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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 17-ALJ-07-0441-CC
Case No. 17-ALJ-07-0444-CC
Appellate Case No. 2020-001072

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

Petitioner/
Respondent,

v.

South Carolina Department of Health and Environmental
Control and Medical University Hospital Authority d/b/a
MUSC Health Emergency Services,.....

Respondents,

Of Whom, Medical University Hospital Authority d/b/a
MUSC Health Emergency Services is

Appellant.

CareAlliance Health Services, d/b/a Roper St. Francis
Healthcare, Roper Hospital, Inc., Bon Secours-St.
Francis Xavier Hospital, Inc., Roper Mount Pleasant
Hospital and Roper St. Francis Berkeley Hospital, ...

Petitioner/
Respondent,

v.

South Carolina Department of Health and Environmental
Control and Medical University Hospital Authority d/b/a
MUSC Health Emergency Services,.....

Respondents,

Of Whom, Medical University Hospital Authority d/b/a
MUSC Health Emergency Services is

Appellant.

**RECORD ON APPEAL
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1 and what they did in their decision letter, is
2 distribution and accessibility part of those
3 criteria?

4 A: That is one of the criteria.

5 Q: Okay. And can you discuss with The Court your
6 analysis of distribution and accessibility as
7 it pertains to this project?

8 A: Yeah. And I think I've mentioned this before.
9 But I don't believe that this project's going
10 to have any impact, in terms of improving the
11 distribution or the accessibility, of emergency
12 services for the population in the area where
13 they propose to put this project. Without
14 repeating on my prior testimony, there's lots
15 of providers out there that are in close
16 proximity. There's going to be a freestanding
17 ED located less than a mile away from their
18 proposed site. And if patients are traveling
19 downtown now to the Medical University, they're
20 not doing it because of lack of access to
21 emergency care, they're doing it for other
22 reasons.

23 Q: And those are all the reasons we've gone
24 through in your testimony?

25 A: They are. Yeah.



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1 Q: Okay. And I think we've also hit on medically
2 underserved groups. Do you have anything you'd
3 like to add on that topic?

4 A: No. And just that -- I guess the last point
5 would be, emergency services are different from
6 most healthcare services. In most healthcare
7 services, if you don't have money, don't have
8 insurance, you're probably not going to get
9 treated. It's an unfortunate fact. But with
10 emergency services, if you're part of the
11 hospital emergency room, which all
12 freestanding EDs have to be in South Carolina,
13 the EMTALA regulations, which someone has
14 testified about, and this is the Emergency
15 Medical Treatment Act that was passed back in
16 the late '80s I believe, requires that any
17 patient who shows up in an emergency who
18 requires services has to be treated. And so
19 the medically underserved are going to be able
20 to access emergency services now. They can go
21 to one of the existing hospitals. They can go
22 to one of the existing freestanding emergency
23 departments or they can go to Summerville's new
24 freestanding emergency departments. So there's
25 nothing about this project that I see is going



1 to have any material impact on the medically
2 underserved population.

3 Q: Okay. All right. We went over that language
4 in the State Health Plan that requires that the
5 Department make this analysis, that the
6 benefits have improved accessibility will be
7 equally weighed with the adverse effects of
8 duplication in evaluating Certificate of Need
9 applications for this service. And this
10 service refers to freestanding EDs. Have you
11 done any assessment of adverse impact?

12 A: I have.

13 Q: And explain to The Court what you've done.

14 A: Well, the -- just as a -- and I'm looking at
15 adverse impact in this case from the standpoint
16 of the Trident Health facilities. And Trident
17 -- and those would be Summerville Medical
18 Center, Trident Medical Center, Centre Pointe,
19 the Summerville freestanding ED that's to be
20 developed, and to a very limited extent to the
21 Moncks Corner Medical Center that's in the
22 northern part of Berkeley County.

23 And first of all as a back drop to this
24 adverse impact analysis, the Trident facilities
25 are already going to be impacted when the Roper



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1 Berkeley Hospital opens up. They're going to
2 only be four miles away from the freestanding
3 ED, I think about 11 miles away from Trident
4 Medical Center, a little bit farther from
5 Summerville -- or be about the same from
6 Summerville. And they're going to take
7 emergency patients out of the market. And so
8 that's already going to have an impact on the
9 Trident facilities and that's going to happen
10 by the end of this year when the new hospital
11 opens up. So already the market's going to see
12 some shift, you know, in utilization.

13 You know, one of the things that we heard
14 a lot of testimony about yesterday with Mr.
15 Valentine is that Trident and Summerville
16 Medical Center have made significant
17 investments in the infrastructure for emergency
18 services in this area. And I have a, you know,
19 quick slide that summarizes that. And you can
20 see between constructing the Centre Pointe
21 facility, which is in North Charleston, the
22 expansion at Summerville, 24 million dollars,
23 the Trident expansion of 10.4, the new
24 Summerville freestanding ED, almost 60 million
25 dollars in investments in emergency department



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1 infrastructure in this market. And so they
2 have a lot at stake in this game, you know, if
3 you will. The impact of another provider
4 that's an unnecessary provider will only
5 further diminish the utilization and, you know,
6 and decrease the efficiency of these providers
7 and then serving this population.

8 Q: These are expenditures that have been done
9 since 2014?

10 A: I think that's about right.

11 Q: Okay. Do you recall the testimony of Dr. Hall
12 who started at MUSC in 2012?

13 A: Yes.

14 Q: And do you recall how much money he said MUSC
15 had spent on its downtown ED in that time
16 period?

17 A: I think he said, 1.5 or 1.6 million dollars.

18 Q: Okay. In light of all of the testimony that
19 you've heard regarding these issues at MUSC, as
20 a health planner where is the better spend for
21 them?

22 A: Well, in my opinion, you know -- I mean, first
23 of all, Dr. Hall described a number of
24 different issues that they have with the EDs at
25 MUSC. And, you know, they're serving almost



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1 80,000 patients a year in their EDs. If they
2 really want to improve access to services for
3 emergency patients, those dollars, in my view,
4 from a health planning perspective, could be
5 better invested in upgrading the ED facilities
6 at the downtown location where the greatest
7 number of patients are going to benefit.

8 As I said before, I think a relatively
9 small percentage of the patients who go to MUSC
10 now are going to utilize this new freestanding
11 ED. So the impact of spending 11.3 million
12 dollars to serve a relatively small population
13 of patients who go to MUSC now, is well
14 outweighed by the value of spending -- and I
15 think he said maybe 35 million. And he threw
16 that out as a number that somebody had
17 identified. If you put 35 million dollars into
18 their existing infrastructure, that would have
19 the benefit to most of those 80,000 or 78,000
20 patients they're serving currently.

21 Q: In other words, to do the same thing that
22 Trident and Summerville have done with their
23 EDs?

24 A: Sure. I mean, you know, I think that -- I
25 think Ms. Valentine testified and other folks



1 have testified that the ED is considered the
2 front door to the hospital. And I think
3 hospitals over the years -- a lot of my clients
4 have increasingly focused on increasing their
5 investments into their emergency departments
6 because it's the first contact that many
7 patients have with your health system and it's
8 also the way that you get a significant
9 percentage of your admissions to your
10 hospitals. And so if we can improve the level
11 of service -- and it's not only about -- again,
12 it's not only about increasing the number of ED
13 bays, it's also about changing the layout of
14 the facility, increasing the investment and
15 technology. All of those things could have the
16 benefit of improving the throughput and
17 improving the experience of the patients going
18 to MUSC downtown.

19 Q: So what other conclusions have you made
20 regarding adverse impact?

21 A: Well, I mean, Trident and Summerville Medical
22 Center are the largest provider of ED services
23 to the area approximate to MUSC'S freestanding
24 ED. And so they're going to lose volume
25 directly -- when that freestanding ED, if it



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1 were to be opened, that's going to take
2 patients primarily away from the Trident Health
3 facilities because they have a large market
4 share in that area.

5 And I think that -- there's discussion and
6 I think we'll hear more about that next week,
7 that the freestanding ED is also going to refer
8 patients down to MUHA's facility downtown for
9 inpatient care. And those are patients, if
10 they had gone to the Trident freestanding ED or
11 gone to the Trident Hospital EDs, they would
12 likely be admitted to the Trident Hospitals.
13 And so it's going to have a secondary affect,
14 you know. It's not only going to lose
15 emergency department visits directly, but
16 they're also going to lose what's called
17 downstream inpatient admissions as a result of
18 not getting the emergency visit to began with.

19 Q: Do you recall Ms. Valentine's testimony about
20 having applied for CONs to do all of these
21 projects that are up on the screen right now?

22 A: Yes. I was involved in all of those CONs.

23 Q: Did you also hear her testimony about Trident's
24 reliance on the CON program in making these
25 expenditures?



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1 A: Yes.

2 Q: And how is that relevant to this case?

3 A: Well, when you operate under the CON state, you
4 assume that the development of new facilities
5 will be done in an orderly fashion, it will
6 done based on the criteria that is set forth,
7 you know, in the State Health Plan and in the
8 project review criteria. And, you know, one of
9 the things you would depend on is that the
10 Department would not approve duplicative
11 facilities for which a need had not been
12 demonstrated. And when you make significant
13 investments like these. I mean, it's with the
14 assumption that new providers may come into the
15 market, but only when there is a legitimate
16 need identified for those providers to enter.
17 And in this case, in my view, there is not a
18 legitimate need that's been identified to
19 approve the Medical University's project.

20 Q: Do you recall Ms. Valentine's discussion about
21 margin and mission?

22 A: Yes.

23 Q: Okay. And so how does this unnecessary
24 duplication affect that?

25 A: Well, I mean, to the extent that the volumes



1 and ultimately the revenues that are received
2 by the Trident facilities are diminished by an
3 unnecessary facility being approved, then that
4 reduces the dollars they have in the future to
5 reinvest in new healthcare services or
6 upgrading facilities and things of that nature.
7 So it has a ripple effect. It not only has a
8 direct effect, in terms of lowering their
9 bottom line now, but it also makes it more
10 difficult for them to make future investments
11 and new services and facilities.

12 Q: In other words, the next time they make a
13 request for capital, would that be evaluated?

14 A: Sure. I mean, HDA is -- you know, it's tough
15 in evaluating capital requests. And it would
16 be -- you know, if they had no assurances that
17 the CON program was actually going to work the
18 way that it was intended, it's going to make it
19 more difficult to get funding for new projects.

20 Q: What other conclusions have you made regarding
21 adverse impact?

22 A: Well, one of the things -- I think Mr. Dayhuff
23 yesterday, was questioning Ms. Valentine about
24 the market share that the Medical University
25 had in the area that Summerville had identified



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1 for its freestanding ED. And Summerville's
2 freestanding ED service area will -- maybe if
3 we pulled that up on here -- was pretty
4 narrowly defined right around the freestanding
5 ED.

6 Q: This is the Trident project?

7 A: This is the Trident project.

8 Q: Okay.

9 A: It was pretty narrowly defined. And I think,
10 Mr. Dayhuff was asking Ms. Valentine, well,
11 look at this chart in the Summerville Medical
12 Center application, it says that Summerville
13 has an eight percent market share in these ZIP
14 codes right around the proposed site. Well, he
15 made it sound like that was a significant
16 market share. Well, eight percent's not a big
17 market share.

18 Q: Are you referring to MUSC's market share?

19 A: MUSC's market share. That's a very small
20 market presence. If we look at the market
21 share slide, which I think is the next one, you
22 can see that the Trident Health System
23 facilities have almost an 80 percent market
24 share in this market. Summerville's -- I'm
25 sorry, Medical center's -- Medical University's



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1 market share has actually declined a little bit
2 using more recent data, it's at 7.4 percent.
3 Roper and St. Francis have about, a little over
4 10 percent, and other providers about three
5 percent. So MUSC is not a big provider of
6 services to this area.

7 You know, oftentimes -- and there are
8 exceptions, but oftentimes these freestanding
9 EDs are put into areas, as Summerville did,
10 that they already serve in order to improve
11 access to patients already served. In Medical
12 University's case, they had to draw a really
13 big area in order to get enough patients to
14 say, well, gosh, we can serve our own patients
15 in this, even though it's unlikely they will go
16 there.

17 Q: Okay. This is 2017 data that's on the screen
18 right now?

19 A: Right.

20 Q: In your opinion as a health planner, once Roper
21 opens up that hospital in October, what would
22 you expect to happen to this market share
23 analysis next year?

24 A: Well, undoubtedly it's going to go down. It's
25 hard to predict exactly how much, but Roper is



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1 going to pull emergency patients out of these
2 very same ZIP codes. And so my anticipation
3 would be that there will be some material
4 market shift. I can't tell you what the exact
5 percentage is, but I would guess minimum five
6 to 10 percent market share shift to Roper with
7 the opening of the new hospital.

8 Q: Okay. Help The Court put this into
9 perspective. Do new hospitals open in markets
10 every day in South Carolina?

11 A: No. It's a pretty rare event, to be honest.
12 I'm trying to remember the last new one that
13 opened up.

14 Q: The one that comes to mind would be Parkridge.

15 A: Parkridge, Tidelands, Waccamaw, the Jasper
16 County Hospital. There's been a few, but, I
17 mean, it's a relatively rare event. So when a
18 new hospital opens, it creates a ripple across
19 the healthcare system in that portion of the
20 healthcare system where they're located.

21 Q: Is it going -- try to help The Court put this
22 in perspective. The difference between a
23 hospital opening up in an established market
24 and a freestanding ED opening up in a market,
25 what's the significance in that comparison?



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1 A: Well, a hospital has a dramatically greater
2 impact on a market than a freestanding ED does.
3 I mean, first of all, the freestanding ED is
4 serving basically a single product line, you
5 know, that is emergency services. A hospital
6 is going to be serving inpatients for all kinds
7 of different things, outpatients. They're
8 going to do outpatient surgery. They're going
9 to do all kinds of lab testing. They're going
10 to have a variety of services, like physical
11 therapy and occupational therapy. And so a
12 hospital comes in, they disrupt the patient
13 flow patterns for a number of different
14 services. A freestanding ED only impacts the
15 emergency services.

16 Q: All right. Let's shift over and look at your
17 analysis of adverse impact regarding this new
18 project by MUSC. Explain to The Court what
19 you've done here.

20 A: Sure. Well, again, I don't believe that very
21 many patients who are going to MUSC now are
22 going to utilize this freestanding ED. So
23 that's my starting point.

24 Q: And is that based upon what we've already
25 looked at today ---



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1 A: Right.

2 Q: --- acuity and those things that we've already
3 ---

4 A: Right. Acuity, pediatrics, hospital admissions
5 and all of that. So I'd assume that 25 percent
6 of the patients that MUHA FSED will serve would
7 come from come from downtown. I think that's
8 probably realistic and maybe even generous.
9 And so the remaining visits that they projected
10 that they're going to receive have to come from
11 somebody else. And if we look at Trident
12 Health's share of what's left over after you
13 pull out the 7.4 percent for Medical
14 University, that's about 86 percent of those
15 patients will come at the Trident Health
16 facility's expense right now. And that means
17 that on average about 10,000 emergency visits
18 per year will be lost to the Trident Health
19 System.

20 Q: So two-thirds of their volume was going to come
21 from Trident?

22 A: Yes.

23 Q: Shift over now and talk a little bit about
24 financial feasibility. Explain to The Court
25 why financial feasibility is a criteria and why



1 is it important?

2 A: Sure. You obviously want to build facilities
3 that you know are going to be able to sustain
4 -- well, first of all, you want to approve
5 facilities that are going to be able to get
6 funding and come out of the ground; you know,
7 you're actually going to be able to do what you
8 say you're going to do from the construction
9 standpoints. And then, secondly, you want to
10 be sure that they're going to have enough
11 resources long term to be able to sustain the
12 services. Otherwise, if you have services that
13 are operating at low levels of utilization and
14 at marginal profitability or even losses from
15 operations, that creates additional
16 inefficiencies in the system, has the potential
17 to drive up prices for healthcare services to
18 the extent that's translated into contracts
19 with commercial insurance carriers and so
20 forth. And it simply creates -- it's why we
21 try to avoid unnecessary duplication, because
22 unnecessary duplication means that facilities
23 are going to have a harder time making a go of
24 it from a financial standpoint. And we want --
25 if we're going to approve facilities, you want



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1 them to be financially healthy as well as
2 providing good quality clinically services.

3 Q: Okay. Talk to me about your analysis of MUHA's
4 availability to finance this project.

5 A: Well, the CON application described two sources
6 of funding for the project. They said that
7 this Nexton FSED, LLC, which was affiliated
8 with Equity, LLC, committed to fund the site
9 development and the building shell construction
10 and MUHA was going to lease that building from
11 them. And then MUHA would be committed to fund
12 the tenant improvements, meaning build out the
13 inside of the shell, put all the infrastructure
14 in for the emergency department, and then the
15 equipment, they would provide all the
16 equipment.

17 Q: So that's at the first site that they no longer
18 are going to build on, right?

19 A: That's right.

20 Q: And they were going to lease that?

21 A: They were.

22 Q: Okay.

23 A: And then with the change of location, this
24 Nexton FSED, LLC is no longer in the picture
25 and so they no longer have a role in funding



1 the project and so MUHA has changed gears.

2 I guess we go to the slide. There really
3 hasn't been documentation of exactly how the
4 projects going to be financed. Dr. Cawley, in
5 his deposition, I guess he will talk about it
6 next week, said he's not sure exactly what
7 source of funds they're going to use. But one
8 thing they did do is that they brought in
9 Strategic Ventures, MUHA Strategic Ventures,
10 which is going to ground lease the property
11 that the site is going to be constructed on.
12 But as far as funding the construction of the
13 building itself, and most of the 11.3 million
14 dollars is going to be in constructing and
15 equipping the facility, there's simply no
16 documentation about how that's going to be
17 funded.

18 And the Medical University has -- already
19 has a number of significant financial
20 commitments that they've made. I think there
21 was discussion earlier about the children's
22 hospital. And that's about a 370 or 380
23 million dollar capital expenditure that's being
24 made right now. And the effect of that is
25 going to hit Medical University's income



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1 statement and balance sheet next year when the
2 project opens. They just recently purchased
3 four hospitals from Community Health Systems.
4 The amount they had to borrow was a 137
5 million. They also assumed another 39 million
6 dollars in leases on top of that. They're
7 participating in development of a micro
8 hospital down in Beaufort County. I think
9 their share would be around 20 million. And
10 they've gotten CON approval for 325 million
11 dollar new hospital, 128-bed hospital in
12 Nexton. So they are -- they have a lot of
13 projects that are either underway or they're on
14 the hook for going forward and they really
15 haven't provided information about their
16 ability to obtain that funding.

17 And they -- if you look at their balance
18 sheet -- and I don't want to go into a detailed
19 discussion of this -- but they have negative
20 equity, if you will, negative net worth on
21 their balance sheet. So they're a highly-
22 leveraged organization already and there's no
23 documentation of exactly how the funding is
24 going to be provided for this project. And as
25 a consequence, I don't believe that in this



1 case the applicant had proven their ability to
2 -- a financial feasibility of the project in
3 the short term. The short term means the
4 ability to fund the project and to get it out
5 of the ground.

6 Q: What information do you typically see from
7 applicants and in your experience what
8 information does DHEC typically require of
9 applicants to show their ability to obtain
10 financing?

11 A: Well, typically you would have letters of
12 commitment. And if you were borrowing money,
13 for example, you would have a letter of
14 commitment or interest, I guess would be more
15 like it, not commitment. But interest from a
16 lending institution, an investment banker,
17 someone like that, who would say, you know, we
18 believe that, you know, it's reasonable that
19 they could borrow the necessary funds to fund
20 this project.

21 Or alternatively or maybe in addition to,
22 you could have a -- you could have a letter
23 from one of the financial officers in the
24 organization that says, look at our balance
25 sheet, we've got 200 million dollars in cash in



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1 our balance sheet. We can easily fund this
2 project out of cash reserves. We haven't seen
3 that type of documentation in this case.

4 Q: For the new site, is there any documentation at
5 all that addresses financial feasibility?

6 A: No.

7 Q: Any other conclusions regarding financial
8 feasibility?

9 A: Well, the other aspect of financial feasibility
10 is long term financial feasibility. That means
11 that, once the project is up and running, will
12 the project generate revenues that are greater
13 than the expenses that they would incur? And
14 the most significant factor that drives
15 financial feasibility of a project is the
16 volume of patients that you're going to serve.
17 And for all the reasons I've already stated, I
18 don't believe that the projections of
19 utilization that MUHA has put in their
20 application are realistic. I don't think they
21 can shift over 14,000 patient visits from
22 downtown to the proposed freestanding ED. And
23 if their intention is to just serve patients
24 that they had served historically, they're
25 going to have very low volume at this



1 particular facility.

2 And given all the changes that have
3 occurred to the structure of the project in
4 terms of the locations -- they're doing
5 construction now versus lease, that the
6 financing approach, who's going to provide the
7 financing. One of the facts they talked about
8 in the application was they were going to be in
9 close proximity to Palmetto Primary Care
10 Physicians, a very large physician group. I
11 think the largest primary care physician group,
12 certainly in the Lowcountry. And that they
13 would be, you know, a good ally and source, you
14 know, for patients.

15 And so given all of the -- and the other
16 thing is that the only financial projections
17 we've seen in this particular project are the
18 financial projections that were presented in
19 the attachments to the application. And that
20 was for a much different project in a different
21 location with a different structure. To my
22 knowledge, it's never been updated. And so we
23 have no financial projections that we can rely
24 on that look at a model of care that's being
25 proposed with the structure that's being



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1 proposed at the new site.

2 And so as a result, my opinion is that the
3 applicant has failed to demonstrate the long-
4 term financial feasibility of the project.

5 Q: Based upon your 40 years in this industry, if
6 MUHA were to submit what is before this Court
7 right now as an application to DHEC, is there
8 enough there for it to be approved?

9 A: It wouldn't be enough for it to be deemed
10 complete.

11 Q: Explain to The Court what deemed complete means
12 in terms of ---

13 A: Well, I mean, before the applicant can actually
14 be reviewed, there has to be sufficient
15 information in the application to allow it to
16 move forward through the review process. So
17 the Department will review an application, look
18 at it, and determine whether or not there's
19 adequate information provided in the responses
20 to each section of the application that would
21 allow them to do an effective review of the
22 application.

23 Q: Just as housekeeping matters, I think you said
24 you had reviewed the HFPP documents. Is that
25 correct?



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1 A: That's right.

2 **MR. SUMMER:** I do believe those are in the evidence,
3 those have been admitted. Okay. That's great.

4 Q: And then you've explained several times your
5 reliance upon the Intuitive 30(b)(6) deposition
6 and its exhibits.

7 **MR. SUMMER:** It's my understanding those were
8 designated by Roper and it's also part of the
9 record in this case. Is that correct, Your
10 Honor?

11 **THE COURT:** They are. I think with the Intuitive
12 exhibit, weren't you all going to review those
13 so that we don't have to download all of the --
14 the ones that you all are not using?

15 **MR. THOMAS:** That was what I believe Ms.
16 Hollingsworth ...

17 **MR. SUMMER:** So the text of the deposition is in.
18 And the issue is the number of exhibits?

19 **MR. WESTBROOK:** We will look at the exhibits and ---

20 **MR. SUMMER:** The person who's probably going to have
21 walk through all those exhibits next week is
22 going to be Dr. Cawley. So I'd rather -- I can
23 certainly utilize this witness to do that, but
24 we can also utilize Dr. Cawley for that
25 purpose. I think his testimony's been that he



1 reviewed that and we certainly would want those
2 exhibits included in the record. Is there an
3 objection to including those exhibits in the
4 record?

5 **MR. WESTBROOK:** I made an objection, but I believe
6 you ruled against me, the emails. The exhibits
7 that were emails, you remember ---

8 **THE COURT:** Yes.

9 **MR. WESTBROOK:** --- I made that objection. And I
10 think you ruled against me on that.

11 **THE COURT:** Yes, I did.

12 **MR. WESTBROOK:** So I believe I don't -- given that,
13 I don't have any other objections to those
14 emails. I believe what it was -- is Ms.
15 Hollingsworth here, yeah. I think Ms. -- yeah,
16 yeah -- I think wanted to look through those
17 and some things you weren't going to use? I
18 can't ---

19 **MS. HOLLINGSWORTH:** Yeah, I think we just ---

20 **MR. SUMMER:** Here's what I would propose. What I
21 would propose to The Court is -- Your Honor,
22 what I would propose to The Court is we have,
23 we do have duplicative exhibits. We have an
24 exhibit where we have all the Intuitive
25 documents as they were -- I don't want to say



1 dumped upon us on native form -- but as they
2 were given to us, okay. So we would be willing
3 to pull that exhibit down and then let the
4 numbered exhibits that appear in the Intuitive
5 deposition remain with the deposition, because
6 I think anyone who's reading that deposition is
7 going to want to refer to those exhibits. And
8 so I think that would be a way to winnow the
9 record down, but then for the deposition to
10 actually make sense to whoever's reading it.

11 **MR. WESTBROOK:** I think that I have no problems with
12 that since I've already made my objection and
13 lost on the email portion off those.

14 **MR. DAYHUFF:** So only the emails that are attached
15 as exhibits to the deposition?

16 **MR. SUMMER:** Correct.

17 **THE COURT:** Now, are any of the exhibits that's
18 attached to the deposition, are those to be
19 filed under seal?

20 **MR. SUMMER:** The entire deposition is to be filed --
21 -

22 **THE COURT:** The entire deposition as well as
23 exhibits ---

24 **MR. SUMMER:** Unfortunately, Your Honor, I didn't --
25 you have to choose your battles.



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1 **MS. HOLLINGSWORTH:** Mr. Summer.

2 **MR. SUMMER:** Yes.

3 **MS. HOLLINGSWORTH:** We actually -- what we agreement
4 was, that the transcript would not need to be
5 under a sealed, but the documents ---

6 **MR. SUMMER:** Okay. So the exhibits will be.

7 **THE COURT:** Okay.

8 **MR. SUMMER:** Is that fair?

9 **MR. DAYHUFF:** That is the agreement.

10 **THE COURT:** The deposition will not be filed under
11 seal. The exhibits will be filed under seal.

12 **MR. SUMMER:** Yes, Your Honor.

13 **THE COURT:** Okay.

14 **MR. SUMMER:** Thank you.

15 **THE COURT:** Okay. I am admitting them with those
16 stipulated ---

17 **MR. SUMMER:** Thank you very much, Your Honor.

18 **(SEALED: Petitioner Roper's Deposition Designation**
19 **Exhibits were admitted into the record at this time.)**

20 **MR. SUMMER:** Thank you very much, Your Honor.

21 **Q:** Mr. Sullivan, if you would for The Court just
22 kind of summarize your opinions regarding
23 MUHA's application.

24 **A:** Sure. In my opinion, there's no community need
25 that's been documented for this project. The



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1 project is inconsistent with the relevant South
2 Carolina Health Plan standards. The project
3 represents an unnecessary duplication of
4 existing resources. I believe that the
5 applicant in this case has failed to
6 demonstrate that it needs additional capacity
7 and also failed to demonstrate that they will
8 simply serve their own patients. It will not
9 improve the distribution. I can add to that
10 accessibility of emergency services. Will not
11 address the needs of the medically underserved.
12 Will adversely impact existing and approved
13 providers with no corresponding benefit in
14 terms of access to the healthcare system. And
15 in this case the applicant has failed to
16 demonstrate financial feasibility either in the
17 long or short term.

18 **MR. SUMMER:** Beg The Court's indulgence.

19 Q: All right. If you'd be so kind as to answer
20 any questions that opposing counsel may have.

21 A: Thank you.

22 **MR. SUMMER:** Your Honor, I would like to make one
23 other promotion and that is to admit this
24 expert's slides like we did Ms. Platt's. Is
25 there objection?



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1 **MR. WESTBROOK:** Sorry, I was listening to somebody
2 whisper in my ear. What is ---

3 **MR. SUMMER:** We used to better at that than we are
4 now.

5 **MR. WESTBROOK:** Speak for yourself, Mr. Summer.

6 **MR. SUMMER:** I was moving to admit into evidence his
7 slides as we did for Ms. Platt. Do you have
8 any objection to that?

9 **MR. DAYHUFF:** I assume that'll apply to Mr. Levitt,
10 his slides?

11 **MR. SUMMER:** If it's good for the goose, good for
12 the gander.

13 **MR. DAYHUFF:** No objection.

14 **THE COURT:** Okay. They're admitted. Yes.

15 **(Petitioner TMC's Exhibit Number 101 was admitted**
16 **into the record at this time.)**

17 **MR. DAYHUFF:** Could I make -- just make sure I
18 understand the Intuitive. So the Intuitive
19 agreement that we just made was the Intuitive
20 deposition transcript comes in in total, not
21 over seal, and the only Intuitive emails that
22 are in evidence are the ones that are attached?

23 **MR. SUMMER:** And there are 71 exhibits and those
24 will be the only exhibits.

25 **MR. DAYHUFF:** The gigantic exhibits of Intuitive



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1 emails maybe designated by you both come out?

2 **MR. SUMMER:** They're coming out.

3 **MR. DAYHUFF:** Fair enough. Just wanted to make sure
4 that was the understanding.

5 **MR. SUMMER:** That thins the record considerably,
6 Your Honor.

7 **THE COURT:** Okay. We probably will need to get with
8 the court reporter to make sure that she has a
9 clear understanding.

10 **MR. SUMMER:** We will do that. And we have a hard
11 copy of those exhibits. We've already provided
12 them to The Court in electronic format. But we
13 have a hard copy and we can do that as well.

14 **THE COURT:** Okay.

15 **MR. SUMMER:** So what I'm admitting now is this
16 PowerPoint and this will Trident's 101 and I
17 believe it is without objection.

18 **THE COURT:** Right. That is the -- yeah. The slides
19 that ---

20 **MR. SUMMER:** That is correct.

21 **THE COURT:** Yes.

22 **MR. SUMMER:** So admitted?

23 **THE COURT:** --- Mr. Sullivan used. Okay. Yeah,
24 those were already admitted.

25 **MR. SUMMER:** Thank you very much.



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1 THE COURT: Okay. Now, before we move -- that's
2 fine, Mr. Sullivan.

3 MR. SULLIVAN: Oh, I'm sorry. I'm sorry. I just
4 want to get out of here.

5 THE COURT: No, he is fine, because we're going to
6 take a lunch break before we move to the Cross-
7 Examinations. Okay. Let's reconvene at 1:15.

8 (Off the Record)

9 THE COURT: Okay. Mr. Westbrook.

10 MR. WESTBROOK: Yes, ma'am.

11 THE COURT: You ready?

12 MR. WESTBROOK: I am.

13 THE COURT: Okay. We can resume the hearing.

14 MR. WESTBROOK: All right. Thank you.

15 MR. SULLIVAN - CROSS-EXAMINATION BY MR. WESTBROOK:

16 Q: All right. Mr. Sullivan, how you doing?

17 A: Good.

18 Q: Good.

19 MR. WESTBROOK: All right. I want to start off by
20 asking my friend Dan to put up MUSC's proposed
21 Exhibit 8 on the screen. And just on the first
22 page just to start off -- well, the cover page.

23 Q: I don't know if you can -- can you see that
24 okay on your monitor there, Mr. Sullivan?

25 A: Yeah, I can.

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1 Q: All right. This is the cover page, is it not,
2 of the Summerville Medical Center CON
3 application for a freestanding ED to be located
4 in Summerville that we've discussed a good bit
5 today and over the past few days; is that
6 right?

7 A: Yes.

8 Q: And I believe you drafted the need section for
9 this application for Trident; is that right?

10 A: I did.

11 Q: Summerville, just again, refresh our memories -
12 - or my memory anyway. Summerville Medical
13 Center is one of the two hospitals that Trident
14 Health System owns; is that right?

15 A: True.

16 Q: Okay. And what's the date that this was
17 submitted to DHEC?

18 A: April 12, 2017.

19 Q: All right. Bear with me just a second while I
20 get this. Let's -- Dan and both Dans, Mr.
21 Bupp, Mr. Sullivan, why don't you -- let's look
22 on Bates page M08.20. Are you there, Mr.
23 Sullivan?

24 A: I am.

25 Q: You see the heading there towards the top of



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1 the page it says FSED Overview?

2 A: I do.

3 Q: Good. So right -- and, again, this is part of
4 the needs section that you authored; is that
5 right?

6 A: Yes.

7 Q: Okay. So that first paragraph under there, it
8 talks about -- and I don't want to belabor this
9 point because I think, not only you, but other
10 witnesses have talked about the number of EDs
11 in this area. But just -- let me just see if
12 I have these right and you tell me if I'm
13 missing anything. So my understanding from
14 this first paragraph here and from the other
15 testimony that I've heard from you and others
16 is that currently the Tri-County area has the
17 following existing freestanding EDs. And by
18 existing, I mean that they are operational at
19 this point in time, okay?

20 A: Okay.

21 Q: There is Centre Pointe, which is in North
22 Charleston area, in the northern part of
23 Charleston County. Is that right?

24 A: Yes.

25 Q: And then there's Roper Northwoods, which



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1 recently relocated or is in the process of
2 relocating. And that's in Charleston County
3 also; is it not?

4 A: Right. Also in the northern section.

5 Q: And in the northern section of Charleston
6 County. Is it operational yet?

7 A: My understanding is it's not, but I may be --
8 it may have changed since the last time I heard
9 about it.

10 Q: Okay. So it's approved. We're not sure
11 whether it's operational.

12 A: I mean, the old one's operational. But the
13 replacement, I'm not sure is operational.

14 Q: All right. Then they're two freestanding EDs
15 up in Moncks Corner, correct?

16 A: There are.

17 Q: One of them owned by Roper and one of them
18 owned by Trident; is that right?

19 A: Correct.

20 Q: And then there's this application that we're
21 reading out of that has been approved, the
22 CON's been issued, but it's not operational
23 quite yet; is that correct?

24 A: Right. I think they're getting ready to break
25 ground.



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1 Q: So -- okay. So it'll be soon be opened; is
2 that right?

3 A: Yeah. Within the year.

4 Q: All right. Now, this particular -- the one
5 we're talking about now, the -- I'm going to
6 call it the Trident Summerville FSED, just to
7 -- I don't know if that's a good mark or not.
8 At least it kind of sits in my mind as I know
9 what I'm talking about. So the Trident
10 Summerville FED or FSED, that was opposed by
11 Roper initially, but then there was a
12 settlement between the two parties and
13 eventually the CON was issued, just to Trident
14 Summerville FED, right?

15 A: That's right.

16 Q: All right. MUSC opposed that during the
17 project review; is that correct?

18 A: Yes.

19 Q: But didn't go to the ALC with that, any kind of
20 opposition?

21 A: That's my understanding.

22 Q: All right. Okay. Now -- and then we've talked
23 a good bit about Roper has a new hospital,
24 Roper Berkeley -- Roper St. Francis Berkeley.
25 I'm not sure exactly what the name is. But we



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1 all know it's somewhere around Carnes
2 Crossroads. And it's scheduled to open this
3 fall, correct?

4 A: Correct.

5 Q: And it'll have a hospital based ED in there,
6 right?

7 A: True.

8 Q: Now, that is a project that Trident opposed and
9 it was litigated and Trident lost the
10 litigation, The Court approved the hospital.
11 Is that correct?

12 A: Right. There were two compete -- well, I guess
13 they really weren't competing applications, but
14 two applications for new hospitals and
15 ultimately both hospitals got approved.

16 Q: Right. And the other hospital you're talking
17 about is the Trident Hospital. I think it's
18 called Berkeley Medical Center, but it's up
19 near the -- or in Moncks Corner, correct?

20 A: It is in Moncks Corner.

21 Q: And it was opposed by Roper, right?

22 A: True.

23 Q: But after litigation, The Courts in that
24 project sided with Trident and approved that
25 hospital and that CON's been issued?



