

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

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

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

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

Respondent,

v.

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

Respondents,

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

Appellant.

RECORD ON APPEAL
VOLUME V

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

The Court has jurisdiction over this matter under S.C. Const. Art. I, § 22; S.C. Code Ann. §§ 1-23-320, 1-23-600(B), 44-1-60(F) and 44-7-210(D); S.C. Code Ann. Regs. 61-15; and Rule 11 RPALC. In addition to the general laws and regulations of the State of South Carolina, this case is governed by the State Certification of Need and Health Facility Licensure Act (S.C. Code Ann. §§ 44-7-110 *et seq.*) (“CON Act”); the regulations promulgated thereunder (S.C. Code Ann. Regs. 61-15) (“CON Regulations”); and the South Carolina Health Plan, enacted August 13, 2015 (“State Health Plan”).

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

Reserving the right to present any issue raised or considered below, and to address any issue that may arise during discovery, Trident alleges that the Department erred in concluding that MUSC’s CON application and the CON application filed by Roper St. Francis Hospital – Berkeley, Inc. (“Roper”) for the establishment of radiation therapy services with the addition of a Varian True Beam LINAC at a total project cost of \$11,608,014 (“Roper’s Proposed Project”) were not “competing applications” pursuant to the CON Act and the CON Regulations. *See* S.C. Code Ann. § 44-7-130(5). *See also* S.C. Code Ann. Regs. 61-15, § 103.6. Trident further alleges that the department erred in its decision to approve both MUSC’s Proposed Project and Roper’s Proposed Project as there is no need for additional linear accelerator services in the service area and neither project complies with the State Health Plan, the CON Act, or the CON Regulations. *See* S.C. Code Ann. § 44-7-210(B). *See also* S.C. Code Ann. Regs. 61-15, § 307.2. Therefore, the Department’s decision to approve MUSC’s Proposed Project must be overturned

as arbitrary, capricious, and affected by other error of law and fact, and MUSC's CON application must be denied.¹

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

Reserving its right to amend this Prehearing Statement to address additional issues and defenses raised during discovery, Trident requests that the Court reverse the Department's Decision to grant MUSC a CON for MUSC's Proposed Project as arbitrary, capricious and affected by other error of law and fact because MUSC's CON application failed to comply with the standards and criteria of the State Health Plan, the goals and purposes of the CON Act, and the applicable project review criteria set forth in the CON Regulations. *Id.*

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

PROCEDURAL BACKGROUND

On May 22, 2017, MUSC submitted its CON application for its Proposed Project. On June 7, 2017, Trident provided notice to the Department of its status as an affected person and its opposition to MUSC's Proposed Project. The application was deemed complete by letter from the Department, dated July 10, 2017, and publication in the South Carolina State Register, dated June 23, 2017. On July 6, 2017, Roper submitted a CON application for Roper's Proposed Project. Roper's Proposed Project was deemed complete on August 23, 2017 and notice was published in the South Carolina State Register, dated August 25, 2017. Trident notified the Department of its status as an affected person and its opposition to Roper's Proposed Project by letter dated September 8, 2017. The Department held a project review meeting on both MUSC's and Roper's Proposed Projects on September 20, 2017, and all parties participated.

¹ In the contested case docketed as 18-ALJ-07-099-CC, Trident challenges the Department's decision to approve Roper's Proposed Project and requests that the Court overturn the Department's decision in that matter as arbitrary, capricious, and affected by other error of law or fact and deny Roper's CON application.

On October 4, 2017, Trident's health care planning consultant, Sullivan Consulting Group, Inc., submitted written comments responding to MUSC's and Roper's arguments as presented at the project review meeting. On November 22, 2017, the Department issued letters approving MUSC's Proposed Project and Roper's Proposed Project. On December 15, 2017, Trident timely requested that the Department Board conduct a final review conference(s) with regard to both projects. By letters dated January 31, 2018, the Department Board declined to conduct a final review conference on either project, thereby rendering the Department's decisions the final agency decisions. Trident filed its Petition for Administrative Review and Contested Case Hearing regarding MUSC's Proposed Project on March 1, 2018. Trident also filed a Petition for Administrative Review and Contested Case Hearing regarding Roper's Proposed Project, which is docketed as case number 18-ALJ-07-0099-CC.

FACTUAL BACKGROUND

i. Competing Applications

The CON Regulations define competing applicants as

two or more persons and/or health care facilities as defined in this regulation who apply for Certificates of Need to provide similar services and/or facilities in the same service area and whose applications if approved would exceed the need for this facility or service. An application shall be considered competing if it is received by the Department no later than fifteen (15) calendar days after a Notice of Affected Persons is published in the State Register for one or more applications for similar services and/or facilities in the same service area. . . .

S.C. Code Ann. Regs. 61-15, § 103.6. *See also* S.C. Code Ann. § 44-7-130(5). There is no need for an additional linear accelerator in the service area and certainly no need for two additional linear accelerators. Roper's CON application was filed within the regulatory time frame to be considered a competing application; yet, the Department inexplicably concluded that MUSC's and Roper's CON applications were not competing.

Because the applications, in fact, were competing, the Department could approve only the one that most fully complied with the requirements, goals, and purposes of the CON Act, the standards and criteria set forth in the State Health Plan, and the applicable project review criteria set forth in the CON Regulations. S.C. Code Ann. § 44-7-210(B). *See also* S.C. Code Ann. Regs. 61-15, § 307.2. Neither MUSC's nor Roper's CON application complies with the State Health Plan, the CON Act, or the CON Regulations; therefore, the decisions to approve MUSC's Proposed Project and Roper's Proposed Project must be overturned.

ii. Community Need

There is no community need for additional radiation therapy services in the Berkeley, Charleston, Colleton, and Dorchester Counties service area. Trident has ample capacity to meet the needs of service area residents. Trident currently operates only two of its three linear accelerators due to low utilization volume. In 2016, Trident's utilization was only 63.2%. Utilization of radiation therapy treatment for all providers has remained flat between the years of 2013 and 2016. While the service area has seen a slight increase in the number of cancer patients being served (approximately 12.5% between 2013 and 2016), there was no corresponding increase in the number radiation therapy treatments. Newer treatment protocols, higher intensity treatments per patient, and improved technology for more precise targeting of tumors has reduced the number of radiation therapy treatments required for many cancer patients. In fact, MUSC upgraded its equipment in recent years, allowing it to treat patients more efficiently. As a result, MUSC's utilization remained relatively flat between 2013 and 2016 and actually decreased slightly between 2015 and 2016.

MUSC failed to demonstrate any institutional need for an additional linear accelerator. MUSC presented no evidence that its patients experienced delays in receiving treatment or that it needed to extend its hours to accommodate patient volume. To the extent that MUSC is

experiencing any capacity constraints, Trident has ample capacity to meet those needs. Trident is approximately 15 minutes from the site of MUSC's Proposed Project. MUSC could refer patients to Trident for treatment, allowing patients residing in Berkeley and Dorchester Counties to be treated closer to home. Referral to Trident would address any concerns MUSC physicians have with regard to patients traveling long distances, which is one reason large cancer centers often refer patients to local providers after an initial diagnosis and the establishment of a treatment plan.

In sum, there is no community need for additional radiation therapy services in the service area, and to the extent that MUSC has an institutional need due to capacity constraints, those issues can be addressed without expending \$9 million dollars on a project that will substantially adversely impact other area providers, most particularly Trident.

iii. Distribution (Accessibility)

Because there is no need for additional radiation therapy services in the service area, the Proposed Project does nothing to increase accessibility to services, including accessibility to services for the medically underserved. The Proposed Project is, in fact, an unnecessary duplication of services. Residents in the service area have more options for radiation therapy treatment than almost all other service areas in the State.

MUSC defined its service area as Berkeley and Dorchester Counties and portions of North Charleston. However, southern Berkeley County residents are closer to MUSC's Mount Pleasant location. Thus, the location of MUSC's Proposed Project will do nothing to increase accessibility to services for those residents.

Locating not one, but two, additional linear accelerators in a service area with no need at a combined project cost of approximately \$20 million dollars does nothing to increase

accessibility to services, is an unnecessary duplication of services, does not contain costs, and represents regressive health planning.

iv. Financial Feasibility

Because there is no community need for additional radiation therapy services in the service area, MUSC's ability to meet its utilization projections is questionable. Because its utilization projections are suspect, the Proposed Project may not be financially feasible. Moreover, MUSC has in progress or in development, approximately \$800 million in CON related projects, and given MUSC's recent financial reports, it is questionable whether MUSC can adequately fund the myriad projects that are in development but not yet in the construction phase.

v. Adverse Impact

The operation of two new linear accelerators in a service area with no need will substantially adversely impact other area providers, and Trident will be the most heavily impacted. Trident ceased operating one of its three linear accelerators due to low utilization. Trident operated at only 63% of capacity in 2016 when using the Department's treatment thresholds. There has been no growth in radiation therapy utilization in the service area for several years, and there is no credible evidence that the trend will reverse. In fact, the evidence indicates that radiation therapy volumes are stabilizing, if not declining.

At the project review meeting, MUSC addressed the number of patients traveling from Berkeley and Dorchester Counties. However, there is no evidence that MUSC will redirect these patients to its new facility. In all likelihood, these patients are traveling to the Hollings Cancer Center because of its specialized services and will continue to do so. In reality, MUSC will compete with Trident for patients, redirecting market share from Trident and exacerbating

Trident's already low utilization rates. This adverse impact will be compounded by the addition of another unneeded linear accelerator at Roper.

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

Pursuant to Rule 19.D of the RPALC, Trident expects to file a Motion to Consolidate this matter with the contested case challenging MUSC's Proposed Project, docketed as case number 18-ALJ-07-0099-CC. Trident will evaluate the necessity for other motions at the completion of discovery, and it reserves the right to raise any motions necessary prior to or at the hearing in this matter.

7. A list of proposed witnesses and exhibits.

Reserving its right to supplement this list at any time, and to call any witnesses listed by any party to the proceeding, as well as any witnesses that may become known to the parties during the discovery process or as the case develops, Trident identifies the following persons or category of witness as potential witnesses at the hearing in this matter:

1. Maggie Parham Murdock, Esquire
Director, Certificate of Need Program
South Carolina Department of Health and Environmental Control
2. Daniel Sullivan
Sullivan Consulting Group
3. Patrick J. Cawley, MD
Chief Executive Officer and Vice President for Health Affairs
Medical University of South Carolina
4. David S. Levitt
Levitt Healthcare Affiliates
5. Sara Bacik, MHA
Chief Strategy and Business Development Officer
Medical University of South Carolina

6. John L. Cooper
Accountant
Medical University of South Carolina
7. Todd Gallati
Chief Executive Officer
Trident Medical Center
8. TMC Radiation Oncologists to be named
Trident Medical Center

Reserving its right to utilize and introduce as evidence any documents identified by any party to the proceeding and to introduce documents gathered during the discovery period, Trident identifies the following as potential exhibits at the trial of this matter:

1. The Department's Record for MUSC's Proposed Project and Roper's Proposed Project.
2. The South Carolina Health Plan, enacted August 13, 2015.
3. Any other relevant documents, data/information or materials produced during discovery by any party or non-party.

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

Trident believes discovery, consistent with the parameters set forth in S.C. Code Ann § 44-7-210(F), is necessary and sufficient.

9. The estimated length of the hearing.

Trident anticipates that the hearing in this matter will take 7 to 10 business days.

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

The undersigned will not be available June 21 – 29 (CLE Meetings); July 18 – 27th (ALC Trial – Judge Funderburk); August 3 – 10th (Family vacation already planned); and August 20 – September 7th (ALC Trial – Judge Durden). The undersigned will also likely be in an ALC trial in November 2018 as well. The undersigned request that the Court permit the parties to develop a consent scheduling order to be approved by the Court.

11. An email address where you can be reached.

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with a copy to: vickilynmmitchell@parkerpoe.com
colleenquillen@parkerpoe.com

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Columbia, South Carolina
May 2, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 2, 2018, she caused to be served the foregoing **PETITIONER'S PREHEARING STATEMENT** on all parties of record by hand delivering a copy of the same addressed as follows:

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- S.C. Code Ann. § 44-1-30
- S.C. Code Ann. § 44-7-110, *et seq.* (the “CON Act”)
- 24A S.C. Code Ann. Reg. 61-15

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

The issues to be determined include the following:

- a) Whether DHEC correctly found that MUSC’s application complies with all relevant standards in the 2015 South Carolina Health Plan (the “Plan”) and relevant project review criteria in section 802 of DHEC Regulation 61-15.
- b) Whether DHEC correctly determined that MUSC’s application is not competing, as defined in Regulation 61-15 § 103(6), with the application submitted by Roper St. Francis-Berkeley, Inc. (“Roper”) that is the subject of Contested Case 18-ALJ-07-0099-CC.
- c) If the Court should find the MUSC and Roper applications to be competing, which application more fully complies with the requirements, goals, and purposes of the CON program, the Plan, project review criteria, and any applicable DHEC regulations.

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

MUSC respectfully requests that the Court approve its application and order DHEC to issue the requested CON. This request action is supported by application and consideration of the applicable standards in the Plan and the relevant project review criteria in section 802 of DHEC Regulation 61-15.

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

MUSC will present documentary evidence, as well as testimony by face and expert witnesses, that its application complies with all relevant Plan standards and project review criteria.

More specifically, MUSC will demonstrate that:

- a) Due to continued population growth and capacity constraints at its facilities, MUSC proposes to develop a radiation therapy facility in Berkeley County.

- b) The project scope includes adding a sixth linear accelerator to a freestanding medical office building. In addition, MUSC will add a CT scanner, treatment planning space, exam rooms, and support space.
 - c) The total cost of the project will be approximately \$9.8 million.
 - d) The project will benefit residents of the service area by improving access to radiation therapy services.
 - e) MUSC has operated for two consecutive years at a utilization rate of over 80% of its capacity.
 - f) If approved, MUSC's radiation therapy facility will perform at 50% of capacity within three years of initiation of services without reducing utilization of existing providers below 80% of their capacity.
 - g) Approval of both MUSC's and Roper's applications would not exceed the need for radiation therapy services in the area. Therefore, DHEC correctly determined that these applications are not competing.
 - h) Should the Court find that MUSC's and Roper's applications are competing, MUSC's more fully complies with the requirements, goals, and purposes of the CON program, the Plan, project review criteria, and any applicable regulations.
6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion**

At this time, MUSC is not aware of any motions it will make at or before the hearing.

7. **A list of proposed witnesses and exhibits**

MUSC expects to call:

- David Carroll
- Patrick J. Cawley, MD
- David S. Levitt
- David Mahvi, MD

MUSC reserves the right to supplement this list.

MUSC will submit the DHEC Record into evidence as an exhibit, but has not yet determined what other exhibits it may offer into evidence.

8. **A statement regarding the necessity for discovery, if any**

MUSC believes discovery consistent with the South Carolina Rules of Civil Procedure and S.C. Code § 44-7-210(F) is necessary.

9. **The estimated length of the hearing**

MUSC estimates the hearing will last 5-7 days.

10. **Any dates in the next one hundred twenty (120) days when you will not be available for a hearing**

MUSC will work with the other parties to develop a proposed Scheduling Order for the Court's consideration.

11. **An email address where you can be reached**

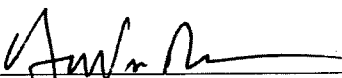
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Columbia, South Carolina

May 2, 2018

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Trident Medical Center, LLC, d/b/a Trident Medical Center,)	DOCKET NO. 18-ALJ-07-0100-CC
)	
Petitioner,)	
vs.)	
)	SOUTH CAROLINA DEPARTMENT
South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUSC Radiation Therapy Center – Berkeley County,)	OF HEALTH AND
)	ENVIRONMENTAL CONTROL'S
Respondents.)	PREHEARING STATEMENT
)	
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Pursuant to the Order for Prehearing Statements issued by the South Carolina Administrative Law Court (“Court”) on April 12, 2018, Respondent South Carolina Department of Health and Environmental Control (“Department”), by and through its undersigned counsel, hereby submits the following prehearing statement.

