sense, I mean, is it
3 fair to say that HCA is familiar with the CON
4 process in South Carolina?

5 A: Sure.

6 Q: And, it's been about 10 years since you've been
7 doing work with them, is that right?

8 A: I think that's about right, yes.

9 Q: And that's both from some sort of healthcare
10 planning and consulting on projects such as, be
11 it cath or linear accelerators, is that some
12 examples?

13 A: Sure.

14 Q: Okay. All right. Now, when you and I spoke,
15 and you might have seen my reference to it this
16 morning, but you'll agree with me that in your
17 opinion, The Department is, sort of, the keeper
18 of the regulations. Do you remember telling me
19 that at your deposition?

20 A: I do.

21 Q: And you continue to describe their role in that
22 way?

23 A: Yes.

24 Q: Okay. And, that they have statutory obligation
25 to administer and control the CON program,



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1 right?

2 A: Correct.

3 Q: Okay. And would you agree with me that their
4 responsibilities aren't just reviewing
5 applications for CON and approval and denial,
6 but there's other obligations they have in the
7 administration of the CON program. Is that
8 fair?

9 A: Yes.

10 Q: What are some of those things that they do?

11 A: I mean, they, you know, part of what they do is
12 help policy. I mean, they help to set, you
13 know, what, sort of, what the bounds of the CON
14 program are and how projects are going to be
15 reviewed. I mean, what is DHEC or what is the
16 CON program?

17 Q: Well, let me just ask you more specifically ---

18 A: Yeah, yeah.

19 Q: --- I mean, so is The Department responsible
20 for developing and enforcing standards for
21 licensure and maintenance of facilities in
22 South Carolina?

23 A: They are.

24 Q: Okay. And then, what about enforcement
25 responsibilities?



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1 A: Yeah, I mean, I haven't seen that very often in
2 South Carolina, but, I mean, I assume that's
3 one of their responsibilities.

4 Q: I mean, are you familiar with the statutory
5 authority of The Department to take enforcement
6 action against providers?

7 A: I am familiar and I know that they have on
8 occasion done that.

9 Q: As an expert in South Carolina Certificate of
10 Need, you would be familiar with The
11 Department's power and authorities under the
12 CON Act, right?

13 A: Sure. I mean, I can't say that I can cite
14 chapter and verse of every single aspect of it,
15 but yeah, I'm familiar with it.

16 Q: Okay. And, of course, in reviewing
17 applications, The Department had the authority
18 to deny an application, is that right?

19 A: Yes.

20 Q: And then, once even after the approval of an
21 application for restoring the process, they
22 have the ability to suspend and revoke
23 licenses, don't they?

24 A: For CON projects or projects that are already
25 up and operational?

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1 Q: Both, I mean, in terms of their enforcement
2 powers, I mean, are you aware that they have
3 the power to deny, suspend and revoke licenses?

4 A: Yes.

5 Q: Okay. And, as well as access civil money
6 penalties, is that right?

7 A: They do.

8 Q: Okay. All right. And, we discussed the Health
9 Plan is planning document, is that right?

10 A: It is.

11 Q: Okay. And, it's DHEC's document, is that fair?

12 A: Yeah, I mean, they are the author of it and
13 they gather input from a lot of different
14 constituencies, but they are the final
15 determiner of what goes in the plan.

16 Q: Okay. And, certainly when we're looking to see
17 what does it mean, we're looking at what The
18 Department meant, is that fair?

19 A: Yeah. In certain circumstances, I think that's
20 fair. I mean, in other circumstances I think
21 that the language of the plan is pretty clear.
22 But, yeah, I mean, The Department is obviously
23 is charged with taking that document and
24 applying it individual CON applications.

25 Q: Sure, but where you have similar circumstances



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1 or maybe you're looking to see what the
2 legislature intended happen or not happen, that
3 doesn't apply to Health Plan document, does it?

4 A: It does not because the legislature is not
5 involved in that process.

6 Q: Okay. But, certainly The Department guided by
7 the purposes of the CON Act, is that right?

8 A: Yes.

9 Q: And what are those?

10 A: Cost containment, avoid unnecessary
11 duplication, accessibility, quality, I don't
12 think I can quote them all ---.

13 Q: Sure. It's that they're responsible for
14 guiding the establishment of health facilities
15 and services, is that right?

16 A: They are.

17 Q: And, is it fair to say that the Health Plan is
18 an important document in fulfilling that
19 responsibility?

20 A: It is. I think it provides a roadmap to, you
21 know, to the industry about how those services
22 will be reviewed and considered.

23 Q: And then, you know, of course, there's the
24 purpose of the act to ensure high quality
25 services are provided in South Carolina, right?

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1 A: Right.

2 Q: Okay. And we can agree can't we, that DHEC is
3 expected to and does interpret the Health Plan?

4 A: They do.

5 Q: Okay. And, in terms of the obligations under
6 the statutory authority with regard to the
7 Health Plan, you would agree with me that it
8 has to be published at least every other year,
9 is that right?

10 A: Right. It hasn't always happened but ---

11 Q: Right.

12 A: --- that is their obligation, yes.

13 Q: But, within the last 10, 15 years, I mean, save
14 for one plan it's been roughly every two years
15 there's an updated health plan?

16 A: I believe that's correct, yes.

17 Q: Okay. And so, the Health Plan is subject to
18 change quite frequently, is that fair?

19 A: It is, I mean, you know, and part of the
20 process is people make suggestions to DHEC
21 every time there's a new plan being developed
22 and DHEC considers those and sometimes excepts
23 them and makes modifications.

24 Q: Okay. And, certainly even with it being every
25 other year, healthcare changes very fast,



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1 doesn't it?

2 A: It can, yeah, depending on what happens at the
3 federal level in terms of regulations and so
4 forth, yeah, I mean, healthcare is constantly
5 evolving.

6 Q: Okay. So, would you agree with me that the
7 Health Plan as a planning document can not be
8 rigid and inflexible?

9 A: I mean, obviously it has to recognize the
10 reality of what's going on in the environment.

11 Q: And in terms of the information, you talked a
12 fair amount about the inventory this morning in
13 your testimony, but the inventory that's
14 contained within the Health Plan, I mean, and
15 the data, you would agree with me that really
16 the moment it's published it's already
17 outdated. Is that fair?

18 A: Sure, I mean, things are changing, I mean,
19 certainly as it relates to utilization data,
20 that utilization data is constantly changing.

21 Q: Okay. And, last year in the 2015 Plan, which
22 I think you talked about this morning, I think
23 the last published year data in there might
24 have been 2013. Is that right?

25 A: I think that's right.



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1 Q: Okay. So, certainly when it was published in
2 2015 we've already got at least one full
3 calendar year and close to two since the time
4 that document is now in effect.

5 A: Yes.

6 Q: And in talking about how, you know, there is
7 major changes in healthcare quite often, I
8 mean, we have hospitals that can close with
9 little warning. Is that right?

10 A: Sure, particularly some of these smaller, rural
11 hospitals.

12 Q: Okay. And in the last 10 years, I mean, there
13 have been several rural hospitals in South
14 Carolina that have had to close their doors,
15 haven't they?

16 A: That is true.

17 Q: I think we've got Bamberg County Memorial
18 Hospital, are you aware of that?

19 A: I am.

20 Q: And Marlboro Park?

21 A: Right.

22 Q: And then, I think the Barnwell Hospital
23 Southern Palmetto, are you familiar with one?

24 A: I am.

25 Q: Okay. And so, certainly it's not your position



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1 or opinion that the communities effected when
2 a hospital closes is required to wait for the
3 next health plans publication in order to
4 figure out if a provider can come provide
5 services to their community.

6 A: I mean, I'm not gonna give you a yes or no
7 answer to that. I think that, I mean,
8 obviously they can't wait. They have to begin
9 to take steps to try to bring services back to
10 the community but obviously that effort to
11 bring services back is still guided by the
12 Health Plan.

13 Q: Okay. But, it's not determined by an
14 inflexible plan that can't be changed but every
15 two years, right?

16 A: Well, it depends on the service I would say.

17 Q: Okay. So, if you have two hospitals in a
18 community and only one provides catheterization
19 services and that hospital closes down, the
20 other hospital's desire to establish a cath lab
21 has to wait until the next published plan
22 because of the previously existing but now
23 defunct lab?

24 A: You know, that's a legal conclusion but I would
25 think there would be an opportunity to make a

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1 compelling case that prior to filing the
2 application that this occurred and this is, you
3 know, the inventory needs to be adjusted for
4 that particular circumstance, because this
5 happened external to anything that anybody, you
6 know, in the health planning process could
7 control.

8 Q: Okay. So, what do you mean it happened
9 external to anyone in the planning process?

10 A: Well, as opposed the DHEC effecting some change
11 in the inventory, for example saying that we're
12 going to take enforcement action and close down
13 a particular lab. I mean, that's an internal
14 decision of DHEC as opposed to external market
15 forces resulting in the closure of a facility.

16 Q: So, if DHEC determined it was necessary to take
17 enforcement action against a cath lab because
18 they were using substandard quality or having
19 significant adverse outcomes repeatedly and
20 they said, in order to ensure high quality
21 services this lab, we've got to take
22 enforcement action. Your saying even that
23 circumstance, there is or is not an ability for
24 another provider to come in and say, we will
25 serve the catheterization needs of this



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1 community, just like inventory is two years
2 down the road.

3 A: Again, if that happens prior to the time an
4 application is filed, like, they come in and
5 they shut down the cath lab, in my view then
6 the inventory would be adjusted to say that,
7 that cath no longer exists.

8 Q: But you would know that inventory hadn't been
9 published again.

10 A: Right. Because that's an extraordinary
11 circumstance and I think that, you know, if
12 there was a reason to shut it down then, you
13 know, it should be public knowledge that's
14 happening and so other providers who might want
15 to provide that service could also enter the
16 fray at that point too.

17 Q: Okay. So, your opinion is based on what you
18 perceive to be a reason The Department would
19 take that action. Is that right?

20 A: Yes.

21 Q: Okay. Now, it's true though isn't it that
22 regardless of what the inventory may say in the
23 most recently published Health Plan, that
24 doesn't prevent a person from submitting an
25 application to The Department, does it?



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1 A: It does not.

2 Q: There's nothing about the inventory in the
3 Health Plan that says you can not submit an
4 application unless X, Y, or Z in the inventory
5 of need analysis.

6 A: That's true. Some states do that but South
7 Carolina is not one of them.

8 Q: And so, there's no rule that says you can not
9 submit an application until the next published
10 plan comes out when these things happen?

11 A: Sure. You can submit an application in South
12 Carolina whenever you want.

13 Q: Okay. Now, though the Health Plan is an
14 important tool in the planning process, I mean,
15 you would agree with me that's not the only
16 information that's necessary for The Department
17 to evaluate an application, is it?

18 A: No. I mean, obviously the applicant also has
19 to satisfy the other project review criteria or
20 the relevant project review criteria.

21 Q: And that information is not found within the
22 Health Plan, is it?

23 A: Some of it is and some of it's not.

24 Q: Okay. So, certainly information about
25 population statistics, incidence rates,



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1 studies, all of those things are external
2 information that applicants or effected persons
3 bring to The Department to assist in the
4 evaluation of an application?

5 A: Typically that's true.

6 Q: Now, in terms of complying with the Health
7 Plan, what is required if DHEC can't approve a
8 CON unless it complies with the Health Plan.
9 Is that right?

10 A: Right. I think there's two different words
11 that ---

12 Q: Right.

13 A: --- are used, you know, like complies and
14 consistent I think ---

15 Q: Right ---

16 A: --- are the terms ---

17 Q: --- so in the CON Act it uses the word complies
18 with the Health Plan. Is that right?

19 A: Right.

20 Q: And then, the regulation I think says
21 consistent with.

22 A: That's right.

23 Q: Is that fair?

24 A: Yes..

25 Q: And so, and same with the regulations that Mr.

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1 Thomas mentioned this morning, 801, 802, it
2 talks about consistent and in compliance.