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1 A: Sided with Roper.

2 Q: I'm sorry?

3 A: Well, I mean, Roper didn't actually oppose the
4 Trident project. It argued that both hospitals
5 should be approved. That's my recollection.

6 Q: Okay. All right. So both hospitals are now
7 approved, the Roper Hospital's opening soon.
8 The Trident Hospital hasn't announced an
9 opening date yet. Is that right?

10 A: Has not.

11 Q: Okay. All right. Now, there's also -- MUSC
12 has a hospital that's being proposed for the
13 Nexton area, correct?

14 A: Correct.

15 Q: And I've seen that referred to often as a
16 community hospital, the MUSC Community Hospital
17 or the Nexton Hospital. And there's a number
18 of references to that in your testimony and
19 other testimony from this week. But that --
20 what's the status of that hospital?

21 A: It's under appeal and it's going to proceedings
22 in November of this year.

23 Q: November of this year. Who's opposing?

24 A: Trident and Roper.

25 Q: All right. And so we don't know how the judge



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1 is going rule on that one though, do we?

2 A: We do not.

3 Q: Obviously. And -- all right. Now, let me jump
4 back up to the Moncks Corner Trident
5 facilities. So you've got a freestanding ED in
6 Moncks Corner and you've got a CON to build a
7 hospital in Moncks Corner. And they're very
8 close together, right?

9 A: Right. In fact, they're almost the same site,
10 but that's my understanding. But ---

11 Q: I think you told me at your deposition they
12 were yards away. Is that right?

13 A: I think that's right.

14 Q: Would it be fair to say they're on the same
15 campus?

16 A: Yeah. I think, ultimately, it will be the same
17 campus.

18 Q: And once the hospital is built, I think you
19 told me that it's your understanding that the
20 FED will be incorporated into the hospital.
21 They wouldn't have a freestanding ED yards away
22 from a hospital that has its own ED, correct?

23 A: Right. They're not sure if the physical
24 structure will be incorporated, but the
25 services will be incorporated into the



1 hospital.

2 Q: So you won't have two ED departments side by
3 side?

4 A: No.

5 Q: Okay. And -- good. Okay. Let's -- let me ask
6 you to turn your attention back to what's on
7 the screen, which, again, is -- the Bates
8 number for this is M08.20 from the Trident
9 Summerville FED application. I'm just going to
10 read a portion of this. We've already talked
11 about the highlighted part. I don't think we
12 need to go there again. But the next sentence,
13 the one that begins the Summerville FSED, do
14 you see that about halfway through the
15 paragraph?

16 A: Yes.

17 Q: It says the Summerville FSED will provide
18 another point of access for emergency patients
19 who reside in Dorchester and Berkeley counties
20 that is proximate to the fastest growing
21 communities in the Tri-County area and an area
22 from which Summerville Medical Center, SMC,
23 receives a significant number of emergency
24 patients currently. Did I read that correctly?

25 A: You did.



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1 Q: So the Summerville -- I think we talked about
2 it a good bit. But the Summerville -- the
3 Trident Summerville FSED is how far away from
4 the new site for the MUSC FED?

5 A: I believe it's about seven miles.

6 Q: About seven miles, okay. And would you say
7 that both of those are -- both of those sites
8 are proximate to the fastest growing
9 communities in the Tri-County area?

10 A: Yes. I mean, it's -- you know, southern
11 Berkeley, portions of Dorchester are among the
12 fastest growing.

13 Q: All right. And how about reading the next
14 paragraph, the first sentence for me, please?
15 Just read it out loud, because I've been
16 talking too much.

17 A: The American Hospital Association reported that
18 the number of EDs at community hospitals grew
19 by 20.4 percent between 2003 and 2013, while
20 the number of hospital EDs declined by 9.7
21 percent.

22 Q: All right. So freestanding EDs are growing,
23 hospital EDs are declining. Is that the
24 message there?

25 A: On a national basis, that's correct.



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1 Q: On a national -- is that also true in South
2 Carolina?

3 A: There had been some closures of rural hospitals
4 which has resulted in the closure of hospital
5 EDs. It's not as big an issue in South
6 Carolina as it is in some other states.

7 Q: Certainly, in the Tri-County area and Horry
8 County, the bulk of the freestanding EDs in the
9 state are in that area. Is that correct -- or
10 those areas?

11 A: Yes.

12 Q: And they've been growing, for the past 10 years
13 a number of new ones have been added, correct?

14 A: Right. And I don't believe -- well, I guess
15 the Williamsburg Hospital would be the only one
16 in that Horry County area that's closed in
17 recent years.

18 Q: All right. Now, the next sentence talks about
19 sort of the way that folks access EDs. Why
20 don't you read that into the record, please?
21 The one that begins at -- is being highlighted
22 by Mr. Bupp over there.

23 A: Sure. The National Center for Health
24 Statistics', NCHS, National Hospital Ambulatory
25 Medical Care Survey: 2013 Emergency



1 Departments Summary, which is the most recent
2 national data available reports that only 14.5
3 percent of patients arrive at a hospital ED by
4 ambulance and only 11.1 percent of patients
5 were admitted to a hospital or observation unit
6 following and ED visit.

7 Q: So let me ask you about that 14.5 percent. So
8 if 14.5 percent arrive at a hospital ED by
9 ambulance, that would be, what is that, 85.5
10 percent arrive by walk-in. Is that the
11 assumption?

12 A: Right, car or other vehicle. Yes, sir.

13 Q: Right. Okay. Let me ask you to turn over and
14 ask Dan to turn us over to Bates page 22 of
15 this document, still in the need section, I
16 believe.

17 A: Okay.

18 Q: And you see at the top of this page, it says
19 Exhibit 2. This is a chart that says Growth in
20 Emergency Department Visits, Residents in Tri-
21 County Area. You see the percent change during
22 this four-year period is a growth of 17.2
23 percent? Is that right?

24 A: I do see that.

25 Q: And your source there is the RFA ---



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1 A: Correct.

2 Q: --- office, is that correct?

3 A: Yes.

4 Q: RFA data. And then, I think after that --
5 below that chart in this application, you talk
6 a bit about FSEDs and sort of the nature of
7 FSEDs and why they're used. Is that correct?
8 Would that be a ---

9 A: That's true.

10 Q: --- good statement? So the sentence right under
11 the chart says, FSEDs not only alleviate
12 pressure on existing emergency services at
13 hospitals, but they also improve access for
14 residents of areas that previously had longer
15 travel times to and waiting times for hospital-
16 based emergency services. Is that -- and I
17 sure you must agree with that or you wouldn't
18 have put it in your application, right?

19 A: I do agree with that.

20 Q: All right. And when you're talking about
21 waiting times for hospital-based emergency
22 services, what are the standard waiting times
23 or do you know what the average waiting times
24 for the hospital-based EDs in the Tri-County
25 area are now?



1 A: I think I would have to defer to the other
2 experts who talked and have already testified
3 in this case. But, I mean, I've seen those
4 metrics. I don't think I could quote them to
5 you chapter and verse.

6 Q: All right. But how do those wait times compare
7 with the wait times in freestanding EDs
8 generally?

9 A: I mean, typically they're shorter in
10 freestanding EDs because they're dealing with a
11 lower-acuity patient population and they don't
12 receive some of the more complex cases that may
13 tie up resources for an extended period.

14 Q: Let's go to the paragraph after this. And the
15 -- towards the bottom of that paragraph there's
16 a sentence that's begins, FSEDs can serve.

17 **MR. WESTBROOK:** And highlight that for us, Dan.

18 Q: Mr. Sullivan, would you read that sentence into
19 the record, please? Why don't you read the rest
20 of the paragraph into the record?

21 A: Okay. Sure.

22 Q: Oh, I'm sorry. I'm giving you too much. Let's
23 -- I'm sure you can handle it. I don't mean to
24 imply that, but I'm not sure I can. So let's
25 just read the -- we'll take them one at a time.



1 Why don't we go with this one right here, okay?

2 A: Okay. FSEDs can serve the large majority of
3 patients served in hospital EDs, although
4 triage protocols are in place to provide for
5 the immediate transfer of patients who require
6 surgical or cardiac intervention, perinatal
7 care, or other specialized inpatient services.

8 Q: All right. And the final sentence says what?

9 A: It says, estimates from existing providers
10 indicate that approximately 80 percent of
11 emergency patients served by hospital EDs can
12 be effectively treated in a freestanding ED --
13 or at a FSED.

14 Q: And freestanding EDs, you may have said this a
15 minute ago, but that -- or something similar.
16 They generally have lower wait times, they're
17 usually more accessible than hospital EDs, is
18 that correct?

19 A: Yeah. I mean, they tend to be standalone
20 facilities, so, you know, parking is a little
21 more convenient for the patients who come to
22 these. And, you know, you're not part of a
23 larger hospital complex.

24 Q: And I think you told me in the deposition that
25 FEDs are all about convenience. Is that right?



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1 A: Yeah. I mean, that's -- that's a, you know,
2 hallmark of why people develop these.

3 Q: All right. Let's go to -- and let me back up
4 for just a minute. That last sentence, the one
5 that's still highlighted up there. Estimates
6 from existing providers indicate that
7 approximately 80 percent of the emergency
8 patients served by hospital EDs can be
9 effectively treated in an FSED. And you've
10 used that same sentence in a number of your
11 applications; have you not?

12 A: Or something similar to it.

13 Q: Or something similar to it, right.

14 A: Yeah.

15 Q: Yeah. Is that based on -- when you say
16 estimates from existing providers, what's your
17 source of that?

18 A: That would just be discussions that I had with
19 clients of mine who operated freestanding EDs.
20 And just asking them, you know, of the base of
21 patients, you know, which categories of
22 patients, you know, could you serve. And, you
23 know, information's generally been 70 to 80
24 percent of the patient base.

25 Q: All right. But in your applications, the ones



1 that I've looked at -- and we can go through
2 them if you'd like -- you used the 80 percent,
3 isn't that correct?

4 A: I may have. I mean, I couldn't recall what
5 I've wrote in every application, but I've used
6 80 percent before.

7 Q: All right. Now, let me ask you to turn over
8 and ask Dan to turn over to Bates page 33,
9 please, of this application. Now, this breaks
10 down your service area -- or your projected ER
11 visits by ZIP codes in the service area, right?
12 And you have a four ZIP code service area for
13 this project, is that right, or at least a
14 primary service area?

15 A: Yeah, they're -- there was a typo in the
16 application. This was later corrected. These
17 ZIP codes are actually in Horry County.

18 Q: Well, now, that's more than 15 minutes away,
19 Mr. Sullivan, I hasten to add. But at any
20 rate, whether the ZIP codes are correctly
21 numbered or not, you had a four ZIP code
22 primary service area in this project, correct?

23 A: I think it -- when I -- you know, there were
24 two issues. I mean, one, I -- I failed to cut
25 and paste the right ZIP code names in here.



1 And secondly, one of the ZIP codes, 29483, as
2 I recall, had been split right before the time
3 the application was filed. You know, like
4 within a year, the year before. And so there
5 was a new ZIP code that was created, 29486. I
6 think if you look at the project review slides,
7 those show the actual service area definitions.
8 I think it's actually a, I believe, five ZIP
9 code service area ---

10 Q: All right. Well, regardless of whether it was
11 four or five. And I understand your
12 explanation.

13 A: Yeah.

14 Q: What -- it looks like to me what you've done
15 there in identifying ZIP codes that make up
16 your primary service area is that you've taken
17 the ZIP codes from which you would get 80
18 percent -- we just talked about a different
19 kind of 80 percent -- but just coincidentally
20 80 percent of your projected visits, because
21 then at the bottom of that chart it says, in-
22 migration 20 percent, right?

23 A: That's right.

24 Q: So what you're doing there, if I'm -- correct
25 me if I'm wrong. It looks to me like you're



1 basing your primary service area, where you get
2 80 percent of your patients, and then you're
3 saying I'm getting 20 percent that are going to
4 in-migrate out; they don't live in the primary
5 service area, but we're going to get some folks
6 from outside that; is that right?

7 A: Right. And I looked at Centre Pointe's
8 experience.

9 Q: Uh-huh.

10 A: Centre Pointe being another Trident facility
11 that opened up a couple of years prior to
12 filing this application. And they're core ZIP
13 codes made up about 80 percent of their volume.
14 And then they had a little broader dispersion
15 of ZIP codes is where the other 20 percent came
16 from.

17 Q: All right. And that's your standard practice,
18 is it not, to do something like -- to focus on
19 a primary service area where you get 80 percent
20 or approximately 80 percent?

21 A: Yeah. I mean, it's variance depending on the
22 service, but, yes, 75 to 80 percent generally.

23 Q: Okay. Seventy five to 80 percent leading, 20
24 to 25 percent who would in-migrate?

25 A: Right.



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1 Q: Okay. Got you. All right. Now, since we were
2 talking about Horry County, let me just clarify
3 that. Horry County, I believe you told me at
4 our deposition, currently, there are three
5 existing -- no, two existing and two approved
6 FEDs in Horry County; is that right?

7 A: That's correct.

8 Q: Okay. And of those four, three of them are HCA
9 owned; is that right?

10 A: Right.

11 Q: And HCA is also the parent of Trident, correct?

12 A: Right. They're the parent of Grand Strand
13 Medical Center in Horry County.

14 Q: And Trident Health System in the area we're
15 talking about?

16 A: Yeah. I don't know if parent is the right
17 word, but that's the ultimate organization
18 that's over the hospitals.

19 Q: I understand. Thank you. All right. And --
20 now, I can't remember if you spoke about this
21 or not. But Trident has a CON application for
22 a freestanding ED that's currently pending
23 where the proposed location is in James Island,
24 right?

25 A: Yes.



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1 Q: And you drafted the need section of that one
2 also, right?

3 A: I did.

4 Q: Now, that is -- where does that stand,
5 procedurally right now, Mr. Sullivan?

6 A: It's scheduled for a hearing in December, I
7 believe.

8 Q: Is that an ALC hearing?

9 A: It is.

10 Q: Okay. And it's being opposed by who?

11 A: It's being opposed by Roper.

12 Q: By Roper?

13 A: Yes.

14 Q: Okay. And I believe in that application also
15 -- we can pull it out if you need to. But I
16 think you said in that application, as you did
17 in this one, that 80 percent of the patients
18 served by hospital EDs could be effectively
19 treated in freestanding EDs. And in this case
20 by the James Island freestanding ED.

21 A: Sure. I mean, as a broad rule. I mean,
22 obviously individual circumstances, they're
23 going to vary.

24 Q: Now, how far -- what is the mileage from
25 Trident Hospital -- well, let me ask you this



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1 first. Would the James Island FED, if it's
2 approved, would it be a department of Trident
3 Medical Center or Summerville Medical Center?

4 A: I believe Trident Medical Center.

5 Q: So how many miles is it from Trident; do you
6 know?

7 A: About 25, I think.

8 Q: Twenty-five?

9 A: That's just an estimate, I mean, it's something
10 in that range.

11 Q: Something in that range. And have you done any
12 kind of time -- drive-time studies for that?

13 A: I think we did. And it's ---

14 Q: You recall?

15 A: -- it's probably a 35 or 40-minute drive.

16 Q: All right. Now, Trident -- we mentioned a
17 minute ago. Trident Medical Center also has a
18 freestanding ED in Moncks Corner, right?

19 A: They do.

20 Q: And again, that's Trident Medical Center, not
21 Summerville Medical Center, right?

22 A: That's correct.

23 Q: Okay. And what's the mileage from Trident to
24 Moncks Corner -- up at that Moncks Corner
25 facility?



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1 A: I want to say it's about 18 or 19 miles.

2 Q: Okay. Do you know -- do you have the drive-
3 time for that?

4 A: I don't. I haven't done that analysis in a
5 long time.

6 Q: All right. And I believe, as we also
7 discussed, Roper has a freestanding ED in
8 Moncks Corner, correct?

9 A: Sure.

10 Q: Do you know what the drive-time is between
11 Roper and that Moncks Corner FED?

12 A: It would be a lot longer because that's
13 probably like a 40-mile trip.

14 Q: Okay. And have you -- or do you have any
15 knowledge of what the drive-time would be?

16 A: It'd be probably in excess of 40 minutes. I
17 don't know exactly what it is.

18 Q: All right. Let's look back at the application
19 we were looking at, which is the Trident
20 Summerville FED application. And let me ask
21 you to go to Bates page 22. I think we may
22 have been on that page when we left it. Yeah.
23 So 22, and you see towards the bottom of that
24 page there's a heading that says, Certificate
25 of Need Standards for Freestanding Emergency



1 Services, right?

2 A: That's right.

3 Q: And then it lists -- on this page, spilling
4 over to the next page, it lists the standards.
5 And then as part of the application, as part of
6 the needs section you give a response to how --
7 to show how you addressed that standard. Is
8 that an accurate way of putting it?

9 A: Yes.

10 Q: Okay. And so, at the very bottom of the page
11 it lists Standard 2, correct?

12 A: It does.

13 Q: All right. And on the next page, the top of
14 the next page, it gives your response, which
15 says, the Summerville FSED will operate as an
16 extension of SMC and will be located in
17 Berkeley County where there is no licensed
18 hospital, period. I'm not going to read the
19 rest of that because that's the part of the
20 sentence that I was interested in. Is that
21 still your opinion?

22 A: Yes.

23 Q: That there's no licensed hospital in Berkeley
24 County?

25 A: Yes.



1 Q: All right. And down at the --

2 **MR. WESTBROOK:** If you scroll down there, Dan.

3 Q: There's Standard 6, which you've talked about
4 some. And the standard -- I won't read out the
5 standard. It says what it says. And then your
6 response to Standard 6, at this part of the
7 application, is one sentence. Why don't you
8 read that into the record?

9 A: The following discussion will document the need
10 for this project, the proposed service area,
11 and why patients are not being adequately
12 served by the existing services in the area.

13 Q: All right. So that one sentence simply says
14 that the rest of the application or the rest of
15 this need section is going address why we
16 comply with the Standard 6; is that right?

17 A: Right. It goes -- it sets forth the different
18 elements of the need.

19 Q: You don't think that response -- your one-
20 sentence response there is too brief, do you?

21 A: Well, no. I mean, it was just an introductory
22 sentence into the rest of the analysis.

23 Q: Thank you. Now, you do agree I believe, do you
24 not, that for the last several years 20,000
25 people or more from the ZIP codes that Mr.



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1 Levitt used for his service area, had been
2 traveling down to MUSC for ED services. You
3 don't dispute the fact that many, total 20,000
4 a year, are going down there for ED services,
5 do you?

6 A: No.

7 Q: Okay. Does your FSED application that we've
8 been talking about up on the screen, does it
9 adjust their utilization projections or do you
10 adjust for utilization projections for acuity
11 or age here?

12 A: I did. And that was part of my analysis in
13 determining how much existing market share I
14 thought we could shift from Summerville Medical
15 Center to the new freestanding ED and how much
16 would be new market share of patients who would
17 be attracted to the facility.

18 Q: Does that analysis appear in the need section
19 or anywhere else in the application?

20 A: That does not. I mean, but I only -- I only
21 shifted a fraction of the overall market share
22 that Summerville and Trident Medical Center had
23 in those ZIP codes in projecting utilization.
24 My assumption is that a lot of those patients
25 will continue to go to the hospital, but there



1 it would be a portion of those patients who
2 would use the freestanding ED.

3 Q: But the actual adjustment that you made, the
4 mathematical calculation that you made to
5 adjust for acuity does not appear in the
6 application?

7 A: It does not.

8 Q: And the mathematical calculation that you made
9 to adjust for age does not appear in there
10 either?

11 A: Well, there -- I didn't make a specific age
12 adjustment because at that point in time there
13 was no separate pediatric ED at Summerville.
14 But I did take into account the acuity of the
15 patients, because I did not assume that there
16 would be, you know, a total shift or even a 75
17 percent shift of market share from those ZIP
18 codes.

19 Q: The James Island application that we talked
20 about a minute ago that you also did, did you
21 make in the application in the need section
22 itself an age or an acuity adjustment there?

23 A: Well, I didn't because Trident had such a small
24 market share on James Island that I really
25 didn't assume that there that would be any



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1 material shift of patients away from the
2 Trident facilities.

3 Q: Okay.

4 A: And so almost all of the patients who were
5 going to go there were going to be new patients
6 to the Trident System. And I assumed that we
7 would only capture, you know, a relatively
8 small portion of the market share in each of
9 those ZIP codes and that service area, one, in
10 recognition of the acuity of the patients and,
11 two, in recognition of, you know, the presence
12 of existing providers.

13 Q: And that Trident market share in James Island
14 is less than five percent, right?

15 A: Overall, I believe that's correct.

16 Q: Right. And the -- I believe you also did the
17 applications for HCA's Grand Strand North
18 freestanding ED?

19 A: I did.

20 Q: And is that the one that's referred to as North
21 Strand?

22 A: Yes.

23 Q: And the one for Grand Strand's Carolina Forest
24 FED?

25 A: I did.



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1 Q: And in those need sections did you, in the
2 application, make an adjustment -- show you any
3 kind of adjustments for acuity or age?

4 A: I did not. I did make an explicit presentation
5 of that, but I recognize that only a portion of
6 existing market shares that Grand Strand was
7 serving in each of those cases would be
8 appropriate to shift and I shifted relatively
9 small percentages of market shares.

10 Q: Now, I think maybe the first question -- or one
11 of the first questions that I asked you when we
12 started a few minutes ago was that this
13 application we've been talking about, the
14 Trident Summerville FED application was filed
15 with DHEC in April of 2017? Does that sound
16 right or do you need to go back and check?

17 A: I think it was Fort Sumter Day, April 12th,
18 2017.

19 Q: Only a native Charleston would remember that.
20 Well done there. So April 14th; is that what
21 you said?

22 A: 12th.

23 Q: 12th, I'm sorry. April 12th. And MUSC filed
24 its application in July that same year, right?

25 A: I believe like the 27th or something like that.



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1 Q: All right. Now ---

2 A: June, I'm sorry. I think it was June 27th.

3 Q: June 27th?

4 A: I believe that's right.

5 Q: All right. In the summertime?

6 A: Yes.

7 Q: A few months after Summerville did, right?

8 A: Correct.

9 Q: All right. And I believe you said in your
10 Direct that Summerville expected that these
11 were going to be treated by DHEC as competing
12 applications, correct?

13 A: We did.

14 Q: And by competing applications, I think you
15 explained that well in your direct, but let me
16 see if I've got it. If DHEC determines that
17 two applications are competing, what that means
18 is they decide that there's only need enough
19 for one and therefore only one can be approved,
20 correct?

21 A: Correct.

22 Q: And during the process of staff review,
23 Summerville advocated the position that these
24 were competing applications and only one could
25 be approved; isn't that right?



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1 A: We did.

2 Q: Now, I believe you testified in Direct that
3 MUSC thought they would be competing as well.

4 A: I thought that's what Mr. Levitt testified to
5 in his deposition.

6 Q: All right. Would you stand on whatever that
7 deposition said?

8 A: I would.

9 Q: Obviously.

10 A: I would.

11 Q: Yeah. And it would be -- do you think it's
12 just as likely that what he said and what MUSC
13 thought was that there was a possibility that
14 DHEC would deem both of them competing and they
15 didn't want to take any -- MUSC didn't want to
16 take any chances and wanted to be batched with
17 the Summerville application?

18 A: Yeah. I don't recall the exact language. I'm
19 sure Mr. Levitt will clarify that.

20 Q: Okay. But whatever Mr. Levitt said in his
21 deposition, if -- you talked about the concept
22 of batching. And if there was a possibility
23 that DHEC were to consider these two competing,
24 in order to be part of that evaluation, part of
25 that analysis, MUSC would have to get its



1 application in by the regulatory deadline,
2 whatever that is, so they could be batched with
3 your application, right?

4 A: That's correct.

5 Q: Okay. And if they missed that deadline and
6 DHEC approved you and DHEC determined that
7 there wasn't -- it was only a need for two,
8 then MUSC would just be out of luck, right?

9 A: Yeah. I mean, if they thought there was only
10 a need for one, then if we were approved and
11 they weren't in the same batch, then they would
12 have been out of luck.

13 Q: Do you recall when the deadline for that -- to
14 be considered part of that batch was?

15 A: I don't remember the publication date of the
16 Summerville project, but I'm pretty sure that
17 MUHA got in under the wire in terms of the
18 deadline.

19 Q: Didn't they get in just barely under the wire
20 though?

21 A: I think it was. I think a matter of a few
22 days, yes, sir.

23 Q: Now, so at the time the argument that you all
24 were making -- when I say you all, I do not
25 mean you personally. I don't know if you were



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1 making this argument personally or not. But
2 what the argument that Trident and Summerville
3 was making to DHEC was there was only a need
4 for one, these were competing applications and
5 you should approve us, rather than MUSC; is
6 that right?

7 A: Yes.

8 Q: All right.

9 **MR. WESTBROOK:** And, Dan, let's get up the
10 opposition letter. I don't know the Bates page
11 of that, but we'll find out when we get it up
12 on the screen. I think this will be from Joint
13 Exhibit 1 and it's DHEC's CON 440. Now, this
14 is a letter from Mr. Thomas, our friend over
15 here, to Mr. Eubank at DHEC dated July 6th,
16 2017. That would have been shortly after MUSC
17 filed its application?

18 A: Yeah. about 10 days later, I guess.

19 Q: Okay.

20 **MR. WESTBROOK:** And let's scroll on down, Dan.

21 Q: And the -- look at the second sentence -- or
22 well I think to put it in context, why don't
23 you look at the first sentence of the second
24 paragraph. It's the first sentence which
25 reads, as the Department knows, SMC recently



1 applied for an FSED to be located in the same
2 area as MUHA's proposed FSED. Then the second
3 sentence says, why don't you read that for me?

4 A: While this may indicate need in the area for
5 additional emergency room services, there
6 certainly is not a need for two FSED
7 facilities, especially two FSEDs, who would be
8 less than a quarter of a mile away from each
9 other.

10 Q: Okay. And then -- so that was in July of 2017.
11 Now, it was in November of 2017, a few months
12 after this, was it not, that Trident filed an
13 application to expand the ED department of
14 Summerville Medical Center, is that right?

15 A: That sounds right.

16 Q: And you drafted that application or the need
17 section of that application also, correct?

18 A: I did.

19 Q: And let's take a look -- that's MUSC's Exhibit
20 12 and let's turn to Bates page M1228. This is
21 -- just check this out. This is part of the
22 need section; is it not?

23 A: It is.

24 Q: All right. Bear with me a second while I find
25 my copy, so I don't have to walk up there in



1 front of you. And read the first sentence on
2 that page, please?

3 A: There is a large and growing base of patients
4 requiring emergency department services in the
5 Summerville FSED service area.

6 Q: Okay. And let's go -- turn over to Bates page
7 32, please. And you see the heading that says,
8 No Unnecessary Duplication?

9 A: Yes.

10 Q: And the first sentence under that heading says
11 what?

12 A: It says, the project will not result in
13 unnecessary duplication of healthcare
14 resources.

15 Q: All right. So in November Trident was taking
16 the position that its ED expansion was based on
17 a large and growing base of patients requiring
18 emergency services in the service area and that
19 the project would not result in unnecessary
20 duplication of healthcare resources. But in
21 July, it was arguing that there was only a need
22 for one FED in the Summerville area; is that
23 correct?

24 A: Yes.

25 Q: Okay.



1 A: There's a reason for that.

2 Q: All right. You want to tell us what that is?

3 A: The freestanding ED serve a specific purpose.
4 And that is to provide a new point of access to
5 emergency services for folks who, you know,
6 like not to go to a hospital-base service. The
7 Summerville freestanding ED addressed that
8 particular need when it was approved. But
9 there still remains the need for hospital-based
10 ED services. And the percentage of patients
11 that we assume would shift from Summerville
12 Hospital's free, I mean, emergency department
13 to the freestanding ED was not enough to
14 alleviate all of the capacity constraints that
15 Summerville had. And so there was still a need
16 for additional capacity over and above the
17 shift of patients to the freestanding ED.

18 Q: All right. Mr. Sullivan, can you think of --
19 you've been working for Trident and HCA for --
20 well, I know you've been working for HCA a long
21 time, but how long have you been working for
22 Trident?

23 A: Maybe 10 years.

24 Q: Okay. In those 10 years, can you think of any
25 CON application filed by MUSC off the peninsula



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1 that Trident did not oppose?

2 A: Well, there was a ambulatory surgery center
3 application that MUSC and East Cooper did
4 jointly.

5 Q: Uh-huh.

6 A: I don't believe Trident opposed that
7 application. I don't know if I can think of
8 every application MUSC filed ---

9 Q: They -- well, obviously they're opposing this
10 application, right?

11 A: Right. I mean, they've opposed most of the
12 projects that have been requested that were in
13 basically Trident's backyard. I mean, that
14 were located in northern Charleston County or
15 in Berkeley County.

16 Q: Okay. So they opposed this project, they're
17 opposing the Nexton Hospital project?

18 A: Right.

19 Q: The linear accelerator case that we tried in
20 January that Trident opposed, right?

21 A: Right.

22 Q: There was a relocation -- you recall the MUSC
23 LINAC, linear accelerator, relocation a few
24 years ago?

25 A: I do.



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1 Q: And that -- Trident opposed that; did they not?

2 A: They did.

3 Q: There were two PEDs cases, pediatric ASC and a
4 pediatric imaging center, that Trident opposed
5 both of those, right?

6 A: They did initially and I guess there was a
7 settlement reached.

8 Q: There was eventually a settlement. But they
9 opposed them and we got into the litigation
10 part of things; did we not?

11 A: We did.

12 Q: And there was an ambulatory surgery center in
13 the West Ashley about the same time for
14 musculoskeletal ASC; do you recall that?

15 A: Right. Right. Over by the Citadel Mall, yes.

16 Q: And Trident opposed that too, right?

17 A: They did initially. I don't think they
18 followed through on ---

19 Q: Well, wasn't that part of the same settlement
20 with the pediatric cases?

21 A: You'll have to tell me. I don't know.

22 Q: Now, how many Trident CONs in that same period
23 of time has MUSC opposed; do you know? How many
24 can you think of?

25 A: I can't think of any.



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1 Q: Okay. All right. Let's talk about some of the
2 changes to the MUSC project. You want spent
3 some time on those and do ---

4 A: Sure.

5 Q: -- I'd like talk you through those. Now, I
6 don't remember exactly what you said today
7 about the CDU and the helipad. But isn't it
8 your opinion that eliminating those two
9 features, CDU and that helipad, eliminating
10 those will not substantially change the way
11 this project complies with any project review
12 criteria?

13 A: That is my opinion. I didn't think they were
14 necessary parts of the project, but MUSC
15 decided to include those in the original
16 application and actually made a fairly big deal
17 about those at the project review meeting. And
18 so, while I didn't personally think that they
19 were particularly important, I don't know what
20 weight they were given by DHEC in their
21 evaluation.

22 Q: But, again, just to make sure I understand.
23 Your opinion is that their elimination does not
24 change the way this project complies with any
25 criteria?



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1 A: No, because ---

2 Q: Criterion.

3 A: Yeah. I mean, because I don't believe that
4 they were necessary components to begin with.
5 It doesn't mean that taking them out doesn't
6 constitute a change in the application.

7 Q: All right. A reduction in size to this project
8 and the reduction in cost, I believe it's your
9 opinion that those are problems only if they
10 fundamentally change the ability of the project
11 to accomplish what it's set forth to
12 accomplish; is that right?

13 A: That's my opinion.

14 Q: And you would agree that a move of a relocation
15 from the first site, possibly a mile away to
16 the second site is not a dramatic change,
17 correct?

18 A: It's not generally. You know, it's -- in this
19 case it was more about a number of elements of
20 the project that changed. I mean, if all that
21 MUSC had done would say, we're going to move .7
22 miles down the road, but everything else is
23 going to stay the same. I think that's a
24 different evaluation than if you change several
25 different elements of the project.



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1 Q: All right. But -- and I understand what you're
2 saying, you're taking a cumulative approach.
3 But just a relocation itself, I think in your
4 deposition you did not have an opinion as to
5 whether that was a substantial change or not.
6 Is that correct?

7 A: Yeah. As far as I know, relocating at that
8 distance in and of itself isn't a substantial
9 change. But it had a rippled affect in terms
10 of other aspects of the project.

11 Q: And if the relocation itself is not a
12 substantial change. You would agree that there
13 is no need -- there would be no need for
14 additional support letters to comply with
15 DHEC's criteria, correct?

16 A: If that in and of itself was the only change,
17 that's correct.

18 Q: So you're taking the position now that
19 additional support letters are required?

20 A: Well, if you look at the totality of the
21 changes, then I would say, yes, additional
22 support letters -- a lot of -- you know, the
23 project that was originally presented to DHEC
24 and what those letters of support were gathered
25 for was for a larger project on a specific



1 medical campus with a CDU and a helipad. And
2 there was a lot of discussion about this being
3 a great location at Nexton. When you look at
4 the accumulation of all of the changes, then I
5 think you probably do need to get some
6 additional support.

7 Q: All right. Let's --

8 **MR. WESTBROOK:** Tammy, let's bring out Mr.
9 Sullivan's -- I'm sorry, you're not Tammy.
10 Let's bring out Mr. Sullivan's deposition.

11 Q: Mr. Sullivan, please open that up for me.

12 A: Easier said than done. Okay.

13 Q: All right. I'm going to ask you to turn over
14 to page 146 and ask Dan to put that up on the
15 screen. And it's at the bottom of 146, so it's
16 going to spill over to 147. And why don't you
17 take a moment to look at it. But where I'm
18 going to start is on 146 line 22 and we're
19 going to go onto page 147 through line five.
20 So why don't I read the question. And actually
21 there are two Qs and two As here, so I'll read
22 the Qs and you read the As, okay?

23 A: Okay.

24 Q: All right. Starting with line 22 on 146,
25 question, and if -- the relocation itself, if



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1 that is not a substantial change, would there
2 need to be any additional project letters from
3 your -- support letters from your experience as
4 a health planner? The answer is.

5 A: Assuming it's not a substantial change.

6 Q: Question, yeah. Answer?

7 A: No, you wouldn't need additional support. I
8 mean, I don't agree that it's not a substantial
9 change, but if that were the case.

10 Q: If it were the case, that the relocation itself
11 were not a substantial change, you would not
12 need additional support. Is that what you just
13 said?

14 A: I think that's what I said before you pulled up
15 my deposition. I just said that, when you look
16 at the totality of the changes, that it is a
17 substantial change and I think you do need
18 additional support letters.

19 Q: All right. You haven't seen any management
20 services agreement for this project, have you?

21 A: I have not.

22 Q: Now, do you recall the ZIP code that the
23 Trident Summerville FED is in?

24 A: I believe it's in 29486.

25 Q: And that's the same ZIP code that the MUSC site



1 is in also, right?

2 A: Correct.

3 Q: And it's the same site, in fact, the original
4 MUSC site was in, correct?

5 A: Yes.

6 Q: So neither the MUSC project nor the Trident
7 Summerville project is located in HPSA; is that
8 my understanding?

9 A: Right.

10 Q: Neither one is in a medically underserved area
11 then, right?

12 A: That's true.

13 Q: Now, does that mean that your project doesn't
14 comply with the medically underserved criteria?

15 A: No. I think -- I mean, to the extent that it's
16 going to provide access to all patients. I
17 guess, what I was saying on my Direct testimony
18 is, there's nothing about this project that's
19 going to enhance access to medically
20 underserved patients.

21 Q: Okay. Let's look at project review slides from
22 Trident. This would be from Joint Exhibit 1.

23 **MR. WESTBROOK:** But, Dan, pull that -- pull up slide
24 36 and we'll see what -- does it have a Bates
25 page? It doesn't. It's slide number 36 --



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1 well, why don't we start with the first page of
2 it, Dan. The one -- the cover page. So --
3 bear with me just a second.