1. The nature of this proceeding:

This matter is before the Court pursuant to a request for a contested case hearing filed by Petitioner Trident Medical Center, LLC, d/b/a Trident Medical Center (“Trident”), challenging the Department’s grant of the Certificate of Need (“CON”) application of Respondent Medical University Hospital Authority, d/b/a MUSC Radiation Therapy Center – Berkeley County (“MUSC”), for the expansion of radiation therapy services by the addition of a sixth linear accelerator, at a total project cost of \$9,804,548.

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

The statutory provisions conferring subject matter jurisdiction to the Court include S.C. Code Ann. §§ 1-23-600(A), 44-1-60(G), and 44-7-210(E).

Other applicable statutes and regulations include the *State Certification of Need and Health Facility Licensure Act* (“the CON Act”), S.C. Code Ann. §§ 44-7-110, *et seq.*, and *Certification of Need for Health Facilities and Services* (“the CON Regulation”), S.C. Code Ann. Regs. 61-15.

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

The issues to be presented for determination are:

- Whether the Department properly found MUSC’s CON application and the CON application submitted by Roper St. Francis Hospital – Berkeley, Inc., d/b/a Roper St. Francis Hospital – Berkeley (“Roper”), which is the subject of another contested case with Docket No. 18-ALJ-07-0099-CC, were not “competing applicants” as defined by S.C. Code Ann. § 44-7-130(5) and S.C. Code Ann. Regs. 61-15 § 103(6);
- Whether the Department properly found MUSC’s CON application complies with the South Carolina Health Plan enacted August 13, 2015 (“Plan”); and
- Whether the Department properly found MUSC’s CON application complies with the relevant project review criteria.

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

The Department requests the Court uphold its decision to grant MUSC’s CON application.

MUSC and Roper do not meet the definition of “competing applicants” as set forth at S.C. Code Ann. § 44-7-130(5) and S.C. Code Ann. Regs. 61-15 § 103(6). MUSC’s CON application complies with the standards for expansion of radiation therapy services contained in Chapter IX of the Plan. MUSC’s CON application complies with the project review criteria of Community Need Documentation (S.C. Code Ann. Regs. 61-15 § 802(2)); Distribution (Accessibility) (S.C. Code Ann. Regs. 61-15 § 802(3)); Medically Underserved Groups (S.C. Code Ann. Regs. 61-15 § 802(31)); and Financial Feasibility (S.C. Code Ann. Regs. 61-15 § 802(15)).

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

MUSC submitted a CON application to the Department on May 22, 2017, for expansion of radiation therapy services and the establishment of a new radiation therapy facility through the addition of a sixth linear accelerator to be located in a freestanding medical office building in Berkeley County, at a total project cost of \$19,234,196. The Department published notice in the June 23, 2017, State Register that the application had been deemed complete and the review cycle had begun.

MUSC's CON application was submitted under South Carolina Health Plan enacted August 13, 2015. The Department identified the following project review criteria as of most relative importance to its review of the CON application: Community Need Documentation; Distribution (Accessibility); Medically Underserved Groups; and Financial Feasibility.

Trident submitted notice to the Department that it was an affected person and opposed MUSC's application. On September 20, 2017, the Department conducted a joint project review meeting, at which it considered presentations on MUSC's CON application as well as a CON application filed by Roper seeking to establish radiation therapy services at its new Berkeley County hospital through the acquisition of a new linear accelerator. The parties submitted additional comments to the Department following the project review meeting.

Based upon a review of all information contained in the record on the CON application, including comments from affected persons, staff determined MUSC's CON application was not a "competing applicant" with Roper's CON application, and that MUSC's CON application complied with the Plan and applicable project review criteria. Department staff issued a written decision approving the application on November 22, 2017.

Trident submitted a request for final review to the Board of Health and Environmental Control ("Board") following issuance of staff's decision. The Clerk of the Board mailed notice to the parties

on January 31, 2018, that it declined to conduct a final review conference in this matter. Trident then filed a request for a contested case hearing with the Court.

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

The Department is not aware at this time of any motions it may raise at the hearing.

7. A list of proposed witnesses and exhibits:

The Department anticipates calling the following witnesses at the hearing:

Maggie Murdock, Director, CON Program
Louis Eubank, Chief, Bureau of Healthcare Planning and Construction

The Department anticipates it will provide as an exhibit a copy of its record on MUSC's CON application. The Department reserves its right to supplement its witness and exhibit list as may prove necessary.

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

The Department anticipates discovery will be necessary as provided for in S.C. Code Ann. § 44-7-210(F) and SCALC Rule 21(B). The Department believes it would be beneficial for the parties to confer on a proposed consent scheduling order to submit to the Court for review and approval.

9. The estimated length of the hearing:

The Department estimates the hearing may take five (5) days.

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

June 25-29, 2018
July 23-27, 2018
August 20-31, 2018
September 3-7, 2018

The Department believes it would be beneficial for the parties to confer on a proposed consent scheduling order, to include a proposed hearing date.

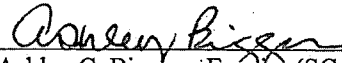
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Respectfully submitted,



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Columbia, South Carolina

the radiation therapy center and MUSC Health Cancer Care Network, LLC (“MUSC Network”) will be the operator and manager of the facility. (DHEC Trial Ex. 1, pp. 3, 5-6).

Under the law, the “licensee” of a project is the “legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or services; the owner of the business.” S.C.Reg. 61-15, Sec. 202(8)(b). MUHA, the proposed licensee in this case, is an agency of the State of South Carolina created under S.C.Code Ann. § 59-123-60(E). As a state agency, MUHA receives appropriations from the General Assembly and is required to prepare and submit an annual budget to the General Assembly and the Governor for review. (S.C.Code Ann. §59-123-60(E)(9) and (11)).¹

Although MUHA is named as the licensee, the CON application indicates that operation and management of the facility will be performed by MUSC Network. As described by Patrick Cawley, M.D.,² in his deposition in this case:

Alliance and MUSC together form the Cancer Care Network, and that group performs the operating and the consulting for other radiation therapy practices that we own.

(Cawley Dep. 36: 4-7 (Exhibit A, attached hereto)). In actuality, according to its Operating Agreement, which was revealed during discovery, MUSC Network is a for-profit Delaware limited liability company owned 51% by Alliance Oncology, LLC (“Alliance Oncology”), a for-profit Delaware company, and 49% by MUSC Strategic Ventures (“MSV”), a 501(c)(3) entity

¹ While Trident recognizes that MUHA has sources of funding other than the State, including revenues from its clinical operations and grants and donations from third parties, it is beyond dispute that MUHA receives regular appropriations from the General Assembly. *See, e.g., Trident Ex. 16, p. 10* (discussing MUHA’s receipt of a cumulative \$35 million in state funding for the planned Children’s Hospital).

² Dr. Cawley is the Vice-President of Health Affairs for the Medical University of South Carolina, the Executive Director of MUHA, and the Chief Executive Officer of MUSC Strategic Ventures.

affiliated with MUHA and the Medical University of South Carolina ("MUSC").³ (Trident Trial Ex. 14, Schedule I; Trident Trial Ex. 56).

The stated business purpose of MUSC Network is to "hold directly or through one or more of the Operating Companies, ownership interests in Centers, to provide services for the entire oncology service line for the Centers and to carry on any and all activities necessary, proper, convenient or advisable in connection therewith." (Trident Trial Ex. 14, p. 7) "Center" refers to "each oncology facility or program in which the Company has a direct or indirect ownership interest..." (Trident Trial Ex. 14, p. 3). The Operating Agreement of MUSC Network provides for capital contributions by the members, establishes a governing board composed of three Alliance Oncology designees and two MSV designees, and sets forth methods for allocating the profits and losses of the business, such allocation being primarily in proportion to the members' ownership interests. As the majority partner, the for-profit entity Alliance Oncology stands to benefit from the venture in a proportionately greater amount than the non-profit entity representing MUSC/MUHA. (Trident Trial Ex. 14, pp. 8-12).

The MUSC affiliate partnering with Alliance Oncology in the MUSC Network joint venture is MSV. Dr. Cawley describes MSV as a 501(c)(3) company that engages in "predominantly joint ventures with for-profit companies that we otherwise couldn't work with as part of MUHA or MUSC." (Cawley Dep. 37: 11-18 (Exhibit A, attached hereto)).⁴ At trial, Dr. Cawley reiterated that MSV's main function is to joint venture with other entities to support

³ The Operating Agreement names "MUSC Health" as a member of MUSC Network. As explained by Dr. Cawley in his trial testimony, MUSC Health has since changed its name to "MUSC Strategic Ventures." (Partial Transcript of Hearing, Cawley Testimony, Tr. 9: 9-18(Exhibit B, attached hereto)).

⁴ Dr. Cawley's understanding of MSV differs from MUSC's public representation of MSV in its organization chart as "being formed in 2015 to allow affiliation with *tax exempt entities* to support the missions and programs of The Medical University of South Carolina, UMA and MUHA." (Trident Trial Ex. 56)(Emphasis added). Consistent with Dr. Cawley's description, MSV in this matter is partnering with a *for-profit* entity (Alliance Oncology) to own another *for-profit* entity (MUSC Network).

MUSC. (**Partial Transcript of Hearing, Cawley Testimony, Tr. 9: 1-8 (Exhibit B, attached hereto)**)).

As is apparent from MUHA's CON application and documents subsequently revealed during discovery, the radiation center in essence will be owned and operated by MUSC Network. The CON application contains documentation, such as a Letter of Intent to Lease the space required to house the project (**DHEC Trial Ex. 1, pp. 53-48**) and various quotes from vendors for medical and office equipment (**DHEC Trial Ex. 1, pp. 53-84; 85-93**), all of which are addressed to MUSC Network or Alliance Oncology and not to MUHA. In response to the requirement that the applicant prove financial feasibility, MUHA submitted a letter from Mr. Greg Spurlock of Alliance Oncology, as the managing member of MUSC Network, indicating that, depending on the interest rates available, the proposed project would be financed by an affiliate of MUSC Network or by an external third party. (**DHEC Trial Ex. 1, p. 160**).

In his testimony at trial, Dr. Cawley acknowledged that the joint venture with Alliance Oncology began because Alliance was a needed source of financing for MUSC/MUHA's radiation therapy projects. (**Partial Transcript of Hearing, Cawley Testimony, Tr. 34: 1-15 (Exhibit B, attached hereto)**). According to Dr. Cawley, for the Proposed Project at issue in this case, Alliance Oncology will be the entity purchasing all of the equipment and other items going into the facility, with the result that neither the assets nor debt liabilities associated with those assets will appear on MUHA balance sheets. (**Partial Transcript of Hearing, Cawley Testimony, Tr. 93: 1-18 (Exhibit B, attached hereto)**).

Under the January 22, 2016, Network Management Agreement by and among Alliance Oncology, MSV, and MUSC Network, Alliance Oncology agrees to (a) "assist" MUSC Network in procuring and obtaining financing for all equipment and office space associated with a particular facility site; (b) employ all administrative and technical personnel for each site; (c)

provide marketing services related to each site; (d) provide billing and collection services to each site, subject to the parties choice that the hospital entity at that site will perform such services itself; and (e) provide, in its discretion, working capital advances (capped at \$500,000 for each advance) to MUSC Network to be repaid with interest. (**Trident Trial Ex. 13, pp. 2-3**).

The Network Management Agreement indicates that all of the services to be performed for the sites will be in exchange for fair market value charges "which are expected to be based on a percentage of collections." (**Trident Trial Ex. 13, p. 1**). The Network Management Agreement additionally provides that each site shall pay a management fee to MUSC Network in the amount of 5% of net revenues. (**Trident Trial Ex. 13, p. 1**)

MSV agrees (a) to provide MUSC Network with the clinical standards developed by the Hollings Cancer Center and with the quality metrics to be met for each facility; and (b) to provide telemedicine services to the sites. Finally, MSV and Alliance Oncology agree jointly to (a) share personnel and costs related to information technology at the sites, with Alliance being responsible for managing the services themselves; and (b) to establish a research database, with a central Institutional Review Board and a tumor board, in order to support clinical trial participation at all sites. (**Trident Trial Ex. 13, pp. 2-3**).

As is clear from the direct examination of Dr. Cawley at the hearing, MSV's responsibilities under the Network Management Agreement are in fact responsibilities that will be met by MUSC or MUHA. For example, Dr. Cawley testified that the quality assurance functions which are the responsibility of MSV under the Network Management Agreement will be performed by MUSC's Clinical Standards Committee, that the telemedicine services which are to be provided by MSV will be provided by MUSC, and, finally, that MUSC will be involved in the clinical trial research and tumor board functions agreed to by MSV. (**Partial Transcript of Hearing, Cawley Testimony, Tr. 38: 21-43: 19 (Exhibit B, attached hereto)**).

Authority of ALC to Review

In this Motion for Directed Verdict, Trident raises the issue whether MUHA's Proposed Project, as planned and submitted to the Department for approval, constitutes a joint venture that violates S.C. Const. art. X, § 11 as well as MUHA's enabling legislation. If the answer to this question is yes, as Trident contends, then, as a matter of law, the Department's decision to approve MUHA's CON application must be reversed.

The constitutional challenge raised by Trident is to the joint venture arrangement proposed by MUHA and does not require the Court to determine the constitutionality of any statute or law. Thus, this issue is properly before the Administrative Law Court ("ALC") and, indeed, must be raised and ruled on by the ALC in order to preserve it. In *Travelscape, LLC v. S.C. Dep't of Revenue*, the South Carolina Supreme Court addressed the ability of the ALC to determine "as applied" constitutional challenges:

It is well settled in this State that ALCs, as part of the executive branch, are without power to pass on the constitutional validity of a statute or regulation. *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). In *Video Gaming Consultants*, we said those challenges present an exception to our preservation rules and should be raised for the first time on appeal to the circuit court. *Id.* at 39, 535 S.E.2d at 345. However, the legislature has since amended the process for appeals from the ALC, providing for a direct appeal to the court of appeals instead of the circuit court. S.C. Code Ann. § 1-23-610(A) (Supp.2009). This procedural change results in a conundrum for litigants bringing "as-applied" constitutional challenges to a statute or regulation: they must first bring an inherently factual issue before a tribunal generally not suited to make factual determinations. While we have not addressed this issue, the court of appeals, in a case arising before the change in the governing statutes, said, "While it is true that AL[C]s cannot rule on a facial challenge to the constitutionality of a regulation or a statute, AL[C]s can rule on whether a law as applied violates constitutional rights." *Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct.App.2002) (citing *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000)).

We find the principle enunciated in *Dorman* and *Ward* to be sound and hold that ALCs are empowered to hear as applied challenges to statutes and regulations. ALCs are better suited for making the factual determinations necessary for an as applied challenge, and finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision.

391 S.C. 89, at 108-109, 705 S.E.2d 28, at 38-39 (2011). Because Trident, in this Motion, asserts the applicability of the joint ownership prohibition set forth in S.C. Const. art. X, §11 to the Proposed Project, this Court is empowered by law to consider and determine the issue.

