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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-001610

Lexington County Health Services District Inc., d/b/a Lexington Medical Center, ...Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control, Prisma Health-Midlands, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center,.....Respondents,

OF WHICH
Prisma Health-Midlands is the Appellant-Respondent and Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the Respondents-Appellants.

APPELLANT-RESPONDENT PRISMA HEALTH-MIDLAND'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. The Health Care Cooperation Act (Act) and Regulation 61-31, authorize the Department of Health and Environmental Control to review and acknowledge Prisma Health Midlands's acquisition of certain Lifepoint Health, Inc. Assets and operate them subject to COPA-97-01 and Conditions, as amended.

A. The Department has the statutory authority to amend Prisma Health Midland's existing Certificate of Public Advantage, designated as COPA-97-01 ("COPA-97-01") and to determine if, and what type of review is appropriate.

B. ALC does not have the authority to rule on LMC's allegation that Reg. 61-31 § 508 fails for vagueness.

i. The ALC has no authority to hear a facial constitutional challenge to Section 508; and

ii. Section 508 is not unconstitutional as applied.

C. When making a determination under Reg. 61-31 § 508, the Department is not required to follow the provisions in S.C. Code Ann. Reg. 61-31 that are applicable only to new applications.

II. The Administrative Law Court committed error of law in failing to give deference to the Department of Health and Environmental Control's interpretation of the Health Care Cooperation Act and S. C. Regulation 61-31.

III. The Administrative Law Court committed error of law and exceeded its statutory authority in reversing the Decision.

A. The Final Orders misapprehend the purpose and scope of the Act and Regs.

B. The ALC committed errors of law when it *sua sponte* raised and ruled on issues in reversing the Staff Decision.

STATEMENT OF THE CASE

On October 6, 1996, Baptist Healthcare System of South Carolina, Inc. ("Baptist") and Richland Memorial Hospital ("Richland"), as the Sponsoring Organizations, submitted their application[1] ("Application") to obtain a certificate of public advantage ("COPA") to enter into a "cooperative agreement" pursuant to the Health Care Cooperation Act, S.C. Code Ann. § 44-7-500, et seq. (1994, 2017) ("Act" or "HCCA") and S.C. Code Ann. Reg. 61-31, Health Care Cooperative Agreements ("Regs.") to form a single nonprofit entity, Prisma Health—Midlands ("PHM"),[2] to operate the Baptist and Richland assets. LMC's Prehearing Statement, Ex. A. Application for Certificate of Public Advantage, pp. 0002-0016. The Pre-Incorporation and Joint Operating Agreement ("JOA") was the cooperative agreement submitted with the Application. Pursuant to § 44-7-530, the JOA, PHM Articles of Incorporation ("Articles") and PHM Bylaws ("Bylaws") were included in the Application and were approved as part of COPA-97-01. PHM's Motions to Clarify and to Reconsider (Alter or Amend) Order Denying Cross-Motions for Summary Judgment, Ex. 14, pp. 0092, 0101-102 and 0175.

On May 8, 1997, the Department of Health and Environmental Control ("DHEC" or "Department") issued its decision ("COPA Decision") advising Baptist and Richland, that subject to the twenty-five (25) conditions contained in the decision, it intended to issue a COPA "for the incorporation of a nonprofit entity to operate the hospitals of the Sponsoring Organizations as a single unit, where the Sponsoring Organizations will develop, implement, and find new initiatives to improve public health and community outreach programs, … ." (COPA Decision) PHM

[1] The application was submitted pursuant to S.C. Code Ann. Reg. 61-31 § 201.

[2] Appellant-Respondent Prisma Health Midlands is a South Carolina nonprofit corporation, formed under the South Carolina Nonprofit Corporation Act of 1996 ("Nonprofit Act"), created when DHEC issued COPA-97-01. The nonprofit corporation name was originally BR Health, but has been changed to PHM to reflect its affiliation with Prisma Health ("Prisma").

Prehearing Statement, Ex. 4, pp. 1242-1248, and 1303-1304. In deciding to approve the COPA Application, the Department specifically found:

> (1) … that the applicant has demonstrated that the likely benefits resulting from the cooperative agreement outweigh the likely disadvantages from the cooperative agreement; and
>
> (2) … that the reduction in competition likely to result from the agreement is reasonably necessary to obtain the benefits likely to result.

Id., 1242-1243. On October 6, 1997, DHEC issued COPA-97-01, "subject to each condition described in the approval dated May 8, 1997" ("COPA Conditions), stating:

> In reaching this decision, the Department has determined that the applicants have demonstrated that the likely benefits resulting from the agreement outweigh the likely disadvantages from the agreement. The Department has also determined that the reduction in competition likely to result from the agreement is reasonably necessary to obtain the benefits likely to result.

PHM Prehearing Statement, Ex. 2. One of the DHEC COPA Conditions was that DHEC retained the right to amend the conditions. PHM has been operating as authorized by the JOA and consistent with its conditions as they have been amended from time to time and DHEC has been monitoring PHM's operations under COPA-97-01 since its creation.

In December, 2019, PHM notified the Department that it intended to purchase substantially all of the Lifepoint Health, Inc.[3] assets ("Proposed Transaction") located in the midlands area of the state, including Providence Hospital, LLC d/b/a Providence Health ("Providence Downtown"), Providence Health Northeast ("Providence NE"), Providence Health-Fairfield ("Fairfield FSED")[4], KershawHealth Medical Center ("Kershaw") (collectively "LPNT Assets"). DHEC Opposition to LMC's Motion for Summary Judgment, Ex. 1, pp. 1-2. PHM took the position that

[3] Lifepoint Health, Inc. is a for-profit company authorized to do business in South Carolina and operates health care facilities in the State.

[4] Fairfield FSED is the freestanding emergency department.

its acquisition and integration of the LPNT Assets "falls squarely within the purpose and scope of the [Act] and regulations and requires only that the COPA conditions be modified and updated to make the LPNT Assets subject to the COPA Conditions." *Id.,* p. 2. PHM requested that DHEC 1) acknowledge that the LPNT Assets are subject to and will be monitored under COPA-97-01 Conditions and 2) the Department make such modifications to the Conditions as it deems necessary. *Id.* DHEC conducted its review of COPA-97-01 and updated the conditions, based on the proposed modifications with the addition of the LPNT Assets. *Id.,* p. 1. On February 28, 2020, DHEC approved PHM's request and "determined that the ongoing conditions of the COPA shall be amended as follows to provide for the addition of the LPNT assets: …" PHM Prehearing Statement, Ex. 1, p. 1. It is noteworthy that in amending the conditions to COPA-97-01, DHEC did not amend its determination that likely benefits resulting from the JOA outweighs the likely disadvantages from the agreement and that the likely reduction in competition resulting from the JOA is reasonably necessary to achieve the benefits. Those determinations are still incorporated in COPA-97-01.

Lexington County Health Services District, Inc. d/b/a/ Lexington Medical Center ("LMC")[5] requested final review from the Board of the Department ("Board"), which the Board denied. LMC petitioned the ALC for a contested case review.

The application of the Act and Regs. to a corporation created by and operating under a cooperative agreement approved by a COPA is a case of first impression in this state. The questions before the Court on PHM's Motion for Summary Judgment are:

> 1) Do the Act and Regs. authorize DHEC to make modifications to the conditions of COPAs it grants and monitor the COPA holder operations for adherence to such conditions.

[5] LMC is a health service district established pursuant to S.C. Code Ann. §§ 44-7-2010 et seq. that operates a hospital in Lexington County and has other health care facilities and providers in Lexington, Richland and other midlands counties.

2) Does the phrase "another review" in Reg. 61-31 § 508 authorize DHEC to determine the type review it can conduct.

3) Is Reg. 61-31 § 508 unconstitutionally vague on its face.

Each of these questions are matters of first impression. The final questions before the Court are whether the ALC's failure to defer to the Department's interpretation of the Act and Regs constitutes error of law and whether the ALC's Final Orders constitute error of law and exceed its statutory authority. PHM has timely appealed the Final Orders.

STATEMENT OF FACTS

COPA 97-01 AND DHEC CONTINUING OVERSIGHT

DHEC has conducted active monitoring and regulation over PHM and its operations under COPA-97-01. COPA-97-01 was issued with 25 conditions. One of those conditions is that PHM has to make an annual report ("Annual Report")[6] to DHEC that: 1) responds to the questions in Reg. 61-31 § 502(B); 2) provides the previous year's audited financial statements; 3) provides information sufficient to enable DHEC to evaluate each of the COPA Conditions; and 4) provides any additional information the Department determines is necessary to evaluate PHM's compliance with the COPA. PHM Prehearing Statement, Ex. 4, *Id.*, p. 1243, ¶ ¶ 1 add 2. Another Condition is that DHEC retains the right to amend the COPA-97-01 conditions as circumstances may change during the life of COPA-97-01. *Id*. p. 1246, ¶ 20.

In 2002, as part of its review of PHM's Annual Report, DHEC informed PHM that 1) it

[6] The Annual Report is often referred to as the "Tithe" report since, in addition to the information required in ¶ 1 of the Conditions, PHM is required to expend ten (10%) percent of its annual excess revenue over expenses "to fund public health initiatives and community outreach program" but would not be less than the greater of 10% or fifteen (15) million dollars in the first five (5) years. The community benefit efforts must be approved annually by DHEC. PHM Prehearing Statement, Ex. 4, p. 1243, ¶¶ 1 and 2; PHM Prehearing Statement, Ex. 5, ¶ ¶ 1 and 2. Through September 30, 2019, PHM has funded $60,861,210 million in public health initiatives and community outreach programs, including funding these programs in years where it had no excess revenue over expenses. DHEC Opposition to LMC's Motion for Summary Judgment, December 13, 2020 letter, Ex. 4, COPA Analysis.

had fulfilled COPA Condition No. 5, by obtaining its stated goal of $71 million in system savings; and 2) DHEC had investigated a complaint filed on behalf of Sisters of Charity Providence Hospital alleging a violation of the COPA and had found that Palmetto Health's *development of a new heart center and collaboration with Columbia Heart Clinic did not violate the* COPA. PHM MJS, Ex. 6, December 17, 2002 letter from Joel C. Grice to Kester S. Freeman.

In November 2003, DHEC modified COPA-97-01 to remove certain conditions that had been fulfilled ("we have reviewed the original twenty-five (25) conditions and have made modifications in which many conditions have been eliminated, while others were combined, amended, or restated.") PHM Prehearing Statement, Ex. 5, November 18, 2003 letter from Joel C. Grice to Kester S. Freeman, Jr. DHEC retained the right to amend the COPA Conditions. *Id.*, ¶ 11.

