

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Jan 12 2021

Appellate Case No. 2020-001610

SC Court of Appeals

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 REPLY TO
PETITIONER/RESPONDENT'S RETURN TO MOTIONS TO CERTIFY CASE FOR
REVIEW BY THE SUPREME COURT AND TO EXPEDITE THE PROCEEDING**

Pursuant to Rule 240(E), SCACR, Appellant-Respondent, Prisma Health–Midlands (“PHM”) submits this Reply in Response to Petitioner/Respondent, Lexington County Health Services District, Inc., d/b/a Lexington Medical Center (“LMC”) Return to Motions to Certify Case for Review by the Supreme Court and to Expedite the Proceeding (“LMC Return”) opposing the same, filed on Friday, January 8, 2021.¹

PHM relies on its Motions to Certify Case for Review by the Supreme Court and to

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Expedite the Proceeding and Memoranda in Support of Motions (“PHM Motion”). To the extent there is a need to respond to the LMC Return, PHM responds *seriatim* to LMC’s argument.

1. Procedural Background.² LMC erroneously states that the DHEC February 28, 2020 decision (“Decision”) “amended the ongoing conditions of an existing COPA issued to Baptist Healthcare System of South Carolina, Inc. (BHS), and Richland Memorial Hospital (RMH), on October 6, 1997 (“COPA-97-01”). The COPA “[was] issued to BR Health System, Inc. (the System)” the single nonprofit entity created by the cooperative agreement—the Joint Operating Agreement (“JOA”)—not to BHS and RMH, as LMC contends. *See* Ex. 3 to PHM’s Motion.

Respondents-Appellants Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield (collectively, “Providence”) and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center (“Kershaw”) (collectively “LPNT”) filed their return to PHM’s Motion, supporting the Motion, on January 8, 2021.

2. Regulatory and Factual Background. LMC’s Return to Motions to Certify case for Review by the Supreme Court and To Expedite the Proceeding³ (“LMC’s Return”) simply outlines the statutory and regulatory process DHEC used in reviewing the COPA application Baptist and Richland submitted in 1996 and DHEC’s subsequent monitoring and regulation of COPA-97-01. PHM does not agree with LMC’s conclusion that PHM’s Memorandum engages in revisionist history and craves reference to the exhibits attached to PHM’s Motion. PHM did not submit an application for a new COPA in this case. PHM does not and has not disputed any part of the

² Whether or not the City of Columbia, Kershaw County, and Fairfield County and Fairfield Memorial Hospital initially challenged the Decision is irrelevant. The fact is they are not parties to this contested case.

³ Not the designation of PHM’s Filing.

regulatory review process DHEC used in approving COPA-1997-01—a fact known to LMC. Again, the COPA was issued to the System—through name change, not PHM. *See* Ex. 3, PHM’s Motion.

Several of LMC’s “factual” recitations are, in fact, argument on the merits of its appeal and not relevant to whether this Court should grant PHM’s Motion. For example, LMC contends that DHEC did not conduct the proper type review—*i.e.*, use the same regulatory process required an initial COPA application (not an issue reached by the ALC). LMC’s Response also argues DHEC’s request to admit regarding its determination that the likely benefits of the Proposed Transaction outweigh the likely disadvantages. LMC’s Request to Admit requested that DHEC admit that its *Decision* did not find that the likely benefits do not outweigh the disadvantages, and did not request an admission that COPA-97-01 did not make such finding.

3. Grounds for Certification.

a. *Sua Sponte Rulings by the ALC.* LMC only argues the merits, quoting from the Clarification Order that the issues ruled on by the ALC arose from its consideration of the issues that the parties admittedly raised. Just as the ALC cited no authority (case law or statutory) in support of its contention, neither did LMC.

b. *LMC’s Vagueness Challenge to Reg. 61-31 § 508.* LMC purports not to understand why PHM, as part of its Certification Motion, asked the Court to rule on the constitutionality of its challenge to the constitutionality of Reg. 61-31 § 508.⁴ PHM has clearly asked this Court to grant the PHM MSJ, which includes deciding whether § 508 is unconstitutionally vague—something only this Court has the jurisdiction to do.