3 A: Correct.

4 Q: But, is there any word or language that you're
5 aware of that says it's strict compliance?

6 A: I've never seen the word, strict, added to
7 that.

8 Q: Okay.

9 A: That's just been my experience that the project
10 needed to satisfy the standards of the State
11 Health Plan.

12 Q: Okay. And I think you told me in your
13 deposition that you thought compliance is
14 pretty strict, right?

15 A: Yes.

16 Q: Okay. But, you've been involved in other
17 applications haven't you where you thought that
18 The Department could act in the way consistent
19 with the Health Plan, but had flexibility,
20 right?

21 A: If you remind me, I might be able to tell you,
22 I mean, the -- I mean, often times -- and I
23 think we talked about this in my deposition,
24 for some of the standards that aren't need
25 related standards for example, if it says you



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1 need to be accredited by this particular
2 organization but you have an accreditation by
3 a similar organization, that does the same
4 thing, you know, and is recognized in the
5 industry. That might be a situation where
6 strict compliance wouldn't make any sense, you
7 know, because it's equivalent to the same
8 thing. But, as it relates to the needs
9 standards, I'm not aware of any situation where
10 The Department does not apply the needs
11 standards strictly.

12 Q: Okay. All right. And now, I think you
13 explained to me to be consistent with the
14 Health Plan meant that whether the standard
15 that the applicant indicates they're going to
16 do what the standard calls for or that the
17 conditions exist in the service area that the
18 standard calls for. Do you recall that
19 testimony?

20 A: Yes.

21 Q: And, did that comport with your opinion today
22 and what it means to be consistent?

23 A: Yes.

24 Q: So, if Roper Berkeley explained in their
25 application that the Bon Secours lab would be

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1 closed if the Berkeley lab were approved, isn't
2 that saying that the conditions that the
3 situation calls for will be met?

4 A: No.

5 Q: Okay. Well, what about where we were talking
6 about all existing labs, and if our position is
7 that lab will not be there to service the need,
8 isn't that being consistent with what the
9 Health Plan calls for?

10 A: In my view, no. It's not a future
11 consideration, it's a current consideration.
12 It's what are, you know, where are the existing
13 labs now and what are the volumes at those
14 existing labs at the time of the review. It's
15 not what will happen after the review and after
16 the decision is issued. That gives the
17 applicant the ability to, sort of, manipulate
18 the outcome of a decision. If they can say,
19 well if you approve me, I'll do X. I think
20 that creates, I think, a difficult situation
21 from the standpoint of regulation and it also
22 creates, I think, an unfair advantage for
23 certain applicants over others.

24 Q: Okay. And so, you've described in your
25 testimony I think that you believe DHEC ignored



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1 Standard 3, right?

2 A: I don't think they ignored it, I just think
3 they didn't apply it appropriately.

4 Q: Okay. Well, at your deposition you used the
5 word ignore. So, are you backing off of that
6 this afternoon?

7 A: Yeah. I think in fact what I meant to say was
8 that they ignored the existence of the Bon
9 Secours St. Francis lab.

10 Q: Okay. Because certainly you'll agree with me
11 that they did take notice of the St. Francis
12 lab, didn't they?

13 A: They did and they seemed to acknowledge that it
14 was an existing lab in the decision letter.

15 Q: And we'll talk about some of those documents,
16 but in terms of what took place here, you
17 talked a lot with Mr. Thomas about a variety of
18 communications but certainly there's nothing
19 that would support that The Department didn't
20 take notice of the St. Francis lab in
21 evaluating these applications, right?

22 A: They certainly took notice of it and they just
23 didn't -- I guess the way they ignored was in
24 applying the numerical criteria under Standard
25 3.



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1 Q: So, their interpretation and application of the
2 standard, you're calling that then ignoring the
3 standard?

4 A: Their ignoring the presence of an under
5 utilized lab.

6 Q: Okay. All right. So, let's talk about
7 Standard 3. We can look at Joint Exhibit 4.

8 A: Okay.

9 Q: I don't have the fancy numbered versions, I
10 think Ms. Isherwood does, so that's good.

11 **MS. ISHERWOOD:** JL4-046.

12 Q: 046. I would like to look at Standard 3 in the
13 Health Plan, Mr. Sullivan.

14 A: Okay. That's on 047.

15 Q: Okay. And actually Vanessa, we will go back
16 one. You were correct to start on the prior
17 page. Let's talk about 1 and 2. I mean,
18 you'll agree with me that Standards 1 and 2 are
19 not in dispute today, correct?

20 A: Correct.

21 Q: There's no challenge to, at this point, the
22 service area that was used or what the
23 utilization threshold capacity requirements are
24 for a diagnostic lab. Is that right?

25 A: That's right.



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1 Q: And so, back to Standard 1, talks about
2 capacity for the variety of labs that are
3 covered by the CON program. Is that right?

4 A: It does.

5 Q: Okay. We deal with adult diagnostic labs, then
6 you have ones that perform adult therapeutic
7 with separately we have pediatric labs. Is
8 that right?

9 A: Yes.

10 Q: But only MUSC is the only provider in the state
11 that has pediatric services. Is that right?

12 A: I seem to recall that there is another provider
13 performing pediatric cardiac cath in the state.

14 Q: Okay.

15 A: Not very many, but I recall that there were a
16 few somewhere else but I would agree with you
17 that MUSC is the only significant provider of
18 pediatric catheterization in the state.

19 Q: Then in terms of Standard 2, can you tell us
20 what is Standard 2?

21 A: This is just defining what the relevant service
22 area is for different types of cardiac cath
23 programs.

24 Q: Okay. And is it fair to say both Standard 1
25 and Standard 2 are definitional standards?

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1 They define something.

2 A: Correct.

3 Q: Number 1 defines the capacity and then 2
4 defines the service area?

5 A: I would agree with that.

6 Q: Okay. Now, in defining the service area for a
7 diagnostic lab, can you read what just that
8 first sentence is?

9 A: Sure. The service area for a diagnostic
10 catheterization laboratory as defined is all
11 facilities within 45 minutes, one-way,
12 automobile travel time.

13 Q: Okay. And, is that the standard that applied
14 to the Roper Berkeley application?

15 A: Yes.

16 Q: And, you agree with me that standard says that
17 it's defined as all facilities. Is that right?

18 A: Yes.

19 Q: And, it certainly doesn't say all existing
20 facilities, does it?

21 A: It doesn't.

22 Q: Okay. Now, let's look at Standard 3, which
23 would be Joint 4, page 47. And as promised,
24 we're certain The Court will be tired of
25 Standard 3 soon, but the language that we focus



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1 on for purposes of this dispute, of course, is
2 that all existing labs in the service area have
3 to perform. Is that right?

4 A: Yes.

5 Q: And so, you would agree with me that Standard
6 2 and Standard 3 are different in that way. Is
7 that fair? Standard 2 uses all facilities and
8 Standard 3 says all existing labs.

9 A: I would agree with that.

10 Q: Okay. And so, I believe you told me at your
11 deposition that the purpose of Standard 3 is to
12 regulate the number of cath labs to ensure
13 existing labs achieve reasonable levels of
14 utilization before the development of a new
15 lab. Does that sound right?

16 A: It does.

17 Q: Okay. And, do you continue to believe that's
18 a fair description of Standard 3?

19 A: Yes.

20 Q: And, we discussed -- you thought that
21 maintaining a historical utilization standard
22 supported quality and cost effectiveness,
23 right?

24 A: Yes.

25 Q: But, that providing less than 10 diagnostic

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1 caths a year is not supportive of quality. Is
2 that right?

3 A: I would agree with that.

4 Q: Or cost effectiveness?

5 A: I would agree with it.

6 Q: Okay. So, when we were discussing the
7 utilization at Bon Secours St. Francis, it was
8 a highly under utilized program, wasn't it?

9 A: I think by most peoples definition it would be
10 a highly under utilized program.

11 Q: And I think I have, hopefully, did the math
12 right earlier, I think it was .25 percent ---

13 A: Looked about right to me.

14 Q: --- capacity. Okay. So, if Standard 3 talks
15 about what it takes for a new lab to be formed,
16 all existing labs that we're looking at for
17 purposes of what you call numerical threshold,
18 right?

19 A: Right.

20 Q: And, the most recent year language, I mean,
21 that is whether it is the most recent publicly
22 available JAR for everyone or perhaps might
23 have some updated data from the provider that
24 typically the data that would be reviewed for
25 the most recent year, correct?



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1 A: Correct.

2 Q: But, in terms of the various definitions
3 available to us otherwise in the standard, we
4 know how a diagnostic lab is defined. Is that
5 fair?

6 A: Yes.

7 Q: It's actually in earlier in the chapter,
8 correct?

9 A: It is.

10 Q: And, we know how service area is defined for
11 this service, correct?

12 A: We do.

13 Q: But, in terms of what an existing lab is,
14 existing is not defined, is it?

15 A: It is not.

16 Q: Okay. But, we know that the plan standard
17 talks about all facilities in a service area
18 but it's only looking to existing facilities
19 for purposes of a numeric threshold, correct?

20 A: Well, I'm not sure that was an intention of the
21 sanction, but that's what the words say.

22 Q: Sure. So, if we're gonna do the plain
23 language, you'll agree with me that those are
24 two different ways of describing an area,
25 right?



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1 A: Sure.

2 Q: Okay. And, it's not clear is it, what the
3 difference is between the two, is it?

4 A: It is to me.

5 Q: That's your opinion, right?

6 A: Sure.

7 Q: But perhaps reasonable minds can differ?

8 A: That would be hard to phantom.

9 Q: Well, we'll talk about that some. So, my
10 understanding from your testimony, and it was
11 your testimony, not mine, that all and existing
12 can't be separated in your mind, is that right?

13 A: In this context, yes.

14 Q: Okay. So, all existing labs in your mind is
15 the same thing as saying all labs. Is that
16 right?

17 A: Yes.

18 Q: Okay. So if -- I believe some of the other
19 definitions you offered me at your deposition
20 for existing meant, open for business.

21 A: Right.

22 Q: Is that right. And then, you also said that it
23 would mean approved, correct?

24 A: Yeah. We had quite a discussion about that, I
25 mean, existing doesn't mean approved. I mean,



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1 approved is a different category. You know, my
2 feeling is that somehow once a project is
3 approved, it has to be given some weight in the
4 evaluation of the need for another lab.

5 Q: Uh-huh. Because what I think you actually said
6 was, in your word, that there was gap in the
7 standard there in looking at when a lab is open
8 for business and how you would deal with an
9 approved lab. Isn't that right?

10 A: Right. It's not specifically spelled out in
11 the standard.

12 Q: But, I recall your deposition, you told me that
13 there was a common understanding in health
14 planning of what an existing program was. Is
15 that right?

16 A: It is.

17 Q: And so, we're talking about existing in the
18 terms of health planning. Isn't that right?

19 A: We are.

20 Q: So, we're not necessarily talking about
21 existing in the physical sense, we're talking
22 about it as a health planning concept. Is that
23 fair?

24 A: Well, I don't think those two things are
25 different.

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1 Q: So, in your mind there is no difference between
2 the health planning concept of existing and the
3 physical existence of an item in the world.

4 A: When you use the term, an existing laboratory,
5 in my view that means one that is constructed,
6 equipped and as I said in my deposition, open
7 for business.

8 Q: Or approved.

9 A: Approved isn't existing, it's another category
10 of lab that I think has to be factored into the
11 analysis. But, I would agree with you that
12 approved is not part of existing.

13 Q: Okay. And so, as you testified there's a gap
14 in the standard.

15 A: It is in that respect.

16 Q: And is that a gap that you would expect The
17 Department to interpret and apply when dealing
18 with an application that might have an approved
19 project in consideration?