4 Q: Well, let's look at it this way. This is
5 identified -- it appears these don't have DHEC
6 Bates numbers on them. And I think I remember
7 this coming up at maybe your deposition or some
8 deposition. But it's exhibit three to your
9 deposition.

10 A: This may have been the piece that was missing
11 from the DHEC record.

12 Q: I think you're right.

13 A: Yeah.

14 Q: I think you're right. So do you recognize that
15 cover sheet, though, as your project review
16 slide cover sheet from August 24th, 2017?

17 A: I do.

18 Q: Okay. Let's go over to slide number 36.
19 That's the only way -- only number on this.
20 And you see the heading there, SMC's
21 Freestanding ED will Promote Services to
22 Medically Underserved Groups. And your first
23 bullet point is because the FSED will operate
24 as a part of SMC, it will be subject to EMTALA
25 requirements. And you talked about EMTALA



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1 today in your Direct. Now, the MUSC FSED would
2 operate as part of the MUSC, correct?

3 A: It would.

4 Q: So it would be subject to EMTALA requirements
5 also, right?

6 A: It would.

7 Q: And your second bullet point about the
8 Summerville project -- the Trident Summerville
9 project is that FSED will serve all patients
10 regardless of their ability to pay. Do you
11 have any concerns that MUSC would not serve all
12 patients regardless of their ability to pay?

13 A: No. I mean, my only point was that there's
14 already going to be a freestanding ED located
15 less than a mile away, so the approval of the
16 -- I mean, the MUSC project would not enhance
17 access to the medically underserved because
18 there's already going to be a freestanding ED
19 there.

20 Q: And have you compared the payor mix and --
21 historical payor mix at MUSC and HCA in terms
22 of Medicaid and indigent care?

23 A: I haven't done it recently. The MUSC payor mix
24 is a little bit skewed because of the pediatric
25 component of their services, which is a high



1 Medicaid mix. But, you know, when we've done
2 the comparisons before Trident just provides a
3 substantial amount of Medicaid and indigent.

4 Q: Okay. At the deposition, I believe you had no
5 opinion about whether -- and I don't recall
6 you -- hearing you talk about this today, about
7 whether the ground lease agreement between MUSC
8 -- that MUSC now has would be a substantial
9 change for the project. Is that correct?

10 A: Yeah. At the time of the deposition -- and I'm
11 still not completely clear on how all the
12 pieces fit together in this project -- I didn't
13 have enough information to know how the ground
14 lease -- and just to back up a little bit, put
15 in context. Before, MUSC was proposing to
16 lease a building from a developer in the Nexton
17 development, whatever it's called. And instead
18 they're going to lease a piece of land and then
19 build a facility on top of it. I don't -- I
20 still don't have an opinion, because I don't
21 know how all the pieces of this fit together
22 yet, until I guess Dr. Cawley testifies. But
23 that piece in and of itself is a change, but I
24 just don't know if it represents a substantial
25 change.



1 Q: And I think also, at least at your deposition
2 -- I don't recall you saying anything about
3 this today -- you had no opinion about the
4 staffing projections in the application for the
5 MUSC project, correct?

6 A: Right. I had not reviewed those.

7 Q: And I believe you volunteered in your
8 deposition, you're not a staffing expert, are
9 you?

10 A: I am not.

11 Q: At your deposition you also had no opinion
12 about MUSC's ability to fund or finance this
13 project; isn't that correct?

14 A: Right. Because I said I didn't have sufficient
15 information.

16 Q: All right.

17 A: I think I expressed my concerns about all of
18 the capital expenditures that MUSC had planned
19 or underway, but I had not seen a definitive
20 plan of financing for this particular
21 engagement.

22 Q: And at your deposition I believe the only
23 criticism you gave pro forma budget in MUSC's
24 application was the volume projections, which
25 you disagreed with and still disagree with,



1 correct?

2 A: I do.

3 Q: All right. But you didn't identify any other
4 criticisms in that budget, right?

5 A: Right. Today, I think the primary thing that
6 I added was that I don't know what the impact
7 of the financing is going to be on the overall
8 projects.

9 Q: Freestanding EDs, you've worked for several of
10 them, we've talked about, in South Carolina?

11 A: Right.

12 Q: Do you know of any freestanding EDs that have
13 failed financially in South Carolina?

14 A: Not that I'm aware of.

15 Q: I mean, the FEDs that you're aware of and
16 familiar with all make money, don't they?

17 A: The ones that HCA operates have all been
18 profitable. I don't have -- haven't been privy
19 to the financial statements for the other ones.

20 Q: Okay. But you're not aware of Roper or any
21 other -- or McLeod or anybody else who owns a
22 freestanding ED, who are struggling to make
23 ends meet with that FED, are you?

24 A: Well, I thought someone from Roper testified
25 that the Moncks Corner freestanding ED for



1 Roper was actually not making money. And I may
2 not recall that exactly right, but I thought
3 there was some testimony that, because the
4 volumes were lower there, that they were not
5 making money.

6 Q: And at -- you have not made any kind of
7 quantified analysis before your latest slides
8 of how many patients you believe MUSC actually
9 will be able to shift to its FED, have you, or
10 that's the first time?

11 A: Yeah. I mean, that's because I didn't quite
12 understand at the time of my deposition. I
13 think I was pretty straight forward about this.
14 Because we had seen the Intuitive documents.
15 And the Intuitive documents talked about, now
16 changing the model from just being emergency
17 services to including urgent care services.
18 And I didn't know how many patients were being
19 projected in each category and so I couldn't do
20 an analysis at that point in time. As I
21 learned more through the deposition process, I
22 felt comfortable. And then with Dr. Cawley's
23 July 2nd email that clarified that they weren't
24 going to do urgent care in those bays at the
25 freestanding ED, then I thought I could go



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1 ahead and make an estimate of what the impact
2 would be.

3 Q: And at the time of your deposition, you had not
4 quantified adverse impact, have you? The slide
5 43, the adverse impact analysis that we looked
6 at today.

7 A: I had not. I mean, I think I said that I
8 believe that it's going to adversely impact the
9 Trident facility, but I hadn't done a specific
10 quantification.

11 Q: And the -- let's look at slide 43 for just a
12 minute, please. This is your new adverse impact
13 analysis, correct?

14 A: Yes.

15 Q: When did you do this?

16 A: Probably in the last 10 days.

17 Q: All right. Did Ms. Valentine or Dr. Wendell or
18 Ms. Eccleston know you were doing this?

19 A: No.

20 Q: All right. And the sources for that, it says
21 MUHA CON application. SC RFA office and SMC
22 FSED CON application. Now, the RFA office,
23 that's Revenue and Fiscal Affairs, right?

24 A: Right.

25 Q: And you had access to that data -- you always



1 had access to that data, right?

2 A: Sure.

3 Q: Okay. So you had the CON application -- both
4 CON applications and the RFA data. Tell me
5 again why you weren't able to do this before
6 your deposition?

7 A: Because I didn't know what the visits that were
8 being projected by MUHA represented. In the
9 original application they talked about serving
10 emergency patients. In the materials that we
11 were provided from Intuitive, there was talking
12 -- there was discussion of a hybrid model. And
13 I learned -- I don't think I was aware of it at
14 my deposition, but after the fact -- that Dr.
15 Cawley's affidavit of February talked about the
16 fact that MUHA was going to adopt a hybrid
17 model. And then in the July 2nd email from Dr.
18 Cawley, he indicated that, no, indeed they were
19 not going to adopt a hybrid model and they were
20 only going to serve emergency patients and that
21 they would have some regular emergency room
22 bays and some fast track bays is my
23 recollection.

24 Q: And you mentioned earlier in your Direct, a
25 document with a spread -- a big spread sheet



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1 with Bates label MUSC 3919. You remember that?

2 A: I do.

3 Q: And that document contains acuity levels; does
4 it not?

5 A: It does.

6 Q: And a lot of other information, of course,
7 right? It's a big document, right?

8 A: It is.

9 Q: And that was produced back in 2018 to Trident.
10 Is that consistent with your memory?

11 A: Yeah. Some point in 2018 it was produced.

12 Q: All right. Hang on for a second, please.
13 Okay. You started off your slides with a look
14 at the purposes of the CON Act?

15 A: Right.

16 Q: And there's nothing in the CON Act, is there,
17 about using CON projects defensively to block
18 other providers from efforts to establish
19 facilities to care for their patients, is
20 there?

21 A: There's not.

22 Q: And there's certainly nothing in the CON Act
23 that describes providers who want to move into
24 a service area as infiltrators, to be blocked
25 from providing services, nothing of that nature



1 substance or tone, is there?

2 A: Not in the CON Act.

3 Q: Okay. Or in the State Health Plan or the reg,
4 correct?

5 A: No.

6 Q: Now, the project -- the relocation, do you
7 dispute that the new site is approximately a
8 mile, depending on whether you drive or as the
9 crow flies, but it's either slightly less or
10 slightly more than a mile from the original
11 site?

12 A: Yeah. I think I measured it and it's a little
13 over .7 as the crow flies and maybe about a
14 mile as you're drive it.

15 Q: And for patients who do go -- and I didn't
16 realize you dispute these numbers or how many.
17 But for patients who live in this area who do
18 go down to MUSC, but who live closer to the
19 original site, they're almost surely are going
20 to live closer to the new site as well, than to
21 MUSC downtown, correct?

22 A: I think that's a fair assumption.

23 Q: And whatever the capacity relief is at the
24 downtown facility, the relocation is not going
25 to change that, is it? I mean, whatever the --



1 whether it's -- however you decide to quantify
2 the degree of capacity constraints and the
3 degree of relief, which will be granted,
4 whether it's small or great, it would really be
5 the same from either of those sites; isn't that
6 correct?

7 A: I mean, there might be a minor difference, but,
8 I mean, it would be, you know, substantially
9 the same.

10 Q: Okay. Immaterial, right? Immaterial
11 difference?

12 A: I don't want to go that far, but it would be
13 substantially the same.

14 Q: Substantially the same?

15 A: Yeah.

16 Q: That's good enough. All right. And that would
17 be -- when we're talking about capacity relief,
18 you heard Dr. Hall's testimony; did you not?

19 A: I did.

20 Q: And his focus about the capacity problems he
21 was having, it really wasn't on the Ashley
22 River Tower or even the pediatric ED, was it?
23 Wasn't it principally on the adult ED at the
24 main hospital?

25 A: That's where he said their biggest problem was,



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1 yes. He said one of their challenges was to
2 get more volume into the Ashley River Tower,
3 into the Chest Pain Center, I think.

4 Q: Did you agree or you have any disagreement with
5 the way that Dr. Hall described the function of
6 fast-track rooms?

7 A: I don't. That was similar to the way I've
8 heard it described previously.

9 Q: And it was -- didn't Ms. Huntington have -- did
10 you detect any kind of difference in her
11 understanding of what fast track meant?

12 A: I thought they were very similar the way that
13 they described it.

14 Q: So the current application's going to have
15 seven treatment -- emergency treatment rooms
16 and five fast-track rooms. And I believe -- is
17 that right?

18 A: That's the plan that I last saw.

19 Q: And Dr. Hall described those as 12 emergency
20 rooms; is that right?

21 A: That's what he described it as.

22 Q: And the original application had 12 emergency
23 spaces, rooms, or bays, or whatever you want to
24 refer to them as; is that right?

25 A: It was.



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1 Q: You heard Dr. Hall talk about the use of
2 telehealth at MUSC?

3 A: I did.

4 Q: You got any disagreements with what he said
5 about how MUSC's going to use telehealth,
6 would use telehealth for this FED?

7 A: I had no knowledge of that.

8 Q: You heard Dr. Hall talk about the accessibility
9 of MUSC physicians, including specialists and
10 residents for the FED? Any disagreements about
11 that?

12 A: Again, that's not something I have any
13 independent knowledge of.

14 Q: And the cost of the project, we talked about
15 that in a minute ago, is going down or has gone
16 down from what it was originally proposed in
17 the application, correct?

18 A: Correct.

19 Q: By what, two or three million dollars,
20 something like that?

21 A: Two point something, maybe.

22 Q: Yeah. And in your experience as a health
23 planner working in -- well, let's just focus on
24 South Carolina since you're -- are the areas
25 you were made an expert in was South Carolina



1 CON process I believe or something like that.
2 Reduced cost: Have you ever known DHEC to have
3 a problem or do you, as a health planner
4 yourself, have a problem with reducing costs or
5 equating a reduced cost as being a substantial
6 change?

7 A: Generally I would not have a problem with that.
8 Again, with the caveat that as long as it
9 didn't change the essential nature of the
10 project.

11 Q: All right. And do you feel the essential
12 nature of this project has it been changed?

13 A: I do. I think that what MUSC put forth to the
14 Department in this case was sort of this new
15 model of freestanding emergency care that was
16 going to include a clinical decision unit and
17 a helipad. It was going to allow them to serve
18 a higher level of patients than traditionally
19 would be served in a freestanding emergency
20 department. And I think that piece of it has
21 been removed. And so now it is more of a
22 generic freestanding emergency department. And
23 so that there has been a change. And, you
24 know, I think a material change in the sense
25 that what they described as the objective of



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1 the project was to sort of introduce a new
2 model of care delivery into the system is no
3 longer that.

4 Q: So the new model of care delivery you're
5 talking about is the CDU and the helipad?

6 A: Right.

7 Q: Now, the helipad, have you heard testimony
8 about MUSC's -- why MUSC decided to go against
9 that, to eliminate the helipad and what they're
10 going to do for helicopter services in the
11 future?

12 A: I heard two things. I mean, one is that it was
13 costly. And, two, they thought there would be
14 very few patients who required helicopter
15 transport.

16 Q: All right. And that was, in fact, Trident's
17 criticism; was it not?

18 A: Yes.

19 Q: All right. And so if they're going to have an
20 area of a parking lot, cordoned off by
21 agreement with the owner to use helicopter
22 traffic when necessary, wouldn't that be a
23 better expense and use of the helicopter
24 services than a helipad that would be a lot
25 more expensive?



1 A: I think it would. And you might have to talk
2 to the people at Chick-fil-a about -- but, you
3 know, I think the -- and, again, you know, I
4 didn't think the helipad and the clinical
5 decision units were important aspects of a
6 freestanding ED. It was MUSC that raised those
7 issues up as being something that was important
8 to their project and distinguished them from
9 the Summerville project. And so I guess what
10 I'm saying is, they've abandoned the pieces of
11 the project that made it distinctive from the
12 Summerville Medical Center project. And so to
13 that extent, that have abandoned at least a
14 portion of what they said that they were
15 planning to do.

16 Q: So you think the essence of the nature of the
17 project has changed, even though it's less than
18 a mile from the original site, that it improves
19 access for however many patients that live in
20 that area that currently go to MUSC, it
21 improves access in the same way, it's --
22 whatever the capacity relief is, it's no
23 different, and 12 bays in the application,
24 there are 12 bays now, same use of telehealth,
25 same use of MUSC's physicians and specialists



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1 and fellows, the lower cost, despite that, you
2 think the nature of the project is essentially
3 changed?

4 A: I do. I think once the discussion with
5 Intuitive started, there was really never any
6 mention again about the redirection of MUSC
7 patients to the facility. It was really
8 talking about where can we put this facility to
9 have the right kind of market capture that
10 would make the facility successful.

11 Q: Well, those were in documents authored by
12 Intuitive; were they not?

13 A: They were. But, I mean, they were -- the
14 design was adopted by MUSC. The site that
15 Intuitive selected was adopted by MUSC. It
16 appears that they were embracing the Intuitive
17 model.

18 Q: But they didn't, did they?

19 A: Well, I think they did until DHEC told them
20 that they couldn't do it. And so then they had
21 to back off.

22 Q: Well, and they -- Dr. Cawley's affidavit back
23 in February was before any contact -- any
24 concerns were raised by DHEC. Now, I know I
25 asked you at your deposition if you had read



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1 that. And you said you couldn't remember
2 whether you had or not. But in that affidavit,
3 I'm sure you've looked at it since then,
4 doesn't he clearly say in that affidavit that
5 there's no deal within Intuitive, they
6 rejected the proposal by Intuitive?

7 A: Yeah. I mean, he certainly said that. But I'm
8 just saying that he -- that while Intuitive may
9 not be part of it, they took many of the
10 concepts that Intuitive had come up with and
11 embraced those.

12 Q: Well, if they -- but they didn't embrace the
13 financial structure, did they?

14 A: Not yet.

15 Q: Well, do you have some inside knowledge that
16 they're going to?

17 A: Well, I don't know. I mean, this project has
18 changed three times I think at least, that I'm
19 aware of. I mean, it's certainly possible it
20 could change again. I don't know.

21 Q: Well, do you -- the Intuitive -- did you review
22 any of the discovery that Trident sent out to
23 MUSC in this case?

24 A: I did.

25 Q: All right. And some of the discovery was



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1 pretty broad. I'm not complaining about it, I
2 didn't have a whole lot of objections. It's
3 typical in cases like this to issue broad
4 discovery requests, correct?

5 A: Yes.

6 Q: And the Intuitive documents that were produced
7 were responsive to some of those requests; were
8 they not?

9 A: They were.

10 Q: And it would have been inappropriate for MUSC
11 not to produce those, correct?

12 A: Correct.

13 Q: But in that production was there anything from
14 MUSC that said -- that showed a signed
15 agreement, other than a non-disclosure
16 agreement, with Intuitive or anything that
17 indicated that MUSC was committed to hiring
18 Intuitive as a consultant?

19 A: I mean, other than the fact that they worked
20 with them over a period, I guess, of about a
21 year or so.

22 Q: And Intuitive's a consulting group, right?

23 A: I guess they're a consulting group and a
24 developer.

25 Q: And they made a proposal to MUSC, correct?



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1 A: They did.

2 Q: And MUSC rejected it, right?

3 A: That's the testimony, yes.

4 Q: Now, with respect to the nursing shortage,
5 there was some testimony I think yesterday
6 about nursing shortages. Trident has not
7 stopped -- through the FED application that you
8 worked on up through the ED expansion at
9 Summerville, has not stopped creating
10 additional ED rooms because of that nursing
11 shortage, have they?

12 A: The have not.

13 Q: Let's go back to Dr. Hall for a minute. With
14 Dr. Hall's testimony, do you remember him
15 saying that the adult ED at the main hospital
16 at MUSC, was experiencing high patient visit
17 volume?

18 A: I heard him say that, yes.

19 Q: And high volume of psych patients? Did he
20 testify to that?

21 A: Yes.

22 Q: Did you hear him testify that there was high
23 boarding by patients waiting for appropriate
24 psychiatric placements or inpatient beds?

25 A: Yes.



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1 Q: And that patients with complex conditions, who
2 require more complex time-consuming work-ups,
3 were present?

4 A: Yes.

5 Q: And he described, did he not, that the MUSC ED
6 as compartmentalized in a way that created
7 challenges to efficiency and made fast tracking
8 patients impossible; did you hear him say that?

9 A: I did hear him say that.

10 Q: And did you hear yesterday Dr. Wendell of
11 Trident and Ms. Eccleston, both at Trident,
12 testify that these conditions Dr. Hall
13 described are the kinds of things that cause
14 the capacity constraints; and as long as Dr.
15 Hall was not fabricating these statements, then
16 MUSC ED was experiencing capacity constraints;
17 is that what they said?

18 A: Right. And I think they both said that that in
19 and of itself didn't mean that that the
20 solution was to add more ED bays.

21 Q: And didn't Dr. Wendell say that he's personally
22 experienced these kind of constraints, that
23 many times when he tried to transfer patients
24 from Trident EDs to MUSC's main adult EDs, you
25 can't get the patient transferred because



1 they're not enough ED rooms available?

2 A: I've heard that, yes.

3 Q: And Dr. Hall testified that his ED had a door-
4 to-doctor time -- what was it, 45 minutes, I
5 believe; and door-to-discharge time of 220
6 minutes; and my favorite new word, LWOT of
7 five percent?

8 A: I did hear that.

9 **MR. SUMMER:** I'm going to object, because what -- if
10 he has a followup question, that's one thing.
11 But what he's doing is summarizing testimony
12 and says, hey, didn't say that. We have the
13 record and we know it, so my objection would be
14 that this is duplicative and it's wasting time.
15 And unless he wants to ask a question about
16 what Dr. Hall said, merely summarizing his
17 testimony is not an appropriate line of
18 questioning.

19 **MR. WESTBROOK:** If I could respond. I am going to
20 ask a followup question, but I wanted to --
21 rather than ask, you know, five setup questions
22 and five -- the same five followup questions,
23 I was going to ask five setup questions and
24 then a followup question, which I have one more
25 setup to do and then my followup would come, if



1 you followed that. I'm not sure I followed
2 that. I'm sort of making it up as I go along.
3 But bear with me for just a second and I think
4 I'll ---

5 **THE COURT:** Go on.

6 Q: And isn't it true that Ms. Eccleston and Dr.
7 Wendell characterized these metrics that we've
8 been talking about as bad and indicative of
9 capacity constraints?

10 A: Yes. I mean, they said that those were out of
11 line with norms.

12 Q: Well, here's my followup question. This is the
13 question that you asking for I think. Given
14 all that testimony, not only by Dr. Hall, but
15 by Dr. Wendell and Ms. Eccleston, wouldn't you
16 agree there's plenty of evidence of capacity
17 constraints down on the peninsula at MUSC's
18 main adult ED?

19 A: Sure. Is that capacity constraint related
20 solely to the number of ED bays is one issue.
21 And then the second is, does this project have
22 any effect on those capacity constraints.

23 Q: Well, I'm sorry, but Dr. Wendell, didn't he
24 testify that one element of addressing this
25 problem was make sure there were enough ED



1 bays?

2 A: Sure. He talked about many other things too in
3 terms of process changes and so forth.

4 Q: But that was on of the factors the he
5 mentioned; was it not?

6 A: Sure.

7 Q: Of the 67 rooms at the MUSC ED that Dr. Hall
8 talked about, what is your understanding or do
9 you have an understanding of the breakdown of
10 those rooms -- of those 67 rooms?

11 A: I think I do. I think I have an understanding.

12 Q: All right. What is that?

13 A: I believe that in the adult ED there are 29
14 regular ED bays and 12 rooms that are for
15 mental health patients.

16 Q: Uh-huh.

17 A: In the pediatric emergency room I believe he
18 said that there were 12 existing bays for
19 general patients and the four E pod rooms for
20 mental health patients.

21 Q: Uh-huh.

22 A: And then in the Chest Pain Center at the Ashley
23 River Tower ED -- let me add those up, that's
24 41 plus 16, that would be 57, so there would be
25 10 ED bays in the Ashley River Tower.



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1 Q: All right. And let me ask you to turn -- let's
2 ask Dan to put up on the screen from your new
3 slides. I can't remember what exhibit number
4 those will be.

5 A: 101.

6 **MR. SUMMER:** Trident 101.

7 Q: Let's go to slide 27, please. This is the HFPP
8 chart, it's a little hard to read.

9 A: Yes.

10 Q: Well, one thing that's not hard to read is the
11 margin there, they are produced by HFPP, a
12 firm initially engaged by MUHA. What makes you
13 say that HFPP was initially engaged by MUHA?

14 A: There was a series of documents that were
15 produced in discovery that had task lists.

16 Q: Uh-huh.

17 A: That included both MUHA and HFPP individuals on
18 the task lists. And they all were dated at
19 times prior to the submission of the MUSC
20 application.

21 Q: All right. And from that you assumed that MUHA
22 engaged HFPP?

23 A: Yeah. I mean, and the discussion -- in the
24 task list, the discussions were things that
25 would appear to be essential elements of



1 pulling together a Certificate of Need
2 application.

3 Q: This information that's contained in this
4 chart, do you know how this was used or why
5 HFPP wanted it?

6 A: I don't. And as I said, it did not show up in
7 the Certificate of Need application.

8 Q: All right. Let's look at slide 33, please.
9 There are two maps and you talked about in your
10 Direct. Did I understand you to say that this
11 was -- well, they're labeled this way. On one
12 side it says site one and the other site two.
13 Is it your understanding this is the original
14 site of the MUSC project and the second site of
15 the MUSC project?

16 A: It appears to be that. But it's -- you know,
17 it's not very well labeled on here. I mean, my
18 primary point in presenting this was to show
19 that they were using relatively narrow
20 geographic areas to define the service area for
21 the project.

22 Q: All right. But do you see where Summerville is
23 on those maps?

24 A: I do.

25 Q: You still think that's the -- either of those



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1 are sites of the MUSC project? Well, let's put
2 it this way. Do you think either of those are
3 the sites of the Berkeley County FED project
4 for MUSC?

5 A: To be honest, I don't know.

6 **MR. WESTBROOK:** Okay. Bear with me a minute. Your
7 Honor, beg The Courts indulgence.

8 Q: All right, just a couple of questions, Mr.
9 Sullivan. Do you anticipate having any
10 problems staffing your Summerville FSED?

11 A: Well, I'm not the one doing the recruiting, but
12 I would assume that they will -- because of the
13 resources that HCA has, that they will
14 ultimately be able to staff it.

15 Q: All right. The original site for the MUSC
16 project, I believe you described it -- I don't
17 remember if you described it today. But I've
18 heard you at your deposition or somewhere
19 describe it as being on a medical campus; is
20 that right?

21 A: Right. And my understanding was that Palmetto
22 Primary Care Physicians, which is a large
23 primary care physician group in Charleston,
24 intended to build a number of things on that
25 site and the MUSC freestanding emergency



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1 department would be one. I think there would
2 be medical office buildings, as I recall from
3 some of the earlier discussion about it. A
4 representative from Palmetto Primary Care
5 Physicians spoke at the project review meeting.

6 Q: What is the current state of that medical
7 campus; do you know?

8 A: I do not know. I know there was -- someone
9 testified, I can't remember who it is, that
10 they did not believe that all of the original
11 plans of Palmetto Primary Care were going
12 forward.

13 Q: All right. But you don't know the specifics of
14 that?

15 A: I do not.

16 Q: All right. I don't have any further questions.
17 Thank you.

18 A: Thank you.

19 **MR. SUMMER:** Your Honor, wouldn't this be a good
20 time for a rest break?

21 **THE COURT:** Yes, it is. So we'll do a 10.

22 **MR. SUMMER:** Does DHEC have any questions?

23 **MS. BIGGERS:** No.

24 **MR. SUMMER:** I only have a handful of questions.

25 **(Off the Record)**



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1 MR. WESTBROOK: Your Honor, one little housekeeping
2 thing before Mr. Summer get's started with Re-
3 Direct.

4 THE COURT: Yes.

5 MR. WESTBROOK: I forgot to do this. And I'd like
6 to do this, is to move to admit into evidence
7 MUSC's Trial Exhibit 12, which is the
8 Summerville Medical Center CON application for
9 its -- the expansion of its emergency
10 department.

11 MR. SUMMER: Without objection, Your Honor.

12 THE COURT: Okay. Thank you. It's admitted.

13 (Respondent MUSC's Exhibit Number 12 was admitted in
14 the record at this time.)

15 THE COURT: And, Ms. Biggers, you said you don't have
16 any questions for this witness?

17 MS. BIGGERS: Correct.

18 THE COURT: Okay.

19 MR. SULLIVAN - RE-DIRECT EXAMINATION BY MR. SUMMER:

20 Q: All right, Mr. Sullivan, I've just got a few
21 questions. The first thing I'd like to talk to
22 you about is, there was a line of questioning
23 about things that you didn't say in your
24 deposition, but you may have said today. You
25 remember that line of questioning?



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1 A: Yes.

2 Q: Do you have your deposition handy?

3 A: I do.

4 Q: Let's pull this out. I'd like to turn you to
5 page 59 of that deposition.

6 A: I'm there.

7 Q: Okay. And I want to start on line six. And I
8 want to read, if you don't mind, responding
9 with what Mr. Westbrook responds. Let's make
10 sure that we all understand under what
11 circumstances your deposition was taken. So
12 beginning at line six, I said, Dan, you and I
13 had talked about this when the deposition was
14 noticed, that we still don't have everything
15 and that, as we get more documents, either for
16 the motion to compel or from Intuitive, that
17 his opinions are going to be influenced
18 probably by those things. So I just want to
19 make sure that -- on the record, that to the
20 extent that we get more information, which I'm
21 hoping we will based upon the motions that we
22 filed in discovery we're trying to take, that
23 his opinions could change between now and time
24 of trial. And we had that conversation. What
25 was Mr. Westbrook's response?



1 A: We did have that conversation. I understand
2 that. I think that would apply to basically
3 anybody, certainly to Mr. Sullivan. And I
4 would just say to the extent you get more
5 information -- I don't know that you're going
6 to get more information, but to the extent you
7 do, I understand that his opinions could
8 change.

9 Q: All right. And then my response on page 60 is,
10 right. And I've got four third-parties
11 subpoenas outstanding right now. As those
12 documents come in, like I said, I will Bates
13 them and circulate them to everybody. And his
14 response?

15 A: Right.

16 Q: And then I said, and we've got the motion to
17 compel opinion, so those are -- those are the
18 things that will make the difference. And his
19 response?

20 A: All righty.

21 Q: Okay. Now, your deposition was taken on what
22 day?

23 A: On June the 4th.

24 Q: Okay. And at that point in time, did we have
25 the Intuitive documents?



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1 A: We did not have -- we had a small sample of the
2 Intuitive documents. We did not have all the
3 Intuitive documents.

4 Q: Intuitive production that is part of the
5 Intuitive deposition had not been produced, had
6 it?

7 A: That's correct. That didn't occur until after
8 that.

9 Q: And did we have the Health Facility Planning
10 Partners production?

11 A: I had not seen that at that time.

12 Q: Okay. And in fact, we had not taken many of
13 the fact depositions in this case at that point
14 in time, had we?

15 A: We had not.

16 Q: Okay. And don't we usually take the fact
17 depositions before we take the expert
18 witnesses?

19 A: Yeah. Generally the experts are done at the
20 end of the deposition period.

21 Q: All right. So let's talk a little bit about --
22 you remember there was a lot of questioning
23 regarding these various other applications and
24 factors regarding those applications. You
25 remember that line of questioning?



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1 A: I do.

2 Q: Okay. And in particular, there were questions
3 about projections of utilization. Do you
4 remember that?

5 A: Yes.

6 Q: Okay. Did any of those projections involve
7 MUSC?

8 A: Did not.

9 Q: Okay. Was there anything in the line of
10 questioning from Mr. Westbrook that changes
11 your opinions that you gave on Direct
12 Examination?

13 A: No. The questions he asked me about were sort
14 of general statements that were made in those
15 CON applications that applied to a broad
16 category of hospitals. In the case of MUSC, we
17 actually had much more granular detail about
18 the types of ED patients that they had and we
19 could analyze that data and to a much greater
20 extent.

21 Q: You remember the line of questioning regarding
22 phrases like infiltrate or offensive or
23 defensive and that those don't appear in
24 Trident's Certificate of Need?

25 A: Or the CON standards or what have you, right.



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1 Q: Do you find anything unusual about those types
2 of phrases appearing in the internal documents
3 at Trident?

4 A: I do not. I mean, virtually every client that
5 I work with, when they're undertaking a project
6 or thinking about it in the context of, not
7 only how are we going to address a particular
8 need and, you know, how was this going to, you
9 know, affect the community, but also what's
10 going to be the competitive response to this
11 from other providers and, you know, how do we
12 position this so that we have the best outcome,
13 both for the community and for -- you know, for
14 our particular institution. I mean, it's just
15 an element of strategic planning for healthcare
16 institutions that you evaluate threats in the
17 environment and you try to do what you can,
18 from a strategic planning standpoint, to
19 minimize those threats.

20 Q: And then the last thing I want to ask you is
21 that sometimes trials actually distill things.
22 And there -- you remember the line of
23 questioning that you've had about the CDU and
24 the helipad and how they were presented at
25 project review?



1 A: Yes.

2 Q: As a health planner, what, if any, effect do
3 you think having those unique aspects in that
4 application affected DHEC's determination that
5 these projects were not competing?

6 **MR. WESTBROOK:** Objection. He's asked -- that calls
7 for speculation on what DHEC's thought process
8 is. Ms. Murdock's going to be testifying
9 Monday. She can talk about that. He doesn't
10 know what she was thinking.

11 **MR. SUMMER:** I've asked him -- I premised the
12 question as a health planner, that's number
13 one. Number two, he's allowed to give his
14 opinion. And the question I'm asking him is
15 based upon what he knows and how this thing was
16 presented at project review. Is there any
17 correlation in his mind between the fact that
18 DHEC did not find these applications competing,
19 based upon how the project was described with
20 the CDU and a helipad. And I think he's an
21 expert and he has the ability to answer that
22 question. I could have asked it as a
23 hypothetical and he would be able to answer
24 that question.

25 **MR. WESTBROOK:** I disagree, Your Honor. I think it



1 calls for speculation.

2 **THE COURT:** I do as well.

3 **MR. WESTBROOK:** Thank you.

4 **MR. SUMMER:** I'll rephrase this and ask it a
5 different way.

6 Q: What, if any, relationship does the CDU and the
7 helipad have with the issue of competing?

8 A: Well, there's sort of two issues, I think. You
9 know, one is whether -- you know, if indeed the
10 applications were both viewed as being
11 competing, that would be -- those would be
12 some factors that could be used to distinguish
13 one application from the other. And so, if you
14 had to make a choice of either or, you might
15 say, well, these features would weigh in favor
16 of approving the MUHA project. I don't
17 personally agree with that, but, I mean, that's
18 certainly a possibility. And then the second
19 would be, that, because the projects were
20 viewed as being sort of different delivery
21 models, because one had the CDU, helipad, you
22 know, was talking about serving a higher level
23 of care, then that could influence a decision
24 on whether or not the projects would be deemed
25 as competing.



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1 Q: All right. I don't have any further questions.
2 If you'd answer any questions The Court might
3 have.

4 **THE COURT:** I have not questions. Thank you, Mr.
5 Sullivan.

6 **MR. SUMMER:** Thank you.

7 **THE COURT:** And, Mr. Summer, is that your last
8 witness ---

9 **MR. SUMMER:** That is Trident's last witness, Your
10 Honor.

11 **THE COURT:** Okay. And we will begin Monday morning
12 with the Department's first witness.

13 **MS. BIGGERS:** Yes, Your Honor.

14 **THE COURT:** Okay. Very good. You all have a good
15 weekend and we will reconvene at 9:00 a.m. on
16 Monday morning.

17 **(Friday, July 26, 2019 administrative hearing ended**
18 **at 3:15 p.m. and reconvened on Monday, August 29,**
19 **2019 at 10:06 a.m.)**

20 **DAY SIX - JULY 29, 2019**

21 **THE COURT:** Please, take your seats. I believe
22 today we're starting with DHEC, is that right,
23 Ms. Biggers?

24 **MS. BIGGERS:** Yes, Your Honor.

25 **THE COURT:** Okay. And if everyone is ready and



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1 there's nothing we need to address before we --
2 we start. Okay. Ms. Biggers?

3 **MS. BIGGER:** Thank you, Your Honor. I'm Ashley
4 Biggers representing South Carolina Department
5 of Health and Environmental Control. And DHEC
6 calls Maggie Murdock to the stand.

7 **THE COURT:** Good morning, Ms. Murdock. And you --
8 if you will face the Court Reporter, raise your
9 right hand, he will swear you.

10 **MARGARET PARHAM MURDOCK,** having been duly sworn,
11 deposes and testifies as follows:

12 **MS. MURDOCK - DIRECT EXAMINATION BY MS. BIGGERS:**

13 Q: Good morning.

14 A: Good morning.

15 Q: Ms. Murdock, will you please state your full
16 name for the record?

17 A: Sure. It's Margaret Parham Murdock. P-A-R-H-
18 A-M.

19 Q: Where are you employed?

20 A: I'm employed at DHEC.

21 Q: How long have you been employed at DHEC?

22 A: I've been employed at DHEC since May of 2015.

23 Q: And what is your title?

24 A: I'm the Director of the Certificate of Need
25 Program.



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1 Q: How long have you held that position?

