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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 – MIDLANDS' FINAL REPLY TO PETITIONER/RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

REPLY ARGUMENT

Introduction

In 1997 DHEC approved the cooperative agreement,[1] the Joint Operating Agreement ("JOA"), under which the Prisma Health-Midlands' ("PHM") health system ("System") is required to operate and issued COPA-97-01, subject to conditions[2] PHM must comply with to maintain the COPA. PHM still operates pursuant to the JOA. There is no dispute that the Department of Health and Environmental Control ("DHEC" or "Department") has actively supervised and regulated PHM's performance under COPA-97-01 over the years.[3]

In 1997, when COPA-97-01 was issued to the PHM System, the hospitals in the System consisted of BHS, RMH and Easley Baptist.[4] Over the years, under DHEC's supervision and regulation,[5] the System has evolved to include BHS, RMH, Parkridge (added 2010) and Tuomey[6] (added 2017). In 2009, PHM was granted a CON exemption for the change of ownership for Easley Baptist and sufficiently addressed the Departments questions regarding the implications to the COPA conditions. R. pp. 784 – 793. In 2019, PHM, under DHEC's supervision, affiliated with

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[1] *See*: S.C. Code § 44-7-510(2) defining cooperative agreement.

[2] *See*: S.C. Code Ann. § 44-7-560(B) authorizing DHEC to place operating conditions on a COPA. The 1997 decision letter approving the COPA originally contained 25 conditions. In 2003, DHEC eliminated the conditions that had been fulfilled and consolidated others so that PHM has been operating under 13 conditions since 2003.

[3] The Federal Trade Commission ("FTC") study—"A Health Check of COPAs. Assessing the Certificate of Public Advantage in Healthcare Markets.—was conducted from 1999 to 2008. COPA-97-01 and DHEC's administration of it was one of the COPAs reviewed. As the FTC study found, inpatient price increases at PHM have been "statistically indistinguishable from control hospitals." https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage. The study was presented at the FTC's June 18, 2019 meeting.

[4] R. pp. 177 - 178. ((COPA-1997-01 and Conditions) and R. pp. 779 – 782.

[5] S.C. Code Ann. Reg. 61-31 § 501 requires DHEC to supervise and regulate COPA-97-01.

[6] Tuomey was purchased from Tuomey Healthcare System, Inc.

GHS to form Prisma. PHM's system evolution under COPA-97-01 over the last 23 plus years is consistent with the evolution in health care in this State and with the purposes of the COPA Act.

PHM adopts by reference the arguments contained in its Initial Brief and submits those arguments in response to any matters contained in LMC's Initial Brief not otherwise replied to herein.

A. REPLY TO LMC'S INITIAL BRIEF.

I. STANDARD OF REVIEW.

LMC relies on S.C. Code Ann. § 1-23-610(B)(e) and asserts that the ALC's decision should be upheld because it is supported by the substantial evidence in the record, in spite of the fact that, throughout its brief, it does not cite to "evidence" in support of the Final Orders. As the ALC concluded and no party appealed, there are no disputes of material fact in this matter. Rather, the central issue in this matter is whether the ALC or DHEC, as a matter of law, correctly interpreted the Act and Regulations. This case is properly reviewed under S.C. Code Ann. § 1-23-610(B)(a) and is a *de novo* review.

II. DHEC'S REVIEW OF THE PHM REQUEST WAS THROUGH AND ITS DECISION INDEPENDENTLY RENDERED IN GOOD FAITH.

LMC's characterization of PHM's December 13, 2019 Letter is inaccurate and misleading. For example, LMC stated that "Prisma Health could benefit from the COPA" and that "little to no review or modification by DHEC of the existing COPA would likely be needed."[7] Respondent LMC Br. 10. In reality, PHM notified the Department it intended to purchase LPNT's three

[7] LMC argues that PHM intended to "pillage" lucrative services from Providence downtown to benefit its Midlands operation. Respondent LMC Br. 10. As demonstrated in the December 13 Letter, PHM, among other things, intended to enhance quality (Reg. 61-31 § 402.1.a), increase cost-efficiency (§ 402.1.c), improve health care provider resources (§ 402.1.d) and eliminate and reduce duplication of health care resources (§ 402.1.e). R. p. 615.

hospitals in Richland and Kershaw County,[8] PHM believed that once purchased the facilities would be subject to the COPA Conditions, and PHM asked DHEC, after evaluating the consequences of the potential purchase to acknowledge that the hospitals would be subject to the COPA Conditions and monitored by DHEC. Instead of saying that the PHM would benefit from the COPA, PHM explained extensively the benefits to South Carolinians arising from the addition of the hospitals to PHM—namely, increased quality, improved access to care and lower costs. PHM craves reference to its letter dated December 13, 2019, R. p. 615.