In late 2017, Palmetto Health and Upstate Affiliate Organization d/b/a Greenville Health System ("GHS") entered into an affiliation agreement to form Prisma Health ("Prisma"), a South Carolina nonprofit corporation operating under the Nonprofit Act. Before that affiliation was completed, Palmetto Health requested and DHEC confirmed that the affiliation did not implicate COPA-97-01 and that the COPA would remain in effect and binding on Palmetto Health after that affiliation became effective. PHM MSJ, Ex. 8.

PENDING TRANSACTION

In the summer of 2019, Prisma and other health care systems were invited to submit a proposal to purchase the LPNT Assets by LPNT. LPNT chose Prisma's proposal and after negotiations, on September 13, 2019, LPNT[7] entered into a letter of intent (as amended, the "LOI")

[7] The LPNT parties to the LOI are: Lifepoint Holdings 2, LLC, a Delaware limited liability company, Providence Holding Company, LLC ("Providence Holding"), a Delaware limited liability company, and Kershaw Health Holdings, LLC, a South Carolina nonprofit corporation.

for Prisma or a Prisma affiliate to purchase the LPNT Assets. *Id.,* Ex. 9, Affidavit of Malcolm Isley, ¶ 1, Exhibit A, LOI and amendments 1-4. PHM is an affiliate of Prisma. *Id.*, ¶ 3. Pursuant to the terms of the LOI, Prisma made an initial good faith deposit of $5,000,000 to LPNT on September 13, 2019 when the LOI was executed and an additional $5,000,000 deposit upon execution of the Asset Purchase Agreement (the "APA"). *Id.*, ¶ 2.

When PHM filed its December 2019 request that DHEC acknowledge that the proposed asset purchase would be subject to the COPA conditions and update and modify the conditions to COPA-97-1 to account for the addition of the LPNT Assets, it did not file an application pursuant to S.C. Code Ann. § 44-7-540 and Reg. 61-31 § 201 and DHEC did not conduct a public review process pursuant to § 44-7-550 and Reg. 61-31 §§ 303 and 304. On February 20, 2020, DHEC requested an Attorney General's opinion regarding

> [w]hat review must be conducted prior to departmental approval of proposed modifications to a cooperative agreement after issuance of a Certificate of Public Advantage if DHEC determines the proposed modifications are substantial under Section 508 of S.C. Code Regulation 61-31, Health Care Cooperative Agreements?

PHM SJM, Ex. 11 Letter dated February 20, 2020 from W. Marshall Taylor, Esq. to Robert D. Cook, Esq., at p. 1). DHEC explained that it interpreted the phrase "another review" as "not necessarily requir[ing] the same type of review as occurs when an applicant applies for a Certificate of Public Advantage." *Id.*

> "DHEC believes it is within its discretion to conduct the review it deems appropriate based on the facts and circumstances involved including, but not limited to, the significance of the proposed change, any relevant time constraints related to the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the cooperative agreement."

Id.

The Attorney General's response, concluded: "[T]here are substantial reasons, discussed above, as to why a court would likely give great respect to DHEC's interpretation. Thus, we advise

that DHEC's interpretation of § 508 would likely be upheld by a court." *Id.,* Ex. 12, Letter dated February 25, 2020 from Robert D. Cook, Esq. to W. Marshall Taylor, Esq., 2020 WL 1068931 (S.C.A.G.). at *7). Having conducted its review and upon receipt of the Opinion of the Attorney General, the Department staff issued the Decision updating the conditions for COPA-97-01 imposing additional requirements upon PHM concluding that "the Department has determined that the ongoing conditions of the COPA shall be amended as follows to provide for the addition of the LPNT assets." PHM Prehearing Statement, Ex. 1 (2/28/20 Decision) p. 1.

ALC PROCEEDINGS

LMC requested contested case review before the Administrative Law Court ("ALC") alleging three errors:

> 1) DHEC does not have the authority to "update" or "amend" the COPA-97-01 conditions to include PHM's acquisition of LPNT assets because the Proposed Transaction itself is a cooperative agreement, which must be independently reviewed by DHEC;
>
> 2) Assuming DHEC has the authority under the Act and Regs. to amend COPA-97-01 Conditions to include the LPNT Assets, the phrase "another review" is contrary to the plain language of the regulation and at odds with the legislative intent; and
>
> 3) S. C. Code Ann. 31-61 § 508 fails for vagueness and exceeds DHEC powers under the Act.

LMC Prehearing Statement, pp. 2-4.

On June 22, 2020, the ALC issued its order which required the parties state the following: "The issues presented for determination *set forth with particularity, including any claims or defenses expected to be raised; ...*" Order for Prehearing Statements, p. 1, ¶ 3. (Emphasis added.) LMC, DHEC and PHM filed their respective Prehearing Statements. In July, LPNT moved to intervene and the ALC ultimately granted the motion on September 4, 2020 – but limited LPNT's

participation in the case.[8]

PHM filed its Motion for Summary Judgment ("PHM MSJ"). DHEC and LPNT supported PHM's MSJ. LMC opposed the PHM MSJ and filed its Cross-Motion for Summary Judgment ("LMC MSJ"), which was opposed by PHM, DHEC and LPNT. The ALC heard the motions on October 20 and issued its Order Denying Cross-Motions for Summary Judgment on November 2 ("Order Denying Cross-Motions").[9] *See* Order Denying Cross-Motions. PHM filed a Motion to Clarify and Reconsider (Alter or Amend). *See* PHM Motion to Clarify and Reconsider (Alter or Amend) with exhibits. LPNT filed a Motion to Clarify. *See* LPNT Motion to Clarify. LMC opposed that part of PHM's Motion to Clarify seeking reconsideration but agreed with PHM and LPNT that the Order should be clarified to be a final order reversing the Decision. On December 7, 2020 the ALC issued its Order on Motion to Clarify and Motions to Reconsider" ("Clarification Order") (collectively "Final Orders"). *See* Clarification Order. This appeal was filed on December 9, 2020, pursuant to S.C. Code Ann., § 1-23-610. While denying the cross-motions for summary judgement, the Final Orders summarily reversed DHEC's Decision.

REGULATORY FRAMEWORK

The General Assembly adopted the Act for the stated purpose of displacing competition with regulatory oversight, by authorizing transactions that will benefit South Carolina health care consumers, despite potential federal and/or state antitrust concerns, which would otherwise prohibit the transactions. South Carolina joined many other states in establishing a state regulatory scheme to immunize designated health care agreements that benefit the State from federal and state

[8] LMC opposed the motion.

[9] The Order Denying Cross-Motions conclude that both[9] parties to the case interpreted the Act incorrectly. The Order misapprehends the fact that there are four parties to the case, including the state agency charged with enforcing the Act and Regs., *See* discussion below regarding the ALC's failure to give deference to DHEC's interpretation of the Act and Regs.

antitrust liability.

The "state action doctrine" was articulated by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341, 352 (1943). Antitrust immunity applies when a state adopts a "policy to displace competition with regulation", *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 413 (1978), under the rationale that "[i]f a state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity." *Town of Hallie v. City of Eau Claire,* 700 F.2d 376, 381 (7th Cir. 1983). "[U]nder certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program. When determining whether the anticompetitive acts of private parties are entitled to immunity, [courts] employ a two-part test, requiring first that "the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy," and second that "the policy . . . be actively supervised by the State." *FTC v. Phoebe Putney Health Sys., Inc.,* 568 U.S. 216, 225 (2013).

The Legislature intended to provide immunity from federal and state antitrust implications for health care providers who participate in discussions or negotiations authorized by Article 4, Chapter 7 of Title 44 and *who conduct business pursuant to an approved cooperative agreement*. S.C. Code Ann. § 44-7-520. (Emphasis added.) *See* S.C. Code Regs. 61 – 31 at § 101 ("[t]hese regulations implement the legislative intent that there be a state regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers which would otherwise violate federal or antitrust laws when the benefits outweigh disadvantages caused by their potential adverse effects on competition.").

The General Assembly charges DHEC with two separate functions in its enforcement of the Act. Its first task is the determination to approve or deny a COPA application. DHEC's second

task is to monitor and regulate operations under a COPA when one is issued. DHEC is required to receive, review and make the decision to approve or deny a cooperative agreement. S. C. Code Ann. § 44-7-540 ("The department shall grant or deny the application … .".) In making the decision whether to approve the application, the Department must determine whether the likely benefits from the cooperative agreement outweigh its likely disadvantages and whether the likely reduction in competition from the agreement is reasonably necessary to obtain the likely benefits. S. C. Code Ann. § 44-7-560. The Legislature also authorized DHEC to establish conditions for COPA approval that are reasonably necessary to ensure that the activities conducted under the approved COPA are consistent with the intent and purposes of the Act. *See also* Reg. 61-31 § 312 (DHEC may establish conditions to ensure "that the cooperative agreement and the activities engaged under it are consistent with these regulations" and the Act's purposes.").

The General Assembly also intended that DHEC be actively involved in monitoring and regulating activities under the approved cooperative agreement and COPA, as conditioned. DHEC's monitoring obligations and authority are set forth in Chapter 5, Reg. 61-31. This authority includes authorizing DHEC to revoke a COPA if: 1) the operations are not in substantial compliance with the COPA and its conditions, including as may be amended; and 2) the benefits of the agreement no longer outweigh the disadvantages; …" S.C. Code Ann. § 44-7-570(A). *See also*, Reg. 61-31, Chapter 5.

Reg. 61-31 clearly authorizes DHEC, as part of its monitoring responsibilities, to approve modifications to the conditions it has established in granting a COPA. Reg. 61-31, § 309 addresses the validity of an issued COPA and provides it is valid only for the project described in the application, "*except as may be modified in accordance with the Regs*." and "[i]mplementation of a project not in accordance with the [COPA] or *conditions subsequently agreed to by the*

Department may be grounds for revocation." (Emphasis added). S.C. Code Ann. Reg. 61-31, § 508 regulates amendments or modifications to a COPA after its issuance and is the section under which DHEC made the Decision. LMC has challenged DHEC's interpretation of § 508.[10]

STANDARD OF REVIEW

This appeal from the ALC is before the Court pursuant to S.C. Code Ann. § 1-23-610. The section provides that the Court "may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced" because the Final Orders were in violation of statutory provisions, in excess the ALC's statutory authority and in violation of constitutional provisions. *Id*.

