

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

SC Court of Appeals

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.

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January 15, 2020
Columbia, South Carolina

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1 Francis lab was not going to continue to be?

2 A: I disagree that the definition is will continue
3 to be. I think, the definition is continues to
4 be or continue to be. Not will continue to be,
5 because, I mean, I think, we would probably
6 agree that I'm existing today, that I'm a ---

7 Q: In a physical sense, right? There you are.

8 A: But, if I drop dead tomorrow, I would not
9 continue to be but at this point in time, I am
10 existing and that's the point in time that The
11 Department was reviewing this application. Bon
12 Secours St. Francis was an existing lab. It
13 continued to be up until that point in time,
14 all the way through the decision. It only
15 ceased to be after the decision and that was a
16 different set of facts that the decision was
17 based on.

18 Q: Sure. But, to the extent that the standard is
19 a planning standard and if we -- and you don't
20 have to agree with the definition, I'm just
21 asking your opinion, if the definition is, to
22 continue to be, would you agree with me that
23 the proposal in the application, Bon Secours
24 St. Francis was not going to continue to be in
25 evaluating the utilization threshold for



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1 purposes of Roper Berkeley?

2 A: I would agree with you that it would not
3 continue to be a facility in the future if it
4 were closed, but Standard 3 says to look at the
5 historical utilization of existing providers.
6 And that's the providers who existed at that
7 point in time, not what's gonna happen at some
8 distance date.

9 Q: And we don't know what existing labs means, but
10 we know it's not all facilities, right?

11 A: Well, we've already been around that tree a few
12 times.

13 Q: You agree with me?

14 A: I don't.

15 Q: Okay. Well, all facilities is the language in
16 Standard 2, right.

17 A: And in this case, I don't believe there's any
18 distinction between all facilities and all
19 existing facilities.

20 Q: For purposes of this case, that's your opinion.

21 A: For purposes of my reading of the South
22 Carolina Health Plan.

23 Q: Okay. But, in the example of two hospitals,
24 one provides caths, shuts down, the next day
25 someone wants to come in and do, you give



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1 greater flexibility in the standard in that
2 circumstance, right?

3 A: Only in the sense that it's not an applicant
4 putting a contingency on an approval that
5 basically eliminates an existing provider from
6 the inventory and says, ignore what's the plain
7 fact that there's a provider out there that has
8 almost no utilization. And, that's relevant to
9 the review of the application under Standard 3.

10 Q: And so, it's relevant under Standard 3 but in
11 your opposition letter your opinion was it's
12 not relevant from a health planning point under
13 the transfer, correct?

14 A: That's right.

15 Q: Okay. All right. And, you're not aware of any
16 prior interpretations of Standard 3, right?

17 A: I am not.

18 Q: Other than the East Cooper, of course, decision
19 is consistent, right?

20 A: Well, they were done simultaneously so, yes.

21 Q: So, certainly had The Department evaluated what
22 an existing lab meant for purposes of Standard
23 3 was applied the same in East Cooper and Roper
24 Berkeley?

25 A: It was.



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1 Q: Okay. And, you would agree with me -- I think
2 you looked at the 2008, 2009 Health Plan, would
3 you agree with me that, in fact, as recently as
4 the 2010, 2011 Health Plan that it was an
5 aggregate utilization for Standard 3?

6 A: It was.

7 Q: So, really there had been only one Health Plan
8 prior to this one that had this particular
9 standard to look at the procedures for existing
10 labs, right?

11 A: Right. Though the language at the beginning of
12 the standard was the same in the '15 plan as
13 well, just in those earlier plans.

14 Q: But in the earlier plan, it was looking at
15 aggregate, correct?

16 A: It was.

17 Q: Okay. So, to the extent you had an outlier lab
18 that didn't necessarily impact threshold based
19 on the capacity and experience of the other
20 labs, right?

21 A: It pulled down the average, but in and of
22 itself it wasn't a bar to approval.

23 Q: Okay. Let's look at the decision letter.
24 Well, actually before we do that, let's follow
25 up on something you talked with Mr. Thomas



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1 about, Joint 1, page 30.

2 A: Okay.

3 Q: That bottom paragraph, we read the first
4 sentence but we didn't read the second sentence
5 into the record so for completeness we should
6 do that.

7 A: Okay. As the result, all labs which will exist
8 following the approval of this project are
9 currently operating well above 500 diagnostic
10 equivalents per lab and meet the utilization
11 requirements of the standard.

12 Q: So, would you agree with me that it was
13 certainly in Roper Berkeley and their planners
14 position that in considering Standard 3 and
15 existing labs, that The Department had the
16 ability to determine based on the fact that St.
17 Francis's lab would close, that the existing
18 labs and their utilization would be everyone
19 else?

20 A: That's their argument.

21 Q: That's only the position that Roper Berkeley
22 took, correct?

23 A: Correct.

24 Q: And, as you said, applicants can take positions
25 with The Department, right?



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1 A: They do.

2 Q: And that's actually a different position than
3 East Cooper took. Is that right?

4 A: Yeah. Because, I think, East Cooper at that
5 point had no knowledge of any plans to close
6 the St. Francis lab.

7 Q: So, East Cooper took the position that they
8 just, they couldn't operate at all and they
9 needed a CON to do anything, right?

10 A: That's what they said.

11 Q: So, we have an applicant and their planner in
12 the East Cooper application had one
13 interpretation and, of course, ours is slightly
14 different, right?

15 A: Correct.

16 Q: And then, your interpretation of it is
17 different from that. Is that right?

18 A: That's correct.

19 Q: Okay. And all of that information was before
20 The Department, was it not?

21 A: It was.

22 Q: Okay. Let's take a look at the decision
23 letter. It starts on page 206 of Joint 1. And
24 let me ask you this first, at the time of this
25 application process, how many labs were there



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1 in the applicable service area?

2 A: Let me go back to -- there were 12.

3 Q: 12 labs?

4 A: Yes.

5 Q: Okay. Now, I think your testimony this morning
6 with Mr. Thomas on direct, in discussing the
7 decision letter, you stated that there was no
8 reference to the Bon Secours St. Francis lab as
9 not existing. Do you remember that?

10 A: I do.

11 Q: Okay. If you would, read for us the community
12 documentation paragraph at the bottom of 207.

13 A: The whole thing?

14 Q: Yes.

15 A: Okay.

16 Q: Just that paragraph.

17 A: While the planning area for diagnostic
18 catheterization services is defined as an area
19 within a 45 minute, one-way drive from the
20 applicant's facility, the applicant further
21 considers it's service area to include Berkeley
22 County as well as parts of Dorchester,
23 Charleston and Colleton counties. Within the
24 planning area, there are a total of 11 existing
25 catheterization labs, which are open and able



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1 to perform the services contemplated by the
2 applicant's project, with the notable exception
3 discussed previously, all labs within the
4 planning area operate between 79 percent and
5 nearly 94 percent capacity.

6 Q: So, would you agree with me then that this
7 paragraph, if fact, does address the Bon
8 Secours St. Francis lab is not an existing
9 catheterization lab?

10 A: Well, it doesn't say that directly, I mean, if
11 you assume that the difference between 12 and
12 11 is the Bon Secours lab, I guess you could
13 make that inference.

14 Q: Do you think it's a reasonable inference?

15 A: I suppose, yes.

16 Q: You talked briefly with Mr. Thomas about
17 Standard 4 and the projections of the
18 applicant. Is that right?

19 A: Yeah. I mean, not specifically about the
20 applicant's projections, just that he was
21 asking me a hypothetical about projecting for
22 500, someone projected 484 or something like
23 that.

24 Q: Sure. You would agree with me that Roper
25 Berkeley's application complied with Standard

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1 4, right?

2 A: They do project -- again, I don't want to get
3 into the merits of the projection, but on the
4 face of it, they project more than 500 cardiac
5 cath procedures. I have a problem with the way
6 that they projected it. I don't personally
7 believe they're consistent with Standard 4, but
8 that's not the position my, you know, that this
9 case is postured on.

10 Q: Right. Because you understand the factual
11 stipulations, right?

12 A: I do. I'm just saying my personal opinion is
13 that they didn't comply with Standard 4 but I
14 understand that's not an issue in this case.

15 Q: Okay. Then you understand for purposes of the
16 hearing, certainly Trident is not challenging
17 Standard 4, right?

18 A: I do understand that.

19 Q: Let me ask you, you did discuss that 2010
20 communications between East Cooper and The
21 Department. Do you recall that?

22 A: I do.

23 Q: And I think there once again, in the East
24 Cooper CON application, lots and lots of
25 information in this document. We'll look at



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1 the effected person letter filed by Roper St.
2 Francis and it's found in the East Cooper's CON
3 application. I don't know what number these
4 would be. It's Joint 2 ...

5 **MR. THOMAS:** 69 and 70.

6 Q: 69 and 70, thank you.

7 A: Okay. I'm there.

8 Q: Okay. If you could, there's an exhibit to the
9 letter. Is that right?

10 A: That's right. There's several things attached
11 to it.

12 Q: And does this exhibit contain those
13 communications that you were addressing earlier
14 about the 2010 conversations between East
15 Cooper and DHEC about the Bon Secours lab?

16 A: Yes.

17 Q: Okay. And I think, you know, accurately Mr.
18 Thomas directed you ultimately though to the
19 letter of Ms. Brandt. Is that right?

20 A: Yes.

21 Q: It's dated May 27th, 2010. You would agree
22 with me that this letter is The Department's
23 response to the discussions that started in the
24 email communication. Is that right?

25 A: It does appear to be. There were several



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1 emails between the East Cooper COO and Mr.
2 Shelton to start with and then, I think, Ms.
3 Brandt addresses in her letter, I guess, what
4 she views as The Department's official response
5 to this request.

6 Q: Because if go a few pages forward, it's the CON
7 basis, 359, but it states that email that had
8 been discussed, that Mr. Shelton writes, is
9 dated May 6th, 2010. Is that right?

10 A: That's right.

11 Q: No wonder, we've, kind of, talked about with
12 his opinion on the ability to close the lab and
13 remove it from the inventory. Is that right?

14 A: That's right.

15 Q: Do you agree with me at the bottom of this
16 email it says, this is a question we are going
17 to have to discuss internally, so I'll have to
18 get back to you with a response, right?

19 A: Right.

20 Q: Okay. And so, certainly at this time, May
21 27th, 2010, the letter from Ms. Brandt, what
22 was her position with The Department.

23 A: That The Department had no mechanism to close
24 ---

25 Q: Oh, I'm sorry, that was poorly asked. What was



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1 her role with The Department?

2 A: Oh, she was ---

3 Q: What title did she hold.

4 A: I mean, her title was Chief Bureau of Health
5 Facilities and Services Development but she was
6 effectively the Director of the CON program.

7 Q: Okay. So, was she senior to Mr. Shelton?

8 A: She was.

9 Q: Okay. And would you agree with me that her
10 letter in response, May 27th, 2010, and I'll
11 just read that, I think we did do it earlier so
12 I apologize if repetitive, based on our review
13 of the standards in the 2008, 2009 South
14 Carolina Health Plan, and the CON law and
15 regulations, we have determined that we do not
16 currently have a mechanism in place that would
17 allow The Department to discount the existence
18 of the St. Francis cardiac cath lab when
19 computing the average utilization for the
20 service area. Is that right?

21 A: Yes.

22 Q: No where in this letter does Ms. Brandt discuss
23 enforcement action against any provider, right?

24 A: She does not.

25 Q: She doesn't raise the enforcement powers of The



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1 Department at all. Is that right?

2 A: She does not.

3 Q: And will you agree with me that there is a
4 difference between discounting the existence of
5 a lab and allowing it to continue verses taking
6 enforcement action in closing a lab?

7 A: Yes. Those are two different things.

8 Q: Okay. And let me ask you this as well, 'cause
9 there's been some back and forth about what
10 information was available to and how. Let's
11 look at Exhibit 1, the initial document, the
12 Bates is, East Cooper 357.

13 A: I'm sorry, which page?

14 Q: I don't know what the -- Joint 7, 272. I'm
15 trying to go to the beginning of this
16 attachment.

17 A: Okay. I'm there.

18 Q: Take a moment to look at this, but it appears
19 to me it's a fax cover sheet. Is that right?

20 A: Right. Back in the old days.

21 Q: Back when we had faxes. So, The Department at
22 least at this time was using a fax machine,
23 right?

24 A: Right.

25 Q: Okay. And would you agree with me that the fax



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1 cover sheet bears a date of May 26, 2010. Is
2 that right?

3 A: It does.

4 Q: It says it's nine pages, right?

5 A: It does.

6 Q: And is the recipient, the to, to Ralph Barbier?

7 A: It is.

8 Q: And is it from Ms. Brandt?

9 A: It is.

10 Q: If you look at the very next page, would you
11 agree with me that the very next page is a May
12 14th, 2010 FOIA request from Mr. Barbier for
13 documents related to East Cooper Medical
14 Center?

15 A: Yes.

16 Q: And so, if you, kind of, flip through, would
17 you agree with me that this document reflects
18 what Mr. Barbier received from The Department
19 response to a one paragraph FOIA letter asking
20 for documents regarding the addition of cardiac
21 catheterization services by East Cooper
22 Regional Medical Center. Is that right?

23 A: Yes.

24 Q: And, do you agree with me that what he got in
25 response was copies of emails as well as the



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1 letter?

2 A: The letter doesn't have a fax header on it.

3 Q: Okay.

4 A: So, I don't know if that came via fax but, I
5 mean, obviously he received a copy of it
6 because he included it ---

7 Q: Right.

8 A: --- as an attachment to his letters.

9 Q: Well, the last document of this attachment with
10 the fax numbers is a letter from East Cooper to
11 The Department, right?

12 A: Right.

13 Q: Ms. Brandt's letter, I think, is actually dated
14 after the fax transmission of FOIA.

15 A: Right. So, the May 12th letter was part of
16 what Ralph received in the fax.

17 Q: So, you would agree with me that in response to
18 this FOIA request, The Department produced
19 emails about the issue?

20 A: They did.

21 Q: It is your understanding that the regulation
22 actually requires that The Department consider
23 more than just the State Health Plan in
24 reviewing and approving applications?

25 A: Yes. It has to consider the project review



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1 criteria as well.

2 Q: Okay. So, your testimony before lunch that the
3 State Health Plan has all information to
4 evaluate an application, that would be
5 incomplete. Is that fair?

6 A: Yeah. What I meant to say was under Standard
7 3, that it has the information needed to
8 evaluate the compliance of the applicant with
9 Standard 3. I mean, obviously there is
10 external data that can also be brought to bear
11 as well.

12 Q: And, you would agree with me that external data
13 could be relevant to the Health Plan standards.
14 Is that right?

15 A: It could be, yes.

16 MS. HOLLINGSWORTH: Your Honor, if I could have just
17 a minute to review my notes, I'm probably just
18 about done.

19 THE COURT: Sure.

20 MS. HOLLINGSWORTH: Your Honor, I don't have any
21 other questions for Mr. Sullivan.

22 Q: Thank you for your time.

23 THE COURT: Ms. Biggers, you have some questions?

24 MS. BIGGERS: Your Honor, I don't have any questions
25 that could add to those Ms. Hollingsworth has



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1 gone through.

2 **THE COURT:** Well, I'm sure we're disappointed. All
3 right. Mr. Thomas you have any re-direct?

4 **MR. THOMAS:** Oh, I've got some, unfortunately.

5 **MR. SULLIVAN - REDIRECT EXAMINATION BY MR. THOMAS:**

6 Q: Mr. Sullivan, I'll try to work backwards. It's
7 more fresh in my mind that way.

8 A: Okay.

9 Q: Go to Joint '2-081', that's the Beverly Brandt
10 letter.

11 A: Okay.

12 Q: And you were just asked a question about this,
13 I believe, in terms of whether or not The
14 Department had any mechanism in place that will
15 allow The Department to discount the existence
16 of St. Francis's cath lab, correct?

17 A: Correct.

18 Q: Okay. Isn't that exactly what The Department
19 did in this case?

20 A: Yes.

21 Q: Okay. So, is that a diametric position to what
22 The Department did in 2010?

23 A: It does appear to be that Ms. Brandt was saying
24 that The Department couldn't really alter the
25 calculation and in the fact they did alter the



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1 calculation in the 2016 decision.

2 Q: Ms. Brandt didn't state in her letter, well,
3 all we have to do is just close down your lab
4 at a time and discount the utilization therein?
5 Is that even mentioned anywhere in the letter?

6 **MS. HOLLINGSWORTH:** Your Honor, I would object to
7 the question, not only is it leading but
8 obviously the letter speaks for itself so
9 trying to get into Ms. Brandt's -- she won't be
10 here to testify which exceeds to what this
11 witness to do.

12 **MR. THOMAS:** She just asked my client ---

13 **THE COURT:** Re-state your question, sir.

14 **MR. THOMAS:** Okay.

15 Q: Would not the same mechanism of discounting
16 been available to Ms. Brandt in the past?

17 A: Yes.

18 Q: Mr. Sullivan, just in terms of the enforcement,
19 I mean, wouldn't a mechanism include --
20 wouldn't enforcement be included in a mechanism
21 that might allow The Department to discount the
22 utilization of a cath lab?

23 A: It could be.

24 Q: Okay. To your knowledge, was Regulation 61-15,
25 Section 102(e)(1) in play back in 2010?



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1 A: I'm not aware that, that's changed in the last
2 eight years.

3 Q: But, Ms. Brandt didn't reference an enforcement
4 action, did she?

5 A: She did not.

6 Q: If you would, Joint Exhibit 7 for me.

7 A: Okay.

8 Q: I think Ms. Hollingsworth asked you some
9 questions about the utilization at the cath lab
10 and she brought up some reasons why it wasn't
11 a very well utilized cath lab and why the
12 volumes were so low. Do you recall that line
13 of ---

14 A: I do.

15 Q: --- testimony. Go to Joint 7 -- first of all,
16 what's the first page of Joint 7?

17 A: That's the cover page for the 2008, 2009 South
18 Carolina Health Plan.

19 Q: Go to Joint 7-014 for me.

20 A: Okay.

21 Q: What was the volume of St. Francis' cath lab
22 back in '04?

23 A: It was 111.

24 Q: Okay.

25 A: So, this lab didn't always operate at very low

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1 volumes, did it?

2 Q: It did not.

3 A: All right. And I'll try and shut down an
4 entire line of questioning regarding whether or
5 not you had notice of the underlying emails and
6 effected person letters and other applications
7 that may not have effected Trident. Would that
8 have changed your analysis, had you known about
9 all of those emails?

10 A: It wouldn't have changed my ultimate conclusion
11 that Standard 3 was not met. It might have
12 changed the content of the letter because, I
13 think, I would have addressed specifically what
14 was being set forth in those email exchanges
15 and so forth between Roper and DHEC but the
16 ultimate conclusion would have been exactly the
17 same.

18 Q: Okay. For example, if you had, had the email
19 that I know we talked a lot about at
20 Petitioner's 5, where, I think, Mr. Eubank
21 references the furthermore statement.

22 A: Right.

23 Q: You might have actually agreed with that
24 statement.

25 A: I would have. I probably have quoted it in my



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1 letter.

2 Q: Go to Joint 01-006 for me. I think Ms.
3 Hollingsworth asked you -- doesn't say, when
4 DHEC approves or if DHEC approves, I mean, she
5 said it doesn't say when DHEC approves the
6 application, correct?

7 A: Right.

8 Q: It doesn't say, if, right either? Look at the
9 last sentence there. What does that say on
10 that page?

11 A: It says, that the Bon Secours St. Francis
12 Xavier Hospital will close and the room will
13 continue to be used as a special procedures
14 lab. I'm sorry, it says, upon DHEC approval of
15 the application.

16 Q: Right. It says, upon. Doesn't say if, doesn't
17 say when, right?

18 A: Right.

19 Q: Okay. Turn to Petitioner's 6 at 001. I think
20 Ms. Hollingsworth asked you some questions
21 about whether or not there was an agreement
22 between St. Francis and East Cooper, or excuse
23 me, St. Francis and DHEC.

24 (Petitioner's Exhibit Number 6 was admitted as an
25 exhibit.)



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1 A: Yes.

2 Q: And this is a letter from Mr. Levitt to Mr.
3 Eubank, see it?

4 A: Yes.

5 Q: And read it into the record.

6 A: Per your request, attached is a letter from
7 Roper St. Francis outlining their status as an
8 effected party with regard to the ECMC cath
9 lab. I think everything will work out just
10 fine for everyone.

11 Q: I think everything will work out just fine for
12 everyone. What do you take that to mean, Mr.
13 Sullivan?

14 A: Well, in the context of all the these emails
15 that the both St. Francis, I'm sorry, that
16 Roper Berkeley and East Cooper would be happy
17 with the result of the CON decisions.

18 Q: Okay. And, this email is dated when?

19 A: April 22nd, 2016.

20 Q: Okay. And, when did DHEC receive the effected
21 person letter from St. Francis indicating the
22 opposition to East Cooper's CON application.

23 A: April 20th.

24 Q: And I believe you said, embedded in that --
25 there was something embedded that indicated



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1 they were going to apply for a CON?

2 A: Yes.

3 Q: Okay. Had they applied for a CON yet?

4 A: No. They didn't apply for the CON until May
5 the 9th.

6 Q: Okay. So, everything's gonna work out just
7 fine for everyone, but a CON hadn't even been
8 applied for yet.

9 A: That's correct.

10 Q: Okay. You were asked an awful lot about the
11 transfer exception by Ms. Hollingsworth,
12 correct?

13 A: Yes.

14 Q: Okay. Let's go to -- I think it's actually
15 Joint Exhibit 4, and go to page 9. This is for
16 the record the 2015 State Health Plan, that's
17 applicable in this case. And ---

18 A: Okay.

19 Q: --- what's the heading on this page?

20 A: Exceptions to Service Area Standards.

21 Q: Are the standards listed on Roman numeral page
22 two and three?

23 A: Yes, in terms of what an applicant who's
24 seeking to transfer a service or beds or what
25 have you.



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1 Q: Okay. And look at Standard 3 and read that for
2 the record.

3 A: The facility receiving the service must
4 demonstrate the need for the additional
5 capacity based upon both historical and
6 projected utilization patterns.

7 Q: Okay. And, in terms of your analysis of the
8 transfer exception, did Standard 3 have
9 anything to do with it?

10 A: It did.

11 Q: Can you explain why?

12 A: Sure. Because there was certainly no
13 indication based on the past performance of the
14 Bon Secours cath lab that would indicate that
15 there was a need for additional capacity. Here
16 was a vacant lab only doing a handful of
17 procedures. And so, you know, my assessment
18 was that's why the Bon Secours lab was not an
19 appropriate lab to be transferred to another
20 facility.

21 Q: And you listed both Standard 3 and the transfer
22 exception in your letter?

23 A: I did.

24 Q: And why did you do that again?

25 A: Again, because it was such an unusual structure

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1 to this application in terms of the applicant
2 talking about conditioning the closure of a lab
3 upon the approval of another lab. That's in
4 effect what transfers usually are, we're going
5 to shut down one program and then open it
6 somewhere else. The applicant never said it
7 was going to be a transfer but I've been
8 surprised before when an applicant presents an
9 application one way and then amends it late in
10 the process to make a different argument and so
11 that was just, sort of, if the applicant tries
12 to say, this is a transfer rather than a new
13 program, then I don't believe they meet this
14 transfer standard.

15 Q: You were hedging?

16 A: I was.

17 Q: Go to Joint 1, page 190 and that's your letter
18 that's in opposition.

19 A: Okay.

20 Q: Are the type of things you listed in your
21 letter the type of things that would typically
22 be brought up for project reviewing?

23 A: Yes.

24 Q: And was Trident granted that?

25 A: They were not.



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1 Q: Okay. Ms. Hollingsworth asked you specifically
2 on Joint 1, 190, about a phrase here, and it
3 looks like the last sentence of the first full
4 paragraph. The application also proposes to
5 close the existing diagnostic cardiac cath
6 program at Bon Secours St. Francis, which is of
7 little consequence given that this program
8 purposefully has only performed only a handful
9 of diagnostic cath procedures over the past
10 several years. And the question I want to ask
11 you is, why is it of little consequence from a
12 health planning perspective?

13 A: Because this program had been around for a long
14 time. It's providing the same types of service
15 that are being proposed for Roper Berkeley.
16 The fact that it was not being well utilized
17 simply closing that program doesn't establish
18 a need for anything. Because you closing a
19 program that has virtually no volume, and that
20 doesn't say well, gosh we must need another
21 cath lab somewhere else. It's not a situation
22 as Ms. Hollingsworth was describing to me where
23 a cath lab at a hospital closed, it was
24 actually serving patients and there was
25 actually a gap in delivery of services in the

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1 community. In this case, very few patients
2 would be effected by the closure of St. Francis
3 cath lab.

4 Q: And I think she asked you about the closure of
5 hospitals and, you know, would the way, the
6 position you've taken, would that somehow
7 foreclose other hospitals from coming on, but
8 in those particular counties, a hospital still
9 has to show need, correct?

10 A: It does.

11 Q: Okay. And, in the counties that she cited have
12 any hospitals replaced those hospitals that
13 shut down?

14 A: They haven't. In fact, I was involved in a
15 project where there was some effort to do that
16 but it never got off the ground.

17 Q: Okay. Turn to Joint 1, page 30, if you would.

18 A: 1, I'm sorry?

19 Q: Joint 01-030, it's just the application.

20 A: Okay. Sorry. I'm there.

21 Q: And, in terms of the context of your statement
22 in your letter that I read into the record and
23 asked you what was the health planning
24 consequences, I mean, what was the utilization
25 in Exhibit 14, what was it showing for the



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1 service area overall, an increase or a
2 decrease?

3 A: Utilization had actually declined between 2012
4 and 2013 in terms of diagnostic equivalents and
5 declined again between 2013 and 2014.

6 Q: In terms of -- you were asked about -- let me
7 see if I can find it here, Joint 1, 187, that's
8 the effected person letter.

9 A: Yeah.

10 Q: And, there were some discussions there about
11 the fact that it didn't raise a bunch of
12 issues, did it?

13 A: That's right.

14 Q: Okay. But, it did state pretty plain that the
15 project does not complain with the standards
16 set forth in the 2015 South Carolina Health
17 Plan. Did I get that right?

18 A: Does not comply.

19 Q: Okay. Did it ask for a project review meeting?

20 A: It does not. Am I missing it?

21 Q: Look right there in the middle.

22 A: Oh, I'm sorry, yeah in the middle of the
23 paragraph, it says we're requesting a project
24 review meeting.

25 Q: Okay. And, what type of information may have



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1 been presented at a project review meeting?

2 A: Well, it would be both for the applicant and
3 any opposing parties would have a chance to
4 articulate what their positions are and so, for
5 example Roper perhaps would have more clearly
6 expressed why it believed that what it was
7 doing was consistent with the State Health
8 Plan. It would also given Trident an
9 opportunity to not only present the positions
10 that it presented in its letter, but also
11 respond to any information that Roper presented
12 at that project review meeting.

13 Q: Turn over to your letter at Joint 1-194. And,
14 Ms. Hollingsworth asked you a few questions
15 about this diagnostic cath lab. She said that
16 there was no mention about existing labs but
17 could you please read the very first line under
18 Standard 3?

19 A: All existing labs in the service area have not
20 performed a minimum of 500 diagnostic
21 catheterization procedures per laboratory in
22 2015.

23 Q: Okay. And you stated that very first and very
24 clear sentence under what?

25 A: Under Standard 3 of the State Health Plan.



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1 Q: And then, you provided a table on Joint 1, 195
2 that states -- that presents what information?

3 A: Utilization of existing labs and showing that,
4 among other things, that the Bon Secours St.
5 Francis lab was under utilized.