LMC complains that the Decision is devoid of any detail regarding its review. Simply put, there is no requirement in the Act or Regs that the Decision details either what DHEC reviewed or the process it used to conduct the review, and, LMC cited to no such authority.

Finally, LMC argues that the Department's review was "a one-sided, heavily influenced private review process that was directed and controlled by Prisma" and that DHEC and PHM extensively negotiated the COPA conditions added by the Department.[9] Respondent LMC Br. 11. Our Supreme Court has consistently held that there is a presumption that officials of this State are acting in good faith in carrying out their duties. *S.C. Nat. Bank v. Florence Sporting Goods, Inc.*, 241 S.C. 110, 115–16, 127 S.E.2d 199, 202 (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."). DHEC operated its review and made its Decision in good faith and was not directed and controlled by PHM.

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[8] The Free Standing Emergency Department ("FED) in Fairfield County is licensed under Providence North East.

[9] The fact that there were "extensive negotiations" about the additional conditions demonstrates on its face that PHM did not "direct and control" the review process or the Decision. Additionally, the Attorney General's opinion (R. pp. 380-387) belies LMC's contention that PHM directed and controlled the review process.

III. THE PURPOSE AND INTENT OF THE ACT AND REGULATIONS SUPPORT DHEC'S DECISION TO APPLY THE CONDITIONS OF COPA-97-01 TO PHM'S OPERATION OF THE ACQUIRED ASSETS.

LMC argues that the purpose and intent of the Act is to provide immunity from potential antitrust liability for "health care providers who 'negotiate, enter into, and conduct business pursuant to a cooperative agreement" but that it does not create immunity for health care providers who negotiate a cooperative agreement without applying for a COPA. Respondent LMC Br. 13-14. LMC relies on the ALC's Order Denying Summary Judgment stating that "the underlying document from which the grant of immunity springs is the 'cooperative agreement'," and, thus, a COPA cannot be issued without a cooperative agreement to support it." *Id.*, pp. 13-14. In this case, there is a cooperative agreement—the JOA.

In issuing a COPA under the Act, both the General Assembly and DHEC recognize that the cooperative agreement may, in fact create a monopoly,[10] but that the monopoly would be more beneficial than detrimental to the State of South Carolina. That is why the General Assembly authorized DHEC to put conditions[11] on a COPA and required ongoing supervision and monitoring[12] of the activities under the approved cooperative agreement. The Legislature gave DHEC the authority to revoke[13] the COPA if the holder exceeded the scope of the COPA.

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[10] Monopoly power -- a heightened form of market power, is characterized by the ability to control prices or exclude competition. See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85, 109 n. 38 (1984) (equating market power with monopoly power) (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (defining monopoly power as the "power to control prices or exclude competition").

[11] *See*: S.C. Code Ann. Reg. 61-31 § 312.

[12] *See*: S.C. Code Ann. Reg. 61-31, Chapter 5.

[13] *See*: S.C. Code Ann. Reg. 61-31, § 503.

Suggestions that competitors and consumers will be harmed because the Transaction will allow PHM to "increase its monopoly" or create "a near-monopoly" are also misguided. The issue is not whether the merged parties will have market power (as LMC has attempted to frame), but rather whether PHM will be able to exercise that power and whether any disadvantages are outweighed by the advantages discussed above. Given the long-standing requirements of the COPA and the new conditions, it is clear that PHM has not been, nor will it be, in a position to exercise market power and clearly the advantages strongly outweigh any potential disadvantages.[14]

Under the amended COPA conditions PHM must, among other things, continue to adhere to the following:

> a. PHM will provide access to competing licensed facilities for those services not offered by such facility in the core service area upon non-discriminatory terms and conditions to any competing licensed facility that requests such access.
>
> b. Neither PHM, nor any of their affiliates, may enter into a contract that by its terms precludes third party payers from contracting with other hospitals in the core service area identified by the Sponsoring Organizations.
>
> c. Except to the extent required by vendors, suppliers or Group Purchasing Organizations ("GPOs"), neither PHM, nor its subsidiaries, shall condition any contract with suppliers, vendors, or GPOs that preclude or limit such suppliers, vendors, or group purchasing organizations to contract with other providers in the core service area identified by the PHM.