The issues presented in this appeal relate solely to the interpretation of the Act and Regs. There are no disputed issues of material fact. Petitioner's Response to Motion to Clarify and Motions to Reconsider (Alter or Amend) by Respondents, p. 3. ("The Order does not otherwise identify disputed material facts, and the facts were fully developed at the hearing on the motions.") The interpretation of a statute is a question of law. *In re Estate of Brown*, 430 S.C. 474, 492, 846 S.E.2d 342, 352 (2020) (*internal citation omitted)*; *Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 75- S.E.2d 61, 63 (2013) (internal citation omitted); S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.,* 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court. We will correct the decision of the ALC if it is affected by an error of law, and questions of law are reviewed de novo.") Questions of law are reviewed *de novo* on appeal without deference to the court below. *DomainsNewMedia.com, LLC v. Hilton Head Isl. – Bluffton Chamber of Commerce*, 423 S.E.2d 295, 814 S.E. 2d 518 (S.C. 2018). The relevant facts are undisputed. The application of the law to undisputed facts also presents questions of law reviewed *de novo* on appeal. *Williams v.*

[10] As discussed below, LMC contends that DHEC exceeded its authority and misinterpreted the phrase "another review" as used in Reg. 61-31 § 508 and the section is unconstitutionally vague.

Government Employees Ins. Co., 762 S.E.2d 705, 709 (S.C. 2014); Nationwide Mut. Ins. Co. v. Rhoden, 728 S.E.2d 477, 480 (S.C. 2012).

In that this matter involves only issues of law, this Court should rule on the merits of the case and not remand the matter to the ALC in the interest of judicial economy and the need to expedite that matter as set out in PHM's Motions to Certify and to Expedite, filed with the Court on December 29, 2020.

ARGUMENT

The material facts in this case are simple and are not disputed.[11] Baptist and Richland applied to DHEC for a COPA and submitted the JOA, Articles and Bylaws as part of the application. DHEC conducted its review under the provisions of Chapters 3 and 4 of the Regs., approved the JOA and issued COPA-97-01. PHM is the nonprofit corporation created by the cooperative agreement approved pursuant to COPA-97-01. PHM has been operating under the JOA, Articles and Bylaws and the Conditions of COPA-97-01, as updated and modified by DHEC, for approximately twenty-three (23) years. DHEC has monitored and regulated PHM under Chapter 5 of the Regs. throughout that time.

Now, as the corporation created under the auspice of the Act and Regs., PHM seeks protection of the Act and Regs to purchase other health care facilities and operate them, just as it has the health care facilities of Baptist and Richland, under COPA-97-01 and its Conditions and DHEC oversight and receive the same "state action" immunity the General Assembly intended.

I. THE ALC COMMITTED ERROR OF LAW IN FAILING TO GRANT SUMMARY JUDGMENT TO PHM.

[11] *See* Reg. 61-31, Chapter 2. Section 44-7-530 of the Act requires that an executed written copy of the cooperative agreement be included in the application.

LMC did not challenge the merits of the Decision. Rather, LMC contends that the Department lacks the *statutory authority under the Act and Regs*. to amend the existing COPA-97-01 to include the LPNT Assets, thus challenging DHEC's interpretation of the Act and Regs. it administers. LMC further contends that even if DHEC is authorized to approve modifications to COPA-97-01, it not authorized to do so without following the Reg. review provisions applicable to new applications.[12] *See* LMC Prehearing Statement, pp. 2-4. LMC also contends that Reg. 61-31 § 508 is unconstitutionally vague. *Id.* p. 3-4.

In interpreting the Act and Regs., the cardinal rule of construction is to ascertain and effectuate the intent of the General Assembly. *Protection and Advocacy for People with Disabilities, Inc. v. Buscemi*, 417 S.C. 267, 273-274, 789 S.E.2d 756, 760 (2016). "It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question. *See Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning.")" *Smith v. Tiffany,* 419 S.C. 548, 555-556, 799 S.E.2d 479, 483 (2017). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. (Citation omitted)." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525-526, 642 S.E.2d 751, 754 (2007); *Strother v. Lexington County Recreation Commission*. 332 S.C. 54, 504 S.E.2d 117 (1998). Finally, "[r]egulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health and Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012)

A. <u>The Department has the statutory authority to amend the COPA Conditions and to determine what type, of review is appropriate for such amendment</u>. Section 44-7-510(2) of the

[12] This includes following the public notice and hearing provisions set forth in Chapter 3 of the Reg.

Act defines "certificate of public advantage" as "the formal approval, including any conditions *or modifications, by the department* of a contract, business or financial arrangement, or other activities or practices between two or more health providers, health provider networks, or health care purchasers that might be construed to be violations of state or federal antitrust laws." (Emphasis added.) *See also*, Reg. 61-31 § 102(2). "Modification" is not a defined term in the Act. "Modification" is defined as "1. A change to something; an alteration…" *Blacks Law Dictionary* Eighth (2004), p. 1025. The plain language of Section 44-7-520(2) allows the Department to make modifications to the conditions of the COPA. As discussed above, § 44-7-560(B) clearly authorizes DHEC to establish conditions to ensure that activities engaged under the cooperative agreement are consistent with the purposes of the Act and allow DHEC to supervise and regulate the activity under the cooperative agreement—the JOA. Indeed, DHEC build just such a modification right into the list of conditions it originally imposed in granting the COPA. PHM Prehearing Statement, Ex. 4, p. 1246. ¶ 20.

In its Decision, DHEC relied on the language of Reg. 61-31, § 508 for authority to modify COPA -97-01 Conditions to include the LPNT Assets under the COPA. PHM Prehearing Statement, Ex. 2, p. 1. Section 508 *Changes After Receipt of a Certificate of Public Advantage* (emphasis added) provides:

> If an applicant amends, alters, or otherwise changes the agreement *after receipt of a Certificate of Public Advantage*, the *Department will decide* whether or not the amendment is substantial and thereby *requires another review*. A change in the application will be considered substantial if the Department believes that the change materially changes the reasons for approval, might materially impact the benefits or disadvantages to the community to be served, or will change the service area of the original application. The addition or deletion of a party to the agreement does not necessarily constitute a substantial change unless the Department believes that the above mentioned criteria will occur.

Reg. 61-31 § 508 is the specific regulation in Chapter 5 Monitoring, that authorizes DHEC, if it decides the change is substantial, to review them. Here, the Department determined that the Proposed Transaction was substantial because they *might materially impact benefits or disadvantages to the community to be served.* PHM Prehearing Statement Ex. 2, p. 1.

Finally, in determining the validity of a COPA, Reg. 61-31, § 309 states that it is only valid for the project described in the application "*except as it may be modified in accordance with these regulations*." (Emphasis added). The Department has the authority to approve, monitor and regulate an amendment to COPA-97-01.

The plain and unambiguous language of the Act and regulations authorizes DHEC to amend COPAs and their conditions after the COPA is issued.[13]

B. Reg. 61-31 § 508 is valid on its face and is not unconstitutional as applied.

i. *The ALC Has No Authority to Hear a Facial Constitutional Challenge to Section 508.*[14] In order to invalidate the Department's clear authority to amend the conditions to an existing COPA under its regulations, LMC's Prehearing Statement makes a facial assertion that Reg. 61-31, § 508 "fails for vagueness" and exceeds the Department's powers under the Act.[15] As an executive branch agency, the ALC does not have the authority to hear and rule on LMC's allegation that Reg. 61-31, § 508 is unconstitutional. See *Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000)("ALJs are an agency of

[13] The ALC recognized that generally the Act and Regs. authorize DHEC to amend COPAs and their conditions. Order Denying Cross-Motions, p. 7, Ftnt. 5.

[14] While LMC admits in its opposition to toe PHM SJM that the ALC does not have the authority to hear a facial constitutional challenge to a regulation, PHM is addressing it because LMC's clarified "as applied" challenge is couched in facial terms.

[15] LMC's Prehearing Statement provides: "DHEC's interpretation of 508 is a matter of first impression necessitates a finding that the regulation fails for vagueness and must be struck down as exceeding DHEC's power under the HCCA." *Id.*

the executive branch of government and must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation."); *Drummond v. State*, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008)("Although appellant is not challenging the constitutionality of the regulation, he is challenging its validity under state law. Because the Administrative Law Court is part of the executive branch, as stated in Video Gaming, it has no authority to rule on the facial validity of [a regulation]."). Therefore, for purposes of its review of the Cross Motions, the ALC was bound by Reg. 61-31, § 508 and erred by not so ruling.

ii. Section 508 is not Unconstitutional as Applied. LMC's Prehearing Statement does not allege § 508 is unconstitutional as applied. In its Prehearing statement, LMC simply alleges: "DHEC's interpretation of Section 508 in this matter of first impression in fact necessitates a finding that the regulation fails for vagueness and must be struck down as exceeding DHEC's powers under the HCCA." LMC Prehearing Statement, ¶ 3, pp. 3-4.[16] LMC's Prehearing Statement makes a direct challenge to the constitutional compliance of COPA Reg. § 508, not an "as applied" challenge.

In its Cross Motion, LMC admits that the ALC is not authorized to rule on a facial challenge to the constitutionality of a regulation[17] and attempts to raise the "as applied" issue for the first time at Summary Judgment.[18] Because the issue of "as applied" vagueness of COPA Reg. § 508

[16] The "vagueness" issue was not raised by any of the four (4) parties that submitted RFRs to the DHEC Board, nor was it raise in the Petitions for Contested case by any of those parties.

[17] *See* LMC Cross Motion, p. 27.

[18] LMC did not seek leave of the ALC as required by SCALC Rule 18 ("Any document filed with the Court may be amended at any time upon motion and for good cause shown, unless the amendment would prejudice any other party in the presentation of its case.")

has not been raised to the ALC, it is not properly before the Court. However, in an abundance of caution, PHM addresses the "as applied" vagueness challenge to Reg. § 508.

LMC contends that Reg. 61-31 § 508 is "written in a manner as to permit or encourage arbitrary and discriminatory enforcement." LMC's Cross Motion, 28. As the ALC stated in *S.C. Dept. of Revenue v. Clyde J. Burris, Sr., d/b/a/C. Joseph Burris Liquors*, Docket No. 96-ALJ-17-201—CC, 1996 WL 909574 *3: "Where a statute provides controlling principles, an administrative agency may exercise a large measure of discretion within those principles." *See, Toussaint v. State Board of Medical Examiners,* 303 S.C. 318, 400 S.E. 2d 485 (1991). Section 508 itself provides controlling principles for DHEC's review. DHEC only reviews the Proposed Transaction under three circumstances, when the Department believes the change: 1) materially changes the reasons for original approval; 2) might materially impact the benefits or disadvantages to the community; or 3) changes the COPA service area.[19] The controlling principle here is for the Department to determine whether the benefits of the Proposed Transaction to the community outweigh its potential disadvantages.

The § 508 review is also part of the Department's monitoring and regulating responsibilities in Chapter 5 of the Regs. Section 501 of the Regs. requires the Department to actively monitor the approved cooperative agreement, as an approved agreement, to assure that it remains in compliance with its COPA conditions. The Department's review here is also constrained by the COPA-97-01 Conditions.