6 Q: As a health planner, did you feel like you
7 needed to give The Department any more
8 information than that?

9 A: It seemed pretty straight forward, but, you
10 know, the standard wasn't met, which was why
11 later on I went into the transfer standards.
12 My assumption was well, they can't possibly be
13 approved under Criteria 3, so they would have
14 to be approved under some other mechanism.

15 Q: How often are public hearings actually
16 requested and held in South Carolina, based on
17 your experience in this state?

18 A: Rarely. I know there was one last year. I
19 haven't participated in one in many years,
20 probably more than a decade.

21 Q: Turn to page -- Petitioner's 5, which is the
22 email we've discussed and, I think, Ms.
23 Hollingsworth asked you a lot of questions
24 about it as well. What is the subject line of
25 that email. If you would just read that into



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1 the record.

2 A: Re St. Francis Xavier cardiac catheterization
3 lab.

4 Q: Okay. So, direct reference to the cardiac cath
5 lab, correct?

6 A: Yes.

7 Q: All right. Could you turn to Joint 1, page 202
8 for me?

9 A: Okay. I'm there.

10 Q: What is the particular label on Joint 1, 202
11 say?

12 A: Correspondence tab.

13 Q: Are you aware of that email appearing anywhere
14 in the correspondence tab?

15 A: I did not see it.

16 Q: Look at Joint 1-211 for me.

17 A: Okay.

18 Q: And this is the miscellaneous tab.

19 A: Correct.

20 Q: Are you aware of that email or any emails
21 regarding this application being included in
22 the miscellaneous tab?

23 A: No.

24 Q: Now, Ms. Hollingsworth asked you some questions
25 about East Cooper's position that the lab was



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1 nonoperational. Did you agree with that
2 position?

3 A: I do not.

4 Q: Okay. As far as you know, did Roper agree with
5 that decision?

6 A: Based on Mr. Barbier's letter, they did not.
7 They said that it was in contravention to CON
8 statute.

9 Q: Okay. And, are you familiar with Mr. Levitt?
10 Do you know who Mr. Levitt is?

11 A: I know Mr. Levitt very well.

12 Q: Okay. And to your knowledge, does he have a
13 law degree?

14 A: He's never mentioned it to me.

15 Q: Ms. Hollingsworth asked you a question
16 regarding -- let's go to Joint 4, some of the
17 standards in the plan, I think, Standards 1 and
18 2. If you go to Joint 4-046 for me.

19 A: Okay.

20 Q: And, I think, she asked you about Standard 1
21 and that she mentioned that Standard 1 and
22 Standard 2 may be more definitional standards.
23 Do you recall that testimony?

24 A: I do.

25 Q: Okay. Number one, can you read the first line

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1 of Standard 1?

2 A: The capacity of a fixed cardiac catheterization
3 laboratory shall be 1200 diagnostic equivalents
4 per year.

5 Q: Okay. Now, that's a -- is that an objective
6 capacity standard?

7 A: It is.

8 Q: Okay. And have you ever seen The Department
9 lower that for purposes of an applicant?

10 A: You mean, use a different standard?

11 Q: Yes.

12 A: No.

13 Q: Okay. And in terms of number two, the service
14 area for a diagnostic cath lab is defined as
15 all facilities within 45 minutes, one-way
16 travel time?

17 A: Yes.

18 Q: In terms of that, the 45 minutes, that's a
19 travel time standard, correct?

20 A: It is.

21 Q: Okay. Are you aware of DHEC ever increasing or
22 decreasing that standard?

23 A: I'm not.

24 Q: Okay. And Standard 4, I don't think I asked
25 you a question about this in terms of whether



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1 or not St. Francis was compliant and if I did,
2 I apologize, what I was asking was would you
3 expect The Department to approve an application
4 or an applicant who for whatever reason, only
5 projected 425 diagnostic cardiac catheters per lab,
6 within three years of operation?

7 A: I've never seen that happen for an applicant to
8 project below the minimum volume under the
9 standard.

10 Q: Would you expect The Department to approve an
11 application if that happened?

12 A: I would not.

13 Q: Now, let's go to Joint 1 at 207, this is the
14 decision letter. I have a couple of questions
15 about it. I was getting confused.

16 A: Okay.

17 Q: I think the question was asked of you, you
18 know, did you believe that The Department
19 actually ignored the cath lab in its analysis
20 at Bon Secours St. Francis and obviously they
21 discussed Bon Secours St. Francis in it,
22 correct?

23 A: They do.

24 Q: So, is it fair to say they ignored the
25 utilization?



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1 A: I think that's fair because they found that the
2 application was compliant with Standard 3,
3 despite the fact there was a provider that was
4 operating below 500, that being the St. Francis
5 cath lab and they specifically said they talk
6 about the one notable exception and then they
7 go on to look at, you know, what the
8 information is excluding the cath lab.

9 Q: In terms of what they did, it says, regardless
10 of the timing of the new lab installation or
11 any potential opposition to application, thus
12 allowing The Department to discount the
13 utilization figures to the lab at the Bon
14 Secours location. Is that pretty much what it
15 says?

16 A: That's what it says.

17 Q: Okay. And in terms of the discounting for
18 purposes of Standard 3, is existing labs
19 suppose to be look at in your opinion as
20 prospective application or retrospective
21 application?

22 A: Well, it's -- I think the standard is clearly
23 retrospective. It says, existing labs in the
24 service area have performed a minimum of 500
25 diagnostic catheterization procedures per

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1 laboratory during the most recent year. So,
2 it's a backward look at utilization.

3 Q: And you keyed in on the two words, have
4 performed.

5 A: Correct.

6 Q: It doesn't say, will perform.

7 A: Correct.

8 Q: I think some questions regarding the inventory
9 of the Health Plan is outdated almost as soon
10 as the Health Plan is approved by the State
11 Health Planning Committee and therefore by the
12 DHEC Board. Do you recall that line of
13 questioning?

14 A: Yes.

15 Q: But, in terms of the actual inventory, what
16 does an applicant or an effected person have
17 the ability to do to determine volumes, updated
18 volumes for that inventory?

19 A: Sure. I mean, even though the utilization
20 numbers might be dated, the applicant or
21 effected person can introduce more recent JAR
22 data that would update what's in the Health
23 Plan.

24 Q: And in your experience has The Department
25 utilized updated JAR data in making its



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1 decision for a plan that may be one or two
2 years old?

3 A: All the time, yes.

4 Q: And in terms of enforcement actions, Ms.
5 Hollingsworth asked you a lot of questions
6 about that, but in terms of what Mr. Eubank
7 stated in his email, he never stated what type
8 of enforcement action that The Department
9 thought about taking, did he?

10 A: Did not.

11 Q: Okay. And, I think, Ms. Hollingsworth actually
12 mentioned it, I don't think I need to pull out
13 44-7-340, but, I think, she said revoke,
14 suspend or deny and including fines, right?

15 A: That's correct.

16 Q: Okay. So, had the decision the made to fine
17 St. Francis, or simply suspend their cath lab
18 for a while, I think, that doesn't necessarily
19 mean that it would have been shut down?

20 A: It doesn't.

21 Q: And, I think, Ms. Hollingsworth started her
22 cross-examination of you about HCA and the
23 familiarity with the CON process in South
24 Carolina, and you agreed that DHEC is the
25 keeper of the regulation, correct?



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1 A: Yes.

2 Q: Is it your understanding as a health planner
3 that, that gives DHEC free reign in how they
4 interpret a regulation?

5 A: My understanding is they have to make
6 interpretations that are not arbitrary and
7 capricious.

8 MR. THOMAS: I have no further questions, Your
9 Honor.

10 MS. HOLLINGSWORTH: Your Honor, given the narrow
11 scope of trial that we have, I would love to,
12 sort of, have an agreement that we just
13 complete, you know, examination with just
14 direct, cross, re-direct and conclude.

15 THE COURT: I'm happy with that.

16 MR. THOMAS: I'm good with that too.

17 MS. HOLLINGSWORTH: That work?

18 THE COURT: Absolutely, me too.

19 MS. HOLLINGSWORTH: Well, after Mr. Sullivan I have
20 one more round.

21 THE COURT: So, I can let him sit down somewhere
22 else? All right. We have not gotten to 5:00
23 o'clock but we're awfully close. What's next
24 on the witness plan.

25 MR. THOMAS: Well, first of all, I was gonna rest,



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1 Your Honor. Petitioner's gonna rest.

2 **THE COURT:** I think resting is a good idea. I think
3 some of us would like some rest.

4 **MS. HOLLINGSWORTH:** Your Honor, I believe our plan
5 then is for DHEC to call its witness, Mr. Lewis
6 Eubank next and even though I believe my that
7 my direct examination probably will not go over
8 an hour, I do think probably given the lateness
9 in the day, it would make sense to go ahead and
10 stop for the day and start with him first thing
11 in the morning.

12 **THE COURT:** All right. Well, let me ask my folks
13 first, what time would suit you to start in the
14 morning. I, as boss, I'll put it to you
15 first, 9:30?

16 **MR. THOMAS:** I'm fine to go earlier, if ---

17 **MS. HOLLINGSWORTH:** Yeah, I am too.

18 **THE COURT:** So, 9:30 or ---

19 **MS. HOLLINGSWORTH:** 9:30 is fine.

20 **THE COURT:** Let me ask my court reporter, 9:30 okay?

21 **COURT REPORTER:** Works for me.

22 **DAY ONE ADJOURNED:**

23 **THE COURT:** All right. So, let's -- we'll adjourn
24 until 9:30 in the morning. I think the room
25 will be locked, your materials should be safe.



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1 If the IT folks don't feel the same about their
2 computers, I would understand they might want
3 to take those with them, but otherwise, we'll
4 adjourn for the day and we'll see you at 9:30
5 in the morning.

6 (Whereupon, the hearing adjourned at 4:43 p.m. and
7 was reconvened on Wednesday, July, 25, 2018 at 9:34
8 a.m.)

9 CALL TO ORDER:

10 **THE COURT:** Please be at ease. We're back on the
11 record in Case Number 16-ALJ-07-0386, this is
12 a contested case, day two. Wow, it's not day
13 five. All right. Well, if everybody's ready
14 to start this morning. Anybody have any
15 complaints that I need to address?

16 (No response.)

17 **THE COURT:** No, all right. Pizza Delivery man came
18 after you left, sorry. Ms. Biggers, I believe
19 its -- you're up this morning first.

20 **MS. BIGGERS:** Thank you, Your Honor. DHEC calls
21 Louis Eubank as its witness.

22 **THE COURT:** All right.

23 **LOUIS EUBANK,** having ben duly sworn, testifies as
24 follows:

25 **MR. EUBANK - DIRECT EXAMINATION BY MS. BIGGERS:**



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1 Q: Good morning. Would you please state your name
2 and also where you are employed and your job
3 position for The Court.

4 A: Yes, my name is Louis Eubank. I am the Chief
5 of the Bureau of Healthcare Planning and
6 Construction at the South Carolina Department
7 of Health and Environmental Control.

8 Q: And in that position what are your basic
9 responsibilities, just briefly.

10 A: I oversee the operation of three divisions
11 within The Bureau, that's the Certificate of
12 Need Program, the Division of Health Facility
13 Construction and the Division of Facility and
14 Service Coordination. Managerial duties,
15 including budgeting, compliance with agency
16 directives, policies, plans and also personnel
17 management.

18 Q: How long have you held that particular job
19 position?

20 A: That title since July 1st of 2017.

21 Q: What about before that date?

22 A: Prior to that I was the Director of The
23 Certificate of Need program for DHEC.

24 Q: And what, again briefly, were your major
25 responsibilities in that role?

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1 A: I was overseeing the CON program, which
2 included the same managerial functions at the
3 division level, but also the acceptance, review
4 of applications and also writing decisions on
5 behalf of the agency.

6 Q: Do you still review CON applications in your
7 current job role?

8 A: I do.

9 Q: How long overall have you worked at DHEC?

10 A: Since November 2nd of 2015.

11 Q: And can you just tell us what college and post-
12 college degrees you hold?

13 A: Sure. I have a Bachelors Degree in Psychology
14 from Virginia Tech and I hold Masters Degrees
15 in Social Work and Public Health from the
16 University of South Carolina.

17 Q: When did you obtain those post-graduate
18 degrees?

19 A: In 2008 and '09, they're successive.

20 Q: Did you have any other professional jobs in
21 between obtaining those post-graduate degrees
22 in the beginning at DHEC?

23 A: I did. I was the Executive Director of two
24 state wide not for profit organizations, the
25 South Carolina Tobacco Collaborative, which was

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1 a truly youth anti-tobacco campaign and
2 subsequent to that, the South Carolina Cancer
3 Alliance, which was the state's cancer lobby.

4 Q: Okay. Now, let's turn over to the subject of
5 this contested case. Can you describe for us
6 your involvement the Roper CON application for
7 diagnostic cardiac cath lab at the Roper
8 Berkeley Hospital?

9 A: Yes. I accepted the CON application submitted
10 by Roper St. Francis Berkeley, reviewed the
11 application, took information in from all
12 sides, both the applicant and the opposition
13 party and ultimately rendered a decision in the
14 matter.

15 Q: At the time that you were reviewing the Roper
16 application, were you involved in any way with
17 other CON applications for similar services in
18 the general area?

19 A: Yes. Around the same time we had the Roper
20 Berkeley application with The Department, we
21 were also reviewing an application at the East
22 Cooper Regional Medical Center for a diagnostic
23 cath service at its location in Mount Pleasant.

24 Q: Which one was filed first?

25 A: That was the East Cooper Regional Medical

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1 Center application.

2 Q: And what was your role in the East Cooper
3 application?

4 A: That was the same role that I had with the
5 Roper Berkeley application, to accept, review
6 and decide upon it.

7 Q: Okay. Now, let's talk for a bit about the
8 State Health Plan. Can you just describe from
9 your point of view in your role at DHEC, what
10 is the State Health Plan?

11 A: The South Carolina Health Plan is a document
12 which is authorized to be created under
13 statute. It is still an Act and it is a
14 planning tool that is created by The Department
15 staff with the input of the South Carolina
16 Health Planning Committee and ultimately
17 approved by our agency's board of directors,
18 which guides the development of certain
19 healthcare facilities and services across the
20 state. It projects in certain instances a need
21 for those services or facilities or beds for
22 that matter. It explains generally the
23 population situation that we're looking at in
24 the state with regard to the total population
25 and it breaks the population down regionally



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1 and by county so that we can see where, you
2 know, population and migration is occurring and
3 where out migration is occurring. And it
4 allows the state to essentially adapt its
5 healthcare planning practices to meet current
6 needs.

7 Q: Does DHEC staff have any involvement in the
8 process of adopting a new State Health Plan?

9 A: We certainly do. We have substantive input
10 into the nature of the plan, those services
11 which are or are not included. We make
12 recommendations to the State Health Planning
13 Committee that meets and approves for the Board
14 of Directors, the Health Plan and with our
15 input we have many conversations, many public
16 meetings and ultimately work towards the
17 approval of a new plan starting at the staff
18 level and then moving to the Health Planning
19 Committee and ultimately, The Board.

20 Q: And you've used the phrase, Board of Directors.
21 Can you tell us what that is?

22 A: Yeah. That's The Board of the South Carolina
23 Department of Health and Environmental Control.
24 They are, sort of, the final body that approves
25 the Health Plan and upon their approval, it is

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1 an act to then enforce.

2 Q: Does it go to the legislature?

3 A: No, it does not.

4 Q: How often is it presented to The Board of
5 Health and Environmental Control for
6 consideration to adopt a new version?

7 A: Well, under the statute it should be at least
8 every two years but I'm happy to say for the
9 last couple of years we've managed it on an
10 annual basis.

11 Q: Okay. Now, there's been a lot of talk today
12 about Standard 3, I'm sorry, today, yesterday
13 about Standard 3 and in case you need to look
14 at, I'll refer you to the Joint Exhibit 4 at
15 page J04-047.

16 A: I'm there.

17 Q: Okay. Can you just again from your perspective
18 as the DHEC reviewer of CON applications and
19 decision maker, can you describe to us what you
20 believe that Standard 3 means?

21 A: Well, I mean, certainly, you know, it's facing
22 us some language but as far as meaning, I think
23 that Mr. Sullivan yesterday did a very nice job
24 explaining the community need aspect of this
25 Standard. That community need that it may be



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1 speaking to where here we have a standard here
2 that we need to look at against the community
3 need for catheterization services, and in this
4 case diagnostic or mobile catheterization
5 services. And whether or not there is a need
6 in that community for an additional operator or
7 an additional lab. But more than that, at The
8 Department level, we're also looking at a
9 quality issue and throughout the cardiovascular
10 service chapter with regard to both
11 catheterization services and open heart
12 surgical services, we see many references to
13 procedural thresholds or surgical thresholds,
14 a certain number of cases that need to occur in
15 order to maintain some level of quality. And
16 those levels are typically referenced back to
17 the national accrediting bodies who make those
18 decisions and we adopt them as part of the
19 plan. And so, if we had an under performing
20 lab and I think I'll refer back that Mr. Thomas
21 yesterday made a mention I believe of a
22 facility that may be performing three or four
23 hundred, something less than 500 diagnostic
24 catheterization services. If there was an
25 additional lab in the area that could further

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1 delude the procedural output at that lab which
2 could have an affect on quality. So, in
3 addition to the community need aspect, we're
4 also considering whether or not the addition of
5 another service would have a detrimental impact
6 on quality on the existing labs.

7 Q: The document that I referred you to, Joint
8 Exhibit 4, can you tell us what was the date
9 that this particular plan was adopted by The
10 Board of Health and Environmental Control?

11 A: This particular plan was enacted August 13th,
12 2015.

13 Q: What plan was current and in effect at the time
14 that Roper submitted its CON application in
15 this matter?

16 A: It was this plan.

17 Q: What about the East Cooper application?

18 A: It was also this plan.

19 Q: Have other versions of the State Health Plan
20 been adopted by The Board since the time of
21 your decisions in these matters?

22 A: Yes. We've had two additional plan approvals
23 since the time of the applications.

24 Q: Have there been any changes to Standard 3 in
25 either of those plans?



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1 A: I don't believe so, except for the volume
2 metrics.

3 Q: Can you ---

4 A: Those changed.

5 Q: What do you mean by that?

6 A: Well, I spoke a minute ago about the procedural
7 thresholds and upon review and revision of the
8 State Health Plan last year, in 2017, those
9 national accrediting bodies that I mentioned
10 had reduced the procedural thresholds necessary
11 to maintain quality in certain catheterization
12 labs in open heart surgical suites.

13 Q: Do you know what those thresholds are now?

14 A: I believe 350 diagnostic procedures.

15 Q: Now, let's talk about past iterations of the
16 State Health Plan before this 2015 one as well.
17 We have some joint exhibits that have already
18 been introduced and I believe that if you look
19 at Joint 7, turn to the first page date of 7-
20 011. Can you tell us what was the date of The
21 Plan at this Exhibit Joint 7?

22 A: The 2008, 2009 South Carolina Health Plan was
23 effective September 12th, 2008.

24 Q: Okay. And then, if you'll turn over to page
25 J07-006.

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1 A: I'm there.

2 Q: Can you tell us what standards that are listed
3 on this page -- what health service do these
4 standards apply to?

5 A: These standards apply to diagnostic
6 catheterization services.

7 Q: And is the -- are there any differences from
8 what you can tell in reviewing the two
9 documents, the one at page J07-006 and the one
10 from the 2015 plan that you reviewed a few
11 moments ago. Are there any differences that
12 you can tell in Standard 3?

13 A: Yes. The Plan from 2008 did not look at a
14 procedure for laboratory. Figure it instead as
15 an aggregated or combined use rate limitation
16 here of 80 percent or 960 equivalents per
17 laboratory for the most recent years. So, this
18 was well documented yesterday, the second half
19 of that standard changed.

20 Q: Okay. Now, let's look at -- okay, let's go
21 back to the standard from Joint Exhibit 4 at
22 page J04-047.

23 A: I'm there.

24 Q: I'm sorry. I'm looking at the wrong one.
25 Yeah, that's right. Okay. So, Standard 3,



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1 what, if any, consideration did you give to
2 Standard 3 when you reviewed and made a
3 decision on Roper's CON application?

4 A: Fairly intense consideration, about both the
5 community needs and that quality issue and
6 certainly gave it all due consideration as to
7 its consistency with the regulation and statute
8 and how we should apply the Health Plan to the
9 review of an application.

10 Q: What labs did you look at when applying the
11 language in Standard 3 of existing labs?

12 A: Well, that certainly the most -- I followed the
13 labs in that 45 minute drive time service area
14 had significant volumes, but then I was also
15 looking at the lab at the Bon Secours St.
16 Francis Hospital in West Ashley as it related
17 to review of both this application and the
18 existing East Cooper Regional Medical Center
19 application.

20 Q: Okay. Can you tell us at what point in time
21 relative to the receipt by DHEC of Roper's CON
22 application, did you first start looking at the
23 Bon Secours lab in particular?

24 A: It was not long after receipt of the East
25 Cooper Regional Medical Center application,



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1 which I believe was received by us in February
2 of 2016.

3 Q: Do you recall what prompted you to start
4 looking at that lab in particular?

5 A: Yeah, Mr. Levitt, David Levitt, who was the
6 healthcare planning consultant that produced
7 that application on behalf of East Cooper had
8 indicated in the application that in his
9 service area analysis of need, that he had
10 eliminated the Bon Secours lab from
11 consideration because of its volumes and he
12 provided an exhibit in the application that
13 showed those volumes having been zero volume
14 for two or three years and then a very low
15 volume in the subsequent years. And so, based
16 on his narrative and the exhibit, I called into
17 question the Bon Secours lab.

18 Q: And I believe the -- if you look at Joint
19 Exhibit 2, can you tell us what Joint Exhibit
20 2 is?

21 A: Yes. This looks like the narrative portion of
22 the East Cooper Medical Center's application
23 for diagnostic catheterization services.

24 Q: Okay. Is this the one that you were referring
25 to that you were looking at, at the same time

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1 as the Roper application?

2 A: It is.

3 Q: Now, if you turn to page J02-072 in Exhibit 2,
4 Joint Exhibit 2. Can you tell us what this
5 is?

6 A: Well, this is a fax cover letter.

7 Q: Okay. Can you tell us what then is at the next
8 page following that?

9 A: Yes. At J02-073 is an email from Ralph Barbier
10 to Beverly Brandt. It's a Freedom of
11 Information Act request.

12 Q: And following that at page J02-074 and it
13 appears this may continue on to J02-076, can
14 you tell us what that is?

15 A: Yes. This is a chain of emails involving
16 Department employees and one, Evan Ray, who was
17 the Chief Operating Officer at East Cooper
18 Medical Center. And it looks like the other
19 subject to the email trail is Les Shelton, who
20 was with DHEC at the time.

21 Q: Was this before or after your -- the dates of
22 these emails, was this before or after your
23 time when you began working at DHEC?

24 A: This was over five years before my time at
25 DHEC.



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1 Q: Are these exchanges included in the DHEC's CON
2 file for the East Cooper application?

3 A: Yes. I do believe so.

4 Q: Okay. Now, let me have you also look at -- I'm
5 gonna start with Roper's Exhibit 2, Respondent
6 Roper's Exhibit 2.

7 A: I'm there.

8 Q: Okay. Tell us what this document is.

9 A: This is an email from myself to Mr. Barbier in
10 April of 2016.

11 Q: Who is Mr. Barbier?

12 A: He was counsel for Roper dealing with this
13 issue of the Bon Secours St. Francis lab.

14 Q: Okay. Why did you write this email to Mr.
15 Barbier?

16 A: To bring to his attention that which Mr. Levitt
17 had included in the application for East Cooper
18 calling into question the validity of the lab
19 at Bon Secours St. Francis based on the volumes
20 from Mr. Levitt's exhibit and my subsequent
21 review of the JAR data.

22 Q: And let's look at -- well, first of all, look
23 at the date. Can you tell us what the date of
24 the email is?

25 A: Yes. April 14th, 2016.



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1 Q: And can you tell us what's the relation in time
2 between the date of this email and the date
3 Roper submitted its application?

4 A: This email predated Roper's application at the
5 Berkeley Hospital by three weeks roughly.

6 Q: Now, I want to take you to the second paragraph
7 in the email and can you read aloud for us the
8 first three sentences of that second email?

9 A: Yes.

10 Q: I'm sorry, that second paragraph.

11 A: I also wanted to take a moment to update you on
12 our intentions regarding the under utilized
13 cath lab at St. Francis Xavier in West Ashley.
14 As you know, a pending CON application for the
15 addition of a cath lab in that service area
16 brought several pieces of information back to
17 the attention of The Department. This included
18 relevant JAR data which showed St. Francis
19 Xavier having performed zero cath procedures in
20 2007, 2008 and 2009 with procedures resuming at
21 a very low level in 2010.

22 Q: Okay. And in the second sentence that you read
23 out loud referencing a pending CON application,
24 what CON application were you referencing
25 there?



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1 A: That was the East Cooper Medical Center
2 application for diagnostic cath services.

3 Q: Okay. And let's then go down, you see the
4 sentence beginning a couple of sentences later,
5 in either case.

6 A: I do.

7 Q: Please read that, just that sentence out loud.

8 A: In either case, the performance of zero
9 procedures in that lab during 2008 and 2009 is
10 violative of S.C. Code Annotated Regulation 61-
11 15, Section 102-1(e), which states in summary,
12 the CON shall be obtained before offering any
13 health service which was not offered in the
14 preceding 12-month period.

15 Q: You've referenced a section of the regulation
16 there, do you know whether a similar language
17 is also included in the CON statute?

18 A: I believe it is.

19 Q: Okay. Then, I believe we have some language
20 that Mr. Thomas had asked Mr. Sullivan to read
21 aloud yesterday, so let's go down to the part
22 that I don't believe Mr. Thomas asked him to
23 read out, in order to. Will you start there
24 and read to the end of the paragraph.

25 A: Yes. In order to provide for the public



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1 benefit in the Roper St. Francis service area
2 with regard to appropriate access to high
3 quality cardiac catheterization, we believe
4 enforcement action against St. Francis Xavier
5 may be necessary. Enforcement actions pursuant
6 to St. Francis Xavier's failure to obtain a new
7 CON in 2010 for its cath lab are provided for
8 in Sections 44-7-320, 344-7-340 in the Code of
9 Laws of South Carolina as Amended.

10 Q: Okay. First of all, can you tell us what you
11 meant by the phrase provide for the public
12 benefit?

13 A: Well, one of the purposes of the Certificate of
14 Need program as outlined in statute is to best
15 meet the public need and that's generally done
16 guiding the establishment of high quality
17 health services in a service area.

18 Q: Okay. So, how did that relate in your mind to
19 this issue with the Bon Secours lab that you
20 were writing about?

21 A: Well, we had an application under review at The
22 Department for the diagnostic cath services at
23 East Cooper and we had every indication from
24 their application that, that would be a high
25 quality, well utilized program and there was a

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1 question as to whether or not the Bon Secours
2 lab would prevent the operation of that lab at
3 East Cooper or the approval of the application
4 itself.

5 Q: Then, let's go to that phrase, we believe
6 enforcement action against St. Francis Xavier
7 may be necessary. Can you describe for us what
8 you had in mind when you wrote that particular
9 language?

10 A: Well, that particular language was referencing
11 my belief that through enforcement that we did
12 have the necessary authority to require the
13 stoppage of catheterization procedures at St.
14 Francis Xavier and that's as a health service.

15 Q: Why do you say, as a health service?

16 A: Because we talked and heard quite a bit about
17 closing the lab and I think that's more of just
18 a physical description. What The Department is
19 actually doing is ceasing operation of a health
20 service, which is cardiac catheterization. And
21 so, through enforcement we would have certainly
22 brought to bear our belief that we had the
23 authority to require Roper's system to cease
24 and desist offering or operating that health
25 service at that location.