20 A: They would have to, yes.

21 Q: Okay. Through looking at Standard 2 and
22 Standard 3, we know that the Health Plan for
23 purposes of the service area defined it as all
24 facilities. In your testimony earlier this
25 morning, in fact, you described the two step



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1 process, right? I believe what you said was
2 that you first look at the service area and
3 then you look at the existing labs and the
4 utilization. Is that right?

5 A: Right.

6 Q: So, you would agree with me that there is
7 certainly as you look at that language and the
8 language of Standard 2 and Standard 3, that
9 there could be facilities included within
10 Standard 2, as all facilities, that could be
11 different than what the existing labs are for
12 purposes of Standard 3, right?

13 A: You know, it's theoretically possible, I can't
14 think of exactly how that would occur.

15 Q: And certainly it's our position that, that's
16 what happened here, right?

17 A: It appears to be but, I mean, it's -- in my
18 mind, in this particular review, there's no
19 difference between all facilities and all
20 existing facilities.

21 Q: Okay. Because the three to seven procedures a
22 year is sufficient in your mind to be open for
23 business, meeting the definition of existing.

24 A: Yeah, I mean, it's the bear minimum, but it has
25 -- Roper has kept that lab alive and that

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1 creates an issue which I think even DHEC
2 recognized in its various correspondence. You
3 know, as long as that facility continued to
4 exist that, that was going to be an issue that
5 implicated Standard 3.

6 Q: Okay. Now, you would agree with me that the
7 Health Plan though is to read where an entire
8 chapter is read together, right?

9 A: Sure.

10 Q: And so, when evaluating how to apply all of the
11 standards that are applicable to a diagnostic
12 cath laboratory, that you would be looking at
13 Standard 2 and Standard 3 at the same time,
14 correct?

15 A: Sure.

16 Q: And so, doesn't that suggest that The
17 Department can interpret that an existing lab
18 is not necessarily all the facilities in a
19 service area for purposes of evaluating
20 Standard 3?

21 A: I don't believe so, I mean, it says all
22 existing labs. It doesn't say some existing
23 labs or pick the existing labs that you would
24 like to include. I mean, it says all existing
25 labs and all existing labs means any labs that



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1 are open and serving patients.

2 Q: So, how was any lab in your definition
3 different than all facilities?

4 A: I don't see a distinction between all
5 facilities and all existing facilities.

6 Q: So, isn't it fair to say that your
7 interpretation of existing labs just renders
8 the word, existing meaningless?

9 A: No. Because, I mean, what I can't figure out
10 is what other labs would not be an existing lab
11 other than an approved lab.

12 Q: Okay. So, would you agree with me then that
13 existing lab is a provision or a portion of
14 Standard 3 that allows for interpretation?

15 A: No.

16 Q: And that's because, of course, existing labs
17 are all labs, right? So, there's no ---

18 A: It's because, existing labs are identified in
19 the Health Plan. There's an inventory that
20 shows what the existing labs are. Now, as we
21 talked about before, that inventory can change
22 based on external factors or internal factors
23 at The Department. But, at the time of this
24 review, nothing had changed with regard to the
25 Bon Secours St. Francis lab.



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1 Q: So, the example we talked about earlier where
2 two hospitals in community, only one provided
3 cath services, they shut down unexpectedly, if
4 The Department is reviewing an application from
5 the other provider to provide services and
6 establish a cath lab, is the lab at the closed
7 hospital an existing lab since it was open last
8 week and had volumes in the most recent year?

9 A: No, as I said before, I think that's a
10 situation where The Department could say, it's
11 no longer an existing lab because it is not
12 operating and it does not serve patients, and
13 it has not in the historical -- maybe not the
14 full 12 months, but in some historical period
15 prior to the filing of the application.

16 Q: So, in my cath scenario that I just gave you,
17 you'll agree that The Department in that
18 circumstance is allowed to interpret what an
19 existing lab was, right?

20 A: Only to the extent that it would not count a
21 lab that was no longer existing.

22 Q: So, the answer to my question though was, yes,
23 that you would allow The Department to
24 interpret existing lab in that scenario of a
25 closed provider in a new application, right?



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1 A: Well, I think in that case it would not be an
2 existing lab.

3 Q: Okay. One of the things you also talked about
4 this morning was, sort of, what you knew or
5 didn't know. Is that fair?

6 A: Yes.

7 Q: The public notice, and interesting actually
8 because I think what I understood from this
9 morning is different that what we talked about
10 at your deposition, so one of the first things
11 I want to do is understand that.

12 A: Sure.

13 Q: I believe you testified this morning that you
14 had no role and hadn't reviewed the East Cooper
15 application until after the decision letters
16 came out.

17 A: That's my recollection now. I mean, I can't
18 remember what we talked about in the deposition
19 but I did no analysis of the East Cooper
20 application prior to my involvement in the
21 Roper Berkeley application.

22 Q: Okay. But, do you not recall testifying that
23 you had a discussion with Mr. Thomas about the
24 East Cooper application after it was filed?

25 A: Yeah, but I did not review the application. We

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1 had a discussion. I was aware that it was
2 filed and I think I asked the question, is
3 Trident interested in that project and he said,
4 no that they're not concerned about it.

5 Q: Okay. But, obviously you had the knowledge,
6 did you not, that East Cooper filed an
7 application to add a diagnostic lab at its
8 facility in Mount Pleasant? Is that fair?

9 A: Yes.

10 Q: Okay. And, based on how you described your
11 position about Standard 3 as it relates to
12 Roper Berkeley, isn't that all the information
13 you needed to know that East Cooper didn't
14 comply with Standard 3?

15 A: Sure. I mean, I thought that East Cooper would
16 be denied.

17 Q: Yeah, but you didn't in any way suggest that
18 Trident participate in that process?

19 A: I mean, no, they did not feel because they do
20 not draw a material number of patients from
21 the Mount Pleasant area that, that would really
22 have any impact on them.

23 Q: So, in that circumstance Standard 3 in the Bon
24 Secours lab didn't matter.

25 A: Well it mattered to -- it should have mattered



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1 to DHEC, I mean, it didn't matter to Trident.

2 Q: All right. So, and you described earlier that
3 you have decades of experience in the CON
4 process and, of course, HCA is very familiar
5 with the process. How many projects would you
6 say you've assisted HCA with over the years?

7 A: In South Carolina?

8 Q: Uh-huh.

9 A: Maybe between 15 and 20.

10 Q: Okay. That's it?

11 A: In terms of CON applications?

12 Q: Uh-huh.

13 A: I mean, in terms of actually drafting CON
14 applications, that's how many. I mean, I've
15 been involved probably in another 6 or 7
16 projects where it was just in opposing an
17 applicant for various services.

18 Q: Okay. So, that first number was just
19 applications you assisted in the drafting of
20 them.

21 A: Right.

22 Q: But, certainly opposing there's a whole other
23 world of applications you've assisted with?

24 A: Sure.

25 Q: Okay. And, you're familiar with the State



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1 Register, correct?

2 A: I am.

3 Q: And, I think we talked about some of them this
4 morning, but you're aware that DHEC publishes
5 information about applications in the State
6 Register, right?

7 A: Right.

8 Q: And, that it provides information to the public
9 about applications received and being reviewed.
10 Is that fair?

11 A: That's fair.

12 Q: Are you familiar with those publications?

13 A: Yes.

14 Q: Do you review them regularly?

15 A: Yeah. Maybe not every week, but, you know,
16 certainly once a month or so I would go back
17 and look at those.

18 Q: And, they're published once a month, right?

19 A: I mean, the other thing, I mean, the DHEC
20 website, you know, also publishes information
21 about applications and where they are in the
22 review and so forth. So, I review that
23 periodically but not every week.

24 Q: But you review -- do you review the State
25 Register every month when it's published?



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1 A: I can't say every month, but I review it often.

2 Q: Okay. And, you're aware that DHEC is subject
3 to the Freedom of Information Act, right?

4 A: Yes.

5 Q: You're familiar with that process?

6 A: Generally, it's not something that I do a lot
7 of, I mean, often times when we receive
8 information under the Freedom of Information,
9 it's coming from the attorneys.

10 Q: Okay. So, the attorneys you work for would be
11 the ones that would handle submitting a FOIA
12 request?

13 A: Typically, that's right.

14 Q: Is it your understanding though that it's just
15 an email address at this point, that you send
16 a letter to an email address FOIAing a certain
17 type of information?

18 A: Yes.

19 Q: Do you think that's a very burdensome process
20 to send an email asking for documents?

21 A: If you know those documents exists it's not.

22 Q: Okay. Now, would you agree with me that filing
23 an effected person letter with The Department
24 is also a widely utilized method to get
25 information about an application?



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1 A: It is.

2 Q: Is that something you frequently do on behalf
3 of your clients?

4 A: Again, the lawyers do it most of the time and
5 on occasion I have done it.

6 Q: Have you had occasion to recommend to your
7 client that they might want to file an effected
8 person letter to get information about
9 projects?

10 A: Yes.

11 Q: Okay. But, to your recollection, you didn't
12 suggest that to Trident regarding the East
13 Cooper application?

14 A: They had made the determination already that
15 they were not interested in that application
16 before I ever got involved.

17 Q: Okay. So, it's your understanding that they
18 were aware of the application and had already
19 made whatever strategic decision they were
20 going to make about opposing that application.

21 A: That's my understanding.

22 Q: Okay. Now, in terms of the effected person
23 letter, you can actually file an effected
24 person letter without being prepared to
25 identify your opposition. Is that right?



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1 A: Yes.

2 Q: So, you can receive the information just as an
3 effected person and not otherwise engage in
4 opposition with The Department over the
5 project. Is that right?

6 A: That's true.

7 Q: Okay. And have you done that on behalf of your
8 clients or in conjunction with your clients
9 interest before?

10 A: I mean, I told you I've been involved in
11 situations where that happened. I don't know
12 that I actually filed the effected person
13 letter, but I've been involved in situations
14 where that happened.

15 Q: Okay. And it sounds like, and from what I
16 understood, your descriptions about your
17 relationship with HCA and Trident, that's
18 something typically the client or the law firm
19 would handle. Is that right?

20 A: Typically the law firm.

21 Q: Okay. All right. Now, if an effected person
22 believes that an application is not approvable
23 or should not be approved, wouldn't you agree
24 that the burden is on the effected person to
25 tell The Department why they believe that to be



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1 the case?

2 A: Sure. I mean, I think that if you want, you
3 know, if you believe that the application
4 should be denied, you should establish what the
5 bases are of your belief.

6 Q: And, in fact, doesn't the CON Act and the
7 regulations say that information about your
8 opposition has to be provided to The
9 Department?

10 A: If you want to subsequently appeal the project.

11 Q: And, as an effected person opposing a project,
12 you have the opportunity to submit materials
13 outlining your opposition, right?

14 A: You do.

15 Q: And, you did so in this case, right?

16 A: I did.

17 Q: Okay. But, you didn't do that in the East
18 Cooper application?

19 A: Did not.

20 Q: And, you can request a project review meeting,
21 an applicant, I mean, an effected person can
22 request a project review. Is that right?

23 A: That's true.

24 Q: As well as you have the right to request a
25 public hearing. Is that right?



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1 A: That's true.

2 Q: Are you aware of the timing requirements to
3 request a public hearing?

4 A: I haven't looked at that in a while, I mean,
5 it's I think, fairly quickly after the
6 application has been deemed complete.

7 Q: Is it your understanding that's, kind of, set
8 in statute what the timeline is that you need
9 to submit that request?

10 A: Yes.

11 Q: Okay. And, you'd agree with me that those
12 rights to those opportunities we just, kind of,
13 walked through that they're available to any
14 person interested in the application. Is that
15 right?

16 A: That's true.

17 Q: And, The Department doesn't refuse and turn
18 away information from effected persons during
19 the review process and say, we are not going to
20 take information, do they?