Finally, LMC contends that the as applied challenge to § 508 "stems from the *type of review* DHEC can undertake." (Emphasis in original.) Petitioner's Reply to Respondent Prisma Health-

[19] There is no allegation that the Proposed Transaction materially changes the reasons for original approval or changes the COPA service area.

Midlands in Further Support of Cross-Motion for Summary Judgment, p. 7 *(a)*. LMC takes issue with DHEC interpretation, concurred in by the Attorney General's opinion, of § 508 does not require it to use the review process outlined in Reg. 61-31 §§ 301, 302 and 303 but authorized the Department to determine, based upon the circumstances of the matter before it, to determine what type review to conduct. *See PHM SJM, Ex. 11 Letter dated February 20, 2020 from W. Marshall Taylor, Esq. to Robert D. Cook, Esq., and. Id.,* Ex. 12, Letter dated February 25, 2020 from Robert D. Cook, Esq. to W. Marshall Taylor, Esq., 2020 WL 1068931 (S.C.A.G.). LMC contends that the phrase "another review" in § 508 can only mean the review set forth in the Act. Petitioner's Response in Opposition to Motion for Summary Judgment and Notice of Motion and Cross-Motion for Summary Judgment, p. 21 ("The only review is that set forth in the statute.")[20] S.C. Code § 44-7-550[21] provides a review process after an application for a COPA is completed. It does not address review of a change or modification after the COPA has been issued. LMC's interpretation is erroneous and contrary to DHEC's and the Attorney General's interpretation.

Reg. 61-31 § 308 dictates the procedure DHEC must follow when there is a change to a COPA application during the review process. It requires that the Department reviews the amendments, if it determines that the amendments constitute a new application, the Department must impose the requirements of §§ 301, 302 and 303. If the Legislature had intended that the Department follow this same review process (as LMC asserts), it would have said so in § 508.

In interpreting statutes or regulations, the cardinal rule of construction is to give meaning to the legislative intent. *Protection and Advocacy*, 417 S.C. at 273-274, 789 S.E.2d at 760 (2016). Undefined words in a must be given their "plain and ordinary meaning without resort to subtle or

[20] S.C. Code § 44-7-550 provides a review process after an application for a COPA is completed. It does not address review of a change or modification after the COPA is issued.

[21] *See also*, Reg. 61-31 §§ 303, 304 and 305.

forced construction to limit or expand the statute's operation." *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007). Neither "another" nor the word "review" are defined in the Act or Regs. Thus, the phrase "another review" must be interpreted in its plain and ordinary meaning *Merriam Webster* defines "another" as: "different or distinct from the one first considered". https://www.merriam-webster.com/dictionary/another. "Review" is defined as: "an act or the process of reviewing"; … "to study material again : make a review". https://www.merriam-webster.com/dictionary/review. *Black's Law Dictionary* defines "review" as: "1. Consideration, inspection or reexamination of a subject or thing."

As both DHEC and the Attorney General concluded, applying the South Carolina rules of statutory interpretation set forth above, the phrase "another review" does not require DHEC to apply the review process required to for a pending COPA application. "Another review" is not a limiting phrase but a phrase allowing DHEC to fashion the type review it deems appropriate under the circumstances of the change sought under § 508. This review can be limited to an internal DHEC review based on materials provided by PHM, on materials DHEC receives from other state agencies such as the Office of Revenue and Fiscal Affairs or other materials DHEC has in its possession as the agency responsible for overseeing and regulating health care facilities and services in this State and the COPA file DHEC has administered since 1997.

DHEC's interpretation is consistent with South Carolina law, and as discussed below, should be deferred to.

II. THE ALC ERRED IN NOT GIVING DEFERENCE TO THE DEPARTMENT'S INTERPRETATION OF THE ACT AND REG.

Our courts have long held that the ALC and the courts of this State should give deference to an agency's interpretation of statutes and regulations the agency is charged with administering. *Kiawah Development Partners, II v. South Carolina Department*, 411 S.C. 16, 34-35, 766 S.E.2d

707, 718 (2014) ("Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'); *A.O. Smith Corporation v. South Carolina Department of Health and Environmental Control*, 428 S.C. 189, 833 S.E.2d 451 (Ct. App.); *Murphy v. South Carolina Department of Health & Environmental Control*, 396 S.C. at 636–38, 723 S.E.2d at 192–94. Neither the Order Denying Cross Motions nor the Clarification Order found DHEC's interpretation of the Act and Regs. to be "arbitrary, capricious, or manifestly contrary to the statute." This is error of law.

The application of the deference doctrine involves a two (2) step-process. First, the court must determine whether the language of the statute or regulation involved, directly addresses the issue involved. *Kiawah,* 411 S.C. at 32, 766 S.E.2d 717. If the regulation is either silent or ambiguous as to the specific issue, then the court must give deference to the agency interpretation. Section 508 does not specifically address what type of review is contemplated by "another review." Thus, the ALC was obligated to give deference to DHEC's interpretation of the phrase or articulate how the interpretation is "arbitrary, capricious, or manifestly contrary to the statute" or identify a compelling reason not to defer to DHEC. The ALC's failure to do so is error of law.

The Department clearly made its interpretation of the Act known to the ACL. *See* generally: South Carolina Department of Health and Environmental Control Response in Support of Prisma Health-Midlands' Motion for Summary Judgment ("DHEC Support of PHM MSJ") and South Carolina Department of Health and Environmental Control's Response in Opposition to Lexington Medical Center's Cross-Motion for Summary Judgment (with exhibits) ("DHEC Opposition to LMC MSJ"). In its Prehearing Statement, the Department submitted that the APA

did not constitute a new COPA, a public hearing was not required in this case (DHEC Prehearing Statement, ¶ 3, p. 2.) and that its "review of changes after issuance of a COPA and modification of ongoing COPA conditions was conducted in compliance with S.C. Code Ann. Sections 44-7-500 … and S.C. Code Ann. Regs. 61-31, … ." (*Id.).*

DHEC interpreted the Act and Regs. expressly to authorize it to make modifications to existing COPAs including any conditions citing the definition of COPA to include "modifications" by the Department. *See* S.C. Code Ann. § 44-7-510(2) and Reg. 61-31 § 102(2).[22] DHEC Support of PHM MSJ, pp. 7-8. The Act and Reg. explicitly authorized DHEC to make modifications to already issued COPAs, *Id.* The Department determined that Reg. 61-31 § 508 was the Reg. that addressed the process for reviewing proposed changes to a COPA after issuance. *Id*., p. 3-5. The phrase "review" or "another review" is used in §508 and is not defined in either the Act or Regs. *Id.*

DHEC determined that the Proposed Transaction might materially impact the benefits or disadvantages to the community and required another review pursuant to Reg. 61-31 § 508. *Id.,* p. 5. DHEC interpreted the phrase "another review" to be "within DHEC's 'discretion to conduct the review it deems appropriate based on the facts and circumstances involved, including, but not limited to, the significance of the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the cooperative agreement.'" *Id ,* pp. 5-6.[23] In an abundance of caution, DHEC requested an opinion from the South Carolina Attorney General regarding the efficacy of its interpretation of § 508. Letter dated February 20, 2020 from Marshall Taylor to Alan Wilson. Solicitor General Robert Cook opined that a court would most likely agree

[22]DHEC also relies on Reg. 61-31 § 309 that states a COPA is valid for the project described in the application "except as may be modified in accordance with [Regulation 61-31]". *Id.,* p. 8.

[23] See also*:* Order Denying Cross-Motions, p. 3. ("the Department put forth its own interpretation … .)

with DHEC's interpretation of its authority to fashion the type review to conduct regarding the Proposed Transaction. Letter dated February 25, 2020 from Robert Cook to Marshall Taylor.

DHEC interpreted the Act and Regs. to authorize it to approve PHM's purchase the LPNT Assets, have them subsumed within COPA-97-01 and updated the conditions for COPA-97-01. *Id.,* p. 8. The ALC agreed with the parties that DHEC has the general authority to approve amendments to COPAs. Order Denying Cross-Motions, p. 7, ftnt. 5. However, the Final Orders disagree[24] with DHEC's interpretation of the Act and Regs. that the Proposed Transaction is the kind of transaction regulated under the Act and Regs. and that the Act and Regs. authorize DHEC to approve Prisma's acquisition of the LPNT Assets even though they were not part of the JOA—the original cooperative agreement.

Here, DHEC's interpretation of the Act and Regs. is reasonable and consistent with its legislatively delegated authority to monitor, regulate, review and modify existing COPAs and any conditions.[25] DHEC has a history of reviewing the Annual Reports and of updating and modifying the condition to COPA-97-01 (*See* PHM Prehearing Statement, Ex. 5, November 18, 2003 letter from Joel C. Grice to Kester S. Freeman, Jr.) and of reviewing proposed changes involving PHM (*See* PHM MSJ, Ex. 8, correspondence with DHEC regarding Palmetto Health's proposed affiliation with GHS). The ALC committed error of law when it did not give deference to DHEC's interpretation of the Act and Regs. DHEC's interpretation of the Act and Regs. in this matter is reasonable and consistent with their language. There is simply no compelling reason to reject DHEC's interpretation. The Court should defer to DHEC's interpretation of the Act and Regs.

[24] *See* Order Denying Cross-Motions, p. 7.

[25] Obviously, this is consistent with DHEC's 1997 condition reserving the right to change or add conditions to the COPA.

III. THE ALC COMMITTED ERROR OF LAW AND EXCEEDED ITS STATUTORY AUTHORITY IN *SUA SPONTE* RAISING AND RULING ON ISSUES AND ASSUMING THE ISSUES WERE BEFORE THE ALC.

PHM has been unable to find a South Carolina case addressing whether an administrative judge at the ALC has the authority *sua sponte* to raise and rule on issues of law.[26] In this administrative case, the ALC based its Final Orders reversing DHEC's Decision on issues it considered *sua sponte.* However, there are a number of South Carolina cases that have held it is an error of law for a court in the unified judicial system created pursuant to Article V of the Constitution of South Carolina *sua sponte* to raise and rule on issues not presented to it by the parties. *Henry v. Chambron*, 304 S.C. 351, 404 S.E.2d 518 (Ct. App. 1991). South Carolina courts have clearly and consistently held that Article V courts have no such power.

As a general rule, a trial court cannot consider issues not raised in the pleadings or set forth by evidence and tried by consent. See *Henry v. Chambron,* 304 S.C. 351, 355, 404 S.E.2d 518, 520 (Ct. App. 1991) ("The circuit court also erred in finding Chambron violated a restriction requiring architectural review of proposed home plans. The alleged violation was not raised by the pleadings, nor was it tried by consent."); *see also* 15 *S.C. Jur. Appeal and Error* § 77 ("A trial court cannot grant judgment or relief on an issue not raised by the pleadings or evidence.").