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1 Q: And what was the basis for your belief
2 regarding that enforcement authority?

3 A: Well, referencing back to Section 102-1(e) of
4 the regulation and the matching section of the
5 statute, for 24 months in the later part of
6 2007, 2008, I believe or the relevant dates
7 for 2008, 2009 there were zero procedures
8 performed. We believe that, that meant that
9 Roper was not offering catheterization service
10 at the West Ashley location, which was
11 violative of the statute and regulation and
12 particularly I believe it's Section 701 of the
13 regulation provides that, really any
14 noncompliance with any article of that
15 regulation is a violation and we have the
16 ability to take enforcement action.

17 Q: And let's skip down to the next paragraph, the
18 third one in this email. And looking about the
19 third line down, a little more than halfway
20 through, you would ask, can you read that
21 sentence?

22 A: Yes. We would ask that you provide such a
23 proposal to us within 10 business days of
24 receipt of this email.

25 Q: Okay. And what proposal were -- what did you

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1 mean by that?

2 A: Well, I wanted to solicit from Mr. Barbier and
3 his client, you know, obviously information but
4 also what they might propose as a remedy to
5 this situation that would save both The
6 Department and Roper St. Francis a significant
7 time and effort in litigation if we would set
8 a formal enforcement action that was latter
9 contested.

10 Q: And do you see up at the first line of that
11 same paragraph, the words last resort in
12 quotes?

13 A: I do.

14 Q: Can you tell us what you meant by last resort
15 there?

16 A: Jumping off my previous statement, I mean, the
17 enforcement action is obviously a very serious
18 matter be it cease and desist action or consent
19 order or an administrative order of The
20 Department. I mean, those are rather serious,
21 they're time consuming. They are able to be
22 challenged and for those reasons, if it's
23 possible for The Department for the sake of the
24 communities and the patients that these
25 healthcare providers are serving, if we can



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1 avoid that formal legal action and come to, you
2 know, a proposal that meets both our
3 requirements under the law and the needs of the
4 community then that's certainly something that
5 we're going to entertain.

6 Q: Okay. And then, look down to the very last
7 sentence of the email and I believe Mr.
8 Sullivan read this aloud yesterday. Can you
9 tell us what you meant by this last sentence of
10 the email?

11 A: Yes. So, in the spirit of this appreciation,
12 that's referencing certainly the very good work
13 that Roper and the St. Francis Health System as
14 well as any number of other healthcare
15 operators in the state. You know, we certainly
16 appreciate their work and we appreciate their
17 willingness to work through these issues with
18 The Department in a satisfactory way for us.

19 Q: And one last question in this email, the
20 sentence you read a few moments ago about
21 responding within ten business days, if you
22 look at the date of this email and then
23 consider 10 business days, what would that
24 deadline have been in relation to when Roper
25 ultimately submitted its CON application?

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1 A: The 10 business days still would have -- the
2 deadline would have come and gone before
3 receipt of their application I do believe.

4 Q: Okay. And so now, let's look at Petitioner
5 Trident's Exhibit Number 5.

6 A: I'm there.

7 Q: And can you tell us what this document is at
8 Trident's Exhibit 5?

9 A: This is an email chain, beginning at the top of
10 the page from Mr. Barbier to myself and he
11 copied Shelly Kelly, DHEC's Director of
12 Regulation, Ashley Biggers, Counsel for The
13 Department and Shannon Cantwell, who's the
14 planner for Roper St. Francis Healthcare.

15 Q: Okay. And did Mr. Barbier appear to be
16 responding to an earlier email in his email?

17 A: Yes, he's responding to the email that we just
18 discussed at Roper's Exhibit 2.

19 Q: Okay. And did Mr. Barbier attach any documents
20 to this email?

21 A: Yes, I believe that he did, entitled the April
22 20th, '16 letter to Louis Eubank, DHEC's
23 Exhibits, effected person and the title
24 continues.

25 Q: Then, let's go over to, within the same

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1 exhibit, page 305-008.

2 A: 008?

3 Q: Correct.

4 A: Okay, I'm there.

5 Q: And actually, you might want look at P05-006
6 and P05-007, directly before P05-008. Do these
7 appear to be the same as documents at those
8 specific pages as we looked at in the East
9 Cooper CON file of record earlier?

10 A: Yes, they do.

11 Q: Okay. Do you know who Les Shelton is?

12 A: Yes. He at the time was the interim CON
13 director or some such title and he's still with
14 The Department today.

15 Q: And then, look over at P05-015. Do you know
16 who Ms. Beverly Brandt is?

17 A: Yes. She was, at the time of this letter, over
18 the Bureau of Health Facilities and Service
19 Development. She was the chief of that bureau.

20 Q: Have you read over the documents on the pages
21 that I've referenced?

22 A: I have.

23 Q: And in your review of those documents, did you
24 see any reference either from Mr. Shelton or
25 from Ms. Brandt regarding enforcement?



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1 A: No, I did not.

2 Q: And at the time, if you look at the dates of
3 the emails, which are both in 2010, which
4 version of Standard 3 in the diagnostic cath
5 part of the Health Plan was in effect at the
6 time these letters, compared to the two
7 versions that you and I looked at earlier in
8 the two Joint Exhibits.

9 A: I think at this time in the first half of 2010,
10 it was still the combined use rate version of
11 the standard, which was in the 2008 Health Plan
12 we discussed.

13 Q: Okay. What thoughts, if any, did you have
14 regarding after your review of those as it made
15 impact? Anything you thought you could do in
16 regarding the Bon Secours lab in these two
17 applications verses East Cooper's?

18 A: Well, I mean, after reviewing the documents and
19 noting there wasn't any reference to code or
20 regulation, I, sort of, disagreed and moved
21 ahead as indicated in those emails utilizing
22 what I believed as my authority and enforcement
23 ability under the law.

24 Q: So, let's talk some more about Standard 3 in
25 the 2015 plan that applied to Roper's



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1 application.

2 A: Okay.

3 Q: What conclusion did you ultimately draw
4 regarding how to treat the Bon Secours cath lab
5 in relation to Standard 3?

6 A: Well, my ultimate decision was that given my
7 firm belief that the Bon Secours St. Francis
8 West Ashley lab had not offered the services
9 for two years and would have required a CON to
10 again be an existing lab that it was, in fact,
11 not an existing lab for the purpose of review
12 under Standard 3.

13 Q: Okay. And then, looking at Joint Exhibit 1,
14 let's turn to page J01-206. Can you tell us
15 what that document is, which begins on that
16 page and continues through J01-208?

17 A: Yes. This is my letter documenting the
18 decision to approve the diagnostic cath service
19 at Roper St. Francis Hospital Berkeley.

20 Q: What was your finding regarding, let's see, on
21 page J01-206, do you see in the blue heading,
22 Compliance With The State Health Plan?

23 A: I do.

24 Q: Tell us what your decision was in that regard,
25 in particular regarding Standard 3.



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1 A: Regarding Standard 3, my ultimate finding was
2 that, you know, we obviously had -- I believe
3 I referenced the conversation we had with Roper
4 about this matter and I explained an
5 inconsistency in my words to the applicant and
6 ultimately determined that the Bon Secours lab
7 was non-existing for the purpose concluded
8 further that the other diagnostic labs in the
9 service area were operating the required
10 volumes for approval and found that ultimately
11 the applicant had sufficiently complied with
12 the standards for diagnostic cath services in
13 The Plan.

14 Q: At the time that you made this decision -- and
15 by the way, what was the date of this decision?

16 A: This decision is dated July 25th, 2016.

17 Q: At the time that you issued this decision, were
18 you aware of any DHEC interpretations regarding
19 the phrase, existing labs for purposes of
20 Standard 3?

21 A: I was not aware of any historical
22 interpretation of that term, no.

23 Q: And as you sit here today and testify, are you
24 aware of any today?

25 A: Only that precedent which we've sat through

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1 these decisions.

2 Q: So, can you just tell us then in your words how
3 do you, in your role as reviewer and decision
4 maker, in particular regarding these two
5 decisions, what do you see the term, existing
6 cath labs to mean? I'm sorry, existing labs to
7 mean.

8 A: Well, based on the decisions and based on how
9 I've interpreted all this information and
10 thinking back to both the community need aspect
11 of Standard 3 as well as the quality issues
12 that we take into consideration with Standard
13 3, I believe that the existing labs are those
14 labs that exists when The Department issues the
15 Certificate of Need for the new lab.

16 Q: Did you hear Mr. Sullivan answer some questions
17 yesterday regarding the inventory of the State
18 Health Plan, and in particular how his opinions
19 regarding whether if a lab is closed, how The
20 Department should proceed with respect to the
21 adoption of a new plan and consideration of any
22 application for that service?

23 A: I did.

24 Q: Can you tell us what is your take on the issue
25 of what you believe DHEC is authorized to do



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1 when a service or facility closes in between
2 two adopted versions of the State Health Plan.

3 A: Well, they certainly keep that information. If
4 we were to update the South Carolina Health
5 Plan each time a facility or service
6 permanently closed, and I'll just use the term
7 closed, we would be required under the CON Act
8 to engage the South Carolina Health Planning
9 Committee, go through that entire public notice
10 process and ultimately present it to The Board.
11 And so, what historically The Department has
12 adopted is a strategy of taking that
13 information into account, whether it is an
14 exemption request to close a facility or we've
15 simply received notice there's been a closure,
16 we take that information and upon the drafting
17 of the next Health Plan, we will use footnotes
18 in the inventories to note all of those changes
19 that have occurred since the last iteration of
20 the Health Plan, be that a closure or the
21 issuance of certificates for new services,
22 beds, equipment anything of that nature.

23 Q: Is there any requirement that you are aware of
24 for a facility that closes, either the facility
25 or beds or a service within the facility to



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1 notify DHEC of such a closure?

2 A: Yes, there are. I believe outside of just CON,
3 there are certainly requirements for
4 notification that I'm less familiar with, but
5 for inventoried services we do request that we
6 be notified for the inventory so that we can
7 make those updates when the Health Plan itself
8 is updated.

9 Q: Are you aware of any requirements for DHEC to
10 then provide a public notice of those closures?

11 A: No, I'm not.

12 Q: Did you conduct a project review meeting with
13 regard to the Roper application?

14 A: No, I did not.

15 Q: Can you just, kind of, tell us generally what
16 is your understanding of a project reviewing
17 is.

18 A: Project review meetings are informal in nature.
19 They're certainly not outlined in the statute
20 or regulation in the way that a public hearing
21 is for the purposes of CON review. They're
22 informal meetings where an applicant and
23 opposing parties may visit The Department to
24 present information on their application or
25 their opposition to Department staff during the



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1 review period. And we would take that
2 information into account as part of the record.

3 Q: Can you tell us what a public hearing is in the
4 context of CON applications?

5 A: Public hearing in the context of CON
6 application is outlined in the statute and
7 regulations whereby a party who may oppose the
8 CON application and who has noticed The
9 Department that they are an effected person and
10 in opposition to an application, I believe
11 within 30 days of an application being deemed
12 complete may request a public hearing, at which
13 time we would make the full call for that
14 hearing at the community level.

15 Q: Did anyone request a public hearing regarding
16 Roper's CON application?

17 A: No.

18 Q: Is there a right to, that your aware of, and
19 based on the CON statute and regulation that
20 you administer for The Department, is there a
21 provision and under that statute or that
22 regulation that gives someone the right to
23 request a staff review or project review
24 meeting?

25 A: No right under the statute or regulation.

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1 Q: What about the same question for public
2 hearing?

3 A: Yes. That is outlined in the law.

4 Q: If someone requests a public hearing, what do
5 you typically do?

6 A: We will hold a public hearing.

7 Q: What's the difference between the two?

8 A: Public hearings are a very formal process where
9 we would notice the public, they're invited to
10 attend the public hearing and there are, I
11 believe, in other parts of upstate code, rules
12 and regulations for holding those public
13 hearings. And in my time at DHEC, we've only
14 had one. The project review meetings by
15 comparison don't have that public notice.
16 They're certainly free and open, it's a state
17 agency and a public meeting but they're not
18 noticed or advertised or anything like that.

19 Q: Why did you not hold the -- I'm sorry, a
20 project review meeting for Roper's application?

21 A: Given the, sort of, the issue at hand here, I
22 wanted and instead of having the project review
23 meeting and PowerPoint presentations and, you
24 know, sort of, oral presentations, I wanted
25 instead to have arguments from both sides if

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1 they chose to submit in writing to include in
2 the record.

3 Q: With regard to ---

4 MS. BIGGERS: Just one moment, Your Honor.

5 Q: With regard to the decision, I'm sorry, the
6 emails that you exchanged with Mr. Barbier and
7 any conversations you may have had with him,
8 did you or anyone else on behalf of DHEC reach
9 any agreement with Mr. Barbier or anyone else
10 representing Roper regarding the outcome of
11 Roper's CON application?

12 | A: No.

13 Q: Did you take into consideration -- strike that,
14 I think that's all the questions I have. Thank
15 you. If you'll answer any questions that other
16 counsel may have.

17 MS. HOLLINGSWORTH: Your Honor, could we just take a
18 couple minutes so I can confer with Mr. Thomas
19 about the order? A brief recess.

20 THE COURT: We'll be at ease for a minute or two.

21 (Off the Record)

22 **THE COURT:** Back on the record. All right, Ms.
23 Hollingsworth.

24 MS. HOLLINGSWORTH: Thank you, Your Honor.

25 MR. EUBANK - DIRECT EXAMINATION BY MS. HOLLINGSWORTH:



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1 Q: Mr. Eubank, it's nice to see you this morning.

2 A: You as well.

3 Q: So, a few questions for you and again, we
4 appreciate you being here and talking to us
5 about this case. I do want to ask you a few
6 questions though. And, of course, you had your
7 deposition taken so some of this will be just
8 making sure I understood that testimony. But,
9 is there anything the statute or the regulation
10 that sets forth when you would refuse an
11 application?

12 A: Yes. There are certainly circumstances where
13 it may not be formatted correctly or didn't
14 include a filing fee and then we would not
15 accept that application for filing.

16 Q: Okay. But, what about if the inventory didn't
17 have a specific piece of information. Is there
18 anything about it that would say, well, on its
19 face, I don't think it's needed so you don't
20 give it to me?

21 A: No.

22 Q: Okay. And in these discussions that Mr.
23 Sullivan talked about at length yesterday, and
24 you addressed them with Ms. Biggers, but do you
25 regularly have discussions with the regulated



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1 community about potential and proposed
2 projects?

3 A: We certainly do.

4 Q: And is that normal and customary?

5 A: Absolutely.

6 Q: Okay. And so, if two different providers read
7 the same section of the Health Plan
8 differently, is there anything that prevents
9 either one of them from submitting an
10 application for consideration?

11 A: No, there's not.

12 Q: And what does it mean to be an effected person
13 during the CON review?

14 A: It's a fairly extensive definition in the
15 regulation even longer than the definition in
16 the statute. But, essentially to be an
17 effected person means that you have some dog in
18 the hunt and would like to be copied on
19 correspondence from The Department to the
20 applicant to include the complete letter,
21 certainly the decision, and that's it.

22 Q: Okay. And you were here yesterday for
23 testimony and we walked through some various
24 public notices and did you agree with all of
25 that testimony about the various public notices



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1 in publications that are part of the CON
2 process?

3 A: Yes. I agree with that.

4 Q: And I think you do have some history in
5 addressing other applications for cardiac
6 services, right?

7 A: Yes. We've had -- in The Department we've had
8 several transfers of cath labs, certainly new
9 catheterization services, like we're talking
10 about today as well as some other Department
11 projects.

12 Q: Okay. And did you assist with the, I think it
13 was the Beaufort application related to heart
14 services.

15 A: I was not the reviewer or ultimate decision
16 maker in that case but was involved, certainly,
17 yes.

18 Q: Okay. And then, same with the transfer of a
19 lab involving McLeod?

20 A: Correct and same circumstances there.

21 Q: Okay. Just so we, kind of, understand from the
22 timeline, did the issues related in your
23 decision to investigate the circumstances of
24 the Bon Secours St. Francis Xavier lab, was
25 that initiated by Roper St. Francis?

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1 A: No. Not in my initial -- use the term
2 investigation very loosely, but my looking into
3 that matter.

4 Q: So, it wasn't raised by Roper Berkeley as an
5 applicant or Roper St. Francis?

6 A: I believe Roper Berkeley as an applicant did
7 later after reference but the initial reference
8 came from East Cooper Regional Medical Center.

9 Q: Okay. And that reference you had talked about
10 that in Joint 2, page, I think, 23 and 24,
11 which is the East Cooper Medical Center's
12 application?

13 A: Yes. Give me those page numbers one more time.

14 Q: 23, the bottom of 23 and then probably the,
15 sort of, the conclusion at the top of 24.

16 A: Yes.

17 Q: Go to the top of 24.

18 A: Yes, that's correct.

19 Q: And so, is this the discussion that you had
20 with Ms. Biggers about Mr. Levitt?

21 A: It is.

22 Q: And Mr. Levitt is the health planner for East
23 Cooper Medical Center?

24 A: He was on this application, yes.

25 Q: And when you were discussing this, is, sort of,



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1 what brought the issue to your attention, he
2 took a position that the laboratory at ---

3 **MR. THOMAS:** Let me object, Your Honor, I think she
4 is leading this witness and this is a friendly
5 witness to Roper St. Francis so it's not cross,
6 it's direct for her.

7 **THE COURT:** I agree, I'll sustain that objection.
8 Re-strike the question.

9 **MS. HOLLINGSWORTH:** Sure, Your Honor. I'm just
10 trying to develop the testimony.

11 **Q:** If you could, just read to us that bottom
12 section of what's highlighted.

13 **A:** With this in mind, Bon Secours St. Francis
14 Hospital's catheterization laboratory is
15 considered nonoperational and requires a CON
16 application if it is to be included in the
17 inventory for catheterization laboratories, as
18 such it is excluded from the service area
19 analysis.

20 **Q:** Okay. So, what is your understanding of what
21 Mr. Levitt's position was?

22 **A:** Mr. Levitt's position referencing to the
23 highlighted section of regulation was that
24 after 2008 or 2009, the Bon Secours lab would
25 have required CON approval to be operational

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1 again in inventoried for purposes of the Health
2 Plan and as that was the case, he did not
3 include that single lab in his analysis of the
4 other labs in the service area.

5 Q: Okay. Let's look at Respondent 1, Roper
6 Exhibit 1.

7 (Respondent's Exhibit Number 1 was admitted into
8 evidence.)

9 A: I'm there.

10 Q: If you'll just look at the top, what is the
11 information about the to whom and subject of
12 this email?

13 A: What's referenced here was from myself to
14 Margaret Murdock, who is CON staff.

15 Q: Okay. And what is the subject?

16 A: Please review email to Ralph Barbier in re St.
17 Francis cath lab.

18 Q: Okay. And why did you send a draft to Ms.
19 Murdock to take a look at?

20 A: It's very typical for me to send drafts to
21 staff review before I send them out just to
22 check for consistency of language, grammar and
23 in this particular case, Ms. Murdock is also
24 herself an attorney and I wanted to ensure that
25 my references to code were correct.

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1 Q: Okay. So, I guess as I understood your
2 testimony, this is consistent with your belief
3 that this was a serious matter?

4 A: Absolutely.

5 Q: Ms. Biggers pointed you -- I did want to ask
6 you about Joint 2-069.

7 A: I'm there.

8 Q: Can you confirm this is East Cooper's CON file,
9 right?

10 A: And I just want to make sure I understood, this
11 document -- is it fair to say that this is the
12 effected person letter?

13 A: Yes, it is.

14 Q: Is the response for the proposal from Roper St.
15 Francis following your email of April 14th?

16 A: Yes, I believe that it is.

17 Q: Okay. So, the information on the second page
18 of this letter, would that be the structure of
19 a proposal that you asked for regarding to plan
20 to apply?

21 A: Yes. Essentially it is, yes.

22 Q: If you could, turn -- let's look at the Roper
23 Berkeley CON file just very quickly. There's
24 Joint 1.

25 A: Okay.

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1 Q: Now, in the Roper Berkeley matter, did Trident
2 Medical Center file an effected person letter?

3 A: Yes.

4 Q: Did they do so in the East Cooper file, a CON
5 to your knowledge?

6 A: No, not to my knowledge.

7 Q: And in terms of page 190 ...

8 A: I'm there.

9 Q: You testified this morning that you wanted
10 arguments in writing that you would be able to
11 include in the record. Is that right?

12 A: That's correct.

13 Q: What is this document here that's in the Roper
14 Berkeley record?

15 A: This is a letter from Mr. Sullivan and Sullivan
16 Consulting Group, on behalf of Trident Medical
17 Center. This is their opposition letter where
18 Mr. Sullivan more fully lays out the opposition
19 arguments raised by Trident Medical Center.

20 Q: Okay. Did you consider his arguments prior to
21 reaching your decision?

22 A: Absolutely.

23 Q: And so, as we look at the letter, and
24 particularly -- let's see, it's probably page
25 198 ...

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1 A: I'm there.

2 Q: In regards to the opposition, look at the
3 paragraph below the number 1.

4 A: Okay.

5 Q: If you could just read that paragraph into the
6 record.

7 A: Roper Berkeley does not satisfy this criteria
8 because there is an overall increase in number
9 of diagnostic cath services in the service
10 area. There currently is no legitimate cath
11 lab program at BSSFH, or Bon Secours St.
12 Francis Hospital, nor has there been since 2007
13 when Roper St. Francis made the decision to
14 discontinue services at the lab, see Exhibit 6.

15 Q: Okay. And so, you were aware of his position
16 when you were evaluating the application?

17 A: Yes, absolutely. It comported with Mr.
18 Levitt's position as well.

19 Q: And Ms. Platt, you're familiar with Ms. Platt?

20 A: I am.

21 Q: And what do you understand her role was during
22 this CON process?

23 A: She was acting as the healthcare planning
24 consultant for Roper Health System.

25 Q: So, did you have her opinion available to you



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1 in the Roper Berkeley application?

2 A: Yes.

3 Q: In Trident's opposition at any time prior to
4 rendering your decision, did Trident take a
5 position that the proposal of Roper Berkeley to
6 close the St. Francis lab if approved for Roper
7 Berkeley lab, was not permitted?

8 A: I don't believe so.

9 Q: Was that anywhere in this letter from Mr.
10 Sullivan?

11 A: No, not that I recall.

12 Q: Are there diagnostic catheterization services
13 being performed at St. Francis Xavier today?

14 A: No.

15 Q: And do you know when they stopped offering
16 those services following your approval?

17 A: Well, based on a letter that we have on file,
18 their contention was those services stopped on
19 or about August 1st, of 2016.

20 Q: And in evaluating Standard 3 in order to
21 evaluate both the East Cooper application and
22 the Roper Berkeley application, did you apply
23 and unusual or special meaning to the word
24 existing?

25 MR. THOMAS: Your Honor, I'm gonna object again. I



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1 think that was a leading question.

2 **MS. HOLLINGSWORTH:** I would disagree that that's
3 leading.

4 **THE COURT:** I'm gonna overrule that objection, I
5 think she's asked about the existing?

6 **MS. HOLLINGSWORTH:** Right, I'm just trying to
7 confirm if his interpretation or application
8 used a special or unusual meaning.

9 **THE COURT:** She's asking a question that he can
10 answer either way.

11 **MR. THOMAS:** It seems to suggest the answer that it
12 does, it somehow did so, I don't know. I'll
13 let it go, Your Honor.

14 **THE COURT:** In the sense that she used the word
15 confirm, I think I'll agree, but I don't think
16 that -- I think the gist of the question is to
17 ask for his opinion on something and I'm gonna
18 allow that.

19 **MR. THOMAS:** All right, Your Honor.

20 **A:** No. I did not apply any special meaning to the
21 term.

22 **Q:** And just so that I understand, your review of
23 these applications and obviously Standard 3 is
24 an issue before The Court, so in focusing on
25 Standard 3, do you believe that your



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1 interpretation application is consistent with
2 the Health Plan?

3 A: I do.

4 Q: Do you believe in any way that it's manifestly
5 contrary to any of your statutory regulatory
6 authority?

7 A: No, I do not.

8 Q: What would be the purposes of the CON Act and
9 program that you consider in evaluating that
10 standard?

11 A: Whether we as a program in reviewing these
12 applications are containing costs, best meeting
13 the needs of the public, guiding the
14 establishment of high quality health services,
15 all of those factors and certainly preventing
16 the unnecessary duplication of services. All
17 four of those factors go into our review of
18 every application that comes before The
19 Department.

20 Q: And is it your belief that, that's what you did
21 in this case as well?

22 A: It is.

23 Q: And you did testify that there's no other prior
24 interpretation at The Department that you're
25 aware of, right?



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1 A: Not that I'm aware of.

2 Q: Was your interpretation and application of
3 Standard 3 as to Roper Berkeley the same way
4 that you interpreted and applied it as to East
5 Cooper?

6 A: Yes.

7 Q: And was the East Cooper decision challenged or
8 appealed?

9 A: No.

10 Q: That's all my questions, thank you.

11 A: Thank you.

12 THE COURT: Mr. Thomas.

13 MR. THOMAS: Thank you, Your Honor.

14 MR. EUBANK - CROSS-EXAMINATION BY MR. THOMAS:

15 Q: Good morning, Mr. Eubank.

16 A: Good morning, Mr. Thomas.

17 Q: I think we're still in the morning.

18 A: For the morning, okay.

19 Q: With respect to this CON application and the
20 East Cooper CON application we've been talking
21 so much about, you never had any discussions
22 with Les Shelton about those, correct?

23 A: No.

24 Q: Okay. And you've never been qualified as an
25 expert in health planning in a court of law,



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1 correct?

2 A: Correct.

3 Q: You haven't been designated as an expert in
4 this case, have you?

5 A: No.

6 Q: Okay. Until you started working at The
7 Department in November of 2015 as the Director
8 of the CON program, you actually had no
9 experience reviewing applications, correct?

10 A: That's right.

11 Q: And you had never drafted a CON application,
12 correct?

13 A: Also correct.

14 Q: And at that time, you didn't have any
15 experience with the South Carolina Health Plan,
16 right?

17 A: Correct.

18 Q: And I think you said, you held the title of
19 Director of the CON Program until July 1st,
20 2017?

21 A: Correct.

22 Q: And when you received the CON application in
23 this matter from Roper St. Francis, you had
24 been on the job as the CON Director for
25 approximately five months?



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1 A: Approximately, yes.

2 Q: And this was the very first cath lab CON
3 application that you had reviewed dealing with
4 a new diagnostic cath service, correct?

5 A: Correct.

6 Q: And I think you had dealt with another CON
7 application, kind of, maybe, contemporaneously
8 with this one in the East Cooper application.
9 That was a McLeod Seacoast diagnostic cath lab
10 transfer, right?

11 A: Yeah. I think that was going on about the same
12 time, that is correct.

13 Q: And so, what McLeod Seacoast was using was the
14 service area transfer standard, correct?

15 A: Yeah, the exceptions to the service area
16 standards.

17 Q: And just for the record, you certainly had no
18 input in the drafting of Standard 3, correct?

19 A: That's correct, not in this Health Plan.

20 Q: And as far as you know, the Standard 3 that
21 we're dealing with here today, had came into
22 existence in its de-iteration of the 2015 Plan
23 that came into existence in the 2012 Plan,
24 right? Is that your understanding?

25 A: I believe so, yes.



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1 Q: Okay. And for the 2015 State Health Plan, you
2 didn't have any substantive input in that plan
3 just by virtue of the fact of when you started
4 your job, correct?

5 A: Correct. It was approved before I came to the
6 agency.

7 Q: Okay. And is it your understanding, and if we
8 need to look at Joint Exhibit 6, we can, but
9 prior to that Standard 3, it was an aggregate
10 standard, correct?

