THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

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APPELLATE CASE NO. 2020-001610
ADMINISTRATIVE LAW COURT CASE NO: 20-ALJ-07-0108-CC

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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.

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# INITIAL REPLY BRIEF OF THE RESPONDENTS-APPELLANTS

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## INTRODUCTION

In this Reply Brief, the Respondents-Appellants Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, and Providence Health Fairfield ("Providence") and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center ("Kershaw") respond to the arguments asserted in the brief of the Respondent Department of Health and Environmental Control ("Department") and the brief of the Respondent Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC"). In offering this Reply to selected arguments of the Respondents, Providence and Kershaw also incorporate and reiterate all of their arguments on all of the issues as set forth in their main brief.

## ARGUMENT

### A. Response to the Department's Brief

In its main brief, the Respondent Department reiterates and incorporates the positions it asserted before the Administrative Law Court (ALC) in support of the summary judgment motion of the Appellant Prisma Health-Midlands (PHM) and in opposition to the Respondent LMC's cross motion for summary judgment. Throughout this proceeding, the Department has contended that its interpretation and application of the Health Care Cooperation Act, found at S.C. Code Ann. §§ 44-7-500, *et seq.* (2018), and the COPA Regulations, found at S.C. Code Ann. Regs. 61-31 (2011), to PHM's post transaction operation of certain hospital facilities to be acquired from Providence and Kershaw is reasonable, consistent with the law and entitled to deference. (**DHEC Response in Support of PHM's Motion for Summary Judgment, R., pp. ___**; **DHEC Response in Opposition to LMC Motion for Summary Judgment, R. pp ____; Transcript of Motions Hearing, pp. 74:12-83:4; 163:22-165:11).** Providence and Kershaw

agree with the positions stated by the Department in its main brief in this case and support its request that its decision to amend PHM's COPA be upheld.

B. Reply to LMC's Brief

In their main brief, Providence and Kershaw address the numerous reasons why the ALC erred in concluding that the Department lacked the authority to modify PHM's existing COPA to include the post-transaction operation of the purchased facilities.[1] Among the reasons argued by Providence and Kershaw is the failure of the ALC to give deference to the Department's reasonable interpretation of its own regulations as allowing such modification.[2] (Brief of the Respondents-Appellants, Issue II, pp. 8-10). In addition to addressing the merits of the COPA amendment issue, [3] LMC asserts in its brief that Providence and Kershaw failed to preserve the deference issue because allegedly the issue was not raised on reconsideration. (LMC Brief, Issue III, pp. 23-25). This argument lacks merit and is not supported by the record.

The issue of the applicability of the deference doctrine was raised and argued to the ALC by PHM and by the Department in their motions filings. (See, e.g., **PHM Motion for Summary Judgment, pp. 20-21; Department's Response in Support of PHM Motion for Summary Judgment, pp. 9-11**). Providence and Kershaw, who were granted limited leave to intervene late

[1] Providence and Kershaw also dispute the contention of the Respondent LMC that a new COPA application was required in order for PHM to gain protection from antitrust actions under the COPA Act. (**Transcript of Motions Hearing, 106:22-107:108:8**). The ALC found as a matter of law that the transaction in this case, which concerns a simple purchase of assets by PHM with no further involvement of the sellers in the control and operation of the facilities, does not involve a new cooperative agreement for which a new COPA is required under the COPA Act. (**Order, p. 7**). Providence and Kershaw agree with this conclusion of the ALC.

[2] The deference doctrine is a legal tenet that is required to be applied by the ALC and appellate courts in reviewing the construction by an agency of its own regulations. *See, e.g., Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014).

[3] To the extent that LMC argues on the merits in favor of the ALC's conclusion, Providence and Kershaw assert and incorporate their opposing arguments in this Reply brief.

in this case, made no written filings with regard to summary judgment but did appear at the ALC hearing on the cross motions for summary judgment. (**Transcript of Motions Hearing, 102:16-20**).

At the motions hearing, counsel for PHM and Providence and Kershaw made extensive arguments to the ALC regarding the application of the deference doctrine to the Department's decision to modify PHM's existing COPA to add conditions to ensure that PHM's post-transaction operation of the acquired facilities met all of the requirements of the original COPA, including the requirement that the benefits of PHM's operation of the additional facilities outweighed any detriment from the reduced competition.[4] (**Transcript of Motions Hearing, pp. 71:9-74:9; 99:2-101:21;112:14-113:168:16-169:8**). In some of the passages cited, the ALC actively engages counsel in discussions concerning the deference doctrine and its applicability to the Department's interpretation of Regulation 61-31 in this case. There can be no dispute that this issue was raised and argued before the ALC.