In *Blackburn and Company, Inc., v. Dudley*, 289 S.C. 416, 338 S.E.2d 151 (1986), this Court held:

> A plaintiff may not base a complaint upon an express contract and recover upon an implied contract or *quantum meruit. Phillips Refrigeration Co. v. Commercial*

[26] There is an ALC case of interest. In *South Carolina Coastal Conservation League v. S. C. Dept. of Health and Evnt'l Control,* Docket No. 15-ALJ-07-0369-CC (Anderson), Petitioner Coastal, on its Motion to Reconsider the ALC's Order, alleged that the ALC erred when it found Coastal abandoned certain issues it had raised before the Department. In its Order Denying Reconsideration, the ALC cited to its Order for Prehearing Statements requiring issues to be presented and a detailed statement of the law supporting the requested actions. The Order held: "While it is true that the theory of abandonment is usually found in the context of appellate review, the principle behind it is sound and this Court believes it applies here. The principle being that a party must support its issues with the legal citations and arguments otherwise the Court is forced (sic) the party's arguments and legal theories for them, which is not the Court's role."

> *Credit Co.,* 256 S.C. 500, 183 S.E.2d 330 (1971). This is a rule of pleading based upon the principle that a plaintiff who has pled one theory should not be allowed to recover upon another. *Hutson v. Stone,* 119 S.C. 259, 112 S.E. 39 (1922). A defendant is entitled to notice of the type of claim to which he is required to respond. *Birlant v. Cleckley,* 48 S.C. 298, 26 S.E. 600 (1897). A judgment must be in accord with the pleadings of the party in whose favor it is rendered, or it is fatally defective. *Brockington v. Lynch,* 119 S.C. 273, 112 S.E. 94 (1922).

Blackburn, 289 S.C. 415, 417-418, 338 S.E.2d 151, 152-153. As in *Blackburn*, PHM had no notice of the *sua sponte* issues raised by the ALC prior to the filing of the Order Denying Cross Motions.

Certainly, if it is an error of law for an Article V court *sua sponte* to raise and rule on issues, absent express statutory authority from the General Assembly, it is an error of law for the ALC to do so. The General Assembly has granted the ALC no such authority. The ALC is a creature of statute, and as such "is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Captain's Quarters Motor Inn, Inc. v. S. Carolina Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). S.C. Code Ann. § 1-23-500 (2005 & Supp. 2012) is the statutory authority pursuant to which the ALC was created. "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." *Howard v. S.C. Dep't of Corrections*, 399 S.C. 618, 733 S.E.2d 211 (2012).

The Clarification Order in this case states "all of the issues that PHM asserts the Court raised *sua sponte* were necessary and vital considerations to the Court's analysis of the issues raised by the parties in their summary judgment motions. *Contra Henry v. Chambron,* 304 S.C. 351, 355, 404 S.E.2d 518, 520 (Ct. App. 1991)".[27] Clarification Order, p. 3. The Clarification Order concludes "that all of the issues the Court allegedly raised *sua sponte* were either directly raised by the parties or were necessary derivative legal considerations of the issues raised by the

[27] Notably, while citing *Henry* as a contrary holding, the ALC Clarification Order does not cite to a case supporting its proposition.

parties." *Id.*, p. 4. At no point in the Clarification Order does the ALC either identify what *sua sponte* issues were directly raised by the parties or cite to where in the pleadings before it the issues were raised. Finally, the ALC's Clarification Order does not cite any authority in support of its contention that the court can raise and rely on "necessary derivative legal considerations of the issues raised by the parties" in reversing an agency decision.

The Final Orders arises from cross motions for summary judgment filed by PHM and LMC. Notably, the ALC *denied* both summary judgement motions, yet instructed the parties to treat the Clarification Order as a final order for purposes of appeal and reversed DHEC's Decision. On its face, the procedural posture of this appeal confirms the fact that the ALC raised and ruled on *sua sponte* issues, without notice to PHM, LPNT and DHEC, the parties defending the Decision. Otherwise, in reversing the Decision, the ALC simply could have granted LMC's MSJ. As the ALC states in its Clarification Order: "*Neither party had advocated for the legal interpretation the Court ultimately decided was correct, and therefore, the Court denied both parties' motions for summary judgment. ... As a result, there are no further facts or legal arguments to develop and the Court's Order is essentially a final order*." Clarification Order, p. 2.a. (Emphasis added).

Of the issues the ALC identified as being before it,[28] the Order Denying Cross Motions only answered the first part of the issues it identified for PHM and agreed with PHM that the "Department has the statutory authority to amend the COPA at issue"[29] but failed to address any of the other issues it identified as being raised by the parties. Instead, the ALC identified and ruled on new issues, issues neither party had advocated for, without notice to the respondents.

[28] *See* Ex. 1, pp. 5-6.

[29] The Order found: "Since there appears to be no controversy over the Department's general authority to approve amendments to COPAs, there is no *issue* for the Court to resolve in this regard." *Id*., p. 7, footnote 5.

As is readily apparent from a review of the issues before the ALC and the ALC's summary of those issues, the issues are all procedural in nature (DHEC's process, its authority under the Act and Regs. and the scope of the Act) and the challenges do not go to the merits of DHEC's Decision.

The issues raised and decided *sua sponte* by the ALC are error of law and should be reversed.

A. The Proposed Transaction Is not the Kind of Transaction Regulated by the Act. The Order specifically finds:

> the Court further concludes because the acquisition of the Assets by PHM does *not qualify as the kind of transaction that is regulated under the COPA Act*, and the Assets are not part of the original cooperative agreement underlying the existing COPA, the Assets cannot be subsumed into the existing COPA.

Order, p. 7. The issue of whether the Proposed Transaction is of the kind regulated under the Act is simply not an issue LMC has raised to this Court nor is it an issue PHM had notice of prior to the issuance of the Order. To the extent the Court has determined that this issue has been raised by LMC, the Order misconstrues and misapprehends the issues raised by LMC in its Prehearing Statement and its "clarified issues" in the LMC Motion.

LMC raised the issue that the Proposed Transaction constituted a cooperative agreement under the Act because the APA is a "cooperative agreement" as defined by § 44-7-510(3) and PHM and LPNT had to submit a new application for a COPA.

> LMC submits that DHEC does not have the authority to "update" or "amend" the *ongoing conditions of COPA-97-01*, originally issued to BSH and RMH on October 6, 1997, in order to include PHM's proposed acquisition of LPNT's assets. By the plain language of the HCCA, PHM and LPNT are each "health care providers" under Section 44-7-510(5) and the proposed transaction identified in DHEC's decision represents a "cooperative agreement" under Section 44-7-510(3), such that if PHM (and/or Prisma Health) desires the benefits of a COPA to apply to the "acquisition . . . of assets," DHEC is required to review the proposed transaction in accordance with the requirements of the HCCA prior to any COPA benefits being afforded, to include the submission of an application by the applicants in accordance with Section 44-7-

> 530 and participation in the review process set forth in Sections 44-7-540, -550 and -560, as well as Chapters 2, 3 and 4 of Regulation 61-31.

LMC Prehearing Statement, pp. 2-4. LMC has never questioned whether the acquisition of assets by PHM, the single entity created and operating under the JOA, is regulated under the Act and Regs.[30]

The issue raised by LMC is that the Proposed Transaction constitutes a cooperative agreement[31] and a cooperative agreement cannot be used to amend the existing COPA. LMC simply argued that DHEC lacked the authority to approve the Proposed Transaction by way of modification additional conditions since the Proposed Transaction was a cooperative agreement.[32]

B. The Issue in this Case Is Whether an Amendment to the Existing COPA is Appropriate under the Facts of this Case. The Order concludes that there is no controversy regarding the Department's general authority to approve amendments to an existing COPA. [33] However, the Order *sua sponte* raises the issue of whether COPA-97-01 can be amended under the facts of this case. Again, this is not an issue raised by LMC and the Court lacks the statutory authority to raise and rule on it. In Ftnt. 5, the Order quotes LMC's argument and then restates the issue.

> LMC asserts PHM misapprehended the issue it raised in this case, which is better described as whether the Department "can approve a proposed transaction between Prisma Health/PHM and LifePoint Health by way of 'amendment' to the COPA

[30] As discussed above, in reaching this conclusion, the Court has exceeded its statutory authority, not given proper deference to the regulatory agency, and violated separation of powers by rewriting the Act.

[31] LMC argued that the Transaction is a cooperative agreement because it is between two parties (Prisma/PHM and LPNT) ("prior to any COPA benefits being afforded, to include the submission of an application by the applicants in accordance with Section 44-7-530 and participation in the review process set forth in Sections 44-7-540, -550 and -560"), not that the Transaction is not the type regulated by the COPA Act. *Id.*, p. 3).

[32] LMC also raised the issue that, "even if DHEC has the authority to update or amend the ongoing conditions as represented in DHEC's decision letter …", "another review" required DHEC to conduct the same review as outlined in the COPA Act §§ 44-7-530 to -570 and Reg. 61-31. *Id.,* pp. 3-4.

[33] LMC argued that the review process DHEC used in amending the COPA decision did not meet the requirements of Reg. 61-31, not that the Transaction was not regulated by the COPA Act.

> issued 23 years ago, rather than requiring Prisma Health/PHM and LifePoint Health to engage in the process set forth in the COPA Act and Regulation 61-31 to receive a COPA, starting with the submission of an application." LMC further argues that to the extent PHM's Motion seeks judgment as a matter of law that the Department, generally, has the authority to approve, monitor, and regulate an amendment to the COPA at issue, the Motion should be denied because the function of the court is not to give opinions on abstract matters but to decide actual controversies. In other words, *LMC argues the Department's general authority to amend a COPA or amend this COPA is not at issue; rather, the specific issue in this case is whether an amendment is appropriate under the facts of this case*.

Order, p. 7, ftnt. 5. (Emphasis added). The ALC's restatement of LMC "issue" misapprehends and is not in accord or consistent with LMC's Prehearing Statement issue or the "clarified" issue in the LMC Motion.

LMC's SJM alleges that the PHM SJM misapprehended the issues LMC raised in its Prehearing Statement and, for the sake of clarity, restated these issued as part of its Motion. LMC SJM, p. 11. Issue 2 questions DHEC's authority to amend COPA-97-01 "by adding conditions purportedly to approve *a new agreement* to acquire the assets of a competing health care provider in the same market without engaging in the review process set forth in the Act and Regulation 61-31."[34] LMC Motion, p. 11. (Emphasis added).