11 A: Correct.

12 Q: But, it did include the word, existence or
13 existing in it, correct?

14 A: It did.

15 Q: Okay. And that standard operated in a fashion
16 to prevent hospitals from applying for a
17 diagnostic cath lab unless all the existing
18 labs in the service area were operating at
19 above an 80 percent threshold, right?

20 A: Right.

21 Q: And with respect to this decision, when you
22 made the decision -- you made the decision in
23 this case, in the Roper Berkeley case, correct?

24 A: I did.

25 Q: And other than what you had received from, you



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1 know, opposition parties and, you know, the
2 applicant, you didn't rely on any other people,
3 health planners or anything else to make this
4 decision, right?

5 A: Not independently, no.

6 Q: All right. And nobody assisted you in
7 reviewing the cath lab decision, excuse me, in
8 reviewing the cath lab application that's at
9 issue here. That was, kind of, your sole
10 review, right?

11 A: Correct.

12 Q: And I believe you stated earlier that the
13 drafting was all of your doing, nobody assisted
14 you, gave you any input with the drafting of
15 the decision, right?

16 A: Correct.

17 Q: I believe Ms. Hollingsworth asked you about a
18 couple of other CON applications you were
19 involved with, and just for the record, the
20 Beaufort Memorial, I think PCI application that
21 came after the applications that are at issue
22 in this case, correct? In terms of your review
23 and decision.

24 A: The initial application for EPCI services,
25 elective PCI services, at Beaufort Memorial

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1 Hospital, I believe was existing at the time
2 that I came to The Department. It was being
3 reviewed. There was a challenge or was an
4 issue with that particular case. Eventually it
5 was withdrawn and resubmitted after my time at
6 DHEC, yes.

7 Q: Okay. And, Mr. Eubank, you're not aware of any
8 situations prior to the contemporaneous
9 decisions of the East Cooper and Roper Berkeley
10 applications where a diagnostic cath lab that
11 was operating below the threshold in Standard
12 3 had to close down in order to let another
13 applicant in to the market, are you?

14 A: No.

15 Q: Okay. You would agree with me that the issue
16 of Standard 3 actually did come up prior to --
17 in the past there was an interpretation of
18 Standard 3 back in 2010 by Ms. Brandt in a
19 similar context but it involved that aggregate
20 portion of the statute, right? Or of the
21 provision.

22 A: Correct.

23 Q: Were you aware of that at the time you made the
24 decision in this case?

25 A: Yes.



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1 Q: Okay. Now, you know, kind of, discounting that
2 decision or that decision by Ms. Brandt back in
3 2010, you didn't investigate to see if there
4 were any similar situations in the past on
5 which you could base The Department's decision
6 with respect to, kind of, below volume
7 operation of St. Francis, correct?

8 A: I reviewed the files available to me as The
9 Department as reviewer and other than the
10 documents provided that you've referenced the
11 email and the letter, I couldn't find anything
12 ---

13 Q: Okay.

14 A: --- of particular note.

15 Q: And as best I understood from your deposition
16 testimony, that you believed that the purpose
17 of Standard 3 in the cath lab standards in the
18 Health Plan is to determine whether or not the
19 labs within the service area, here 45 minutes
20 from the proposed lab, are operating at a
21 sufficient capacity to warrant approval of an
22 additional lab. Do you recall your testimony?

23 A: I do.

24 Q: Okay. And you didn't -- when I asked you that
25 question, you didn't talk anything about the

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1 quality at that time, did you?

2 A: No. I understood your question to be very
3 literal and today expounded on that
4 understanding.

5 Q: Okay. But, at the time I asked you about the
6 purpose of Standard 3, this was a month ago you
7 didn't mention anything about quality, right?

8 A: No. I gave a very technical explanation to you
9 that day.

10 Q: Okay. And The Department with the advice of
11 the State Health Planning Committee, The Board,
12 determined that sufficient capacity back 2015
13 and 2016 was 500 diagnostic procedures, right?

14 A: Correct.

15 Q: Now, you approved Roper's CON application on
16 the basis that the proposal was consistent with
17 Standard 3 and the other standards of the South
18 Carolina Health Plan because at the time you
19 rendered the decision, you did not consider St.
20 Francis' lab to be an existing lab, correct?

21 A: That's correct.

22 Q: Okay. But, you agree with me that, that
23 language during the most recent year, there
24 were procedures listed in inventory of the cath
25 lab standards in the Health Plan.



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1 A: I would agree that there was data contained in
2 the Health Plan about that particular facility,
3 yes.

4 Q: Okay. And in the 2015 -- The Department had
5 the JAR application available, excuse me, the
6 JAR report or Joint Annual Report, available to
7 it in 2015, correct with respect to this
8 decision?

9 A: Yes.

10 Q: Okay. And you would agree with me that whether
11 you use procedures or equivalents here, that
12 the cath lab is no where close to 500 and
13 hadn't been for a long time, correct?

14 A: Correct.

15 Q: 500 procedures. And you don't dispute that St.
16 Francis was actually operating its cath lab as
17 late as 2015, correct?

18 A: Operating? No, I wouldn't disagree with that
19 statement.

20 Q: Okay. And just in terms of the word, existing
21 and this is plainly understood, can't be an
22 operating cath lab and be nonexistent, correct?
23 The plain meaning of that word?

24 A: I mean, plain meaning with regard to Standard
25 3, they could be operating at, I believe, as

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1 The Department has seen a number of facilities,
2 I think they're operating but that shouldn't be
3 the case and I think that's the story here.

4 Q: Well, I understand you think that's the story,
5 but the State Health Plan even carried
6 inventory for St. Francis when it was at zero
7 catheters, correct?

8 A: Correct.

9 Q: In fact, it had many opportunities with
10 subsequent State Health Plans to remove St.
11 Francis from the inventory, correct?

12 A: I believe that would be correct.

13 Q: Okay. Now, you would agree with me that in
14 order to actually perform a cath procedure in
15 a cath lab, you have to offer that service,
16 correct?

17 A: Correct.

18 Q: And let's look at Joint Exhibit 1 at 2003,
19 2004, if we could. It's 203 and 204. It's
20 called, lack of sleep.

21 A: I'm there.

22 Q: All right. This is the deemed complete letter.
23 Is that right or I think that's right.

24 A: Yes.

25 MR. THOMAS: Can we switch this over and try to get



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1 this up on the screen?

2 Q: So, is this the deemed complete letter, Mr.
3 Eubank?

4 A: Yes, for the Roper St. Francis Hospital
5 Berkeley cath lab project, yes.

6 Q: And it's dated May 26th, 2016?

7 A: Correct.

8 Q: Okay. And just for the record, if you turn
9 over to J -- Joint 1-204, what is the very
10 first project review criteria that's listed
11 there?

12 A: Compliance With the State Health Plan.

13 Q: Okay. And that particular project review
14 criteria is always listed as number one with
15 respect to -- and these effected person, excuse
16 me, in these deemed complete letters with
17 respect to health services that have standards
18 in the State Health Plan, correct?

19 A: Correct.

20 Q: And the reason that project review criteria is
21 always listed as number one is because the
22 statute plainly states that The Department may
23 not issue a CON unless an application complies
24 with the South Carolina Health Plan project
25 review criteria and other regulations, correct?



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1 A: Correct.

2 Q: Okay. Now, in terms of -- let's go to Joint
3 Exhibit 1, 207 if we could. And this is your
4 letter, approval letter, and I'm gonna try to,
5 kind of, summarize what we've got here. So,
6 because the applicant agreed to close down the
7 cath lab, and I'm looking at Joint 1, 2007,
8 which is, kind of, I think where you summarize
9 this idea of, you know, being able to discount
10 the utilization but because they agreed to
11 close down the cath lab upon the approval of
12 the CON application, so regardless of the
13 timing of the new lab installation or any
14 potential opposition, you believe that allowed
15 The Department to discount the utilization of
16 the lab, correct?

17 A: To render the utilization of that lab mute for
18 the purposes of the decision, correct.

19 Q: Okay. And this is under the heading,
20 Compliance with the State Health Plan, correct?

21 A: Correct.

22 Q: Okay. Now, you don't deny that a CON
23 application for new diagnostic cath services
24 has to comply with Standard 3 to be approved by
25 The Department, do you?



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1 A: No. I don't disagree with that.

2 Q: Okay. And that's because if the CON
3 application doesn't comply with this Standard
4 3, it wouldn't comply with the State Health
5 Plan, right?

6 A: Correct.

7 Q: Okay. And if it doesn't comply with the State
8 Health Plan, it can't be consistent with the
9 State Health Plan, correct?

10 A: I don't believe that.

11 Q: You don't believe that?

12 A: No.

13 Q: So, you believe that an application can not
14 comply with one of the standards of the State
15 Health Plan and still be consistent with the
16 State Health Plan? I just want to ...

17 A: Yes. I mean, because we find compliance in
18 different ways for different projects and I
19 mean, you might have a situation where the
20 project, you know, I like the example from
21 yesterday that was brought up with regard to
22 some of those standards in the Health Plan that
23 are a little more declarative we've got some
24 flexibility so, you know, when one person may
25 say it's compliant, the other person may say,



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1 it's not compliant but it's completely
2 consistent with the Health Plan itself.

3 Q: You have to make the ultimate decision as to
4 reviewer though, right?

5 A: Correct.

6 Q: That it complies with that standard to be
7 consistent, correct?

8 A: Yes, that it's compliant enough to be
9 consistent.

10 Q: Compliant enough. So the fact that some people
11 -- obviously, you know, there are going to be
12 opposition parties in certain instances that
13 are gonna say, we don't believe it complies but
14 at the end of the day, you have to find that it
15 does comply with standard in order to find it
16 be consistent with the State Health Plan,
17 correct?

18 A: Yes.

19 Q: Okay. That's all I was trying to get at.

20 A: Okay.

21 Q: And you would agree with me that with respect
22 to Standard 4 here, Mr. Eubank, I mean, this
23 application rather than dealing with this word,
24 existing, in Standard 3, we're dealing with
25 Standard 4, but the applicant came in and

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1 everything is perfect with that application but
2 they're only projecting 475 caths by year three
3 and you even do them a solid, you call them and
4 say, maybe you need to redo your calculation
5 for Standard 4 and they come back and say, no,
6 we done it three times, it's 475. You can't
7 approve that CON application, can you?

8 A: Reading Standard 4, if the applicant in their
9 application projected the volume that you're
10 talking about, no, I don't believe so.

11 Q: Because it wouldn't be compliant with Standard
12 4, it wouldn't satisfy Standard 4 of the cath
13 lab standards, correct?

14 A: Correct, as they're seen here, no.

15 Q: And it wouldn't be consistent with the State
16 Health Plan, right? The application?

17 A: Not at that level, no.

18 Q: Okay. Now, Mr. Eubank, I hate asking open-ended
19 questions in cross, but I can do it today, when
20 with respect to Standard 3, is an existing lab,
21 in terms of volume, too low? Is it at 40
22 caths?

23 A: I don't think that we have any standards for a
24 floor.

25 Q: Okay.

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1 A: In the particular Health Plan that we're
2 talking about there wasn't anything that said,
3 you know, Department, if you see this number,
4 you know, stop that health service at that
5 facility.

6 Q: Okay. That means, there's not a floor, right?

7 A: Correct.

8 Q: I mean, well, there is a floor, the floor is
9 500, right?

10 A: For projections.

11 Q: No, no, no. Look at Standard 3, what I'm
12 asking you is what is a nonexistent lab in
13 terms of volume in The Department's mind. If
14 they're only doing 40 caths, is that an
15 existing lab for purposes of Standard 3?

16 A: If they have done 40 catheterization labs,
17 every year, then we would have available data,
18 yes.

19 Q: That's an existing lab, correct?

20 A: Correct. It never ceased to offer the health
21 service for 12 months or more and it's not an
22 application for a new service.

23 Q: Okay. What if it's 10 consistently?

24 A: That still meets the definition I think of
25 existing in that it continuously offered that



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1 service.

2 Q: So, if I've got you right, it's those two years
3 of zero data several years before the
4 application was submitted by Roper St. Francis
5 that allowed you to say, you're not an existing
6 lab, right? Is that The Department's position?

7 A: That's yeah, that's my contention and I think
8 we've seen a number of statements to that
9 effect in emails and other documents.

10 Q: Well, we didn't see it at -- any statements
11 like that from Roper though, right? They
12 actually in the effected person letter, and I
13 can get it out but I think you've probably seen
14 it enough, Mr. Barbier took exception with Mr.
15 Levitt's statement in the East Cooper
16 application, correct?

17 A: That's correct.

18 Q: Okay. And pretty bluntly said, we're open for
19 business and we're not gonna close until our
20 CON application is approved, correct.

21 A: Those were his words I believe, yes.

22 Q: Now, in terms of this idea of Roper shutting
23 down its cath lab, you would agree with me that
24 it never agreed to close down the cath lab in
25 the event that The Department denied the CON



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1 application, right?

2 A: Yeah, I don't believe that was offered in what
3 we've seen.

4 Q: Okay. And you think that -- you would agree
5 with me that as far as you know, and what
6 you've read and Roper's position, that they had
7 no intention of closing that cath lab, unless
8 their application was approved, correct?

9 A: I believe that was their take on it, yes.

10 Q: Okay. Now, let's go to, well, Petitioner's
11 Exhibit 5, if you don't mind. I don't know how
12 deeply we'll get into this one just yet but
13 this is Petitioner's Exhibit that contains your
14 letter and Mr. Barbier's, or your email to
15 Ralph regarding enforcement action and that
16 type of thing and Mr. Barbier's response later
17 on in the week, correct?

18 A: That is correct.

19 Q: Okay. Now, you would agree with me that in
20 terms of the enforcement action that you
21 referenced within your email, you never
22 referenced what kind of enforcement action
23 you're to take, correct?

24 A: No.

25 Q: Because there's several different things you



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1 could have done, right? You could have revoked
2 their CON, correct?

3 A: Correct.

4 Q: Okay. You could have suspended the CON for --
5 or suspended their ability, maybe, to operate
6 the cath lab for awhile?

7 A: That would be correct.

8 Q: Okay. And then, or you could have just
9 assessed penalties with some type of plan of
10 correction, correct?

11 A: That's also correct.

12 Q: Okay. And at least for purposes of your email,
13 nowhere in here, at this point in time, are you
14 stating, we don't consider the lab to be
15 existing, right?

16 A: Well, I think in as much as I've laid out to
17 Mr. Barbier that there were no procedures
18 performed, then I'll reference you to this
19 section of regulation and here's some
20 additional facts and then I think he
21 interpreted correctly that we didn't really
22 consider that lab to be existing though it was
23 clearly operational.

24 Q: Well, I think you state in the letter you said,
25 the data from 2008 and 2009 continue to be

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1 correct. And those were the years of zero cath
2 volume, correct?

3 A: That's correct. Ms. Cantwell had provided, the
4 planner for Roper, had provided some data that
5 showed there were procedures in 2007 instead of
6 2008, 2009 remained in question at zero volume.

7 Q: Okay. And you referenced 61-15, Section 102-
8 1(e), which states in summary, the CON shall be
9 obtained before offering any health service
10 which was not offered in the preceding 12
11 months, right?

12 A: Correct.

13 Q: Okay. And you understood at that time, or
14 maybe a little bit later, that Roper's position
15 was that they did offer cath lab service, maybe
16 nobody could use it, but they were offering
17 services.

18 A: That was Mr. Barbier's contention, yes.

19 Q: Okay. And in fact, I think you testified
20 earlier today that you knew any enforcement
21 provisions with Roper were going to be
22 incredibly lengthy because you fully expected
23 Roper to challenge any enforcement proceedings,
24 correct?

25 A: I think my response was a little more general

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1 to enforcement action being an involved process
2 and certainly challengeable in court, yes.

3 Q: Okay. But, do you agree with me you did
4 consider that they were gonna be pretty lengthy
5 proceedings?

6 A: Oh, definitely could have been, yes.

7 Q: Okay. And you would agree with me that it
8 could have ended up here in this court,
9 correct?

10 A: It could have, could have.

11 Q: And Roper could have prevailed on those
12 proceedings and then, it would have been that
13 existing cath lab out there, right?

14 A: That could have been the case.

15 Q: Okay. And you don't deny The Department's
16 inquiry with respect to St. Francis cath lab
17 actually began on or about or very close to the
18 time when East Cooper Regional Medical Center
19 applied for their cath lab in early February,
20 right?

21 A: Correct.

22 Q: Okay. And that's when East Cooper contended
23 that St. Francis' cath lab was irrelevant for
24 purposes of East Cooper's need analysis with
25 respect to Standard 3, right?

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1 A: Yes, when Mr. Levitt's application, that is
2 correct.

3 Q: Okay. And Mr. Levitt didn't even include,
4 didn't even make a reference in his analysis to
5 St. Francis' cath lab volumes, right?

6 A: Other than to say they were excluded, no.

7 Q: Okay. And in other words, didn't even list
8 them out that you're aware of.

9 A: Well, by exhibit, I mean, he provided in the
10 application the exhibit that showed the
11 volumes.

12 Q: Fair enough. Now, let's go to, if you would,
13 in the Petitioner's Exhibit notebook to
14 Petitioner's Exhibit 3 for me.

15 **(Petitioner's Exhibit Number 3 was admitted into**
16 **evidence.)**

17 A: I'm there.

18 Q: Okay. And this is I believe Ms. Cantwell -- in
19 an email to Ms. Cantwell to you providing
20 follow-up information to The Department
21 relative to the issues of whether or not St.
22 Francis's cath lab should be excluded from the
23 market analysis for new providers and whether
24 or not it has been operating in violation of
25 law, correct?



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1 A: Correct.

2 Q: Okay. And then, she actually sets out the
3 several years there from '07 to '014 with the
4 various volumes, correct?

5 A: Correct.

6 Q: And basically within the email states, towards
7 the last few lines there, as noted by Les
8 Shelton, we do not have the ability to close
9 the lab and remove it from the inventory and
10 then she references the CON director's reply
11 and that's Ms. Brandt's letter, correct?

12 A: Correct.

13 Q: And she's correct, Ms. Cantwell says, the CON
14 director's reply confirms this and advises ECMC
15 in an alternate way, via the Health Plan, to
16 accomplish their goal. Is that right?

17 A: That's correct.

18 Q: Okay. And this was approximately -- it says,
19 I believe it says, February 22nd, 2016 and that
20 first line, the following information is
21 provided as a requested follow-up to our
22 conversation two weeks ago. So, by, kind of,
23 you know, two weeks from the 22nd, I'm looking
24 at around February 8th, right?

25 A: Correct.



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1 Q: Okay. So, that's pretty soon after East Cooper
2 filed its CON application, you were on the
3 phone with somebody at Roper saying, we need to
4 talk.

5 A: Yes, so Ms. Cantwell specifically.

6 Q: Okay. So, you were the one that reached out to
7 Roper St. Francis about their volume, correct?

8 A: Yes.

9 Q: Okay. And you did this because East Cooper
10 ignored them in its CON application, right?

11 A: And provided by exhibit the zero volumes for
12 certain years, yes.

13 Q: Okay. Let's go to Petitioner's 3, page 11 and
14 that's Ms. Brandt's letter, dated May 27th,
15 2010, right?

16 A: It looks familiar.

17 Q: And she was in charge of the CON program at the
18 time, right?

19 A: Yes, and whatever else may have been included
20 in the bureau at the time, I'm not fully aware.

21 Q: Fair enough. So, at least in terms of this
22 letter, The Department's, sort of, official
23 position was they couldn't close the lab and
24 deny the existence for purposes of Standard 3.
25 Is that fair?



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1 A: Fair, yes.

2 Q: Okay. And she, I think we've already said it,
3 that Ms. Brandt's solution is, let's amend the
4 State Health Plan, right?

5 A: Correct.

6 Q: And that never happened, right?

7 A: With reference to ...

8 Q: With reference to this particular problem she's
9 dealing with in the letter, P3-011.

10 A: That's correct. It was not.

11 Q: And there were never any footnotes added in the
12 State Health Plan referencing the fact that The
13 Department doesn't consider St. Francis's lab,
14 even though it's in the inventory, to be an
15 operational lab, correct?

16 A: No footnotes to my knowledge.

17 Q: And then, right after these discussions in 2008
18 and 2009, excuse me, these discussions in 2010,
19 after a couple of years of zero volumes in '08
20 and '09, St. Francis started doing some
21 volumes, right? You've got volumes for 2010,
22 '11, '12, '13, '14 and '15, right?

23 A: Correct.

24 Q: It was, kind of, like, they were doing just
25 enough to get by, right?



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1 A: To whatever degree get by is that volume.

2 Q: You think they were doing just enough so they
3 could stay in inventory?

4 A: I would have no idea of the intention behind
5 that volume.

6 Q: Because that's not a question you ever asked,
7 right?

8 A: No.

9 Q: Okay. You think perhaps one possibility they
10 were doing such a low volume was to avoid an
11 enforcement action? Is that possibility?

12 MS. HOLLINGSWORTH: Objection, calls for
13 speculation.

14 THE COURT: I'll sustain that. Try that a different
15 way.

16 MR. THOMAS: Okay. I'll try it a different way.

17 Q: If they performed cath labs, excuse me, cath
18 in that cath lab, then the possibility of an
19 enforcement action by The Department is going
20 to be less. Is that a fair statement?

21 A: I think it would be a fair statement if the
22 volumes continued unabated across time but it
23 wouldn't seem like a great strategy after
24 having zero volume for two years.

25 Q: But it worked, didn't it? All the way up until



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1 East Cooper applied?

2 A: Until I was made aware of it. Yes, I suppose
3 so.

4 Q: Well, you were aware of it because, you know,
5 the State Health Plan's published by The
6 Department and they get a Joint Annual Report
7 every year from each and every provider,
8 correct.

9 A: That's correct.

10 Q: Let's go to Petitioner's Exhibit 4, if we
11 could.

12 (Petitioner's Exhibit Number 4 was admitted into
13 evidence.)

14 A: Okay.

15 Q: All right. Let's start on page 4 of this
16 particular Exhibit.

17 A: Okay.

18 Q: All right. Let me make sure, I'm sorry, it was
19 page 2.

20 A: Okay.

21 Q: This is an email from Mr. Barbier to you, dated
22 March 7th, 2016. It states, hello Louis. Do
23 you have time this week for a call to discuss
24 this matter? Also, I would like to follow-up
25 with you on my call this morning with Jennifer



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1 Hyman regarding redacted, right? Presumably
2 that had something to do with the Trump
3 administration, there.

4 A: So, you're on 3, flipping backwards to 2?

5 Q: Yes. Yeah, 2 that's where the first line of
6 the email starts from Mr. Barbier, I'm just ...

7 A: Yes. That's correct.

8 Q: Okay. And then, I believe that very same day,
9 if you look at P04-002, you state that you've
10 got some time, Wednesday or Thursday and
11 that's, you know, which day works better for a
12 call or discussion, correct?

13 A: Correct.

14 Q: Okay. Now, let's go Petitioner's Exhibit 5.

15 A: I'm there.

16 Q: All right. Then at 5-001, if you look at the
17 email at the bottom of the page, that's Mr.
18 Barbier -- it's from you to Mr. Barbier,
19 Roper's attorney and says, I appreciate your
20 call the other day to discuss a couple of open
21 matters with Roper St. Francis. Is this the
22 call that, kind of, arose out of the March 7th
23 email or was that a different call?

24 A: This may have been a different call. I mean,
25 this is significantly later but I can't recall



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1 exactly the schedule of conflicts that Mr.
2 Barbier and I may have had.

3 Q: Okay. Fair enough. But you have a call at
4 some point between March 7th and April 14th and
5 you send this follow-up email, right, which has
6 been, kind of, the center of discussion in this
7 case.

8 A: Correct.

9 Q: Okay. And no doubt, you state that continued
10 operation of the St. Francis Xavier cath lab at
11 such as low volume prohibits the entry of any
12 additional cath labs in the service area as
13 outlined in South Carolina Health Plan for such
14 services, right?

15 A: That's correct.

16 Q: Okay. And the only standard that would
17 prohibit entry that you're aware of is Standard
18 3, right?

19 A: Also correct.

20 Q: And at least in this email -- I know you
21 referenced enforcement action but you don't
22 mention anything about how you're gonna go
23 about discounting the volumes of the cath lab,
24 correct?

25 A: Not in this email, no.

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1 Q: Okay. And you don't reference any exceptions
2 for low volume labs in the email, right?

3 A: No.

4 Q: You simply state that the standards in the
5 Health Plan prohibit the entry of the
6 additional cath labs by continued operation,
7 right, of St. Francis's lab, with respect to
8 Standard 3.

9 A: Correct.

10 Q: Okay. So, you also state, that the low volume
11 would also prohibit the transfer of that cath
12 lab from one of the operators facilities to
13 another under the service transfer criterion
14 which requires adequate historical utilization
15 figures. You state that, right? I read that
16 correctly?

17 A: Yes.

18 Q: Okay. So, is it fair to think that at this
19 point an applicant such as Roper, if they see
20 something like that, they're not going to send
21 you a cath lab application predicated on the
22 service transfer exception, correct?

23 A: Correct.

24 Q: And they didn't send you one predicated on
25 that, right?



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1 A: That's correct.

2 Q: Okay. And you've referenced enforcement
3 action. We've talked about that, that there's
4 some options available there to you, correct?

5 A: That's correct.

6 Q: Okay. Now, and I don't think I will need to
7 make you go to the Joint Exhibit, we looked at
8 the correspondence tab yesterday, this email
9 that's about the application for St. Francis,
10 it didn't make it into the correspondence tab
11 of the record, right?

12 A: Correct.

13 Q: Okay. And the effected person letter that
14 Roper filed with East Cooper that actually
15 references the fact that it intends to apply
16 for a CON application, that didn't make it into
17 the correspondence file of the St. Francis
18 application either, correct?

19 A: No. I don't think the St. Francis application
20 had been received by then, by the time we had
21 these pieces of correspondence.

22 Q: Okay. So, do you only put in forward
23 correspondence at the time that you received an
24 -- you, know, after the time the application is
25 received related to that application?



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1 A: Yes.

2 Q: Okay. So, anything done prior to that is not
3 going to make it into the DHEC record, correct?

4 A: Well, that particular application, no, not
5 typically.

6 Q: Okay. So, somebody who -- an effected person
7 would have to FOIA other applications in order
8 to, maybe, determine what was said about the
9 instant application that they're interested in,
10 right?

11 A: If that how they chose to word the request and
12 we had a very general FOIA request come in all
13 the time and we reach out to the requestor and
14 firm up what it is they're looking for so we
15 can adequately respond.

16 Q: Sure. So, back to Petitioner's 5, I'm sorry,
17 let's go to Petitioner's 6. Now, this is an
18 April 22nd, 2016 email from you to Mr. Levitt,
19 correct?

20 A: Correct.

21 Q: Could you read what you wrote into the letter
22 to the redaction -- and into the email to the
23 redaction portion.

24 A: Hi David. Per your request, attached is a
25 letter from Roper St. Francis outlining their



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1 status as an effected party with regard to the
2 ECMC cath lab. I think everything will work
3 out just fine for everyone additionally, and
4 begin redaction.

5 Q: Okay. So, I think everything will work out
6 just fine for everyone. Is it fair to say that
7 the everything is the CON applications at issue
8 in this case for Roper St. Francis and to a
9 lesser degree, the East Cooper application?

10 A: No. On April 22nd, there was no Roper St.
11 Francis application, and I suppose it's
12 referencing only Mr. Levitt's application for
13 East Cooper Medical Center.

14 Q: Okay. But, you would agree with me that as of
15 April 20th, 2016, you knew that St. Francis was
16 going to file a CON application, excuse me, not
17 St. Francis, Roper Berkeley was going to file
18 a CON application for new diagnostic cath lab
19 services at Roper Berkeley, correct?