2 A: Since July of 2017.

3 Q: And did you have a different title before July
4 2017?

5 A: Yes. I was a Senior Consultant with the
6 Certificate of Need Program from the time I
7 started at DHEC until I became Director.

8 Q: How long overall have you worked at DHEC?

9 A: A little over four years.

10 Q: Okay. Can you tell us the -- what your role is
11 now as the Director of the CON Program?

12 A: Sure. I'm tasked with managing the -- the
13 Department's administration of the Certificate
14 of Need Program. We are charged via our
15 statute with fulfilling the purposes of CON,
16 Certificate of Need, CON, by way of our
17 statutory requirements, our regulation and the
18 State Health Plan. Our general -- our mission
19 is to promote cost containment, prevent
20 unnecessary duplication of healthcare
21 facilities and services, to guide the
22 establishment of health facilities and services
23 in South Carolina to best serve the public
24 need, and to ensure high quality services are
25 provided in health facilities across the state.



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1 Q: And is that codified anywhere, what you just
2 testified to?

3 A: Yes. It is our statutory purpose, our core
4 purposes in our statute 447 -- and of course,
5 I forget the -- the last bit of it here, but
6 yes. Those are statutory purposes.

7 Q: So, in your role prior to being Director of CON
8 Program as Senior Consultant, what were you job
9 duties in that role?

10 A: My primary responsibility was reviewing,
11 analyzing and developing staff decisions on
12 Certificate of Need applications throughout the
13 -- for projects throughout the state of all
14 different kinds. And also, to assist in the
15 development of the South Carolina Health Plan,
16 which is another task that my primary area is
17 responsible for. We develop the State Health
18 Plan and for -- in concert with the State
19 Health Planning Committee that is primarily
20 appointed by the Governor, and then, presented
21 to our DHEC Board for adoption. So, the State
22 Health Plan and the -- and the review of CON
23 applications and then providing various bits of
24 research and advice to the Director at the
25 time, Sam Phillips. And those -- those were my



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1 -- I had some other duties that were not
2 related to CON, but those were my Certificate
3 of Need duties.

4 Q: Do you still perform those duties now as --
5 even though your title has now changed to ---

6 A: Yes.

7 Q: --- Director?

8 A: Yes. I perform all of those duties and then,
9 I also supervise other reviewers who do
10 basically the same types of things that I did
11 as a Senior Consultant and -- and provide
12 general management and oversight of the
13 program.

14 Q: Okay. And can you tell us a little bit about
15 your educational background?

16 A: Sure. I'll start with ---

17 Q: Starting with college.

18 A: Okay. I -- I did a little over two years of
19 undergraduate work at Princeton and the
20 remainder at Furman University here in South
21 Carolina. And after that, I moved to Denver
22 and studied at the University of Denver School
23 of International Studies. Then, moved back to
24 South Carolina after a hiatus to have a -- to
25 start a family, and then went to law school at



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1 University of South Carolina where I graduated
2 in 2008. And I've been working as -- well --
3 and then, after that I worked as an attorney
4 with Nelson Mullins for two years. And then
5 with the Wyche Law Firm until I -- until I
6 started at DHEC.

7 Q: Okay. So, do you hold any professional
8 licenses or certificates?

9 A: Well, I'm a member of the South Carolina Bar
10 and the -- also, the District of South
11 Carolina. I have a certificate in -- an
12 Associate Public Management and that's it.

13 Q: Okay. So, let's go back to your duties at
14 DHEC. You mentioned assisting in developing of
15 the South Carolina Health Plan. Can you
16 describe for us what that process is?

17 A: Yes. The -- our statute requires that we
18 develop and maintain a State Health Plan and
19 that we update the plan at least every two
20 years. We actually try to update the plan at
21 least in part every year now. The plan itself
22 is required by statute to contain certain
23 things including an inventory of the health
24 facilities and services in the state that are
25 -- that need a CON. It also has to contain



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1 projections of need for the various services
2 for which there are standards in the plan. The
3 plan also has to contain those standards that
4 guide based on what the service or facility
5 type is. The standards sort of guide the CON
6 applicant as to what sorts of things that
7 applicant to -- to do and that the project
8 needs to in order to fulfill the requirements
9 of the State Health Plan. And the plan also
10 has to include a general statement regarding
11 what project review criteria are considered
12 important in reviewing that particular type of
13 service or facility. We -- the staff develops
14 a draft of the plan each time we update it.
15 The staff develops a draft, then we -- we meet
16 with the State Health Planning Committee and
17 ultimately, publish the draft for public
18 comment. And then, we wait at least 30 days
19 for public comments. Sometime in the -- during
20 that time, we will have public hearings at each
21 of the DHEC regions to -- to hear oral public
22 comments or receive additional written
23 comments. And then, we meet several more
24 times, usually with the State Health Planning
25 Committee to finalize a proposed draft, and



1 then we submit that draft to the DHEC Board,
2 and the Board votes whether or not to adopt the
3 plan.

4 Q: Okay. And then you also mentioned your duties
5 include developing staff decisions in CON
6 applications.

7 A: Yes.

8 Q: Can you walk us through that process of
9 starting with when a CON application comes in
10 the door at DHEC?

11 A: Sure. When a CON application comes through the
12 door, the first we need to do is ensure that we
13 can accept it for filing. We look to see
14 whether or not it's in the right format. We
15 look to see whether there's been a public
16 notice run in a newspaper. There's a
17 requirement specified in our statute reg
18 regarding what kind of newspaper notice the
19 applicant needs to -- to run prior to our being
20 able to accept the application. There's a \$500
21 filing fee. And then, some other -- and then
22 the rest of the application requirements are
23 laid out in the regulation. So, once we have
24 the -- the initial requirements for accepting
25 an application for -- for filing are very --



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1 they're very broad. And so, we'll public -- we
2 submit our request to the publishers of the
3 State Register to publish a list of
4 applications that need accepted for filing
5 during the prior month. And then, once the
6 application is accepted, then we move to -- to
7 making sure that we have enough information in
8 the application to -- to effectively review the
9 project. And once we determine that we have
10 enough information, which is whatever the
11 applicant has put in their answers to the
12 various questions that are listed in the
13 regulation, any additional information the
14 applicant has decided to submit or that we
15 requested that the applicant submit. And once
16 we've collect enough information, we'll --
17 we'll have it published again in the State
18 Register as deemed complete. And that starts
19 a -- a clock that basically by our statute and
20 regulation, we must wait at least 30 days after
21 the publication that the -- that the
22 application has been deemed complete. Once
23 that publication -- the -- that State Register
24 publication comes out, we have to wait 30 days.
25 30 days or more, but no less than 120 days to



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1 reach a staff decision regarding the
2 application. And that staff decision is a
3 written decision. We will make findings
4 regarding the project review criteria that we
5 have identified in the deemed complete letter,
6 which I forgot to -- let me back up a little
7 bit. Part of the process of deeming an
8 application complete is that we will prepare a
9 letter to the applicant, and that letter will
10 identify what project review criteria the --
11 the Department staff has determined are most
12 important in reviewing that particular
13 application. Then that deemed complete letter
14 sent to the applicant. If -- if any affected
15 persons have notified the Department that they
16 would like to be considered affected persons,
17 which is a defined term, then we will also send
18 a copy of the deemed complete to the affected
19 person, and then we proceed to review. And we
20 review the application based on the State
21 Health Plan applicable looking at the purposes
22 of CON and pay particular attention to the
23 criteria that we've identified in the deemed
24 complete letter as most important for review.

25 Q: Okay. What type of information is generally in



1 a CON application that comes in the door?

2 A: Well, it's a -- it depends on the project, but
3 the -- the information we gather, it usually is
4 in -- in the applicant's answering all the
5 various questions that are listed in that
6 section of our regulation. There's a long list
7 of questions that are just kind of a -- that
8 are broadly applied to all CON applications.
9 Not all of the questions are applicable for
10 every application. For example, a home health
11 agency will -- will likely give us very little
12 or no information in response to the questions
13 regarding construction and site plans, zoning,
14 those types of things, or, you know, equipment
15 costs. And so, we -- we start with the kind of
16 general questions that are asked in the
17 application that seek to give us an idea of
18 what the project is -- is seeking to do.

19 Q: Okay. And then, once you get to the -- once
20 you have deemed an application complete, are
21 there any other steps that happen between that
22 point and time when you issue your decision?

23 A: Sometimes there are. Well, there's review, of
24 course. We will review the -- the application
25 to ensure compliance with the appropriate plan



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1 standards or -- and project review criteria.
2 And sometime -- there are a couple of events
3 that can happen during the review period. The
4 applicant or the affected party can request a
5 public hearing and that -- that process is laid
6 out in our governing law. We rarely have
7 those. I can only think of one instance since
8 I've been at DHEC that we've had a -- a formal
9 public hearing regarding a project or a set of
10 projects. Coincidentally, it was for free
11 emergency departments in Carolina Forest. But
12 we do have an informal process. It's called a
13 project review and we -- basically, the
14 Department will -- Department staff will host
15 a meeting where the applicant and affected
16 parties, either opposing parties or other
17 affected parties can come to -- to the
18 Department. Sometimes we'll -- we'll actually
19 travel to where the applicants are and it's
20 basically an opportunity for the parties to
21 discuss their projects in support or opposition
22 to the projects and provide -- and then, also
23 provide written documentation. We allow for --
24 when we do have project review meetings, we
25 will typically allow a certain amount of time



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1 after the project review meeting for the
2 parties to respond to each others comments or
3 offer additional documentation based on issues
4 that have arisen by virtue of either the
5 discussion or the documents that we received
6 leading up to the project review. One of the
7 things that's most useful to me and to our
8 staff about the project review process is that
9 we request and -- and most -- most, if not all
10 of the time, the parties are -- are helpful and
11 compliant with our request to share their --
12 the documentation that they submit to us, they
13 will submit to each other, so that we don't
14 have to -- to go through the sort of formal
15 FOIA request process to get documents into the
16 hands of the parties that are you, you know,
17 opposing -- either opposing each other's
18 projects or -- or responding to each other's
19 comments. And so, everyone has a chance to see
20 and respond to the issues that are -- that are
21 being reviewed and discussed by virtue of the
22 project review meeting. So, those -- the
23 documentation is what is the most useful to --
24 to the Department, as a result of the project
25 review process. As we do get a lot of good



1 information as a result of that and it gives us
2 a chance to see some of these arguments fleshed
3 out and -- and provides us an opportunity to
4 possibly uncover some additional issues or
5 facts that we might not have otherwise thought
6 of. I'd like to think that we thought of
7 everything before anybody else shows it to us,
8 but we are human.

9 Q: So, let's turn to the application we're here
10 about today. And you have some notebooks up
11 there with you. If you can find the one marked
12 Join Exhibit Number 1.

13 A: Okay.

14 Q: Do you see that?

15 A: I have it.

16 Q: Okay. Can you tell us what that is?

17 A: It's the Certificate of Need application.

18 Q: Certificate of Need application for who?

19 A: For the MUSC free standing -- free standing
20 emergency department, which is the subject of
21 this lawsuit.

22 Q: What was your involvement with this application
23 on behalf of DHEC?

24 A: I was the -- the primary reviewer of this
25 application and I did the analysis and



1 developed the staff decision.

2 Q: Why -- was a CON required for this project?

3 A: Yes.

4 Q: Why?

5 A: For several reasons. Our statute lays out the
6 -- the triggers for CON, what projects require
7 a CON. In this case, there were a couple of
8 applicable subsections. First, a Certificate
9 of Need is required for a capital expenditure
10 buyer on behalf of a healthcare facility that
11 exceeds a certain amount provided for in the
12 regulation, which is 2 million dollars. And
13 that was the case here. This project -- total
14 project cost was roughly 13 million. The other
15 trigger is that a CON is required for a project
16 -- a capital expenditure buyer on behalf of a
17 healthcare facility that is associated with the
18 addition or substantial expansion of health
19 facility or service that has standards in the
20 State Health Plan. And freestanding ED
21 services do have specific standards in the
22 South Carolina Health Plan.

23 Q: What are freestanding emergency -- or what is
24 a freestanding emergency department?

25 A: A freestanding emergency department is -- it's



1 actually an extension of an existing hospital's
2 emergency department. So, it -- it exists
3 under the license of an existing licensed
4 hospital. It is -- it provides the same 24/7
5 emergency service, services that a full fledged
6 hospital will. It is usually located in the
7 same county as the licensed hospital under
8 which it's operating, unless it's being
9 established in a county that does not have a
10 licensed hospital. In this case, the
11 freestanding ED is intended to be in Berkeley
12 County, which does not currently have a
13 licensed hospital. And MUSC is the licensed
14 hospital under which this particular FSED will
15 operate and it is in Charleston County.

16 Q: Let me turn your attention within Joint Exhibit
17 1 to the page -- Page 545 within this Exhibit.
18 And when you get there, can you just tell us
19 what that document is.

20 A: This is the deemed complete letter that --
21 that's what we call it. It's the letter that
22 I -- that I just discussed earlier that we sent
23 to the applicant and any affected parties that
24 outline the project review criteria that the
25 Department has determined are most important in



1 the review of -- of this project.

2 Q: And if you'll look on the second page of this
3 letter, this -- Page 456 of the Joint Exhibit.
4 Can you tell us what -- what are the project
5 review criteria listed as most important for
6 this project?

7 A: They are -- and -- and this -- these criteria
8 come from a list of 33 project review criteria
9 laid out in our regulation. But the ones that
10 we determined most important for this project
11 are community need documentation, distribution,
12 medically underserved groups, and financial
13 feasibility.

14 Q: Who chose this particular ones to list as most
15 important for this -- for the review of this
16 application?

17 A: I did.

18 Q: Why did you choose these particular four?

19 A: These were the review criteria that -- I went
20 through my typical process, which is to review
21 an application as soon as I get it, to go
22 through the whole thing and then, I think about
23 the application and what I've read in my
24 initial as I go through the list of project
25 review criteria and our regulation. And -- and



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1 thinking about the purposes of CON, the
2 characteristics of the project itself, what I
3 know about the service area. Then, as I go
4 through that process to -- to determine which
5 of the project review criteria I believe are
6 most important based on our mission.

7 Q: And I believe when you were telling us earlier
8 about the State Health Plan, I believe you --
9 you mentioned something about project review
10 criteria in the State Health Plan?

11 A: Yes. Yes

12 Q: Let us know more about that.

13 A: The State Health Plan -- we are required by
14 statute to include the State Health Plan a
15 general statement about what project review
16 criteria are most important -- important in
17 reviewing a certain type of project. The way
18 that we've laid out that general statement in
19 our State Health Plan currently is just to
20 include a -- a list of certain review criteria.
21 And so, I -- I look at that as well. I should
22 have mentioned that as part of process. When
23 I go through the State Health Plan thinking
24 about the project, I also look at that general
25 statement. And most of the time, as is the



1 case here, I will choose from -- the majority
2 of the project review criteria will come from
3 that list in the State Health Plan.

4 Q: What was the State Health Plan that was in
5 effect in under which -- when the application
6 was filed?

7 A: This application was filed when the -- what we
8 refer to as the 2015 Health Plan was in effect.
9 I think that one was adopted in August of 2015.
10 August the 13th, maybe. And so, we -- we start
11 -- we review an application under the plan that
12 was in place when the application was received
13 by the Department.

14 Q: And I believe that plan is one of our admitted
15 Exhibits. I'm not sure which number ---

16 **MS. BIGGERS:** Does anyone happen to know the number
17 of the 2015 plan? The Exhibit number for Ms.
18 Murdock to turn to?

19 **MS. HOLLINGSWORTH:** Roper 55.

20 **MS. BIGGERS:** Roper 55.

21 A: All right.

22 **MS. BIGGERS:** Thank you.

23 A: All right. I'm there, mostly.

24 Q: Okay. Can you turn to the Page within Roper
25 Exhibit 55 that lists the relative importance



1 project review criteria for freestanding
2 emergency services?

3 A: Yes. That is in Chapter 11, Page 11-5, which
4 is also RSF 55, Page 023.

5 Q: How does that list in the State Health Plan in
6 the 2015 Plan compare to the list in your
7 deemed complete letter we were looking at a few
8 minutes ago?

9 A: I believe everyone -- every project review
10 criteria that's on this -- that's in the deemed
11 complete letter came from this list. Let me
12 make sure, I just lost my place here. Well,
13 there's one substitution, medically under-
14 served groups is in the deemed complete letter
15 and resource availability is -- is not in the
16 deemed complete letter. Resource availability
17 is listed in the State Health Plan. Also,
18 there's a -- a criteria Number 1, compliance
19 with the need outlined in this section of the
20 plan. Our statute says that every project --
21 that we can't approve a project if it doesn't
22 comply with a State Health Plan. So, since
23 there's no discretion for us to choose whether
24 or not to include compliance with the plan as
25 a project review criteria, we -- we typically



1 don't put that in the deemed complete letter
2 since it's automatically one of the -- one of
3 the most important elements of our review.

4 Q: Why is -- so, why is resource -- why did you
5 choose not include the resource availability
6 from the list in the Plan in your deemed
7 complete letter list of relative importance
8 project review criteria?

9 A: Well, this -- the -- the term resource
10 availability doesn't specifically correspond to
11 an actual project review criteria listed in the
12 -- in our regulation. So ---

13 Q: How -- can you explain that further? What do
14 you mean?

15 A: Yes. The -- the list -- each of the other
16 project review criteria on this list correspond
17 to the title of the project review criteria on
18 the list of 33 that are in regulation 61-15,
19 our regulation. And those are the criteria
20 from -- that's the list of criteria from which
21 we need to choose whatever project review
22 criteria are go in the deemed complete letter.
23 We have since then updated the plan to remove
24 that -- that verbiage resource availability.
25 The closest thing that -- that I believe



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1 corresponds to that resource availability
2 language is the staff resources project review
3 criteria in the -- in the regulation. The --
4 the Plan -- when we -- when we finally did
5 update this language, we included staff
6 resources in the updated plan. I think it --
7 it's -- I was a little troubled expecting an
8 applicant to comply with a project review
9 criteria that was unclear the way that I
10 believe this one is unclear. That's not to say
11 that we didn't look at the resource
12 availability elements of the application to be
13 sure that there wasn't anything problematic
14 that required us to -- to find a way to include
15 that -- that term in another form in the deemed
16 complete letter.

17 Q: What does the staff resources project review
18 criteria in the regulation address in general?

19 A: It addresses in general the staffing plan. The
20 project review criteria requires us to look at
21 the -- the reasonableness of the staffing plan.
22 We look at the track record of the applicant if
23 the applicant has staffed other facilities. We
24 look at -- there are a couple of other
25 subsections to it, but basically, we look at



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1 the -- at the staffing plan and the -- the
2 reasonableness of the plan. The proposed plan
3 and the -- the applicant's track record in
4 staffing.

5 Q: Any particular reason why you didn't list the
6 staff resources project review criteria in the
7 list of most relative importance project review
8 criteria?

9 A: In this case, it -- with this project and with
10 the -- the -- the other FSED project that I was
11 reviewing at the same time, the Summerville
12 Medical Center FSED, both of those projects I
13 reviewed simultaneously because I wanted to
14 determine whether or not they were competing
15 applications and based on the -- on the
16 identify of each applicant, one being MUSC and
17 the other one being Trident Health and -- and
18 the staffing plans in the applications and the
19 fact that both projects were going to be an
20 extension of an existing hospital department,
21 just based on everything in -- in total of both
22 projects, there wasn't anything particularly
23 concerning or unique about the staffing plans
24 or anything that -- that exists in the staffing
25 -- in the staffing sources, project review



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1 criteria that I felt needed to be fleshed out
2 and developed in -- by way of the finding in
3 our decision.

4 Q: Okay. So, you just mentioned the term
5 competing applications. Can you tell us what
6 that is?

7 A: Yes. It's a -- it's a defined term and there
8 are a couple of elements to competing -- to
9 meeting the definition of a competing
10 applicant. One of them is -- is the timing of
11 the submission of potentially competing
12 applications. They have -- if there's an
13 application submitted, then any potentially
14 competing application would need to have been
15 received by the Department within 15 days of
16 the first application being deemed complete in
17 the State Register. The second element of
18 meeting the definition of competing
19 applications, in order to meet that definition
20 then that means that approving both
21 applications would exceed the need for that
22 type of healthcare facility or service. In
23 this case, the timing part of that definition
24 test was met by the applications. But after
25 review of both applications, I did not -- it



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1 was clear that approving both applications
2 would not exceed the need for freestanding ED
3 services in -- in the area.

4 Q: Did you issue the decision for the other FSED
5 as well?

6 A: Yes.

7 Q: What was that decision?

8 A: I granted that -- I granted approval of the
9 CON.

10 Q: Okay. So, let's turn to your decision letter
11 for MUSC's FSED application. And let's look at
12 -- look at Page 551 in Joint Exhibit 1. So ---

13 A: Okay.

14 Q: Are you there?

15 A: Yes.

16 Q: So, towards the bottom of Page 551, there's a
17 mention of Summerville FSED project. Is that
18 the one you were just talking about?

19 A: Yes.

20 Q: And again, what was your conclusion regarding
21 competing applications?

22 A: That the two applications were not competing.
23 They did not meet the definition ---

24 Q: What was ---

25 A: --- of competing applications.



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1 Q: What was the basis of that conclusion?

2 A: I concluded that the -- that approving both
3 applications would not exceed the need. The
4 development an implementation of both projects,
5 would not exceed the need for that type of
6 service in the service area.

7 Q: And what was the service area?

8 A: In this case, the service area was defined by
9 the applicants. We don't have a specific
10 service area that's laid out in the State
11 Health Plan for FSED services the same that a
12 service area is laid out for other services.
13 So, they -- the service area -- both projects
14 are -- are -- are close -- very close to each
15 other. And so, generally under the analysis I
16 did, they have roughly the same service or
17 enough of the similar service area to where
18 when I -- when I analyzed that the area in
19 which the projects appeared to draw, would draw
20 most of their patients, which is kind of
21 referred to as a primary service area, I did
22 not think -- I thought that the market would
23 support, easily support both projects based on
24 the -- the -- the need for those services, the
25 increasing need for those services in that



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1 area, which is generally the -- the kind of
2 Berkeley -- Berkeley, North Charleston,
3 Dorchester area.

4 Q: Okay. Now, let's turn to Page 552 of Joint
5 Exhibit Number 1. So, let's go through your
6 analysis of compliance with the need outlined
7 in the South Carolina State Health Plan. Tell
8 us what your findings were with regard to
9 compliance with the plan.

10 A: Generally, I found that the project did comply
11 with the requirements of the State Health Plan.
12 Specifically, the -- I guess, subsection by
13 subsection, each -- both Summerville and MUSC
14 did apply for Certificate of Need for this
15 project. Both applications -- or both projects
16 are -- would be an extension of an existing
17 hospitals emergency service. In this case,
18 both applicants were proposing to establish a
19 freestanding emergency service in a county that
20 does not have a licensed hospital, which is
21 Berkeley County. And both applicants,
22 including MUSC, have a license that is in good
23 standing and in operation to support the off
24 campus emergency service. So, that's
25 compliance with 1 and 2. The 3 and 4 were



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1 also, based on -- on documentation and
2 assurances in the application, I've determined
3 that both 3 and 4 are satisfied. They're not
4 very -- I don't think they're contested in this
5 case. Same with Number 5 regarding physical
6 structure and meeting the life safety code.
7 Section 6, the applicant must demonstrate the
8 need for the service by documenting where
9 potential patients for this proposed service
10 would come from and why they are not being
11 adequately served by the existing services in
12 the area. In this case, I found that MUSC did
13 comply with this standard. Initially, with the
14 application, MUSC provided an analysis of its
15 current emergency department patient base.
16 This is basically MUSC's documentation of where
17 it is currently receiving of the -- the origin
18 of the patients that it sees in its ED right
19 now at the -- at its hospital on the -- on the
20 peninsula. And so, MUSC's analysis included
21 kind of a -- it was broader strokes in the
22 initial application, but after subsequent
23 documentation during the review period and in
24 response to the project review, MUSC provided
25 a breakdown by zip code of what patients were



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1 currently traveling from areas near -- near the
2 proposed location of the project, how many of
3 the patients were currently traveling to the
4 peninsula to receiving these services and then,
5 MUSC provided an analysis of what percentage
6 of each of those groups of patients they
7 thought would -- would go to the project to
8 receive ED services instead of the hospital on
9 the peninsula. MUSC then provided follow-up
10 document after the project review of during the
11 review period that discussed the -- the
12 existing services and particularly the services
13 in the area that -- where the project is
14 intended to be located. And documented what
15 the sort of general state of utilization and
16 capacity is at those facilities now as evidence
17 of why the existing facilities and services
18 would not be sufficient to -- to serve the --
19 the patients that MUSC is seeking to serve with
20 the project. I was satisfied with MUSC's
21 analysis and then, later as part of the
22 community need documentation, which I'm -- I'm
23 sure you're going to -- about to ask me about,
24 I did some -- some sort of alternative research
25 to be sure that -- that market would support



1 the project, both projects.

2 Q: Okay. So -- and before I get there, let's just
3 look at -- again, in the plan and that would be
4 MUSC Exhibit 55, I believe is -- I'm sorry.
5 Roper Exhibit 55. The 2015 Plan. Can you tell
6 us what the statement -- do you see the -- the
7 sentence below the list of relative importance
8 of project review criteria?

9 A: Yes.

10 Q: Can you explain to us what -- the significance
11 of that statement?

12 A: Yes. And that's actually something that I left
13 out of my description of what -- what the --
14 our governing statute requires us to -- to have
15 in the plan. And that's a -- a basically a
16 statement regarding whether or not the benefits
17 of improved -- of improved accessibility will
18 be equally weighed or will outweigh adverse
19 effects of duplication, sort of the balancing
20 test in evaluating the Certificate of Need
21 applications for that particular service.

22 Q: So -- and how did you -- or did you consider
23 that statement in your review and decision
24 making of this application?

25 A: Yes. In fact, this statement -- that analysis,



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1 the sort of looking at the benefits of
2 accessibility versus the adverse effects, if
3 any, of duplication is part of the kind of
4 fundamental analysis of any CON application.
5 And it goes to core purposes. We are charged
6 with -- with ensuring the development of -- of
7 healthcare facilities and services that -- that
8 serve public -- best serve the public need and
9 accessibility is part of that analysis. And
10 we're also charged with preventing unnecessary
11 duplication of healthcare facilities and
12 services. And so, this balancing test here
13 basically instructs me in reviewing that --
14 that I don't need to basically put my thumb on
15 the scale when I'm looking at one versus the
16 other. This is -- that each of those things
17 will be equally weighed. And so, I -- looking
18 at this particular application, I -- I
19 determined in my review and still believe that
20 the benefits of approved accessibility in this
21 case and in the case of the Summerville project
22 far outweigh any adverse of duplication. In
23 fact, it's my determination based on my
24 analysis that the adverse effects would occur
25 in the absence of these projects, not because



1 of these projects.

2 Q: Can you explain that further?

3 A: Yes. Duplication -- there's duplication and
4 then there's unnecessary duplication.
5 Duplication is, obviously, you know when you
6 have more than one of something, which I
7 believe we have in this case. We have more
8 than one ED that -- that I reviewed in this
9 particular instance, two FSED projects. And we
10 also have those projects going in an area of
11 the state where there are already some ED
12 services. So, there is duplication, but
13 unnecessary duplication is there's another
14 element to that. And I think probably the best
15 example of unnecessary duplication is
16 duplication of services when there's no need
17 for those services. In this case, I thought
18 there was clearly need for the -- for these two
19 projects without question based on the
20 fundamental things that we always look at when
21 we review CON applications and that's
22 population growth, utilization of existing
23 facilities and things like that. So, in this
24 case, it was without question the -- the
25 balancing test weighed in favor of approving



1 the projects.

2 Q: Okay. So, let's move into the community need
3 documentation project review criteria.

4 A: Okay.

5 Q: What was your finding with regard to community
6 need documentation?

7 A: I -- my finding that was MUSC complied with the
8 project review criteria.

9 Q: And what was the basis for that finding?

10 A: Well, first looking at MUSC's own analysis
11 regarding its own patient base and the
12 projections it made based on how many patients
13 it thought would go to its -- to this proposed
14 facility rather than traveling all the way
15 downtown to its -- its main hospital in the
16 peninsula. Part of that analysis included a
17 look at how far the particular patients were
18 from the proposed project versus the -- the
19 main hospital in the peninsula. And that -- in
20 totality, MUSC's own analysis, I thought was
21 reasonable. I also sought to do some kind of
22 alternative analysis. My -- I think part of
23 job is to take an applicant's analysis and try
24 to poke holes in it and see if I can find
25 faults or see if I can -- if I can anticipate



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1 any problems with the projections. In this
2 particular case, the -- the market in that
3 area, and I know we've heard lots of testimony
4 about the right service area is, but at least
5 in the area sort of immediately surrounding the
6 proposed location of the project and that
7 includes parts of North Charleston, Berkeley
8 County, parts of Dorchester County. The -- the
9 ED services utilization in that area is
10 exploding and has been over the last, at least
11 five years. So, as part of my analysis,
12 although it's not -- although it's not
13 specifically required by the language of the
14 regulation, I think it's important anyway to
15 look at every -- not only the existing
16 facilities in the area that might be effected
17 by the project, but also any approved projects
18 that are not yet online that are considered,
19 quote, existing facilities, end quote. In this
20 case, I looked at Trident and Summerville
21 because -- Trident Medical Center and
22 Summerville Medical Center, which are both
23 Trident Health hospitals. Those are the
24 closest distance wise to this project. The
25 closest existing facilities. I also know that



1 both of those hospitals have undertaken ED
2 renovation projects fairly recently. So, I
3 looked at -- I looked at the actual
4 applications submitted by each of those
5 hospitals, first looking at Trident Health.
6 Trident applied for a CON back in -- it was
7 right before I came. I think it was April of
8 2015 for expansion of its ED. And so, I looked
9 at that application and looked at Trident's
10 need analysis there. At that point, Trident
11 had stated in its application that it was
12 already above what it considered kind of an
13 industry standard capacity for ED services.
14 And at the time of the application, it was
15 projecting out to -- I think it projected that
16 by 2019, which would be its proposed year three
17 of the project -- maybe that was -- that might
18 have been proposed year one, I'm not sure. But
19 anyway, it -- it had projected that it would
20 have roughly 60,000 ED visits by 2019. That
21 was in their application. Then I went and
22 looked at Trident Health's joint annual report
23 of hospitals, that's JAR, which is a report
24 that every hospital is required to complete and
25 submit its -- the JARS are all held in an



1 online portal that's maintained by the Revenue
2 of Fiscal Affairs Office. And looking at
3 Trident's JAR, I saw that by 2017, it had
4 already had 98,000 -- or by 2016, it had had
5 98,000 ED visits, which is -- was well above
6 the 60,000 that it had anticipated having in
7 2019. So, clearly, that -- that projection in
8 Trident's ED expansion application had been --
9 had been met easily and then, you know, far and
10 above what it had anticipated in applying for
11 that CON. Summerville Medical Center also
12 applied for a CON for ED -- for an ED
13 expansion. And I think they submitted their
14 application in November of 2017. After --
15 after submitting this -- their freestanding ED
16 application in this case and looking at that
17 application, Summerville had anticipated that
18 it would have I think 63 -- roughly 63 ED
19 visits by 2021.

20 Q: 63?

21 A: ED visits.

22 Q: Is that ---

23 A: 63,000. Sorry. Did I say 63?

24 Q: Yeah.

25 A: It easily exceed 63. Yeah. It had anticipated



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1 -- it had projected 63 -- roughly 63,000 ED
2 visits by 2021. Then when I looked at -- when
3 I looked at Summerville's 2017 Joint Annual
4 Report, it had already received 70,000 ED
5 visits by 2017. So, again, it had already met
6 -- it exceed what was going to be its 2021
7 projection by 2017, four years earlier. So, I
8 was satisfied that -- and in both applications,
9 both hospitals have stated that they were
10 already exceeding their capacity. I think each
11 --I think Trident's was estimating that it was
12 -- it was already receiving close to 2,000
13 visits per ED bay back when it applied for its
14 CON in 2015. And then Summerville's
15 application I believe stated that it was
16 already seeing more than 2,000 patients per ED
17 bay. And its application stated that that was
18 above what it considered its capacity. So, in
19 both cases, the State of Affairs now --
20 actually the State of Affairs two years ago was
21 already -- both hospitals had exceeded what
22 they projected they were going to be seeing
23 much farther out than now. So, I was satisfied
24 that both of that hospitals had realized their
25 projections and having already put those plans



1 into place, the market need services already.
2 They were already, you know, 50,000 -- close to
3 50,000 more ED visits just by those two health
4 systems alone. By those two hospitals alone,
5 50,000 more visits than they had anticipated
6 much farther down the road. So, whatever --
7 whatever inaccuracies there may have been at
8 MUSC's analysis about all of its patients
9 shifting from the downtown hospital to the
10 freestanding ED, even if all those patients
11 didn't shift, the market itself in the area was
12 already desperately in need of additional ED
13 services just based on what I had seen in those
14 two nearby hospitals. I've looked at -- I'm
15 sorry. I looked at Roper -- Roper Hospital,
16 several of its Carolina affiliated hospitals.
17 Their ED visits have increased by several
18 thousand over the past five years or so.
19 MUSC's ED utilization at -- at the peninsula
20 had not grown as fast, but also I -- I think
21 that's explained by ED -- by MUSC's evidence
22 that it was -- it was at capacity at its down
23 -- at its hospital in the peninsula. So, the
24 community need -- MUSC had demonstrated that it
25 had a lot of patients that were coming from the



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1 area where it wanted to put the project. And
2 it proposed to put services where the
3 population is. Where there -- and also, where
4 the utilization of surrounding facilities
5 demonstrated that the utilization of that kind
6 of service is growing most rapidly, extremely
7 rapidly.

8 Q: What were your findings as -- regarding
9 population growth in Berkeley County?

10 A: Population growth is -- it's growing faster
11 than anticipated. I looked at -- one of the
12 things I also looked at as part of this
13 analysis was the -- the approved, but not
14 existing, Roper-Berkeley hospital that is -- is
15 slated up to come alone, I believe, later this
16 year. And as -- the more I dove into the
17 analysis of these projects, the more I realized
18 how desperately I hope that it will open as
19 soon as -- as soon as possible based on the
20 need in that area. I looked at Roper's initial
21 application for its hospital because although
22 most of the language in the -- in the
23 distribution project review criteria and the
24 community need, all these project review
25 criterias talk about analyzing the affect of a



1 project on existing facilities. I think as
2 part of our general purposes of CON and guiding
3 establishment where these services are needed,
4 I think we need to look towards what will exist
5 in the future in addition to what exists now.
6 And so, I wanted to be sure the Roper-Berkeley
7 would still be able to accomplish what it set
8 out to do and the way -- the way that I looked
9 at that was to look at its initial application.
10 One of the things that -- that struck me right
11 off the bat, was that Roper's projections and
12 its application for the Roper-Berkeley hospital
13 had 2015, I believe, was its year 3. And so,
14 it was projecting out, you know, whatever its
15 utilization and other things were going to look
16 like in 2015 including what the population
17 would be in 2015. As it turns out, now that
18 2015 has come and gone, we realize that the
19 population in Roper-Berkeley's service area,
20 which included much of the Tri-County area --
21 well, Roper referred -- Roper expected to only
22 get its -- what it referred to as its Roper-
23 aligned patients. And so, Roper's analysis was
24 very much like MUSC's analysis is in this case
25 in that Roper expected this patients that were



1 already going to Roper Hospital downtown, Roper
2 expected those patients to shift to its Roper-
3 Berkeley Hospital based on sort of the same
4 thing, that they were already coming all the
5 way downtown to go to Roper. So, they decided
6 that their hospital where their patients were,
7 but it -- the application itself included an
8 analysis of the tri-county population and it
9 turns out that -- that the projections were
10 about 100,000 people less in the tri-county
11 area in 2015 than ended up being in the tri-
12 county area in 2015. And then, if you move
13 forward, what will now be Roper's year 3, it
14 looks like based on the population projections
15 in the -- and the most recent State Health Plan
16 that the year-three population in the tri-
17 county area of Dorchester, Berkeley and -- and
18 Charleston will be about 20,000 people more
19 than the projected year-three population in the
20 tri-county area in Roper's application.
21 Roper's application didn't discuss its ED
22 utilization projections. It had very little in
23 that application about what -- how many
24 patients were going to come to the ED. So, the
25 best I could do was to look at Roper's



1 narrative, it's plan, and it's general
2 methodology for that whole hospital was
3 redirection of Roper aligned patients from
4 Roper downtown to Roper-Berkeley. And so, it
5 -- based on the market, based on MUSC's similar
6 reasoning, it didn't look like -- to me, I
7 found that the -- approving this project and
8 approving the Summerville project would not
9 interfere with Roper's plan for its hospital
10 based on its representations in its original
11 application.