LMC's "clarified" issue adds nothing to LMC's Prehearing claim that DHEC does not have the authority to amend or add conditions to the existing COPA unless it undertakes the review process outlined in the Act and COPA Regs.[35] Nowhere in LMC's Prehearing Statement, LMC SJM or Petitioner's Reply to Respondent Prisma Health-Midlands in further Support of Cross-Motion for Summary Judgment (LMC Reply), does LMC raise or even suggest that the "facts of

[34] "Clarified" Issues 1 (whether the Transaction constitutes a cooperative agreement) and 3 (whether Reg. 61-31 § 508 is unconstitutional) do not address LMC's argument that DHEC lacks authority to amend COPA-97-01 or its conditions.

[35] *See* LMC Prehearing Statement, p. 3 ("to include the submission of an application by the applicants in accordance with Section 44-7-530 and participation Section 44-7-530 and participation in the review process set forth in Sections 44-7-540, -550 and -560, as well as Chapters 2, 3 and 4 of Regulation 61-31".)

this case" deprive DHEC of its admitted statutory authority to amend an existing COPA. The ALC exceeded its statutory authority and committed error of law when it *sua sponte* raised and ruled that amending the COPA is not appropriate in the facts of this case.

Additionally, having concluded that DHEC has the authority to amend a COPA and its conditions, concluding that the unidentified facts in the case prevent amendment goes to the merits of the Decision, an issue also not before the ALC.

C. The Proposed Transaction Completely Changed the Nature of the Original Cooperative Agreement. Again, this is not an issue raised by LMC and the Court lacks the statutory authority to raise and rule on it. In discussing whether the LPNT Assets could be subsumed under COPA-97-10 through the APA, the Order found the Proposed Transaction would:

- completely change the nature of the original cooperative agreement;
- profoundly alter the cooperative agreement between Baptist and Richland;
- engages in the pretense of adding "a few new conditions to regulate the inclusion of these distinctly different hospitals into the agreement;"[36]

materially changes the underlying justification for COPA approval and provides antitrust protection to a single buyer not otherwise having access to COPA protection; and

- the Proposed Transaction is outside the purposes of the Act.[37]

Order Denying Cross-Motions, p. 10. Also, the Order concluded: "PHM, thus cannot amend the COPA in the way it seeks . . . because extending the existing COPA's coverage over the assets through an amendment is inappropriate." *Id,,* p. 12.

[36] PHM has acted in good faith in seeking to amend the COPA-97-01 conditions to subsume the LPNT Assets and operate them under the JOA. LMC did not accused PHM and/or DHEC of engaging in an inadequate or insincere attempt during the review process.

[37] LMC did not even mention, much less discuss, the purposes of the COPA Act in its Prehearing Statement or in its Motion.

LMC has not raised any of these issues in this contested case—not in its Prehearing Statement—not in its "clarified issues" raised in its SJM.[38] Even scouring the LMC Prehearing Statement and the Motion's "clarified issues", LMC did not raise these issues. The ALC exceeded its statutory authority and committed error of law when it *sua sponte* raised and ruled that the Proposed Transaction changes the nature of the original COPA agreement.

D. The Existing COPA Is Only Applicable to the Assets Owned by the Sponsoring Organizations when the COPA Was Issued.[39] The Order Denying Cross-Motions found that "because … the Assets are not part of the original cooperative agreement underlying the existing COPA, the Assets cannot be subsumed into the existing COPA." Order, p. 7. Nowhere in LMC's Prehearing Statement or in the LMC MSJ does LMC remotely suggest that an issue before this Court is that since the LPNT Assets were not assets listed in the JOA, they cannot be operated under the JOA and be subject to amended COPA conditions. The ALC exceeded its statutory authority and committed error of law when it *sua sponte* raised and ruled that since the LPNT Assets are not part of the JOA approved by the COPA, the Assets cannot be subsumed under the COPA. As discussed further below, the COPA is not a static permit and allows PHM to acquire new assets to be covered by the COPA and sell assets that were covered by the COPA. PHM has not previously been given notice of this Court raised issue.

E. A Single Hospital Operating Pursuant to a COPA Approved JOA Cannot Acquire New Assets and Have the New Assets Protected under the Existing COPA. The Order found: "But the 'cooperative agreement' cannot be extended to achieve the objective of protecting a single

[38] As part of its Reply, PHM objected to the clarified issues and craved reference to the issues raised in LMC's Prehearing Statement. Respondent, Prisma Health – Midlands' Motion to Clarify and to Reconsider (Alter or Amend) Order Denying Cross Motion for Summary Judgment, p. 8, Ftnt. 9.

[39] As discussed below, the JOA and COPA are not static and frozen in time and provide for changes in the health care system through asset acquisition under the auspices of DHEC monitoring and regulation.

hospital entity's[40] expansion of its operations from antitrust challenges." Order Denying Cross-Motions, p. 12. Nowhere in LMC's Prehearing Statement or in the LMC SJM does LMC remotely suggest that it challenges DHEC's Decision because under the Act, PHM, as a single entity, cannot expand its operations through an asset purchase and obtain antitrust protection under COPA-97-01. Rather, LMC argues that because PHM entered into an agreement with LPNT to purchase assets, that was a new cooperative agreement and has to be reviewed pursuant to Chapter 3 and 4 of Reg. 61-31.[41]

The ALC exceeded its statutory authority and committed error of law when it *sua sponte* raised and ruled that "the 'cooperative agreement' cannot be extended to achieve the objective of protecting a single hospital entity's expansion of its operations from antitrust challenges."

IV. THE ALC COMMITTED ERROR LAW AND EXCEEDED ITS STATUTORY AUTHORITY IN REVERSING THE DECISION.

The ALC's Final Orders misapprehends the scope of Act and Regs., specifically including the authority a corporation formed and operated under a COPA and the authority DHEC has to monitor and regulate that corporation's conduct under the COPA and its conditions. The Final Orders frames the issues before it as concerning whether the Proposed Transaction requires a new COPA application or an amendment to COPA-97-01.[42] Order Denying Cross-Motions, p, 6. relied on two (2) legal conclusions in reversing the Decision. First, the ALC concluded that contrary to LMC's contention, the APA was not a cooperative agreement, thus no application was required. Second, the ALC concluded that contrary to the contentions of PHM and LPNT and the

[40] PHM is not a single hospital entity, but a single entity operating multiple hospitals within a health care system.

[41] As discussed below, the Order misapprehends the COPA Act.

[42] "[B]oth PHM's and LMC's motions concern whether the transaction in this case requires a new COPA, application or an amendment to the existing COPA, and, if an amendment is sufficient, what kind of review is the Department required to undertake when approving an amendment?"

Department's finding, PHM could not amend the COPA-97-01 to subsume the LPNT assets and DHEC erred in approving the change and updating the conditions accordingly. LMC took the position that if the APA did not require a new application and COPA, COPA-97-01 could be amended but not under the process—the review required a public review—used by DHEC.

In its Order Denying Cross-Motions, the ALC made, *inter alia*, the following conclusions of law: 1) the Department has general authority to approve amendments to COPAs;[43] 2) the "cooperative agreement" is the underlying document from which the Act's grant of immunity springs and a COPA cannot be issued without a supporting cooperative agreement;[44] 3) a single purchaser does not fall within the definition of cooperative agreement;[45] 4) PHM cannot amend COPA-97-01 to subsume the LPNT Assets "it purchased into the Richland Memorial Hospital and Baptist Hospital COPA";[46] 5) "the Proposed Transaction would add assets that are part of a distinctly different hospital system and … completely change the nature of the original cooperative agreement;"[47] 6) the addition of the new hospital system into Richland's and Baptist's COPA is outside the Act's purposes;[48] 7) adding the Assets would not be a modification to the JOA but a complete change to the Richland and Baptist "project";[49] 8) the Assets are outside the scope of COPA-97-01;[50] and 9) PHM's "holding" of COPA-97-01 does not "elevate its authority… in seeking modification of the COPA."[51]

The effect of the Final Orders is to treat COPA-97-01 as a static document only applicable to the assets Baptist and Richland brought to the table in 1996. Order Denying Cross Motions, p.

[43] Order Denying Cross Motions, p. 7, Ftnt. 5.
[44] *Id.,* p. 8.
[45] *Id.*, p. 9 and 10.
[46] *Id,* p. 10.
[47] *Id.*
[48] *Id.*
[49] *Id.,* 11.
[50] *Id.,* p. 12.
[51] *Id.*

12. The ALC has misapprehended the intent and findings of the General Assembly and committed error of law and exceeded its authority in reversing the Decision.

A. Purpose of the Act and Regs. The Order *sua sponte* found that the Proposed Transaction did not comply with the purposes of the Act. In *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), South Carolina's Supreme Court, in addressing an issue involving statutory interpretation, held that where the statutory terms are unambiguous, the court is unwilling to look outside the statutory terms to justify an assumption that the Legislature meant something different. *Smith*, 419 S.C. 548, 556. The Supreme Court deferred to the General Assembly's policy decisions and stated:

> The point remains—absent a constitutional prohibition, where the General Assembly has spoken and established policy, separation of powers demands that courts honor the legislative policy determination.

Id. 419 S.C. 559.

As discussed above, the General Assembly struck the balance among competing concerns (the benefits derived from allowing otherwise competing health care systems to consolidate into a single operating entity to operate for the benefit of South Carolinians versus any diminution in competition) and made the policy decision to allow the department to determine whether to issue a COPA initially and to monitor and regulate the COPA during its lifetime, including approving or denying any requests for modification through acquisition of assets. The authority granted by the Legislature includes the authority to monitor and make determinations regarding proposed modifications to the COPA or its conditions.

The Act is a comprehensive legislative scheme that allows health care providers to enter into cooperative agreements to supplant federal and state antitrust laws and to continue to operate under the agreement as long as the benefits from the cooperative agreement outweigh the

disadvantages from the potential adverse effects on competition. S.C. Code Ann. §§ 44-7-505,-520 and -560. The General Assembly made its public policy findings in support of its determination to grant state action protection through the Departments review, approval and ongoing regulation and monitoring of approved COPA's.

These findings are:

> (1) [T]he cost of improved health technology and scientific methods contributes significantly to the increasing cost of health care;
> (2) [C]ooperative agreements among hospitals [sic] health care purchasers, and other health care providers would foster improvements in the quality of health care for South Carolinians, moderate cost increases, improve access to needed services in rural areas, and enhance the likelihood that rural hospitals can remain open;
> (3) [F]ederal and state antitrust laws may prohibit or discourage cooperative agreements that are beneficial to South Carolinians and that such agreements should be encouraged; and
> (4) [C]ompetition as currently mandated by federal and state antitrust laws should be supplanted by a regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers when the benefits outweigh the disadvantages caused by their potential adverse effects on competition.