20 A: Reasonably sure, yes.

21 Q: Okay. Denying East Cooper's application, you
22 would agree with me, that wouldn't work out
23 well for East Cooper, right?

24 A: No. I mean, denial of an application is
25 certainly not a positive outcome for the

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1 applicant.

2 Q: And denial of the Roper Berkeley application
3 wouldn't work out well for them either, right?

4 A: Correct.

5 Q: Okay. And do you know why Roper chose not to
6 submit a response to Trident's opposition
7 letter to its CON application?

8 A: No.

9 MS. HOLLINGSWORTH: Your Honor, I would object to
10 that question. It calls for speculation.

11 MR. THOMAS: I asked him if he knew, I didn't ask
12 him to speculate. I asked him if he actually
13 knew the ---

14 MS. HOLLINGSWORTH: You're asking about my client's
15 ---

16 THE COURT: He's, Mr. Thomas, I believe you're
17 asking him to speculate on somebody else's
18 intention and insofar as that's what you're
19 seeking to get from him, I would sustain that
20 objection.

21 MR. THOMAS: No. I asked him, Your Honor, whether
22 or not he knew the reason why and if he says,
23 yes, then I can say, well what do you
24 understand that reason to be. I didn't ask him
25 to say what you think Roper's ---



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1 THE COURT: Oh, okay.

2 MR. THOMAS: Yeah.

3 THE COURT: Well, to that extent then, you can ask
4 him if he knows..

5 MR. THOMAS: Okay.

6 Q: Do you know the reason why Roper did not submit
7 a letter in response to Trident's letter of
8 opposition?

9 A: No.

10 Q: Okay. And you would agree with me that in most
11 instances when a letter of opposition goes into
12 an application, that the applicant typically
13 responds, correct?

14 A: That would be typical..

15 Q: I mean, if not, in writing they may ask to meet
16 with you, correct?

17 A: Also possibly, yes.

18 Q: And Roper didn't ask to meet with you in this
19 situation regarding Trident's letter of
20 opposition, right?

21 A: Correct.

22 Q: Let's go to Petitioner's 7 for me. I think
23 it's a one pager.

24 (Petitioner's Exhibit Number 7 was admitted into
25 evidence.)



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1 Q: And this is a May 20th, 2016 email from you to
2 Mr. Levitt, correct?

3 A: That is correct.

4 Q: All right. And the re lines of Hugh Lidens.
5 I won't read the redactions, but in the
6 paragraph there it says on another note, we did
7 receive the Roper CON app in time to deem it
8 complete this month and issue both cath lab
9 decisions prior to the deadline for East Cooper
10 Medical Center, correct?

11 A: Correct.

12 Q: All right. And why was it necessary for Roper
13 Berkeley's CON application to be -- for that
14 decision to be issued prior to the deadline for
15 East Cooper Medical Center when they weren't
16 competing applications?

17 A: I felt that it was important to adjudicate this
18 issue either with or without enforcement prior
19 to issuing a decision for East Cooper just for
20 everyone's benefit in having on the record my
21 interpretation of these things. I felt like
22 that was important for both East Cooper and for
23 Roper.

24 Q: But you thought that as long as you'd had
25 assurance from Roper that -- and you did, that



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1 if their application was approved, their legal
2 counsel stated and their application stated
3 they're gonna close down that lab, correct?

4 A: I had the language that was in the application.
5 But for the purposes of East Cooper, their
6 decision letter would have remained the same in
7 either event ---

8 Q: Okay.

9 A: --- on the Roper side.

10 Q: I understand that. But you knew that -- and
11 tell me if you didn't feel like you were
12 assured, but in your mind you knew that if you
13 approved the CON application for Roper, their
14 intention was to close down the lab, right?

15 A: That was their statement in the application,
16 yes.

17 Q: Okay. And did you have any reason to doubt
18 that?

19 A: No. It's a certified application.

20 Q: Just about to say, Ms. Cantwell, the regulatory
21 affairs specialist for Roper St. Francis signed
22 the application right underneath that exact
23 certification, right?

24 A: Correct.

25 Q: And so is it fair to say that in your mind, you

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1 approve Roper, they close it down, that gives
2 you the latitude in order to approve East
3 Cooper, right?

4 A: No. My enforcement authority gave me the
5 latitude to approve East Cooper because, as I
6 said, their decision letter essentially would
7 have remained unchanged saying Bon Secours
8 doesn't exist, your application is good and
9 then completely separate from that issue would
10 have been whatever enforcement matters we would
11 have taken up with Roper.

12 Q: And you felt the need that both applications,
13 I mean, decision letters had to go out in the
14 same day, right?

15 A: Just for the purpose of having the adequate
16 time to answer the questions, and as I said, I
17 thought it was important to include that in the
18 letters. And it took approximately that long
19 to get to that point.

20 Q: Did you feel that it was absolutely necessary
21 to make sure those letters went out on the same
22 day?

23 A: Absolutely necessary?

24 Q: Yes.

25 A: No.

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1 Q: Okay. But you chose to do it that way, right?

2 A: Correct.

3 Q: Okay. And you knew the broker had no plans to
4 shutter its lab unless they got an approval,
5 right? I think you've already testified to
6 that.

7 A: That's correct.

8 Q: Okay. Let's go to Petition's 8.

9 **(Petitioner's Exhibit Number 8 was admitted into**
10 **evidence.)**

11 Q: This is email six days later from you to Mr.
12 Barbier dated 5/26/2016, correct?

13 A: Correct.

14 Q: Could you read this one into the record up to
15 the redaction?

16 A: Sure. Hi, Ralph. I'm running around like a
17 crazy person today so I hope you don't mind
18 this quick note. Roper Cath Lab is accepted
19 and deemed complete in tomorrow's register.
20 The letter will go out the same day.
21 Everything is still looking good for the
22 process you and Ashley and I discussed
23 previously, begin redaction.

24 Q: Okay. And that process was Roper replies,
25 represents in the application that it'll close



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1 it's lab upon approval and you'll review the
2 application up until the decision point,
3 correct? Is that the process there? Or did I
4 miss anything?

5 A: Yeah. No. It's the typical process. The
6 application is received, accepted for filing,
7 deemed complete, reviewed and then decided
8 upon.

9 Q: Okay. Now, in your estimation is that the
10 Roper's application's approved they close then
11 both applications, East Cooper and Roper
12 Berkeley, can then, in your mind, be compliant
13 with Standard 3 of the state health plan,
14 correct?

15 A: Both applications, yes. For that service.

16 Q: Okay. Let's go to Petitioner's Exhibit 9.

17 **(Petitioner's Exhibit Number 9 was admitted into**
18 **evidence.)**

19 A: Okay.

20 Q: This is July 25th and 26th emails kind of going
21 back and forth between you and Mr. Levitt, and
22 it attaches the both -- the two approval
23 letters, correct?

24 A: Correct.

25 Q: Okay. And at the very top -- well, let start



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1 with -- let's start with Mr. Levitt's email at
2 the bottom here. He -- he reads to you, or he
3 -- he types out to you -- just checking on the
4 status with the subject line East Cooper Seal
5 in it, correct?

6 A: Correct.

7 Q: Okay. And then you -- you type back, you
8 should have gotten an email copy of the
9 decision from Nick yesterday, did it not come
10 through? David says on the 26th, I didn't
11 receive it. And then on the 26th later that
12 morning, see attached. I have included Roper
13 comment as well since the two were tied
14 together, right?

15 A: Correct.

16 Q: So you -- you believe these two CON
17 applications were tied together, correct? And
18 -- and that's because the standard agree,
19 right?

20 A: I don't believe they were tied together as much
21 as they included quite a bit of the same
22 language and questions arising from the
23 Standard 3 applied to both.

24 Q: Right.

25 A: That's, I mean, that's the extent to which they



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1 were tied together.

2 Q: But if you didn't have the Standard 3 issue are
3 they tied together at that point? For
4 instance, St. Francis doesn't exist. And they
5 are applying at the same -- in the same exact
6 situation. East Cooper applies and in early
7 February and then Roper applies in April.
8 They're not tied together at that point,
9 correct? Or, excuse me, May I believe is when
10 Roper applied. They're not -- they're not tied
11 together at that point, are they?

12 A: Well, I mean, that's essentially the situation
13 that we had. The -- the Department said Bon
14 Secours doesn't exist. I have two applications
15 for the same service in the same service area
16 so to a degree they will be tied together
17 because we're conducting the analysis on both
18 applications for the same service in the
19 service area.

20 Q: Okay. But they wouldn't have been competing
21 applications, right?

22 A: No, they weren't competing applications.

23 Q: All right. And -- and unless that Roper St.
24 Francis cath lab existing, and what I'm saying
25 is it never had a lab. You're not looking --



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1 there's no reason to approve the two CON
2 applications at the same time, is there?

3 A: No.

4 Q: Okay. Will you agree with me that the terms of
5 the absolute compliance was Standard 3 if you
6 don't discount St. Francis's diagnostic cath
7 lab, East Cooper CON application cannot be
8 approved, right?

9 A: So absolute compliance would pre-suppose that
10 we didn't zero volume years Bon Secours.

11 Q: Right.

12 A: Is that the example you want to ---

13 Q: Sure.

14 A: Then that would be correct.

15 Q: Okay. I know you're a lawyer but have you have
16 heard the term estoppable before?

17 A: I've heard it yes.

18 Q: And that agencies can sometimes be estopped in
19 taking enforcement actions if they didn't take
20 them previously? Have you heard it in that
21 context?

22 A: I believe so, yes.

23 Q: Okay. Now just in terms of this word approved,
24 and I think I understand the Department's
25 positions otherwise, but on -- let's go to



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1 Joint Exhibit 1 at 226.

2 A: I'm there.

3 Q: Okay. And this is the letter that went out
4 July 26, 2016, saying to Ms. Cantwell saying we
5 need proof of closure, right?

6 A: Correct.

7 Q: Okay. And it didn't go out after the decision
8 became the final Agency decision, right?

9 A: That's correct.

10 Q: Okay. And Bon Secours got you the letter back
11 on August 17 that stated that the cath lab was
12 effective closed August 1st, right?

13 A: That's correct. I believe that Joint Exhibit
14 227.

15 Q: Okay. And so although it's patently obvious
16 that Bon Secours didn't wait until after the
17 decision became the final Agency decision in
18 order to inform the Department that it had
19 closed it's lab, correct?

20 A: Correct.

21 Q: Okay. And you would agree with me that the
22 final Agency decision, the staff's approval
23 letter became the final Agency decision
24 sometime in late September of 2016, is that
25 fair?



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1 A: I believe about the 21st when the Board of
2 Directors declined to hear your request for a
3 final review conference.

4 Q: Okay. Fair enough. And the applicant other
5 than the approval letter from the Department
6 receives no other type of letter approving the
7 application other than that, correct?

8 A: No.

9 Q: Okay. And generally, on the 16th day if
10 there's no opposition to the staff approval
11 letter, that's when that letter transforms into
12 the final Agency decision, correct?

13 A: I believe the 15th day and then that's about
14 the time usually on the 15th or 16th day we
15 would mail the Certificate of Need itself.

16 Q: Right. And is it fair to say you're aware of
17 no decisions, policies, or other documentation
18 that DHEC or otherwise that supports an
19 interpretation that the phrase existing labs in
20 the service area means those labs in existence
21 at the time of the final Agency decision rather
22 than at the time of the staff approval, are you
23 aware of any documentation like that?

24 A: No.

25 Q: Okay. And Standard 3 doesn't reference final

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1 Agency decision, correct? It just says
2 approved, right?

3 A: Correct.

4 Q: And just so we have for the record, you didn't
5 speak to anyone at the Department about the
6 interpretation and of the words, and Standard
7 3 approved existing or the phrase, during the
8 most recent prior to making your decision,
9 correct?

10 A: I believe maybe that the most recent year just
11 to confirm my understanding at that time that
12 we were talking about the Joint Annual Report
13 year for which the most recent data was
14 available.

15 Q: Okay. Fair enough. I was hoping you might ask
16 for it. And you don't deny the fact that the
17 lab was existing for purposes of treating
18 patients, correct? But not existing, in your
19 mind, for purposes of rendering decision, is
20 that a fair statement?

21 A: I think I was understanding that it exist apply
22 to both the applicant and to my -- one to the
23 applicant and one to me. They -- my
24 understanding of existing has to do with the
25 purpose on our plan and the other -- the

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1 applicant's understanding may be for the
2 treatment of patients.

3 Q: And I can't subpoena Kierkegaard to get him in
4 here and talk about existentialism but, for
5 purposes of just having a cath and lab, I got
6 to go to an existing lab to get that cath,
7 right?

8 A: Short of Kierkegaard, I will agree with that.

9 Q: All right. Now, obviously, there's no
10 operational cath lab at Roper Berkeley right
11 now because the structure's literally coming
12 out of the ground, correct?

13 A: That's correct.

14 Q: Okay. But you consider that an existing cath
15 lab, diagnostic cath lab, for purposes of
16 Standard 3, correct?

17 A: If you're -- if you are referring to the
18 deposition testimony that was my immediate
19 response, yes.

20 Q: Okay. What is your response today?

21 A: The same as I offered in the deposition. That
22 I would consider that back if there was
23 information to be presented by an applicant or
24 potential applicant contrary to that belief.
25 I would certainly take that information into

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1 account and discuss that with the applicant or
2 potential applicant.

3 Q: Okay. Let me ask you a few questions related
4 to some of the questions you were asked from
5 the Department's attorney, Ms. Hollingsworth.
6 I've already asked you a little bit about the
7 quality reference that you made with respect to
8 Standard 3 that wasn't made in your deposition.
9 I understand you were within a technical -- a
10 technical definition at the time. But, is it
11 the Department's decision -- or, excuse me --
12 is the Department's position that St. Francis
13 wasn't running a high quality cath lab during
14 the years that it had low volumes?

15 A: Explicitly, no. But we do have national and
16 international organizations, for that matter,
17 that inform the Department through our research
18 on what incredibly high quality programs look
19 like from a volume standpoint. And on this
20 case it's a little more complex because you
21 have the same operators in those positions
22 performing the procedures at I think most of
23 the Roper health systems so the analysis would
24 be a little more complicated than just going at
25 it from a lab to lab analysis.

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1 Q: Right. So there's a little more to it than
2 just simply looking at volume?

3 A: Correct.

4 Q: Okay. But the Department had access to these
5 national benchmark data, correct?

6 A: Correct.

7 Q: And you know, and we can look at it if we need
8 to, but I think from basically 2004 going
9 forward, we had triple digits in '04 and then
10 it was all double digits and downhill pretty
11 much from '05, correct? Including two or three
12 zeroed years, right?

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

14 Q: Okay. But despite having those national
15 benchmarks, the Department didn't do anything
16 about that cath lab in terms of the inventory
17 or in terms of enforcement action, correct?

18 A: I don't believe that they did, no.

19 Q: Okay. And you would agree with me at least for
20 purposes of Standard 3 there's no reference to
21 quality in that particular standard, correct?

22 A: No. Not in the standard you're referencing.

23 Q: Okay. Now, I believe you said that there was
24 a change in the August 15th, 2015 in that State
25 Health Plan, or from that health plan to the



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1 next one because the Department's threshold
2 actually went down to 350 diagnostic caths,
3 correct?

4 A: Correct.

5 Q: Okay. And, the Standards now and then back in
6 2015 make no allowances, at least in the
7 diagnostic and mobilization cath services
8 portion, about common operators or anything of
9 that nature, correct? And when I say common
10 operators, common cardiac cath cardiologists
11 who perform the procedure.

12 A: I believe there's some language in the health
13 plan that speaks to the number that should be
14 performed by individual physicians. And most
15 especially in those cases where we have a new
16 program or, I can't remember exactly the
17 language, but there are some references to the
18 individual providers, yes.

19 Q: But isn't that under the emergent elective PTI
20 standards?

21 A: I believe that's correct.

22 Q: Okay. Now, and in terms of this concept of all
23 existing labs, Mr. Eubank, and in terms of we
24 know we had volumes after '09, right? We had
25 volumes at a cath lab and it was a diagnostic



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1 cath lab, correct? At St. Francis? And they
2 were very low volumes, right?

3 A: Correct.

4 Q: But that -- doesn't that tell you as a -- as
5 the Director of CON and someone who's reviewing
6 CON applications that perhaps there's not a
7 preference among physicians to do, or patients,
8 to have caths done in a diagnostic only lab?
9 Wouldn't that be one possible indication?

10 A: It could be a possible indication among many.

11 Q: Okay. And, if you go to -- let's go to Joint
12 1 real quickly, to page 30. Just let me know
13 when you get there.

14 A: I'm there.

15 Q: Okay. And what -- you're understanding is that
16 Ms. Platt drafted B-11 in this CON application?

17 A: I do believe that's correct.

18 Q: Okay. And she set out in Exhibit 14 the
19 historical utilization of the existing labs in
20 the service area?

21 A: Yes.

22 Q: Okay. And she included St. Francis, correct?

23 A: Yes.

24 Q: You would agree with me that she had to do this
25 because when we look at the Standard 3 right



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1 above that, it's spelled out for us. New
2 diagnostic cath services shall be approved only
3 if all existing labs in the service area have
4 performed a minimum of 500 diagnostic caths,
5 correct?

6 A: Yeah. I mean, I can't speak specifically to
7 her reasoning for inclusion but my assumption
8 was simply that she included as much
9 information as available to everyone in the
10 application.

11 Q: Okay. But it's that have performed language
12 that tells you, it tells you any other
13 applicants or affected persons, that's a
14 retroactive look-back, so to speak. That's
15 kind of redundant, but it's a retroactive
16 application that needs to be done, correct?

17 A: Correct. It's past tense.

18 Q: Yep. And the prospective standard is set for
19 in Standard 4. Everybody's got to be doing
20 this back then, going forward you need to be
21 doing this by year three. That's the
22 instruction that I was going to asking,
23 correct?

24 A: Correct.

25 Q: Okay. And she listed all 12 of the existing

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1 labs in the service area, right?

2 A: She listed 12 labs.

3 Q: Well, what did she call it? Let's just -- what
4 did Roper refer to them as?

5 A: The title of the Exhibit 14, Existing Labs.

6 Q: Okay. And she listed the two from Trident
7 Medical Center, right?

8 A: She did.

9 Q: And she had to because those are in the service
10 area, what ten miles away from the Roper
11 Berkeley site?

12 A: Yes.

13 Q: Okay. Now, I've been talking about Ms. Brant's
14 letter enough. And she doesn't reference
15 enforcement action specifically, does she,
16 anywhere in her letter, right?

17 A: No.

18 Q: But she says we can look at it if you need us
19 to. But she says that we, there's no existing
20 mechanism that allows us to discount the
21 utilization and the existence of St. Francis's
22 lab, correct?

23 A: Those were her words, yes.

24 Q: Okay. And that was in the context of East
25 Cooper inquiring about applying for a



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1 diagnostic cath lab, correct?

2 A: Correct.

3 Q: And, to your knowledge, Regulation 61-15,
4 Section 1021(e), that's been a part of the CON
5 regulations for a very long time, correct?

6 A: That's my understanding, yes.

7 Q: Okay. And it certainly predates Ms. Brandt's
8 tenure as the CON director, doesn't it?

9 A: I believe it does.

10 Q: And no one at DHEC, because I believe you said
11 that in terms of enforcement, that you wanted
12 -- that that provides for the public benefit of
13 the citizens of the Roper St. Francis service
14 area, correct? That that would be why you want
15 to bring the enforcement action, correct?

16 A: Yes.

17 Q: Okay. And the concern was the low volumes and
18 that could maybe mean a low quality lab,
19 correct?

20 A: Well, beyond that we had, you know, going back
21 to the very beginning of this trial, we had the
22 question of would that prevent anything else
23 from happening in the market, so ...

24 Q: Okay. Did you ever go back and inquire what
25 Ms. Brandt, why she couldn't take enforcement



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1 action under 61-15, section 1021(e)?

2 A: No. I certainly did not.

3 Q: Okay. And is there one possible reason for
4 that? The fact that they didn't believe that
5 that was an option to them?

6 MS. HOLLINGSWORTH: Objection. It calls for
7 speculation.

8 THE COURT: I agree with that. I sustain that
9 objection and try and put it a different way.

10 MR. THOMAS: That's fine, Your Honor.

11 Q: And the Les Shelton -- let's go -- maybe that's
12 what we need to do. Let's go to Joint 2,69 and
13 more specifically let's go to that fax and we'd
14 like to talk about. Back in the '70s they
15 called that a mojo.

16 A: I am at the fax.

17 Q: Okay. And the actual -- let's go to Joint 2 at
18 73, and that's the cover letter, well the FOIA
19 letter. It's the FOIA letter.

20 A: Correct.

21 Q: And the phrase there is, I hereby request
22 copies of all documents in the Department's
23 possession, including correspondence, regarding
24 the addition of cardiac cath services by East
25 Cooper Regional Medical Center. That's what



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1 Mr. Barbier is inquiring about, correct?

2 A: Correct.

3 Q: And if you turn over to Joint 2, tab 074, and
4 this is Mr. Shelton's email, towards the bottom
5 there, to Mr. Evan Ray at East Cooper, correct?

6 A: Correct.

7 Q: And in that second paragraph, we don't have the
8 ability to close the lab and remove it from the
9 inventory, see. And then Les says, however,
10 given that it has been out of operation for
11 more than three years, it's certainly a fair
12 question to ask whether it should be considered
13 in the need calculations. Correct?

14 A: Correct.

15 Q: Okay. And in terms of Les, you never went back
16 and spoke to Mr. Shelton about what he wrote
17 here, correct?

18 A: Correct.

19 Q: Okay. Mr. Shelton still works for the
20 Department, right?

21 A: He does.

22 Q: And I have a question about the project review
23 meeting because Ms. Hollingsworth, and maybe it
24 was just Ms. Biggers, asked you about that.
25 But I understand that it's not a statute of



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1 regulation but if the -- if an opposition party
2 requests project review and the Department
3 agrees to that project review, the applicant
4 cannot -- if the applicant doesn't consent that
5 doesn't necessarily mean that the project
6 review won't go forward, right?

7 A: That's correct.

8 Q: Okay. And if the applicant doesn't go to that
9 project review meeting, that could be
10 detrimental to their case, correct?

11 A: No. We make it clear with regard to a project
12 review meeting, that there's actually no --
13 there would be no prejudicial treatment based
14 on attendance, so ...

15 Q: I understand that. I guess maybe that was an
16 inartful question. The fact of the matter is
17 is that somebody going to be presenting
18 something in opposition to your project that
19 you're not going to be able to response to,
20 right?

21 A: Well, again, given the nature of the project
22 review meetings where we request the written
23 follow-up within a certain period of time
24 following the project meeting, all of that
25 information is shared with all of the parties

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1 and they could then, again, I suppose decide
2 whether or not to respond.

3 Q: Well that's if there's some type of written
4 product that comes out of the project review
5 meeting, that you would agree with me that
6 oftentimes physicians and others show up at a
7 project review meeting and speak to the merits
8 or against a certain application, correct?

9 A: That's correct.

10 Q: All right. So they would have not opportunity
11 to be able to respond to what they said unless
12 they got a court reporter for the proceeding,
13 right?

14 A: That's correct.

15 Q: Okay. Ms. Hollingsworth asked you some
16 questions about Mr. Sullivan's letter and some
17 of the statements he made regarding the
18 existence of the cath lab. But you would agree
19 with me that all of the statements with regard
20 to disregarding the cath lab, existence of the
21 cath lab, they were all made under the heading
22 of the service area exception standard,
23 correct?

24 A: I believe in his letter that would be where the
25 information was found.



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1 Q: Okay. And Mr. Levitt never addressed the
2 service area standards in the CON application
3 for East Cooper when he was specifically
4 referencing St. Francis's cath lab, correct?

5 A: That is correct.

6 Q: Okay. And Ms. Hollingsworth asked you some
7 questions about Mr. Sullivan's opposition
8 letter but were -- you weren't -- go to Joint
9 1, 194 for me? I want you to at least have it
10 there.

11 A: Okay.

12 Q: You weren't confused or otherwise befuddled by
13 Mr. Sullivan's statement, all existing labs in
14 the service area have not performed a minimum
15 of 500 diagnostic cath procedures per lab in
16 2015. I mean, that wasn't some kind of unusual
17 statement, Mr. Eubank?

18 A: No. I didn't consider it to be particularly
19 befuddling that day.

20 Q: I wouldn't think that you would. And that's in
21 direct reference to Standard 3, right?

22 A: Yes, under that heading, correct.

23 Q: Okay. And does Mr. Sullivan have to spell out
24 that all existing labs have not performed a
25 minimum of 500 diagnostic cath procedures in

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1 order to make it clear that that violates
2 Standard 3 when it's the first sentence under
3 Standard 3? That he didn't do that for you or
4 anyone else at the Department to make his
5 position clear?

6 A: No, I should think not.

7 Q: Okay. Thank you for answering my questions
8 today, Mr. Eubank. It's always a pleasure.

9 A: Yes, it is.

10 THE COURT: Redirect?

11 MR. EUBANK - REDIRECT EXAMINATION BY MS. BIGGERS:

12 Q: My first follow-up question is about your
13 testimony regarding Standard 3 and health
14 quality and what might relate to it in your
15 view. Let me ask you to turn to Joint 4, the
16 2015 South Carolina Health Plan and
17 specifically page J04-044.

18 A: I'm there.

19 Q: Okay. And do you see the paragraph beginning
20 about halfway down, post-cardiac, that
21 paragraph?

22 A: Yes.

23 Q: Okay. Now then go about five lines down and
24 you see the sentence beginning optimal?

25 A: I do.



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1 Q: Okay. Can you read that sentence and the
2 following sentence into the record for us?

3 A: Yes. Optimal performance requires a case load
4 of adequate size to maintain the skills and
5 efficiency of the staff. Cardiac
6 catheterization laboratories should perform a
7 minimum of 500 diagnostic equivalents per year.
8 (Diagnostic catheterizations are weighted as
9 one equivalent's therapeutic catheterizations
10 as two impaired medical.)

11 Q: Okay. And these -- the numbers there
12 specifically the number for the diagnostic,
13 does that -- do you see a relation between that
14 number and the number in Standard 3?

15 A: Yes. The 500 is referenced in both.

16 Q: In your view does -- do the two sentences you
17 read from J04-044 have any relation to quality?

18 A: Yes. When we discussed the optimal performance
19 and then we look at the standard I think that
20 does speak to quality. Obviously, someone
21 undergoing a cardiac catheterization procedure
22 would want an optimal performance that
23 environment by their provider.

24 Q: Okay. And now let's talk about your reference
25 in your email to Mr. Barbier about enforcement.



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1 We -- Mr. Thomas asked you about multiple types
2 of enforcement action available to the
3 Department. At the time you wrote that email
4 did you have in mind any particular enforcement
5 type?

6 A: Yes. I was certainly considering that a cease
7 and desist order may be required to be sent to
8 Roper in addition to a substantial monetary
9 penalty.

10 Q: And what -- why would you consider -- why did
11 you consider cease and desist as a possibility?

12 A: Because in my view after the two years of no
13 operation and zero volumes, despite Mr.
14 Barbier's arguments to the contrary, I didn't
15 believe that they offered the health service
16 for those two years. That it would have
17 required a CON and that that was an unapproved
18 service operating in the community that would
19 have warranted a cease and desist at that
20 point.

21 Q: And okay did Roper's application itself address
22 it's intentions regarding the Bon Secours cath
23 lab?

24 A: Inasmuch as it stated that if approved -- if
25 the instant application was approved for the



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1 Berkeley project that they would close the Bon
2 Secours St. Francis lab.