Argument

A. Enabling Statutes

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

(1) to make bylaws and regulations considered expedient for the management of its affairs and its own operations not inconsistent with the constitution and laws of this State or of the United States;

(2) to confer the appropriate degrees in medicine, dental medicine, pharmacy, nursing, health-related professions, and graduate studies in related health fields upon students and other persons as in the opinion of the board of trustees may be qualified to receive them; and

(3) to make contracts and to have, to hold, to purchase, and to lease real estate and personal property for corporate purposes; and to sell and dispose of personal property and any buildings that are considered by it as surplus property or no longer needed and any buildings that it may need to do away with for the purpose of making room for other construction. These powers must be exercised in a manner consistent with the provisions of Chapter 35 of Title 11 [the South Carolina Procurement Code].

S.C.Code Ann. § 59-123-60(A). Finally, S.C.Code Ann. §59-123-30 confirms MUSC's original 1832 charter and recognizes all of the rights and privileges granted therein.⁵ The law specifically

⁵ MUSC's original charter also provides no authority for MUSC to create subsidiary or affiliated corporate entities. (Exhibit C, attached hereto).

requires all revenue earned by MUSC to be expended for a public purpose and makes MUSC subject to the Freedom of information Act and to State ethics laws. (S.C.Code Ann. § 59-123-60 (B), (C), and (D)).

In addition to creating MUSC and its board, in a 2000 amendment to the same legislation, the General Assembly established MUHA as a separate state agency to be governed by a board composed of the same persons as sit on the MUSC board. As conceived by the General Assembly "Whenever the board functions in its capacity as the governing body of the hospital⁶, the board of trustees is constituted and designated as the Medical University Hospital Authority, an agency of the State of South Carolina (hereinafter called authority)." (S.C.Code Ann. § 59-123-60(E)). MUHA is granted the sole authority to manage, regulate and operate the healthcare (as opposed to the educational) functions of MUSC, including the power to:

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

S.C.Code Ann. § 59-123-60(E)(13).

MUSC has no statutory authority to create a subsidiary or affiliated corporation to perform the educational functions it is charged with performing. MUHA is granted the authority to establish not-for-profit entities to carry out its functions with regard to the healthcare operations of MUSC, with the limitation that any such nonprofit entities are subject to all laws and regulations applicable to MUHA. Neither MUSC nor MUHA is given any authority to form for-profit corporations. *See Medical Soc. of S.C. v. Medical Univ. of S.C.*, 334 S.C. 270, 513

⁶ "Hospital" is defined in the enabling legislation to mean "the Medical University hospitals, clinics, and other health care and related facilities." S.C.Code Ann. § 59-123-60(E). Under §59-123-60(L), all real and personal property, tangible and intangible, relating to the hospital is deemed to be the property of MUHA.

S.E.2d 352 (1999)(“An agency created by statute has only the authority granted it by the legislature.”).

B. S.C. Const. art. X, 11

S.C. Const. art. X, § 11 provides in relevant part that “neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation.” In *Nichols v. South Carolina Research Authority*, 290 S.C. 415, 351 S.E.2d 155 (1986) the Court considered whether the South Carolina Research Authority, which it determined was an agency of the state, could engage in joint ventures “by receiving some degree of ownership in high technology firms” as part of its mission to promote research and development and enhance the research capacities of the state’s public and private universities, (290 S.C. at 421, 351 S.E.2d at 158). In invalidating the joint venture transactions entered into by the Research Authority, the Court found that “[t]he Constitution clearly prohibits public agencies, such as the Authority, from engaging in joint ownership with private parties.” *Id.* In *Nichols*, the Court held that the Research Authority was prohibited from entering any joint venture with a private business based on (a) the absence of any express enabling legislation and on (b) the plain language of Article X, § 11.

Nichols involved the direct participation by a state agency in joint ventures in which the agency itself would have an ownership interest in a private company. In this case, MUHA will not be a direct owner of MUSC Network, the entity that will lease the facility space, employ all of the administrative and technical clinical staff, own all of the equipment, and manage and operate the proposed radiation therapy center. Instead, MUHA has chosen to utilize MSV, a MUSC/MUHA-controlled non-profit affiliate, to jointly own MUSC Network, a private for profit company. (See **Trident Ex. 56** and **MUSC Ex. 63**). As specifically acknowledged by Dr. Cawley, MSV’s purpose is that it “predominantly joint ventures with for-profit companies that

we otherwise couldn't work with as part of MUHA or MUSC." (Cawley Dep. 37: 11-18 (Exhibit A, attached hereto)). In other words, with respect to the Proposed Project, MSV is being used by MUHA to joint venture with a private for-profit company (Alliance) and to hold an ownership interest in another private for-profit company (MUSC Network) because MUHA and MUSC, as state agencies, are prohibited under the law and the South Carolina Constitution from holding these interests directly.⁷

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

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

⁷ It should be noted that the structure of the Proposed Project is fundamentally different from the arrangements approved by the courts in cases such as *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982) and *Gilbert v. Bath*, 267 S.C. 171, 227 S.E.2d 177 (1976), which involved long-term leases of assets and management arrangements between governmental entities and private companies. See also, *Taylor v. Richland Memorial Hosp.*, 329 S.C. 47, 495 S.E.3d 431, 432 (1998)(approving a joint venture between Richland Memorial and Baptist Hospital, reasoning in part that all parties were governmental and/or nonprofit alleviating concerns that any interest in profits would supersede the public mission or even incidentally benefit a private party).

380 S.C. at 43, 668 S.E.2d at 398-399. The ORBIT decision is the Court's expression of its intent to uphold strictly the constitutional prohibition against joint ownership, even when there are "laudable" goals involved and even when such ownership is attempted through indirect means or entities.

In this case, MUHA and MUSC are using MSV to joint venture with a for-profit private entity to establish a radiation therapy center that MUHA, by its own admission, cannot adequately finance alone. As part of the joint venture, MSV will have a minority 49% ownership interest in a private, for-profit corporation (MUSC Network) that is majority owned and controlled by another private, for-profit company. Under Article X, §11 neither MUHA nor MUSC can hold such ownership interests. The use of MSV to circumvent the joint ownership prohibition is exactly the conduct condemned and invalidated by the Court in ORBIT.

Further, in the case of both MUHA and MUSC, the General Assembly has expressly prohibited the type of circumvention present in the Proposed Project. As noted above, MUSC has no authority to create affiliated entities, whether non-profit or for-profit. MUHA is expressly permitted to form non-profit entities on the condition that "any entity created pursuant to this subsection is considered to be an entity of the authority and subject to all laws and regulations applicable to the authority under this section." This section concludes with "the formation of for-profit corporations by the authority is strictly prohibited." S.C.Code Ann. §59-123-60(13).

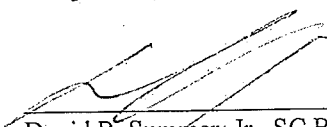
Under the law, MUHA can utilize non-profit entities to carry out its functions but those entities are subject to all laws and regulations applicable to MUHA, including the constitutional prohibition against joint ownership in private companies and the prohibition against the creation of for-profit companies. As a state agency, MUHA is also bound to act within the scope of authority imposed by its enabling legislation. *See Medical Soc. of S.C. v. Medical Univ. of S.C.*, 334 S.C. 270, 513 S.E.2d 352 (1999) ("An agency created by statute has only the authority

granted it by the legislature.”). Thus, as an affiliated entity of MUHA, MSV is prohibited under the law and the South Carolina Constitution from holding an ownership interest in MUSC Network, a private for-profit entity. As found by the Court in ORBIT, the participation of MSV in MUSC Network in violation of the law renders MUSC Network an illegal entity. As such, it cannot manage and operate the Proposed Project as submitted in MUHA’s CON application.

Conclusion

For the foregoing reasons, the Proposed Project, as submitted to the Department, constitutes an unlawful arrangement in violation of S.C.Const. art. X, §11 and S.C.Code Ann. §59-123-60(13). Therefore, as a matter of law, MUHA’s Certificate of Need application must be denied.

Respectfully Submitted,



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*Attorneys for Trident Medical Center, LLC
d/b/a Trident Medical Center*

Columbia, South Carolina
January 24, 2019

EXHIBIT A

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

TRIDENT MEDICAL CENTER, LLC, d/b/a TRIDENT MEDICAL
CENTER,

Plaintiff,

vs. DOCKET NO. 18-ALJ-07-0100-CC

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL
CONTROL AND MEDICAL UNIVERSITY HOSPITAL AUTHORITY,
d/b/a MUSC RADIATION THERAPY CENTER - BERKELEY COUNTY,

Defendants.

OPEN & RESTRICTED TRANSCRIPT

** THIS TRANSCRIPT CONTAINS CONFIDENTIAL CONTENT **

D E P O S I T I O N

WITNESS: PATRICK CAWLEY, MD
DATE: Tuesday, December 11, 2018
TIME: 3:27 p.m.
LOCATION: MUSC
96 Jonathan Lucas Street
Charleston, South Carolina
TAKEN BY: Attorneys for the Plaintiff
REPORTED BY: MARIE H. BRUEGGER, RPR, CRR

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(INDEX AT REAR OF TRANSCRIPT)

1 Q Do they provide management or consulting
2 services for MUSC in its other oncology service lines
3 already existing today?

4 A Alliance and MUSC together form the Cancer
5 Care Network, and that group performs the operating
6 and the consulting for other radiation therapy
7 practices that we own.

8 Q And as I understand it, your primary cancer
9 care vehicle is the Hollings Cancer Center?

10 A Yes.

11 Q And does everything else sort of fall under
12 the umbrella of the Hollings Cancer Center, or are
13 there other ways that you would sort of break your
14 cancer care services into departments?

15 A No, that is correct.

16 Q And so currently today, the MUSC Cancer Care
17 Network, LLC is the entity that manages the Hollings
18 Cancer Center?

19 A No, not at all. Alliance Oncology, in
20 partnership with MUSC, operates the radiation therapy
21 here at MUSC.

22 Q So the existing linear accelerators are all
23 operated by/in conjunction with the other entity,
24 Alliance?

25 A Correct.

1 Q And does Alliance Oncology have employees
2 here on the ground running things, providing
3 management services, or are they sort of remote?

4 A No. Once again, it's done in conjunction.
5 They have some employees, we have some employees, and
6 it's done together.

7 Q But to the public receiving care, it appears
8 to be Medical University Hospital Authority providing
9 the care?

10 A Yes.

11 Q What is MUSC Strategic Ventures?

12 A That is a separate 501(c)(3) associated with
13 MUSC that serves to further the mission of MUSC.

14 Q What other types of activities are conducted
15 by MUSC Strategic Ventures?

16 A Predominantly joint ventures with for-profit
17 companies that we otherwise couldn't work with as part
18 of MUHA or MUSC.

19 Q Does MUSC Strategic Ventures have any debt
20 that you're aware of?

21 A I believe it does, but it's a small amount.
22 I could not tell you the exact amount.

23 Q Under \$10 million?

24 A I couldn't tell you.

25 Q You run a billion-dollar company, so a

EXHIBIT B

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
Docket No. 18-ALJ-07-0100-CC

Trident Medical Center, LLC, d/b/a)
Trident Medical Center,)
)
Petitioner,)
)
v.)
)
South Carolina Department of)
Health and Environmental Control)
and Medical University Hospital)
Authority, d/b/a MUSC Radiation)
Therapy Center-Berkeley County,)
)
Respondents.)
)

**PARTIAL ADMINISTRATIVE HEARING
TESTIMONY OF PATRICK CAWLEY, M.D.**

Wednesday, January 16, 2018
4:45 p.m. - 6:58 p.m.

The Testimony of Patrick Cawley, M.D. before the Honorable H.W. Funderburk, Jr. was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 16th day of January, 2019 before Nadine A. Garrett, Court Reporter and Notary Public in and for the State of South Carolina.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

1 Strategic Ventures. What is that?

2 A: Strategic Ventures is a separate 501(c)(3) set
3 up about three years ago. Once again, and it's
4 organizing principal is to serve -- is to
5 further the mission of MUSC. And it's main
6 function is to joint venture with other
7 companies or other entities to help fulfill
8 that mission.

9 Q: All right. MUSC Strategic Ventures, you may
10 have said this already, but I missed it if you
11 did, what was the original name of the MUSC
12 Strategic Ventures?

13 A: Well, in the first six to 12 months of its --
14 after its birth, it was called MUSC Health for
15 a period of time. And that was -- that became
16 too confusing and different -- internally and
17 we ended up just separating that out about six
18 to 12 months later.

19 Q: And in a minute we're going to get to the last
20 box, which says MUSC Health, but, again, as I
21 understand it, MUSC Strategic Ventures was not
22 it's original name?

23 A: Correct.

24 Q: Is that what you said?

25 A: Correct.



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1 A: The main thing they bring, at the time we got
2 together with them, was they bring financial
3 resources in order to keep our equipment very
4 cutting edge. So, we have a lot of radiation
5 therapy equipment and have had for a long time.
6 Keeping that very cutting edge, keeping it on
7 -- keeping the best equipment or getting the
8 best equipment ends up being very expensive.
9 And so, we work with Alliance. Alliance is a
10 large provider across the entire world,
11 actually. And they buy -- they buy these --
12 they don't buy one at a time, they buy dozens.
13 And they're able to get very, very good rates
14 on the equipment. And that was the major
15 reason. Since then we've developed and worked
16 with them and they bring tremendous operational
17 expertise to the radiation oncology business as
18 well. And we've enjoyed that relationship.

19 Q: Good. All right. Let's look at MUSC Exhibit
20 5. And pull it up.

21 (Respondent MUSC's Exhibit Number 5 was introduced
22 into the record at this time.)

23 Q: That says Operating Agreement of MUSC Health
24 Cancer Care Network, LLC. And, Dr. Cawley,
25 what's the date on that agreement?



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1 called out for, you know, this is a company,
2 Alliance -- you know, once again, Alliance is
3 a for-profit entity. Making sure profit isn't
4 a -- reaching an appropriate profit, that's a
5 fiduciary responsibility they have and we
6 wanted to make sure that that didn't run into
7 conflict with our responsibilities.

8 Q: All right. Okay. Let's go to another
9 agreement involving Cancer Care Network. This
10 is Exhibit 4.

11 MR. WESTBROOK: Dan, can you put that up for us.

12 (Respondent MUSC's Exhibit Number 4 was introduced
13 into the record at this time.)

14 Q: And this is entitled Network Management
15 Agreement. Are you familiar with this
16 agreement?

17 A: Yes.

18 Q: And, again, is this one that you signed
19 yourself?

20 A: Yes.

21 Q: All right. Let's go to section 4(a), which is
22 on -- I believe it's on page three. But
23 wherever it is, 4(a). Again, this is a long
24 section, so I don't want you to read this into
25 the record, it'll take too long, but it's --



1 the title of it is Quality Assurance. Take a
2 moment to refresh your memory if you need to of
3 what this section says and then tell us the
4 importance of this section to MUSC Health.

5 A: It's similar to the previous section on
6 quality. And it calls out the importance that
7 MUSC is going to be involved and is going to
8 oversee the quality assurance program of any
9 site in which this joint venture is active.

10 Q: All right. Does this paragraph reference the
11 Clinical Standards Committee?

12 A: Yes.

13 Q: The clinical standards of MUSC? Tell us about
14 that.

15 A: The Clinical Standards Committee is a committee
16 that's underneath the overall Board that we
17 delegate all clinical decision making to, that
18 the Board delegates clinical decision making
19 to.

20 Q: All right. Now, let's go over to 4(b), which
21 is a refreshingly short section. How about
22 reading that into the record for us. It says,
23 Telemedicine.

24 A: MUSC-H shall develop and provide telemedicine
25 service to the Sites, in consultation with each



1 Hospital, pursuant to terms to be set forth in
2 service agreements with each Hospital.

3 Q: Telemedicine is -- is that different or the
4 same thing as telehealth?

5 A: It's the same thing.

6 Q: And what does it mean?

7 A: It means delivering clinical services over --
8 not directly to the patient, face-to-face. It
9 could be over a computer; it could be over the
10 telephone; it could be over e-mail. There's a
11 variety of ways to deliver telemedicine
12 services.