R. pp. 173 – 175.

In submitting its December 2019 request to DHEC, PHM stated:

> *Prior to the execution of the APA*, we are notifying DHEC that it is our belief that the LPNT Assets being acquired by Prisma Health-Midlands are subject to the COPA conditions and are asking DHEC after evaluating the benefits and competitive consequences of the asset acquisition: 1) to acknowledge that the

[14] The ALC Order Denying Cross-Motions, and overruled the Department's Decision allowing the LPNT Assets to be operated under the JOA, concluded that "to find otherwise would allow PHM to claim its acquisition of practically any assets fits within the spirit of the COPA between Richland Memorial Hospital and Baptist Hospital." R. p. 32.

> LPNT Assets are subject to and will be monitored[15] under the COPA Conditions, and 2) to make such updates and modifications to the COPA Conditions as the Department deems necessary.

(Emphasis added). R. p. 357. No one disputes the fact that PHM did not have to have DHEC's permission to purchase the LPNT assets.

In determining that the APA is not the type agreement subject to the Act and PHM was attempting to alter the "underlying justification for the COPA's approval",[16]the ALC misapprehended both the underlying justification for the COPA's approval and the fact that the APA was not before DHEC.[17]

LMC and the ALC both focus on the Asset Purchase Agreement ("APA" or "Proposed Transaction"). In its Prehearing Statement, LMC insisted that the APA is a "cooperative agreement" and should have been submitted to DHEC pursuant to the Act. Or, as the ALC characterized LMC's argument, "as a matter of law, PHM and LifePoint Health must submit a new COPA application ... *in order to allow for review of the proposed transaction* ... and that DHEC lacks the authority to circumvent that process by way of additional conditions to COPA-97-01.[18] (Emphasis added). R. p. 40. The APA was never submitted to DHEC for its review. It was not

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[15] The General Assembly requires DHEC to continuously monitor PHM's operations under the JOA to assure that the benefits from the cooperative agreement continue to outweigh the disadvantages. LMC's argument that the Decision did not make a finding that the benefits derived from PHM operating the LPNT Assets outweighs the disadvantages is misplaced. That finding is in the 1997 COPA Decision and in COPA-97-01. The purpose of DHEC's review under Reg. 61-31 § 508 was to determine whether the benefits of adding the LPNT Assets to the System changed its determination regarding the benefit/disadvantage analysis. By deciding to add conditions to COPA-97-01 to further regulate PHM's operations under the JOA with the LPNT Assets, DHEC *a fortiori*, determined that the benefits of operating the LPNT Assets under the approved cooperative agreement outweighed the disadvantages. As that finding is already in COPA-97-01, there was no need for DHEC to add it to the Decision.

[16] *See* Respondent LMC Br. pp. 14 -15.

[17] In point of fact, the APA was not executed until after the Decision was issued.

[18] See discussion below regarding the *sua sponte* issues ruled on in the Final Orders regarding LMC positions and how they have morphed to mirror the ALC Final Orders.

even signed until *after* the Decision was rendered. It was not the APA that DHEC was reviewing but whether the addition of hospital assets to the PHM System would cause the likely disadvantages of the modification to outweigh the benefits being gained from the JOA.

Simply put, PHM asked DHEC to acknowledge that it could operate the acquired LPNT assets pursuant to the JOA under DHEC's ongoing supervision. The unambiguous intent of the Legislature was to authorize the Department "to provide direction, supervision, regulation and control over **approved cooperative agreements** ..." S.C. Code Ann. § 44-7-520(A).

LMC and the Final Orders misapprehend the nature, purpose and underlying justification for the JOA certified by DHEC as being to the public advantage in COPA-97-01. The JOA is the cooperative agreement the Sponsoring Organizations used to create the new entity to operate the combined system and "*to create a vertically, horizontally, and geographically integrated health care delivery system that is locally governed and accountable.*" (Emphasis added). R. p. 779. Pursuant to Reg. 61-31 § 202(C)(1), an executed copy of the JOA was submitted to DHEC during the application process. BHS and RMH requested that the JOA "be certified as being to the public's advantage." R. p. 421. The Articles of Incorporation and Bylaws are exhibits attached to and incorporated into the JOA. R. pp. 779 – 782.