21 A: I'm not aware that they've ever done that.

22 Q: Okay. Now, in going through the timeline, we
23 have the East Cooper application as Joint 2.
24 And, I do know that Mr. Thomas talked to you
25 about this, this morning but one of the things



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1 I thought it would be helpful because we talk
2 about so many dates, I thought it might be
3 useful to, kind of, lay that out so that it's
4 clear when and how things happened. In looking
5 at the East Cooper application, now the file
6 date in terms of when it was received at The
7 Department, that was February 4th ---

8 A: Correct.

9 Q: --- 2016. Is that right?

10 A: Yes.

11 Q: Now, are you aware though of other notification
12 that applicants have to provide to the public
13 related to their plans to file a CON?

14 A: Sure. They have to file a public notice in a
15 local newspaper for a period of five days, four
16 or five days prior to filing the application.

17 Q: Okay. And, I think we have it at for the first
18 date, Respondent's Exhibit 9. Are you familiar
19 with seeing these attachments in CON
20 applications?

21 (Respondent's Exhibit Number 9 was admitted as an
22 exhibit.)

23 A: I am.

24 Q: And, I think maybe, I'm not sure if you talked
25 about this one, but certainly I think you



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1 talked about the one in the Roper Berkeley
2 application.

3 A: We did.

4 Q: Okay. But, you'll agree with me that in the
5 East Cooper application, that the public notice
6 required by the CON process was published on
7 the 1st date of January 27, 2016.

8 A: Yes.

9 Q: Is that right? Okay. And, that's, of course,
10 in the Post and Courier and then that
11 information is included in the application. Is
12 that right?

13 A: It is.

14 Q: So, then the next date we talked about, of
15 course, was the February 4th filing date that
16 we just reviewed. Then, the next significant,
17 kind of, notice we know about is the State
18 Register publication. Is that right?

19 A: Yes.

20 Q: And, I think that's in the exhibit Joint 2 at
21 101 but my notes show that, that was published
22 as accepted on February 26th, 2016. So,
23 there's the notice of establishment of
24 diagnostic cardiac cath services. Do you see
25 that?



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1 A: Right. That's when it was accepted for review.

2 Q: For review, that's right. And, it says right
3 there that -- well, and it might be the prior
4 case, but it says it's effecting Charleston
5 County, right?

6 A: Right.

7 Q: And, that East Cooper's filing a CON to
8 establish diagnostic cath services at a project
9 cost of close to \$450,000.00 dollars, right?

10 A: Yes.

11 Q: Okay. Now, and I believe, and we talked about
12 this at your deposition, that same State
13 Register references an application -- there's
14 a appeal and a relocate of the McLeod Loris
15 cardiac cath lab to McLeod Seacoast.

16 A: Yes.

17 Q: Do you recall that application?

18 A: I do.

19 Q: And, I think in your deposition you told me you
20 were assisting Grand Strand with opposing that
21 project. Is that right?

22 A: That's correct.

23 Q: So, this State Register publication date would
24 have been one that certainly in your work for
25 HCA for Grand Strand you would have been



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1 looking for the publication of that
2 information. Is that right?

3 A: Yes. I mean, I was aware of the East Cooper in
4 filing an application.

5 Q: Okay. And so, you were aware it was for a
6 diagnostic cath in Charleston County, right?

7 A: I was.

8 Q: Okay. Now, in looking at the application we
9 know, I think it's Joint 2-112, that it was
10 published again in the State Register as deemed
11 complete on March 25th. Is that right?

12 A: Yes.

13 Q: Okay. And, in looking at the public notices
14 and you talked about this more, so I don't
15 think we have to go too far into it, but the
16 Roper Berkeley CON application was published
17 May 27th, 2016, right?

18 A: Yes.

19 Q: But, the application itself was filed May 9th?

20 A: Yes.

21 Q: And then, I think you and Mr. Thomas did talk
22 earlier today about Roper Berkeley's Post and
23 Courier publication in late April, right?

24 A: Yes.

25 Q: Okay. So, certainly as we're going through



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1 this timeline it starts back on January 27,
2 2016, that we have a potential applicant
3 planning to address diagnostic cath services in
4 the service area that Trident sits in, right?

5 A: Yes.

6 Q: And then, that continues and even all the way
7 through late April and then May, we have
8 another application that, you know, late April,
9 of course, that application is published in the
10 Post and Courier, right?

11 A: Yes.

12 Q: And then, we've got the State Register in late
13 May, correct?

14 A: Yes.

15 Q: Okay. And so, you would agree with me that
16 Trident did make the decision to participate in
17 the Roper Berkeley application, right?

18 A: Yes.

19 Q: And, they filed an effected person letter and
20 stated opposition?

21 A: They did.

22 Q: But they chose not to do that with East Cooper,
23 right?

24 A: Correct.

25 Q: Now, Trident didn't file their effected person



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1 letter though until June 24, 2016. Is that
2 right?

3 A: Correct.

4 Q: Okay. And I think it's at Joint 1-187. I know
5 Mr. Thomas has talked to you about it this
6 morning. But, in your discussions this
7 morning, you several times referenced that what
8 you didn't know and what persons couldn't know
9 about this proposal from Roper St. Francis,
10 right?

11 A: Based on what we received after publishing the
12 effected party letter.

13 Q: Okay. But, you would agree with me that all of
14 these notifications that we've just discussed
15 were notifications to the public, correct?

16 A: Sure.

17 Q: And so, the information that would at least
18 trigger notice and then whatever conduct they
19 may want to take, that happened as early as
20 January 27th, right?

21 A: Well, if they were interested in the East
22 Cooper application, which they weren't, but I
23 think in terms of Trident, their interest
24 started with the publication of the notice in
25 the newspaper about Roper Berkeley's intent to

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1 seek approval for a cath lab.

2 Q: But, you would agree with me that the East
3 Cooper application on its face is addressing
4 diagnostic cath services in Trident's service
5 area, right?

6 A: Yes.

7 Q: Okay.

8 A: I mean, in the 45 minute service area, but not
9 in -- you know, there's two different service
10 areas. There's the 45 minute drive time
11 service area and then there's the real service
12 area in terms of where a particular provider
13 draws its patients from.

14 Q: Right. And, I thought I recall from some of
15 your earlier opposition that you challenged the
16 fact that Roper Berkeley considered the service
17 area for purposes of drawing your patients
18 different from the drive time service area. Do
19 you recall that?

20 A: I don't but, I mean, I may have. I don't
21 recall, I'm sorry.

22 Q: Okay. But, you would agree with me for
23 purposes of Standard 2 in diagnostic cath
24 services as defined in the 2015 Health Plan
25 that Trident Medical Center was within the



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1 service area applicable to East Cooper's
2 application.

3 A: Sure. But, I mean, the interest of an
4 individual party in getting involved in a case
5 is much more driven by where they actually draw
6 patients from rather than an arbitrary drive
7 time service area.

8 Q: Okay. So, it's much more to do with whether
9 they believe that it would be suitable for that
10 person to have the services or not, right?

11 A: In whether they're going to be adversely
12 impacted potentially by the approval of the
13 project.

14 Q: And so, it's not necessarily whether or not The
15 Department acted within their authority in
16 approving the application?

17 A: I mean, if the front end -- we don't know how
18 The Department's going to act. You know, all
19 we know is what the applicant is proposing.
20 And so, I think every hospital provider in the
21 state does the same thing. They look at
22 projects and decide is this something that's
23 going to effect us. If it's not, then we're
24 probably not going to get involved in it. If
25 it is, then we probably will get involved in

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1 it.

2 Q: And, you would agree with me though that at
3 times when they make a decision not to get
4 involved, then they're not going to have access
5 to information that they may otherwise find
6 relevant about their service area. Is that
7 fair?

8 A: I guess it's possible.

9 Q: Okay. So, when we were looking though at the
10 substance of what East Cooper had to say, I
11 mean, you would agree with me, and I think you
12 looked at it this morning, that in no uncertain
13 terms, East Cooper took the position that the
14 Bon Secours St. Francis diagnostic lab was
15 nonoperational, right?

16 A: Right.

17 Q: Let's take a look at Joint 2, page 23. I think
18 actually if you look at the top of 24.

19 A: Okay.

20 Q: East Cooper says specifically, Bon Secours St.
21 Francis Hospital's catheterization laboratory
22 is considered nonoperational and requires a CON
23 application if it is to be included in the
24 inventory. Is that right?

25 A: That's what it says.



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1 Q: And so, that was there on the face of the CON
2 application, right?

3 A: It was. That was the applicant's opinion.

4 Q: Sure. And that was the opinion and position
5 they were taking with The Department, right?

6 A: It was.

7 Q: Okay. And so, is it fair to say that it was in
8 their estimation that The Department had the
9 ability to interpret and apply the standards in
10 a way that would do as they suggest should be
11 done?

12 A: It appears from that statement, yes that they
13 were asking The Department to ignore this
14 particular lab in its evaluation under criteria
15 3.

16 Q: That's not what it says though, right? It
17 doesn't say ignore the lab, they actually say
18 the lab doesn't exist because it needs a CON to
19 operate, right?

20 A: Yeah. They're saying it shouldn't be in the
21 inventory.

22 Q: Okay. They're saying it doesn't exist. Is
23 that a fair reading of that?

24 **MR. THOMAS:** Objection, Your Honor. I think
25 document speaks for itself and I'm looking at

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1 now and I don't see the word exist anywhere in
2 there. So, I'm thinking she's badgering the
3 witness a little bit.

4 **MS. HOLLINGSWORTH:** Mr. Sullivan, I'm sorry for
5 badgering. We can move on. I apologize, Your
6 Honor.

7 **THE COURT:** Mr. Thomas, I'm gonna sustain your
8 objection only to the extent that the question
9 has been asked answered.

10 **MS. HOLLINGSWORTH:** That's fine, Your Honor. Thank
11 you very much.

12 **Q:** In looking though at the application, Mr.
13 Sullivan, you would agree that an applicant can
14 take any position with regard to how the
15 standard should be applied to their
16 application, right?

17 **A:** Sure, and they often do.

18 **Q:** And, it's up to The Department to review all of
19 the information that comes before it and make
20 a decision based on what is and is not within
21 their authority in the record before it, right?

22 **A:** Yes.

23 **Q:** Okay. And, in this case, of course, we know
24 what East Cooper's position is. Were you aware
25 -- and again, this is where I'm a little



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1 confused from your deposition, now I thought
2 you had testified that you had read the East
3 Cooper application prior to the decision. Are
4 you saying now you haven't?

5 A: If I said that in my deposition, I think that
6 was a misstatement because I have no
7 recollection of having reviewed that
8 application prior to the decision on the Roper
9 Berkeley project.

10 Q: So, it's your testimony today that the decision
11 came down and then you reviewed the
12 application.

13 A: Yes. As we got ready for this hearing, that's
14 when I reviewed it.

15 Q: Okay. All right. So, as you sit here today
16 though, you're aware that the East Cooper
17 application was in conjunction with MUSC. Is
18 that fair?

19 A: Yeah. I mean, I knew generally 'cause I do
20 some work for East Cooper that they have a
21 strong relationship with MUSC, generally.

22 Q: Okay. And so, in fact, when you look at their
23 projections with regard to utilization, they're
24 actually using and assuming shifts in MUSC's
25 diagnostic cath patients. Is that right?

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1 A: Yes.

2 Q: And, we can look at Joint 2 of 28. And so, we
3 have the exhibits up there looking at
4 utilization in passing and I think the
5 applicant says that ECMC is developing the
6 proposed project with support from MUSC
7 Division of Cardiology. Do you see that?

8 A: I do.

9 Q: And that their using MUSC's service area
10 definition. Is that right?

11 A: Yes.

12 Q: Okay. And it is expected that a portion of the
13 diagnostic catheterization patients at MUSC
14 will shift to ECMC, right?