12 Q: Okay. Let's move to the next project review
13 criterion discussed in your discussed in your
14 decision letter, distribution acceptability.
15 What were -- what was your conclusion regarding
16 distribution acceptability?

17 A: I concluded that -- that the MUSC project --
18 that this project complied with that project
19 review criteria.

20 Q: What was the basis for that conclusion?

21 A: That the project would not result in
22 unnecessary duplication. I had determine in my
23 need analysis that there -- although there
24 would be duplication in that, this would be an
25 ED service in an area that also included other



1 ED services, but this not an unnecessary
2 duplication because there was so much need for
3 this particular service in that area. And
4 there are some other elements to this project
5 review criterion including access and ensuring
6 patients -- low-income patients and patients
7 without the ability to pay could still receive
8 services. I was satisfied based on MUSC's
9 documentation including its indigent care plan
10 and other things that it would -- that it
11 satisfied the rest of this criteria as well.

12 Q: Okay. And then moving to medically under-
13 served groups, what was were your conclusion
14 from that project review criterion?

15 A: I concluded that this project also complied
16 with the medically under-served groups
17 criteria.

18 Q: What was the basis for that conclusion?

19 A: It was -- some of it dovetailed with what I
20 looked at in analyzing the -- the distribution
21 criteria including service to under-served
22 groups, MUSC's record of indigent care and the
23 percentage of Medicaid and Medicare patients
24 that would use the facility. A lot of this, as
25 with the Summerville project, involved



1 analyzing these types of things with respect to
2 MUSC as a whole because this is an extension of
3 an existing hospital department. The analysis
4 of these types of elements of the medical
5 under-served groups, project review criteria
6 necessarily involved looking at the hospital
7 for a myriad of reasons including, you know,
8 the -- the fact that EMTALA applies in both
9 cases. And so, I was satisfied that indigent,
10 medically under-served and other similarly
11 situated patients would have access to this
12 project.

13 Q: Okay. And financial feasibility, what was your
14 finding or your conclusion regarding financial
15 feasibility?

16 A: I found that the project complied with this
17 project review criteria.

18 Q: What was the basis for that conclusion?

19 A: I looked at the -- the attestation from the
20 accountant that -- that provided the per forma
21 and assurances that the -- to the -- attesting
22 the reasonableness and accuracy of the
23 calculations and assumptions in the pro forma.
24 Generally, what we look at it, since this -- as
25 is true with every CON application, these are



1 projections, these are plans. So -- so this
2 is, you know, a prediction about what all these
3 elements will -- you know, what will actually
4 come to fruition. And so, what we look for
5 here is how this project would compare to other
6 similar projects in cost, expense items, thinks
7 like that that they're generally included in a
8 pro forma. That also involves looking at the
9 -- kind of the -- the revenue generating
10 elements of it to be sure, you know, that the
11 -- if the utilization projections are -- are
12 too unreasonable, then we might not be able to
13 rely on the -- you know, the revenue part of
14 the pro forma. In this case, I look through
15 the pro forma of -- again, of both projects.
16 Nothing jumped out as particularly -- there
17 were no -- no red flags. It seemed to -- both
18 of the projects seem to kind of fall generally
19 within the range of what is reasonable and
20 typical for establishment for establishment at
21 FSED services.

22 Q: Okay. Does that essentially sum up your
23 reasons for issuing the decision letter
24 approving the CON application of MUSC?

25 A: Yes.



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1 Q: Okay. Now, since the time of your decision
2 letter, has there been an natural amendment to
3 MUSC's CON application?

4 A: No. The -- our regulation allow -- has two
5 different instances in which it speaks to
6 project changes and one of -- one of the
7 instances is before issuance of a CON and one
8 of the instances is after issuance of the CON.
9 In this case, there is no CON, so we're looking
10 at the former case and the regulation provides
11 that during the review period, it -- that the
12 Department would look at -- has to look at
13 project changes to determine whether or not
14 there's been a substantial change. And so, it
15 -- if there's an amendment to the application
16 that rises to the level of the substantial
17 change, then that would require submission fo
18 a new application. But again, that -- that
19 regulatory language specifies that -- that this
20 amendment would occur during the review
21 process. And so, we didn't receive any
22 amendment to the applications during the review
23 process.

24 Q: Okay. During -- since the time that this
25 matter has been pending at the Administrator of



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1 Law Court, have you had any reason to become
2 aware of any potential changes that MUSC may be
3 considering to the project even though there's
4 been no amendment to the application?

5 A: Yes.

6 Q: Can you tell us what your understanding is and
7 what the basis of that understanding is?

8 A: Yes. Sometime during the -- and I'm sure we
9 could look at calendar dates and things like
10 that. My memory doesn't work that way. I just
11 know that after the decision -- after issue of
12 the decision in this -- this case, so after the
13 review period, I initially received a phone
14 call from MUSC's attorney, Dan Westbrook,
15 asking kind of you know what I thought about
16 some possible changes that MUSC was thinking
17 about making to the project, and what I might
18 think about -- about those changes. So, we had
19 a general discussion about the possibility of
20 moving to a different location that was -- my
21 understanding was it was not far from the
22 original location. I don't remember if -- if
23 there was a mileage distance quoted, but it was
24 basically hypothetically not far and that the
25 project would be -- that the project cost would



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1 be lower, the size of the project would be
2 smaller, and so, those were the initial
3 possible -- I think specifically, there was a
4 possibility that the project might be moved to
5 -- instead of building a new facility, MUSC was
6 thinking about possibly up-fitting an existing
7 Urgent Care Center. And so, I discussed that
8 kind of hypothetical situation with Mr.
9 Westbrook and said, that, you know, that we
10 review those changes if we needed to review
11 those changes according to the guidance that we
12 have from the Court and the MRI at Belfair
13 case, which is we would need to determine
14 whether the project complied with the same
15 project review criteria in substantially the
16 same. That's the way that we -- that would
17 review all changes. And that we also had some
18 other guidance by way of some factors listed
19 in, I believe, another administrative law court
20 order and some of the factors were, you know,
21 whether the project was more costly, whether
22 there were added beds, which in this case
23 wouldn't be an issue because there aren't beds.
24 But generally, based on what I understand from
25 the guidance in the case, it's preferable to be



1 less costly and smaller. Those two things are
2 generally better than large and more expensive.
3 So, that's kind of the gist of the conversation
4 that I had with Mr. Westbrook that, you know,
5 this is how would we view it. Based on what
6 little we talked about now, I could tell you
7 smaller is generally better, less expensive is
8 generally better. But, of course, I would need
9 see details before we could actually make a
10 determination.

11 Q: And then, have you looked into any of the
12 testimony that was presented last week in this
13 contested case?

14 A: Yes. I've listened to testimony. I listened
15 to most of Kathy Platt's testimony and most of
16 Dan Sullivan's testimony. I also read some of
17 the pre -- of the documents that were -- that
18 were submitted to the Court prior to the
19 beginning of this hearing, including an
20 affidavit from Dr. Cawley from MUSC. So, I
21 have a little bit more -- I have some
22 familiarity with some of the other details of
23 the potential changes to the project.

24 Q: And what are those -- some of those other
25 potential changes other than the ones you



1 already listed?

2 A: Well, I -- I believe the -- the distance of the
3 new proposed location is roughly a mile from
4 the original proposed location of the project.
5 The -- the cost of the project is a couple of
6 million dollars lower. The size of the project
7 will be smaller and that there will be no
8 helicopter pad that -- built as part of the
9 project.

10 Q: So, considering the factors that you said
11 before you generally look at in looking at
12 changes to a project, what are -- how does the
13 Department view typically a change to a
14 proposed site location of a project?

15 A: The department will look at a proposed change
16 and see if that would affect whether the
17 project would comply with the project review --
18 with the relative importance project review
19 criteria and the plan in substantially the same
20 way as it did before. In this case, the change
21 in location would not affect my determination
22 regarding whether and why the project complies
23 with any of the project review criteria under
24 which I analyzed it.

25 Q: And have you actually driven by the originally



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1 proposed site and the site that MUSC is
2 proposing to locate this project now?

3 A: Yes.

4 Q: When was that?

5 A: A few days maybe before my deposition. In this
6 case, my -- the CON team took the CON van down
7 to Berkeley County and we drove to several
8 sites of several projects that are either
9 approved or pending in Berkeley County,
10 including this -- this project. We looked at
11 the original proposed location and the new
12 proposed location during that trip. And having
13 driven from -- from the original proposed
14 location to the new proposed location, it -- it
15 confirmed for me that the change in the
16 location would not affect the -- the compliance
17 or reasons for compliance of this project with
18 the Plan. In fact, I even -- I was the
19 navigator and I managed to get us turned around
20 in between one location and the other location.
21 And it still didn't seem that far. So, it
22 really is just on the other side of the highway
23 basically. The new proposed location is not as
24 -- not tucked away as much in a kind of -- you
25 have to take fewer turns off the main road to



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1 get to it. So, if anything, I think the new
2 location is -- is more accessible than the old
3 location.

4 Q: And then, you mentioned earlier a helipad. How
5 -- was the helipad of any importance to you in
6 your original review of the application?

7 A: The helipad was -- was mentioned often by MUSC,
8 but -- and it was an interesting component. It
9 also added cost to the project. It -- it was
10 not relevant at all, first of all, to my
11 determination regarding whether or not the
12 project and the Summerville project met the
13 definition of competing applications. It had
14 nothing to do with the -- with the population
15 growth and utilization of those services in the
16 area and -- and it didn't have anything to do
17 with MUSC's analysis of what patients were
18 already traveling downtown to -- to the
19 hospital -- to MUSC's hospital on the peninsula
20 versus what patients would be redirected to
21 that particular facility. Again, it was an
22 interesting component, but I -- I -- it didn't
23 affect my analysis of the compliance of the
24 project review criteria other than to be
25 slightly concerning because it was a costly



1 component. It turned out it was not so costly
2 as to make the project not compliant with the
3 financial feasibility project review criteria.
4 But it certainly wasn't necessary for approval
5 for the project.

6 Q: And what about the CDU, how important if at all
7 was that in your review of the original CON
8 application?

9 MR. THOMAS: Your Honor, I need to object. Ms.
10 Murdock is actually undertaking an analysis of
11 the exact sort which she said she would not do
12 in her deposition. I would like to -- I'd like
13 to read her deposition that Mr. Summer took
14 just a couple of months ago. Question: I also
15 heard you testify if asked you would perform
16 this analysis, correct?

17 MS. BIGGERS: And -- objection -- Your Honor, I'm
18 going to object ---

19 MR. THOMAS: Answer: Yes.

20 MS. BIGGERS: --- that before he be allowed to be
21 read her deposition into the record during his
22 question. I --see, his reading her testimony
23 into the record during -- in his question. I
24 -- I think we should address just his objection
25 before he's allowed to make it part of the



1 record.

2 **MR. THOMAS:** Your Honor, can I get my objection on
3 the record too, please. I agree with Ms.
4 Biggers for the point of that this -- if he
5 wants to try to impeach on his cross-exam, he
6 certainly can do that. This seems like a
7 cross-exam that he's doing right now and he's
8 doing out of turn. Thank you. I've got an
9 admission from this witness in her deposition
10 sworn under oath she would not undertake this
11 analysis. Ms. Biggers doesn't want me to get
12 this on the record, but she wants to be able to
13 get all of this stuff on the record that her
14 witness is testifying to now, Your Honor, which
15 she actually said she wasn't going to do on the
16 day of ---

17 **THE COURT:** And you can get into the record during
18 your cross.

19 **MR. THOMAS:** Well, I'm trying to keep this out of
20 the record. That's the exact reason I'm making
21 the objection. I don't want all of this own
22 the record because she said she wouldn't do it.

23 **MS. BIGGERS:** My ---

24 **MR. THOMAS:** So, the fact of the -- the toothpaste
25 is out of the tube because you're going to hear



1 everything one way or the other.

2 **MS. BIGGERS:** My -- my question was actually what
3 importance of, if any, was the CDU Unit to her
4 original decision on the application.

5 **MR. THOMAS:** Yeah.

6 **MS. BIGGERS:** Which does not go to the -- the
7 questions that Mr. Thomas just read from her
8 deposition at all.

9 **MR. THOMAS:** This is all in the same vein of
10 substantial change, Your Honor. And that was
11 the whole question. Mr. Summers spent a lot of
12 time on this in the deposition saying, you're
13 not going to do this, you're going to do this,
14 you're not going to do this on the fly in the
15 courtroom. She said, no I'm not. I'm not
16 doing it. She's doing exactly that right now.

17 **THE COURT:** But her questions relates to her
18 original analysis, not to an analysis that's
19 related to ---

20 **MR. THOMAS:** Your Honor, with all due respect, I
21 mean, what they're trying to do is set up the
22 fact that that didn't mean anything, this
23 didn't mean anything, the other thing didn't
24 mean anything. And at the end of the day, what
25 they can draw in their order -- in their



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1 proposed order that we'll draft for you, is
2 that this didn't mean a thing. This was just
3 -- this was not a substantial change to the
4 Department and therefore, you know, please take
5 notice of that because I would've made the same
6 decision without all of these things that --
7 you know, she said she wasn't going to do. She
8 swore under oath that she wasn't going to do
9 it.

10 **THE COURT:** Okay. And I hear you, Mr. Thomas, and I
11 will -- I'm going to overrule your objection,
12 but it is on the record and I ---

13 **MR. THOMAS:** Thank you, Your Honor.

14 **THE COURT:** You're talking to me. You're not
15 talking to ---

16 **MR. THOMAS:** Yes, ma'am.

17 **THE COURT:** --- to a jury.

18 **MR. THOMAS:** Right. I understand.

19 **MS. HOLLINGSWORTH:** Your Honor. Just for the
20 record, Roper certainly does join in the
21 objection raised because I do think that's
22 testimony elicited is addressing whether or not
23 that change affects compliance with the review
24 criteria, which is exactly the analysis. So,
25 I certainly understand the detestation of



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1 questions, but the testimony being elicited in
2 the response is asking her to perform whether
3 or not it's substantial. So, I didn't -- I
4 just wanted to let you know that we did join
5 that objection.

6 **THE COURT:** Okay. Thank you.

7 Q: Ms. Murdock, what, if any important did the CDU
8 have in your review of the CON application?

9 A: It wasn't a particular import -- the internal
10 layout and flow of the facility itself, those
11 kinds of -- of clinical evaluations and
12 decisions regarding the site plan of the
13 project is not something that I would typically
14 look at in reviewing need and -- and, you know,
15 whether or not for us the -- the project
16 unnecessarily duplicates existing facilities
17 and services. And generally, with regard to --
18 to location, project-scope, project size, it is
19 not uncommon for a project to -- to end up in
20 a different location than it was originally or
21 to have a config- -- configuration that did it
22 originally. In fact, Summerville Medical
23 Center is well aware of how significant post-
24 CON issuance changes can be regarding
25 configuration size, scope, cost. Our -- our --



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1 our analysis regarding location is centered on
2 is the project going in a place where it's
3 needed, is the project going in a place where
4 it will unnecessary -- unnecessarily duplicate
5 other facilities and services. Is the project
6 financially feasible. Whether or not a project
7 does a more configuration or another is not
8 something that I typically focus on unless
9 there is a specific reason -- reason specific
10 to that type of service facility or project
11 that requires me to do that. But you know, the
12 schematic design, layout, things like that,
13 there are other DHEC bureaus that look at those
14 things later down the road. Our construction
15 division will look at the -- you know, the
16 traffic -- details of construction to ensure
17 compliance with other DHEC regulations.
18 Licensing will look at other things that are
19 involved with clinical space. Certainly, if
20 the project -- if the applicant wants to be
21 certified then -- and there'll be surveys done
22 by our certification bureau or other third
23 party certification entities to determine
24 whether or not those things are compliant with
25 those particular regulations. But as far as my



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1 analysis of the original application, I didn't
2 factor in the CDU specifically when I was
3 looking at whether or not the project complied
4 with any of the project review criteria. I
5 would say one other things about -- about
6 location, you know, we -- we -- the CON staff
7 has to allow some flexibility often in the case
8 of -- of any part of a CON project that's going
9 to -- that's going to require an applicant to
10 enter into third-party contract tool
11 arrangements either through a lease or a land
12 sale or construction and things like that. And
13 so, often times a project will change --
14 certain elements like that will change based on
15 the fact that we're not going to require a
16 party that entered into any binding third-party
17 contracts that would -- that would lock the
18 applicant into an arrangement when the
19 applicant actually doesn't know whether or not
20 it'll even be able to proceed with the project
21 itself. So, the fact that a lease might -- you
22 know, the lease parties might change or the,
23 you know, the sort of building plan for -- for,
24 you know, contracting with buildings and
25 architects and things like that. Some of those



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1 things do change and we will look at them to
2 see whether or not the project complies with
3 the same project review criteria in the same
4 way. But it's not uncommon to have a change in
5 location at all.

6 Q: Okay. Well, those are all of my questions Ms.
7 Murdock. If you can just please answer
8 questions from attorneys for the other parties.
9 Thank you.

10 THE COURT: I'm going to give the witness a 10-
11 minute break before we move to the next set of
12 questions. Thank you.

13 (Off the Record)

14 THE COURT: Mr. Westbrook.

15 MR. WESTBROOK: Thank you, Your Honor.

16 MS. MURDOCK - CROSS-EXAMINATION BY MR. WESTBROOK:

17 Q: How are you?

18 A: Good.

19 Q: Good. Ms. Murdock, you testified a little bit
20 about your background with DHEC. Since you
21 joined DHEC and was it 2015, is that what you
22 said?

23 A: Yes.

24 Q: Can you give us an approximation about how many
25 CON applications you've reviewed?



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1 A: It's hard to say.

2 Q: I don't want you to guess. But if you can ---

3 A: Yeah.

4 Q: --- give us a reasonable estimate, that would
5 be fine. If you can't, that's -- that's fine
6 too.

7 A: I would say more than 50.

8 Q: More than 50. Okay. All right. The -- how
9 would characterize the general status if you --
10 if you have this knowledge, of ED capacity in
11 the tri-county area right now?

12 A: My understanding is that the most -- most of
13 the ED facilities in the tri-county area are --
14 are operating at -- at or above capacity.

15 Q: And would these -- is that another way of
16 saying that is that a number of the facilities
17 have capacity constraints?

18 A: Yes.

19 Q: And do you agree -- I believe you did in your
20 direct testimony that the number of ED visits
21 has been growing significantly in the tri-
22 county area in the last few years?

23 **MR. THOMAS:** Objection. Leading, Your Honor. This
24 is not a hostile witness to the Medical
25 University of South Carolina, therefore, per



1 the rules of evidence, he must asked open-ended
2 questions.

3 **MR. WESTBROOK:** Your Honor, I would say -- first of
4 all, we got two things. First of all, I don't
5 mind rephrasing this question, but second of
6 all, as a general rule, I believe what the
7 rules say about cross-examination simply is
8 that usually leading questions are allowed.
9 It's certainly in the discretion of the Judge
10 though. But I don't mind rephrasing the
11 question.

12 **MR. THOMAS:** I can read the rule, Your Honor. It is
13 leading questions should not be used on direct
14 on examination except as may be necessary to
15 develop the witness' testimony. This really is
16 more of a direct, Your Honor. However, luckily
17 for me, the rule goes on to say, ordinarily
18 leading questions should be permitted on cross-
19 examination when a party calls a hostile
20 witness, an adverse party or a witness
21 identified with an adverse party, interrogation
22 may be by leading question. This is not a
23 hostile party or witness to the Medical
24 University of South Carolina. She approved
25 their project. She just testified in favor of



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1 that project. Therefore, it must be ---

2 **THE COURT:** I agree with you Mr. Thomas. Mr.
3 Westbrook, if you will, rephrase the question.

4 **MR. WESTBROOK:** Thank you, Your Honor.

5 Q: How would you ---

6 **THE COURT:** However, refrain from leading questions.

7 **MR. WESTBROOK:** I will do so. Thank you.

8 Q: How would you characterize the growth of ED
9 visits in the tri-county area in recent years?

10 A: In recent years, the growth of ED visits in the
11 tri-county area has been what I would say is
12 explosive. It has -- and certainly exceeded
13 projection by both planners and applicants in
14 many cases including hospitals, including
15 Trident.

16 Q: All right. What other companies -- who are the
17 companies that own all of the existing and
18 approved EDs in the tri-county -- well, let's
19 just say in Berkeley County at least?

20 A: Well, there aren't any existing hospitals in
21 Berkeley County. There is an approved
22 hospital, Roper-Berkeley, that will hopefully
23 be online by, I believe October of this year.
24 Then, Roper has a freestanding ED facility up
25 in northern Berkeley County as does Trident.



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1 And then there are these two approved -- well,
2 the two freestanding EDs that were recent
3 approved as -- Summerville's and this one,
4 MUSC's.

5 Q: All right. And these two applications you just
6 mentioned and that you talked about, the
7 Summerville freestanding ED and the MUSC FED
8 that is subject to this case, you discussed in
9 your direct that you considered whether or not
10 these were competing applications.

11 A: Yes.

12 Q: My question to you is was -- was this a
13 difficult or easy decision for you ultimately
14 after you did your review?

15 A: This was an easy decision. Like I said, the
16 growth in ED visits in the area, in particular
17 in the tri-county area in general, but in
18 particular in the North Charleston, Dorchester,
19 Berkeley-County area of the ED utilization has
20 been increasing dramatically.

21 Q: All right. With respect to the Summerville FED
22 decision that you are -- or application that
23 you were asked about, I think on direct. Let
24 me ask Mr. Buff to put up Bates Page M8460 from
25 MUSC's Exhibit 8, which is admitted into



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1 evidence. Put that up on the screen. Well,
2 I'll tell you what, before we look at that,
3 let's start with -- just so you can identify,
4 let's start at the previous page. Can you tell
5 us what this is please?

6 A: This is the deemed complete letter for the
7 Summerville freestanding ED project.

8 Q: All right. Let's look over to the next page
9 please, which would be Page -- is that 460 for
10 the record? Yeah. 460. All right. Let's look
11 at the priority review criteria that you
12 identified and it -- I'm sorry. Are you -- did
13 you -- were the reviewer for this? Is that
14 what you testified?

15 A: Yes.

16 Q: All right. So, does that mean that you are the
17 one or somebody else that determined these
18 criteria, which were the priority criteria?

19 A: I did.

20 Q: All right. Are these -- does this include
21 resource availably among the priority criteria?

22 A: No.

23 Q: Does it include staff resources among the
24 primary criteria?

25 A: No.



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1 Q: No. And by the way, does it include adverse
2 effects, criteria 23 among the priority
3 criteria?

4 A: No.

5 Q: In fact, are these the same? Are these
6 different any way from the priority criteria
7 that you identified for the MUSC FED project?

8 A: These are the same.

9 Q: Okay. Now, the -- I believe you mentioned in
10 your direct -- another CON application that
11 Summerville Medical Center filed to expand
12 their ED department.

13 A: Yes.

14 Q: Were you the reviewer on that?

15 A: I believe so.

16 Q: All right. Let's take a look at MUSC's Exhibit
17 12, please.

18 **MR. WESTBROOK:** And, Dan, let's turn over to Page 23
19 or Bates Page 23 of that Exhibit, which would
20 be M12-23 -- .23.

21 Q: Let me ask you to look, Ms. Murdock, at
22 Footnote 2.

23 A: Okay.

24 Q: And Footnote 2 in the -- in the body of the
25 letter ---



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1 **MR. WESTBROOK:** Dan, before you pull up -- pull up
2 the footnote, let's look in the body of the
3 letter where footnote 2 appears.

4 Q: What is it footnoting?

5 A: It is ---

6 Q: Ms. Murdock, can you tell us -- can you read
7 that into the record as to what it's -- what
8 Footnote 2 is footnoting?

9 A: Yes. Hold on.

10 Q: If you need a copy -- if you have trouble
11 reading that, I've got a copy I can give you.

12 A: I just want to make sure I don't go too far
13 back. Okay.

14 Q: Why don't you start with -- yeah. I'm sorry.
15 You start wherever you want to, but that
16 sentence that ends with the footnote 2 is the
17 ---

18 A: Right. It says, this FSED will redirect some
19 volume away from SMC's hospital ED. However,
20 given SE -- SMC's high historical utilization
21 and expected continued growth in ED visits in
22 its service area, more capacity in the hospital
23 ED is necessary.

24 Q: All right. And did you agree with that
25 statement about more capacity being necessary?



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1 A: Yes.

2 Q: And SMC I guess refers to ---

3 A: Summerville Medical center.

4 Q: All right. Now, let's read the footnote
5 please, Footnote 2.

6 A: It says the Medical University of South
7 Carolina, MUSC, also received approval for a
8 new FSED near the Summerville FSED, but MUSC
9 stated in its application that it expected to
10 serve only those patients who historically have
11 traveled to its hospital ED in downtown
12 Charleston.

13 Q: So, how does that relate to Summerville Medical
14 Center's argument here or position here that
15 more capacity in the hospital ED is necessary?
16 Why is that footnoted by that information?

17 A: I understood that to mean that Summerville
18 Medical Center was -- was saying that its
19 expanded ED would not affect the projected
20 utilization of the MUSC project. That was how
21 I interpreted that footnote.

22 Q: All right. Let's look at MUSC's Exhibit 8,
23 which is the Summerville Medical -- well, yeah.
24 Summerville Medical Center's CON application
25 for FED. This is the one that you testified



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1 about that you reviewed and approved, is that
2 right?

3 A: Yes.

4 Q: All right. Let's look on Bates Page M8.33,
5 please.

6 **MR. WESTBROOK:** And if you could put that up there.

7 Q: And what I want to ask you to look at, Ms.
8 Murdock, is -- the whole page is entitled
9 Exhibit 12 Summerville FSED Projected Emergency
10 Visits. Look down at the bottom of the page
11 please. What is the in migration percentage
12 for -- that is listed there?

13 A: 20 percent.

14 Q: All right. And let's go back up to the -- and
15 for each of these years, 2019, 2020 and 20 ---

16 **MR. WESTBROOK:** Go down to the bottom, Dan.

17 Q: --- 2021, is the in migration percentage for
18 each of those years projected?

19 A: 20 percent. Yes. For all three years.

20 Q: So, the four zip codes that are identified as
21 Summerville's service area account for what
22 percentage of the projected emergency visits?

23 A: It looks like 80.

24 Q: It would be 80 percent?

25 A: Yes.



1 Q: Is that what you're saying?

2 A: Well, it would be everything but the in
3 migrations, assuming that that's -- that's
4 everything that's projected in the total.

5 Q: So, 100 minus 20 is 80, right?

6 A: Yes.

7 Q: Okay. All right. Let's look at the same
8 Exhibit, Bates Page 22. Look down and there's
9 a chart at the top of the page that says
10 Exhibit 2. And then, the second under that,
11 the paragraphs that begins FSED's differ from
12 Urgent Care Centers. What I really want you to
13 look at, if you don't mind, is the sentence
14 that begins -- it's about halfway through that.
15 It says FSEDs can serve the large majority of
16 patients served in hospital EDs. Do you agree
17 with that, that FSEDs can serve the large
18 majority of patients served in hospital EDs?

19 A: Yes. For the most part, I do.

20 Q: And that was the -- this was again was the --
21 the application -- what's the status of the
22 application now?

23 A: I can't recall of the top of my head. I
24 believe it's approved, but I'm not sure.

25 Q: Well, you approved it, didn't you?



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1 A: I just don't recall the -- the time line.

2 Q: All right. Do you know -- do you recall
3 whether a CON has been issued for this yet or
4 not?

5 A: I don't recall off the top of my head.

6 Q: All right. But ---

7 A: I have to look at the timing.

8 Q: But it go staff approval?

9 A: Yes.

10 Q: All right.

11 A: Yes.

12 Q: Okay. Staff being you?

13 A: Yeah.

14 Q: Okay. All right. Let's look at -- let's go to
15 two pages behind this at Bates Page 20. And
16 under the heading FSED overview, the second
17 paragraph under that, do you see towards the
18 end of that paragraph where the applicant says
19 ---

20 **MR. THOMAS:** Your Honor, I'm going to lodge an
21 objection. I just looked back at my notes
22 because I know Mr. Westbrook kept saying, you
23 know, you testified on direct about this
24 application. She testified very generally
25 about this application. And nowhere did --I



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1 don't believe Ms. Biggers actually asked about
2 this Exhibit or -- or these topic areas that
3 Mr. Westbrook is going into. And he's on cross
4 now and therefore, I don't know if -- it seems
5 to me that he needs to drill down on what was
6 spoken about before in -- testified to before.

7 **MR. WESTBROOK:** Your Honor, scope of cross is not
8 limited by what goes on in direct. This is not
9 redirect, it's cross.

10 **MR. THOMAS:** Okay. That's fine.

11 **THE COURT:** The objection is overruled.

12 Q: Okay. So, we're looking at that second
13 paragraph under the heading and do you see
14 where the applicant says the last two to three
15 lines of that paragraph, it -- it talks about
16 an emergency department summary from hospital
17 ambulatory medical survey reports that 14.5
18 percent of patients arrive at hospital ED by
19 ambulance?

20 A: Yes. I see it.

21 Q: All right. And when you reviewed this
22 application, did you have any reason to doubt
23 or dispute or did that cause you any problems,
24 did you disagree with that statement at the
25 time. Did they cause you to disapprove the



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1 application?

2 A: No.

3 Q: Let's look at Bates Page 34 of this
4 application. There's a heading in this
5 application at -- on this page, same
6 application of course, no unnecessary
7 duplication. Do you see that?

8 A: Yes.

9 Q: And in the last paragraph under that heading,
10 the one that begins RSF Berkeley Hospital --
11 first of all, remind us, which hospital is the
12 RSF Berkeley Hospital.

13 A: That's the -- the Roper-Berkeley Hospital that
14 is approved, but not yet licensed. The one
15 that's slated to come online, I think in
16 October.

17 Q: All right. And the -- and I just realized
18 before we got to that third paragraph, the very
19 first sentence under that heading on no
20 unnecessary duplication says what?

21 A: This project will not result in the unnecessary
22 duplication of healthcare resources.

23 Q: And I assume you would not have approved this
24 if you disagree with that statement?

25 A: That's correct.



1 Q: All right. Let's go down to the -- where it
2 references the Roper-Berkeley Hospital. The
3 second paragraph -- well, why don't we start at
4 the first -- read the first two sentences and
5 I want to ask you something about that.

6 A: The RSF Berkeley Hospital will be located 4.5
7 miles to the west of the Summerville FSED when
8 it opens. However, during the hearing
9 regarding the RSF Berkeley project, Roper
10 affirmatively stated that its new Berkeley
11 Hospital would only serve patients currently
12 utilizing its existing facilities.

13 Q: All right. And was that your understanding of
14 the Roper-Berkeley position?

15 A: Yes.

16 Q: Let's see. Bear with me just a moment, Ms.
17 Murdock. I just had a sudden inspiration.
18 Would you read that next sentence please? The
19 one that begins because.

20 A: Because the Summerville FSED will service
21 primarily patients utilizing Trident Health
22 System facilities, it will have a minimal
23 impact on RSF Berkeley and the approved access
24 to freestanding emergency services will -- will
25 far outweigh -- outweighs any minimal impact on



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1 RSF Berkeley.

2 Q: Did you agree with that sentence?

3 A: Yes. Yeah and the ---

4 Q: All right. I'm sorry. Go ahead.

5 A: The -- the Summerville FSED does have a
6 certificate issued.

7 Q: Okay.

8 A: Is that -- that -- I don't know why I faltered
9 on that one. That was the one you were asking
10 me about, right?

11 Q: It was.

12 A: Yeah. I'm sorry.

13 Q: All right.

14 A: Yeah. Of course, it does.

15 Q: Thanks for that clarification.

16 A: Sorry.

17 Q: Is it your understanding as a CON Director that
18 DHEC and CON Department that you're -- that you
19 direct, has -- what kind of statutory authority
20 -- does it have statutory authority enough to
21 reorder criteria?

22 A: I believe it does.

23 Q: All right. And with respect to the Summerville
24 application, do you know if that project that
25 now for which you clarified that a CON has been



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1 issued, is in a medically under-served area?

2 A: It depends on how you define that term. If
3 you're talking about ---

4 Q: I'm talking the -- just let me clarify the --
5 let me rephrase then. Do you know if that
6 project is in a medically under-served area as
7 defined by CMS?

8 A: I don't know.

9 Q: And do you know if it's in a HPSA, H-P-S-A, as
10 defined by CMS?

11 A: I -- I don't believe so.

12 Q: All right.

13 A: But I -- only because I think that's what David
14 Summer said at my deposition.

15 Q: Well, you ---

16 A: So.

17 Q: Mr. Summer, I don't ---

18 A: I did not know then.

19 Q: --- too much weight to Mr. Summer's testimony,
20 but in this case, let's -- let's go with it.
21 So, and do you know if the MUSC FED, that is
22 the subject of this case, are in -- is in an
23 MUA or a HPSA?

24 A: For the same reason, I now don't believe that
25 it is.



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1 Q: All right. Does that -- how does that factor
2 your analysis of whether they -- whether either
3 of these projects comply with a medically
4 undeserved criteria in regulation 61-15?

5 A: Well, what I -- what I now know about those two
6 designations, which is very little, it -- those
7 aren't part of our -- of DHEC's analysis when
8 we look at the medically under-served groups'
9 project review criteria. One is a CMS
10 designation and the other one is DHHS. CON has
11 its on framework under which we must analyze
12 all projects and so -- so we -- we don't use
13 those.

14 Q: All right. Now, the -- tell me what's your --
15 since you've been CON Director or since you've
16 -- let's just take it back. Since you've been
17 working at DHEC in the CON Department or CON --
18 it's a department or division, what is it?

19 A: Division. Program.

20 Q: Program. Since you've been working in the CON
21 program, tell me what the policy or practice --
22 if there's no policy, what the practice has
23 been, with respect to meeting or talking about
24 CON projects with CON applicants or their
25 representatives or for that matter, affected



1 persons?

2 A: We -- we openly encourage communication between
3 the applicants and affected persons or any --
4 any interested parties with department staff
5 regarding any Certificate of Need application
6 or matter.

7 Q: All right. Now, with respect to this project,
8 you testified about a telephone call you and I
9 had.

10 A: Yes.

11 Q: At any time since the approval letter was
12 issued, has anybody from MUSC or representing
13 MUSC in any capacity asked you for a formal
14 analysis and determination of whether there's
15 been a substantial change to the project or
16 not?

17 A: No.

18 Q: And do you -- are you aware of any sort of
19 requirement or -- or -- or even if it's not a
20 requirement, a particular reason why that
21 should have happened or would be necessary?