⁴ PHM, DHEC and LPNT each contend that LMC’s challenge was a facial one. LMC’s contended in its Cross-Motion for Summary Judgment that it was “as applied.”

c. *Acquisition and Operation of New Assets Under an Existing COPA.*⁵ LMC's Prehearing Statement did not challenge the merits of the Decision, *i.e.* how many emergency departments PHM⁶ would have in Richland County versus the entire COPA service area.⁷

2. Grounds for Expedited Treatment. LMC complains that PHM took too long to file its Motion. The Court can take judicial notice that: 1) there were only seven (7) business days between December 9 and December 29, with December 24, through 28 being State holidays or weekends.⁸

PHM did not propose a schedule to the Court but, made the Court aware of the novel issues of significant public importance and the need for expedited treatment, PHM respectfully believes that it is up to the Court to set the briefing schedule and hearing dates. LMC argues that just because COVID-19 affects all hospitals and people, not just PHM, COVID-19 is not a reason to expedite.⁹ Notably, LMC¹⁰ did not challenge the fact that PHM is the safety net health system for the Midlands Region

On the one hand, LMC argues that while the appeal issues are important, they are not so important that the Court of Appeals should hear the matter first and LMC's time to brief and argue

⁵ PHM will not answer the hyperbolic language in this section, particularly in light of the affidavit of Mr. Isley and Mr. Bundy.

⁶ The Decision includes conditions. Condition ¶ 16 requires PHM to provide a specific plan for closing or reducing the number of facilities or for transfer of services, which requirement is in addition to the Certificate of Need requirements in S.C. Code §§ 44-7-110 *et seq.* LMC can challenge. PHM Motion Ex. 3.

⁷ PHM did not put in all of the exhibits to the various pleadings it provided as exhibits. PHM only provided those exhibits it felt were relevant to its Motion.

⁸ The Clarification Order was filed on the afternoon December 7 and the notice of appeal was filed before noon on December 9, 2020.

⁹ LMC urges the Court to disregard the "recently adopted" PHM Indigent Care financial policy. The PHM Indigent Care Policy is an added condition, ¶ 17, to the Conditions in the Decision. There is absolutely no rule that prohibits PHM from submitting an affidavit and attaching documents to it for purposes of these Motions.

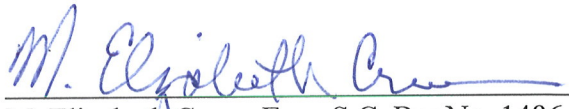
¹⁰ It did not even mention that LMC is one of the area hospitals sending COVID-19 patients its can't treat (while still sending trauma and other patients to PHM Richland).

the case not be “severely curtailed. As opposed to having this Court timely decide the pending questions.

Finally, LMC, echoing the ALC, alleges that PHM should not have agreed to a March 2 date, for LPNT to terminate the APA if it so chooses and the date should have been extended. Simply put, parties to an agreement have to agree to a term. A year, March 2, 2021 was the longest closing date PHM could negotiate.

CONCLUSION

PHM respectfully requests that its Motion be granted and that the Court set a scheduling order.



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SC Court of Appeals

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’ Reply to Petitioner/Respondent’s Return to Motions to Certify Case for Review by the Supreme Court and to Expedite the Proceedings 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 12th day of January, 2021, addressed as follows:

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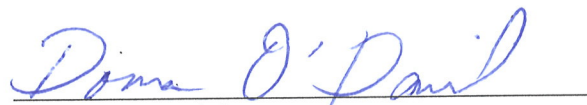
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Dated: January 12, 2021
Columbia, SC

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January 12, 2021

Via Hand Delivery and Email (supctfilings@sccourts.org)

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

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SC Court of Appeals

**Re: Lexington County Health v. SCDHEC, Prisma Health – Midlands, et al.
Appellate Case No. 2020-001610**

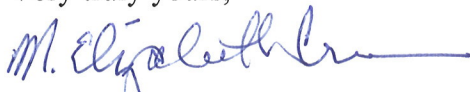
Dear Mr. Shearouse:

On behalf of Prisma Health-Midlands, enclosed for filing with the Court is the original and one copy of Appellant/Respondent Prisma Health-Midlands' Reply to Petitioner/Respondent's Return to Motions to Certify Case for Review by the Supreme Court and to Expedite the Proceeding.

Please provide a file-stamped copy of the above-stated document in the enclosed self-addressed stamped envelope.

By copy of this letter, we are providing the Court of Appeals, and service all counsel of record, with a copy of the same.

Very truly yours,


M. Elizabeth Crum

MEC/dmo
Enclosures

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
January 12, 2021
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cc: **All w/enclosure**

The Honorable Jenny Abbott Kitchings, Clerk (*w/encl. – via U.S. Mail and email to ctappfilings@sccourts.org*)

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