15 A: That's what it says.

16 Q: Okay. Now, you talked about communication
17 between The Department and Roper St. Francis
18 this morning and, sort of, made several
19 discussions and characterizations of us, I
20 think, let's look at that email particularly.
21 I mean, I know that you and Mr. Thomas talked
22 about it a good bit. Let's look at Respondent
23 2, please.

24 (Respondent's Exhibit Number 2 was admitted as an
25 exhibit.)



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1 A: Okay.

2 Q: Okay. And, you're familiar with this email,
3 right?

4 A: Yes.

5 Q: And, I think we talked about it -- you talked
6 about it a good bit this morning, but the date
7 of the email is April 14th, right?

8 A: That's right.

9 Q: And, you agree with me that was roughly two
10 months after East Cooper's application was
11 filed?

12 A: Yes.

13 Q: Okay. And so, at the top of the very opening
14 paragraph, it's really the start of the second
15 paragraph is where they start talking about it,
16 but do you see where it says, I also want to
17 take a moment to update you on our intentions.

18 A: Yes.

19 Q: Okay. If you could, take a minute a read that
20 to yourself.

21 A: I see that.

22 Q: And so, would you agree with me that, again
23 reading -- of course, Mr. Eubank will here to
24 talk to us about what he meant, you and I, we
25 can't tell you what he meant by anything but



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1 certainly reading what he wrote, would you
2 agree with me that The Department is telling
3 Roper St. Francis, their intentions regarding
4 the under utilized cath lab at St. Francis
5 Xavier. Is that right?

6 A: Yes.

7 Q: Okay. And, looking at this discussion then
8 that he engages in his email, it says, let's
9 see down a good bit. Do you see that sentence
10 in order to provide? It's about the last two
11 sentences.

12 A: I see. I see.

13 Q: Okay. If you could, read that into the record.

14 A: In order to provide for the public benefit in
15 the Roper St. Francis service area with regard
16 to appropriate access to high quality cardiac
17 catheterization, we believe enforcement action
18 against St. Francis Xavier may be necessary.
19 You want me to keep going?

20 Q: Yes. You can finish.

21 A: Enforcement actions pursuant to St. Francis
22 Xavier's failure to obtain a new CON in 2010
23 for its cath lab are provided for in Sections
24 44-7-320 through 44-7-340 of the Code of Laws
25 of South Carolina as Amended.



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1 Q: Okay. And so, did that, in terms of the
2 statutory references, does that refresh your
3 recollection a little bit about the enforcement
4 powers The Department has?

5 A: Yes.

6 Q: Okay. You'd agree with me that this is formal
7 notice of an intent to pursue enforcement
8 against the St. Francis Xavier lab, right?

9 A: I don't know if it's formal notice, it's an
10 email. I mean, typically those things go out,
11 you know, in a letter form and sometimes under,
12 you know, with a registered mail and so forth.
13 It certainly telling them that their
14 contemplating taking this step. It's their
15 intention to move forward. I don't think
16 they've taken any official action at this
17 point. Just that, that would be the next step
18 in the process.

19 Q: Okay. You'd agree with me that it says in the
20 next paragraph, should you wish to receive a
21 formal letter to this effect, we'll be happy to
22 provide one, right?

23 A: Right.

24 Q: So, would you agree with me that this was the
25 notice to St. Francis Xavier about an intention

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1 to pursue enforcement?

2 A: It would certainly letting the know that they
3 were serious about the issue and that they were
4 planning to take enforcement action, but I'm
5 not sure from a legal standpoint whether it's
6 actually a legal notice of that, you know,
7 attempt.

8 Q: Sure. And I'm not asking you about a legal
9 notice, I'm just trying to determine whether
10 you would agree that, that was notice to Roper
11 St. Francis of an intention to pursue
12 enforcement action.

13 A: Sure.

14 Q: And he actually says, and again we're using the
15 exact words, as you know The Department takes
16 any possible enforcement action very seriously
17 and holds out this action as quote, last resort
18 when interacting with a regulated community.
19 I would ask you provide to The Department, on
20 behalf of your client, a proposed solution to
21 this continuing issue in the hopes of avoiding
22 any such action. Is that right?

23 A: Yes.

24 Q: Okay. And I believe, let's see, now, I think
25 you've testified earlier that it was the East



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1 Cooper application that, sort of, brought this
2 issue to certainly at least, Mr. Eubank's
3 attention. Is that right?

4 A: That certainly seemed to be the case.

5 Q: Okay. You weren't aware of any other
6 communication group discussions prior to the
7 date of the East Cooper application, right?

8 A: I was not.

9 Q: And as I understand, kind of, what happened
10 next, we have in Joint 2 at page 069 -- you
11 looked at this, this morning with Mr. Thomas,
12 but this is a letter dated April 20th, 2016.
13 I'll give you a minute to get there.

14 A: Yes, I'm there.

15 Q: Okay. And, of course, you'll acknowledge the
16 document that you're in right now is the East
17 Cooper CON application, right?

18 A: It is.

19 Q: And so, this letter that we're discussing is in
20 the East Cooper application file, right?

21 A: It is.

22 Q: Okay. And you would agree with me that
23 effected persons who notified The Department of
24 their interest in the application would receive
25 a copy of this communication, correct?



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1 A: They should.

2 Q: Are you aware of an example of someone who
3 didn't get a copy of this communication that
4 filed as an effected person?

5 A: No. I'm just aware of other situations where
6 we were an effected person and we did not get
7 certain letters that were in the file and we
8 had to subsequently go back and request them.

9 Q: And were you given them when you requested them
10 of The Department?

11 A: Yes.

12 Q: Okay. Now, the letter dated April 20th, would
13 you agree with me that this is the response of
14 Roper St. Francis to The Department's April
15 14th email?

16 A: Well, it certainly contains elements of that
17 but the main purpose of this letter, as I
18 thought, was to become an effected person with
19 respect to the East Cooper application. So, I
20 mean, in here they talk about what their
21 intentions are about dealing with the St.
22 Francis cath lab. But, it's not a direct
23 response, I mean, a direct response would be,
24 we got your email, we understand you want us to
25 come up with a solution, here's the solution.



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1 This is embedded in an effected person request.

2 Q: Take a look back at Petitioner's 5 that you
3 reviewed with Mr. Thomas this morning.

4 A: Okay.

5 Q: P5-01.

6 A: Okay.

7 Q: And this is the email you addressed with Mr.
8 Thomas this morning, correct?

9 A: It is.

10 Q: And you acknowledged that the attachment
11 actually on this email is this letter in the
12 CON application to be April 20th, 2016 letter?

13 A: I believe I'm in the wrong document, sorry.

14 Q: We can look at Petitioner's 5.

15 A: Yeah, I think the email is the response to Mr.
16 Eubank's April 14th email. I think this letter
17 is -- I mean, this email is saying look at this
18 letter and this is what we're proposing to do,
19 so ---

20 Q: Right.

21 A: I mean, it's a -- in my view, it's, kind of, a
22 strange way to respond to somebody telling you
23 their gonna take enforcement action is to embed
24 your response in a letter requesting effected
25 person status, but in any event, ultimately Mr.



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1 Barbier pointed Mr. Eubank to that letter and
2 said this is what our response is.

3 Q: They embedded their response in a publicly
4 available document, right?

5 A: They did.

6 Q: So, the proposal that Roper Berkeley and Bon
7 Secours St. Francis offered to The Department
8 is laid out specifically in the East Cooper CON
9 application, right?

10 A: What they say their going to do, yes. I mean,
11 but it doesn't indicate, I mean, other than
12 saying that there were discussions, I wasn't
13 aware that they were -- discussions to me means
14 telephone conversations and person meetings.
15 I was not aware that there was a paper trail,
16 if you will, in terms of emails back and forth
17 between the two parties.

18 Q: Because you didn't ask The Department for it,
19 correct?

20 A: Because we were not involved in this particular
21 project.

22 Q: Because Trident decided not to obtain
23 information in the file by filing an effected
24 person letter, right?

25 A: Sure. I mean, does an existing provider have



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1 to oppose or become an effected person on every
2 application in order to make sure that they
3 have all the information that's out there? I
4 mean, it seems like if somebody files an
5 application that you're an effected person,
6 that somehow if there's relevant information
7 that ought to be provided in the file.

8 Q: Right. It's in the file but the way you get a
9 copy of the file is you just write a letter to
10 The Department saying, I'm an effected person,
11 please give me a copy of the file, right?

12 A: Right.

13 Q: Okay.

14 A: But this wasn't in the Roper Berkeley file,
15 this was in the East Cooper file.

16 Q: Because this predated the Roper Berkeley
17 application, correct?

18 A: It did.

19 Q: Okay. So, this April 20th letter predates the
20 Roper Berkeley CON application, correct?

21 A: It does by a couple of weeks.

22 Q: But, it certainly describes in detail what the
23 plan is and actually addresses prior
24 communications with The Department surrounding
25 the issue, right?

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1 A: It does.

2 Q: Okay. In looking at the letter that's actually
3 in the CON file for East Cooper, you would
4 agree with me that at the top of the second
5 page of the letter Mr. Barbier writes, however
6 as we discussed on March 10th and again on
7 April 19th, 2016, Roper St. Francis has made
8 the decision to open a new diagnostic
9 catheterization laboratory at its hospital that
10 is currently under development in Berkeley
11 County. Is that right?

12 A: Yes.

13 Q: Okay. So, you would agree with me that any
14 effected person interested in diagnostic cath
15 services in this service area, when they had a
16 copy of this letter, could have reached out to
17 The Department and asked about the content of
18 those discussions that are referenced in this
19 letter, right?

20 A: I think they have the right to do that, yes.

21 Q: And on May 6th, 2016, I think is the date that
22 the application was probably signed, so May
23 9th, 2016 is when the application was filed by
24 Roper Berkeley?

25 A: That's correct.



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1 Q: Okay. And you would agree with me that on the
2 face of the CON application filed by Roper
3 Berkeley, it discloses the plan suggested by
4 Roper Berkeley that upon approval of the lab at
5 Roper Berkeley, the lab at Bon Secours St.
6 Francis Xavier would close, right?

7 A: Correct.

8 Q: We look at Joint 1, page 6, would you agree
9 with me that -- I'll give you a chance to get
10 there.

11 A: I'm there.

12 Q: And is the B2 response portion of the
13 application?

14 A: It is.

15 Q: And, is B2 just one of the types questions to
16 be answered so to speak of a CON applicant?

17 A: It is.

18 Q: And is this, sort of, the first opportunity
19 with text to describe the project that's
20 represented by the application?

21 A: It is.

22 Q: Okay. Would you agree with me that the bottom
23 of the second paragraph it says, upon DHEC
24 approval of the application, the diagnostic
25 catheterization laboratory, at its sister

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1 hospital, Bon Secours St. Francis Xavier
2 Hospital, will close and the room will continue
3 to be used a special lab?

4 A: It does.

5 Q: Again on .1B17

6 A: Okay.

7 Q: This is the B11 section of the application,
8 correct?

9 A: It is.

10 Q: Is this the section that you're most frequently
11 involved in as a planner?

12 A: It is. This is what I call the need section.

13 Q: Okay. And what do you typically include when
14 you're drafting applications in the B11
15 response?

16 A: I would typically start with the project
17 description. Maybe not an exhaustive one but
18 generally describing the project and the
19 objectives of the project but then, go through
20 the analysis of population, existing providers,
21 historical utilization, use rates, projected
22 utilization, that sort of thing.

23 Q: Okay. Do you consider this section of the
24 application to be an important one?

25 A: Sure. I think it's arguably the most important

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1 part of the application.

2 Q: Okay. Would you agree with me in the project
3 overview -- well, let me ask you this, would
4 you agree that this B11 is drafted very similar
5 to the way you just described you would do it?