13 Q: All right. What kind of telemedicine services
14 or telemedicine program do you have at MUSC
15 now?

16 A: MUSC has gotten heavily into telemedicine in
17 the last five to six years. I think we have
18 over 80 different types of programs right now.
19 When it comes to cancer care, we do tele-cancer
20 consultations remotely. We also do what we
21 call virtual tumor boards. And there's dietary
22 follow up, things like that.

23 Q: Will tel-medicine be a feature or be involved
24 at all in the Nexton site if it's ultimately
25 approved?



1 A: Yes. Just about everything we're doing anymore
2 heavily involves telemedicine.

3 Q: All right.

4 A: And that includes this project.

5 Q: Okay. The next paragraph I want you to look at
6 is 5(b), which is on the same page if you'll go
7 down a little bit.

8 MR. WESTBROOK: Dan, are you putting that up?

9 Q: It says Research. And, Dr. Cawley, once again,
10 would you just read the highlighted section
11 into the record, please, and comment on that
12 for us?

13 A: The parties shall jointly work to create a
14 research data bank, in compliance with all
15 applicable laws and regulations, including
16 without limitation support for oncology
17 clinical trials.

18 Q: All right. What is the significance of a
19 research data bank including without limitation
20 support for oncology clinical trials? What is
21 the significance of that to this project in
22 Nexton?

23 A: Well, once again, I'll go back to the mission
24 of MUSC. The mission of MUSC is not just to
25 provide clinical care, but also to do research



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1 and to do education. So, it's important to us
2 that we wanted to be able to deliver research
3 capability at this site, not just clinical
4 care, and we wanted to put it in the agreement,
5 make it clear. And this is what this says.
6 The reason research is important to us, because
7 it's just -- it's part of our mission. And we
8 know that there can't be clinical care without
9 research into developing that -- those clinical
10 care pathways.

11 Q: All right. And let me ask you just a really
12 fundamental question. The reference there is
13 to oncology clinical trials. What are clinical
14 trials?

15 A: Clinical trials are the very end of research.
16 So, research starts with just people in a lab
17 maybe develop a drug or a therapy. And at the
18 very, very end before you can actually release
19 that out widely before the FDA approves it, you
20 must actually measure it in clinical trials.
21 That's what a clinical trial is. It actually
22 takes the final, final -- the final, final step
23 before something can be approved for use.

24 Q: All right. And I note that at the last line of
25 this paragraph there's a reference to the



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1 development of a virtual tumor board. You
2 mentioned that term a moment ago. Remind us,
3 what is a virtual tumor board?

4 A: A tumor board is one component of what I would
5 call multi-disciplinary care. We know that
6 cancer care is done best when it's delivered by
7 a multi-disciplinary team. By that I mean that
8 the surgeon, the medical oncologist, the
9 radiation oncologist, the dietician, and the
10 social worker, all kinds of other people come
11 together to discuss the patient and what's the
12 best treatment. And that's done best in -- and
13 when these people all come together, they sit
14 in a room and they talk about the patient,
15 that's called euphemistically a tumor board.
16 And historically sometimes it's hard to get
17 everybody together. And by doing it virtually,
18 you can make sure everybody that needs to be
19 there is there.

20 Q: Okay.

21 A: Some may be in the room, some may be there via
22 video, et cetera.

23 Q: Okay. And so, you've been working with
24 Alliance now, you said for five or six years.
25 I asked you and you told us why you chose to



1 members in the Network and MUSC gets two; is
2 that correct?

3 A: Correct.

4 Q: Okay. Now, I believe you testified previously
5 that some of the great stuff you get out of
6 this alliance, for lack of a -- I don't mean to
7 make a pun, but -- one of the things you get is
8 access to capital, correct?

9 A: Yes.

10 Q: Okay. Because they're the ones who are buying
11 the equipment and everything that's going into
12 this facility, correct?

13 A: Correct.

14 Q: Okay. The other advantage you have from a
15 financial standpoint in having that type of a
16 partner is you're taking that off of your
17 balance sheet; are you not?

18 A: Taking the 51 percent off?

19 Q: Well, the assets that are owned by Network are
20 not going to appear on your balance sheet, are
21 they?

22 A: Correct.

23 Q: Neither will their liabilities appear on your
24 balance sheet?

25 A: Correct. They'll be referred to though in



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EXHIBIT C

THE
STATUTES AT LARGE

OF

SOUTH CAROLINA;

EDITED, UNDER AUTHORITY OF THE LEGISLATURE,

BY

DAVID J. McCORD.

030

VOLUME EIGHTH,

CONTAINING THE ACTS RELATING TO CORPORATIONS AND THE MILITIA.

630

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SOUTH CAROLINA
DEPARTMENT OF ARCHIVES & HISTORY
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AN ACT TO INCORPORATE THE MEDICAL COLLEGE IN SOUTH CAROLINA.

I. *Be it enacted* by the Senate and House of Representatives, That a Board of Trustees and Professors be, and are hereby, established and declared to be a corporate body, under the style and title of "The President, Trustees and Faculty of the Medical College of the State of South Carolina."

II. *And be it further enacted*, That the said board of trustees shall consist of eleven members, viz: Nathaniel Heyward, C. J. Colcock, Henry L. Pinckney, Robert J. Turnbull, Samuel Prioleau, Elias Horry, William Drayton, Jacob Ford, H. A. DeSaussure, Jasper Adams, and Mitchell King, Esq's., who shall elect a president from among themselves.

III. *And be it further enacted*, That when a vacancy shall occur among the members of the said board of trustees, such vacancy or vacancies shall be filled by the remaining members of the board.

IV. *And be it further enacted*, That the Faculty shall consist of J. Edwards Holbrook, Samuel Henry Dickson, Thomas G. Prioleau, Edmund Ravenel, Henry R. Frost, and John Wagner, Professors.

V. *And be it further enacted*, That the said board of trustees and faculty shall have perpetual succession of officers and members, with a common seal; shall have power to make all lawful and proper rules and by-laws, for the government and regulation of themselves and of the said College; and that the said corporation is declared capable of receiving and holding real and personal estate, not exceeding sixty thousand dollars, whether acquired by gift, devise, bequest or purchase, for the benefit of the said College.

VI. *And be it further enacted*, That whenever a vacancy shall occur in the faculty of the said College, the said board of trustees and faculty shall have power to elect to the vacant professorship, and also to establish such other or assistant professorship, under such regulations as they may deem essential to the interest of the said College, and to remove any professor or professors for incapacity or misconduct.

VII. *And be it further enacted*, That the said board of trustees and faculty shall have power to confer medical degrees, with license to practice medicine and surgery, on such persons as may have attended lectures in the said College, and may be recommended by the faculty, and on such other persons as they may propose.

VIII. *And be it further enacted*, That this shall be deemed a public Act; that the same need not be pleaded, but may be given in evidence under the general issue.

IX. *And be it further enacted* by the authority aforesaid, That this Act shall be and continue of force for the term of twenty-one years.

In the Senate House, the twentieth day of December, in the year of our Lord one thousand eight hundred and thirty-two, and in the fifty seventh year of the Sovereignty and Independence of the United States of America.

H. DEAS, *President of the Senate.*

H. L. PINCKNEY, *Speaker of the House of Representatives.*

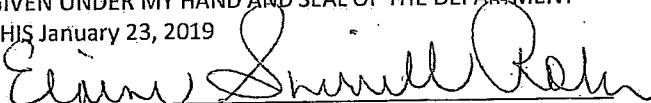
STATE OF SOUTH CAROLINA
RICHLAND COUNTY

THIS IS TO CERTIFY THAT this and/or the attached is a true and accurate copy of Act No. 2580, "An Act to Incorporate the Medical College in South Carolina"; dated December 20, 1832

Recorded in records of the SC General Assembly, Statutes at Large, Vol. 8, title page and page 379

Now on deposit with the South Carolina Department of Archives and History

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THIS January 23, 2019


Elaine Sherrill Rohr, Archivist
Reference Services

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Trident Medical Center, LLC, d/b/a) Docket No. 18-ALJ-07-0100-CC
Trident Medical Center,)
)
Petitioner,)
)
vs.)
)
South Carolina Department of Health and)
Environmental Control, Medical)
University Hospital Authority, d/b/a)
MUSC Radiation Therapy Center-)
Berkeley County, and Roper St. Francis)
Hospital - Berkeley, Inc. d/b/a Roper St.)
Francis Hospital - Berkeley,)
)
Respondents.)

MUSC'S MEMORANDUM IN OPPOSITION
TO TRIDENT'S MOTION FOR DIRECTED VERDICT

The Medical University Hospital Authority d/b/a MUSC Health ("MUSC")¹ submits this memorandum in opposition to Trident Medical Center, LLC d/b/a Trident Medical Center's ("Trident") motion for directed verdict. In its motion for directed verdict, Trident contends that MUSC's Certificate of Need ("CON") application for a linear accelerator facility must be denied because the MUSC Health Cancer Care Network, LLC ("MUSC Network"), the management company for MUSC's proposed linear accelerator facility, is an "illegal entity" that violates the South Carolina Constitution and state law.

¹ The Medical University Hospital Authority d/b/a MUSC Health was referred to during trial as "MUSC." This naming convention continues in this memorandum except when use of "Medical University Hospital Authority" or "Hospital Authority" is necessary for clarity. FEB 25 2019

FILED
FEB 25 2019

Trident's motion for directed verdict should be denied because the Administrative Law Court ("ALC") does not have jurisdiction over Trident's claims that MUSC Network is an illegal entity as (1) these claims are not based upon the application of the standards and criteria in the relevant DHEC statutes and regulations; (2) these claims are not "as-applied" constitutional challenges to the application of the standards and criteria in the relevant DHEC statutes and regulations; and (3) Trident failed to raise these claims during the DHEC review process. Trident's motion for directed verdict should also be denied because Trident's claims that MUSC Network is illegal are without merit.

ARGUMENT

I. THE ALC DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER TRIDENT'S CLAIMS THAT MUSC NETWORK IS ILLEGAL

A. The ALC does not have subject matter jurisdiction over claims that do not arise from the application of the relevant agency statutes or regulations

The ALC is a court of limited subject matter jurisdiction. *Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 403 S.C. 576, 585-86, 743 S.E.2d 786, 791-92 (2013) ("The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers."); *Med. Univ. Hosp. Auth., v. S.C. Dep't of Health and Envtl. Control*, No. 18-ALJ-17-0172-CC at *4 (A.L.C. Jan. 4, 2019) ("[T]he Court must remain cognizant that the ALC, as a statutory court, is an instrumentality of circumscribed power.").

The ALC's limited jurisdiction is set forth in the Administrative Procedures Act ("APA"). The APA authorizes the ALC to conduct contested case hearings regarding agency decisions, hear appeals of agency decisions, and preside over public hearings regarding proposed regulations. S.C. Code Ann. §§ 1-23-380, 505(3), and 600; *see also* SCALC Rule 2. Pursuant

to its contested case jurisdiction, the ALC conducts *de novo* hearings to determine whether parties should receive licenses, permits, and other approvals from state agencies. S.C. Code Ann. § 1-23-505(3) (defining “contested case” as “a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing”); *Marlboro Park Hosp. v. S.C. Dep’t of Health and Env’tl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004); *S.C. Dep’t of Health and Env’tl. Control v. Blocker*, No. 15-ALJ-07-0554-CC at *4 (A.L.C. Oct. 3, 2016) (“[T]he ALC was created specifically for the purpose of hearing cases arising out of agency decisions.”).

In contested cases involving agency licenses, permits, and other approvals, the ALC’s jurisdiction is limited to claims arising from the application of the requirements, standards, and criteria in the relevant agency statutes and regulations. *E.g.*, *Trident Med. Ctr., LLC v. S.C. Dep’t of Health and Env’tl. Control*, Nos. 09-ALJ-07-0332-CC & 09-ALJ-07-0333-CC at *23 (Sept. 26, 2012)(“Trident must prove by a preponderance of the evidence that the Department erred in approving both applications under the applicable statutes and regulations or that the Department erred in finding that the Roper St. Francis CON application complied with the State Health Plan and Project Review Criteria.”). Conversely, the ALC has repeatedly recognized that its contested case jurisdiction does not extend to claims that do not arise from the application of the requirements, standards, and criteria in the relevant agency statutes and regulations.

In *Coneross Concerned Citizens v. S.C. Department of Health and Environmental Control*, an agricultural permitting case, the ALC granted an involuntary non-suit on petitioners’ claims that a proposed farm “violates the State’s nuisance law and would diminish their property

values.” No. 05-ALJ-07-0462-CC at 8 (A.L.C. Sept. 6, 2006). The ALC held that application of the standards in the relevant regulation determined whether the DHEC permit would be issued. *Id.* at 7 (“The Petitioner thus has the burden of proving by a preponderance of the evidence that the evidence fails to support the issuance of a State Agricultural Permit to Mr. Tippet for a poultry farm pursuant to Part 200 of Regulation 61-43”). The ALC further held as follows:

Regulation 61-43, Part 200 does not give the Department the authority to decline a permit merely because it believes that the operation of a poultry farm at the location would affect property values. . . . Furthermore, the ALC is not the proper forum to pursue nuisance claims.

Id.

In *Smith v. S.C. Budget and Control Board, S.C. Retirement Systems*, the ALC held that it did not have jurisdiction to consider equitable claims for reformation and rescission of a petitioner’s retirement eligibility date. No. 06-ALJ-30-0688-CC at 8 (A.L.C. Apr. 25, 2007). The ALC held that application of rules found in statutes regarding the TERI program determined petitioner’s retirement eligibility date, and petitioner’s equitable claims “are separate and independent from her claim of eligibility for retirement” and “to the extent that [the APA] confers the authority to grant equitable remedies, such remedies must be provided in connection with a claim over which this court has jurisdiction.” *Id.*

The Court of Appeals has also repeatedly held that the ALC does not have jurisdiction over claims that do not arise from the application of the requirements, standards, and criteria in the relevant agency statutes and regulations. In *SGM-Moonglo, Inc. v. S.C. Department of Revenue*, the Court of Appeals affirmed the ALC’s decision not to adjudicate petitioner’s claim that a restrictive covenant precluded approval of a Department of Revenue permit. 378 S.C. 293, 294-95, 662 S.E.2d 487, 488 (Ct. App. 2008). The Court of Appeals held as follows:

An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose. Pursuant to section 61-4-520 of the South Carolina Code (Supp.2006), the ALC must determine whether a proposed location is proper and suitable prior to granting an off-premises beer and wine permit. Restrictions in the chain of title of a proposed location, however, are not a legitimate concern of the ALC in determining whether the location is suitable. Accordingly, the ALC did not err in refusing to consider the existence of the restrictive covenant.

Id.

In *S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc.*, the Court of Appeals affirmed the ALC's decision that the ALC did not have jurisdiction over petitioner's civil claim and held as follows:

We hold that the Administrative Law Court does not have the power to grant the Department of Consumer Affairs a refund of fees paid by consumers for credit counseling service when the provider of those services has violated the Consumer Credit Counseling Act. An action for this relief is a civil action under section 37-6-113(A) of the South Carolina Code, and must be brought in circuit court.

390 S.C. 182, 187, 700 S.E.2d 468, 470 (Ct. App. 2010); *see also* Randy R. Lowell, South Carolina Administrative Practice and Procedure, 152 (2d ed. 2008) ("The ALC has no authority to decide civil matters or to award monetary damages in cases.").

In this contested case then, the ALC has subject matter jurisdiction over claims that arise from the application of the requirements, standards, and criteria in the relevant DHEC statutes and regulations, but the ALC does not have subject matter jurisdiction over claims that do not arise from the application of the standards in these statutes and regulations.