3 Q: And did that actually occur?

4 A: Yes. We -- I determined that they satisfied
5 all of their new criteria and the State Health
6 Plan approved the project and they subsequently
7 wrote to the Department that they had closed
8 the lab.

9 Q: Did you -- once you received confirmation
10 regarding closure of the lab, did you feel a
11 need to take enforcement action at that point?

12 A: No. That was the intended result, so beyond
13 that, no.

14 Q: At any point in the review process before you
15 made your decision, did you consider what
16 action, if any, you might take regarding the
17 Bon Secours lab had you found a reason to deny
18 Roper's application?

19 A: Had we had reason to deny the application I
20 think at that point we -- in the decision
21 letter, that's where we would have instructed
22 them to cease and desist all operations to the
23 other lab, as they had referenced it in their
24 application. Which I think would have given us
25 the ability to reference our enforcement in the

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1 decision letter and then go from there with a
2 notice of enforcement conference and
3 proceeding.

4 Q: Okay. At the time that you made the decision
5 what were your expectations regarding the
6 future of the Bon Secours diagnostic cath lab?

7 A: That it would -- they would no longer be
8 operating or providing that service at that
9 location.

10 Q: And there's also been some questions in cross-
11 examination, again, regarding the Les Shelton
12 email and the Beverly Grant letter. Did,
13 again, did Mr. Shelton mention enforcement at
14 all in his email?

15 A: No.

16 Q: And in your role at DHEC with respect to the
17 CON program, do you feel that you are -- do you
18 feel that a decision whether or not to take
19 enforcement action under the CON statute and
20 regulation is mandatory or discretionary?

21 A: It would be discretionary.

22 Q: And, again, in your role at DHEC do you feel
23 that your authority to take enforcement action
24 is any way impacted by the decision of anyone
25 in that position before you to take enforcement



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1 action or not.

2 A: No. Especially absent any knowledge of their
3 interpretations or anything like that.

4 Q: Okay. Those were all of my redirect questions.
5 Thank you.

6 **THE COURT:** Ms. Hollingsworth, anything?

7 **MS. HOLLINGSWORTH:** I have no questions, Your Honor.

8 **THE COURT:** Mr. Eubank, you may return to your seat
9 I believe. Ms. Hollingsworth, do you have
10 another witness for us?

11 **MS. HOLLINGSWORTH:** Yes, Your Honor, we do. We
12 would have our expert witness, Ms. Platt, but
13 we -- given that it's about a little after
14 12:00.

15 **THE COURT:** It is.

16 **MS. HOLLINGSWORTH:** We'd ask that you take a lunch
17 break?

18 **MR. THOMAS:** No objection here, Your Honor.

19 **THE COURT:** Okay. I would offer to get pizza in
20 while he's, or she's testifying but she might
21 feel left out. An hour and half back?

22 **MR. THOMAS:** Sure.

23 **MS. HOLLINGSWORTH:** Yes.

24 **THE COURT:** All right. So, we're 12:08 so we'd be a
25 little after 1:30, but we'll shoot for that.



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1 MS. HOLLINGSWORTH: Your Honor, that is our only
2 witness so that would be the last testifying.

3 MR. THOMAS: And I may have a little bit of
4 rebuttal, but not much.

5 THE COURT: Okay. All right. Well, we'll see you
6 about 1:30ish.

7 MS. HOLLINGSWORTH: 1:30ish we will be back.

8 (Off the record from 12:08 p.m. until 1:39 p.m.)

9 THE COURT: We're back on the record in Case Number
10 16-ALJ-07-0386. And we are ready for a final
11 witness.

12 MR. LONG: We are, Your Honor. We've switched
13 places. I'm Jim Long. I'm ready to speak a
14 little bit in this trial finally.

15 THE COURT: I know it's been hard keeping yourself
16 quiet.

17 MR. LONG: That's very true, Your Honor. Let me
18 call my witness to the stand on behalf of
19 Roper-Berkeley.

20 CATHERINE PLATT, having been duly sworn, testifies
21 as follows:

22 MS. PLATT - DIRECT EXAMINATION BY MR. LONG:

23 Q: Ms. Platt, would you state your full name for
24 us today?

25 A: Sure. Catherine M. T. Platt.



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1 Q: Okay. And where do you reside?

2 A: 691 Amsterdam Avenue, Atlanta, Georgia 30306.

3 Q: Okay. And what's your occupation?

4 A: I'm a healthcare management consultant.

5 Q: All right. Can you describe briefly for the
6 Judge your office and employees?

7 A: Sure. I have an office in Atlanta, Georgia.
8 I have currently a staff of two consultants and
9 a research analyst in Atlanta, and I also have
10 a contract relationship with Tory Tipshreeny
11 who is located here in Columbia.

12 Q: Okay. And what is Tory Tipshreeny's background
13 and experience?

14 A: She, I believe has an MHA from the University
15 of South Carolina and worked for DHEC for
16 approximately eight and a half years before
17 coming to work with me.

18 Q: And when she worked for the Department what did
19 she do?

20 A: She was in charge of reviewing all of the,
21 like, the determination letters and non-
22 reviewability and exemptions and a wide variety
23 of other staff functions. I can't remember
24 exactly what her title was by the time she
25 left. She was in a supervisory role?



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1 Q: But it was in the CON office?

2 A: It was in the CON office, yes.

3 Q: Okay. And did she assist you with this case
4 and application?

5 A: Yeah, she did.

6 Q: All right. Tell me a little bit about your
7 education background.

8 A: Sure. I have a bachelors in psychiatry -- or
9 psychology -- from Emory University and a BA
10 focusing in healthcare management and finance
11 from Boston University.

12 Q: And can you review your work experience?

13 A: Sure. So while I was in graduate school I
14 worked as a budget and financial analyst for
15 Massachusetts General Hospital. Then I
16 returned to Atlanta where I started as a
17 consultant with Sullivan Consulting Group. I
18 worked there for 18 years. I guess by the time
19 I left I was a principal and then started my
20 own firm approximately 10 and a half years ago
21 and have been working in that capacity since.

22 Q: And what kind of work do you do for your
23 clients?

24 A: I would say about 80 percent is related to
25 certificate of need applications, whether it's



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1 preparation or opposition or participating in
2 appeal proceedings such as this. And the rest
3 is similar types of healthcare planning and
4 financial advisement to the same client base on
5 an ongoing basis between the CON projects.

6 Q: And you've testified in court as an expert
7 witness in the past?

8 A: Yes.

9 Q: What states?

10 A: Florida, Georgia, South Carolina, North
11 Carolina, Kentucky, Tennessee, and Alabama.

12 Q: Okay. And you said you've testified in South
13 Carolina?

14 A: Yes.

15 Q: In Administrative Law Court here?

16 A: Yes.

17 Q: And been qualified as an expert?

18 A: Yes.

19 **MOVE TO QUALIFY WITNESS:**

20 **MR. LONG:** Your Honor, we would move Ms. Platt as an
21 expert in healthcare planning and state health
22 planning?

23 **MR. THOMAS:** We have no objections.

24 **WITNESS QUALIFIED:**

25 **THE COURT:** Without objections, she is so qualified.



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1 MS. PLATT - DIRECT EXAMINATION BY MR. LONG (CONT.):

2 Q: Okay. All right. I thought we might take a
3 second and kind of talk about a cath lab just
4 briefly, all right? What -- can you explain to
5 the Court exactly what kind of services are
6 provided in a cath lab?

7 A: Sure. So most diagnostic and therapeutic
8 procedures can be done in a cardiac cath lab.
9 When we're talking about diagnostic procedures,
10 it's essentially a combination of threading a
11 catheter through a vessel and using imaging
12 equipment to take pictures of what's happening
13 in those vessels. And the same equipment and
14 lab can be used to take images of the cardiac
15 vessels around the heart as well as other
16 vessels in the body, the carotid, the vessels
17 of your limbs or abdomen. So a lab that can be
18 used for diagnostic catheterization could also
19 perform what's called interventional radiology
20 procedures. So it's imaging of other vessels.
21 And then when it becomes the therapeutic lab is
22 when not only are you imaging those vessels but
23 you're also at the same time performing
24 procedures that say, remove a blockage by
25 either essentially, you know, blasting away and



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1 various ways the blockage, or putting in a
2 stent is another common therapeutic procedure.
3 So it's the same, again, imaging equipment,
4 it's the same staff, it's the same room. But
5 it becomes therapeutic when you go that next
6 step to address whatever you're imaging and
7 whatever the problem might be in the lab.

8 Q: Are all of those procedures covered under the
9 CON program? Every single time you imaging in
10 a cath lab?

11 A: Well a lot of times, and in the case of St.
12 Francis's lab, it's an interventional radiology
13 lab. So if you're doing images of any other
14 vessel in the body besides the cardiac vessels
15 it's not covered under CON. It -- the only
16 time it would covered is if developing that
17 room exceeded the capital threshold. But the
18 service itself is not covered by CON. When it
19 becomes a CON issue is when you're imaging the
20 vessels of the heart and then it's a cardiac
21 cath and that's when it becomes reviewable
22 under CON.

23 Q: All right. And in the St. Francis lab that
24 used to exist, were they -- what kind of cath
25 procedures were they doing around the heart?



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1 A: They were doing diagnostic cardiac cath
2 procedures but also they were -- that roome was
3 doing interventional procedures on other parts
4 of the body -- imaging other parts of the body
5 as well.

6 Q: And just for the heart, was it diagnostic and
7 therapeutic or just diagnostic?

8 A: Just diagnostic not therapeutic.

9 Q: And this cath lab at Roper-Berkeley, will it be
10 diagnostic and therapeutic or just diagnostic?

11 A: Just diagnostic.

12 Q: All right. Generally, which one is more risky
13 for the patient and complex for the physician?

14 A: Therapeutic.

15 Q: Okay. And also these cath procedures around
16 the heart sometimes on children?

17 A: Yes, they are.

18 Q: And those pediatric procedures, are they more
19 complex than they would be in regards to
20 adults?

21 A: Yes, definitely.

22 Q: All right. Now over your career, your 20-plus
23 year career, how has this medicine and science
24 changed these procedures over time?

25 A: Well they've generally become more routine in



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1 nature. So the diagnostic procedures in
2 general have become very routine. Most
3 community hospitals have a diagnostic cath lab.
4 You know, small rural hospitals probably would
5 not but most, you know, decent-sized community
6 hospitals have the capability to do the
7 diagnostic work. And then even the therapeutic
8 procedures have become more routine. Over the
9 course of my career, initially hospitals were
10 required to have open heart surgery capability
11 and backup in order to perform the therapeutic
12 procedures because there was considered to be,
13 you know, an element of risk in doing those
14 procedures. But over time, starting in the
15 early 2000s, more and more states have moved
16 towards allowing for the therapeutic procedures
17 with out other heart surgery back up. And
18 during that frame of time sort of the
19 regulations have dropped off. A lot of the
20 states we work in don't regulate diagnostic
21 cath at all from a CON perspective. And many
22 of them even have just exemption processes for
23 therapeutic to ensure minimum quality
24 standards, that policies and procedures are in
25 place and adequate volume, but there's not a

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1 whole process around showing the need for
2 therapeutic catheterization.

3 Q: Okay. Thank you.

4 Let's take a look at Respondent's Exhibit 2
5 here up on the screen. Okay? And we've seen
6 this letter before from Mr. Eubank to Mr.
7 Barbier. This email, and you've heard the --
8 you've sat the entire trial, right?

9 A: Yes.

10 Q: So you've heard the testimony of the other
11 witnesses?

12 A: Yes.

13 Q: Is this a serious email?

14 A: Yes, definitely.

15 Q: What do you think that?

16 A: Well, I mean, I think that the fact that the
17 Department is putting Roper St. Francis on
18 alert that they would pursue enforcement action
19 and that they are asking for a pretty immediate
20 response to this potential action is very
21 serious in my opinion.

22 Q: Is this something that you would of talked to
23 your client about if you had received it?

24 A: Oh, absolutely. Immediately.

25 Q: All right. And now in your view what exactly



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1 is he telling Mr. Barbier and Roper St. Francis
2 in this email?

3 A: That he has concerns about the history of the
4 operation of the cath lab at St. Francis. And
5 that under his authority he's considering
6 enforcement action on the St. Francis lab and
7 asking for basically St. Francis to propose an
8 alternative that might satisfy his concerns in
9 order to weigh the actual proceeding through an
10 enforcement action.

11 Q: And what's the date on this letter, I mean this
12 email?

13 A: It's April 14th, 2016.

14 Q: Now let's take a look at Joint Exhibit 2, pages
15 69 and 70. Joint Exhibit 2 is the East Cooper
16 CON application.

17 A: Okay.

18 Q: And this is a letter to Mr. Eubank from Rob
19 Barbier, right?

20 A: Yes. Okay.

21 Q: Okay? First, how easy would it have been for
22 Trident to get this letter?

23 A: Well they would have had a variety of ways to
24 get it.

25 MR. THOMAS: Object to the form. I'm going to



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1 object to this question, Your Honor.

2 **MR. LONG:** I'll rephrase it.

3 Q: How easy would it have been for any provider in
4 the state of South Carolina to get this letter?

5 A: Pretty easy. They would either have filed an
6 effected ---

7 **MR. THOMAS:** I'm going to object, Your Honor. I
8 just want to get my objection on the record.
9 It wasn't because the way Mr. -- I'm sorry --
10 Mr. Long phrased it. So I think it's now with
11 the testimony of Mr. Sullivan who says that
12 getting any of this wouldn't have changed how
13 we approached the opposition of the project.
14 It's irrelevant. It doesn't matter if he got
15 it or he didn't or tried to get it or didn't.
16 I mean, their position's the same. So I just
17 think that it's wholly irrelevant under Rule
18 401.

19 **THE COURT:** Okay. I think your right as a matter of
20 principle, but as a matter of convenience for
21 the Court I'm going to allow it questioned and
22 answered.

23 **MR. THOMAS:** Okay.

24 A: Okay? So it's pretty easy. There's one of two
25 ways. The provider would either file as an



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1 effected party and then DHEC would file -- or
2 would send them all of the correspondence
3 related to the file and/or they would file a
4 FOIA request, which is simply an email, and
5 request the contents of the file and that would
6 be sent to them, so. Easy and several
7 approaches.

8 Q: And what date is this letter?

9 A: April 20th, 2016.

10 Q: So six days after the email, right?

11 A: Yes.

12 Q: All right. Look at the second paragraph?

13 A: Okay.

14 Q: At the bottom of the page? And look at that
15 quoted language there that is quoted on the
16 East Cooper application. Could you read that
17 into the record?

18 A: Sure. Just the quoted part?

19 Q: Well just read the first sentence and point out
20 the quoted part.

21 A: Okay. Further, Roper St. Francis noted that on
22 pages 20 through 21 of the East Cooper
23 application East Cooper asserts that the Bon
24 Secours St. Francis Hospital cath lab, is
25 considered non-operational and requires a CON.



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1 application if it is to be included in the
2 inventory for cardiac catheterization
3 laboratories. As such, it is excluded from the
4 service area analysis.

5 Q: Okay. How would you characterize East Cooper's
6 position as quoted in that paragraph there?

7 A: Basically that St. Francis is operating their
8 cath lab without a CON because they had not
9 performed services for -- or not purported
10 providing any volume of procedures for several
11 years.

12 Q: Okay. And what are they asking the Department
13 to do?

14 A: They're basically asking the Department to take
15 action and remove St. Francis from the
16 inventory considering the lab closed.

17 Q: And are they asking for an enforcement action?

18 A: Indirectly, yes. They're asking for it to be,
19 you know, formally shut down.

20 Q: Okay. Take a look at the next page, the top
21 paragraph.

22 A: Okay.

23 Q: Now Mr. Barbier says here East Cooper's
24 position regarding the lab is inconsistent with
25 the applicable CON laws and the South Carolina

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1 Health Plan. Now do you think it is in -- that
2 is inconsistent with health plans for the
3 Department to just sua sponte remove St.
4 Francis from the inventory without any sort of
5 enforcement action or any other formal action?

6 A: Yeah. I don't think they can do that. They
7 can't just simply award or remove it, but they
8 can take action.

9 Q: Okay. Now when were you retained by Roper St.
10 Francis or Roper-Berkeley to work on this
11 application?

12 A: I believe it was April 18th, 2016.

13 Q: Okay. So you were aware of the positions that
14 were being taken in the case about the time you
15 came on board?

16 A: Yes.

17 Q: All right. And in this letter does Roper St.
18 Francis and Roper Berkeley make a proposal to
19 the Department as to what they intend to do?

20 A: Yes.

21 Q: And what is that proposal?

22 A: It's essentially to apply for a new cardiac
23 cath lab at Roper St. Francis Berkeley and shut
24 down the lab at St. Francis formally.

25 Q: Okay. And then you were hired on the 18th or



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1 right about that particular day. Is -- what
2 were you told by the client as to what their
3 proposal was going to be?

4 A: That they were going to apply as a new cardiac
5 cath provider in Roper Berkeley and, again,
6 shut down the St. Francis cath lab.

7 Q: All right. Now yesterday Mr. Sullivan said
8 that this application was, and I think the
9 words he used, direct quote, bizarre situation.
10 Do you agree with that characterization?

11 A: No. I mean, I think it's somewhat unusual but
12 I don't know that it's bizarre.

13 Q: Can you give me -- the Court -- some examples
14 of CON situations that might be similar to this
15 one for something's that closed and something
16 else open?

17 A: Well, I think that happens quite frequently in
18 order to -- for hospitals to adapt to the
19 changing needs of their patients. You know, an
20 example I can think of is, say OR's. For
21 example, a hospital might have some small,
22 older OR's that are not very suitable for the
23 types of procedures they're doing and they
24 might offer to close those as part of say
25 filing a CON for a new ambulatory surgery

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1. center. And they would formally close those
2. OR's if approved for the ambulatory surgery
3. center. Another type of situation might be bed
4. capacity that's being effectively used.
5. That's, you know, kind of empty beds that a
6. hospital might want to use for say change acute
7. care beds to psych beds or rehab and they would
8. agree to, you know, close the acute care beds
9. or remove the acute care beds from the
10. inventory formally upon approval of the psych
11. beds or rehab beds.

12. Q: Okay.

13. A: That, and, you know, a while back MRI was
14. regulated under the State Health Plan and a
15. provider might agree that they would
16. discontinue mobile MRI services when they were
17. apply for a new fixed MRI unit. So there's a
18. variety of situations where hospitals kind of
19. modified how they're approaching services and
20. agree to close a service and open it in a
21. different capacity to, again, be flexible and
22. meet the needs -- the changing needs of their
23. patient base.

24. Q: So does this proposal that, when they called
25. you in April, strike you as being something

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1 that's really completely out of the ordinary?

2 A: No. It didn't.

3 Q: All right. Let's talk a little bit about the
4 review process itself. What in your opinion as
5 a healthcare planner and an expert on the
6 Health Plan, what's your role? What is the
7 role of the State Health Plan in regards to the
8 Department's review of an application?

9 A: It's a planning tool that provides guidance to
10 the Department in their review of CON
11 applications. And it sets forth standards for
12 specific services under review and ways to
13 evaluate those services in terms of need for
14 the project, minimum quality standards,
15 unnecessary duplication of services and such.

16 Q: And so, in your opinion what is the role of the
17 project review criteria with the -- in regards
18 to the Department's review of the applications?

19 A: They're sort of broader overarching criteria
20 doesn't apply to all projects. So not every
21 CON triggers State Health Plan standards. So
22 only certain services are covered by the State
23 Health Plan but the project review criteria
24 apply to all CON applications that are filed.

25 Q: Okay. And where is this product review



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1 criteria found? In the Health Plan or are they
2 located in a different ---

3 A: They're located in the regulations.

4 Q: All right.. What about the remaining
5 regulations. Not the project review criteria
6 that are in the regulations but the other
7 regulations. What is their role in regards to
8 assisting the Department in their review of the
9 applications?

10 A: They're more related to the process. When they
11 set forth what requires review then they forth
12 the process for reviewing an application and
13 then the actual CON application form itself is
14 embodied in those regulations so it sets forth
15 everything that an applicant needs to file and
16 include in the CON application in order for the
17 Department to review it.

18 Q: And when you talked about the process in the
19 regulations can you give me an example? What
20 does it mean about that?

21 A: Sure. So the -- like the requirement to file
22 a public notice before you file the CON and how
23 much the filing fee is and then the time
24 periods for review for completeness and then
25 ultimately the time periods for the decision

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1 and such.

2 Q: And what must the CON application establish in
3 order to be approved?

4 A: Well it has to establish that it's consistent
5 with the project review criteria and it doesn't
6 have to meet every single project review
7 criteria but it has meet the ones that the
8 Department determines are relevant and
9 applicable to the project.

10 Q: Okay. So let's take a look at Joint Exhibit 4,
11 we looked at this, of course, over the last day
12 and half. I'm at pages 46 and 47. Joint
13 Exhibit 4 is the 2015 State Health Plan. Now
14 is that the Health Plan that applicable to this
15 application?

16 A: Yes, it is.

17 Q: All right. Now look at the bottom of page 46
18 and then at the top of page 47 you have four --
19 you have four -- or you have the Standards
20 related to cath. Now we -- you're aware that
21 it's stipulated that the first four standards
22 are the Standards that related to this
23 application, right?

24 A: Yes.

25 Q: And you agree with that?



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1 A: Yes.

2 Q: All right. Generally, going back to the page
3 before, page 46, what is the purpose of
4 Standard One in your opinion?

5 A: Standard 1 is more informational in nature and
6 it sets forth how the Department will look at
7 the capacity of a cardiac cath lab. And how it
8 defines weighted approval and it 's based on
9 the types of procedures that are being done in
10 the cardiac cath lab.

11 Q: Okay. How about the purpose of Standard 2?

12 A: It's also informational in nature. It helps
13 the applicant and Department define the service
14 area for the proposed cardiac cath project.

15 Q: Okay. And look with me at the next page. What
16 would the purpose of Standard 3 be?

17 A: To me Standard 3 assists the applicant and the
18 Department in identifying the capacity of the
19 labs in the service area that are available to
20 meet the needs that the applicant is trying to
21 demonstrate and that they plan to serve.

22 Q: Okay. And when you use the word capacity there
23 you mean -- don't all the labs have the same
24 capacity?

25 A: Yes, but what's available in terms of, you



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1 know, are the labs completely full or, you
2 know, is there available excess capacity from
3 existing providers to meet the needs of the
4 service area.

5 Q: Okay. And then what about the purpose of
6 Standard 4?

7 A: It's similar. Both 3 and 4 in my opinion, both
8 look at sort of community need in terms of
9 what's available and then the applicant's next
10 step under 4 would be to project and quantify
11 the need for the service for the target service
12 area population and show that they can provide
13 a minimum of 500 diagnostic caths without
14 taking sufficient volume from another provider
15 to drop them below 500 diagnostic caths.

16 Q: You heard Mr. Eubank's testimony this morning
17 about quality in the existing cath labs. Do
18 you agree with that?

19 A: Yes. I think there's a quality component to
20 both of these two as well. I mean, that's why
21 there's minimum volumes set forth.

22 Q: Okay. Now in your opinion which one of these
23 two -- between 3 and 4 is the most important
24 Standard?

25 A: I think number 4 is the most important.

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1 Q: Why is that?

2 A: Because under number 4, the applicant has to
3 identify the target population they're going to
4 serve, how -- what is the size of that
5 population and what it's going to be in the
6 future. How much of that population they're
7 going to serve so that results in their
8 projected utilization and does that meet the
9 minimum 500 diagnostic procedures. And then
10 they have to show that projection in the
11 context of the overall market to show that
12 they're not going to reduce the volume of other
13 existing providers.

14 Q: Okay. Now generally, is the South Carolina
15 State Health Plan a flexible planning document
16 or a rigid planning document when compared to
17 other states?

18 A: I think it's very flexible.

19 Q: Okay. Now in your opinion, what would be the
20 purpose of having a flexible planning document?
21 In other words, why would the Department want
22 to have a document that was a flexible planning
23 document?

24 A: I think for a couple reasons. One is because
25 it's not required to be updated annually a lot



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1 of things can change between when, you know, a
2 new plan is adopted. So it allows the
3 Department to look at the current situation in
4 the market, what's happening in the market,
5 what may have changed in the market, and put
6 that current situation and the future
7 situation. You might have approved providers,
8 things that you know are going to be developed
9 or implemented and put all of that in the
10 context of these standards and evaluate the
11 project. So one is, you know, allowing the
12 flexibility for the changing healthcare
13 environment. And another is to be able to be
14 responsive to those changes and ensure that,
15 you know, the population of South Carolina can
16 have their needs met. You know, instead of
17 waiting for, say, a planning cycle to go by and
18 a need to be recognized down the road.

19 Q: All right. Let's take a look again at the
20 standards, if we could. Looking at Standard 2
21 you see the phrase that the service area
22 applies to all facilities?

23 A: Yes.

24 Q: Within a 45 minute drive time. All right look
25 at Standard 3. And Standard 3 addresses all



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1 existing labs.

2 A: Yes.

3 Q: See that? Okay. Are those phrases the same?
4 All facilities and all existing facilities, or
5 all existing labs?

6 A: No. What -- when it's talking services, so
7 it's, you know, the program as a whole is there
8 a cardiac cath program and it just uses the
9 word all. That's the service area definition.
10 And then the Standard 3 focuses specifically on
11 labs and a service may have more than one lab.
12 And then it also distinguishes all existing
13 labs.

14 Q: Now is the word existing defined?

15 A: No, it is not.

16 Q: All right. Do you -- you heard the definition
17 in the opening about that existing is to
18 continue to be?

19 A: Yes.

20 Q: Do you have any objection to that definition?

21 A: Nope. It's in the dictionary.

22 Q: Is -- now is that a reasonable definition for
23 that term as a health planner?

24 A: Yes. I think it is because I think that when
25 you're, you know, health planning is a future-



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1 looking practice. And you're looking at, you
2 know, what are the needs going to be in the
3 future and when services are going to be
4 available to meet those needs. So you can't,
5 you know, freeze it in time when the whole
6 purpose is to look forward and make sure that
7 sufficient services are going to be available
8 and accessible to the South Carolina population
9 in the future.

10 Q: Okay. Did the Department determine that the
11 Bon Secours St. Francis lab was an existing lab
12 or that it was an existing lab in its decision
13 letter?

14 A: For the purposes of Standard 3 they determined
15 it was not existent.

16 Q: All right. In your opinion do you support
17 that?

18 A: Yes.

19 Q: All right. Now in your opinion what is the key
20 fact or facts in the application to support the
21 Department's determination that the lab in Bon
22 Secours St. Francis is not an existing lab?

23 A: Well I think that the most important fact is
24 that it's not going to continue to be -- it was
25 proposed to be, and clearly set forth that it

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1 was going to be closed and that it would never
2 exist at the same time as the proposed Roper
3 Berkeley County cardiac cath lab.

4 Q: All right. Let's take a look at Joint Exhibit
5 8.

6 **(Joint Exhibit Number 8 was admitted into evidence.)**

7 Q: Joint Exhibit 8 is the staff response to the
8 request for final review. And if you could
9 look over that the third page of that, under
10 paragraph 1?

11 A: Okay.

12 Q: I'm sorry, I meant the number 1. This is about
13 the middle of the page.

14 A: Okay.

15 Q: And I'm not sure I'm right here. You know I
16 think I'm on the wrong page, and I'm sorry. I
17 apologize. Go to the -- it's the third page of
18 the document. That's it. Okay? What is the
19 staff response to the request for final review?

20 A: So here they're saying, again, ---

21 Q: First, tell the Court what the document is.

22 A: Okay. So this document is basically Trident
23 had requested a final review from the DHEC
24 Board and that was declined and this document
25 is that staff's response basically saying why

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1 they're not going to have a final review. And
2 in this response -- I guess we're looking at
3 page three which is page four of the Joint
4 Exhibit, set forth the reasons for the staff to
5 decline the final review.