6 A: Sure.

7 Q: In terms of the project overview, you would
8 agree with me again this section of the
9 application addresses the Bon Secours St.
10 Francis Xavier laboratory, right?

11 A: It does.

12 Q: And would you agree with me that on page 24 of
13 the application, that Roper Berkeley identifies
14 and provides context to the, sort of, what
15 their belief is in terms of the utilization of
16 the Bon Secours St. Francis laboratory? If you
17 look in the middle paragraph.

18 A: Yeah, they do describe their explanation of why
19 the lab is under utilized.

20 Q: And for the record it says, as a result of the
21 close proximity between Roper Hospital and Bon
22 Secours St. Francis Xavier Hospital and
23 physician referral practices and tendencies,
24 the Bon Secours St. Francis Xavier Hospital lab
25 has been largely under utilized. Is that



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1 right?

2 A: That's what it says.

3 Q: And then it proceeds with the proposal that the
4 laboratory would be closed following approval
5 of the proposed Roper St. Francis Hospital
6 Berkeley lab, right?

7 A: Yes.

8 Q: Okay. Now, we've walked through the timeline
9 going back as early as January of 2016 and,
10 sort of, the goings on in this service area as
11 it relate to diagnostic cardiac
12 catheterization, right?

13 A: Right.

14 Q: Okay. And would you agree with me that by late
15 April Trident knew and could have known that
16 Roper Berkeley was planning to file for
17 diagnostic cath services at its Berkeley
18 campus?

19 A: Yes.

20 Q: Okay. And, of course, the information
21 available to Trident included not only the
22 Roper Berkeley publication in the newspaper,
23 but was also available had they been an
24 effected person in the East Cooper application.
25 Is that right?



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1 A: There would have been some information about
2 that project in the East Cooper application.

3 Q: You would agree with me though, that April 20th
4 letter provides the detail of what the proposal
5 would be, right?

6 A: Right. I don't know that it's significantly
7 different from what's in the application but
8 that did provide the same type of discussion.

9 Q: Right. So, the information both in the April
10 20th letter is consistent with what the
11 proposal submitted actually was, right?

12 A: Yes.

13 Q: Okay. And so, would you agree with me though
14 that an effected person reading the letter in
15 the East Cooper application, that it would
16 address other discussions that took place
17 between Roper St. Francis and The Department?

18 A: Well, they talked about two specific
19 discussions that were had, but that's all it
20 said, that there was no context or no
21 documentation provided about those discussions.
22 To me when I read it I thought, this is what
23 Roper has decided to do. I had no idea that
24 DHEC had been discussing this with them and I
25 know you don't like the word agreement, but at

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1 least had acknowledged this seemed to be an
2 acceptable solution.

3 Q: Well, and we'll talk about that 'cause you
4 understand I think and you acknowledge, there
5 was no agreement between Roper St. Francis and
6 The Department about the outcome of the
7 application in advance, was there?

8 A: Well, there was no document that says this is
9 an agreement, but there were statements in
10 various emails from DHEC that says, this looks
11 good, you know, I think it's a win-win and
12 things of that nature, you know, that led me to
13 believe that DHEC was on board with, if Roper
14 agreed to do this, they were likely to get
15 their application approved.

16 Q: If the application was approvable, right?

17 A: Yeah. I mean, obviously they have to actually
18 review the application, yes.

19 Q: Okay. And I think we've talked about this
20 before but you were never engaged prior to any
21 of these applications being filed to evaluate
22 cardiac catheterization services at
23 Summerville, right?

24 A: I was not.

25 Q: And, what reason were you provided from Trident

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1 or their attorney about why they chose not to
2 oppose East Cooper?

3 **MR. THOMAS:** Objection, Your Honor. She's asking
4 for attorney-client privilege information, so
5 he can answer the question as to my client, but
6 not to anything we've discussed.

7 **MS. HOLLINGSWORTH:** Your Honor, there's no attorney-
8 client privilege from Mr. Thomas to Mr.
9 Sullivan.

10 **MR. THOMAS:** Well, in that aspect, Your Honor, with
11 Summerville, he's just a consulting expert.
12 He's not been named as a testifying expert in
13 any type of case, so in that context, he's
14 consulting only and I certainly do have
15 privilege with him as a consulting expert. He
16 hasn't been disclosed -- that's not even a case
17 right now, Your Honor.

18 **MS. HOLLINGSWORTH:** Your Honor, if I ---

19 **THE COURT:** Go ahead, please.

20 **MS. HOLLINGSWORTH:** If I may, the question was about
21 the decision not to oppose East Cooper, Your
22 Honor, it wasn't about Summerville Medical
23 Center. I asked the question of what reason
24 was he given why Trident chose not to oppose
25 East Cooper.

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1 MR. THOMAS: Oh, I apologize, I thought I heard
2 something in there about Summerville, just
3 preceding that.

4 THE COURT: I think that Summerville was mentioned
5 but I appreciate your clarifying the question.

6 MS. HOLLINGSWORTH: Thank you, Your Honor.

7 THE COURT: Restate the question ---

8 MS. HOLLINGSWORTH: Yes.

9 THE COURT: --- to the witness.

10 Q: I asked what reason were you given from Trident
11 or its attorney about why they chose not to
12 oppose the East Cooper application?

13 A: Because that was the area that East Cooper
14 would serve, being Mount Pleasant. It was not
15 what I'll call the core service area of Trident
16 and its cardiac cath program. Unlike the Roper
17 Berkeley where Berkeley County is part of the
18 primary service area for Trident.

19 Q: Okay. But so, in terms of making it an
20 independent decision not to file an effected
21 person letter to get a copy of the record, what
22 would be the reason not to take that step given
23 that the service area where Trident sits is
24 certainly a topic of discussion in reviewing
25 the applications? Isn't that fair?



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- 1 A: I mean, it might have been in some academic
2 interest, but, you know, at this point we had
3 no idea that Roper was planning to file an
4 application. All we knew was that East Cooper
5 had filed an application and Trident decided
6 that really wasn't something that was to
7 greatly impact them. And so, there was really
8 no reason to be an effected person to get the
9 file. I mean, I don't routinely get
10 applications that I don't have a direct
11 interest in.
- 12 Q: Okay. But you would agree with me that Trident
13 had the right to so file and chose not to,
14 right?
- 15 A: Yes.
- 16 Q: Okay. And, of course, nothing prevented them
17 from filing a letter and obtaining a copy of
18 the record, right?
- 19 A: No.
- 20 Q: Okay. Let's look at the effected person and
21 opposition letter in the Roper Berkeley
22 application.
- 23 A: Okay.
- 24 Q: I believe it's at page 187 of Joint 1.
- 25 A: Okay.

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1 Q: Do you know why this letter wasn't filed with
2 The Department until June 24th?

3 A: I do not.

4 Q: Did you draft or participate in the drafting of
5 this letter?

6 A: Not to my recollection.

7 Q: Okay. And, if we could look down to the bottom
8 half of what's, sort of, the main paragraph.
9 Where it says, more specifically, if you could
10 read that for the record.

11 A: More specifically, Trident opposes the above
12 referenced CON application because, among other
13 reasons, the project does not comport with the
14 purposes of the CON Act. The project does not
15 comply with the standards set forth in the 2015
16 South Carolina Health Plan. The project is not
17 needed. The project will have an adverse
18 impact on Trident's cardiac catheterization
19 program and it's open heart program. The
20 project does not increase accessability to
21 catheterization services and the project will
22 not contain costs.

23 Q: And so, you would agree with me that in order
24 to be an effected person in the Roper Berkeley
25 application, Trident simply submitted a letter



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1 about a paragraph in length and that was
2 sufficient to become a participant in the
3 process. Is that right?

4 A: Yes.

5 Q: Okay. And now, that description of the
6 opposition in this letter, you didn't mention
7 the Bon Secours St. Francis lab, did you? Is
8 that referenced here at all?

9 A: No, it's not.

10 Q: Is Standard 3 specifically identified in here
11 at all?

12 A: No, just the Health Plan generally.

13 Q: Okay. So, based on this information is there
14 any notice or explanation to The Department
15 about Trident's position with regard to
16 Standard 3 and Bon Secours St. Francis' lab?

17 A: Not at this point.

18 Q: Okay. In looking at the re line, there's no
19 reference is there to a transfer of a service,
20 right?

21 A: There's not.

22 Q: And in fact, if you look at, kind of, flip back
23 to page 6 of the description of the project, it
24 says in the second paragraph does it not, if
25 approved this project will initiate diagnostic



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1 cardiac catheterization service in conjunction
2 with the hospital's planned opening in 2019?

3 A: Yes.

4 Q: So, you would agree with me wouldn't you that
5 no where in the CON application submitted by
6 the applicant is there a reference to the
7 transfer of an existing service?

8 A: There is not.

9 Q: Okay. So, on June 24th, 2016, when Trident
10 submits this letter, Trident does not appear to
11 be under the impression that it's a transfer
12 application, are they?

13 A: To my knowledge at this point, I don't know
14 that we had fully reviewed the application and,
15 sort of, fleshed out what we thought the issues
16 were with the application, other than, you
17 know, we knew that the project wasn't needed in
18 Berkeley County and we didn't believe that it
19 was consistent because of past review of the
20 State Health Plan. We were aware that there
21 was an under utilized provider in the service
22 area. So, to my knowledge that was the extent
23 of the analysis that was done at that point.

24 Q: But, to address this issue that has come up
25 about whether it was a transfer of service,



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1 there's nothing submitted in the application by
2 the applicant that states or even indicates
3 that it's a transfer. Is that fair?

4 A: It is, and in fact, you know, I only addressed
5 those standards because I couldn't figure out
6 what this project was.

7 Q: Okay.

8 A: And it appeared to be, I guess, somewhat
9 unorthodox form of transfer because the closure
10 of one lab is dependent on the approval of
11 another lab. I mean, that typically what
12 happens in a transfer project. But, I would
13 agree with you there's not a mention of that
14 and Roper Berkeley did not address the transfer
15 provisions in its applications.

16 Q: I mean, your confusion aside, Roper Berkeley
17 doesn't anywhere in their application describe
18 this as a transfer does it?

19 A: It does not.

20 Q: And, they only address the standards applicable
21 to a new service, right?

22 A: That is correct.

23 Q: Okay. Now, in this letter from Trident to The
24 Department, June 24th, 2016 at Joint 1-187,
25 isn't this the letter in which Trident would

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1 have requested a public hearing had they wanted
2 one?

3 A: Yes.

4 Q: Okay. So, again to the extent that Trident
5 believed they were entitled or should request
6 a public hearing, it was this letter and the
7 timeline for this letter that they needed to do
8 that. Is that right?

9 A: That's my understanding.

10 Q: Okay. Now, your July 21st opposition letter on
11 page 191 on 1.

12 A: Okay.

13 Q: And we do not have to spend time disagreeing
14 about the variety of disputes you raised
15 because we really are focused on Standard 3.
16 Is that right?

17 A: That's right.

18 Q: Okay. And so, what we're talking about with
19 regard to Standard 3 is whether or not the
20 application satisfied Standard 3 in order to be
21 consistent with or in compliance with the
22 Health Plan. Is that fair?

23 A: That's fair.

24 Q: Okay. And, of course, knowing that some things
25 are undefined, is there a definition of what it



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1 means to satisfied the standard?

2 A: I've not seen that.

3 Q: Okay. And as we've, kind of, talked about
4 there's no definitional guidance for what it is
5 to be consistent with the Health Plan, right?

6 A: Not that I'm aware of.

7 Q: Same with compliance with the Health Plan?

8 A: Yes.

9 Q: And what we talked about earlier is your view
10 on that depends much on the type of standard or
11 criteria that you're evaluating in certain
12 circumstances. Is that fair?