In the 1997 application Part A Questionnaire, instead of drafting an agreement for the parties to work together to operate the hospitals, BHS and RMH proposed the creation of a single nonprofit entity[19] to step in their shoes and operate the hospitals as a single unit which would be able to achieve operating efficiencies, avoid duplication of capital expenditures and health care services, in the face of changes in government and commercial reimbursement and increasing indigent care needs and which would allow for the development of new public health initiatives.

[19] BHS and RMH are the members and appoint the Board of Directors of PHM. R. p. 781.

R. p. 225. BHS and RMH requested that the JOA "be certified as being to the public's advantage." *Id.*

IV. THE ALC IMPROPERLY DECIDED THE SUMMARY JUDGMENT MOTIONS ISSUES THE ALC RAISED *SUA SPONTE.*

PHM relies on pages 20-31 of its Initial Brief in response to LMC arguments. PHM provides the following additional argument in its Initial Reply Brief.

Ever since the ALC issued its Order Denying Cross-Motions, LMC has attempted to morph its legal issues from those presented in its Prehearing Statement,[20] to those issues raised *sua sponte* and decided on by the ALC. The ALC conclusions in its Final Orders amply demonstrate that fact. In the Order Denying Cross-Motions, the ALC characterized LMC's argument that,

> as a matter of law PHM and LifePoint Health must submit a new COPA application as provided by S.C. Code Ann. § 44-7-530 of the South Carolina Code in order to allow for review of the proposed transaction as set forth in S.C. Code Ann. §§ 44-7-540 to 5670 of the COPA Act and Chapters 2, 3, and 4 of Regulation 61-31, and that DHEC lacks the authority to circumvent that process by way of additional conditions to COPA-97-01.

R. p. 26. The ALC additionally concluded that LMC argued that the APA fits within the Act's definition of "cooperative agreement" but alternatively, if it does not, then the LPNT Assets "can be added to the COPA through an amendment" but only if the § 508 review process is the same or substantially similar to the review process for a new application. *Id.*

The ALC's Clarification Order admits that the Final Orders were not based on the legal issues raised by the parties[21] ("[n]either party had advocated for the legal interpretation the Court ultimately decided was correct." R. p. 36.

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[20] PHM craves reference to pp. 2-4 of LMC Prehearing Statement. R. pp. 195-196.

[21] The Clarification Order found that LMC did not "specifically frame any of its issues in its summary judgment motion like it" framed it in its Opposition to PHM's Motion to Clarify. R. p. 40.

LMC's reliance on *Cooper River Timber Company v. Cone,* 181 S.C. 288, 187 S.E. 341, 343 (1936) and *Salvo v. Hewitt, Coleman & Assoc., Inc.*, 274 S.C. 34, 38-39, 260 S.E.2d 708, 711 (1979) is misplaced and in error. In *Cooper River*, the plaintiff made a motion to the circuit court to refer the case to the Master-in-Equity, which motions was opposed by the defendant. The circuit court denied the motion and placed the matter on its calendar for hearing. Our Supreme Court held that "Counsel for the plaintiff were present at the hearing and decision of the motion and had full opportunity of being heard, and no doubt were fully heard, on the question of the court's authority to order the case so docketed. There is no contention here to the contrary." *Cooper River*. 181 S.C. 288, 187 S.E. 341, 343 (1936). *Cooper River* stands for the proposition that as a general rule, a court may not grant relief in a preliminary motion request beyond the limits or scope of the notice of the motion except when all counsel were present and had the full opportunity to argue the issue exceeding the notice in the motion. That was not the case in this matter.

LMC's reliance on *Salvo* is also misplaced. In *Salvo*, the court was faced with a Worker's Compensation case where a motion for summary judgment was granted based on the third ground stated in the summary judgment motion. *Salvo v, Hewitt, Coleman & Associates, Inc.*, 274 S.C. 34 (1979), 260 S.E.2d 708 at 39. On appeal, Salvo claimed that the motion ground did not sufficiently apprise him of the tort issues on which summary judgment was granted. Assuming that notice was insufficient, the Court held that "appellant fully argued the issues without objection at the hearing, and later submitted a proposed order disposing of these issues." In *Salvo*, the lower court ruled on a summary judgment ground presented to it—here, no such ground was presented to the ALC and the Final Orders **denied both summary judgment motions and "nullified" the DHEC Decision on other grounds.** *Salvo* is also distinguishable from this case because PHM did not have the opportunity to argue the *sua sponte* issues raised by the ALC in its Final Orders.