22 A: No. I'm not aware of any -- any reason why we
23 would have asked that or I would have been
24 asked to undertake that analysis. What we do
25 as a program area is outlined by the statute



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1 and regulation and the State Health Plan. And
2 there are two circumstances under which we
3 would undertake to review a project for
4 substantial change. One is during the review
5 period, which I -- which I believe means prior
6 to the staff decision and the other is after
7 issuance of a certificate of need.

8 Q: All right. Let me ask Dan to turn to Joint
9 Exhibit 1, the DHEC record, and let's go to
10 Bates Page, DHEC CON 8. And tell me if you can
11 read this when it comes up, Ms. Murdock.

12 **MR. WESTBROOK:** Yeah. Let that go down.

13 Q: So, what I want to ask you about is the heading
14 down there that says, MUSC emergency services
15 and differentiating factors. First of all, do
16 you recognize this or do I need to backtrack to
17 -- to the beginning of it. Do you recognize
18 what part -- what this is from?

19 A: I believe it's from the -- the project overview
20 section of the application.

21 Q: Of which application?

22 A: Of MUSC's FSED.

23 Q: All right. The one we're here about today ---

24 A: Yes.

25 Q: --- right?



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1 A: Yes.

2 Q: And let's -- let's take a look at that -- MUSC
3 emergency services and differentiating factors.
4 And I want you to take a minute if you don't
5 mind just to browse silently through this --
6 those -- the rest of this page and then I'm
7 going to ask you a question a question or two
8 about that. Let me know when you're ready.

9 A: I'm ready.

10 Q: Okay. The first paragraph -- the first line,
11 in fact, talks about MUSC Health has what?

12 A: The only nationally recognized trauma center in
13 South Carolina.

14 Q: Okay. The second paragraph, the first line
15 says MUSC Health also has what?

16 A: A pediatric emergency department at MUSC
17 Children's Hospital, which is South Carolina's
18 only full service pediatric emergency room.

19 Q: All right. And then, at the -- the third
20 paragraph says as an academic medical center
21 and level II trauma center, the emergency
22 department at MUSC what?

23 A: Is unique compared to other providers for
24 various reasons including, but not limited to
25 ---



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1 **MR. WESTBROOK:** And let's go over to the next page,
2 Dan. This is Bates Page 9.

3 **Q:** You see all those bullet points? I'm not going
4 to ask you to read all of those, but do you see
5 the terms helipad or CDU or whatever the
6 acronym CDU stands for listed or identified or
7 referenced or alluded to anywhere in that list
8 of bullet points or those other paragraphs that
9 we were talking about?

10 **A:** No.

11 **Q:** And let's look -- just to be complete, beneath
12 the bullet points, there's a paragraph that
13 says MUSC Health is certified by the joint
14 commission as what?

15 **A:** A primary stroke center.

16 **Q:** And then the last paragraph says the Society of
17 Chest Pains Centers has what?

18 **A:** Designated MUSC Health as an accredited chest
19 pain center.

20 **Q:** Okay. Once again, what is the heading of this
21 section that you -- from the application, the
22 MUSC application that you've been reading?

23 **A:** MUSC Emergency Services and Differentiating
24 Factors.

25 **Q:** Okay. In a CON application there's a



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1 certification that is required, is there not?

2 A: Yes.

3 Q: And what -- what is the purpose of that
4 certification?

5 A: It's a certification from the applicant
6 regarding the information contained in the
7 application.

8 Q: And what -- what does it -- what does the
9 certification say? You don't have -- not
10 verbatim, but ---

11 A: It's generally certifying -- certifying the
12 veracity of the statements made in the
13 application. The information contained in the
14 application.

15 Q: At what -- and the certification in -- in your
16 view, the Department's view, is to the accuracy
17 of veracity of that information at what time?

18 A: At the time it's submitted to the Department.

19 Q: Does that -- is there anything in that
20 certification that expressly or implicitly
21 indicates that -- that the information is
22 frozen in stone for the rest of time?

23 A: No.

24 Q: And I recall you testifying on direct that
25 changes to location are not uncommon among CON



1 applications ---

2 A: That's right.

3 Q: --- is that right?

4 A: That's right.

5 Q: What about other changes?

6 A: Well, depending on the project changes are --
7 are quite common. Again, these -- CON
8 applications are -- they're plans, projections,
9 predictions and so, a lot of the actual facts
10 that come to fruition during implementation of
11 the project are only -- can't be known to the
12 applicant or anyone else until undertaking the
13 project, various stages of the project.
14 Certainly, elements affecting construction cost
15 can affect the total project cost, the
16 breakdown of the project cost. Equipment,
17 vendors, and their pricing can affect various
18 elements of the cost of the project. And
19 whether or not the vendor quotes are -- are
20 valid for certain length of time given the --
21 the long time period during which an
22 application can be pending or in question,
23 certainly while an application is -- is
24 involved in litigation, there can be many
25 months or years during which the project is



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1 languishing and there are a lot of elements of
2 the project for which the -- the underlying
3 facts supporting the predictions would not
4 remain stagnant.

5 **MR. WESTBROOK:** Thank you, Your Honor. I don't have
6 any further questions.

7 **THE COURT:** Thank you. Okay. Are we going to begin
8 with ---

9 **MS. HOLLINGSWORTH:** I think -- I think have the
10 pleasure, Your Honor ---

11 **THE COURT:** Okay. Very good, Ms. Hollingsworth.

12 **MS. HOLLINGSWORTH:** I do, Your Honor. It's -- it's
13 12:22 and I think -- since the way we're trying
14 to share witnesses, mine may be a bit longer.

15 **THE COURT:** Thank you for bringing that to my
16 attention.

17 **THE COURT:** We'll take a lunch break this point and
18 we will -- 1:30.

19 **(Off the Record)**

20 **THE COURT:** Please be seated. We are all ready. We
21 can resume the hearing. Ms. Hollingsworth.

22 **MS. HOLLINGSWORTH:** Thank you, Your Honor.

23 **MS. MURDOCK - CROSS-EXAMINATION BY MS. HOLLINGSWORTH:**

24 **Q:** Good afternoon, Ms. Murdock. How are you?

25 **A:** I'm fine. How are you?



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1 Q: So, I appreciate you being here with us and as
2 -- as we know, I think we talked about -- we
3 attended your deposition a couple of months
4 ago. You recall that, right?

5 A: Yes.

6 Q: Okay. And you've gone through your background
7 for us this morning and your -- and your
8 license is still current, right?

9 A: Yes.

10 Q: Right? And in your experience after law
11 school, you did primarily litigation -- general
12 litigation work, is that right?

13 A: Yes.

14 Q: Okay. So, you hadn't done any Certificate of
15 Need specific work, had you?

16 A: Very little. A little bit.

17 Q: Yeah. I think you said for Mr. Hart?

18 A: Yep.

19 Q: Okay.

20 A: And it wasn't very much.

21 Q: Okay. But when you came on board of May of
22 '15, you came directly to the CON program,
23 right?

24 A: Yes.

25 Q: And I think you told me that Sam Phillips was



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1 the director at the time?

2 A: Yes.

3 Q: In May of '15, it was just a couple months
4 though, wasn't it, before he resigned as
5 director of that program; is that right?

6 A: Yes.

7 Q: I think he stayed on, sort of as a consultant;
8 is that right?

9 A: Yes. He -- he resigned and then stayed on --
10 I think he changed his kind of employment
11 status so that the position would open up, so
12 that -- so that they could -- the agency could
13 open up the position and advertise for it.

14 Q: Okay.

15 A: Which they couldn't do if he was still
16 occupying it as he was before.

17 Q: Okay. So, that's all like maybe some decision
18 letters or writings ---

19 A: Yes.

20 Q: --- are still authored by him.

21 A: Yes.

22 Q: Is that your recollection?

23 A: Yes.

24 Q: Okay. And I think you said that when you --
25 when you came on board, you worked directly



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1 primarily for on-the-job one-on-one training
2 with Mr. Phillips, right?

3 A: Yes.

4 Q: Okay. And then, you assumed the interim CON
5 Director for a little before Mr. Eubank was
6 hired?

7 A: Yes.

8 Q: But since -- I think the Summer -- maybe July
9 of '17, you -- you have the title Director of
10 the CON program, right?

11 A: That's right.

12 Q: Okay. And I think you described some -- part
13 of that restructuring, you're in bureaus now,
14 is that right?

15 A: Yes.

16 Q: And is it I believe three main bureaus?

17 A: Well, we -- we consolidated into one bureau ---

18 Q: Okay.

19 A: --- with three -- three divisions.

20 Q: Programs?

21 A: Or programs. At the -- it's functionally the
22 same. I think it's division now that I think
23 about it.

24 Q: Okay.

25 A: But functionally the same as a program. We



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1 have Certificate of Need, Construction and
2 then, Health Facility Services Coordination.

3 Q: Okay. And they're separate, but yet you work
4 together and coordinate a fair amount, is that
5 right?

6 A: Yes.

7 Q: Okay. Do any of the -- the reviewers that you
8 have that you supervise right now, how many do
9 you have?

10 A: I supervise two of the -- two of the other
11 reviewers.

12 Q: Okay.

13 A: And then we have Lewis Eubank still does CON
14 review, but he's my supervisor.

15 Q: Okay. And then, how long have your reviewers
16 been with the Department?

17 A: Both of them have been there a little bit
18 longer than I have. Actually, Vonja Szatkowski
19 has been there for at least a year longer than
20 I have. And then, Jennifer Hyman, longer than
21 I have, but I'm not -- I'm not quite sure how
22 much earlier than I arrived at the Department
23 that she arrived at the Department.

24 Q: Okay. So, you've been there right around four
25 years ---



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1 A: Yes.

2 Q: Is that right? So, they've been there maybe
3 five approximately.

4 A: I think Vonja has being there for five and
5 Jennifer's been there for four, but more --
6 more of -- four plus. And I've been there about
7 four.

8 Q: Okay. And do either of -- and I'm just going
9 to say Ms. Jennifer and Ms. Vonja so that ---

10 A: Okay.

11 Q: --- I can avoid the last names.

12 A: I had to practice for a while.

13 Q: Do either of the reviewers have any sort of
14 public health or finance background?

15 A: I don't know about the finance background, but
16 -- but not public health. No.

17 Q: Okay.

18 A: They're both law firm backgrounds as well.
19 They're both paralegals.

20 Q: Paralegal. Okay. You -- you're -- but, none
21 of the other ones have a law degree like you
22 do, right?

23 A: That's right.

24 Q: Okay. So, you described to us the staff review
25 process and you've sort of identified maybe the



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1 three main sources of authority, is that right?

2 A: Yes.

3 Q: And the Certificate of Need Act 447-110.

4 A: Thank you.

5 Q: Of course, is -- as where it is and I have it
6 written down so ---

7 A: Okay.

8 Q: --- that's my advantage here. And the
9 regulation. Which regulation is that?

10 A: It's 61-15.

11 Q: Okay. And that's the regulation for the
12 Certificate of Need program, right?

13 A: Yes.

14 Q: Okay. And then, you -- you mentioned the
15 Health Plan, right?

16 A: Yes.

17 Q: And the Health Plan through, it's an
18 independent document. It's provided for -- in
19 the CON Act itself, is that fair?

20 A: Yes.

21 Q: Okay. But you -- those are three sort of
22 bodies of rule or authority that you follow in
23 performing your responsibilities for the CON
24 program?

25 A: Yes.



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1 Q: The same with your -- your staff review as you
2 supervise, is that right?

3 A: Yes.

4 Q: Okay. And you described the process for us
5 here this morning and -- and you had spoken
6 about it at your deposition, but as I
7 understood it, you sort of have this -- it gets
8 assigned -- every application typically gets
9 assigned when it comes in the door, is that
10 right?

11 A: Yes.

12 Q: And -- and you have sort of a informal, but
13 formal, sort of division of the State that you
14 follow in your program, is that right?

15 A: Yes.

16 Q: And what do you -- how do you have that divided
17 up?

18 A: Where our -- I guess our default assignment
19 process is to divide the state into DHEC
20 regions, one through four, and I -- again, my
21 default assignment area is still four, which is
22 the Low Country.

23 Q: And what do the other -- who has the other
24 area?

25 A: Vonja Szatkowski is -- typically does region



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1 three. Jennifer Hyman typically does region
2 two. And then, we used to have a senior --
3 senior consultant, Steve Drewing, who reviewed
4 region one applications, but he's no longer
5 with the Department, so we kind of alternate
6 the region one applications based on workload
7 and -- and other things.

8 Q: And this sort of kind of default assignment, is
9 that -- I think you told me you started that
10 when you kind of reorganized in -- in July of
11 '17?

12 A: Something like that. The -- that assignment
13 procedure was independent of the restructuring
14 that was actually the -- the idea of another
15 employee who is no longer with the -- the
16 department, Nick Gerald, who -- who came up
17 with that idea. And so, on his suggestion, we
18 tried it and it seemed to work well.

19 Q: Okay. Now, in terms of the review process
20 itself, you'd agree with me that it's the
21 applicant's responsibility to provide DHEC the
22 information that the CON requires -- the CON
23 regulation requires in order for you to review
24 the application, is that fair?

25 A: Yes. The applicant is in charge of its own



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1 application. So, it's in the applicant's best
2 interest to provide us with all the information
3 we need in support of the application.

4 Q: And you talked about sort of two different kind
5 of significant publications. So, there's two
6 different points in time where there will be
7 information provided to the public for the
8 State Register, is that right?

9 A: Yes.

10 Q: And tell us what those two are?

11 A: There the -- the notice of applications that
12 have been accepted for filing and then, the
13 notice of applications that have been deemed
14 complete. Most -- typically they're separate
15 publications, but sometimes we'll have an
16 application that is noticed as accepted and
17 deemed complete in the state register. It'll
18 be on each separate list, but it'll be in there
19 twice.

20 Q: Okay. And I think you described that the --
21 that -- sort of that first time -- that first
22 deadline that's accepted for filing.
23 Generally, most things are going to be
24 accepted. I think you described it as -- you
25 know, the application on a form, a filing fee



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1 and proof of the public -- the publishing of a
2 notice in the newspaper, right?

3 A: Yeah.

4 Q: I mean, there's a very broad requirement that
5 you would say, okay, I've accepted this for
6 filing?

7 A: Yes. And they're spelled in the regulation.
8 It says once we have X, Y, Z, then we will
9 publish it as a accepted for filing. So, the
10 -- so, the things that are listed there -- I
11 think it's the filing fee and the -- the --
12 something about format and the public notice,
13 I think those are the three.

14 Q: But as I understood it, that -- that next
15 requirement to be noticed and deemed complete
16 is a more substantive requirement, is that
17 fair?

18 A: Yes.

19 Q: Okay. And as I -- I think understood when
20 we've talked before, if there's something
21 that's missing, you -- DHEC may very well, say,
22 well, we can't deem this complete yet because
23 there is required information that we don't
24 have, is that -- is that right?

25 A: That's -- that is an option. But often time,



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1 we don't delay -- depending on what the
2 information is that we need and whether or not
3 we can -- we think it's reasonable and expect
4 it that we will get it in time. Sometimes, we
5 do not delay the publication of the deemed
6 complete notice. There are a few kind of
7 procedural hurdles regarding publication time
8 lines and things like that that -- that cause
9 a lot of delay in the process anyway. And so,
10 sometimes, we try to time it to where we will
11 make sure the applicant is aware of the
12 applicant might have made us aware that we need
13 additional information. And so, we will -- we
14 will publish the application as deemed complete
15 per review because we have enough to at least
16 begin the review and we are reasonably certain
17 that we're going to get what we need in order
18 to make a decision.

19 Q: Okay. And you described to me -- because we
20 kind of talked very specifically about this
21 period of time between once you've notified the
22 public that's it's been accepted for filing and
23 then this -- this period of time until you feel
24 confident that you can deem it complete. I
25 think you described that as a deeper review of



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1 the application. Is that -- is that accurate?

2 A: Yes. Usually, there's -- there's -- because we
3 will have had time to look at the application
4 more substantively.

5 Q: Okay. And so, I -- you're doing this kind of
6 deeper review or this in depth to review to
7 determine whether or not you have questions
8 that require more information before you can
9 deem is completed. Is that right?

10 A: That's part of it. Yes.

11 Q: Okay. And I think you described that the --
12 that the regulation itself provides a guide
13 that your department when doing that in depth
14 review, is that right?

15 A: I'm not sure I follow. We use the -- the
16 information sought by the application questions
17 as -- as sort of a guide as to what to look for
18 in the application. As long -- as well, as the
19 project review criteria and the Plan.

20 Q: Okay. Let's -- let's look at regulation 61-15.
21 I'm a paper person, which is ---

22 A: I am too.

23 Q: There we go.

24 A: My tattered over there on my backpack.

25 Q: And we just spoke about this a few moments ago.



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1 This is your -- the CON regulations, right?

2 A: Yes.

3 Q: And if you would, look at Section 202.

4 A: Okay.

5 Q: As I understood when we spoke before, that this
6 is -- I think that the description was a guide
7 or an outline that is used when you're doing
8 this deeper review in order to determine
9 whether you can deem an application complete.

10 A: This is the information that is sought by means
11 of the application. So, basically the
12 questions that the applicant answers.

13 Q: Okay.

14 A: So, this is -- this is how we will get
15 information. Usually, we get the information
16 in response to these questions.

17 Q: Okay. And so, it's -- it's answers to these
18 questions where applicable that you're looking
19 to determine whether the applicant is giving
20 you the necessary information?

21 A: Yes.

22 Q: I think actually the back of the regulation has
23 an actual form document. Is that my ---

24 A: Yes. It's -- it's an appendix.

25 Q: Okay. All right. And now, is it fair to say



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1 that it's during this deeper review that your
2 reviewing the applications contents in order to
3 evaluate what the most project review criteria
4 might be for the proposed project?

5 A: Yes. That -- that consideration starts
6 immediately as we go through the first reading
7 and then, any subsequent reading of any
8 subsequent information that we might receive.

9 Q: Okay. And I think you described that at all
10 times, you're looking at this within the lens
11 of the -- for purposes of the CON Act, right?

12 A: Yes.

13 Q: And so, if I understood -- if you're missing
14 information or if you feel you need additional
15 information, you have a process where the
16 Department can ask the applicant to provide
17 additional information, right?

18 A: Yes.

19 Q: And that's provided for somewhere in the
20 regulation?

21 A: Yes.

22 Q: Where is that?

23 A: There's a formal process for seeking additional
24 information in Chapter 2 -- I'm sorry. It's
25 Chapter 3, section 302.



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1 Q: Okay. And timing wise, would you requests the
2 additional information before you deem it
3 complete?

4 A: If we're using this particular process. This
5 formalized process. Then, yes.

6 Q: So, there -- there's some timing sort of clock
7 that start and stopped, is that right?

8 A: Yes.

9 Q: So, if you could, kind of tell us generally how
10 that works.

11 A: Well, if we're using this particular section,
12 then after receipt of the application --
13 actually, I -- within 30 days after acceptance
14 of an application, the Department can request
15 additional information and then, the applicant
16 will have 30 days to respond. And then, if the
17 applicant does not submit the request within
18 the time period, then the application is deemed
19 withdrawn.

20 Q: Okay.

21 A: The -- the Department can -- can ask additional
22 questions after that sort of similar process.

23 Q: Okay.

24 A: Under this section.

25 Q: But this -- this sort of formal mechanism in



1 302 is not one that you all use in sort of the
2 program while you've been there the last four
3 years, do not exercise very often either, do
4 you?

5 A: That's correct.

6 Q: Okay. Now, and -- and to make sure I -- I
7 understand before we dig in further. I think
8 you described to me that you're making sure --
9 when you're doing this deeper review before you
10 deem the application complete, you're making
11 sure you have enough information to do a proper
12 review with an eye for purposes of the Act,
13 right?

14 A: We have enough information to begin a review.

15 Q: Okay.

16 A: Yes.

17 Q: Okay. And fair point, I think you described
18 too that you may see something during your
19 review of the application -- because you -- you
20 testified your specific process, you review the
21 entire application front to back when it is
22 assigned to you, is that right?

23 A: Yes.

24 Q: Okay.

25 A: Whenever I can, I -- I may not read every page.



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1 I might skip over a zoning letter or an
2 exhibit, or a particularly long equipment list,
3 but right. That's right.

4 Q: All right. And you -- so, your -- your
5 personal kind of habits and practice is you --
6 you look at the entire filling and you look at
7 the -- the CON regulation and all of the
8 project review criteria, is that right?

9 A: Yes.

10 Q: Okay. And then, you do that -- and I think you
11 described it to see if anything bubbles to the
12 surface, which I thought was an interesting
13 analogy.

14 A: Welcome to my mind. But yes.

15 Q: But ---

16 A: What can -- what can I say?

17 Q: You might be using that though to see -- so,
18 for example, maybe you don't have all of the
19 information, but you might then choose a
20 project review criteria that, you know, should
21 pull out that information from the applicant.
22 Is that -- is that a fair kind of example of
23 how you used the criteria?

24 A: I don't know that I've ever -- I don't know
25 that -- I can't say for sure that I've ever



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1 used the criteria that way because I've --
2 because I was hoping it would make the
3 applicant submit additional information. It
4 usually is just kind of looking at the project
5 in general and its -- its relation to the
6 purposes of CON and what kind of findings are
7 important in order to -- to determine that
8 project's compliance. But I'm not sure that
9 I've -- I'm not sure that I would -- maybe I
10 have, but -- but it's not my normal process to
11 choose project review criteria in order to --
12 to solicit a response from the applicant.
13 Usually, if I need something from the
14 applicant and I can't complete the review
15 without it or I -- or -- or the lack of that
16 information is going to affect whether the --
17 the application's approved or denied, I'll just
18 ask the applicant for it or look for it
19 elsewhere, whatever information is available to
20 the Department.

21 Q: But if -- is it fair to say that when you're
22 doing, again, this sort of cool review without
23 having made specific decisions about project
24 review criteria, that if you found like a red
25 flag that struck you as significant, that



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1 you're going to use the review process to kind
2 of further evaluate this red flag in order to
3 make a finding if necessary in your decision?

4 A: Sure. If it's -- if it's a red flag, I'd
5 probably make some sort of note about -- I
6 might put a sticky note on that page. It might
7 be as simple as that.

8 Q: Okay.

9 A: And then come back to it later when I'm -- when
10 I'm looking at the application again.

11 Q: And I don't know if we made this clear this
12 morning in your direct, but an application
13 doesn't have to comply with every project
14 review criteria, right?

15 A: That's right.

16 Q: But would you agree with me that if you the
17 reviewer believed that there was a project
18 review criteria that was material and
19 significant to a project, that if the
20 application didn't comply with that criteria,
21 you could deny it?

22 A: Yes.

23 Q: Okay. All right. And so, I also understood
24 you all discussed briefly this morning, but the
25 Department -- the project review criteria



1 identified in the Health Plan, every service or
2 facility type has separate project review
3 criteria identified, is that right?

4 A: Yeah. Well, there's a list in every chapter
5 for every -- every type of service in the --
6 that has standards in the Plan. It's -- it's
7 required -- it's part of the general statement
8 that the statute requires that we make. And
9 so, our -- our -- the way that we have made
10 that general statement in the Plan is to -- to
11 list some criteria ---

12 Q: Okay.

13 A: --- in that section.

14 Q: But as I understood, even this morning, the
15 Department staff reviewing the -- an
16 application, don't believe you're required to
17 include those criteria in the deemed complete
18 letter and the notification of important review
19 criteria, is that right?

20 A: Right. We -- we interpret those statute and --
21 and regulation to give Department staff
22 discretion to reorder the project review
23 criteria in which -- which include reordering
24 a project criteria -- project review criteria
25 in the regulation, all 33 of them. So, some



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1 can -- can come off the list that's in the
2 general statement and some can be added to the
3 list that's -- that's in the general statement
4 in the Plan.

5 Q: And you -- you -- you find that discretion in
6 the regulation you said, is that right?

7 A: It's either in the statute or the regulation.
8 It says the Department may reorder the project
9 review criteria.

10 Q: Okay. All right. Let's ---

11 A: Or both. It might be in both. I can't
12 remember exactly.

13 Q: Okay. Let's -- the Health Plan itself, let's
14 look at -- I think it's Roper 55, which would
15 be the 2015 Health Plan. So ---

16 **MS. HOLLINGSWORTH:** Caroline, it's in that yellow
17 notebook.

18 A: Okay.

19 Q: And it's -- your heavily involve in the Health
20 Plan process, is that fair?

21 A: Yes.

22 Q: And I think you described, certainly when we
23 spoke, that it's a -- it's a huge
24 responsibility for your program, that sort of
25 the drafting and maintaining of the Plan, is



1 that right?

2 A: Yes.

3 Q: And even though it's only published every two
4 years or -- and now, I think trying to get to
5 an annual publication, I think you described
6 that the Health Plan process never stops, is
7 that right?

8 A: Yes. That's right.

9 Q: Okay. And now, every time you approve a
10 project or issue a certificate of need, the --
11 the CON your program is maintaining sort of
12 active knowledge of those approvals and
13 issuances, right?

14 A: Right.

15 Q: And so, that when you're reviewing subsequent
16 applications for proposed services or projects,
17 you are always kind of considering, even if
18 it's not in the most recent published health
19 plan, you are maintaining active knowledge of
20 what has happened since then, is that fair?

21 A: Yes.

22 Q: Okay. All right. And -- and that -- that goes
23 for all the reviewers in your program, right?

24 A: Well, that goes for the program as a -- as a
25 whole. That's -- yeah.



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1 Q: That's not just specific to how you review
2 them. That's your -- the CON program maintains
3 ---

4 A: Right.

5 Q: --- active knowledge of everything approved and
6 everything issued, is that fair?

7 A: We -- we maintain knowledge. We -- we should
8 know because we maintain an inventory of all
9 the projects that we've approved.

10 Q: Okay. And in terms of projects that have
11 standards in the Health Plan, your department
12 is making sure that applications comply with
13 that section of the plan, is that -- is that
14 fair?

15 A: Yes.

16 Q: And that would be whatever the provisions are
17 in that specific section, is that right?

18 A: Well, certainly compliance with the standards
19 in the Plan. So, there -- there are some
20 narrative parts of the Plan that we don't
21 necessarily -- that are in there for
22 informational purposes. And actually, some --
23 some elements of chapters in the plan that
24 don't cover specific services or facilities.
25 And so, those are -- some -- some things are in



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1 there for informational purposes. Some are
2 just statements, but we certainly make sure
3 that the -- that the project complies with the
4 standards set forth in the Plan.

5 Q: Okay. And -- and the requirement is that an
6 application must comply with the South Carolina
7 Health Plan, right?

8 A: Yes.

9 Q: Okay. And -- and I think that you -- you
10 explained it this way, there's no discretion on
11 the part DHEC staff to approve an application
12 that does not comply with the Health Plan,
13 right?

14 A: It must comply with the Plan.

15 Q: Okay. And as I understood our discussions
16 before that there are more than just standards,
17 that actually, there's other instructions that
18 the application does need to comply with.

19 A: Well, there are other -- there are --
20 everything that's in the Plan is set forth in
21 the statute. The statute tells us what we must
22 include in the Plan. And so, -- you know
23 there's certain elements of that that -- the
24 plan has to -- has to include an inventory.
25 And so, an application, you know, whether or



1 not it complies with the inventory, that's kind
2 of not even really relevant question. And then
3 there -- there are other things that --
4 including that general statement of project
5 review criteria that we're -- that the statute
6 requires us to put in the Plan. But we do not
7 interpret our responsibility to mean that
8 compliance with the plan means that every CON
9 application per a chapter in the plan must
10 comply -- that we need to review that
11 application with the -- with relative
12 importance criteria listed in the plan as the
13 ones that we list in the deemed complete
14 letter.

15 Q: Okay.

16 A: So, the -- the regulation and the statute, it
17 would control versus -- anything in the plan
18 that might conflict with the statute of the
19 regulation, the regulation of the statute's
20 going to control.

21 Q: Okay. So, it's your position that if the
22 health plan has -- so, just using the project
23 review criteria, the relative importance of the
24 project review criteria, which by statute have
25 to be included for every type of facility or



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1 service covered by the Health Plan, is that
2 right?

3 A: By statute, a general statement regarding the
4 criteria considered important in reviewing that
5 service needs to be in the Plan. What we --
6 the way that we've made that general statement
7 is to -- is to include a list of some project
8 review criteria that are generally important in
9 reviewing that.

10 Q: And -- and by we, you're talking about the
11 Health Plan document, right?

12 A: When I saw we, I mean anybody charged with
13 making a decision on an application. And by
14 we, when I talk about what we must include in
15 the Health Plan, I mean the Department.

16 Q: Right. Because the Health Plan is actually
17 promulgated by the Health Planning Committee
18 with the assistance of your department and
19 approved by the DHEC Board, right?

20 A: Well, actually, it's the -- the staff and with
21 the assistance and oversight by the Health
22 Planning Committee, but the Board has the
23 ultimate authority on whether or not the Plan's
24 adopted.

25 Q: Right. And so, it's the DHEC Board that



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1 approves the State Health Plan, right?

2 A: Yes.

3 Q: Okay. So, this is not -- the Health Plan is
4 not put forth by the Department staff, right?

5 A: Not just the staff. It's put forth by the
6 Department.

7 Q: Right. Board -- the Board of the Department,
8 right?

9 A: Well, the Department as a whole. I mean, the
10 Board is the ultimate authority of the
11 Department, so it is put forth by the
12 Department.

13 Q: Right. But so -- I -- and I just want to make
14 this clear though, there's a distinction, is
15 there not, between the Department staff and the
16 Department Board, right?

17 A: Yes. The staff answers to the Board.

18 Q: Right. And so ---

19 A: Certainly.

20 Q: --- even within the contested case of the CON
21 approval process, you issue a staff decision
22 out of your Department, your CON program, but
23 your subject to review and approval from your
24 board.

25 A: Yes.



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1 Q: Right? Okay. Let's look at regulate -- back
2 at the regulation. If you could, let's turn to
3 304. I think this might be what we've been
4 discussing in terms of the regulation that
5 addresses the relative importance criteria.

6 A: Okay.

7 Q: It's says regulation 304. Is that the
8 regulation here referring to what you believe
9 that staff has the discretion to change the
10 project review criteria?

11 A: Yes.

12 Q: Okay. And -- and where in the regulation do
13 you find that discretion?

14 A: Well, it begins by saying the Department
15 notifies the applicant of the relative
16 importance of the project and then it says if
17 subsequent to this notice, the Department
18 determines that the relative importance of the
19 review criteria has changed, the Department
20 must again notify the applicant by certified
21 mail. And then, in subsection 2, it says the
22 staff may reorder the relative importance of
23 the project review criteria, no more than one
24 time during the review period.

25 Q: Okay. So, you'll agree with me that Section



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1 304-1 has the Department providing notification
2 of the relative importance of the project
3 review criteria to be used, right?

4 A: Yes.

5 Q: Okay. And then -- and then, in Section 2, is
6 says that the staff may reorder the relative
7 importance of those criteria, no more than one
8 time, is that right?

9 A: Yes.

10 Q: Okay. And it's in the statute, right? 44-7-
11 180B4 that says the Health Plan must include a
12 statement of the relative importance of project
13 review criteria for each type of service or
14 facility?

15 A: I don't know if that's exact language. I'd
16 have to look at the statute to see.

17 **MS. HOLLINGSWORTH:** Pull that up.

18 Q: That be 44-7-180 in section B. Okay. And this
19 is the provision you were addressing regarding
20 the Health Plan and the creation of the
21 document, is that correct?

22 A: That's right.

23 Q: So, B4 provides with the advice of the Health
24 Planning Committee, the Department shall
25 prepare a South Carolina Health Plan for use in



1 administration of the Certificate of Need
2 Program provided in this article. Then it
3 says, the Plan at minimum, must include -- and
4 in Section 4, a general statement as to the
5 project review criteria considered most
6 important in evaluating Certificate of Need
7 applications for each type of facility,
8 service, and equipment including a finding as
9 to whether the benefits of approved
10 acceptability to each such type of facility
11 service and equipment may outweigh the adverse
12 effects caused by the duplication of any
13 existing facilities, service or equipment.

14 A: Yes.

15 Q: Is that right?

16 A: That's right.

17 Q: So, as I understood your discussion of the
18 regulation as compared to the statute, the
19 Department, your -- your program interprets the
20 regulation as providing staff the discretion to
21 change those project review criteria
22 implemented in -- pursuant to 180-B4?

23 **MR. WESTBROOK:** Objection. Mischaracterization.
24 That's not what she testified to.

25 **MS. HOLLINGSWORTH:** Okay. I will ask -- ask it more



1 broadly.

2 Q: Can you then explain for me now that we've had
3 that language to refresh -- how you interpret
4 or how you find that discretion?

5 A: Well, like I said before, the statute contains
6 a list of requirements for what we must put in
7 the State Health Plan and that subsection 4
8 requires us to include a general statement as
9 to the project review criteria considered most
10 important in evaluating Certificate of Need
11 applications for each type of facility. And
12 so, we did that in the plan. So, we have
13 complied with that part of the statute that
14 requires us to put that general statement in
15 the Plan. We also have the language in the
16 regulation that says that the notification of
17 what relative importance criteria are is made
18 by letter by the Department by certified mail,
19 which is the deemed complete letter. That
20 letter is prepared and sent to the applicant
21 and affected parties by the Department staff
22 during the review process. And then, there's
23 a provision that says that the -- that
24 subsequent to that deemed complete notice -- I
25 added the word deemed complete, if the



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1 Department determines the relative importance
2 that the review criteria has changed, the
3 Department must again notify the applicant by
4 certified mail, which is what we do. Again,
5 that would be done by staff. And then that --
6 paragraph 4, subsection 2, says the staff may
7 reorder the relevant importance of the project
8 review criteria no more than one time during
9 the review period. So, I believe that that
10 reordering -- that the staff reordering of the
11 relative importance criteria, the limitation of
12 it happening more than one time, refers to the
13 paragraph above it. It talks about the
14 Department must notify the applicant when the
15 relative importance of the project review
16 criteria has changed. So, that's roughly where
17 we get our -- our -- the determination that
18 staff has the discretion to reorder the project
19 review criteria. We look at -- and we -- when
20 we say reorder, we believe that because the
21 regulation provides us with a list of 33
22 project review criteria, that that is the list
23 from which we choose.

24 Q: And certainly, you can do more -- you can have
25 more project review criteria applicable to



1 project as important than what's identified in
2 the Plan, right?

3 A: Yes.

4 Q: But I guess I'm just trying to understand,
5 where is that the authority to reorder includes
6 changing the criteria that was approved by the
7 DHEC Board for each service?

8 A: The list from which we choose the project
9 review criteria comes from the regulation. And
10 so, that is the list that we use to order or
11 reorder project review criteria. We use the
12 general statement as a general guide in
13 evaluating those -- whether or not we reorder
14 it, but I believe that the authority to -- to
15 do what we have described comes from this part
16 of the regulation.

17 Q: And by -- and the authority being to -- to not
18 include as relative important criteria --
19 criteria that are otherwise identified in the
20 Plan?

21 A: Correct.

22 Q: All right. If we could go back to Roper 55 in
23 the Health Plan. And the 2015 Health Plan is
24 the Plan applicable -- was in effect at the
25 time you received the -- the MUSC application,



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1 is that right?

2 A: That's right.

3 Q: And I think you describe it as in effect for a
4 couple more days?

5 A: I believe so.

6 Q: And -- and I understood the time, you were not
7 involved in the drafting of the 2015 Plan, is
8 that right?

9 A: I was -- I came -- came to the Department at
10 the tail end of that process.

11 Q: Okay.

12 A: So, I didn't -- I wasn't involved in creating
13 the original draft, but I was involved in -- in
14 editing, finalizing the final draft of the
15 Plan.