B. Trident's claims that MUSC Network is illegal do not arise from the application of the standards in the DHEC statutes or regulations

Under the APA, MUSC's CON application is a request for an agency approval – a CON – from a state agency – DHEC. S.C. Code Ann. § 1-23-500(4). In response to this request for a CON and pursuant to the CON Act, DHEC applied the standards in the State Health Plan and

the “project review criteria” in DHEC Regulation 61-15. S.C. Code Ann. § 44-7-210. In this contested case, the ALC has subject matter jurisdiction over claims that arise from the application of the CON standards in the State Health Plan and the project review criteria in DHEC Regulation 61-15. *Amisub of S.C., Inc.*, 403 S.C. at 585-86, 743 S.E.2d at 791-92.

In its directed verdict motion, Trident contends that the management company for MUSC’s proposed linear accelerator facility, MUSC Network, is “an unlawful joint venture” and, therefore, MUSC’s CON application must be denied. Trident Mot./Mem. at 1. Trident’s contention that MUSC Network is illegal is based upon the following two legal claims: (1) the co-ownership of MUSC Network by MUSC Strategic Ventures (“MUSC SV”) and Alliance Oncology, LLC (“Alliance Oncology”) is a violation of the state constitutional prohibition on political subdivisions being joint owners or stockholders of companies; and (2) MUSC SV and MUSC Network are illegal or *ultra vires* because the Medical University of South Carolina’s enabling statutes do not authorize it to establish corporate affiliates and because the Medical University Hospital Authority’s enabling statutes do not permit its corporate affiliates to own for-profit entities. *Id.* at 7-12.

Trident’s directed verdict claims are clearly not based on the DHEC statutes and regulations that apply in this contested case. Trident’s claims clearly do not arise from the application of the standards in the State Health Plan or the project review criteria in DHEC Regulation 61-15. There is no standard in the CON Act or the State Health Plan, and no project review criterion in Regulation 61-15, pursuant to which DHEC (or the ALC) considers whether the ownership of a proposed management company for a linear accelerator facility violates the state constitutional prohibition on governmental subdivisions being owners or stockholders of companies. There is no CON standard or criterion whereby DHEC (or the ALC) considers

whether the proposed management company for a linear accelerator facility – or the corporate entities that own that management company – are illegal or *ultra vires* under state statutes.

Not only do Trident's claims not arise from the standards in the applicable DHEC statutes and regulations, *they have no meaningful nexus to MUSC's CON application or the proposed facility at all.* If a court with jurisdiction determined that MUSC Network or MUSC SV was illegal and one or both of these corporate entities were dissolved, such a result would have no material effect on MUSC's CON application or the proposed facility. Instead of having MUSC Network be the management company for the proposed linear accelerator facility, the Medical University Hospital Authority, the licensee of the facility, would contract with Alliance Oncology to manage the facility or would manage the facility itself.² That Trident's claims of illegality – even if meritorious – would have no material effect upon MUSC's CON application or the proposed facility further demonstrates that these claims are not properly part of a CON contested case.

Trident's claims that MUSC Network is an illegal entity are based upon application of the state constitution and enabling statutes for the Medical University of South Carolina and the Medical University Hospital Authority. Because Trident's claims arise from application of these authorities, and not from application of the CON standards in the State Health Plan or the project review criteria, the ALC does not have subject matter jurisdiction over these claims.

² Changing the manner in which a linear accelerator facility is managed is not a substantial change. DHEC Reg. 61-15 § 605 (substantial changes constitute a new CON project); *MRI at Belfair, LLC v. S.C. Dep't of Health and Envtl. Control*, 394 S.C. 567, 573-76, 716 S.E.2d 111, 113-15 (2011) (if the amended CON project meets the project review criteria it originally met in substantially the same way, the changes to the project are not substantial changes that void the CON under section 605).

II. TRIDENT'S CLAIMS THAT MUSC NETWORK IS ILLEGAL ARE NOT AS-APPLIED CONSTITUTIONAL CLAIMS ARISING FROM THE APPLICATION OF THE STANDARDS IN THE DHEC STATUTES OR REGULATIONS

Trident contends that ALC has jurisdiction over its claims that MUSC Network is unconstitutional and MUSC SV and MUSC Network are illegal or *ultra vires* because these claims are "as applied" constitutional claims. Trident Mot./Mem. at 6-7. Trident is mistaken.

As set forth above, the ALC's jurisdiction in this contested case is limited to claims applying the standards in the CON statute, State Health Plan, and DHEC regulation 61-15. Not surprisingly then, the ALC's "as applied" constitutional jurisdiction in this contested case is limited to claims asserting that DHEC's (or the ALC's) application of these CON standards violates the state or federal constitution. *Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 424 S.C. 80, 84, 817 S.E.2d 633, 635 (Ct. App. 2018), *reh'g denied* (Aug. 22, 2018) (holding that ALC's application of the CON Act, the State Health Plan, and the Project Review Criteria did not violate the Dormant Commerce Clause).

As demonstrated above, Trident's claims that MUSC Network is unconstitutional and that MUSC SV and MUSC Network are illegal or *ultra vires* are not based upon the application of the standards in the CON statute, State Health Plan, or DHEC Regulation 61-15. Consequently, Trident's claims do not include allegations that DHEC (or the ALC) has applied a CON standard or criterion in a way that violates the state or federal constitution. Trident's claims, then, are not as-applied constitutional claims arising from the application of the standards in the relevant DHEC statutes and regulations, and, therefore, the ALC does not have subject matter jurisdiction over these claims.

III. THE ALC DOES NOT HAVE JURISDICTION OVER TRIDENT'S CLAIMS THAT MUSC NETWORK IS ILLEGAL BECAUSE TRIDENT DID NOT RAISE THESE CLAIMS DURING THE DHEC REVIEW PROCESS

Even if the ALC has subject matter jurisdiction over Trident's claims that MUSC Network is unconstitutional and MUSC SV and MUSC Network are illegal or *ultra vires*, which is denied, the ALC could still not adjudicate these claims because Trident did not raise these claims during DHEC's review of MUSC's CON application.

A contested case hearing of the final agency decision must be requested in accordance with Section 44-1-60(G). The issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during the staff review.

S.C. Code Ann. § 44-7-210(E). If a party fails to undertake a required procedural prerequisite, to bringing a claim in the ALC, including failing to raise the claim or issue during DHEC staff's review of a CON application, the ALC lacks procedural jurisdiction to consider the claim or issue. *Tract 7, LLC v. S.C. Dep't of Health and Env'tl. Control*, No. 15-ALJ-07-0258-CC at *3 (A.L.C. July 28, 2015); *S.C. Dep't of Health and Env'tl. Control v. Myrtle Beach Estates*, Nos. 16-ALJ-07-0366-CC, 16-ALJ-07-0433-CC at *5 (A.L.C. May 18, 2017).

On May 22, 2017, MUSC filed its CON application for a linear accelerator facility. DHEC Trial Ex. 1 at 1. At that time, *Trident had access to all of the information it claims it needed to make the allegations contained in its January 24, 2019 directed verdict motion.* Specifically, MUSC's CON application states that Medical University Hospital Authority is the licensee for the facility. DHEC Trial Ex. 1 at 3 & 5. The CON application states that the Medical University of South Carolina established MUSC SV. *Id.* at 9. The CON application states that MUSC Network is a Delaware limited liability company that will be the management

company for the facility. *Id.* at 5, 10, & 15.³ The application states that “Alliance Oncology, LLC strategically partnered with MUSC Strategic Ventures. . .” and that Alliance Oncology owns 51% and MUSC SV owns 49% of MUSC Network. *Id.* at 10, 6 & 15. The CON application also includes a lengthy narrative discussion of MUSC, MUSC SV, MUSC Network, and Alliance Oncology, and their roles in the proposed linear accelerator project. *Id.* a 9-10.⁴

Rather than raise its allegations of illegality at that time, Trident waited until the end of trial. By letter dated June 7, 2017, Trident notified DHEC that it opposed MUSC’s CON application. *Id.* at 224. On September 20, 2017, DHEC convened a project review meeting on the Roper and MUSC CON applications to establish linear accelerator facilities in Berkeley County at which Trident made a presentation opposing both CON applications. MUSC Trial Ex. 10. On October 4, 2017, Trident submitted a post-project review letter to DHEC opposing the Roper and MUSC CON applications. DHEC Trial Ex. 1 at 360-64. Trident did not claim in its June 7 letter, in its project review presentation, or in its October 4 post-project review letter that MUSC Network is an illegal entity. *Id.* at 224 & 360-64; MUSC Trial Ex. 10. Trident did not claim in its June 7 letter, in its project review presentation, or in its October 4 post-project review letter that MUSC Network is unconstitutional or that MUSC SV and MUSC Network are illegal or *ultra vires*. *Id.* On November 22, 2017, DHEC approved the Roper CON application and the MUSC CON application. DHEC Ex. 1 at 375-78. Because Trident made no claims about the

³ MUSC Network is referred to variously in the CON application as “MUSC Health Cancer Care Network, LLC,” “MUSC Cancer Care Network, LLC” and “The Network.”

⁴ During the project review meeting with DHEC staff and with Trident representatives present, MUSC stated that MUSC Network would manage the proposed linear accelerator facility and that “[t]his company is a strategic partnership between Alliance Oncology, LLC, the nationwide leader in radiation oncology and radiosurgery programs, and MUSC Strategic Ventures, an organization established to support the mission and activities of MUSC and University Medical Associates.” MUSC Trial Ex. 9 at 5.

alleged illegality of MUSC Network and MUSC SV, DHEC did not consider these alleged issues.

Id.

In its January 24, 2019 directed verdict motion, Trident claimed – for the first time – that MUSC Network is unconstitutional and MUSC SV and MUSC Network are illegal or *ultra vires*. Trident attempts to avoid the appropriate application of section 44-7-210(E) by contending – repeatedly – that Trident needed discovery, and even trial testimony, before Trident could make its claims.

Trident . . . moves the Court . . . for an order directing a verdict in Trident's favor on the grounds that, based on evidence presented during discovery and at trial of this matter. . .

Trident Mot./Mem. at 1.

In actuality, according to its Operating Agreement, which was revealed during discovery, MUSC Network is a for-profit Delaware limited liability company owned 51% by Alliance Oncology, LLC, a for-profit Delaware company, and 49% by MUSC Strategic Ventures (“MSV”), a 501(c)(3) entity affiliated with MUHA and the Medical University of South Carolina (“MUSC”).

Id. at 2-3.

[N]one of this information was made available to DHEC while this application was being reviewed. This information was produced last fall during the course of discovery and through the testimony that we've now gotten from Dr. Cawley in his case about exactly who each of these legal entities are.

Trident Mot. Tr. at 14-15 (attached as Ex. 1). However, as described in detail above, the record is clear that the information Trident claims it needed to make its motion has been in Trident's possession since May 2017.⁵

⁵ Trident also had ready access to information about these corporate entities through the South Carolina Secretary of State and the Delaware Department of State, Division of Corporations websites.

Suffice it to say, alleging that MUSC Network is unconstitutional and that MUSC SV and MUSC Network are illegal or *ultra vires* more than a year and a half after MUSC filed its CON application and more than a year after DHEC approved MUSC's CON application is much too late. Pursuant to section 44-7-210(E), Trident had to present these claims to DHEC staff during the review of MUSC's CON application to assert these claims now, and because Trident did not do so, the ALC does not have procedural jurisdiction over Trident's claims.

IV. TRIDENT'S CLAIMS THAT MUSC NETWORK IS ILLEGAL ARE WITHOUT MERIT

On September 2, 2015, MUSC Health was incorporated as a non-profit, public benefit corporation. DHEC Ex. 1 at 9; MUSC Health Certificate of Incorporation (attached as Ex. 2). On December 11, 2015, MUSC Health's name was changed to MUSC Strategic Ventures ("MUSC SV"). MUSC SV Articles of Amendment (attached as Ex. 3). MUSC SV was established by, and is an affiliate of, the Medical University of South Carolina and the University Medical Associates of the Medical University of South Carolina ("UMA"). DHEC Ex. 1 at 9; MUSC SV Articles of Incorporation at 1-2 (attached as Ex. 4). MUSC SV was not established by, and is not an affiliate of, the Medical University Hospital Authority. *Id.*

MUSC SV is a non-member, nonprofit corporation that is managed by a board of directors that includes five members appointed by the Medical University of South Carolina, two members appointed by UMA, and one community member. *Id.* MUSC SV was established to further the missions and programs of the Medical University and UMA "including their collaboration with Medical University Hospital Authority, a subdivision of the State of South Carolina." *Id.*

On January 22, 2016, MUSC Network was incorporated as a for-profit Delaware LLC. DHEC Ex. 1 at 10. MUSC Network is a joint venture between Alliance Oncology and MUSC SV. *Id.* Alliance Oncology owns 51% and MUSC SV owns 49% of MUSC Network. *Id.* at 5-6. MUSC Network is the management company for the proposed linear accelerator facility at issue in this case. *Id.* at 5 & 10.

A. MUSC Network is not an unconstitutional joint venture

The South Carolina Constitution provides in pertinent part as follows: “neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company association or corporation.” S.C. Const. Art. X, § 11; *Nichols v. S.C. Research Auth.*, 290 S.C. 415, 421, 351 S.E.2d 155, 158 (1986)(“The constitution clearly prohibits public agencies, such as the [South Carolina Research] Authority, from engaging in joint ownership with private parties.”).

Trident does not allege that the Medical University of South Carolina and the Medical University Hospital Authority directly own MUSC Network in violation of Article X section 11. Trident instead contends that MUSC Network violates Article X section 11 because the Medical University and the Hospital Authority are joint owners of MUSC Network through their corporate affiliate, MUSC SV: Trident Mot./Mem. at 10.⁶ Trident is mistaken.

In *Brashier v. S.C. Department of Transportation*, the Supreme Court considered the claim that the Department of Transportation’s (“DOT”) plan to finance, develop, and operate the Southern Connector, a toll road in the Upstate violated, *inter alia*, Article X section 11’s

⁶ Trident’s claim that MUSC Network is unconstitutional because the Medical University Hospital Authority is indirectly owning MUSC Network through its affiliate, MUSC SV, is of no moment because, as set forth above, MUSC SV is an affiliate of the Medical University of South Carolina and UMA – not the Hospital Authority.

prohibition on political subdivisions jointly owning companies. 327 S.C. 179, 187-88; 490 S.E.2d 8, 13 (1997), *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). DOT's plan included establishing a nonprofit, public benefit corporation without members, the Southern Connector 2000 Association, Inc. (the "Association"), that would pay a developer to construct the Southern Connector (through the Association's issuance of tax-exempt bonds), that would manage and operate the toll road, and that would dissolve and distribute any assets to DOT upon the repayment of the bonds. *Brashier*, 327 S.C. at 183, S.E.2d at 10.

The Supreme Court rejected the claim that DOT establishing and being involved with its affiliate Association constituted unconstitutional joint ownership by DOT of Association, and held in pertinent part as follows:

SCDOT has a certain amount of control over Association. Directors of Association are subject to approval by SCDOT and SCDOT can remove any director for cause. Also, upon Association's dissolution its assets will be distributed to SCDOT. However, this involvement is insufficient to create joint ownership in Association or in the Southern Connector by SCDOT. SCDOT is not a stockholder in Association. The agreements make it clear the Southern Connector will be owned by SCDOT but operated by Association.

Brashier, 327 S.C. at 187-88, S.E.2d at 13-14 (emphasis added).