13 A: Yeah. I mean, I think there are certain
14 objective standards and there's other standards
15 that are more subjective and I think, you know,
16 as it relates to the objective standards, I
17 don't think that's a case by case analysis. I
18 mean, I think there's a, yeah, there's a common
19 way of applying those standards but

20 Q: Okay.. Well, you talked about Standard 3 on
21 page 5 of your letter, it's Joint 1 at 194.
22 The top part of the next page.

23 A: Yes.

24 Q: But, you don't specifically make any mention to
25 the Bon Secours St. Francis lab as being



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1 existing and preventing the satisfaction of
2 Standard 3 by Roper Berkeley, right?

3 A: I didn't single that out, I mean, obviously
4 it's a lab that's operating below 500.

5 Q: You would agree with me that your challenge, at
6 least in this letter with regard to Standard 3,
7 has to do with Roper Berkeley's use of
8 equivalents for purposes of the 500 numeric
9 number verses procedures. Is that right?

10 A: Right. And also, that all existing labs were
11 not above 500.

12 Q: But, other than, sort of, that paragraph we
13 don't otherwise go into any detail about a
14 proposal or Bon Secours, right?

15 A: Right. Because at that point, I did not see
16 the email string between Roper and The
17 Department. I understand that there had been
18 this give and take discussion going on over a
19 period of a few weeks about how to deal with
20 this particular lab. I thought Roper had come
21 up with this idea that DHEC was just gonna
22 evaluate that along with everything else in its
23 application. I didn't know that they had any
24 prior understanding that DHEC was on board with
25 this. Had I known all that, I would have



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1 addressed that in much more detail.

2 Q: Well, let's talk about that because that
3 certainly became, kind of, get back into, back
4 and forth, 'cause I'm only aware of the one
5 email of the notice and then the email with the
6 April 20th letter. Let's talk about what you
7 do say to The Department. You would agree with
8 me, you knew at the time you drafted this
9 letter that Roper St. Francis Berkeley proposed
10 to close the Bon Secours St. Francis lab upon
11 approval of this application.

12 A: I do know.

13 Q: There's nothing about that proposal that you
14 didn't have access to from the moment the
15 filed, correct?

16 A: That's true.

17 Q: In fact, you would have known about it from the
18 East Cooper application had you read it when it
19 was filed, right?

20 A: True.

21 Q: Okay. So, looking at the first paragraph of
22 your letter to The Department on July 21, 2016,
23 at Joint 1-190, if you would, read the last
24 sentence of your opening paragraph to Mr.
25 Eubank.



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1 A: The application also proposes to close the
2 existing diagnostic cardiac cath program at Bon
3 Secours St. Francis Hospital, which is of
4 little consequence given this program has
5 purposely only performed a handful of
6 diagnostic catheterization procedures over the
7 past several years.

8 Q: Other than the information about the
9 enforcement plan of The Department, there's
10 nothing else in the email correspondence
11 between The Department and Roper St. Francis
12 that's not part of what you see right here,
13 correct? A proposal to close Bon Secours St.
14 Francis upon approval of Roper Berkeley, right?

15 A: I disagree with that.

16 Q: Okay.

17 A: I think there was extensive discussion in the
18 emails. Apparently there were some face to
19 face meetings too back in March, I think was it
20 was March 10th and March -- some other date in
21 March where Mr. Barbier referred to these
22 discussions in his letter where they were
23 specifically focusing on ways to deal with the
24 Roper, I'm sorry, the St. Francis lab in
25 conjunction with criteria of Standard 3. All



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1 I knew was that Roper had talked to The
2 Department. They thought that, we're going to
3 shut down this lab and that'll make everything
4 okay because a low volume lab will be taken out
5 of the inventory. I thought -- that's why I
6 addressed the transfer standards 'cause I
7 thought they were trying to do some sort of
8 quasi-transfer without really calling it a
9 transfer. And, it just didn't make sense to me
10 in the context that it was presented in the
11 application.

12 Q: Okay. But, looking at your opposition letter,
13 this is the opening paragraph. This is not in
14 the transfer section of your letter, right?

15 A: It's not.

16 Q: It's not in the section dealing with new
17 services, right?

18 A: Right.

19 Q: And you tell The Department that the proposal
20 to close the existing diagnostic cardiac cath
21 lab at Bon Secours is of little consequence,
22 right?

23 A: Right. In terms of supporting the approval of
24 a lab at Berkeley.

25 Q: Okay. And, certainly your words to The

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1 Department, what you told them is it was of
2 little consequence, right?

3 A: Right. As it related to this particular
4 project because closing a lab that has not been
5 highly utilized does not establish the need for
6 a completely different part of the service area
7 for another lab.

8 Q: Okay. And, certainly you would agree with me
9 that in the application -- we walked through
10 this in your deposition, we can do this again,
11 but the application contained all the
12 information about the historical and projected
13 utilization for the Berkeley County lab,
14 correct?

15 A: It did.

16 Q: Okay. And so, you knew at the time that you
17 submitted this that the applicant was
18 submitting it as a new service, right?

19 A: I knew that's what they were saying, but as I
20 said, because of the, sort of, unusual nature
21 of what they were proposing it appeared to be
22 a transfer.

23 Q: So, you felt the need to address both ways in
24 which Roper Berkeley could seek to get a lab,
25 right?



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1 A: Correct.

2 Q: Okay. But, certainly your opening paragraph
3 doesn't address either one of those. You are
4 just actually addressing the proposal of the
5 applicant to close the St. Francis lab in
6 conjunction with this application, right?

7 A: Right, which also relates to those other
8 considerations because it appeared to me that
9 Roper Berkeley was, or that Roper itself, was
10 saying that by closing this lab, we, kind of,
11 clear up any problems in terms of lack of need
12 for another cath lab and I don't believe the
13 proposal to close the St. Francis lab does
14 anything to document the need for a cath within
15 Berkeley County.

16 Q: Okay. You're aware though, aren't you, of the
17 existing utilization for those providers that
18 were in the market, MUSC, Trident and Roper
19 Downtown, right?

20 A: Right.

21 Q: And you're aware that they were all over 80
22 percent in some and in excess of 90 percent,
23 correct?

24 A: Sure. I mean, Roper's was, sort of, a self-
25 inflicted problem because they had another lab



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1 they could have utilized but they didn't.

2 Q: Sure. And so, to the extent that they wanted
3 those services and wanted to put them where
4 they would be used, that would be the
5 application to place a lab at Berkeley, right?

6 A: Well, in my view, they had a diagnostic lab.
7 It wasn't being utilized and then they were
8 proposing to do the same thing in a place
9 that's farther away than St. Francis was and
10 yet, they expected their cardiologists to drive
11 all the way to Goose Creek when they wouldn't
12 drive West of the Ashley.

13 Q: Right. They're proposing to put it further
14 away because they thought that was a better
15 distribution of services within their system,
16 right?

17 A: That what they said.

18 Q: Okay. And certainly the cardiologists that
19 filed letters of support with The Department
20 affirmed their intentions with regard to the
21 use of the lab, right?

22 A: They did. I assume they did the same thing
23 when the St. Francis lab was approved.

24 Q: Okay. Did you review that application to see
25 if they were the same physicians back in the



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1 '80s?

2 A: I'm sure they're not the same physicians.

3 Q: Okay. So, in looking at page 9 of your letter,
4 Joint 1, 198, you agree with me that what you
5 told The Department as this time was there's
6 currently no legitimate cath lab program at Bon
7 Secours St. Francis Hospital, nor has there
8 been since 2007 when Roper St. Francis made the
9 decision to discontinue services at the lab,
10 right?

11 A: Right. Again, in the context of the transfer
12 standards.

13 Q: Sure. That's certainly what you told The
14 Department, right?

15 A: Yes.

16 Q: And this is your opposition to the project
17 provided to The Department for their
18 consideration and evaluation of the
19 application, right?

20 A: It is.

21 Q: And, looking at the next paragraph, next page,
22 you told The Department, The Department should
23 not recognize Bon Secours St. Francis
24 Hospital's diagnostic catheterization program
25 as an existing service merely because only



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1 three diagnostic caths are performed on average
2 which is not indicative of an actual program,
3 right?

4 A: Right. In terms of transferring a program from
5 one hospital to the other, there wasn't a real,
6 full-time program operating at Bon Secours St.
7 Francis.

8 Q: But it's your language, you use the word
9 existing here, right?

10 A: I did. And maybe that was inartful, but what
11 I meant was this is not a program that warrants
12 transfer to another provider because it has not
13 been providing a meaningful level of volume
14 historically.

15 Q: Because you did not believe The Department
16 should consider it to be existing, right?

17 A: For purposes of transfer, yes. Obviously with
18 respect to Standard 3, I did include it as an
19 existing provider and looked at its
20 utilization.

21 Q: So, you're taking the position that The
22 Department should consider it not existing for
23 the transfer standard, but existing for new
24 services standard?

25 A: I've taken the position that it shouldn't be

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1 considered a program that's eligible to be
2 transferred and I think Mr. Eubank agreed with
3 that in one of his emails.

4 Q: And we'll look at his emails, but I just want
5 to make sure I understand that your position
6 before The Department in opposition to the
7 project, you're taking the position here today
8 that what you meant is that it was not existing
9 for purposes of transfer but it was existing
10 for purposes of the new service.

11 A: No. That's not the position I'm taking.

12 Q: Okay.

13 A: The word existing here was probably inartfully
14 used. What I was saying is, this is not a
15 full-time operational program that would
16 warrant transfer to another provider. Really
17 the applicant has to start all over again with
18 a new program.

19 Q: So, instead of the word existing, what if we
20 used your words, no legitimate cath lab
21 program.

22 A: Yeah, something like that would be ---

23 Q: So, your just trying to move around from the
24 word existing because of Standard 3 or ...

25 A: I was not thinking of Standard 3 as I wrote

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1 this particular section of the letter.

2 Q: Okay.

3 A: Obviously in Standard 3, it was clear that I
4 included that particular facility as an
5 existing facility.

6 Q: So then, as I understand your opinion, you
7 believe The Department had the ability, for
8 purposes of evaluating a transfer application,
9 to not consider Bon Secours to be an existing
10 lab that could be transferred. So, for that
11 criteria, you thought they had the ability to
12 interpret it that way?

13 A: Not that it -- not an existing lab, but an
14 appropriate lab to be transferred.

15 Q: But, you certainly said existing here, right?

16 A: I did. And as I said, that was an inartful use
17 of that word, existing.

18 Q: No matter what word you use though, if you're
19 telling The Department, you can't let them
20 transfer it,---

21 A: Right.

22 Q: --- because you take the position it's an
23 increase in the service area, right?

24 A: I take the position that it's not a program
25 that should be eligible to be transferred,



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1 particularly read in context with the next
2 standard, which is the facility receiving the
3 services must demonstrate the need for
4 additional capacity based on both historical
5 and projected utilization patterns. And I
6 don't believe that the historical utilization
7 of that lab established that as an appropriate
8 lab to be transferred to the proposed Roper
9 Berkeley facility.

10 Q: But, we talked about serving at your
11 deposition, you'll agree with me, that if the
12 lab is existing, then it could have been
13 transferred under the service exception
14 criteria, right?

15 A: Yeah. And I thought that's in fact what Roper
16 might try to argue and so, yeah, I mean, they
17 can argue that. They could say, yeah, we
18 believe that this meets the transfer criteria.
19 What I was saying is, I don't believe it meets
20 the transfer criteria.

21 Q: But, as you sit here today with the application
22 that is in front of you, knowing as you do that
23 your opinion is that it's an existing lab, you
24 would agree with me that it was subject and it
25 could have been approved as a transfer under



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1 the 2015 Health Plan, right?

2 A: I believe that it was an existing lab, but I
3 don't believe it could have been approved under
4 the transfer provisions for other reasons.