16 Q: Certainly, by the time of the 2017/2018 Plan,
17 you had been there throughout that sort of
18 ongoing planning process, right?

19 A: That's right.

20 Q: Okay. And looking at the standards for
21 freestanding emergency services, it'd be Page
22 411-5. And if we could just ---

23 **MS. HOLLINGSWORTH:** That section that has the from
24 the relative forms all the way down. Yeah.
25 Thank you.



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1 Q: Okay. And you'd agree with me that this is --
2 in the 2015 Health Plan, which is the Plan you
3 used for the review as well, is that right?

4 A: That's right.

5 Q: Okay. And that this is where we would find a
6 Roman Numeral XI-V, the relative importance of
7 project review criteria that applicable to the
8 project proposed by MUSC, right?

9 A: This is the list of relative importance project
10 review criteria contained in the freestanding
11 ED section of the 2015 Plan. This is the list
12 that is included as the general statement we
13 include in the Plan as required by statute.

14 Q: Okay. But it's -- it's your belief that
15 compliance with the Health Plan does not
16 include compliance with these criteria
17 necessarily, that they can be changed or
18 modified?

19 A: It's -- it's my view that compliance with the
20 relative importance criteria must be compliance
21 with the relative importance criteria that are
22 listed by the deemed complete letter for each
23 project. And so, if that project review
24 criteria is not included in the deemed complete
25 letter, that doesn't mean -- that doesn't



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1 necessarily mean that the project need to
2 comply with one of these criteria, but it does
3 mean the Department may not make a specific in
4 the decision letter regarding that project
5 review criteria.

6 Q: And in that -- in that discussion, you're
7 speaking to the Department staff, the staff
8 reviewer of the applications, is that right?

9 A: Yes. Who -- the drafter of the decision. Yes.

10 Q: Okay. All right. And we talked about that --
11 you discussed the resource availability
12 criteria number 4 for this particular facility
13 and service. You talked about it this morning
14 as well. Do you recall that?

15 A: Yes.

16 Q: Okay. And I think that the discussion that you
17 had -- certainly, we've talked about it that
18 when you saw this here, you don't -- you didn't
19 find a matching title in the 33 criteria in the
20 regulation that had the words as the title
21 resource availability, is that right?

22 A: That's right.

23 Q: And -- and I think -- your testimony this
24 morning was that you were troubled asking that
25 an applicant comply with an unclear project



1 review criteria?

2 A: Yes.

3 Q: Okay. And so, you -- and I think we talked
4 about -- and I think we talked about that
5 certainly before that staff resources might be
6 the most similar in terms of the language used,
7 what's really just two words. But that you
8 find in the project review criteria.

9 A: Right.

10 Q: In terms of the titles, I guess.

11 A: If we were looking for a title that matched
12 most closely, then staff resources I believe is
13 -- is probably it.

14 Q: Okay. Take a look at -- well, so MUSC Exhibit
15 9, although I don't know -- this is the one
16 that didn't have the all -- all the pages --
17 maybe not. Yeah. I'm so sorry, 422. That
18 would help. And you're familiar aren't you
19 with -- there was actually a number of
20 freestanding emergency department applications
21 that were going on -- well, really since before
22 you -- years you've been in the Department, is
23 that right?

24 A: Yes.

25 Q: Okay. Both in Horry County as well as even the



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1 tri-county low -- low country area?

2 A: That's right.

3 Q: Okay. And here we have a -- a deemed complete
4 letter for the Grand Strand Regional Medical
5 Center North Strand CON application. And I
6 just want you to look at the second page with
7 the deemed complete letter to -- it's sort of
8 a standard process, is it not?

9 A: Yes.

10 Q: But save, of course, for the selection of the
11 criteria. Otherwise, sort of what the notice is
12 for and ---

13 A: Right.

14 Q: --- and those directives. But it is in this
15 letter that not -- that you notify an applicant
16 of the project review criteria that you could
17 review or consider most important for purposes
18 of your review and approval or denial of the
19 project ---

20 A: Yes.

21 Q: --- is that fair? Okay. And so, this is a
22 freestanding emergency department project under
23 the same 2015 Health Plan. And do you see
24 there the criteria that were identified by Ms.
25 Vonja for that application?



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1 A: Yes.

2 Q: And this was in 2015. Had you previously
3 reviewed any of the sort of deemed complete
4 letters and other freestanding emergency
5 department applications before selecting the
6 criteria for these projects?

7 A: Probably, but I -- I'm not sure that I reviewed
8 them all.

9 Q: Okay. You'll agree with me that she has
10 identified resource availability and then,
11 identified a number of project review criteria
12 in regulation 61-15, Section 802 that are
13 relevant to this resource availability ---

14 A: That ---

15 Q: --- analysis or criteria, do you see that?

16 A: That's what it -- what it -- I should say that
17 at this point, Ms. Szatkowski would have been
18 doing this on Sam Phillips' behalf. So, he's
19 probably the one that -- that -- that -- I
20 don't know for sure, but I think he's the one
21 that picked all those criteria.

22 Q: The program director at the time?

23 A: Yes.

24 Q: Okay. And the person that you were doing that
25 one on one training with when you came to the



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1 program?

2 A: Yes.

3 Q: Okay. And so, when you look at these
4 particular criteria that are identified, 20A,
5 20B, 20C, and we don't have to go through them
6 specifically, but is it -- to your -- to your
7 knowledge, criteria 20, that's staff resources,
8 right?

9 A: Let me check.

10 Q: Thank you.

11 A: Yes. 20 is staff resource.

12 Q: And 21 is support services and equipment?

13 A: Yes.

14 Q: 22 is distribution, is that right?

15 A: Yes.

16 Q: 23 is adverse effect to other facilities?

17 A: Yes.

18 Q: And if you look at the subsection, she
19 identifies or perhaps Mr. Phillips identified,
20 they all relate to sort of staffing related
21 concerns, is that fair?

22 A: Not -- not all of them necessarily.

23 Q: Okay. How would you otherwise describe what
24 these criteria address?

25 A: Well, 20 -- 20 is the staff resources project



1 review criteria. 21 is support services and
2 equipment. And it doesn't say anything about
3 staffing in that one. 22 talks about
4 distribution. Again, it doesn't specifically
5 mention staffing. 23 has a subsection that
6 mentions staffing.

7 Q: Okay.

8 A: And then 24 talks about training programs.

9 Q: Well, and -- and going back 21 actually says
10 support services and equipment, right?

11 A: Yes.

12 Q: Okay. Okay. But so, at the time that you were
13 selecting project review criteria for this
14 freestanding -- these -- both of the
15 freestanding emergency department applications,
16 you didn't consider the department's precedent
17 for evaluating or how to identify the resource
18 availability criteria?

19 A: I'm not sure I follow what you mean by the
20 Department's precedent. I didn't -- I
21 obviously did not choose these exact project
22 review criteria.

23 Q: Okay. I understood your testimony on direct to
24 be that you were troubled asking for compliance
25 with an unclear project review criteria. So,



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1 my question was did you -- is there some reason
2 that you didn't similarly identify resource
3 availability as in that freestanding emergency
4 department application review?

5 A: I didn't identify all of those project review
6 criteria listed in -- in the sub -- in the
7 list, letter D because in reviewing the -- both
8 the Summerville application and the MUSC
9 application, I did not consider those to the
10 most important in reviewing the applications.

11 Q: Okay. And we -- in the -- the other criteria
12 and is there at the top even in that letter,
13 but compliance with the need outlined in this
14 plan, that -- in the Plan standards, that's the
15 first criteria listed, right?

16 A: Yes.

17 Q: The 2015 Plan standards. And I understood your
18 testimony, compliance with the plan is -- is a
19 given, is that right?

20 A: It's required by -- by statute, so yes.

21 Q: There's no discretion. You cannot approve an
22 application that is not compliant with a health
23 plan, right?

24 A: Right.

25 Q: And so, your testimony was you don't need to



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1 have it in the deemed complete letter because
2 it -- it is a requirement regardless of whether
3 it would be a separately identified criteria.

4 A: That's right. It is a criteria listed in
5 Section 802, subsection 1, but since compliance
6 with the South Carolina Health Plan is
7 mandatory, we don't -- we just don't include it
8 in the -- in the deemed complete letter.

9 Q: And I think in the subsequent plan ---

10 A: Usually. Sometimes we still do.

11 Q: I think it's the subsequent plan, that one's
12 gone off the list anyway, is that right?

13 A: Yeah. We tried to -- to kind of standardized
14 those lists a little bit to -- to remove that
15 since it's not -- it's not subject to the, you
16 know, reordering on or off the list. It's not
17 anything that we can take off the list. And so,
18 just to clear up any confusion. And there may
19 be a couple of chapters where that's still
20 listed, but our intent was to take that off of
21 the relative importance criteria general
22 statement list because we don't have any
23 discretion where that compliance is complete.

24 Q: And now -- and you added medically under-served
25 groups to the criteria for your review of the



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1 freestanding EDs in Summerville, right?

2 A: Yes.

3 Q: Okay. And I think that's criteria 31. And at
4 your deposition and you know, this morning as
5 well, you -- you -- you -- very strong opinions
6 about the need of -- in Berkeley County for
7 these services, right?

8 A: Well, in Berkeley County and -- and some of the
9 nearby areas of Dorchester and North Charleston
10 ---

11 Q: Okay.

12 A: --- as well.

13 Q: Well, when -- when we spoke before, you -- you
14 testified that you distinctly remember your
15 thought process and that Berkeley County was an
16 under-served population generally and
17 especially with respect to emergency services,
18 do you recall that?

19 A: Yes.

20 Q: And so that's still the recollection you have
21 today, right?

22 A: Yes.

23 Q: And so, this belief about the needs of the
24 Berkeley County population and that they were
25 medically under-served, that's part of what had



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1 you identify that criteria for your review, is
2 that right?

3 A: Yes.

4 Q: All right. If we could look at Demonstrative
5 7. And you talked about most of these projects
6 this morning. But May of 2015 is when you
7 arrived at the Department, right?

8 A: Right.

9 Q: And so, you were already at the Department. In
10 fact, perhaps the interim CON Director in
11 December of 2015? Do you recall whether you
12 were or were you maybe just stepping down from
13 that?

14 A: I think that Lewis Eubank had already joined us
15 by then.

16 Q: Okay. So, you had served ---

17 A: So, I would have been Senior Consultant.

18 Q: Okay.

19 A: Yeah.

20 Q: So, you temporarily served as the interim CON
21 director until Mr. Eubank was hired, is that
22 right?

23 A: Yes.

24 Q: Okay. But you were certainly, at that point,
25 well familiar with the CON program, is that



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1 fair?

2 A: Yes.

3 Q: December of 2015.

4 A: As much as you can be in between May and
5 December. Yes.

6 Q: Okay. Well, I think you testified actually a
7 fair amount this morning about the Trident
8 Emergency Department renovation project, right?

9 A: Yes.

10 Q: Okay. So, you're familiar with it and you
11 reviewed that application in terms of all of
12 your analysis for these projects?

13 A: The Trident -- yes.

14 Q: Right?

15 A: Yes.

16 Q: Okay. And then, you were aware of the issuance
17 of the Certificate of Need for the Roper-
18 Berkeley Hospital, right?

19 A: Yes.

20 Q: And in fact, your office actually issued the
21 Certificate of Need, right?

22 A: Yes.

23 Q: Okay. So, you don't just review and approve
24 assuming that there's no change to that
25 approval. It's actually your Department that



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1 issues the certificates themselves, right?

2 A: I'm not sure what I file about determining
3 whether the approval is -- was -- the CON was
4 issued because the Court ruled that we issued
5 it.

6 Q: Right.

7 A: And ---

8 Q: I probably went to fast, but ---

9 A: Okay.

10 Q: Once your department approves, there's a staff
11 approval unless it's changed on appeal for some
12 reason, you would then -- your department is
13 the one that issues the Certificate itself?

14 A: Yes.

15 Q: Okay. And so, then in May of 2016, you're
16 familiar, right, that the Certificate of Need
17 was issued for the Berkeley Medical Center in
18 Moncks Corner?

19 A: Yes.

20 Q: And August 2nd of 2016, that would have been
21 the issuance of the Certificate of Need for
22 Trident's emergency Department renovation
23 project, is that right?

24 A: That's right.

25 Q: And you were familiar with that?



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1 A: Yes.

2 Q: And just a couple months later, November of
3 2016, there are two applications for
4 freestanding emergency departments that your
5 office review and approved. Do your recall
6 that?

7 A: I -- I'm -- yes. I'm familiar with them. I
8 can't -- I have no reason to dispute the time
9 line, but -- but yes. I mean, I know what
10 projects you're talking about. Yes.

11 Q: Okay. And so, that -- the Roper Northwoods
12 freestanding emergency department, that's the
13 one in North Charleston, right?

14 A: Yes.

15 Q: And, then the Center Pointe is also in
16 Charleston County?

17 A: Yes.

18 Q: And then, you were aware, weren't you, that in
19 June of 2017, the Certificate of Needs were
20 actually issued for the Roper and Northwood
21 relocation and expansion and the Center Pointe
22 opening?

23 A: That sounds right. Again, I -- I'm not -- I
24 don't -- those were not my cases, so I can't
25 say for sure that's the time line, but it



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1 sounds right. I have no reason to dispute it.

2 Q: Sure. And right around the time period linked
3 to 2017 is right around when your restructuring
4 the Department and you're about to assume the
5 -- your current position of Director of the CON
6 program, right?

7 A: Yes. That's right.

8 Q: And then, September of 2017, of course, we have
9 these decisions approving the Summerville
10 Medical Center freestanding emergency
11 department and the MUSC freestanding emergency
12 department?

13 A: Yes.

14 Q: Okay. So, you would agree with me even if we
15 -- you might not recall specific dates, you'll
16 agree with me that you were aware of all of
17 these applications, both approved and CON
18 issues -- issued -- sorry -- since the time you
19 started with the Department, is that fair?

20 A: Yes.

21 Q: Okay. Now, so -- kind of -- let's -- walking
22 through them each a little bit more, you -- the
23 Trident application to expand its emergency
24 department and you talked about that a good bit
25 this morning and I think even made some



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1 comments about some of the volumes you saw in
2 that application. Do you recall that?

3 A: I do recall that.

4 Q: So -- so, that means you -- you do recall that
5 what Trident sought to do was in part expand
6 its emergency department to add treatment
7 space?

8 A: Yes. Among other things, yes. Yes.

9 Q: Right. Right. That -- the project itself
10 covered some other areas ---

11 A: Yes.

12 Q: --- within the facility, is that fair? Okay.
13 And so, you would have been aware, wouldn't
14 you, that MUSC opposed Trident's project?

15 A: Not necessarily that one. I mean, I -- I
16 wasn't -- that would have been Sam's case and
17 then, I don't know who the reviewer was on
18 that. I'm not -- I'm not particularly familiar
19 one way or the other about MUSC's opposition of
20 that project. I don't -- I don't dispute that
21 they did, but I'm not -- I haven't -- I didn't
22 go back and look at the rest of the -- I didn't
23 look at the -- to see what the -- the
24 opposition status was.

25 Q: Okay. So, in -- in reviewing what you talked



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1 about this morning in terms of volumes and
2 projections, you didn't also review MUSC's
3 adverse impact challenge to those plans of --
4 of Trident's?

5 A: Not specifically. No.

6 Q: Okay.

7 A: I just looked at the application and the need
8 analysis.

9 Q: Okay.

10 **MS. HOLLINGSWORTH:** Pull up Page 344.

11 Q: I -- you testified, you were -- you've been
12 here most of the week, is that right? Or last
13 week anyway ---

14 A: I was ---

15 Q: --- for testimony.

16 A: I was here for two witnesses.

17 Q: Which witnesses were you here for?

18 A: Kathy Platt and Dan Sullivan.

19 Q: Okay.

20 A: And I wasn't here for all of either of their
21 testimony.

22 Q: Okay. So, do you recall if you were here for
23 the portions of the testimony talking about the
24 various oppositions of these hospital systems
25 to each other on various projects?



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1 A: I recall during Dan Sullivan's testimony, I
2 think it was on cross-examination.

3 Q: That he was asked some of the questions by ---

4 A: Yes.

5 Q: --- the Medical University?

6 A: Yes.

7 Q: Okay. And so, but you -- you didn't as part of
8 your analysis of the project review the adverse
9 impact claims or the alleged potential negative
10 impact to quality and outcomes that MUSC
11 asserted in that case?

12 A: Part of my analysis of what project?

13 Q: In looking -- using the volumes and the
14 projections in this CON application to support,
15 as I understood it, your beliefs about the need
16 for these two freestanding emergency
17 departments ---

18 A: I did not go back and review MUSC's opposition
19 arguments ---

20 Q: Okay.

21 A: --- for the Trident ED expansion.

22 Q: Okay. Do you agree -- you -- you were at the
23 Department by July of 2015, right?

24 A: I had been there for almost exactly two months.
25 That's right.



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1 Q: Do you recall if there was a project review for
2 this project that you would have attended?

3 A: Oh, I don't remember. I really don't -- I
4 really -- I don't recall.

5 Q: Take a look if you would -- let's look at CON
6 359. And so, Mr. Phillips though was the
7 director at the time still in ---

8 A: Yes.

9 Q: --- summer of '15?

10 A: Yes, he was.

11 Q: So, you can't -- you don't have a recollection
12 if this was one of the projects that you had
13 one-on-one training with him?

14 A: No.

15 Q: Okay. And in looking at -- so, this is his
16 decision letter. Sort of a standard start to
17 the decision letter that your department still
18 does today, is that right?

19 A: Yes. That first paragraph is very similar to
20 what we do today.

21 Q: Okay. And this -- sorry. The sticker's at the
22 bottom Roper's Exhibit 25. But if you look --
23 and we can flip to sort of the next page and
24 the page after. Do you agree with me this is
25 a pretty lengthy analysis by Mr. Phillips with



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1 -- that's included in this decision letter?

2 A: I do.

3 Q: Do you recall that or was this project actually
4 unique because the Department actually issue
5 the CON, but then had to rescind it because the
6 Medical University had filed an appeal?

7 A: I remember that -- us having to rescind a
8 certificate in -- I think it was two cases ---

9 Q: Okay.

10 A: --- for that reason. It was a wires crossed
11 type mistake. Yes.

12 Q: Okay. And -- and I should have said, so when
13 your -- it's not your policy to go back and
14 review decision letters when you're looking at
15 a project, an approved project that you're
16 using to sort of justify more need in a
17 service area?

18 A: Well, it depends on why I'm using -- what I'm
19 using from the project and why. It depends on
20 what information I'm seeking. I did not go
21 back and review and analyze this particular
22 decision.

23 Q: Okay. So, did -- you didn't review either the
24 application or the decision to evaluate
25 Trident's utilization projections and what



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1 population it is that they were planning to
2 serve with the expansion?

3 A: I went back and reviewed the -- some of the
4 introductory material, the project cost and the
5 need analysis of the application.

6 Q: Okay.

7 A: That's what I specific -- specifically, that's
8 all I recall going back to look at.

9 Q: Okay. And so you didn't review to know that
10 MUSC had opposed and challenged that project,
11 right?

12 A: I -- I didn't go any further in reviewing the
13 rest of that record.

14 Q: But ultimately, MUSC and Trident settled their
15 contested case or MUSC's appeal, right?

16 A: I believe that's right.

17 Q: Okay. And that -- that happens ---

18 A: Yes.

19 Q: --- at your program. You get notified that
20 providers resolve their contested cases.

21 A: Yes.

22 Q: Okay. Now, in addition to the Trident
23 expansion of its -- would you agree with me
24 that their emergency department, the hospital
25 emergency department sits in North Charleston?



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1 A: Trident?

2 Q: Yes.

3 A: Yes.

4 Q: Okay. Would you describe it some other way?

5 A: No. I -- I just -- Trident and Summerville, I
6 sometimes mix them up. I got to make sure I
7 got the right one in the right spot.

8 Q: Okay.

9 A: One's in Dorchester. One's in Charleston.
10 Just had to think for a second.

11 Q: Okay. But so -- but Trident's hospital based
12 emergency department, that's in North
13 Charleston, right?

14 A: Yes.

15 Q: Okay. It's not in downtown. It's not on the
16 peninsula.

17 A: No.

18 Q: Okay. And so -- you were aware that that
19 certificate of Need and were you aware when it
20 was implemented actually in February of 2017?
21 The Trident ED expansion.

22 A: I think I recall seeing a final completion
23 report. I don't remember exactly when -- when
24 it came in.

25 Q: Okay. And then we talked about the Certificate



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1 of Need for the two Berkeley Hospital projects,
2 right?

3 A: Right.

4 Q: That's been during your tenure. You recall
5 those being issued, right?

6 A: Right.

7 Q: Okay. So, the Trident's Center Pointe
8 freestanding emergency department -- what
9 involvement did you have or knowledge did you
10 have about that application?

11 A: I didn't have any direct involvement with that
12 application.

13 Q: Okay. Did you review the application as part
14 of this analysis that you did for these
15 applications?

16 A: I don't believe so.

17 Q: Okay. So, in terms of evaluating the -- the
18 population to be served, the acuties, the six
19 million dollar investment, you didn't -- you
20 didn't look at that before making evaluations
21 of need and capacity?

22 A: I did not go back and look at any of the Center
23 Pointe record -- administrative record.

24 Q: Okay. Well, how did you evaluate capacity in
25 the service area if you didn't evaluate or



1 review the Center Pointe project?

2 A: I'm aware of Center Pointe and I'm aware of
3 where it is. I did not need to go back and look
4 at the administrative record -- record to be
5 aware of it as a -- an existing facility in
6 North Charleston.

7 Q: Okay.

8 A: So, it -- it was part of what I already knew
9 about the service area. It is farther away
10 from the proposed project, either the
11 Summerville project or the -- or the MUSC
12 project than both Trident and Summerville --
13 Summerville Medical Center.

14 Q: What -- so, do you know what -- what capacity
15 Center Pointe has? How many treatment spaces
16 it has?

17 A: Off the top of my head, I -- I don't know for
18 sure.

19 Q: Okay. All right. So, what about the
20 freestanding emergency department, the project
21 that Roper Saint Francis filed to sort of
22 replace and expand the Northwood freestanding
23 emergency department? What role did you have
24 in that project?

25 A: That was not my case. So, I was aware of it.



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1 I was aware of some of the arguments associated
2 with it, but it wasn't my -- my case to review.

3 Q: Okay. Well, but in terms of evaluating
4 approved implemented existing emergency
5 services in the tri-county area, wouldn't you
6 have reviewed the Northwood application?

7 A: Not necessarily.

8 Q: Okay.

9 A: Again, I was aware of it and I was generally
10 aware of -- of where it is and again, further
11 away -- Trident and Summerville hospitals are
12 basically not exactly, but kind of in between
13 the proposed project location and these other
14 North Charleston freestanding EDs.

15 Q: Okay. Would you have attended the project
16 review meeting that DHEC held for that
17 application?

18 A: I don't recall. I know that there were some
19 elements of that matter that came up during
20 other case reviews, but I don't think I
21 attended an actual project review meeting for
22 that case. Maybe I -- I just don't remember.

23 Q: Well, in your review of the -- these
24 applications in -- in the Summerville
25 freestanding ED application, you would have



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1 been certainly -- you were aware of Trident's
2 challenges to the Roper Northwoods' expansion
3 piece because that was raised to you during
4 your review in these cases, right?

5 A: Yes.

6 Q: And specifically that Trident opposed Roper
7 Northwood having some additional space because
8 of their multiple ED expansion projects we just
9 walked through, right?

10 A: Yes.

11 Q: Okay. And do you recall that Roper Saint
12 Francis submitted to you some of the materials
13 that represented Trident's objection in the
14 Northwoods' application?

15 A: Yes.

16 Q: Okay. And then, certainly, by the time the
17 MUSC application came in the door, you had
18 Summerville's application for a freestanding
19 emergency department, right?

20 A: Right.

21 Q: I think you got that April of 2017?

22 A: That's sounds right.

23 Q: Okay. Now, you were talking about -- you were
24 asked to review ---

25 **MS. HOLLINGSWORTH:** Let's just pull up MUSC Exhibit



1 8, please.

2 Q: Mr. Westbrook asked you several questions about
3 sort of the application narrative for the
4 Summerville freestanding application this
5 morning. Do you recall that?

6 A: I do.

7 Q: If you would ---

8 **MS. HOLLINGSWORTH:** Let's put it to 25.

9 Q: Exhibit 8 in your notebook. Trying to find it.
10 Mr. Westbrook asked about.

11 A: Would this be an MUSC notebook?

12 Q: Yes, ma'am.

13 A: Page ---

14 Q: 8 something.

15 A: 820.

16 Q: Yes. Say MUSC 8-20.

17 A: Okay. I'm there.

18 Q: And I just want to ask you about this Paragraph
19 that Mr. Westbrook directed you to. So, it's
20 the middle paragraph in there again, Hospital
21 Association.

22 A: Yes.

23 Q: You'll agree with me that MUSC is not a
24 community hospital, is it?

25 A: I mean, depends on how you define community



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1 hospital. Can you be more specific what you
2 want to know what MUSC is not?

3 Q: In terms of health planning, you -- you don't
4 have a -- an opinion or belief as to whether
5 MUSC is a community hospital?

6 A: It's not a term that I would typically use to
7 describe MUSC, but without a definition of
8 community hospital, I don't know. I don't want
9 to speak out of term.

10 Q: Okay. How would you describe MUSC? What kind
11 of hospital is it?

12 A: It's a -- it's a major academic medical center
13 on the peninsula of Charleston. It has a level
14 I trauma center, an extensive array of
15 services. It's got a high level tertiary
16 hospital.

17 Q: Okay. And I think I've actually learned the
18 word quaternary in the ---

19 A: I didn't want to say it, but yeah. That --
20 apparently, that's a thing. So, it's that too.

21 Q: I thought it would risk it.

22 A: Yeah.

23 Q: So, you'll agree with me that is not -- you
24 wouldn't compare MUSC to Summerville Medical
25 Center and say that they are similar types of



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1 services -- hospitals in terms of their
2 services and capabilities?

3 A: Again, I'm not -- I'm not trying to be
4 difficult, but I look at things in terms of
5 regulation. And both of those hospitals
6 operate under the regulation 61-16 and will be
7 required to have certain services. So, in that
8 -- and they have the same of license issued by
9 DHEC. So, in that respect they are similar.
10 But I do believe that MUSC offers a lot of
11 services that Summerville probably doesn't
12 have.

13 Q: I mean, if I understood what you read through
14 in the MUSC application, MUSC is unique in the
15 state in a number of ways according to MUSC,
16 right?

17 A: Yes.

18 Q: Okay. Do you know how many beds MUSC has?

19 A: Not off the top of my head. No.

20 Q: When you reviewed the JARS that you reviewed
21 during your independent analysis, did you not
22 look at the number of beds that each facility
23 was licensed for?

24 A: Not when I was looking at ED services?

25 Q: Okay. So, would it surprise you to know that



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1 in the JARS that you would have reviewed that
2 there were only 94 beds at Summerville, but
3 over -- yes -- 700 beds at MUSC?

4 A: What kind of beds are you talking about because
5 there are several different licensing
6 categories of beds? Are you talking about
7 general acute care hospital beds?

8 Q: Sure. The license bed in the JAR.

9 A: Okay. License beds includes also site beds,
10 and the patients of these beds. So, if -- I
11 mean, I would -- if I needed to know how many
12 beds each hospital had, I would go look at the
13 licensing information that we have that's
14 available.

15 Q: Sure. Because MUSC might have even more
16 specialized services ---

17 A: Sure.

18 Q: --- that have specially designated beds, right?

19 A: Sure.

20 Q: Okay. And -- but in terms of looking at the
21 JARS -- so, what I hear you saying is you only
22 looked at, I guess, the ED visit volume.

23 A: Yes. And the -- when I was going back to look
24 at ED trends and utilization trends. Yes. I
25 was just looking at that specific section on



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1 the JAR that includes the number of ED visits
2 among other things.

3 Q: Okay. Let's -- let's look at Page 25 of
4 Summerville's application. You'll agree with
5 me that Summerville's CON application actually
6 provides data and information about other
7 providers of similar services in the services
8 area, right?

9 A: Yes.

10 Q: And MUSC did not do that in their CON
11 application that they submitted to the
12 Department, did they?

13 A: In the initial document that they submitted,
14 no. They submitted that -- that information
15 later.

16 Q: Right. And I understood there's some
17 information that you received during or after
18 project review, right?

19 A: Yes.

20 Q: But the CON application, the file that was
21 submitted to you to review, did not include any
22 information about other providers of emergency
23 services, right?

24 A: It included some very general conclusory
25 statements about other providers and that there



1 will be no effect on or adverse effect on other
2 providers.

3 Q: Okay. And -- okay. We can look at it, but
4 you'll -- will you agree with me that they did
5 not identify any other provider of similar
6 services in the CON application that they
7 submitted for your review?

8 A: In the initial application, I don't recall that
9 they did.

10 Q: Okay. And in looking at this information that
11 -- right there, that Exhibit in the trend, and
12 certainly you had this information available to
13 you in Summerville's application, right?

14 A: Yes.

15 Q: Which is, of course, JAR data, which is also
16 subsequent data that you pulled, right?

17 A: Well, in addition to what's here because I
18 looked at 2017 and 2016 information. So, yeah.

19 Q: You look at 2017 or you looked at 2016?

20 A: I'm sorry. At the -- at the time of the review
21 of the application, I looked at 2016.

22 Q: Okay. And certainly according to this JAR
23 data, while Summerville had a percent increase
24 of 32.2 percent, MUSC's was just 4.5 percent,
25 right?



1 A: Yes.

2 Q: Okay. And you were asked this too regarding --
3 you were asked to look at the service area, but
4 Summerville just used a four zip code primary
5 service area, right?

6 A: Right.

7 Q: And then they had, I think, a 20 percent number
8 sort of what would come from outside of those
9 four zip codes, right?

10 A: Right.

11 Q: Okay. And you'll agree with me that service
12 area like that defined in that way is
13 reasonable or more reasonable than a three-
14 county service area?

15 A: It depends on the project, but I -- I did think
16 that Summerville's service area was reasonable.

17 Q: Okay. And you thought that MUSC's three-county
18 service was not reasonable, right?

19 A: Not necessarily.

20 Q: Okay. Well, what did you think about their use
21 of a three-county service area for the
22 freestanding emergency department?

23 A: Well, I wanted to know why they used that
24 service area and some of the data that they
25 included in their application in support of



1 that was data regarding what -- where they're
2 getting their patients, where MUSC patients are
3 coming from. And so, they based, I believe
4 their service area in part on data about MUSC
5 patients.

6 Q: Right. MUSC's entire patient experience,
7 right?

8 A: Their ED patient experience.

9 Q: So, having kind of walked through both that
10 time line and talked about these various
11 applications that have been approved, right,
12 the ED expansion for Trident, the establishment
13 of another freestanding emergency department
14 for Center Pointe, and the replacement and
15 expansion of Roper Northwoods, you still felt
16 that Berkeley County had a need for emergency
17 services?

18 A: Yes.

19 Q: Okay. And in fact, I think you described --
20 this morning, you called it explosive growth,
21 is that right?

22 A: Yes.

23 Q: And is that still your belief?

24 A: Yes.

25 Q: Let's take a look at what I think you saw this



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1 coming through Mr. Sullivan, MUSC 34.

2 A: I should say, when I was referring to the
3 growth as explosive, it was not limited to just
4 Berkeley County.

5 Q: Okay. And as I described it, you've adopted
6 this -- the north area description that I've
7 heard used this past week, the north area?

8 A: Yes. I'm not sure that I'm using the exact
9 same boundaries, but -- but yes, generally.

10 Q: Okay. So, in terms of this explosive growth,
11 we have this document, it's actually MUSC's
12 trial exhibit that Mr. Sullivan was asked about
13 and came in for his testimony, but you'll agree
14 with me that MUSC medical center, the downtown
15 ED, has not experienced explosive growth since
16 they filed their application, have they?

17 A: No.

18 Q: In fact, they've had year over year decline
19 since 2016?

20 A: I believe it's year over year, but generally,
21 yes.

22 Q: Okay.

23 A: There's been a slight decline.

24 Q: All right. And if you had looked at the 2017
25 joint annual report for Trident, would you be



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1 surprised to see that Trident's emergency
2 department's visits have declined?

3 A: I think they've declined slightly in between
4 2016 and 2017.

5 Q: Okay.

6 A: I think from 98,000 to 90 -- 97,000 visits
7 rough -- roughly.

8 Q: So, as part of kind of coming through this
9 process that we've been through, because I
10 understand you seen Discovery documents and
11 had, of course, been here for some of the past
12 week, but is it your understanding that the ED
13 visits have not continued to climb for many of
14 the area providers?

15 A: Ask me that one more time, please?

16 Q: Is it your understanding or do you have an
17 understanding as to whether or not the ED
18 visits, the visits to the emergency department
19 in this tri-county area have not continued to
20 rise, that they have flattened or declined?

21 A: From when to when?

22 Q: Since you approved the applications.

23 A: So, in between 2017 to 2018?

24 Q: Yes, ma'am.

25 A: I haven't seen any 2018 JAR data.



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1 Q: Okay. But is ---

2 A: So, that deadline is, I think, next week.

3 Q: Sure. But ---

4 A: So, I don't know -- and I haven't necessarily
5 -- I don't -- I mean, I have been here for
6 testimony regarding the 2017 to 2018 increase
7 or decrease.

8 Q: And so if -- you -- you've mentioned a couple
9 times though that you've seen some things in
10 Discovery and -- which has been provided
11 selected Discovery materials?

12 A: As far as things in Discovery, I think it was
13 -- I -- I've looked at things that were
14 attached to -- to motions, but not necessarily
15 just the general Discovery documents.

16 Q: Okay. Let's take a look -- well, first, let me
17 ask you this. You mentioned this afternoon
18 that there are times when an application going
19 back to those sort of two important publication
20 dates, that there are times that one
21 application may be published for both accepted
22 for filing and deemed complete in one state
23 register, right?

24 A: Right.

25 Q: I learned the phrase double-published is one



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1 way to describe it. Does that sound accurate?

2 A: That's the term lots of people like to use.

3 Yes.

4 Q: Okay.

5 A: And ask for now.

6 Q: The State Register that -- let's see. I think
7 we have it -- we put a Bates on it of Roper
8 Saint Francis ... But the July -- oh, I'm
9 sorry. June 23rd, 2017 State Register, does
10 that sound familiar? And you have the
11 application in front of you. I think it shows
12 you at the very back, but is that the State
13 Register that this application was published
14 in?

15 A: I -- I believe so. I -- that sounds right.

16 Q: Well, you can turn in the CON record to Page
17 560.

18 A: Page 5 ---

19 Q: Yeah. In the CON in Joint 1, it's Page 560 of
20 the CON.

21 A: Oh, 60. I'm sorry. I thought you said 50.

22 Q: I'm sorry.

23 A: Okay. I'm there.

24 Q: Okay. And so, this is the -- it tells us at
25 the very bottom, the June 23rd, 2017 State



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1 Register, correct?

2 A: Yes.

3 Q: And it tells us right there in the center
4 affecting Berkeley County, MUSC had two
5 applications, I guess. One for this
6 freestanding emergency department in Berkeley
7 County and a radiation therapy center in
8 Berkeley County. Do you see that?

9 A: Yes.

10 Q: And so, this is the notification that it's been
11 accepted for filing, right?

12 A: Right.

13 Q: And then, if you turn two pages, the
14 freestanding emergency department and the
15 radiation therapy project were also published
16 as deemed complete.

17 A: Yes.

18 Q: Do you see that?

19 A: Yes.

20 Q: Now, this application was filed as a file
21 stance of June 6th, 2017. See it on the front
22 page?

23 A: Yes.

24 Q: And go to the, I think the second page of the
25 Exhibit 50. In looking at -- or would it



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1 surprise you to realize that the publication
2 deadline for the State Register was June 9th?
3 So, just three days after you received the
4 application?