Like Association, MUSC SV is a nonprofit public benefit corporation without members that was established by a governmental subdivision to further the subdivision's mission. MUSC SV Articles of Incorporation at 1 (attached as Ex. 4). Like DOT, the Medical University of South Carolina has "a certain amount of control" over its affiliate's board of directors. *Id.* at 2. Like Association, when MUSC SV dissolves, its assets will be distributed to the political subdivision that established it. *Id.* at 2 (assets will be distributed to "MUSC and/or UMA in such proportions as the Board of Directors shall determine . . .") *Id.* at 2.

Ultimately then, just as DOT's establishment of, and involvement with, its affiliate, Association, did not transform DOT into an unconstitutional "joint owner or stockholder" of Association, then Medical University's establishment of, and involvement with, MUSC SV does not make the Medical University a "joint owner" of MUSC SV in violation of Article X section 11. As Medical University of South Carolina is not a "joint owner" of MUSC SV, the Medical University clearly cannot be a "joint owner" of MUSC Network *through* MUSC SV. Therefore, Trident's claim that the Medical University violates Article X section 11 through MUSC SV's ownership of MUSC Network is without merit.

Trident's reliance on the *O'Brien* case for the notion that the Medical University violates Article X section 11 through its affiliate's ownership of MUSC Network is misplaced. Trident Mot./Mem. at 10. *O'Brien* held that municipalities could not use the "vener" of a trust to avoid the constitutional prohibition on investing public funds in the stock market. The Supreme Court was very obviously focused upon preventing political subdivisions from putting public funds at risk in the stock market. 380 S.C. 42-43, 668 S.E.2d at 398-400 (2008) ("Article X, § 11 concerns the *investing* of government funds.").⁷ The *O'Brien* holding is based upon very specific provisions in the state constitution and other state statutes that limit such investing to "protect public funds from risky investments" and that fact that the trust at issue was "no different than any other investment house (Merrill Lynch, Oppenheimer, etc.)." *Id.* Suffice it to say, MUSC SV is not a vehicle by which the Medical University is investing public funds in the stock market and, therefore, this case is inapposite.

⁷ *O'Brien* came on the heels of the 2008 stock market collapse. *O'Brien*, 380 S.C. at 43, 668 S.E.2d at 398, n. 4 (referencing "the current debacle with sub-prime lending.").

B. MUSC SV and MUSC Network are not illegal or *ultra vires*

Trident claims that MUSC SV and MUSC Network are illegal or *ultra vires* because the Medical University of South Carolina's enabling statutes do not authorize the Medical University to have affiliates and the Medical University Hospital Authority's enabling statutes do not permit its affiliates to co-own for-profit entities.⁸ Trident Mot./Mem at 7-9. Trident ignores the Medical University's implied powers.

While an agency has those powers that are expressly set forth by statutes and regulations, an agency also has powers that are "necessarily implied for it to effectively fulfill the duties with which it is charged." *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005); *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 131, 459 S.E.2d 876, 880 (Ct. App. 1995), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996) (municipal corporation has powers expressly granted it and "those which are necessarily or fairly implied in or incident to the express powers, or those powers essential to the accomplishment of its purpose."); Op. S.C. Atty. Gen., Oct. 22, 2004 at *3 ("While an agency must possess the requisite statutory authority in order to exercise a particular power. . . . it is not absolutely necessary to spell out each and every power which the agency may undertake.").

Boards of public universities have implied powers to undertake actions "necessary and proper for the achievement of the ends for which the university was founded" *Moye v. Bd. of Trustees of Univ. of S.C.*, 255 S.C. 46, 54, 177 S.E.2d 137, 140 (1970). "In addition to those powers which are expressly conferred by statute, a governing board of a public institution, such

⁸ Trident's claim that the Hospital Authority's enabling statutes do not permit its affiliates to co-own MUSC Network is of no moment because MUSC SV is an affiliate of the Medical University and UMA – not the Hospital Authority.

as a college and a university, has the implied power to do everything that is necessary and convenient to accomplish the objects of the institution.” Op. S.C. Atty. Gen., May 1, 1970 at *2 (citing 15 Am. Jur. (2d) Colleges and Universities Section 5 at 591; 14 C.J.S. Colleges and Universities Section 18 No. 371 of 1969); *see also* Op. S.C. Atty. Gen., Oct. 22, 2004 at *14 (“Opinions of this Office have consistently concluded that a governmental entity is not prohibited from creating a nonprofit corporation for fundraising and to assist the entity in carrying out its statutory purpose and mission. Public colleges and universities have done so frequently over the years.”).

The Medical University of South Carolina is a public university. The Medical University’s board, therefore, has the “necessarily implied” power to undertake actions that are “necessary and proper” to further the Medical University’s mission and programs. MUSC SV was established by the Medical University and UMA to further the mission and programs of the Medical University and UMA, including “providing MUSC, MUSC Physicians and MUHA with infrastructure that is integral and needed to support the delivery of high quality evidence based care, advancement of knowledge; fostering of innovation, and promotion of healthy communities” DHEC Ex. 1 at 9; MUSC SV Articles of Incorporation at 1 (attached as Ex. 4). Because the Medical University board has the power to undertake actions necessary to further its mission, and because MUSC SV clearly furthers the Medical University’s mission, the Medical University can establish MUSC SV, and Trident’s claims MUSC SV and MUSC Network are illegal or *ultra vires* are without merit.

The Medical University of South Carolina and the University of South Carolina Medical School must report information regarding the financial compensation of certain administrators and physicians to the General Assembly each year. S.C. Code Ann. § 59-101-197. This

reporting extends to the corporate affiliates of these medical schools. *Id.* Affiliate is defined as follows:

For purposes of this section "affiliate" means any entity controlled by or under common control with another entity, whether through ownership, interlocking boards or officers, charter, bylaws, or otherwise and including each professional staff office or practice of each medical school receiving an appropriation from the State, and each trust or foundation which has as one of its significant purposes the support of a medical school receiving an appropriation from the State.

Id. (emphasis added). This statute, which recognizes that the public medical schools in South Carolina have affiliates, further undermines Trident's claim that the Medical University's affiliate, MUSC SV, is illegal or *ultra vires*.⁹

CONCLUSION

For the reasons set forth above, the ALC should deny Trident's motion for directed verdict and resolve this contested case through the application of the standards, requirements, and criteria in the CON Act, the State Health Plan, and DHEC Regulation 61-15.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

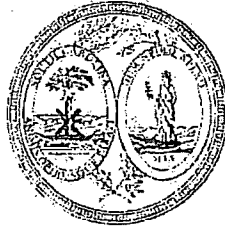
Daniel J. Westbrook
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Attorneys for Medical University Hospital
Authority, d/b/a MUSC Health

Columbia, SC
February 25, 2019

⁹ For example, UMA is the faculty practice plan for the Medical University of South Carolina and is a nonprofit affiliate of the Medical University that was established in 1991.

The State of South Carolina



Office of Secretary of State Mark Hammond

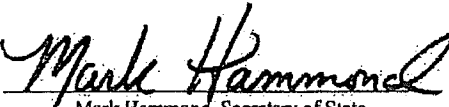
Certificate of Incorporation, Nonprofit Corporation

I, Mark Hammond, Secretary of State of South Carolina, Hereby Certify that:

MUSC HEALTH, a nonprofit corporation duly organized under the laws of the State of South Carolina on September 2nd, 2015, and having a perpetual duration unless otherwise indicated below, has as of the date hereof filed a Declaration and Petition for Incorporation of a nonprofit corporation for religious, educational, social, fraternal, charitable, or other eleemosynary purpose.

Now, therefore, I, Mark Hammond, Secretary of State, by virtue of the authority in me vested by the S.C. Code Ann. §33-31-101 et seq., do hereby declare the organization to be a body politic and corporate, with all the rights, powers, privileges and immunities, and subject to all the limitations and liabilities, conferred by Chapter 31, Title 33, of the S.C. Code of Laws and Acts amendatory thereto.

Given under my Hand and the Great
Seal of the State of South Carolina this
2nd day of September, 2015.


Mark Hammond, Secretary of State

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Jan 31 2019
REFERENCE ID: 279570

Mark Hammond
Secretary of State of South Carolina



STATE OF SOUTH CAROLINA
SECRETARY OF STATE

NONPROFIT CORPORATION
ARTICLES OF AMENDMENT

TYPE OR PRINT CLEARLY WITH BLACK INK

Pursuant to the provisions of Section 33-31-1005 of the 1976 South Carolina Code of Laws, as amended, the applicant delivers to the Secretary of State these articles of amendment.

- 1. The name of the nonprofit corporation is MUSC Health
(Must match name on record with Secretary of State's Office)
- 2. Date incorporated September 2, 2015
(Must match date on record with Secretary of State's Office)
- 3. On December 11, 2015, the following amendment was adopted, Article First in amended to read as follows:
(Date the amendment was decided upon)
The name of the corporation is MUSC Strategic Ventures (the "Corporation").

- 4. By checking this paragraph #4 the applicant represents that (a) approval of the amendment by the members was not required, (b) the amendment was approved by a sufficient vote of the board or directors or the incorporators. (Do not check this paragraph #4 if member vote was required or if the required vote of directors or incorporators was not obtained.)
- 5. If the approval of the members was required to adopt the amendment(s), provide the following information:
 - (a) Designation (Classes of Membership) _____
 - (b) Number of memberships outstanding _____
 - (c) Number of votes entitled to be cast by each class entitled to vote separately on the amendment _____
 - (d) Number of votes of each class indisputably voting on the amendment _____
 - (e) Complete one of the following as appropriate
 - (i) Total number of votes cast for and against the amendment by each class entitled to vote separately _____
 - (ii) Total number of undisputed votes cast for the amendment by each class which was sufficient for approval for that class _____

160714-0138 FILED: 07/14/2016
MUSC STRATEGIC VENTURES
Filing Fee: \$10.00 ORIG
Mark Hammond South Carolina Secretary of State

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SECRETARY OF STATE OF SOUTH CAROLINA

MUSC Health

Name of Corporation

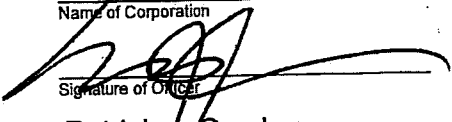
6. By checking this paragraph #6 the applicant represents that approval of the amendment by some person or persons other than the members, the board, or the incorporators is required pursuant to Section 33-31-1030 of the 1976 South Carolina Code of Laws, as amended, and that the approval was obtained. (Do not mark paragraph #6 if either of these statements is not true.)
7. If the amendment provides for an exchange, reclassification, or cancellation of memberships, provisions for implementing the amendment must be set forth here if provisions are not contained in the amendment itself _____

8. If this corporation is converting from either a public benefit or religious corporation into a mutual benefit corporation, mark this paragraph #8 which certifies that a notice, including a copy of the proposed amendment, was delivered to the South Carolina Attorney General at least twenty days before the consummation of the amendment.

12/11/15
Date

MUSC Health

Name of Corporation


Signature of Officer

Patrick J. Cawley

Type or Print Name

Chief Executive Officer

Position of Officer

FILING INSTRUCTIONS

1. Two copies of this form must be submitted for filing.
2. Filing fee of \$10.00 payable to the Secretary of State
3. A self addressed stamped return envelope.
4. If the space in this form is insufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form, or prepare this using a computer disk which will allow for expansion of space on the form.

Mail to: Secretary of State
Attn: Corporations
1205 Pendleton St, Suite 525
Columbia, SC 29201

Form Revised by South Carolina Secretary of State, March 2012

ROA_2051

Jan 31 2019

REFERENCE ID: 279570


SECRETARY OF STATE OF SOUTH CAROLINA

**MUSC Health Board of Directors
December 11, 2015
Minutes**

Attendees:

Dr. Donald Johnson, Chair
Mr. Charles Schulze
Dr. Murrell Smith
Dr. David Cole
Dr. Patrick Cawley
Dr. Scott Reeves
Mr. Tom Stephenson
Dr. Bruce Elliott
Dr. Don Rockey

Annette Drachman, Esq.
Mr. Mark Sweatman
Mr. Steve Hargett
David McLean, Esq.
Ms. Susan Barnhart
Ms. Gina Ramsey
Ally Abernathy, Esq.
Mr. Mike Denham
Ms. Emzee Hilliard
Ms. Sarah Bacik

The meeting was called to order at 12:19pm by Dr. Donald Johnson, Chair.

Rollcall by Mark Sweatman. Next meeting is Friday, February 12, 2016.

Item 1. Minutes Review from October 7, 2015 meeting

Minutes reviewed and approved.

Item 2. Bylaws Amendment

Changes to the bylaws included:

Article of Dissolution

Definition of Chief Executive Officer and MUSC Vice President for Health Affairs

Added language to allow a nondirector be a member of a board committee

Bylaw amendments approved.

Action: Approval needed.

Item 3. Name Change Proposal

Dr. Cole stated there is a realization that this entity which is currently MUSC Health has a smaller role in context to the enterprise wide MUSC Health. There is possible confusion to call one MUSC Health and know which is exactly being referred to. A name change is needed to better recognize what the function of this entity separate from the greater management structure that is MUSC Health. Suggestion to change name to MUSC Strategic Ventures.

Dr. Don Johnson discussed having a possible resolution added to bylaws on why the organization was created. Dr. Cawley stated this will be discussed further in an upcoming Executive Committee meeting.

Name change approved from MUSC Health to MUSC Strategic Ventures.

Action: Approval needed.

Jan 31 2019
REFERENCE ID: 279570


SECRETARY OF STATE OF SOUTH CAROLINA

Item 4. Independent Board Member

Dr. Cawley discussed there were 25 to 30 nominations. Final two being presented to board are John Bluford and Rod Rutledge. Principles used to narrow down list are they are local, have healthcare experience and diversity. Formal Recommendation is Rod Rutledge.

Rod Rutledge approved as independent board member.

Action: Approval needed.

Item 5. Committee Reports

5a. Executive Committee – no update

5b. Clinical Integration Committee – Projects will begin without further waiting.

North Charleston Pediatric

West Ashley Project

Mt. Pleasant Ambulatory Surgery Center

Summerville/Berkeley Project

5c. Finance Committee –

MUSC Health/ Alliance Oncology Joint Venture

Finance Committee recommends that, subject to legal approval of the deal, the corporation enter into a Joint Venture with Alliance Oncology

Financing for additional projects

Tenet Discussion

Joint Venture with Alliance Oncology approved.

Action: Reports received as information. Finance Committee's recommendation approval needed.

Item 5. Executive Session

No items to address in executive session.

Action: Report received as information.

Item 6. Other Committee Business

Request to move meeting time to 10:00am for board members that have to travel.

Mark Sweatman will send out agenda items ahead of time to board members.

There being no further business, the committee adjourned at 12:51pm.

Respectfully Submitted,

Angie Baldwin

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Jan 31 2019
REFERENCE ID: 279570


SECRETARY OF STATE OF SOUTH CAROLINA



STATE OF SOUTH CAROLINA
ARTICLES OF INCORPORATION
OF
MUSC HEALTH

The undersigned, for the purpose of forming a nonprofit corporation pursuant to the South Carolina Nonprofit Corporation Act hereby certifies:

FIRST: The name of the corporation is MUSC Health (the "Corporation").

SECOND: This Corporation is a public benefit corporation.