S.C. Code Ann. § 44-7-505. Further, the General Assembly stated its intent in adopting the Act:

> (A) It is the intent of this article to *require the State to provide direction, supervision, regulation, and control over approved cooperative agreements* through the department and the Attorney General. This state direction, supervision, regulation, and control of cooperative agreements will provide immunity for health care providers, health provider networks, or purchasers who participate in discussions or negotiations authorized by this article from civil liability and criminal prosecution under federal or state antitrust laws.
>
> (B) A health care provider, health provider network, or health care purchaser may negotiate, enter into, and *conduct business pursuant to a cooperative agreement* without being subject to damages, liability, or scrutiny under any state antitrust law. …

S.C. Code Ann. § 44-7-520. (Emphasis added).

Sections 44-7-505 and -520 clearly set for the General Assembly's two-pronged charge to DHEC—to approve or deny COPAs and to monitor and regulate the approved cooperative agreements during the life of the COPA. The ALC correctly concluded the approved cooperative

agreement is the foundation of the COPA and compliance with the cooperative agreement is the continued basis for immunity under a COPA. Order Denying Cross-Motions, p. 8.

The Order Denying Cross-Motions focused on the Act's regulation and control of "cooperative agreements" provisions in §§ 44-7-505 and 44-7-520. *Id.* The legislative findings in § 44-7-505 and intent in § 44-7-520 clearly envision cooperative agreements engage in future provision of health care services and encourage such agreements and operations. The Order misapprehends the legislative intent of the statutes. The conduct of business under an approved cooperative agreement, as long as the conduct conforms with the COPA and conditions, is immunized from challenge or scrutiny under federal antitrust laws under the plain and unambiguous language of § 44-7-520(5). *See also*, § 44-7-570.[52] Obviously, a COPA has to be in place before a health care provider can conduct business pursuant to a cooperative agreement. The General Assembly's clear and unambiguous findings and intent set forth in the Act specifically includes DHEC monitoring and regulating a single corporation,[53] PHM, conducting it business pursuant to the JOA approved by COPA-97-10, as long as the conduct complies with COPA-97-01 and its Conditions.[54]

B. COPA-97-01 was Issued to PHM, not Baptist and Richland, The ALC also misapprehended or misunderstood to whom COPA-97-01 was issued. The Order Denying Cross-Motions concluded that the COPA was Richland Memorial Hospital's and Baptist Hospital's COPA. *See* Order Denying Cross-Motions, p. 10 ("it purchased into the Richland Memorial Hospital and Baptist Hospital COPA" and the addition of the new hospital system into Richland's

[52] Section 44-7-570 unambiguously authorizes the Department to "charge an annual fee to cover the cost of monitoring and regulating these agreements, including certificates of public advantage."

[53] See below for additional discussion of a single entity operating under a COPA.

[54] As discussed below in 2.c, COPA-97-10 is not a static document.

and Baptist's COPA). To the contrary, COPA-97-01 was issued to BR Health System, Inc. ("This Certificate of Public Advantage, No. COPA-97-01, is issued to BR Health System, Inc. (the System) for the incorporation of a nonprofit entity to operate the hospitals of the Sponsoring Organizations as a single unit.") PHM Prehearing Statement, Ex. 2. The fact that Baptist and Richland are still extant is irrelevant to PMH's operations of the health care system under the JOA and COPA-97-01.

C. The Act and Regs. Authorizes PHM to Purchase Assets and DHEC to Modify the COPA Conditions to Accommodate the Assets under the COPA. The ALC misapprehended the provisions of §§ 44-7-520(B), -560 and -570[55] when it concluded that PHM's "holding" of COPA-97-01 does not "elevate its authority in seeking modifications of the COPA" (Order Denying Cross-Motions, p. 12) and PHM cannot amend COPA-07-01 to subsume the LPNT Assets (Order Denying Cross-Motions, p. 10.) Section 44-7-560(B) authorizes the Department to establish conditions "that are reasonably necessary to ensure that the *cooperative agreement and the activities engaged under it are consistent with this article*". (Emphasis added). PHM is the single entity operating under the JOA. The plain and ambiguous meaning of § 44-7-560(B) authorizes DHEC adopt conditions to the COPA that regulate the activities engaged in by PHM under the JOA.

Purchasing and selling assets are activities PHM is authorized to engage in under the JOA and the Nonprofit Act. The JOA provides, in pertinent part: "it is the intention of the Sponsoring Organizations to create a vertically, horizontally, and geographically integrated health care delivery system that is locally governed and accountable; … .;" PMH Motion to Clarify and to

[55] *See also*, Regs. 61-31, § 312 (providing in part conditions to: "improve efficiencies in the delivery of care, including improving economics of scale in the delivery of services; reduce or eliminate unnecessary duplication of services or technology; and to ensure that the activity is appropriately supervised and regulated.) and Chapter 5.

Reconsider, Ex. 14, p. 0092. PHM's Articles of Incorporation specifically provide that it is a public benefit corporation, which purposes include, "developing, operating and maintaining, a vertically, horizontally, and geographically integrated health care delivery system, and any other business or activities" and "providing hospital facilities and health care services for inpatient medical care of the sick and injured… ." *Id.,* PHM Articles, Ex. 14, p. 0175 The Nonprofit Act authorizes PHM to "to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property or any legal or equitable interest in property, wherever located." S.C. Code Ann. § 33-31-303(4). DHEC knew that PHM had the authority to purchase real and personal property when it approved PHM operating pursuant to the JOA.

D. The Act and Regs. do not Limit PHM's Operation of Assets under the JOA and COPA to the Assets Described in the JOA. The ALC misapprehends the Act and Regs. when it concluded that to be under the protection of the existing COPA, the "Assets had to be part of the original cooperative agreement underlying the existing COPA." Order Denying Cross-Motions, p. 7. S.C. Code Ann. Reg. 61-31 § 202 sets out the application requirements and is divided into four parts: a) questionnaire; b) narrative; c) programmatic documents and d) assurances. Reg. 61-31 § 202(a) identifies the parties and contact information; 202(b) proscribes the information required to be in the original COPA application;[56] c) requires the provision of the negotiated cooperative agreement; and d) requires eight assurances about how the cooperative agreement will be carries out.

There is not statutory language in either the Act or Regulations that require or suggest by necessary implication that it is the legislative intent for the JOA to be limited to operating only the assets owned by the Sponsoring Organizations at the time the COPA was approved and issued.

[56] As a review of § 202.b plainly demonstrated, there is no requirement that the health care facilities owned by the Sponsoring Organizations have to be listed

Such an interpretation of the Act and Regs. would reach an absurd result not warranted under any theory of statutory interpretation. *See State v. Cty. of Florence*, 406 S.C. 169, 173-74, 749 S.E.2d 516, 518 (2013); *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778, 782 (1964)

To the contrary, the Act and Regs. plainly contemplate modifications to agreements after a COPA is issued and require DHEC, in this case, no less than annually to monitor PHM's activities under the COPA.[57] Reg. 61-31 § 502 mandates what PHM must report to DHEC in its Annual Report. Including in the Annual Report must be "a detailed description of any changes, modifications, deviations, amendments, or other differences from the approved application; … ." Reg. 61-31 § 502(b)(2). Reading the Act and Regs. *in pari materi*, it is clear that PHM is not limited to operating only the assets referenced in the Sponsoring Organizations' application. *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 598, 757 S.E.2d 408, 416 (2014).

E. <u>The ACL Misapprehends what a COPA and its conditions are and DHEC's Authority with Regard to COPA-97-01 and its Conditions.</u> The General Assembly established DHEC as the state agency, not the ALC, to determine: 1) whether the Proposed Transaction is within PHM authority under the JOA and 2) whether, with the addition of the LPNT Assets, the benefits derived from the JOA still outweigh any diminution in competition in the service area.[58]

The Order also concludes that

> A change that falls outside the scope of an existing COPA is more evident when, as is the case here, the change is not requested by the parties to the cooperative agreement underlying the COPA. *PHM, thus cannot amend the COPA in the way it seeks.* Indeed, to find otherwise, would allow PHM to claim its acquisition of

[57] Reg. 61-31 § 502 requires that a COPA holder report at least every two years.

[58] LMC has not raised any issue regarding the merits of the DHEC Decision, just the process DHEC used in reaching the Decision.

> practically any assets fits within the spirit of the COPA between Richland Memorial Hospital and Baptist Hospital.

Order, p, 12. This finding misapprehends the COPA Act and Regulations. PHM cannot amend COPA-97-01. A COPA is the permission that DHEC grants under the Legislature's comprehensive scheme that allows health care providers to enter into a cooperative agreement to supplant federal and state antitrust laws and to continue to operate under the agreement as long as the benefits from the cooperative agreement outweigh the disadvantages from the potential adverse effects on competition. The permission is DHEC's state action determination for PMH to operate under the JOA as long as the operation comports with COPA-97-01 and its conditions.

DHEC, not PMH, has the right to make changes to the Conditions of COPA-97-01. *See* S.C. Code Ann. § The Conditions are the limitations that DHEC placed on PMH's operations, in order to assure that the benefits of PHM's operations under the JOA outweigh the disadvantages and the likely reduction in competition is reasonably necessary to achieve the benefits.

As discussed above, DHEC monitors and regulates the JOA to ensure that it remains "in compliance with the conditions of approval … ." Reg. 61-31 § 501. The final word is not what PHM "claims" but what DHEC approves. In this case, PHM requested that DHEC exercise its authority to amend the Conditions of COPA-97-01 to the LPNT Assets are subject to the COPA-97-01 Conditions and add whatever new conditions DHEC deemed necessary to assure compliance with the COPA. South Carolina Department of Health and Environmental Control's Response in Opposition to Lexington Medical Center's Cross-Motion for Summary Judgment, Ex. 1, p. 2. The Department is under no obligation to approve whatever claims PHM brings to it. DHEC is presumed to exercise it review of PHM's claims and make its decisions in good faith.[59]

[59] The Department carried out its good faith duties in this matter and must assuredly will in the future. <u>See</u>: *Howell v. Littlefield,* 211 S.C. 426, 468, 46 S.E. 2d 47,49 (1947) ("The presumption is always in favor of the correct performance of his duty by an officer ***.' … 'The presumption is that no official person, acting under oath of office,

S.C. Code Reg. 61-31 § 508 authorizes DHEC alone to make any decision regarding amendment of modification after a COPA is issued.

F. The ALC Misapprehends DHEC's Argument Regarding a Single-Buyer Acquisition and the Application of the Act and Regs. The Order also finds that "this case does not involve a merger between hospital systems, but rather an acquisition by PHM . . . . The Department's interpretation is consistent with the statute's clear exclusion of a single-buyer acquisition from qualifying as a cooperative agreement under the COPA Act." Order Denying Cross-Motions, p. 9. The Order misapprehends the Act and Regs. and DHEC's argument thereunder.