5 Q: Okay. Now, should we talk about the deposition
6 testimony. We walked through each of the
7 criteria. Should we do that again because ---

8 A: Sure.

9 Q: --- in your deposition you agreed that it met
10 all of the criteria for transfer, right?

11 A: If I said that, I misspoke because it clearly
12 does not meet the criteria for transfer. It
13 does not meet the criteria in terms of
14 demonstrated need and it didn't meet the
15 criteria in terms of the impact on existing
16 providers and I thought I said that in my
17 deposition.

18 Q: Okay. Because we walked through the B11 and
19 talked about the utilization, both historical
20 and projected, within the application for the
21 Berkeley project, right?

22 A: I did, we did talk about that. And, I said I
23 didn't agree with those projections but that
24 wasn't the subject of this particular hearing.

25 Q: Right. But, you agree with me that the



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1 information was there contained in the
2 application for The Department, right?

3 A: It was. I disagreed that it was accurately
4 presented but it was in the application.

5 Q: Let's look at the communication with The
6 Department. Perhaps we need to have an
7 understanding of what it says. I think,
8 Respondent 2.

9 A: Okay.

10 Q: So, this is the email that you've referred to
11 a few time, right?

12 A: I do.

13 Q: Your conversations that might have gone back
14 and forth between The Department and Roper St.
15 Francis, would you agree with me that to the
16 extent that The Department was evaluating or
17 investigating the circumstances behind the St.
18 Francis lab, would you agree with me that this
19 letter is the culmination of what they've
20 concluded?

21 A: It does appear to be.

22 Q: I mean, you would agree with me that, I want to
23 take a moment to update you on our intentions
24 regarding the under utilized lab, right?

25 A: Right.

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1 Q: Okay. And certainly, I think we've discussed,
2 this was the notice to Roper St. Francis
3 regarding an intention to pursue enforcement,
4 right?

5 A: We did.

6 Q: And it was notice that they were happy to
7 provide in a more formal letter, right?

8 A: Right.

9 Q: But otherwise, would you agree with me that
10 this email was meant to serve as the
11 notification of that plan?

12 A: Well, I think there's a distinction between
13 notice of our intention to pursue it as oppose
14 to actually pursing enforcement action. I
15 don't think they were ready to take the step of
16 pursuing enforcement action because they were
17 giving Roper the opportunity to respond to
18 this.

19 Q: They're giving Roper the opportunity to
20 respond, correct but, you would agree with me
21 that they had 10 days to do so or The
22 Department was going to proceed, correct?

23 A: That's what they said.

24 Q: Okay. You and Mr. Thomas discussed this
25 language in the middle of the page.



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1 MS. HOLLINGSWORTH: That middle section, that large
2 middle paragraph, Vanessa.

3 Q: The further one, you discussed this, this
4 morning, right?

5 A: I did.

6 Q: And I'll read it into the record so that we
7 can, to use Mr. Thomas' word, unpack it a
8 little bit. It says, furthermore, the
9 continued operation of the St. Francis Xavier
10 cath lab at such low volumes prohibits the
11 entry of any additional cath labs in the
12 service area as outlined in S.C. Health Plan
13 standards for such services. And as I
14 understand your opinion, this is the sentence
15 that you believe addresses Standard 3. Is that
16 right?

17 A: Yes.

18 Q: Okay. You would agree with me that it says,
19 the continued operation of the lab.

20 A: Right. But it's operating now. It's an
21 existing program. And, the continued
22 operation, meaning into the foreseeable future
23 would present a bar to other providers coming
24 into the market.

25 Q: Right. So, you would agree with me then, The



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1 Department's position is that lab can not
2 continue at those volumes, right?

3 A: That's what they're here.

4 Q: Okay. And would you agree with me that this
5 language, the language of continued operation
6 is a forward looking discussion?

7 A: I think it is in this sense in that, you guys
8 need to do something to fix this but it doesn't
9 relate specifically to how you should apply
10 Standard 3 of the State Health Plan.

11 Q: Right, 'cause Standard 3 is not actually
12 mentioned here, right?

13 A: It's not. But, that's the only reason why the
14 low utilization would prevent other providers
15 from coming into the service area.

16 Q: If it were permitted to continue like that, is
17 that right?

18 A: Yes.

19 Q: Okay. And so, you would agree with me though
20 that this sentence specifically uses the words,
21 the continued operation at this volume, right?

22 A: It does.

23 Q: Okay. And then, the next sentence the other
24 portion of it that you and Mr. Thomas talked
25 about this morning reads, the low volume would

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1 also likely prohibit the transfer of that cath
2 from one of the operators facilities to another
3 under the service transfer criteria which
4 requires adequate historic utilization figures.
5 Is that right?

6 A: Yes.

7 Q: And have you seen any information that would
8 lead you to believe that, at this point, The
9 Department had information about the historic
10 utilization of the Roper Downtown labs?

11 A: Well, they certainly had the information in the
12 State Health Plan and the JARs.

13 Q: Sure. But, I mean, in discussions with Roper
14 St. Francis, had you seen any discussion of the
15 Roper Downtown utilization?

16 A: I did not.

17 Q: And you would agree with me that certainly in
18 the context of the underlying Berkeley Hospital
19 case, that if the hospital being constructed
20 now, that the historical utilization for
21 purposes of establishing those beds in Berkeley
22 County was the experience of Roper Downtown,
23 right?

24 A: That was certainly one factor.

25 Q: Okay. And so, within the affiliated systems,

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1 you would agree with me that Mount Pleasant
2 Hospital, Bon Secours St. Francis Hospital and
3 Roper Downtown are all within the system?

4 A: Yes.

5 Q: Okay. As I understood -- well, let me ask you
6 this, okay, The Department asked Roper St.
7 Francis for a proposed solution. Is that
8 right?

9 A: Yes.

10 Q: Okay. And it actually says, in hopes of
11 avoiding such action, right?

12 A: Right.

13 Q: And they give a deadline for Roper St. Francis
14 to respond.

15 A: They did.

16 Q: Is there anything in this letter that says, we
17 will accept whatever proposal you give us?

18 A: No.

19 Q: Okay. And have you seen any email or letter or
20 even the testimony of Mr. Eubank that The
21 Department planned in advance to accept
22 whatever proposal Roper St. Francis brought to
23 them?

24 A: I did not see those words.

25 Q: Okay. And I believe you agreed with me in your



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1 deposition, there was no agreement to approve
2 the application in advance, was there?

3 A: Right. There just seemed to be an
4 understanding, let's say that, between DHEC and
5 Roper that if they did what they proposed to
6 do, which was conditions of closure of the cath
7 lab on the approval of the Roper Berkeley
8 project, that, that seemed to be a good
9 solution or win-win situation or whatever the
10 words were that were used.

11 Q: But, you would agree with me at all times that
12 it has had the language, if approved, right?

13 A: I mean, it said, if approved, it just said that
14 we think, -- again, obviously, DHEC has to
15 review the application. At this point, there
16 was no application before DHEC. It didn't say,
17 we will approve any application you would file.
18 It does not say that.

19 Q: Right. And Roper Berkeley's application
20 doesn't say when approved, we will close the
21 Bon Secours St. Francis lab, right?

22 A: It does not. It says, if approved.

23 Q: So, the application says, if approved, right?

24 A: Correct.

25 Q: So, as I understand your opinion then, you

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1 require that -- if I understand your opinion,
2 it was required that the lab be closed first,
3 then a subsequent publishing of the inventory
4 and then applications submitted for the
5 division of those services. Is that right?

6 A: Yes. I think that would be the appropriate way
7 to do it. I mean, particularly since this was
8 being done through a discussion among the
9 parties and if this was a bar, which I agree
10 with Mr. Eubank that it was a bar to existing,
11 I mean, for new programs to come into the
12 service area, then it seems like the
13 appropriate way to do this would be to say,
14 Roper, we're not gonna give you the option of
15 providing us a conditional guarantee that
16 you're gonna close this program. We want you
17 to close the program. And, if you agree to do
18 that, then we will consider that in the next
19 state health planning process, which was gonna
20 take place fairly shortly after that and then
21 we will reflect that in to the next State
22 Health Plan. That would have been a way and
23 then all parties would have had access to that
24 information and could have applied on equal
25 footing.



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1 Q: So, you take the position that Roper St.
2 Francis was required to consent to the
3 enforcement action against the lab.

4 A: Well, I mean, Roper didn't take that position.
5 They disagreed with Mr. Eubank's position.

6 Q: Right.

7 A: And so, what Roper tried to do was to have
8 their cake and eat it too, saying well, we'll
9 close it but only if you give us another one.
10 And to me, that is not what Standard 3 in the
11 State Health Plan talks about. It talks about,
12 let's look at the actual utilization of actual
13 labs that are in the marketplace and how well
14 those are utilized. Not that there's gonna be
15 -- we can ignore this one. You agree to shut
16 it down and then we'll approve you to build
17 another one. I mean, that's not what I would
18 consider good health planning.

19 Q: Well, I thought you agreed with me earlier that
20 they didn't ignore it, right? They did address
21 the Bon Secours St. Francis lab.

22 A: Yeah. I said that they ignored it in the
23 calculation of whether or not existing
24 providers satisfied Standard 3.

25 Q: You testified at your deposition that existing

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1 meant all labs that are out in the community,
2 either approved or existing, that would be
3 serving the need that a new provider would be
4 seeking to serve. Do you remember that?

5 A: I do. And I remember clarifying that later on
6 and saying that, obviously approved is
7 different from existing and we talked about
8 this gap, you know, in the standards that we
9 talked about later in my deposition. What I
10 was saying was is that all labs have to be
11 considered, if they're approved or if they're
12 operational in serving patients.

13 Q: Sure. But, your testimony in your deposition
14 was that it would be the labs that would be
15 serving the need, you would agree with me that
16 Bon Secours St. Francis was never going to be
17 serving the needs that Roper Berkeley was
18 applying to serve, right?

19 A: It could be. If Roper took aggressive actions
20 to get cardiologists out to Bon Secours St.
21 Francis campus and utilize an existing resource
22 that was already in place. Sure, that could
23 have served a need.

24 Q: My question to you was, using your definition
25 that it was a lab that would be serving the



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1 need that a new provider would be seeking to
2 serve, Bon Secours St. Francis's lab would
3 never be serving the need that Roper Berkeley
4 was seeking to serve because they were never
5 going to exist at the same time, right?

6 A: Well, they were never going to exist at the
7 same time under the proposal that Roper St.
8 Francis made but that's different from the
9 application of standards.

10 Q: But, your definition of existing contemplates
11 who will be providing services for the need
12 that the applicant wants to provide and in that
13 definition, that's not Bon Secours St. Francis,
14 right?

15 A: No. My definition isn't who will be providing
16 services needed, it's who is serving the need.
17 It's a current thing. Present tense, I guess,
18 would be the correct term.

19 Q: So, your -- and we're happy to pull it out, try
20 one more time, make sure you'll agree with me
21 that your definition was the only logical way
22 to apply this would be to look all of the labs
23 that are out in the community, either approved
24 or existing, that would be serving the need
25 that a new provider would be seeking to serve,

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1 right.

2 A: Yeah. And maybe, if I said would be, I meant
3 that they are existing and they are currently
4 operational.

5 Q: Because to the extent the existing looks at
6 something that's going to continue to be, in
7 order to determine what someone else wants to
8 do, Bon Secours St. Francis was not going to
9 continue to be, right?

10 A: Well, they were going to continue to be unless
11 they got CON approval.

12 Q: Well, I mean, certainly from the context of
13 what the application proposed, what Roper
14 Berkeley was asking to do was not the same
15 thing as Bon Secours would be doing at the same
16 time, right?

17 A: It wasn't and that's irrelevant, I think, to
18 the review of the application under Standard 3.

19 Q: As you've determine existing for purposes of
20 trial, right?

21 A: Yes.

22 Q: So, if the usual and customary meaning of
23 existing was continued to be, will you agree
24 with me that under the proposal made by Roper
25 St. Francis Berkeley, that the Bon Secours St.



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