In its Order, the ALC specifically acknowledged that the parties raised the reasonableness of the Department's interpretation of Regulation 61-31, § 508 but declined to rule on the issue because of its own findings and interpretations of the COPA Act and COPA Regulations. (**Order Denying Motions for Summary Judgment, pp. 12-13**)("Furthermore, because extending the existing COPA's coverage over the Assets through an amendment is inappropriate, I do not reach whether the Department's interpretation and application of "another review" under §508 is correct as a matter of law. I also decline to engage in an analysis of "another review" that would merely be an exercise in dicta."). Because the ALC did not overlook or misapprehend the issue,

[4] As clarified by counsel for the Department in answer to questions from the ALC, in its review of the request by PHM to modify the original COPA conditions, the Department considered the advantages and disadvantages of the addition of the new facilities to PHM's system. (**Transcript of Motions Hearing, p. 27:3-12; 75:17-77:3**).

but, in fact, acknowledged and addressed it by finding that a ruling was unnecessary, Providence and Kershaw did not specifically request in their Motion to Alter or Amend (Reconsider) that the ALC engage in "an exercise in dicta" and determine whether the Department's decision that it had the authority under § 508 to review and modify the conditions to PHM's original COPA is reasonable and, thus, entitled to deference.[5] Nevertheless, in its Clarification Order, the ALC revisited and reiterated its conclusion on this issue by once again refusing to determine whether the Department's interpretation of § 508 is reasonable. (Clarification Order, p. 6)("As the Court explained in its Order, it did not address these issues because, after having concluded that an amendment under §508 was not appropriate in this case, the Court did not need to make a determination regarding those issues. The Court continues to decline to engage in an analysis that would merely be an exercise in dicta.").

Providence and Kershaw, along with PHM and the Department, raised and argued the issue before the ALC at the hearing on the Cross Motions for Summary Judgment. Clearly, the ALC had knowledge of, and the opportunity to rule on, the merits of the deference issue but it specifically and repeatedly chose not to for the reasons stated in both its Orders. In essence, the ALC's ruling on the deference issue was that it was not relevant to disposition of the case, given the ALC's analysis of the COPA Act and PHM's request.

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[5] In their Motion to Alter or Amend (Reconsider), Providence and Kershaw state "In moving for reconsideration, the LifePoint Respondents address and seek correction of those issues and matters which the Court misapprehended or failed to address adequately in its Order…Thus, the LifePoint Respondents preserve the right to appeal on all available grounds, but do not raise herein those issues which the Court considered or addressed in its Order but which all of the Respondents, including the LifePoint Respondents, contend were decided incorrectly. In that regard, the LifePoint Respondents *reassert and preserve all arguments in favor of granting PHM's Motion for Summary Judgment and denying LMC's Cross-Motion for Summary Judgment as set forth in all of the pleadings filed by all of the Respondents."* (**Providence/Kershaw Motion to Alter or Amend, p. 1, n. 1**)(Emphasis added).

Furthermore, in its Motion to Alter or Amend (Reconsider), Providence and Kershaw preserved and reasserted all of its arguments raised before the ALC, including the reasonableness of the Department's interpretation of its own regulations and the deference according such interpretation. Providence and Kershaw were not required to continually propound successive motions to reconsider in light of the ALC's acknowledgement of the issue in its original Order and especially in light of the ALC's continued refusal in its Clarification Order to rule on an issue it considered to be dicta.[6] The ALC's failure to correctly apply the deference doctrine to the Department's interpretation of Regulation 61-31, § 508 has been preserved and is before this Court.[7]

[6] In *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 25, 602 S.E.2d 772, 780-781 (2004), the South Carolina Supreme Court addressed and sought to clarify the case law surrounding issue preservation through the use of motions to reconsider. In summarizing its discussion of this issue, the Court noted: "If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." In Footnote 5 to this statement, the Court specifically held that "[w]e are presented in this case with a party which believed a Rule 59(e) motion was necessary and appropriate. We do not mean to imply by our emphasis on the potential importance of such a motion that one is necessary or desirable in every case. An aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to simply file and serve a timely notice of appeal." *Id.*

[7] In support of its claim that Providence and Kershaw failed to preserve the issue of deference because it was not specifically raised in a motion to reconsider, LMC cites the 2019 Revised Notes to Rule 29(d) of the Administrative Law Court Rules of Procedure. The notes indicate that "[i]ssues raised in the contested case proceedings but not *addressed* in the written order are no longer deemed denied, but must be raised by the parties in a motion for reconsideration in order to be preserved for appeal." (Emphasis added). In this case, as noted above, the issue of deference was both raised by the parties and addressed by the ALC in both its Orders.

## CONCLUSION

For the reasons discussed above, Respondents-Appellants respectfully request that this Court reverse the Final Orders of the ALC and uphold the decision of the Department to amend the conditions of COPA-97-01 to cover the operation of the Providence and Kershaw facilities by the Appellant-Respondent Prisma Health-Midlands.

Respectfully submitted,

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February 26, 2021
Columbia, South Carolina

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Lexington County Health Services
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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
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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.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on February 26, 2021 he caused a copy of the foregoing **INITIAL REPLY BRIEF OF THE RESPONDENTS-APPELLANTS** to be served upon all counsel of record via electronic mail to each counsel's individual AIS email address pursuant to SC Supreme Court COVID Order 2020-05-29-02 addressed as follows:

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February 26, 2021



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**Re: Appellate Case No: 2020-001610**
***Lexington County Health Services District, Inc. d/b/a Lexington Medical Center v. South Carolina Department of Health and Environmental Control, et al.***

Dear Ms. Kitchings:

Enclosed for filing in connection with the above, please find the *Initial Reply Brief of Respondents-Appellants.*

By copy of this letter and pursuant to the Court's standing Order, we are serving copies of same to all counsel of record via email.

With best regards, I am

Sincerely,

David B. Summer, Jr.

Enclosure

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