THIRD: The Corporation is organized exclusively to operate for charitable, scientific, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), or the corresponding provision of any subsequent federal tax law and within such limits:

(a) To advance, nurture, support the missions and programs of The Medical University of South Carolina, an agency and political subdivision of the State of South Carolina ("MUSC"), and the University Medical Associates of the Medical University of South Carolina, a South Carolina nonprofit corporation (doing business as MUSC Physicians) ("UMA"), including their collaboration with Medical University Hospital Authority, a subdivision of the State of South Carolina;

(b) To operate for the benefit of, to perform the functions of and to carry out the tax-exempt purposes of MUSC and/or UMA, and any other existing or future tax-exempt affiliates of MUSC and/or UMA; and

(c) To promote, establish, conduct, and maintain activities on its own behalf or as it may contribute to or otherwise engage in to support and assist MUSC and/or UMA, and any other existing or future tax-exempt affiliates of MUSC and/or UMA;

and to do such acts and carry on such activities as may be permitted by nonprofit corporations under the South Carolina Nonprofit Corporation Act and other laws of the State of South Carolina in order to accomplish the purposes set forth in this Article THIRD. Notwithstanding any provision of these articles of incorporation or any provisions of applicable state law, the Corporation shall not carry on any activities that would cause the Corporation to fail to qualify as an organization exempt from tax under Section 501(c)(3) of the Code or the corresponding provision of any subsequent federal tax law.

FOURTH: No part of the assets or net earnings of the Corporation shall ever inure to the benefit of or be distributable to any of its incorporators, directors, officers, or any other person having a personal or private interest in the activities of the Corporation, except that the

1

150902-0118
MUSC HEALTH

FILED: 09/02/2015

Filing Fee: \$25.00 ORIG



Mark Hammond


South Carolina Secretary of State

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ROA_2054

Jan 31 2019

REFERENCE ID: 279570

 ion shall be authorized and empowered to pay reasonable compensation for services actually rendered and to make reimbursement in reasonable amounts for expenses actually incurred in carrying out the purposes set forth in Article THIRD hereof.

FIFTH: No substantial part of the activities of the Corporation shall be devoted to the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of, or in opposition to, any candidate for public office. The Corporation shall not be authorized to accept gifts or contributions or other funds for purposes other than the purposes of the Corporation hereinbefore stated.

SIXTH: The Corporation shall have no members.

SEVENTH: The affairs of the Corporation shall be managed by its board of directors (the "Board of Directors"). The number of members of the Board of Directors (the "directors") and the manner of choosing the directors shall be as set forth in the Bylaws of the Corporation.

EIGHTH: In the event that at any time the Corporation is a private foundation within the meaning of Section 509(a) of the Code (or the corresponding provision of any subsequent federal tax law), then:

(1) The Corporation shall distribute its income for each taxable year at such time and in such manner as not to subject it to the tax on undistributed income imposed by Section 4942 of the Code (or the corresponding provision of any subsequent federal tax law).

(2) The Corporation shall not engage in any act of self-dealing as defined in Section 4941(d) of the Code (or the corresponding provision of any subsequent federal tax law).

(3) The Corporation shall not retain any excess business holdings as defined in Section 4943(c) of the Code (or the corresponding provision of any subsequent federal tax law).

(4) The Corporation shall not make any investments in such manner as to subject it to tax under Section 4944 of the Code (or the corresponding provision of any subsequent federal tax law).

(5) The Corporation shall not make any taxable expenditures that would subject it to tax under Section 4945(d) of the Code (or the corresponding provision of any subsequent federal tax law).

NINTH: In the event of the liquidation, dissolution, or winding up of the Corporation, whether voluntary, involuntary, or by operation of law, all the remaining assets and property of the Corporation shall, after payment of all necessary expenses thereof and the payment or provision for all debts, liabilities and obligations of the Corporation, be distributed to MUSC and/or UMA in such proportions as the Board of Directors shall determine to any of the foregoing entities so long as they are then recognized as tax-exempt organizations within the meaning of Section 501(c)(3) of the Code or the corresponding provision of any subsequent

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Jan 31 2019
REFERENCE ID: 279570

~~Mark H. ...~~ I WITNESS WHEREOF, the undersigned, being the incorporator hereinbefore named, has
executed, signed, and acknowledged these articles of incorporation this 15th day of September
2015.


TERI CARTER


Matthew P. Utecht, Incorporator

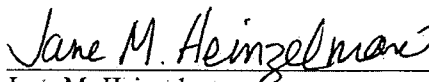
CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Medical University Hospital Authority, d/b/a MUSC Health, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivery of a copy of same to:

Pleadings: **MUSC'S MEMORANDUM IN OPPOSITION TO TRIDENT'S MOTION FOR DIRECTED VERDICT**

Counsel Served: Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

David B. Summer, Jr., Esq.
William R. Thomas, Esq.
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100 (29201)
Post Office Box 1509
Columbia, SC 29202-1509



Jane M. Heinzelman
Senior Administrative Assistant

Columbia, South Carolina

February 25, 2019

FILED

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SC ADMIN LAW COURT

relief, Trident requests that the Court overturn DHEC's decision to approve MUHA's Certificate of Need application.

As MUHA notes in its Memorandum in Opposition, information concerning the ownership and management of the Proposed Project was presented to DHEC in MUHA's CON. Indeed, the law requires that a CON application contain such disclosures. Under S.C.Code Ann. Reg. 61-15 § 202(8), the applicant must provide ownership information regarding the proposed project, including providing such information for any entity engaged to manage or operate the facility. The Court must presume that such ownership information about the person or entity managing the proposed facility is required by regulation for a reason and that such information must therefore be considered by DHEC in evaluating a proposed project. Otherwise, the requirement for such information would be useless.¹

Similarly, the §202 Part D Assurances require the applicant to affirm that "the facility will be operated and maintained in accordance with the standards prescribed by law and regulations for the maintenance and operation of such facilities," and § 802 sets forth a list of thirty-three criteria that are to be addressed by the applicant in its CON application and considered by DHEC in recommending approval or denial of the application, including (13) Record of the Applicant (Owner and/or Administrator); (14) Ability to Complete the Project; and (15) Financial Feasibility. In the case at hand, the unconstitutionality and illegality of the entity proposed to be the manager/operator of the Proposed Project would render the applicant unable to comply with any of these CON criteria and standards.

The question of the constitutionality and legality of MUSC Health Cancer Care Network, LLC ("MUSC Network") to act as the manager/operator of the Proposed Project as argued by

¹ See, *U.S. Fid. & Guar. Co. v. Sec. Fire & Indem. Co.*, 248 S.C. 307, 314-315, 149 S.E.2d 647, 650-651 (1966) ("While the statute does not expressly state that the coverage of a certified policy will continue in force if the insurer fails to comply with the notice requirement, such is the clear intent and result of the language used. . . . Any other construction would render useless the requirement that notice be given.").

Trident in this case arises under and is integral to the standards and criteria that must be met in order to obtain a Certificate of Need under the CON law. Thus, this Court has the subject matter jurisdiction to consider and rule on Trident's Motion as part of its review of MUSC Network's CON application.

B. "As-applied" Constitutional Claims

MUHA's second argument in opposition to Trident's Motion is that the question of the constitutionality of MUSC Network is not an "as applied" claim and, therefore, the Court lacks the subject matter jurisdiction to consider it. Again, MUHA misses the point. Under the law as articulated by the South Carolina Supreme Court:

It is well settled in this State that ALCs, as part of the executive branch, are without power to pass on the constitutional validity of a statute or regulation. *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). In *Video Gaming Consultants*, we said those challenges present an exception to our preservation rules and should be raised for the first time on appeal to the circuit court. *Id.* at 39, 535 S.E.2d at 345.

Travelscape, LLC v. S.C. Dep't of Revenue, 391 S.C. 89, 108, 705 S.E.2d 28, 38-39 (2011).

As discussed by the Court in *Travelscape*, a "facial challenge" to the constitutionality of a statute or regulation cannot be determined by the ALC because, as a creature of the executive branch, the ALC is required to follow statutes or regulations as passed by the General Assembly.² When the question for determination does not require the ALC to invalidate a law or regulation passed by the General Assembly, the ALC has the authority to consider and determine the constitutionality of particular conduct or arrangements before it. That is the holding in

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

Travelscape, in which the Court raised the authority of the ALC *sua sponte* and decided it as a matter of first impression. 391 S.C. at 108, 705 S.E.2d at 38-39 (2011).³

In this case, Trident does not claim that a statute or regulation is unconstitutional on its face. Instead, Trident asks the Court to examine the Proposed Project as presented to DHEC and conclude that the Proposed Project cannot comply with Certificate of Need standards and criteria because the proposed manager/operator of the facility is a for profit joint venture entity whose creation exceeds the scope of MUSC/MUHA's statutory authority and violates the South Carolina Constitution. The Administrative Law Court has the subject matter jurisdiction to address Trident's constitutional claims as asserted in this case and can decide them without declaring any statute or regulation unconstitutional.

C. Authority to Consider and Determine Question

MUHA argues as its third grounds of opposition to Trident's Motion for Directed Verdict that this Court lacks the "procedural jurisdiction" to consider Trident's Motion because Trident did not challenge the constitutionality of MUSC Network before DHEC staff. As support for its argument, MUHA points to §44-7-210(E) which provides that "A contested case hearing of the final agency decision must be requested in accordance with Section 44-1-60(G). The issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during the staff review." MUHA's argument misapprehends the limitations as set forth in §44-7-210(E) and interpreted by the Court of Appeals in *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct.App. 2004)(holding that the law limits a contested case hearing to the *issues* presented or considered by DHEC staff but does not limit *evidence* concerning those issues).

³ In fact, in footnote 11 to the opinion, the Court observed "While *Travelscape* does not specifically state it is making an "as applied" challenge to this statute, it is clear from the briefs it does not argue section 12-36-920 is facially unconstitutional."

As noted above, MUHA was required to, and did, address in its CON application issues involving the ownership of the proposed manager/operator of the facility, the record of the applicant, including both the owner and the manager, the ability to complete the Project, and the financial feasibility of the Proposed Project. (*See* S.C.Code Ann. Reg. 61-15 § 202 and § 802). MUHA also was required to, and did, assure DHEC that the facility would be operated in accordance with the law. (*Id.* at § 202(d)). Thus, the ownership of the manager/operator of the Proposed Project and its effect on the Project's ability to comply with CON criteria and standards was *presented* to the DHEC staff as an issue for consideration. Further, because DHEC is required by law to determine whether a proposed project complies with the South Carolina Health Plan, Project Review Criteria and other regulations before it can recommend approval (S.C.Code Ann. §44-7-201(C)), DHEC also *considered* the ownership and other above-discussed issues. Under § 44-7-210(E), the Court has the authority to consider the issues raised in Trident's Motion for Directed Verdict.

Furthermore, as discussed in its Motion for Directed Verdict, Trident did not have a complete picture of MUSC Network's structure and its integral role in the operation and financing of the Proposed Project until the completion of discovery and completion of the testimony presented by MUHA during the hearing. In discovery, MUHA produced for the first time organizational and operational documents that described MUSC Network's ownership and its interests and responsibilities with regard to the Proposed Project. In discovery, Trident was able to take the deposition of Dr. Patrick Cawley, who elaborated on MUSC Network's role in the Proposed Project. Further evidence on the ownership issue was revealed in the hearing testimony of Dr. Cawley. As is obvious from its Motion, Trident relied extensively on this evidence and testimony in moving the Court to determine that the Proposed Project cannot meet

the criteria and standards of the CON law when its proposed manager/operator is an unconstitutional, illegal entity.⁴

Under the *Marlboro Park* doctrine, the Court has the authority to consider evidence on the issues even when the evidence is first revealed after the completion of the DHEC staff review. Trident has asked the Court in this case to consider the evidence of MUSC Network's unconstitutional ownership in connection with its review and consideration of whether MUHA's CON application meets the requirements of the applicable CON law. Consideration of the evidence and issues raised in Trident's Motion for Directed Verdict is consistent with the law as interpreted by the Court in *Marlboro Park*.⁵

D. Constitutionality/Illegality of the Proposed Project as Presented to DHEC

As its final argument in opposition to Trident's Motion for Directed Verdict, MUHA disputes the merits of Trident's position that the use of MUSC Strategic Ventures to create and jointly own an interest in a private, for-profit entity (MUSC Network) violates the prohibition against joint ownership set forth in S.C. Const. art. X, § 11 and is contrary to MUSC/MUHA's enabling statutes. Trident sets forth in its Motion the evidence and the law supporting its position and will not repeat its extensive arguments here. Instead, Trident respectfully refers the Court to

⁴ MUHA glibly argues in its Memorandum that, to the extent any problem exists with MUSC Network, MUHA can simply change the management/operation of the Proposed Project and proceed. Whether such change would be a substantial or material change to the Project such that additional CON review is required, however, is a question that must be considered by DHEC staff. (S.C.Code Ann. Reg. 61-15, §310).

⁵ Trident disputes MUHA's characterization of the limitation of the scope of a contested case as implicating "procedural jurisdiction." Rather, Trident believes that the requirement that issues be brought before DHEC staff prior to being raised before the ALC is an exhaustion of remedies requirements which can be waived in certain circumstances. Thus, Trident notes that, even if it had the knowledge to call DHEC's attention to the evidence of MUSC Network's unconstitutional role in the Proposed Project, asking DHEC to consider the constitutionality and/or illegality of the ownership of the manager/operator of the Proposed Project would have been futile. *See, e.g., Ward v. State*, 343 S.C. at 19, 538 S.E.2d at 247 (2000) ("Requiring a party to go before an agency or the ALJ who cannot rule on the constitutionality of a statute would be a futile act.").

Trident's Motion for Directed Verdict for a detailed discussion of the merits of Trident's position in this matter.)

Briefly, Trident notes the following in direct response to MUHA's assertions in its Memorandum. MUHA seeks to rely on *Brashier v. S.C. Dep't of Transp.*, 327 S.C. 179, 490 S.E.2d 8 (1997), *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) as support for its contention that MUSC's affiliation with MUSC Strategic Ventures does not violate the joint ownership prohibition and, therefore, MUSC Strategic Ventures' ownership interest in a private, for-profit company does not violate the constitution.

In *Brashier*, the Court found that SCDOT's participation in an association of entities supporting the Southern Connection did not violate the constitutional prohibition against joint ownership. In reaching that conclusion, the Court specifically determined that:

SCDOT is not a stockholder in Association. The agreements make it clear the Southern Connector will be owned by SCDOT but operated by Association. "[T]his Court has never held a public entity's naked title to property operated by a private entity resulted in unconstitutional joint ownership." *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 355, 287 S.E.2d 476, 481 (1982) (also noting public entity had acquired neither stock nor any other form of ownership in private company). At no time will SCDOT and Association jointly own anything, *Nichols v. South Carolina Research Auth.*, 290 S.C. 415, 351 S.E.2d 155 (1986), cited by Appellant, is clearly distinguishable. In *Nichols*, a state agency admitted that in carrying out joint ventures, it planned to procure ownership interests in private entities. *Id.* at 421, 351 S.E.2d at 158.

327 S.C. at 188, 490 S.E.2d at 13 (1997).

Trident does not assert that MUSC or MUHA's affiliation with MUSC Strategic Ventures is a joint ownership situation. MUSC formed MUSC Strategic Ventures and has sole control over it. According to Dr. Cawley, MUSC Strategic Ventures is a 501(c)(3) company that engages in "predominantly joint ventures with for-profit companies that we otherwise couldn't work with as part of MUHA or MUSC." (Cawley Dep. 37: 11-18). At trial, Dr. Cawley reiterated that

MUSC Strategic Ventures' main function is to joint venture with other entities to support MUSC and/or MUHA. Trident argues that MUSC/MUHA's attempt to use its wholly-controlled affiliate, MUSC Strategic Ventures, to circumvent the joint ownership prohibition fails under *O'Brien v. S.C. ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008), a case that was decided ten years after *Brashier*.