6 Q: Does it say in the middle of the page there --
7 do you see after the -- this contention is the
8 crux of Trident's opposition. Do you see that?

9 A: Yes.

10 Q: Can you kind of publish that for the Court --
11 read that?

12 A: Sure. This contention is the crux of Trident's
13 opposition as they claim the catheterization
14 lab at Roper St. Francis Xavier has performed
15 fewer than ten diagnostic procedures in the
16 most recent year.

17 Q: And then read the next couple of sentences.

18 A: Sure. As to this issue the decision noted that
19 upon approval of the project the Xavier lab
20 would be shuttered. See Decision. Moreover,
21 by letter dated August 17th, 2016, Roper St.
22 Francis notified the Department that Xavier
23 Laboratory had been permanently closed on
24 August 1st, 2016.

25 Q: And the key last sentence.



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1 A: Okay. The Department staff concludes this
2 closure would be sufficient to meet the spirit
3 and letter of the Plan standard for a
4 establishment of an additional diagnostic
5 cardiac catheterization lab in the 45 minute,
6 one way drive time service area.

7 Q: So do you agree with that?

8 A: Yes.

9 Q: And you think that the closure of the lab
10 itself is sufficient to satisfy Standard 3 and
11 the spirit and the language of the Plan?

12 A: Yes. It will not continue to be. It will not
13 exist for the purposes of planning for that
14 service area.

15 Q: And is that position reasonable?

16 A: I think so.

17 Q: Is it contrary to the plain language of the
18 Plan?

19 A: I don't believe it to be.

20 Q: Okay. And do you think it's consistent with
21 the State Health Plan?

22 A: Yes.

23 Q: All right. Now going back to the Plan being a
24 flexible document, as a health planner why
25 would it be beneficial to the public for the



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1 Department to have flexibility when it was a
2 facility or service closes?

3 A: Again, it allows a provider to more quickly
4 respond to the agency, renew that response and
5 hopefully get the service to the community to
6 maybe replace, you know, a service that has
7 been closed.

8 Q: Listening to Mr. Sullivan and Trident's
9 position yesterday, if that view was adopted by
10 the Department that was set forth in this
11 yesterday, how long would it take to replace a
12 cath lab that closed?

13 A: It could take a very long time for, you know,
14 an example, let's say a cath lab closed shortly
15 after the publication of the State Health Plan
16 and then you'd have to wait two years for a new
17 State Health Plan to be adopted that recognized
18 that that lab was closed. And then, you know,
19 maybe six -- approximately six months for the
20 CON, you know, full process from preparation
21 through a decision. And, you know, potentially
22 even, you know, a appeal after that. Then even
23 without an appeal, then you have another, you
24 know, maybe six months to a year to build and
25 equip the cath lab. So you're talking a multi-



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1 year process before you could replace that
2 service and make sure that the services were
3 available to a community.

4 Q: Is that in the best interest of the public?

5 A: No. I don't believe it to be.

6 Q: You heard Ms. Hollingsworth's hypothetically
7 yesterday about the two hospitals being in the
8 same service area and one of them had caths and
9 one them didn't and it closed?

10 A: Yes.

11 Q: Okay. Do you have a response or an opinion
12 about how that should be handled?

13 A: Yes. So I think, you know, just like it was in
14 this case, you know, the lab closes then, you
15 know, the other hospital should have the
16 immediate ability to recognize that, propose a
17 lab and a CON to meet that need and DHEC
18 consider the closure of the lab in their review
19 of the application in order to bring the
20 services back to the community as quickly as
21 possible.

22 Q: In regards to the Health Plan and the closure
23 of the St. Francis lab, in your opinion, does
24 it matter whether the St. Francis lab closes
25 four days after the decision, three days before



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1 the decision or three -- or two months before
2 -- or at the same time as the application?
3 Does the date of the closure, is that
4 significant to the Department?

5 A: I don't think it is because the bottom line is
6 that lab will never exist at the same time as
7 the proposed Roper Berkeley lab.

8 Q: Okay. How unusual was Bon Secours St. Francis
9 historical utilization in that lab for
10 diagnostic caths?

11 A: It's pretty -- it's sort of an aberration. I
12 mean, if you look at the State Health Plan, the
13 most recent one published at the time for the
14 application, there are a few other labs in the
15 state that are not well utilized. They might
16 have, you know, 90 or a hundred procedures,
17 which would be somewhere between one to two a
18 week. But there's no other lab or program in
19 the state that's only doing, you know, a
20 handful of cases in a single year.

21 Q: Is low utilization or low volume support --
22 does that low volume support or oppose the
23 Department's later determination that they'll
24 be -- that the St. Francis lab was not an
25 existing lab?



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1 A: The low volume supports the Department's
2 finding that it's not an existing lab.

3 Q: All right. Let's take a look at the
4 application itself, Joint Exhibit 1 at page
5 190? Okay, this is -- do you recognize this
6 document?

7 A: Yeah.

8 Q: All right. Can you tell us what it is?

9 A: Sure. This is the opposition letter filed by
10 Mr. Sullivan representing the effected party,
11 Trident Medical Center, in the Roper St.
12 Francis Berkeley CON application.

13 Q: Okay. Well first, did you respond to this
14 letter?

15 A: No. We did not really have time. We started
16 to, I mean, it was filed on July 21st, which I
17 believe was a Thursday and then the decision on
18 the CON was issued the very beginning of the
19 next week so there really wasn't sufficient
20 time to respond.

21 Q: Okay. It was actually done four days later
22 wasn't it?

23 A: Yes.

24 Q: The 25th?

25 A: Yes.

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1 Q: So that's a Thursday, so it would have been
2 Monday?

3 A: Right.

4 Q: Okay. Let's take a look over at I guess it's
5 page 199.

6 A: Okay.

7 Q: If you look at Mr. Sullivan's position in
8 regards to the lab about mid-way down the page.
9 So in his discussion of the -- what is Mr.
10 Sullivan's position in regards to whether the
11 St. Francis lab is existing or not existing?

12 A: Well, so, here he goes into a discussion of the
13 ---

14 **MR. THOMAS:** Your Honor, I'm going to object. Mr.
15 Sullivan's already commented on his letter. He
16 wrote the letter. He's been cross-examined on
17 the letter. I don't think we need to hear from
18 Ms. Platt about what Mr. Sullivan thought or
19 did. It's right in front of the Court. And,
20 you know, he's the best evidence of what this
21 letter is and what it presents. They've had
22 more than enough opportunity so she doesn't
23 need to be talking about this.

24 **MR. LONG:** Actually this is our first opportunity.
25 This is our first witness and she's an expert.



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1 I mean she's clearly within her bounds of
2 testimony to be able to comment on the opinions
3 of the other experts.

4 **THE COURT:** Mr. Long, I'm ---

5 **MR. LONG:** I'm not going to -- I don't have ---

6 **THE COURT:** I understand this -- we've been through
7 this ground a good bit. Mr. Sullivan has
8 testified what he's written here. He's
9 testified about what he thinks he meant by what
10 he's written here. I think she's entitled to
11 offer an opinion on behalf of Roper about what
12 she thinks it means. I don't think she can say
13 what he thinks it means. But she can certainly
14 say what she thinks it means. And I'm not sure
15 whether I'm sustaining objection or not at that
16 point, but ...

17 **Q:** I can rephrase it. Well let's ask it this way.
18 Can the Roper St. Francis lab be an existing
19 lab under Standard 3 and not an existing lab
20 under the transfer provision?

21 **A:** No. I think that would be entirely
22 inconsistent. If it's not existing for the
23 purposes of transfer then it's not existing for
24 the purposes of Standard 3. There's not two
25 different definitions of existing.

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1 Q: Okay. And if the -- all right -- let's then
2 move ahead here. This is -- let's look at
3 this. In -- we'll come back to that about
4 that. Let's move on to a different subject
5 real quick. Tell the Court if you would please
6 what your role was in regards to the actual
7 preparation of the CON application?

8 A: Sure. So we were engaged to assist Roper St.
9 Francis in preparing the application. The bulk
10 of our work was focused on questions B-11 which
11 is the question in the application where the
12 applicant has to demonstrate they've identified
13 the target population to be served and then
14 describe the needs of that population and how
15 the proposed project would meet those needs.
16 And then also encompassed in the response to
17 that question is responding to the standards in
18 the State Health Plan. And then we worked with
19 Mr. Cantwell of Roper St. Francis to, you know,
20 compile and file the entire application.

21 Q: All right. Let's take a look at Joint Exhibit
22 1 which is the CON application. And
23 particular page six. Okay this is question B-
24 2, all right? And you can just remind the
25 Court what does the Department -- what does --



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1 what did the applicant and you as the planner
2 assisting the applicant, say to the Department
3 on page six of the application as to what the
4 proposal was in regards to Roper Berkeley and
5 St. Francis?

6 A: So the first paragraph basically describes the
7 Roper St. Francis Health Care System, the
8 hospitals that comprise that system including
9 the approved Roper St. Francis Hospital in
10 Berkeley County, a 50 bed hospital that's under
11 construction. And then the plan to develop or
12 initiate diagnostic cardiac cath services in
13 conjunction with the opening of that hospital.
14 And that upon approval of the project that the
15 lab at Roper St. Francis -- I'm sorry at St.
16 Francis Hospital would close but that room
17 would continue to be used as a special
18 procedure or interventional radiology room.

19 Q: All right. Let's look at page 17. And then
20 what this page begins?

21 A: So the beginning of this page is again an
22 overview of the project similar to the last
23 question we looked at. Then we go on to
24 identify the target population which is the
25 area of the tri-county that the applicant

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1 projects to draw the majority of it's patients
2 from, which is Berkeley County and then some
3 adjacent zip codes in Dorchester and Charleston
4 County. We identify the service area and then
5 go on to describe the population
6 characteristics of the service area.

7 Q: And how many pages is the need analysis? It
8 starts on page 17 or what -- I'm not sure of
9 the page -- but this is like a

10 A: It goes all the way over to page 42. So, I
11 mean ---

12 Q: Okay.

13 A: --- it's the largest response in the
14 application. It's what I consider the most
15 intense health planning section of the
16 application.

17 Q: All right. Let's take a look at page 30. Is
18 this your discussion of Standard 3?

19 A: Yes.

20 Q: All right. And did you acknowledge -- what did
21 you say about Bon Secours' lab at the bottom of
22 page 30?

23 A: At the very bottom?

24 Q: Or in the top of it. What did you say about
25 Bon Secours St. Francis lab on page 30?



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1 A: We presented the information about the lab.
2 The lab has been reported. We showed the
3 volume that had been reported the most recent
4 three reporting years: 2012, 2013, '04,
5 showing nine procedures, three procedures and
6 four procedures. So we were completely up
7 front about the lab and about it's low
8 utilization and then at the bottom of that page
9 we state, while Bon Secours St. Francis Xavier
10 Hospital is operating below 500 diagnostic
11 equivalents per year, the lab will be closed
12 upon the approval of the project. As a result
13 all labs which will exist following the
14 approval of this project are currently
15 operating well above 500 diagnostic equivalents
16 per lab and meet the utilization requirements
17 of the standard. So we also showed that all of
18 the other providers are very well utilized.

19 Q: And so were you including Bon Secours St.
20 Francis as an existing lab in your discussion
21 of Standard 3?

22 A: No. I mean, we were -- we presented it as a
23 reporting lab but we said it will not exist
24 upon approval of the project. It will not
25 continue to exist to meet the needs of the

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1 population.

2 Q: Okay. As you know, we've done -- we've got it
3 and put a stipulation that we've done. If you
4 can turn to the paragraph 10 I'm just going to
5 ask you a couple of quick questions for the
6 record. Okay. We stipulated that the CON
7 application satisfies Standard Four of the
8 State Health Plan. Does the application
9 contain anything where you establish that?

10 A: Yes. It actually includes multiple pages where
11 we go through a detailed analysis of how we
12 project the utilization for the proposed lab
13 and then demonstrate in the context of the
14 overall market that the new lab will not result
15 in a reduction of the existing providers below
16 the 500 minimum.

17 Q: All right. And we've stipulated that community
18 need as project for new criteria at 802.2 has
19 been satisfied. Can you tell us where that
20 would be found in the application?

21 A: I would say most of what goes to community need
22 is contained in that question B-11. There, you
23 know, may be other parts that are referenced
24 but the bulk of what's considered under
25 community need is there.



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1 Q: Okay. The next subparagraph (d), the
2 application meets the requirements for
3 distribution accessibility in the project
4 review criteria. Can you tell the Court where
5 that would be located in the application?

6 A: Sure. So that would also reference the -- all
7 the analysis and everything related to the
8 market in question B-11, as well as
9 accessibility in terms of say, financial
10 accessibility. There's questions in the
11 application related to payer mixing and
12 acceptance of all patients.

13 Q: And if we go to the next page, okay? We
14 stipulated that the project's financially
15 feasible under the project review criteria.
16 Can you tell the Court how you established
17 that?

18 MR. THOMAS: Your Honor, I'm going to object. This
19 is why we did the stipulation.

20 MR. LONG: All I'm -- Your Honor, all I'm doing,
21 Your Honor, I've got four more questions on
22 this. It's all stipulated to, but I think it's
23 important just to have in the record where in
24 the application -- that this information is in
25 the application. Because the Department

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1 reviewed it. And I know maybe it's a little
2 overkill as far as the evidence goes, but I've
3 only got three more questions on this. I
4 promise I'll be done in about four minutes,
5 okay?

6 **THE COURT:** Mr. Thomas, I'm going to overrule that
7 objection. I think what he's wanting to do is
8 give me some guidance as to where I can find
9 some information. And I'm going to let him do
10 that.

11 **MR. THOMAS:** Sure.

12 **THE COURT:** It'll save me a little time later.

13 **MR. THOMAS:** Okay.

14 **MR. LONG:** Thank you, Your Honor. That's exactly
15 it.

16 **Q:** All right. Looking at -- where would the
17 financial feasibility information be?

18 **A:** Sure. So there's a lot of information related
19 to financial feasibility. There is a
20 presentation of the project costs, so what are
21 the costs to develop the lab and equip it. How
22 are those costs funded. What is the source of
23 funds. And then a three year projection,
24 basically an income statement, showing that the
25 operation of the labs will be financial



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1 feasible once operational.

2 Q: Okay. And how about cost containment as the
3 project view criteria?

4 A: Similarly, you'd look to those same financial
5 resources to look at, again, what is the cost
6 of the project and is it -- will it be
7 operating cost effectively.

8 Q: And where would the information be that
9 established that there's no adverse impact on
10 the existing providers?

11 A: That's also looking at question B-11 as part of
12 that analysis where we project the volume of
13 patients to be served. How, you know, what is
14 the size of that population. How many are
15 going to be served by the new lab and what
16 impact that will have on other existing
17 providers.

18 Q: Okay. All right. Thank you. Does the CON
19 process have a public notice requirement?

20 A: Yes, it does.

21 Q: And, can you as an interested person or any
22 provider review -- what provisions does it have
23 that's available to the public?

24 A: So first there's a publication requirement
25 before the application is even filed. You have



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1 file a public notice in a local newspaper that
2 basically gives a brief description of the
3 project so that any provider, and really any
4 citizen of the area, can be on notice that the
5 project is going to be filed. Then there's a
6 couple of different publications once the
7 application is filed. The state register
8 recognizes when an application's been filed and
9 when it's been deemed complete for review, and
10 obviously that's a public document. And then
11 on the DHEC website there's a monthly report
12 that is made available to download that shows
13 all current CON application in any phase of the
14 review or appeal.

15 Q: In your experience in working with clients in
16 South Carolina, does the regulated community
17 avail themselves of these notices.

18 A: Yes. Everybody that I work with is pretty well
19 aware of all of those different notices and
20 reviews them to look for what they're
21 competitors and other parties in the market are
22 doing.

23 Q: All right. In South Carolina is DHEC -- the
24 CON office at DHEC -- is it available to the
25 regulating community?



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1 A: Oh, very much so. I think they're very
2 accessible and approachable and I think they
3 really want to engage with the regulated
4 community.

5 Q: So can you meet with them?

6 A: You can meet with. You can call them. I find
7 them very responsive and very accessible.

8 Q: Was there every a time when you were told that
9 the DHEC office -- that the DHEC, well the
10 Department had decided to approve this
11 application before you received the decision
12 letter?

13 A: No..

14 Q: Okay. Let's take a look at Joint Exhibit 2,
15 page 81.

16 A: Okay.

17 Q: This is Ms. Brandt's letter from 2010 that we
18 talked about earlier today?

19 A: Okay.

20 Q: All right. How would you compare Ms. Brandt's
21 position to Mr. Eubank's position that we
22 review earlier in your testimony?

23 A: Well it appears that Ms. Brandt is being asked
24 something slightly different than I think what
25 Mr. Eubank was asked to respond to. It looks

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1 here that East Cooper is essentially asking her
2 to sort of ignore the St. Francis lab for the
3 purposes of calculating the average utilization
4 of the existing labs. And I think here she's
5 responding to say basically, you know, we
6 recognize that they, you know, have been idle
7 for three years, but we can't just simply
8 ignore them. You know, and she's suggesting
9 that, you know, maybe that be brought to the
10 attention of the committee for the next plan.
11 But it doesn't appear that she was being asked
12 to take action and in any way shut down the lab
13 or anything like that. It's just simply asking
14 if, you know, they can be ignored.

15 Q: Do you think her position and Mr. Eubank's
16 position are inconsistent with each other?

17 A: No, I don't. I also think, again, the ask
18 appears to be different.

19 **MR. THOMAS:** Objection, Your Honor. I think Mr.
20 Long is to some degree asking Ms. Platt to
21 speculate as to what Ms. Brandt's position
22 outside of what's clearly noted in the letter
23 is, and she can't do that even as an expert.

24 **MR. LONG:** I didn't ask her to speculate. I asked
25 her whether Ms. Brandt's position in the letter



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1 and Mr. Eubank's position was consistent.

2 **MR. THOMAS:** As long as she -- as long as it's
3 within the letter. I did hear that, I'm sorry.

4 **THE COURT:** Yeah, I think that's what he's asking,
5 too. He's asking about this position and that
6 position. How they compare. And I think you
7 can do that so I'm going to overrule that
8 objection.

9 Q: Do you think they're inconsistent?

10 A: I don't.

11 Q: Okay. Can you explain why?

12 A: Sure. So here Ms. Brandt is saying basically
13 I can't discount the existence or just ignore
14 it. Whereas, Mr. Eubank is saying I'm not
15 going to ignore it, I'm going to actually take
16 action and I'm either going to ask them to
17 propose a solution or I'm going to bring an
18 enforcement action against them.

19 Q: Okay. Now in your -- in the application in the
20 in the need analysis you did, how were you able
21 to project that Roper Berkeley will attain 500
22 caths when Bon Secours St. Francis lab had less
23 than ten a year?

24 A: So the utilization of the proposed Roper
25 Berkeley lab is heavily driven by what's

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1 happening at the Roper downtown campus.

2 **MR. THOMAS:** Your Honor, I'm objecting. Sorry, this
3 has nothing to do with the interpretation of
4 Standard 3. Mr. Long's actually asking this
5 witness to give into the merits of this CON
6 application and how's she projecting things for
7 Standard 4. Which we've already stipulated to.

8 **MR. LONG:** Just one question, Your Honor. It would
9 have been over by the time he made the
10 objection.

11 **MR. THOMAS:** I don't know if I agree with that
12 either.

13 **MR. LONG:** I'm just trying to get some context to
14 what's going on here.

15 **THE COURT:** Restate your question.

16 **MR. LONG:** I just asked her how she felt as a
17 planner she could project 500 caths at Roper
18 Berkeley when Bon Secours had only had less
19 than 10 caths in the years leading up -- per
20 year -- in the years leading up to the
21 application. Which I also thing, Your Honor,
22 as an aside, Mr. Sullivan did comment on that
23 I believe yesterday. Just one question.

24 **THE COURT:** I'm going to allow the question and the
25 answer. Let me tell you something gentlemen



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1 and ladies, when you projected about the
2 future, you're not even shooting craps with
3 real dice. So you can answer the question.

4 Q: Go ahead.

5 A: Okay. So, again, the Roper cath lab is very
6 heavily utilized. It's over -- well over 90
7 percent of capacity. Many, many of those
8 patients reside out in Berkeley County, so
9 bringing a cath lab out to that community would
10 increase access for those resident. The
11 doctors strongly supported this application and
12 many of the cardiologists are already making
13 efforts to develop new offices out in Berkeley
14 County. And as we described in the
15 application, the cardiologists have not been
16 supportive of the St. Francis cath lab because
17 it's so close to the existing Roper cath lab
18 that they don't want to have to cover two cath
19 labs when it's not really enhancing access for
20 their patients.

21 Q: All right. Let me ask you about this. If the
22 St. Francis lab had been an existing lab under
23 the Health Plan definitions, could it have been
24 transferred to Roper Berkeley?

25 A: Yes, definitely.



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1 Q: All right. And how different would the
2 application have been if it had been a transfer
3 as opposed to a closure and new application?

4 A: Not very different at all. I would say 85
5 percent of the application would be identical.
6 The plans, the costs, the projections all
7 really would have been exactly the same, but
8 instead of addressing the State Health Plan
9 standards related to new diagnostic cardiac
10 cath lab we would have addressed the standards
11 related to transfer.

12 Q: And would there have been historical
13 utilization to support the transfer?

14 A: Yes. We would have used the same basis of the
15 historical utilization for the Roper lab.

16 Q: Okay. And would the result have been if there
17 had been a transfer ---

18 A: I think it would have been the same the same
19 result..

20 Q: Which is what?

21 A: Approval of a transferred lab to Roper St.
22 Francis-Berkeley and no lab at St. Francis.

23 Q: Okay. Based on everything that we've
24 discussed, is the Bon Secours St. Francis lab
25 an existing lab under Standard 3?



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1 A: No.

2 Q: Okay. If it is not an existing lab under
3 Standard 3, and based on the application, the
4 stipulations and that finding is there any
5 basis for this Court to reverse the
6 Department's decision?

7 A: Not that I'm aware of.

8 Q: Okay. In your opinion should the application
9 have been approved?

10 A: Yes.

11 **MR. Long:** Can I have one moment, Your Honor?

12 Q: That's all I have. Thank you.

13 **MR. LONG:** Thank you, Your Honor.

14 **THE COURT:** Before you stand up, Mr. Thomas -- Ms.
15 Biggers do you have any questions for this
16 witness?

17 **MS. BIGGERS:** No, Your Honor. I do not.

18 **THE COURT:** All right. Mr. Thomas.

19 **MR. THOMAS:** Thank you, Your Honor.

20 **MS. PLATT - CROSS-EXAMINATION BY MR. THOMAS:**

21 Q: Good afternoon, Ms. Platt.

22 A: Good afternoon.

23 Q: We've met before.

24 A: Yes.

25 Q: Ms. Platt, you've done a lot of CON work in



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1 this state, haven't you?

2 A: Yes.

3 Q: And going through your background you actually
4 used to work for Mr. Sullivan, correct?

5 A: Yes, I did.

6 Q: And you would agree that in part he trained
7 you?

8 A: Yes, he did.

9 Q: And Roper St. Francis is a large hospital
10 system. It's got three hospitals and one
11 coming out of the ground, right?

12 A: Yes, that's correct.

13 Q: Okay. You would agree with me that the
14 administrators at Roper St. Francis are
15 sophisticated folks, correct?

16 A: Yes.

17 Q: They run a -- I don't know if it's a billion
18 dollar revenue, but it's a big company,
19 correct?

20 A: It is a pretty large health system, yes.

21 Q: Now, and Ms. Cantwell at Roper, she -- what do
22 you understand her position to be?

23 A: She's basically in charge of, you know, kind of
24 the CON and regulatory-related activities for
25 the system.



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1 Q: Okay. She, yes, she does -- she's pretty much
2 of pretty much every CON that comes out of
3 Roper, correct?

4 A: Yes.

5 Q: Okay. And you've worked with her on many
6 occasions before, right?

7 A: Yes.

8 Q: Okay. And you believe she's well qualified at
9 her job too, right?

10 A: Yes. Well, she used to DHEC as well.

11 Q: Got you. And certainly she's got to be
12 familiar with the State Health Plan's part of
13 her job as well, right?

14 A: Yes. I would assume so.

15 Q: And she signed the CON application, I believe
16 we talked about that, and certified that it was
17 correct to the best of her knowledge, right?

18 A: She did.

19 Q: Okay. And in you're pretty much in agreement
20 with how the Department went about applying the
21 Standard 3 in this case, right?

22 A: Yes.

23 Q: Okay. Of course, I believe at your deposition
24 you stated that you hadn't spoken with anyone
25 at DHEC who's on the DHEC CON staff now or in

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1 the past about the interpretation of the
2 Standard 3 of the diagnostic cardiac cath lab.
3 Do you recall that?

4 A: I do.

5 Q: Okay. And this about the cath lab CON that
6 you've actually dealt with in South Carolina at
7 least in the last five years, right?

8 A: Yes. In the last five years I believe this is
9 the only South Carolina cath lab project I've
10 worked on.

11 Q: And obviously the Health Plan contains
12 objective volume threshold standards among
13 others with respect to utilization for various
14 health services, right?

15 A: It does contain standards that include volume
16 measures.

17 Q: Okay. You don't believe they're objective?

18 A: I think that the way they're written there is
19 an element of objectivity and subjectivity in
20 terms of all the different information that
21 DHEC is able to consider in the context of
22 those standards.

23 Q: Okay. At least with -- when it says have
24 performed 500 caths, is that objective or
25 subjective?



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1 A: Well the volume number is objective, but again,
2 how it's applied in the context of that market
3 is subjective and it depends on the market
4 situation and all the information that's made
5 available to DHEC in it's review and
6 interpretation of that standard.

7 Q: Okay. Now you would at least agree with me
8 that Standard 3 is a retrospective standard in
9 that the language states, shall be approved
10 only if all existing labs in the service area
11 have performed a minimum of 500 diagnostic
12 caths. Do you at least agree with me on that?

13 A: It is -- I mean, I would look at it more as of
14 sort of a current standard. I mean, it's
15 looking at the most recently available data to
16 evaluate the capacity in the market. So, I
17 mean, if it was really like truly
18 retrospective, you might look at multiple years
19 of a historical trend. Obviously, to have data
20 it has to have occurred, but it's essentially
21 trying to capture what's happening in the
22 market right now in terms of available capacity
23 and how it's utilized.

24 Q: Well, that's not entirely true, right? Because
25 it's looking at the most recent JAR data,

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1 right?

2 A: Well it is not limited to just the most recent
3 JAR data. I mean, the -- I think that when you
4 look at published data, the most recent JAR is,
5 you know, the most recent published data. But
6 DHEC can also take into consideration data
7 that's provided by the applicant that might be
8 more current.

9 Q: Here they looked ---

10 A: Or of the opponent.

11 Q: --- here they looked at 2014, right? That was
12 the most recent year?

13 A: That was the most recent year of published
14 data.

15 Q: And we were in 2016, correct?

16 A: Yes.

17 Q: That's retrospective, correct?

18 A: It's the most current available data.

19 Q: Okay. And the prospective standard that's at
20 issue -- or that's not at issue but that's in
21 the diagnostic cath lab standard, that's
22 Standard 4. It basically says the applicant's
23 got to say I'm going to do this many in year --
24 by the third year of operations whenever they
25 state that will be, correct?



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1 A: Standard Four does contain a projection or a
2 future looking analysis.

3 Q: Thank you. Because that language actually says
4 proposed service will perform. It doesn't say
5 have performed, it says will perform, right?