DHEC's argument is not directed at whether PHM, as a single entity operating pursuant to an approved JOA, can purchase the LPNT Assets subject to the Conditions of COPA-97-01. South Carolina Department of Health and Environmental Control's Response in Opposition to Lexington Medical Center's Cross-Motion for Summary Judgment, p. 3-4. Rather, DHEC's argument addresses LMC's contention that the APA between PHM and LPNT constitutes a cooperative agreement. *Id.* p. 3 ("Moreover, the proposed transaction is not a cooperative agreement as defined in the HCCA." The ALC misapprehended or overlooked DHEC's contention that "the operation of the purchased assets will be in the control of PHM, the entity that was formed as a result of the approved cooperative agreement between and among Baptist Healthcare System of South Carolina, Inc., and Richland Memorial Hospital, and the holder of COPA-97-01." *Id.*, p. 4. The

will do aught which is against his official duty to do, or will omit aught which his offical duty requires to be done.'" (Citations omitted.) *See also*: *S.C. Nat. Bank v. Florence Sporting Goods, Inc.*, 241 S.C. 110,115-16, 127 S.E.2d 199 (1962) "In the absence of any proof to the contrary, public officers are presumed to have properly discharged the duties of their offices and to have faithfully performed the duties with which they are charged." (Citations omitted).

Court's conclusion misapprehends that fact that PHM, in purchasing the LPNT Assets, will be acting pursuant to its authority to acquire real property under the JOA approved by DHEC.[60]

G. The JOA Is a Living Document Intended to Provide PHM Flexibility in Developing a Vertically and Horizontally Integrated Health System and Respond to Changes[61] in the Provision of Health Care under DHEC's Monitoring and Regulation. The Order misapprehends or misconstrues the JOA and the relationship between the Agreement and COPA-97-1 and Conditions the Act and Regs. under which DHEC is required to monitor and regulate PHM.[62] The Order legislates that a COPA is a stagnant determination based on the original application and cannot later be modified to add additional assets. Order Denying Cross-Motions, p. 7. ("not part of the original cooperative agreement underlying the existing COPA").

The JOA is the formal business arrangement approved by DHEC as part of COPA-97-01. To be in compliance with the existing COPA, PHM must continue to operate under it, as discussed further below. The Act and Regs. clearly contemplate Department amendments to Conditions after issuance of a COPA in accord with the legislative findings and intent of the Act and Regs. As noted above, DHEC is required to monitor as regulate a COPA as long as it is in effect. S.C. Code Ann. § 44070570(A).

In adopting the comprehensive scheme to approve, modify and regulate cooperative agreements and their compliance with COPAs, the General Assembly clearly intended that the Conditions of a COPA could be

[60] See discussion above below regarding PHM's authority to act under the JOA, as approved by DHEC in COPA-97-01.

[61] The legislative findings in S.C. Code Ann. § 505 demonstrate the General Assembly's awareness of and understanding that the provision of health care is changing and advancing. Section 505(1) (increasing cost of health care); 505(2) (improvements in quality of care do not happen overnight, moderating cost increases).

[62] It must be borne in mind that DHEC has that sole authority pursuant to § 44-7-570(A) to monitor and regulate PHM.

amended after it is issued and in effect. The very definition of "Certificate of Public Advantage" anticipates that a COPA can be modified by the Department after its issuance.[63]

The fact that the Legislature did not intend to restrict PHM or any COPA holder from operating an ongoing health care system acquiring or selling assets, adding or dropping services or making other operating changes in its provision of health care is clearly demonstrated by § 44-7-570(B). It mandates that the Department "actively monitor and regulate the activities undertaken pursuant to agreements approved under this article and *may request information whenever necessary to ensure that the agreements remain in compliance with the conditions of approval*." (Emphasis added). It is self-evident and this Court can take judicial notice of the fact that that there are major advances in the provision of health care, including the methods of and places for delivery of health care services. Pursuant to the General Assembly's intent in adopting the Act, as a health system providing health services to residents of the Midlands Service Area, under the auspices of an approved JOA, PHM must have to ability to change the nature and location of the services its provide, subject to COPA-97-01 and its Conditions as long as the COPA is in effect. To reach any other conclusion would be an absurd result opposed to the Act's findings. *See*, S.C. Code Ann. § 44-7-505.

This is further evidenced by the fact that there have already been changes in the hospitals covered by the existing COPA. When COPA-97-01 was issued in 1997, there were three hospitals that were to be operated by PHM—PHM Baptist, PHM Richland and Baptist Easley. Now, PHM operates PHM Baptist, PHM Parkridge, and PHM Richland.[64] The Department issued a CON to PHM to build Parkridge. In 2010, the Department issued an exemption[65] for the Greenville Hospital System to purchase 50% of Baptist Easley and specifically determined that the sale did not implicate COPA-97-01. Respondent, Prisma Health-Midlands'

[63] Modification" is not defined in the COPA Act but its ordinary definition is "a change to something: an alteration." Black's Law Dictionary, Eighth Edition, p. 1025 (2004).

[64] PHM also operates PHM Tuomey, which PHM acquired in 2017 as part of the United States Department of Justice's settlement of *U.S. ex rel. Drakeford v. Tuomey,* 792 F.3d 364 (2015).

[65] The exemption was issues pursuant to the Certificate of Need Regulations, Reg. 61-15 § 104.

Motions to Clarify and to Reconsider (Alter or Amend) Order Denying Cross-Motions for Summary Judgment, Ex. 13. ("In the future, please do not hesitate to contact the Department … regarding projects with potential COPA implications."

The import of the ALC's conclusion is that DHEC's statutory authority to amend conditions is declared by the ALC to be limited to: (a) modifications only during the application process; (b) preclusion of any acquisition of additional assets[66]; and (c) prohibiting DHEC from approving additional assets under any existing COPA such that PHM cannot ever acquire additional assets.

H. Section 508 authorizes the Department, not the ALC, to Determine Whether the Proposed Modification to the Cooperative Agreement Changes the Reasons for the COPA. "PHM's amendment would add assets which are part of a distinctly different hospital system and therefore completely change the nature of the original cooperative agreement." Order Denying Cross-Motions, p. 10. Ftnt. 8.[67]

The Order misapprehends S.C. Code Reg. § 508. As its title states, Section 508 deals with "changes after receipt of a certificate of public advantage." The section authorizes "the Department [to] decide whether or not the amendment is substantial and thereby requires another review." *See* Reg. 61-31 § 508. There are three reasons the Department conducts another review of the agreement under § 508 if it determines the change is substantial: 1) the change materially

[66] Taken to its logical conclusion, it PHM is limited to the hospitals that it acquired to operate under COPA-97-01, it is also limited to the personal property such as medical equipment used for diagnosis and treatment. That flies totally in the face of the legislative purpose of DHEC's approving cooperative agreements when the benefit the health and well-being of our citizens. *See* § 44-7-505(1) ("the cost of improved health technology and scientific methods contributes significantly to the increasing cost of health care"). Obviously, PHM is seeking DHEC's approval to maintain the state action protection under COPA-97-01. *See* discussion above regarding legislative intent.

[67] As discussed above, LMC did not contest the merits of the Decision, namely that it was beyond the Department's authority to approve the acquisition of a "distinctly different hospital system" under the JOA and COPA 97-01 and Conditions, or that the Decision was arbitrary, capricious or clearly contrary to law. Thus, this issue is not properly before this Court because it was raised by the ALC *sua sponte.*

changes the reason for approval; 2) the change might materially impact the benefits or disadvantages to the community; or 3), the service area is different from that in the Application. *Id.* LMC did not challenge the Department's Decision on any

There is no limitation of the subject of the amendment, *i.e.*, assets from another hospital system. There is no language generally in the Act, Reg. 61-31 or specifically in § 508 that prohibits the acquisition by PHM, as a COPA holder, from purchasing part of the assets of a different hospital system. DHEC must review the effect of the assets being purchased on competition and whether the acquisition changes the reason for approval.[68] The fact that the Assets here are from another hospital system is subject to DHEC's determination as to whether the likely benefits resulting from PHM's operation of the LPNT Assets under the JOA still outweigh the likely disadvantages and the reduction in competition likely to result from the addition of the Assets is reasonably necessary to obtain the benefits from the addition of the Assets.[69]

The ALC further misapprehends the fact that the "reasons for approval" are different than changing the "nature of the original cooperative agreement." Further, the Order misapprehends the fact that § 508 provides that not even the "addition or deletion of a party to the agreement does not necessarily constitute a substantial change unless the Department believes that the above mentioned criteria will occur." DHEC is authorized to approve changes to an agreement even if a party, such as LPNT, were added to the JOA, as long as the Department determined that benefits

[68] It is uncontested that the Midlands Service Area identified in the Application and approved with the COPA, has not changes.

[69] *See* Reg. 61-31 § 508. There are three reasons the Department conducts another review of the agreement under § 508 if it determines the change is substantial: 1) the change materially changes the reason for approval; 2) the change might materially impact the benefits or disadvantages to the community; or 3), the service area is different from that in the Application. LMC did not challenge the Department's Decision on any of these three reasons. Yet again, LMC only challenged the process DHEC employed in rendering its Decision.

resulting from PHM's operation of the LPNT Assets under the JOA still outweigh the likely disadvantages.

The ALC simply made a naked conclusion, not based on evidence in the record,[70] that the ACT and Regs. did not allow an existing COPA holder to purchase the assets of a competing hospital system and the acquisition changed the nature of the original cooperative agreement. This is error of law and exceeds the ALC's statutory authority.

CONCLUSION

For the reasons in this Initial Brief, Appellant Respondent PHM respectfully requests this Court overrule the ALC's Final Orders, and affirm the Department's Decision as a matter of law.

Respectfully submitted,

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Columbia, South Carolina

[70] Obviously, there is no evidence in the record to support the ALC's conclusion because it is not an issue in the contested case.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2020-001610
Case No. 20-ALJ-07-0107-CC

Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, ... Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control, Prisma Health-Midlands, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center, ... Respondents,

OF WHICH Prisma Health-Midlands is the ..... Appellant/Respondent,

AND
Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are ..... Respondents/Appellants.

CERTIFICATE OF SERVICE

I, Donna O'Daniel, an employee of Burr & Forman LLP, hereby certifies that a true and correct copy of the **Appellant-Respondent Prisma Health-Midlands' Initial Brief** was served upon counsel for the Respondents in the above-captioned matter, via email at the email addresses listed below, and by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, this the 8th day of January, 2021, addressed as follows:

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