Unlike the *Brashier* case, MUSC Strategic Ventures, the non-profit affiliate created by MUSC, absolutely will have an ownership interest in a private for-profit entity (MUSC Network). It will share this ownership with another private, for-profit entity, Alliance Oncology. In the later-decided *ORBIT* decision, the Court found that a governmental entity could not use an affiliated entity to do indirectly what it was forbidden to do directly, in this case, have an ownership interest in a private entity.⁶ By its own admission, MUSC/MUHA uses MUSC Strategic Ventures to circumvent the joint ownership prohibition.⁷

In its Memorandum in Opposition, MUHA also argues that Trident "ignores" MUSC's implied authority to create subsidiary or affiliated entities, such as MUSC Strategic Ventures, when Trident contends that the Proposed Project as presented to DHEC violates MUSC/MUHA's enabling legislation. In raising implied authority, MUHA concedes that MUSC does not have the explicit authority to create affiliated entities.

As Trident argues in its Motion, MUSC's enabling statutes do not explicitly vest any authority in MUSC to create subsidiary or affiliated entities. MUHA, which is established and addressed in the exact same legislation as MUSC, is granted the explicit authority to create non-

⁶ MUHA dismisses the *ORBIT* holding as being based on "very specific provisions" in the state constitution limiting investment in the stock market. However, the "very specific provision" that prevented investment in the stock market is the **exact same** provision that prevents joint ownership in a private entity, *i.e.*, art. X, §11 that states "neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation."

⁷ MUSC Strategic Ventures was originally named "MUSC Health" and on paper was created to support the mission of MUSC. At some point the name was evidently changed to reflect its true purpose of joint venturing with other entities.

profit subsidiaries. MUHA's grant of this authority is limited by the requirement that any nonprofit subsidiary or affiliated entity created by MUHA is subject to all of the laws applicable to MUHA. MUHA is specifically prohibited from creating for profit entities.

Under the doctrine of statutory construction "*expressio unius est exclusio alterius*," the grant of authority to MUHA to create nonprofit subsidiaries and affiliates compels the conclusion that the absence of such grant of authority to MUSC in the same statute means that the General Assembly did not intend for MUSC to have such authority. Therefore, no such authority can be implied. (*See, e.g., Nelson v. Ozmint*, 390 S.C. 432, 702 S.E.2d 369 (2010)(holding that inclusion of an early release provision for second offenders but not including such provision for third offenders in the same statute compelled the conclusion that the General Assembly intended that no early release would apply for third offenses)). Furthermore, it should go without saying that a Court cannot find that a state agency has the implied authority to engage in conduct that violates the South Carolina Constitution.

Conclusion

For the foregoing reasons, Trident urges the Court to grant Trident's Motion for Directed Verdict on the grounds that the Proposed Project, as submitted to the Department, constitutes an unlawful arrangement in violation of S.C.Const. art. X, §11 and S.C.Code Ann. §59-123-60(13) and, therefore, MUHA's Certificate of Need application must be denied.

Respectfully Submitted,

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d/b/a Trident Medical Center*


Columbia, South Carolina
March 7, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 7, 2019 s/he caused the foregoing **TRIDENT MEDICAL CENTER LLC'S REPLY TO MUHA'S MEMEORANDUM IN OPPOSITION TO MOTION FOR DIRECTED VERDICT** to be served on all parties of record via electronic mail and by placing a copy of the same, in the United States Mail, first class postage prepaid, addressed as follows:

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
SC Department of Health & Environmental Control
2600 Bull Street
Columbia, SC 29201

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Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioner,)

vs.)

South Carolina Department of Health and)
Environmental Control, Medical University)
Hospital Authority, d/b/a MUSC Radiation)
Therapy Center-Berkeley County, and)
Roper St. Francis Hospital – Berkeley, Inc.)
d/b/a Roper St. Francis Hospital -)
Berkeley,)

Respondents.)

Docket No. 18-ALJ-07-0100-CC

MUSC’S MOTION FOR
RECONSIDERATION

Pursuant to SCALC Rule 29(D) and Rule 59(e), SCRCP, the Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center-Berkeley County (“MUSC”) moves the Court to reconsider, alter, and amend the May 14, 2019 Order Granting Petitioner’s Motion for Judgment as a Matter of Law and Denying Certificate of Need on Other Grounds (the “Order”). This motion is supported by the following grounds.

1. The Court determined that the Certificate of Need (“CON”) for MUSC’s proposed linear accelerator facility in Berkeley County (the “Proposed Facility”) was invalidly issued to the Medical University Hospital Authority and is therefore void under S.C. Code Ann. §§ 44-7-230(A) & (E), that Alliance Oncology, LLC (“Alliance”) is the “actual licensee” of the Proposed Facility, that State Health Plan Standard 6 applies to the CON application for the Proposed Facility, and that the CON application contains false and misleading information,

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including the attestation regarding controlling interest in the Proposed Facility. These determinations should be removed from the Order because:

- a. These issues could have been, but were not, presented to or considered by the South Carolina Department of Health and Environmental Control (“DHEC”) during staff review, and adjudication of these issues would therefore violate S.C. Code Ann. § 44-7-210(E);
- b. These issues were presented for the first time and adjudicated in the Order, providing MUSC with no opportunity to offer testimony or other evidence to address them during the contested case hearing;
- c. These determinations are based upon the erroneous legal interpretation and misapplication of the CON Act and Regulations including, but not limited to, S.C. Code Ann. §§ 44-7-230(A) & (E) and DHEC Regulation 61-15 §§ 202(2)(b)(8)(b) & 202(2)(d)(9);
- d. The determination that Alliance is the actual licensee fails to give appropriate deference to DHEC’s decision that Medical University Hospital Authority is the licensee of the Proposed Facility; and
- e. These determinations are arbitrary, capricious, and not supported by the evidence in the record.

2. The Court determined that the CON application for the Proposed Facility could not be approved because MUSC Strategic Ventures (“MUSC SV”) and MUSC Network, LLC are illegal, *ultra vires*, and/or unconstitutional, but that presenting these claims to DHEC during staff review was not required because it would have been futile to do so. This determination should be removed from the Order because:

- a. This determination violates S.C. Code Ann. § 44-7-210(E); and
- b. This determination is arbitrary, capricious, and not supported by the evidence in the record.

3. The Court determined that “because MUSC’s enabling statutes do not explicitly vest any authority in MUSC to create subsidiary or affiliated entities, . . . MUSC SV and The Network are illegal or *ultra vires*.” This determination should be removed from the Order

because it is based on the erroneous interpretation and misapplication of the South Carolina Constitution, the relevant enabling statutes, and relevant case law.

4. The Court determined that, under *Marlboro Park v. S.C. Dept. of Health and Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004), Trident can pursue its claim that the CON application for the Proposed Facility cannot be approved because MUSC SV and MUSC Network, LLC are illegal, *ultra vires*, and/or unconstitutional. This determination should be removed from the Order because it rests upon an erroneous interpretation of *Marlboro Park*.

5. The Court determined that, because “Trident did not have a complete picture” until discovery and/or the contested case hearing was conducted, Trident can pursue its claim that the CON application for the Proposed Facility cannot be approved on grounds that MUSC SV and MUSC Network LLC are illegal, *ultra vires*, and/or unconstitutional. This determination should be removed from the Order because it is arbitrary, capricious, and not supported by the evidence in the record.

6. The Court determined that the “necessary dissolution” of MUSC Network LLC would constitute a substantial change to the CON application and cause the Proposed Facility to become a new project under DHEC Regulation 61-15 § 605. This determination should be removed from the Order because:

- a. The issue could have been, but was not, presented to or considered by DHEC during staff review, and adjudication of the issue would therefore violate S.C. Code Ann. § 44-7-210(E);
- b. This issue was presented for the first time and adjudicated in the Order, providing MUSC with no opportunity to offer testimony or other evidence to address the issue during the contested case hearing;
- c. This determination is based upon an erroneous legal interpretation and misapplication of the CON Act and Regulation including, but not limited to, DHEC Regulation 61-15 § 605 and relevant case law regarding § 605; and

- d. This determination is arbitrary, capricious, and not supported by the evidence in the record.

7. The Court determined that MUSC "cannot adequately finance" the Proposed Facility without the assistance of MUSC Network LLC. This determination should be removed from the Order because:

- a. This issue could have been, but was not, presented to or considered by DHEC during staff review, and adjudication of the issue would therefore violate S.C. Code Ann. § 44-7-210(E); and
- b. This determination is arbitrary, capricious, and not supported by the evidence in the record.

8. The Court determined that the Proposed Facility would not satisfy the criteria of financial feasibility without the assistance of MUSC Network LLC. This determination should be removed from the Order because:

- a. This issue could have been, but was not, presented to or considered by DHEC during staff review, and adjudication of the issue would therefore violate S.C. Code Ann. § 44-7-210(E); and
- b. This determination is arbitrary, capricious, and not supported by the evidence in record.

9. The Court determined that MUSC Network LLC would control "almost every aspect" of the Proposed Facility. This determination should be removed from the Order because:

- a. This issue could have been, but was not, presented to or considered by DHEC during staff review, and adjudication of the issue would therefore violate S.C. Code Ann. § 44-7-210(E); and
- b. This determination is arbitrary, capricious, and not supported by the evidence in the record.

10. In addition, the Order should be altered and amended to deny Trident's motion for directed verdict for all the reasons set forth in MUSC's memorandum in opposition to Trident's motion including: (1) the Court does not have jurisdiction over Trident's legal claims;

- (2) Trident could have, but failed to, present these issues during the DHEC review process; and
- (3) Trident's legal claims are without merit.

11. If the Order is altered and amended as set forth above, a Final Order should then be issued that adjudicates the issues over which the Court has jurisdiction, that were presented to or considered by DHEC staff, and about which evidence was presented by the parties during the contested case. As the Court and the parties have completed the hearing and developed a full evidentiary record in this case, altering and amending the Order as set forth above and issuing a Final Order that would resolve all the issues that are before the Court in this contested case would better serve the interests of judicial economy, would resolve this case more efficiently and expeditiously, would conserve the parties' resources, and most importantly would better serve the interests of "the roughly 30% of MUSC cancer patients who live in the North Area and currently travel to the main MUSC campus in downtown Charleston for treatment."

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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May 24, 2019

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Medical University Hospital Authority, d/b/a MUSC Health, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivery of a copy of same to:

Pleadings: **MUSC'S MOTION FOR RECONSIDERTION**

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Jane M. Heinzelman
Senior Administrative Assistant

Columbia, South Carolina

May 24, 2019

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SC ADMIN LAW COURT

In its Order, the Court granted Trident's Motion for Judgment as a Matter of Law, finding that:

(a) the Court has subject matter jurisdiction over the issue of the constitutionality of the Proposed Project because, under the Certificate of Need ("CON") Act and regulations, the ownership and management of the Proposed Project is integral to DHEC's review of the CON application;

(b) the Court could consider the issue whether the Proposed Project was legally organized under the South Carolina Constitution because, under the *Marlboro Park* doctrine¹, the Court can consider facts and evidence that comes to light after DHEC's review below;

(c) the Medical University of South Carolina ("MUSC") has no statutory authority to create subsidiary or affiliated entities;

(d) MUHA has the statutory authority to create not-for-profit entities that are subject to all of the laws governing MUHA but has no statutory authority to create for-profit corporations;

(e) the MUSC/MUHA affiliated entities that comprise the Proposed Project are illegal or *ultra vires*;

(f) the use of an affiliated entity to form the Proposed Project with a private for-profit entity violates S.C. Const. art. X, §11;

(g) the dissolution of the operating entity for the Proposed Project would substantially alter the Project and require additional CON review; and

(h) MUHA is not the correct licensee for the Proposed Project because the illegal operating entity actually manages and controls it and, therefore, the CON was approved for the wrong entity.

Based on its findings and conclusions summarized above, the Court reversed the decision of DHEC and denied MUHA's CON application.

In its Motion for Reconsideration, MUHA argues that the Court should amend its Order to remove the findings and conclusions set forth above. The grounds for MUHA's Motion for Reconsideration fall into two categories. First, MUHA re-asserts the factual and legal arguments it presented to the Court in its original response to Trident's Motion for Judgment as a Matter of Law. Second, MUHA contends that, because Trident made its motion at the conclusion of the

¹ See *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct.App. 2004).
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case, MUHA had no opportunity to present testimony or evidence on the issue. MUHA's arguments fail for the reasons discussed below.

II. Argument

A. MUHA's Motion Fails to Raise Any Issues Misapprehended or Overlooked by the Court.

A Rule 59(e) motion is appropriate to preserve issues which have been raised by a party but not ruled on by the trial court.² See, *Wilder Corporation v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (S.Ct. 1998); *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (S.C.App. 1995). In discussing the parameters of a Rule 59(e) motion, the South Carolina Supreme Court has noted two purposes for such motions:

[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. S.C. Dep't of Transp., 602 S.E.2d 772, 781, 361 S.C. 9, 24 (2004).

MUHA's Motion for Reconsideration does not raise any new issues for the Court to consider nor does it raise any issues which the Court failed to overlook. The Court's Order contains a detailed recitation of the facts found by the Court based on the evidence presented to it. The Order also contains a thorough analysis of the law as cited and applied by the Court in reaching its conclusions. MUHA's motion simply reiterates the arguments made by MUHA in its February 26, 2019 Memorandum in Opposition to Trident's motion, most of which arguments were referenced specifically by the Court in its Order.³ Because the Court understood, acknowledged, and addressed MUHA's arguments in its Order, MUHA states no grounds that

² Rule 59(e), SCRCP, is incorporated into the Rules of the Administrative Law Court by SCALC Rule 29(D).

³ For Trident's response to the merits of MUHA's arguments, Trident incorporates by reference and respectfully refers the Court to Trident's Motion for Judgment as a Matter of Law (Directed Verdict) filed on January 24, 2019 and Trident's Reply to MUHA's Response filed on March 7, 2019.

would require the Court to alter, amend or reconsider its findings and conclusions. The Court correctly determined the facts based on the evidence before it and correctly applied and determined the law. MUHA's Motion for Reconsideration should be denied.

B. MUHA was provided adequate opportunity to respond to Trident's Motion.

In its Motion for Reconsideration, MUHA contends that it was deprived of the opportunity to present testimony and otherwise address the issues raised in Trident's Motion for Judgment as a Matter of Law because Trident made its motion at the close of the case. MUHA's argument overlooks that the Court granted MUHA thirty days in which to respond to Trident and that MUHA in fact filed a lengthy written response to Trident's motion within that time frame. As noted above, the Court specifically sets out and addresses most of MUHA's issues and arguments and implicitly through its findings and conclusions addresses all of the issues and arguments raised in MUHA's Memorandum in Opposition.

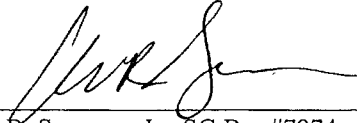
Furthermore, MUHA failed to request that the Court re-open the record in order to receive testimony or demonstrative evidence from MUHA on Trident's motion despite MUHA's having been granted thirty days to formulate its response. If MUHA contended that it was unable to respond without the opportunity to present further testimony or evidence, MUHA should have raised this issue before it filed its written response or, at the least, MUHA should have requested this relief in its written response. Because it did neither, MUHA has waived any objection to the Court's Order on those grounds.⁴ MUHA's failure to present additional evidence provides no basis for reconsideration or amendment of the Court's Order.

⁴ Trident rejects MUHA's argument that further evidence is needed on whether the structure of the Proposed Project is constitutional and within the scope of MUSC and MUHA's enabling legislation. The Court's Order relies on undisputed facts, most of which come from MUHA's own CON application, the organizational and transaction documents governing the Proposed Project, and MUHA witnesses, to reach its conclusion in this case.

III. Conclusion

For the reasons stated above, MUHA's Motion for Reconsideration should be denied and the Order of the Court denying MUHA's Certificate of Need Application should remain as issued.

Respectfully Submitted,



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Columbia, South Carolina
June 3, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

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

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

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

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

(signature page attached)

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March 4, 2020