First, the Prehearing Statements, Motions for Summary Judgment and responses thereto, set forth the issues the parties put before the ALC before the motions hearing. At the beginning of the hearing, the ALC asked each of the parties a number of questions regarding the parties' allegations. The parties then argued their cases.

As the Supreme Court said in *Coogler v. California Ins. Co. of San Francisco, Cal.*, 192 S.C. 54, 5 S.E. 2d 459, 461 (1939):

> It would seem to be plain, upon well settled and fundamental principles, that no order or judgment affecting the rights of a party to the cause should be made or rendered without notice to the party whose rights are to be thus affected, for otherwise a party would be deprived of his day in court.

Coogler, 192 S.C. 54, 5 S.E. 2d 459, 461 (1939). PHM did not have the opportunity to argue the issues the ALC raised and decided the case on. PHM was prejudiced and injured by the lack of notice and opportunity to argue the dispositive legal issues and interpretations of law in this matter.

V. THE ALC ERRED IN REFUSING TO ADDRESS DHEC REVIEW UNDER REG. 61-31 § 508.

LMC contends that reversing the ALC's Final Orders would lead to the absurd result of providing immunity to health care providers that have not negotiated, entered into and been awarded a COPA. PHM has been awarded a COPA and proposes to purchase the LPNT assets pursuant to the approved cooperative agreement, a legality misapprehended by both LMC and the ALC. PHM incorporated its arguments on pages ___ in its Initial Brief by way of further response.

VI. THE ISSUE OF DEFERENCE TO THE AGENCY'S INTERPRETATION IS PRESERVED.

LMC alleges that PHM and LPNT both failed to preserve the ALC's error 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" and regardless of how it is framed,

"deference to DHEC's interpretation of its regulation was not preserved for appellate review." Respondent LMC Br. 23. The Doctrine of Issue Preservation is a judicial doctrine promulgated by the Supreme Court of South Carolina. LMC cites to the note to Rule 29, SCALC[22] as authority in support of PHM's and LPNT's alleged failure to preserve the deference issues. As part of the executive branch, the ALC cannot set a rule that established what issues are preserved for the Judicial Branch to Review. A note in an administrative agency's rule interpreting a deletion from the rule is not binding on a party. Importantly, it is up to the Article V courts to make the determination regarding issue preservation.

The requirement for issue preservation is that an issue must be raised and ruled on. Both PHM and LPNT argued extensively before the ALC that it should give deference to DHEC's interpretation of Reg. 61-31 § 508. *See:* R. pp. 882, lines 9 - 885, line 9; pp. 908, line 22 – 914, line 18; pp. 923, line 14 – 924, line 16; p. 947, lines 17-24; p. 956, lines 5-17.[23] Clearly, the issue of deference to DHEC's interpretation to the regulation was ruled on. While not directly arguing it, LMC appears to be contending that the ALC did not rule on the deference issue, citing to *Elam v. S.C. Dept. of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772,280 (2004) for the proposition that an issue raised but not ruled on is not preserved, absent a motion to reconsider.

The ALC found that a single buyer, irrespective of whether it was operating under a COPA, could not use the transaction to get immunity. As DHEC explained in its Response in Opposition to Lexington Medical Center's Cross-Motion for Summary Judgment, PHM "requested DHEC to: (1) acknowledge that the proposed acquisition of LPNT assets would be subject to the COPA-97-

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[22] *See*, Respondent LMC Br. 23-24. The note provides, in pertinent part: "Issues 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 to a motion for reconsideration in order to be preserved for appeal." That language is not contained in Rule 29.

[23] PHM fails to understand how LMC can declare the language of § 508 is "plain and unambiguous" and at the same time say it is unconstitutionally vague.

01 conditions and (2) make updates and modifications to the conditions of COPA-97-01, as necessary. R. p. 603. After its review pursuant to § 508, DHEC determined that "[n]o new COPA application was required for the proposed transaction." *Id. 4.* The Department interpreted § 508 to allow PHM to add assets to the System operating under the approved cooperative agreement and COPA Conditions.