6 A: It does say will perform.

7 Q: And that's in the future, correct?

8 A: Yes.

9 Q: Okay. Have performed, past, will perform,
10 future. We can agree to that?

11 A: We agree that it says will perform.

12 Q: So -- I've got to get this for the record -- is
13 have performed past tense?

14 A: It is past tense, but I think in my opinion,
15 the goal of Standard 3 is to look at what's
16 currently available in the market. And as I
17 said, for utilization to be measured it has to
18 have a curve, but it's not this long term look-
19 back. It's an assessment of what's available
20 in the market today in terms of capacity that's
21 going to available when you're looking to the
22 future.

23 Q: Okay. And in terms of the CON applications
24 that you've worked on, there wasn't an
25 application in which there was a question as to

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1 whether one of the existing providers had not
2 met an objective threshold, correct?. You
3 haven't looked at one like that?

4 A: I'm not sure I understand your question. I
5 mean, is this talking in the universe of all
6 applications I've ever ---

7 Q: Yes.

8 A: --- looked at?

9 Q: Right.

10 A: I don't know that I can say that I've never,
11 ever seen a ...

12 Q: All right. I'm going to have you your
13 deposition transcript.

14 A: Okay.

15 Q: Let's go to page 12, line 7.

16 A: Okay.

17 Q: And I'll a question and you answer. All right.
18 Do you recall, I mean, in any of the cath lab
19 applications that you've worked on where there
20 was a question as to whether one of a kind of
21 the existing providers had not met a threshold
22 as obviously it has been raised by Trident in
23 this case? What's your answer?

24 A: I don't recall that being a specific issue.

25 Q: Okay?



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1 A: I thought the question you just asked me was
2 broader than cath lab.

3 Q: I just asked -- I actually asked if the record
4 is stated from the transcript.

5 A: Okay. I must have misunderstood.

6 Q: Okay. And then, line 6 I say okay and what do
7 you say?

8 A: In any other project?

9 Q: Okay. Thanks. In fact, you would agree with
10 me at the time of your deposition you couldn't
11 think of one CON application you had ever
12 drafted that did not comply with the South
13 Carolina Health Plan, correct?

14 A: That was not found to be sufficiently -- wait,
15 so, I guess I'm not sure I understand your
16 question.

17 Q: Let's go to page 36 of your deposition
18 transcript, line 13.

19 A: Okay.

20 **MR. LONG:** Your Honor, he's not using this
21 correctly. Because he's not asking her the
22 question. I mean, that clearly was not even a
23 question really to ask her. She's like, I
24 don't even understand what you're saying. And
25 he's going to try to interpret that in

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1 deposition?

2 **MR. THOMAS:** I ask her ---

3 **MR. LONG:** Just ask the question, you know, did you
4 say this in the deposition and she says no, or
5 if she says something different, do you recall
6 when you said this? It's just not, you know --

7 -

8 **MR. THOMAS:** I expect some training, Your Honor. I
9 never said did you say this in a deposition.
10 Normally, what I do, and what most of the
11 people I work with do, is they ask the question
12 and if it's -- if the witness says, I don't
13 know the answer to that ---

14 **THE COURT:** And he's asking you to ask the question
15 before you go to the deposition, which I think
16 that ---

17 **MR. THOMAS:** I did.

18 **THE COURT:** Well you did it this last time, but you
19 didn't with the second.

20 **MR. THOMAS:** I said, in fact at the time of your
21 deposition you couldn't think of one CON
22 application you had ever drafted that didn't
23 comply with the South Carolina Health Plan.
24 That's the question I asked. And she said I
25 don't understand the question. And so I'm just



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1 getting transcript because she did understand
2 it the last time I asked. Your Honor, I've got
3 a cite to almost every question I'm going to
4 ask Ms. Platt. And I do that just so ---

5 **THE COURT:** I understand. And I appreciate what
6 you're doing, I just -- she's asking you to
7 clarify the question. I don't think she's
8 saying she doesn't know or doesn't remember or
9 she's saying something different than she said
10 in the deposition.

11 **MR. THOMAS:** Right.

12 **THE COURT:** She's asking you to clarify the
13 question. I think she's entitled to do that.
14 Mr. Long, you got something else?

15 **MR. LONG:** I just want to say if he's going to try
16 to impeach her the way that he's -- or try to
17 use the deposition in the way that he's
18 proposing to use it, he should ask the question
19 exactly the way it is in the thing and he's
20 not. He's changing some little words around.
21 And so, that's -- and I think that's what's
22 causing the confusion with the witness. But,
23 I mean, obviously, Your Honor, I don't want
24 make a mountain out of a mole hill.

25 **THE COURT:** Well you could -- we can ask him to

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1 simply repeat the questions in the deposition.

2 You want to do that?

3 Q: Ms. Platt, have you ever drafted a CON
4 application in South Carolina that you thought
5 did not 100 percent comply with the South
6 Carolina Health Plan?

7 A: And the answer is not that I can think of.

8 Q: Okay. Thank you. Would you agree with me that
9 generally and under normal circumstances the
10 Department cannot approve the CON application
11 that does not comply with an objective
12 utilization standard of the South Carolina
13 Health Plan like those for cath lab and
14 radiation therapy?

15 A: Generally, they need to comply with the
16 standards in the State Health Plan. However,
17 it's up to the Department to interpret those
18 standards.

19 Q: Okay. I understand your position with that.
20 And would you agree with me, Ms. Platt, that if
21 an applicant could not show compliance with the
22 Health Plan's subjective standards that's
23 something that you would actually point out to
24 the Department if you were representing an
25 effected person opposing the project?



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1 A: If I were representing an opponent and I
2 believed that an application did not meet a
3 standard, I would point that out.

4 Q: Okay. And your job as a health planner is to
5 go through the CON application that your client
6 may be opposing and make sure the applicant
7 your client is challenging has complied with
8 the substantive, qualitative and quantitative
9 health plan standards, correct?

10 A: That would be my role, yes.

11 Q: Okay. And you would agree with me that the
12 phrase, during the most recent year means the
13 most recent year in which there is JAR data
14 available, correct?

15 A: It generally means that but applicants and
16 opponents also provide DHEC with more recent
17 internal utilization data in many cases as
18 well.

19 Q: Okay. And in this case, you didn't, right?
20 You provided 2014 data as to the St. Francis
21 lab even though you had access to the 2015
22 data, correct?

23 A: I'm not sure if I had access to it or not. I
24 had access to the Roper 2015 data and that's
25 what we used as the basis for projecting the

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1 utilization.

2 Q: Are you telling me your client and Ms. Cantwell
3 could not have gotten the 2015 JAR data and
4 2016 -- or, excuse me, the 2015 diagnostic cath
5 data and to you in 2016 by May?

6 A: No. I'm not telling you that all. They -- I'm
7 sure they could get it.

8 Q: Okay.

9 A: But what was important for the purposes of
10 projection was the base of patients that were
11 driving from Berkeley County to Roper Hospital
12 to utilize that lab.

13 Q: Okay. That's not the question I asked, right?
14 I asked you if you utilized that information.
15 I didn't ask you why after that, did I?

16 A: You didn't ask me why. I'm telling you the
17 information that we received and why we asked
18 for that data.

19 Q: And you didn't FOIA MUSC to get their 2015 cath
20 lab data, did you?

21 A: We did not.

22 Q: All you had to do was write a little FOIA
23 request to MUSC, one little paragraph, right?

24 A: We don't generally FOIA other parties.

25 Q: Okay.



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1 A: We FOIA DHEC.

2 Q: But you didn't do that in this case to get
3 MUHA's 2015 JAR data, did you?

4 A: I don't it was filed yet. I don't know that
5 the 2015 JAR's were filed when we started
6 working on this in April of 2016.

7 Q: Well, they were available by June weren't they?

8 A: The application had already been filed by then.

9 Q: Okay. You don't -- can't update information in
10 an application after it's been filed?

11 A: You can. We didn't have the opportunity to do
12 that. We didn't do that.

13 Q: You didn't have the opportunity to do that?
14 Couldn't have put the FOIA in for MUHA's
15 statement?

16 A: We could of. We have already filed the
17 application. We hadn't been asked DHEC to
18 supplement it with newer data.

19 Q: Oh, we'll get to that. Now, you're not aware
20 of any CON applications in South Carolina that
21 have been approved when the CON application did
22 not comply with at least one of the Health Plan
23 standards, correct?

24 A: Not that I can recall.

25 Q: I think Mr. Long made some references to Ms.



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1 Tipshreeny who used to work at the CON division
2 for DHEC, correct?

3 A: Yes.

4 Q: Do you know when she stopped working at DHEC?

5 A: I think it would have been December of -- I
6 want to say 2009.

7 Q: Okay. So she wasn't -- she wouldn't have been
8 privy to Ms. Brandt's 2010 letter, or during
9 that process she wouldn't have been with Ms.
10 Brandt going through that process with respect
11 to the earlier inquiry by East Cooper and Mr.
12 Evan Ray regarding the utilization of St.
13 Francis, is that fair?

14 A: I'm not 100 percent positive on that timing,
15 but I don't think she was there.

16 Q: All right. And you didn't discuss that issue
17 with her at the time that y'all were drafting
18 the application, correct?

19 A: No.

20 Q: Okay. If you go to just Petitioner's Exhibit
21 1 for me. Just real quickly. It's -- I think
22 it's got the blue ...

23 A: Okay.

24 Q: And go to -- just go to tab 1 there?

25 A: Okay.



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1 Q: And this is the Joint Annual Report of
2 Hospitals for Bon Secours St. Francis Xavier,
3 do you see that?

4 A: Yes.

5 Q: Okay. And you the date up at the top left hand
6 corner of the page?

7 A: Yes.

8 Q: Okay. That June 29, 2016?

9 A: Yes.

10 Q: All right. So that JAR was available prior to
11 the submission of the application -- or excuse
12 me, prior to the approval of the application in
13 the Roper Berkeley matter, correct?

14 A: I guess just -- yes. Yes, it was.

15 Q: Okay. So Mr. Long asked you a number of
16 questions about the B-11 and Joint Exhibit 1.
17 And I'm going to ask you a few questions, too.

18 A: Okay.

19 Q: So if you'll turn to page 30 for me.

20 A: Okay.

21 Q: All right. I'll try not to -- try to repeat
22 too much about this, but. The heading here, of
23 course, is diagnostic and mobile cath services,
24 correct?

25 A: Yes.



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1 Q: You set out Standard 3, correct?

2 A: Yes. Yes.

3 Q: All right.. The first line of -- underneath
4 Standard 3 is that cardiac cath utilizations
5 per lab has remained strong in the overall
6 service and the existing labs within the
7 defined service area are performing on average
8 almost 900 diagnostic caths per year. Do you
9 see that?

10 A: Yes.

11 Q: And St. Francis Hospital is included in the
12 table for historical utilization of existing
13 labs, correct?

14 A: Yes. We used -- all labs that had reported
15 that they utilization.

16 Q: Not all labs. All existing labs.

17 A: All existing labs, yes.

18 Q: Yeah. And it doesn't say current utilization
19 of existing labs in the service area, right?
20 It says historical.

21 A: Well, here, yes. In our table we presented
22 three years. We didn't have to present three
23 years but we chose to provide three years.

24 Q: All right. Because it's a retrospective
25 standard, right?



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1 A: Because we wanted to be forthcoming in the
2 operations of St. Francis as well as show that
3 overall, all the labs in the area are well
4 utilized.

5 Q: Okay. Save for one, right? Save for St.
6 Francis?

7 A: St. Francis is not well utilized.

8 Q: Okay. And then you state right below that,
9 while Bon Secours-St. Francis Xavier Hospital
10 -- right below the table -- is operating below
11 500 diagnostic equivalents per year, the lab
12 will be closed upon the approval of the
13 project, right?

14 A: Yes.

15 Q: And then as a result, all labs which will exist
16 following the approval of this project are
17 currently operating well above 500 diagnostic
18 equivalents per year -- or per lab, correct?

19 A: Yes.

20 Q: And that's based on the table at 2015, right?
21 Or, excuse me, the 2014 data you've got in
22 Exhibit 14?

23 A: Yes. Showing the other three providers are all
24 very highly utilized.

25 Q: Okay. And there is not a standard regarding,



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1 you know, all labs which will exist following
2 the approval of this project are currently
3 operating well above 500 diagnostic caths?
4 There's not a standard that reflects that, is
5 there?

6 A: The language that I used is slightly different
7 than the standard but the intent is the same.
8 That the St. Francis lab will not continue to
9 exist and all the other existing labs are
10 highly utilized.

11 Q: Okay. And you'd agree with me that the volume
12 each year from 2012, 2013, 2014 is declining in
13 each of those three years, correct?

14 A: It has gone down a little bit, but overall the
15 labs are still well above 500 and the capacity
16 standard, they're all operating at a high level
17 of capacity.

18 Q: Okay. And you base that capacity standard on
19 the standard -- the objective standard in the
20 State Health Plan, right? Above the 80 percent
21 of the 1200 that's expressed in the standard 1,
22 correct?

23 A: Yes.

24 Q: Okay. And you include Trident's two labs in
25 there as well, right?



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1 A: Yes.

2 Q: Okay. And you provided this aggregate
3 standard, okay -- or excuse me, this aggregate
4 number average on Exhibit 14, under -- for 2014
5 at 892. You provided an average of all four
6 labs, correct?

7 A: Of all four programs?

8 Q: Yes.

9 A: Yes, we did.

10 Q: Okay. Well, and then you divided by the number
11 of labs there 12, correct?

12 A: Yes.

13 Q: Okay. And even though there's not a standard
14 at this point in time in the State Health Plan
15 regarding an average of all the existing labs,
16 correct?

17 A: That is not the standard in this Health Plan.
18 It was in prior health plans and I think we
19 just wanted to show DHEC in several different
20 quantitative ways that the programs in the area
21 are very well utilized.

22 Q: Okay. Kind of like how Mr. Sullivan wanted to
23 show that the service area standards wouldn't
24 apply -- that the application couldn't be
25 approved under the service area exception



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1 standards in his opposition letter, right?

2 A: I guess I'm not see that parallel.

3 Q: That's fine. We'll move on. Okay. At
4 anywhere in this B-11 -- I think Mr. Long asked
5 you to tell us how extensive it was. It goes
6 from page 17 to 42. By my math, you know, that
7 is probably the longest section in here -- in
8 the CON application. You never state anywhere
9 in here that the lab in its current iteration
10 at this time was non-operational, correct?

11 A: I don't believe we say that it is non-
12 operational. I believe we say that it will be
13 closed upon approval of the project.

14 Q: Never say that it doesn't exist, correct?

15 A: I'm not sure that we say that it does not
16 currently exist. I believe we say that it will
17 not exist because the plan is to close the lab
18 upon approval.

19 Q: All right. So you don't say that it's in
20 existence, right?

21 A: We don't that it's in existence. We say that
22 it will not exist.

23 Q: Okay. You don't say that it doesn't exist?
24 You say it will not exist?

25 A: I don't know that we used those exact words.



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1 Q: Okay. And no where do you state that the
2 Department considers St. Francis to not offer
3 the service, correct?

4 A: I don't believe we state that.

5 Q: Okay. Because if you had stated that, you
6 would have been taking a position opposite of
7 your own client's effected person letter,
8 correct? As to the East Cooper application,
9 right?

10 A: Right. I mean, the -- I believe the point
11 there is related to the historical operation
12 and whether they've lost CON authorization.
13 And we don't agree with that position and did
14 not agree with that position.

15 Q: Right. And you didn't agree with the
16 Department's decision that it was subject to
17 enforcement action at the time, correct?

18 A: I didn't come to a conclusion one way or
19 another. The client came to the conclusion
20 that they would offer this as a proposal to
21 meet DHEC's concern about the enforcement.

22 Q: They never told you that they were under an
23 enforcement action at the time that you drafted
24 the application, correct? Or that there was
25 any type of enforcement action that was

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1 potentially in play, right?

2 A: Well there wasn't an enforcement action that
3 was taken. I don't know that I was aware of
4 the email that said that they might bring an
5 enforcement action.

6 Q: And you weren't aware not only of the email,
7 you weren't aware that -- you were never
8 informed verbally by Mr. Barbier or anyone at
9 Roper that there was a potential for
10 enforcement action if the application was not
11 approved, correct?

12 A: We were only engaged about three weeks before
13 this was filed so the decision had already been
14 made that this would be presented to DHEC as a
15 proposal for a new lab and that the plan would
16 be to close the St. Francis lab upon approval.
17 So those decisions had already been made by my
18 client and we were helping them draft the
19 application to that effect.

20 Q: I understand that. That's not the question
21 that I was asking. The question I was asking,
22 you were never informed that there was
23 potentially an enforcement action in play with
24 respect to this situation that Roper found
25 itself in with the zero utilization back in

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1 2008, 2009, correct?

2 A: The email to that effect was not shared with me
3 when we were engaged.

4 Q: Okay. Was it shared with you any other way?
5 Verbally, by Mr. Barbier, or by somebody at
6 Roper like Ms. Cantwell? Did they ever say
7 anything about an enforcement action to you?
8 Maybe that's the way to ask.

9 A: It's -- I mean, it's two years ago. Not that
10 I can recall. Again, I think the decision was
11 made, this is the proposal, this is the way
12 we're presenting it to DHEC. And we helped
13 them draft it that way.

14 Q: Okay. So the answer is no, you don't recall
15 any discussions about an enforcement action
16 about this application, about East Cooper's
17 application, or about the volume at St.
18 Francis, is that fair?

19 A: Well you just ---

20 Q: I asked you if you recall ---

21 A: --- you just broadened -- you just broadened
22 what you asked me before. I don't recall any
23 discussion of an enforcement action. I was
24 well aware of the low utilization at St.
25 Francis. I was well aware of East Cooper's



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1 application. I was well aware of the effected
2 party letter in the East Cooper application
3 that said essentially what this says in this
4 application, is we will, you know, propose to
5 close the lab simultaneously with the, you
6 know, with the approval of the new lab at Roper
7 Berkeley.

8 Q: Okay. And you never told your client, Roper,
9 that based on that zero utilization that they
10 could somehow be subject to an enforcement
11 action either, correct?

12 A: They didn't ask me that question.

13 Q: Okay. That's your answer. My question to you
14 is: Did you ever tell them, yes or no?

15 A: Did I ever tell them that they'd be subject to
16 an enforcement action?

17 Q: That they could be subject to an enforcement
18 action because of zero utilization back in '08
19 or '09?

20 A: I did not. I didn't have enough information
21 about what was happening in '08 or '09 to give
22 them an opinion on that.

23 Q: Well, wait a second, you didn't have the State
24 Health Plan's, with respect to cardiac cath in
25 2008, 2009? Or, excuse me, the 2010, 2011

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1 State Health Plan?

2 A: I did.

3 Q: Okay. And the zero utilization is listed in
4 there, correct?

5 A: It is.

6 Q: Okay. Are you saying you just didn't -- you
7 weren't aware of that utilization in the Roper
8 St. Francis -- in terms of Roper St. Francis
9 utilization back in '08, '09?

10 A: I wasn't working with St. Francis -- Roper St.
11 Francis back in '08, '09.

12 Q: Okay. Did you go back further than 2012 to
13 look and see if they had ever had higher or
14 lower volumes?

15 A: I did not. It was unnecessary for drafting the
16 application.

17 Q: Okay. But you knew about it though, right?

18 A: I don't remember when I became aware of it.

19 Q: Well you became aware of these when you look at
20 the East Cooper application that you just said
21 you had read.

22 A: That ---

23 Q: Or Mr. Levitt said ---

24 A: That's probably true.

25 Q: Okay. And in terms of volumes, we know that



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1 the threshold standard in 3, the volume is
2 standard is 500, right? Back in 2015. It's
3 350 now, right?

4 A: Yes.

5 Q: Okay. And do you -- you don't really know that
6 there is a volume by which a cath lab comes
7 into existence for purposes of health planning,
8 right?

9 A: There's -- I mean, there's not a specific
10 volume that, you know, all of a sudden you
11 cross the threshold and then it exists. I
12 mean, there's ---

13 Q: Okay. And you would agree with me that
14 Standard 2, if you want to look at it, it's at
15 Joint 4 at 46. If you're there?

16 A: Okay.

17 Q: And that's Joint 4 at 46, so Standard 2. That
18 is a service area standard, correct?

19 A: Yes.

20 Q: Okay. And Standard 2 states all facilities,
21 correct?

22 A: Yes.

23 Q: Okay. It doesn't refer to all labs in those
24 facilities or all existing labs, it just says
25 all facilities, right?

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1 A: It says all facilities.

2 Q: Okay. And those are simply because the cath
3 lab may be within 45 minutes of an existing
4 lab, that doesn't mean that they're necessarily
5 competitors, right?

6 A: That is possible. For the purposes of the
7 State Health Plan the service area is defined
8 as that travel standard, but in terms of how
9 facilities compete, they may not view a
10 competitor in all parts of that service area.

11 Q: All right. And would you say that you know the
12 Charleston, Dorchester and Berkeley markets
13 fairly well?

14 A: I've done a number of projects there, yes.

15 Q: Okay. Do you believe that Trident and East
16 Cooper Regional Medical Center compete heavily
17 for the same patients kind of given the
18 geographic constructs of the tri-county market?

19 A: I mean, they certainly would have some overlap
20 in their service area. I mean, the sort of
21 metro area is viewed as a market, but they
22 would not necessarily be as directly
23 competitive as some other hospitals.

24 Q: As a health planner could you even hazard a
25 guess at how many or what percentage of



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1 Trident's overall cath volume comes out of the
2 East Cooper area?

3 A: I don't have any idea.

4 Q: Do you think it's high?

5 A: I'm sure they do have some patients coming from
6 there but I'm sure it's not the majority of
7 their patients.

8 Q: All right. Do you think it could be less than
9 one percent?

10 A: I don't know.

11 Q: Okay. And if it was less one percent, Ms.
12 Platt, might that be a reason why Trident's not
13 interested in East Cooper's diagnostic cath lab
14 as -- from your perspective as a health
15 planner?

16 A: Well, first of all it depends on how you define
17 the East Cooper area. You know, East Cooper
18 serves an area broader than its, you know,
19 immediate local vicinity, so there may be areas
20 that overlap where Trident and East Cooper both
21 draw patients from. So, I guess I don't have
22 enough basis to assume that your one percent is
23 correct or incorrect.

24 Q: That as -- as being from the Lowcountry myself
25 from the East Cooper area, we always kind of



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1 thought of that as east of the Cooper River.

2 Is that your understanding of that?

3 A: That is my understanding, but that doesn't mean
4 that a facility on East Cooper is limited to
5 serving only patients east of the Cooper River.

6 Q: But if Trident, which is located in North
7 Charleston, correct?

8 A: Yes.

9 Q: All right. Served less than one percent of its
10 patients, its cath lab patients from the East
11 Cooper area, might that be a reason from a
12 health planning perspective that it's not that
13 interested in East Cooper's application for a
14 diagnostic cath lab?

15 A: It might be a reason not to oppose it but I
16 would still think they might be interested in
17 what their -- what somebody else in the greater
18 Charleston market was doing.

19 Q: Okay. Now, I think we've look at this quite a
20 bit so I'm going to try to not to ask you too
21 much about it, but let's go to Petitioner's 5.
22 This is the infamous email that we've all spent
23 so much time on. Let me know when you get to
24 it. Yeah, we're back into this one again.
25 Sorry.



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1 A: Which page was it? The first page?

2 Q: Yes. Let's start on the first page.

3 A: Okay.

4 Q: Okay. And just for the record, you'd never
5 seen this email before until this litigation,
6 correct?

7 A: That's correct.

8 Q: Okay. And you agree with me that Mr. Eubank
9 with respect to the furthermore, the continued
10 operation, he was referring to Standard 3?

11 A: Where are you?

12 Q: Page -- on the -- P5-002.

13 A: All right.

14 Q: Furthermore, the continued operation of St.
15 Francis Xavier cath lab.

16 A: I think he's generally referring to Standard 3.

17 Q: Okay. In fact that's what he testified to
18 today, correct?

19 A: Yes.

20 Q: All right. And Mr. Long asked you a few
21 questions about the service area exception
22 whether or not you thought that this -- that
23 this lab would be approved or approvable under
24 that service area exception, correct?

25 A: The transfer section?



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1 Q: Yes.

2 A: Yes.

3 Q: Okay. But did you not see the language that
4 Mr. Eubank actually put forth in his own email
5 stating that the low volume would also likely
6 prohibit the transfer of that cath lab from one
7 of the operator's facilities to another?

8 A: I did see that. And I think what Mr. Long
9 asked me is if it was existing could it have
10 applied for a transfer. In this email Mr.
11 Eubank is saying he doesn't believe it to be
12 existing and therefore it couldn't file as a
13 transfer.

14 Q: He doesn't say that anywhere in this email,
15 does he, Ms. Platt?

16 A: Well, he ---

17 Q: Doesn't think he's being ---

18 A: --- and I think that's what he testified to.
19 Is if he's going to bring enforcement action
20 against, he doesn't believe it to be existing.

21 Q: Okay. But he believes it to be existing enough
22 that the continued operation of the cath lab at
23 such a low volume prohibits the entry of any
24 additional cath labs in the service area,
25 correct?



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1 A: If you believe it to be existing, yes, it would
2 prohibit the entry.

3 Q: All right. And that's why he said it, right?

4 A: He said if it was -- if he believed it to be
5 existing it would prohibit the entry.

6 Q: That's what he said today? He didn't say it in
7 that email, right?

8 A: I think that's how he was interpreting it.
9 That was my understanding.

10 Q: Okay. All right. Now, Ms. Brandt's letter, if
11 you'll turn over the same Exhibit to Number 15,
12 or page 15 for me?

13 A: Okay.

14 Q: Had you seen this letter before this
15 litigation?

16 A: No.

17 Q: Okay. But it was in the East Cooper Regional
18 Medical Center's CON cath lab, right?

19 A: Yes. Actually, you're right. I saw it in that
20 -- I believe I saw it in that context.

21 Q: Okay. But you didn't really think much about
22 it when you saw it, right?

23 A: I didn't really focus on it that much, no.

24 Q: Okay. Fair enough. And you agree she clearly
25 states in here that she believes there's not a



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1 mechanism in place that would allow DHEC to
2 discount the existence of the St. Francis cath
3 lab, correct?

4 A: My understanding is that she does not have a
5 mechanism to just simply ignore the lab.

6 Q: Okay. Do you not believe that enforcement
7 action could be considered one mechanism that
8 would allow the Department to discount the
9 existence of the St. Francis cardiac cath lab?

10 A: I don't think that would be discounting.
11 That's actually taking action to close -- to
12 actively close the lab. And if she took that
13 action to actively close the lab then certainly
14 it wouldn't be in the inventory for the
15 purposes of this analysis.

16 Q: Now you stated that you don't believe that she
17 was being asked to take an enforcement action,
18 correct?

19 A: In the series of emails it does not appear that
20 way to me.

21 Q: Okay.

22 A: It appears to me that she's being asked to
23 simply not include it in the calculation.

24 Q: Now the Department doesn't need to be asked by
25 a third party to take enforcement action,



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1 right?

2 A: No, they don't have to be.

3 Q: All right. And if they thought that this lab
4 somehow posed a low quality or some type of
5 danger to the community, they certainly could
6 have taken enforcement action, couldn't they?

7 A: They could of. I don't believe in this
8 instance that's what was being asked of them by
9 East Cooper.

10 Q: I understand that but what I'm asking you is --
11 and I think you've answered -- they don't have
12 to be asked to take enforcement action. If
13 they think that a health service is potentially
14 dangerous to the community, they can take
15 enforcement action on their own, correct?

16 A: They could. I think what they're saying here
17 is ---

18 Q: I understand.

19 A: --- in response to this request, no we can't
20 simply leave it out of the calculations and
21 ignore it.

22 Q: And they never took any enforcement action
23 after this, correct?

24 A: The did not.

25 Q: The didn't amend the State Health Plan after



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