While the ALC refused to decide the issue of DHEC's "interpretation and application of the definition of "another review", (*i.e.* whether review had to be conducted under the review process outlined in Reg. 61-31 §§ 303, 304, and 305, the ALC most assuredly reached and rejected DHEC's interpretation of Reg. 61-31 § 508 as allowing PHM to manage the LPNT Assets under COPA-97-01 pursuant to the JOA. The ALC concluded that its Final Orders had the **ultimate effect of nullifying DHEC's Decision to add conditions to COPA-97-01 to assure that the benefits of the JOA still outweighed the disadvantages,** so that PHM could operate the LPNT Assets under the COPA Conditions. (Emphasis added). R. p. 36. When the ALC ruled that "the ultimate effect of the Court's interpretation of the law nullified the Department's decision", the ALC necessarily ruled that it disagreed with DHEC's interpretation and was ***not*** giving deference to DHEC's interpretation of § 508 as allowing COPA holders to change or modify it. Clearly, by nullifying the Decision, the ALC ruled on the issue of deferring to DHEC's interpretation of the regulation. As PHM stated in its Motion to Clarify, the Order Denying Cross-Motions, it did not rule on the issues regarding DHEC's interpretation of Reg. 61-31 § 508 (another review) and did not rule on the argument regarding the constitutionality of § 508. R. p. 752.

Accordingly, Defendant's error preservation argument is frivolous.

Assuming the deference issue is preserved, LMC argues that a court should defer to the agency's interpretation only if the statute is unclear. Middle ground here, DHEC interpreted Reg.

61-31 § 508 to authorize it to modify or amend existing COPA Conditions to provide for the operation of additional assets under the cooperative agreement. PHM relies on its deference argument on pages 20-23 from its Initial Brief in response to LMC's deference argument.

The ALC and the parties to this case all agree that the Department has the "general authority to approve amendments to COPAs" and has the authority to amend COPA-97-01, just not under the facts of this case. LMC specifically argued in its Prehearings Statement that assuming DHEC "had the authority to update or amend the Conditions, it could only do so pursuant to the review process used to approve a new cooperative agreement". R. pp. 196-197.

VII. DHEC PROPERLY INTERPRETED THE TERM "ANOTHER REVIEW" IN S.C. CODE ANN. REG. 61-31 § 508.

As an additional sustaining ground, LMC suggests that the Court can affirm the ALC's Final Orders on the ground that DHEC's interpretation of the phrase "another review" in S.C. Code Ann. Reg. § 508 is manifestly contrary to the COPA Act. As recognized by the South Carolina Attorney General, DHEC's interpretation is not. *See*, R. pp. 380 - 387. The phrase "another review" is not a defined term. When a word in a statute is undefined, "in the first instance, defining a particular statutory term is an administrative function." (internal citations omitted), *Young v. South Carolina Dep't of Highways & Public Transp.*, 287 S.C. 108, 113, 336 S.E.2d 879, 882. This Court should defer to DHEC's interpretation on Reg. 61-31§ 508.

In attempting to show that DHEC's interpretation is "manifestly" at odds with the COPA Act, LMC attempts to rely on inapplicable provisions of the State Certificate of Need and Health Facilities Licensure Act. ("CON Act"). In support of its argument, LMC cites to S.C. Code Ann. Reg. 61-15 § 508 and *MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control,* 394 S.C. 567, 716 S.E. 2d 111 (Ct. App. 2001). Reg. 61-15 § 605 is the CON regulation that governs a change in an approved health care CON project and expressly provides that if the Department

determines the change is substantial, it *will* be considered a new project. Under Reg. 61-15, a new project has to go through the CON review and approval project. Reg. 61-31 § 508 does not provide that if the Department determines the proposed change is substantial, DHEC has to conduct another review to determine if the change results in the benefits of the project still outweighing the disadvantages. Unlike Reg. 61-15 § 605, if the Department determines that the modification or change is substantial, there is no regulatory requirement that it constitutes a new project.

In *Belfair,* the Court simply affirmed the Department's decision regarding what constituted a substantial change under the CON regulations.

VIII. S.C. CODE ANN. REG. 61-31 § 508 IS NOT UNCONSTITUTIONAL EITHER FACIALLY OR AS APPLIED.

PHM relies on its Initial Brief, pages 14-20 in response to LMC's argument regarding the constitutionality of § 508—both facially (plead in its Prehearing Statement—R. pp. 194-207) and as applied.

B. REPLY TO DHEC'S INITIAL BRIEF

PHM agrees with DHEC's arguments in its Initial Brief.

CONCLUSION

For the reasons stated above and in its Initial Brief, Respondent-Appellant PHM respectfully requests 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 PHM's operation of the LPNT Assets pursuant to the JOA, as additionally conditioned by DHEC.

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