5 A: If it was the Thursday before the second Friday
6 of the month, then that sounds right.

7 Q: Okay. So, in just three days you had the time
8 to do that deep in depth review to determine
9 that you could deem it complete for purposes of
10 having it included in the State Register?

11 A: Apparently.

12 Q: Okay. Well, do you recall why you have done it
13 so quickly?

14 A: I don't specifically recall.

15 Q: Okay.

16 A: There was -- there's nothing that sticks out in
17 memory as -- as unique to this particular
18 incidents of double-publishing.

19 Q: Okay. And you -- you described -- again, you
20 kind of talked to me sort of you had the
21 distinct memory of this sort of need for
22 emergency services in Berkeley County. And
23 lets take a look at the ---

24 **MS. HOLLINGSWORTH:** Well, Your Honor, we would move
25 to have Roper Saint Francis 60 admitted into



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1 evidence.

2 **MS. BIGGERS:** No objection.

3 **MR. WESTBROOK:** No objection.

4 **THE COURT:** Okay. It's admitted.

5 **MS. HOLLINGSWORTH:** Thank you, Your Honor.

6 **(Petitioner Roper's Exhibit Number 60 was admitted**
7 **into evidence.)**

8 Q: If we could look at the map. We are not very
9 high tech when my very skilled staff and I are
10 trying to do maps, but does it surprise you
11 when you see a county as big as Berkeley County
12 is that this proposed freestanding emergency
13 department is really quite literally sitting on
14 the County line?

15 A: Surprised me in what way?

16 Q: Well, you described to me previously and we've
17 talked about this morning that Berkeley County
18 had this driving need for emergency services,
19 so I'm -- I'm trying to understand how ---

20 **MR. WESTBROOK:** Objection. Objection.
21 Mischaracterization. She didn't limit that to
22 Berkeley County. She specifically noted that
23 -- that the need was beyond Berkeley County.

24 **MS. HOLLINGSWORTH:** Certainly, Your Honor, I
25 understand how she's clarified that or added to



1 that this morning. But at her deposition, the
2 testimony was directly related to Berkeley
3 County. It was not an expansion ---

4 **MR. THOMAS:** Objection. She can't -- if she's going
5 to impeach her, she needs to do it. She can't
6 quote her deposition. She needs to let the
7 witness see what she said. If she wants to try
8 to impeach her, do it correctly.

9 **THE WESTBROOK:** Yeah. I mean, I -- what I heard was
10 a question that was related to her earlier
11 testimony today.

12 **MS. HOLLINGSWORTH:** It -- it's both, Your Honor. I
13 believe she expanded on her testimony. I'm not
14 attempting to impeach her.

15 **MR. WESTBROOK:** Well, if you're not attempting -- if
16 she's not attempting to impeach her, she can
17 paraphrase what she said under her ---

18 **MS. HOLLINGSWORTH:** Okay.

19 **MR. WESTBROOK:** --- deposition.

20 **MS. HOLLINGSWORTH:** Your Honor, I'll rephrase the
21 question.

22 **THE COURT:** Okay. Thank you.

23 Q: Ms. Murdock, how is that you feel that the
24 location that's been proposed for this
25 freestanding emergency department will provide



1 more access to emergency services for Berkeley
2 County residents?

3 A: Well, there are several reasons and some of
4 those reasons include the fact that MUSC showed
5 through its -- through the application process
6 that it had a -- a large enough number of
7 patients that were traveling from the area
8 around the proposed location all the way down
9 to the peninsula to received ED services at
10 MUSC. MUSC's proposal was that these MU -- to
11 borrow a term from Roper's application, these
12 MUSC aligned patients would have better access
13 to emergency services if they -- if those
14 services were available in the area where those
15 patients were actually located. And so, that
16 in addition to some of the other things that I
17 knew about the service area. And I gained that
18 information through all sorts of different ways
19 including review of JARS, review of prior
20 applications, review of statements made by
21 various folks that, you know, that in totality
22 -- that -- that is some of what I relied on to
23 determine that there was a need -- a need in
24 Berkeley County for this. That this project
25 would provide increased access to the patients



1 of Berkeley County.

2 Q: Okay.

3 A: And the surrounding area.

4 Q: Okay. So, you would agree with me that at the
5 time you were considering this CON application
6 that you considered that Berkeley County was an
7 undeserved generally and an undeserved
8 population especially with respect to emergency
9 services?

10 A: Yes.

11 Q: Okay. And so, you would agree with me though
12 that the map reflects that this project is
13 sitting at -- really at the line between
14 Berkeley and Dorchester County?

15 A: It's very close to the border of Dorchester
16 County. Yes.

17 Q: And when you drove around and looked at the
18 locations prior to your deposition, did you
19 note -- or did you know where the county line
20 was between ---

21 A: Not exactly. I had a general idea, but no --
22 not exactly.

23 Q: Okay.

24 A: It's harder than you might think to get a map
25 that will show everything including county --



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1 the county boundaries.

2 Q: And you'll agree with me, Berkeley County
3 geographically is a very large county, is it
4 not?

5 A: Yes. It is. It includes a lot of wetland and
6 forest area, and other things.

7 Q: So -- and I believe you described it to me, but
8 the application -- the proposal of MUSC is to
9 alleviate downtown capacity constraints, right?

10 A: That is certainly a justification cited in its
11 application.

12 Q: And not to serve Berkeley County generally, but
13 MUSC proposes to serve its patients living the
14 areas proximate to the proposed location, is
15 that fair?

16 A: That was MUSC's position. Yes.

17 Q: Let's take a look at the CON record, which is
18 Joint 1. And you've described I think a couple
19 of times, but it wasn't until project review
20 that you received information identifying by
21 zip code where MUSC's patients were coming
22 from, is that right?

23 A: I believe it -- yeah. I believe it was project
24 review.

25 Q: You did not have that information in the



1 application sort of filing itself, did you?

2 A: I don't believe so.

3 Q: Okay. Take a look if you would at MUSC's
4 project review presentation, Page 530 of Joint
5 Exhibit 1.

6 A: Okay.

7 Q: And is this what you recall as familiar to you,
8 the information by zip code of the patients
9 that MUSC has historically served and how they
10 anticipate shifting them to the freestanding
11 emergency department?

12 A: Yes.

13 Q: When you look at sort of the number of visits
14 and the shift and the volumes, would you agree
15 with me that actually the largest zip code by
16 patient count for the number of patients to --
17 or number of visits, let me clarify, is
18 actually a Charleston County zip code?

19 A: If you're referring to 29406, yes. That's a
20 Charleston zip code that appears to have the
21 largest number of -- of ED visits associated
22 with the patient shift.

23 Q: Okay. It was 2,690, right?

24 A: Yes.

25 Q: And I think the -- the next closest would be,



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1 it looks like a Dorchester zip code, is that
2 right?

3 A: Yes.

4 Q: Okay. And so, the Charleston zip code provided
5 by count the largest number of visits and
6 looking otherwise at the numbers, would it
7 surprise that Dorchester County actually
8 provides more of the intended visits that
9 Berkeley or Charleston County?

10 A: Looking at the numbers, it doesn't surprise me.
11 I haven't totaled them all out by county, but
12 no -- that -- that wouldn't surprise if I ---

13 Q: Okay.

14 A: --- got a calculator out right now.

15 Q: So this primary service area or the primary
16 intended zip codes to redirect that number for
17 Dorchester County is 40 percent of the total.
18 Does that surprise you or not?

19 A: I mean, I'm not going to doubt your math.

20 Q: Okay. You might want to, but ---

21 A: I -- I ---

22 Q: I did have Ms. Glover check me a couple of
23 times.

24 A: Okay.

25 Q: Do you consider Dorchester County to be a



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1 medically undeserved area?

2 A: With respect to ED services or just in general?

3 It -- yeah. It could be.

4 Q: But at the time you were reviewing these
5 applications, do you recalling have a belief
6 that Dorchester County was under-served for
7 emergency services?

8 A: I didn't a specific analysis on whether or not
9 Dorchester County itself was under-served with
10 ED services.

11 Q: Okay.

12 A: My analysis focused on kind of the -- the
13 proposed service area as a whole.

14 Q: Okay. Did you consider when you finally had
15 information about sort of patient origin of the
16 sort of proposed redirection, did you consider
17 those zip codes or areas in which MUSC was
18 proposing that the patients would travel the
19 opposite direction? So, rather than -- instead
20 of going to the peninsula, to the medical
21 university, they would instead go the opposite
22 direction outward to the freestanding emergency
23 department. Would you consider that?

24 A: Did I consider that they would do that or that
25 MUSC was alleging those patients would do that?



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1 Q: That that was the proposal of MUSC that -- what
2 percentages of the patients they were proposing
3 were going to reverse their travel pattern in
4 order to go to the Summerville freestanding
5 emergency department.

6 A: You mean, would they travel a different
7 direction on 26? Yes.

8 Q: You did consider that?

9 A: Yes.

10 Q: Okay. And did you consider that that largest
11 zip code specifically would then now be driving
12 past a freestanding emergency department and a
13 hospital or two by going the opposite
14 direction? Did you consider that?

15 A: Okay. Ask me that on more time.

16 Q: Sure. The -- the Charleston county zip code
17 that we're looking at that's going to provide
18 2,690 of the visit count, did you consider that
19 when they -- for those patients that were
20 reversing their travel direction, that they
21 would now be bypassing Roper Northwood and
22 Trident Medical Center in order to get the
23 Summerville ED?

24 A: I knew that that was the assumption that --
25 that some of the patients, including the ones



1 that some of the patients in this zip code
2 would be traveling, you know, in a direction
3 that would take them past those facilities.

4 Q: In terms of medically under-served groups
5 though, I mean, you would agree with me that
6 MUSC was not proposing to serve a medically
7 under-served group. They're proposing to serve
8 the patients that they're already serving,
9 right?

10 A: They were -- yes. They were proposing to serve
11 the patients that they were already serving.

12 Q: Okay. So nowhere in the application or
13 following -- following the filing of these
14 additional comments, project review is there a
15 proposal by MUSC to serve patients that aren't
16 getting services somewhere else. They are
17 proposing to serve their MUSC downtown
18 patients, right?

19 A: That's MUSC's general position was that they
20 were going to service patients that -- that --
21 that were already coming from those areas close
22 to the project to MUSC. I did not do an
23 evaluation as to whether or not those patients
24 themselves were part of or constituted in whole
25 an under-served group. So, yes. That was



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1 MUSC's proposal.

2 Q: And all of these hospitals, whether they're
3 hospital based emergency department or
4 freestanding, these hospitals are all subject
5 to EMTALA, right?

6 A: Yes.

7 Q: Okay. So, MUSC complies with that as do all of
8 the other hospital emergency service providers
9 in the area, right?

10 A: Yes. Including Summerville. I determined that
11 both of those applications had similar
12 compliance requirements under EMTALA.

13 Q: You were describing this morning sort of an
14 analogy to Roper-Berkeley hospital application.

15 A: Yes.

16 Q: And you even asked to confirm a statement in
17 Summerville's application regarding the hearing
18 in the ALC in that case, but you weren't at the
19 department in 2012, were you?

20 A: No.

21 Q: Okay. Because I was at the hearing in that
22 case and I -- I -- I'm surprised to hear that
23 Summerville's position on how that hearing
24 went. But you weren't -- you can't confirm or
25 deny anything about what was said at the



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1 hearing on those contested cases, right?

2 A: No.

3 Q: But in terms of -- and making an analogy to
4 Roper-Berkeley, you're -- you understand that
5 was a CON application for a hospital, right?

6 A: Yes.

7 Q: It's very different than a freestanding
8 emergency department, right?

9 A: Well, yes. I mean, it didn't address ED
10 services or ED projections in it's application
11 at all.

12 Q: Right. Because it was ---

13 A: It's a very different -- it's a different
14 project.

15 Q: Yeah. The hospital application, right?

16 A: Uh-huh (affirmative response). Yes.

17 Q: And you'll agree with me that the plans -- that
18 provision related to being approved for a
19 hospital are different than the plan standards
20 related to freestanding emergency services,
21 right?

22 A: Yes. They're in two -- two separate chapters.
23 Yeah.

24 Q: And in fact, in the standards or the chapter
25 related to establishing a hospital, there's



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1 actually provisions by which there can be sort
2 of an institution specific project, right?

3 A: Yes.

4 Q: And are you aware generally that Roper-Berkeley
5 is being developed through the transfer of
6 existing beds form Roper downtown?

7 A: Yes. I believe Roper didn't have a hospital
8 specific bed need at the time that it wanted to
9 put forth this project, so it used beds that it
10 already had. That's my understanding with the
11 nature of this project.

12 Q: And so, Roper-Berkeley, the -- sort of the
13 premise behind Roper-Berkeley was that the
14 patient being served in the proposed service
15 area, they're removing the beds from downtown
16 to closer to where those patients lived?

17 A: Yes.

18 Q: That generally your understanding?

19 A: Yes.

20 Q: And you would agree with me that before -- long
21 before Roper-Berkeley CON was filed, Roper
22 Saint Francis had had a freestanding emergency
23 department in Berkeley, hadn't they?

24 A: I believe so.

25 Q: And I don't know if you were here for the



1 testimony earlier, but I think over 20 years
2 Roper's freestanding emergency department in
3 Moncks Corner has been operating. Does that
4 surprise you?

5 A: No.

6 Q: Okay. And so, certainly by the time that Roper
7 Saint Francis sought to establish a hospital in
8 Berkeley County, they had a presence in
9 Berkeley County for a very long time. Would
10 that be fair?

11 A: Yes.

12 Q: Okay. And you'll agree with me though that the
13 standards related to freestanding emergency
14 services don't have a institution specific or
15 facility specific sort of need analysis or
16 opportunity, is that fair?

17 A: Well, we don't make need objections in the FSED
18 standards the way that we do for hospitals.
19 And so, hospitals -- the hospital bed need
20 generates a specific number of beds that are
21 needed. And the freestanding ED section of the
22 plan doesn't do that.

23 Q: Right. A freestanding ED provision
24 specifically talk about a community need,
25 right?



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1 A: Well, the -- the language in the -- in the plan
2 talks about, you know, where the patients will
3 come from and why they're not be adequately
4 served.

5 Q: In the service area, right?

6 A: Yes.

7 Q: So, it's evaluating a need in the area that the
8 application is proposing to establish services?

9 A: Yes.

10 Q: Okay. Your decision -- you drafted it, right?

11 A: Yes.

12 Q: And as I understood, Mr. Eubank supported your
13 decision, right?

14 A: Yes.

15 Q: Looking at the -- the 2015 Health Plan -- we
16 don't -- we don't have to pull it up. This
17 should be easy enough, but a freestanding
18 emergency department is an outpatient facility,
19 right?

20 A: Yes. Well, if -- yes. It's a -- it's an
21 extension of an existing hospitals ED, which is
22 generally considered an outpatient service.

23 Q: Right. And -- but if we -- you recognize that
24 a freestanding emergency department is one of
25 two types of facilities covered in the chapter



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1 **MR. WESTBROOK:** No objection.

2 **MS. BIGGERS:** No objection.

3 **THE COURT:** Okay. It's admitted.

4 **(Petitioner Roper's Exhibit Number 25 was admitted in**
5 **the record.)**

6 Q: And if we could, Ms. Murdock -- if we could
7 look at the decision letter in this project.
8 It's Joint 1, Page -- it starts 551.

9 A: Okay.

10 Q: Looking at 552. And your decision letter --
11 and again, you drafted this letter, right?

12 A: I did.

13 Q: And you lay out the plan standards as they are
14 found in the 2015 Health Plan, correct?

15 A: Yes.

16 Q: And then, you have a concluding sentence there
17 at the bottom addressing the application's
18 compliance with all of those standards, is that
19 right?

20 A: Yes.

21 Q: Okay. And with regard to -- and you discussed
22 this morning that sort of standard too in the
23 same -- the same county and exception when you
24 want to go establish a freestanding emergency
25 department in a county other than where your



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1 hospital is located. Do you recall talking
2 about that this morning?

3 A: Yes.

4 Q: Okay. And in your decision letter, I believe
5 it's in that bottom paragraph. The sentence is
6 that Berkeley County currently does not have a
7 licensed hospital.

8 A: Yes.

9 Q: Is that -- okay. And I think we discussed your
10 deposition, but prior to these applications,
11 meaning the MUSC application and the
12 Summerville application for a freestanding
13 emergency departments, you had not previously
14 handled an application or reviewed and
15 application that implicated that provision was
16 in standard 2, is that right?

17 **MR. WESTBROOK:** Objection, Your Honor. Same
18 objection I made the other day. Licensed
19 hospital that's already been ruled as a matter
20 of a law, but there's no licensed hospital in
21 Berkeley County. It's -- we've already brief
22 and argued that issue quite a bit. And so, I
23 would object to any questions related to
24 whether there's a licensed hospital in Berkeley
25 or standard 2 -- compliance with of standard 2.



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1 **MS. HOLLINGSWORTH:** And -- and, Your Honor, I
2 certainly understand his position, but the
3 issue, of course, in summary judgements, you
4 have not heard from the Department at all and
5 I think I have to develop a record of what the
6 Department's interpretation is through the DHEC
7 witness in order to -- for purposes of -- if I
8 have an appeal, then I have to have her
9 testimony on the record as to what her
10 interpretation, if anything.

11 **THE COURT:** I mean, if you wanted to specifically
12 ask her what her interpretation is, then I'm
13 going to allow you to do that. Mr. Westbrook,
14 I'll allow her to do that. But we're not going
15 to ---

16 **MS. HOLLINGSWORTH:** No, Your Honor. I ---

17 **THE COURT:** --- expand any.

18 **MS. HOLLINGSWORTH:** I just clearly am trying to get
19 on the record a couple answers so that we can
20 -- I can have in the record, Your Honor.

21 **Q:** And Ms. Murdock, so my questions was prior to
22 these two applications at issue, the MUSC
23 application and the Summerville freestanding
24 emergency department application, you had not
25 previously reviewed an application that



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1 involved this same county exception in standard
2 2, is that correct?

3 A: I believe so.

4 Q: Okay. And at the time you rendered your
5 decision, you were not relying on any
6 precedent, department precedent policy or
7 written interpretation of that provision in
8 standard 2 regarding a county with a licensed
9 -- without a licensed hospital?

10 A: Could you ask me that one more time?

11 Q: Yes.

12 A: I was relying on department regulations. So,
13 clarify that question a little bit. I'm not
14 sure I'm -- I'm understanding what you're
15 asking me.

16 Q: Sure. I -- it's my -- your -- my understanding
17 is that at the time you rendered your decision
18 and you were evaluating standard 2 and you make
19 this conclusion that Berkeley County currently
20 does not have a licenced hospital that at the
21 time they did not rely on any department
22 precedent policy or written interpretation of
23 that language.

24 A: Of the language in the State Health Plan
25 regarding -- again, I just want to clarify. I



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1 was relying on the Department's definitions set
2 forth in regulation regarding what -- what let
3 -- what hospital, you know -- what is and is
4 not a hospital. But I wasn't relying on any
5 specific prior CON decisions or -- or
6 containing interpretations regarding this
7 particular language.

8 Q: This particular provision in the Health Plan?

9 A: Yes.

10 Q: Okay. And if you would -- well, let me just
11 ask you this. Well, let's look at Roper 19
12 quickly.

13 **(Petitioner Roper's Exhibit Number 19 was introduced**
14 **into the record at this time.)**

15 Q: Are you familiar with the CON activity tracker
16 that your office circulates? Sort of a
17 spreadsheet that -- that's circulated within
18 your department.

19 A: It -- this is a -- if -- I believe that this is
20 a kind of a prototype that one of our project
21 management folks is working on with Lewis.

22 Q: Are you or are are not familiar with the
23 document called the CON activity tracker?

24 A: I am not specifically familiar with that
25 document. But it may be a -- a new spreadsheet



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1 that -- that is being developed, but if you can
2 -- I mean ---

3 Q: Go back.

4 A: It looks like some other spreadsheets to -- we
5 have, but I know that Dillon Setterly (ph) has
6 been working on a program that will allow us to
7 use a kind of roster of projects to do certain
8 things, but it's still being developed.

9 Q: Okay. This document that was produced in
10 Discovery by the Department, it's in an email,
11 and then ---

12 A: Yes.

13 Q: --- it has this XLSX. That's a Excel
14 spreadsheet, right?

15 A: Yes.

16 Q: Okay. And you received that email -- Mr.
17 Eubank forwarded you the CON tracker on August
18 30th, 2018, is that right?

19 A: Yes.

20 Q: Okay. And then, below Mr. Setterly (ph), is
21 that -- is that his name?

22 A: Yes.

23 Q: Okay. He's providing -- this is a template, is
24 that right?

25 A: Yes.



1 Q: Okay.

2 A: Again, I believe this is a prototype and look,
3 here's something we can do. Here's some things
4 that it can do.

5 Q: Okay. And in the email, Mr. Setterly (ph) to
6 Mr. Eubank has forward to you, Lewis, sheet 5
7 is your template, just type the license number
8 in the highlighted cell in the first row and if
9 it is on the sheet, one, it will populate the
10 rest, is that right?

11 A: That's what it says.

12 Q: And then, the second page is the Excel
13 spreadsheet that is tracking the various CON
14 projects going through your office?

15 A: I -- I again ----

16 **MR. WESTBROOK:** Your Honor, objection. She has
17 already testified that she's not familiar with
18 this spreadsheet or this template. And to keep
19 asking her the same thing over and over again
20 or asking her questions about this, she's
21 already said this is not something that she's
22 familiar with.

23 **MS. HOLLINGSWORTH:** Your Honor, with respect, she's
24 the program director and it was her -- her
25 email that's been produced. So, I -- I --



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1 again, we can move on. Just move it in to the
2 record as evidence and we can complete the
3 questions.

4 **MR. WESTBROOK:** Well, I -- I object to that being
5 entered into evidence. There's been no
6 foundation laid for it. There's been no
7 authentication of it. I mean, this -- you
8 know, this witness says she doesn't know what
9 it is. So, I -- I don't see how it gets into
10 evidence. Not without -- unless it comes
11 through another witness.

12 **MS. HOLLINGSWORTH:** Your Honor, it's -- it's her --
13 it's her document, Your Honor. It's to Ms.
14 Murdock. I certainly understand if -- I'm
15 trying to just put in the record related to
16 this license issue and move on. But I -- I have
17 to have the document into evidence. It's Ms.
18 Murdock's document produced in Discovery. I --
19 I don't plan to ask her to confirm or deny the
20 attachments, but I think from the Department
21 producing the document, this is the witness.
22 It's her email. I don't think that that's ---

23 **THE COURT:** So, you're putting the email in, but not
24 the attachment?

25 **MS. HOLLINGSWORTH:** The email and the attachment,



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1 Your Honor. There -- it's a single document.

2 **THE COURT:** Yeah. But she can't identify the
3 attachment. I'm sorry, Ms. Biggers.

4 **MS. BIGGERS:** I was going to join in the objection
5 based on the -- the witness has -- has
6 testified that she doesn't have knowledge of it
7 and that it's not her document and that it's a
8 prototype. So, it's -- I was just joining --
9 joining in the objection.

10 **MR. WESTBROOK:** And I was say just add in that she -
11 - she -- I think she said she thinks it must be
12 a prototype. She wasn't even sure about that,
13 I believe. So ---

14 **MS. BIGGERS:** Thank you.

15 **MR. WESTBROOK:** I don't have a problem with the
16 email, I suppose. But the -- the attachment,
17 I would object to.

18 **MR. THOMAS:** I'm going to join in, Your Honor, with
19 Roper here because if this is an authentic
20 document, first of all, let's give it
21 authentication. If this is an authentic
22 document, we need to stop this trial now and we
23 need to start asking, okay, is this fake, is
24 this real. They produced this to us.
25 Secondly, the CON tracker is on an attachment



1 from Ms. Murdock. How could that not be part
2 of the document? So, if she makes -- she made
3 disclaim knowledge about it, but it certainly
4 on an email that she sent to her boss, Lewis
5 Eubank.

6 **MS. BIGGERS:** Yes. But it was on -- on an email
7 that was sent to her. That does not in anyway
8 give her authorship or ownership of the
9 document or impute any knowledge of its
10 contents and -- and I really don't see the
11 relevance of it either in that content text.

12 **MS. HOLLINGSWORTH:** Well, Your Honor, as to
13 relevance, I'm trying to be very respectful of
14 the Court's request, but I -- your -- I'm just
15 -- for purposes of this record, I have to have
16 information in the record related to the
17 Department's position on the certificate of
18 need and whether or not it's a license. All
19 I'm trying to do is a put a document in -- it's
20 the witnesses' document. So, if she's claiming
21 that it's not the -- the right attachment, then
22 we do have an issue, I guess, which will sort
23 of unwind where we are in the case. I don't
24 think there's any reason I -- I can go through
25 this whole document with the witness if there's



1 some reason. But the witness testified she is
2 familiar with the CON activity tracker.
3 There's other documents we can start pulling
4 out. I simply was trying to put this is, so
5 that for purpose of preserving my appeal
6 rights. I have the document. This is the
7 witness on the stand. It's her email and it's
8 the attachment.

9 **THE COURT:** Ms. Hollingsworth, I -- I disagree with
10 you that your appeal rights have not already
11 been reserved, but if you want to question this
12 witness about the Department's interpretation
13 of what constitutes a licensed hospital for
14 purposes of the -- of the CON Act, you can
15 question other on that and I don't think any of
16 these -- anyone will have an objection. I gave
17 you the right to do that, but on a limited
18 basis just to address and elicit that testimony
19 from her.

20 **MS. HOLLINGSWORTH:** Right, Your Honor. And I
21 appreciate that because that's what I'm trying
22 to do in this document is an example of the
23 Department having a discussion where they are
24 identifying a -- the Certificate of Need and
25 they reference it as a license number.



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1 **THE COURT:** But she can't authenticate that document
2 and she's already testified that it is a
3 template.

4 **MS. HOLLINGSWORTH:** Okay. Well, then, Your Honor.
5 If -- if the issue is the attachment, then I
6 would move that the email be admitted into
7 evidence.

8 **THE COURT:** Okay.

9 **MR. WESTBROOK:** No objection to the email.

10 **MS. BIGGERS:** None.

11 **(Petitioner Roper's Exhibit Number 19 the email was**
12 **admitted into evidence.)**

13 **MR. THOMAS:** As long as the attachments ---

14 **MS. HOLLINGSWORTH:** Mr. -- Mr. Thomas makes a good
15 point. I will proffer, if I may, the
16 attachment separately.

17 **THE COURT:** Okay. We'll have to go in to the record
18 as a proffer.

19 **(Petitioner Roper's Exhibit Number 19 the attachment**
20 **was proffered.)**

21 **MS. HOLLINGSWORTH:** Thank you, Your Honor.

22 **Q:** Ms. Murdock, you would agree with me that Roper
23 Saint Francis brought up the issue of whether
24 or not Roper-Berkeley was a licensed hospital
25 in Berkeley County during staff review.



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1 A: Yes.

2 Q: Okay. And you'll agree with me that your
3 decision letter ---

4 **MS. HOLLINGSWORTH:** We can pull up the decision
5 letter.

6 Q: Your decision letter does not address Roper
7 Saint Francis' concerns or allegations in
8 anyway, does it?

9 A: It does not reference Roper's position that it
10 -- that there's a licensed hospital in Berkeley
11 County. No.

12 Q: And your decision letter does not anywhere at
13 all mention Roper Saint Francis, Berkeley, or
14 Berkeley Medical Center in evaluating
15 compliance with the standards, is that right?

16 A: The decision letter does not specifically
17 mention the -- the Roper Berkeley project at
18 all.

19 Q: Okay. And as I certainly understand the
20 position of the Department, we discussed at
21 your deposition you -- you are considering
22 regulation 61-16 when you think about licensed
23 hospital for purposes of these standards, is
24 that right?

25 A: That is certainly one of the regulations that



1 I'm considering. Yes.

2 Q: Okay. And the other regulation you're
3 considering is what?

4 A: Well, since it relates to a CON matter, then
5 certainly I would -- I would -- I would relate
6 it to -- to our regulation 61-15 and then the
7 statute, 447110, it's the -- the -- our
8 governing statute. It contains definitions
9 that I would -- that I refer to when I -- when
10 I seek to -- to determine what is or is not a
11 licenced hospital.

12 Q: And you'll agree with me that a Certificate of
13 Need is a required step or approval before a
14 hospital can get a license to operate under 61-
15 16, is that fair?

16 A: Yes.

17 Q: And would you agree with me that if a licensed
18 hospital for purposes of standard 2 in the
19 Health Plan includes a hospital with a
20 Certificate of Need -- if that's the case, then
21 the MUSC freestanding ED CON application did
22 not comply with standard 2?

23 A: Okay. I -- I don't agree with that statement
24 the way that you've phrased it. No.

25 Q: I understand you don't agree with it, but I'm



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1 asking you to assume if -- if a licenced
2 hospital in standard 2 of the Health Plan
3 included a Certificate of Need in the
4 definition of licensed hospital, if that were
5 the case, then MUSC's freestanding ED
6 application would not have complied with
7 standard 2?

8 **MR. WESTBROOK:** I object to that question. It -- on
9 multiple ground. And I'll try to be succinct.
10 Among other things, I believe, Your Honor
11 granted -- allowed her to ask a couple of
12 questions, direct questions to this witness
13 about the Department's position. She's asked
14 many questions and -- and has gone in various
15 avenues here. Second, I think the way that
16 question was phrased, it calls for a legal
17 opinion. And third, once again, Your Honor has
18 already ruled as matter of law about -- on this
19 issue. And fourth, it's almost 4:00 o'clock.
20 Ms. Hollingsworth is already on her cross gone
21 longer than -- far longer than Ms. Biggers went
22 on her direct and if we are going to adhere to
23 our 5:00 o'clock cutoff time, we still have Mr.
24 Thomas' cross to go. So, for all those
25 reasons, I object.



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1 **MS. HOLLINGSWORTH:** And, Your Honor, my last
2 question on the issue that I was trying to ask
3 ---

4 **THE COURT:** I'm sustaining the objection ---

5 **MS. HOLLINGSWORTH:** That's fine.

6 **THE COURT:** Let's move on.

7 Q: As I understood when we were discussing the
8 standard -- standard 6, which is the other --
9 would you agree with me is the other standard
10 that the opponents of the MUSC application
11 challenged the application's compliance with?

12 A: Yes.

13 Q: Okay. And you would agree with me that there
14 are sort of two components addressed by
15 standard 6, one being that the applicant has to
16 demonstrate need for the service by documenting
17 where potential patients could come from?

18 A: Yes.

19 Q: And that the other component is demonstrating
20 why patients are not being adequately served in
21 the service area by the existing services, do
22 you agree with that?

23 A: Yes.

24 Q: Okay. And in addressing need, isn't it true
25 that MUSC only addressed an alleged need that



1 its downtown ED had for additional capacity?

2 A: MUSC's need for additional capacity downtown
3 was certainly a part of the -- the -- of MUSC's
4 position in response to -- in regards to that
5 project review -- or that standard -- standard
6 6.

7 **MS. HOLLINGSWORTH:** Let's pull up Page 27 of the
8 application.

9 Q: Ms. Murdock, this is the place in the
10 application where the applicant addresses the
11 standards in the Health Plan, is that right?

12 A: Yes.

13 Q: This is familiar to you?

14 A: Yes.

15 Q: Okay. And if we could go to the top of the
16 next page where the applicant responds to
17 standard 6 in the Health Plan. You'll agree
18 with me that MUSC gave just a conclusory
19 response to standard 6, right?

20 A: Yeah. The response that follows that standard
21 language is a conclusory response. Yes.

22 Q: And you'll agree with me there's no analysis or
23 even mention of other facilities in the CON
24 application, is there?

25 A: In the initial document filed with the



1 Department, there was none but a very
2 conclusory statement regarding facilities.

3 Q: Okay. And it's your opinion, isn't it, that
4 it's important to address the standard and
5 existing facilities and whether or not they're
6 adequately serving the population as part of
7 the analysis?

8 A: Yes. Which is what I believe MUSC ultimately
9 did address those things in subsequent
10 documentation that it sent to the Department
11 during the review period.

12 Q: It was also your opinion that they did a poor
13 job in this section of addressing standard 6,
14 right?

15 A: Initially, in this response -- this conclusory
16 response, I did not think was -- was -- it
17 definitely was -- was lacking. And I would've
18 hoped that they would submit additional
19 information in response to this -- in regards
20 to the standard, which they did.

21 Q: Okay. Let me ask you this, is the purpose of
22 the CON Act and the regulations to accommodate
23 patient choice?

24 A: The purpose of the CON Act is set forth in
25 statute. Now, there are four purpose that I --



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1 I believe that are listed.

2 Q: Okay. So, my question though is -- is -- is a
3 purpose of the CON Act or the regulations to
4 accommodate patient choice?

5 A: That language it not included in the purposes
6 listed in the statute.

7 Q: Okay. And so, it's ensuring patients have
8 convenient access to a preferred or particular
9 healthcare provider, a goal or a purpose of the
10 CON Program?

11 A: That language it not included in the statute as
12 one of the purposes of CON.

13 Q: Okay. And you'll agree with me that community
14 need is different than facility specific need,
15 right?

16 A: It can be. Yes.

17 Q: Okay. And where an applicant is required to
18 demonstrate community need, there has to be
19 more in the application than just the needs of
20 a specific facility, right?

21 A: It depends on the application. Sometimes
22 facility specific need and community need are
23 similar. Sometimes they're not. So it depends
24 on the project.

25 Q: Okay. This particular project is not --



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1 they're not an obligation to have --
2 demonstrate a community need?

3 A: Yes.

4 Q: Okay. And you acknowledge don't you that the
5 freestanding emergency department that MUSC
6 proposes to put in Summerville will not be able
7 to do everything that the downtown emergency
8 departments do?

9 A: Correct.

10 Q: Service wise or acuity of the patients, right?

11 A: Downtown is a level I trauma center and the
12 freestanding ED, although it will be a part of
13 the Department, it will not have the same
14 capabilities for the very, very high community
15 cases.

16 Q: And you acknowledge, it's relevant what the
17 acuity levels of these patients are that the
18 applicants proposing to offload capacity,
19 right?

20 A: Could you say that one more time?

21 Q: Sure. You acknowledge, don't you, that it's
22 relevant what the acuity levels are of these
23 patients that the applicant is proposing to
24 offload capacity?

25 A: What do you mean by proposing to offload



1 capacity? Can you rephrase that.

2 Q: Sure.

3 A: I don't understand.

4 Q: The suggestion or the proposal that these
5 patients will be sent to the freestanding
6 emergency department, that capacity redirected
7 to the freestanding emergency department --
8 you'll agree with me, will you not, that the
9 acuity levels of those patient is relevant?

10 A: Yes.

11 Q: And you'll agree with me that you don't have
12 any data or other documentation of what the
13 acuity levels are of the patients that MUSC has
14 proposed to redirect or shift?

15 A: I believe that MUSC did submit some
16 documentation regarding acuity. I don't recall
17 specifically in what submission, but I believe
18 it was addressed.

19 Q: Okay. And so -- well, let's pull that up, so
20 that we can clarify that. Following project
21 review, you received some additional
22 information from MUSC, right?

23 A: Yes.

24 Q: Okay. And I think it's out of order. 507.
25 So, is this -- is this what you recall



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1 receiving from MUSC giving information that you
2 believe is related to acuity ---

3 A: I believe ---

4 Q: --- in patients?

5 A: I believe so.

6 Q: All right. And this would be the historical ED
7 volume by type using the ED billing codes. Is
8 that -- is that your understanding?

9 A: I know the source is MUSC's internal data.
10 I've heard testimony that those are billing
11 codes. So, yes. That is what I now believe.

12 Q: You don't recall or reviewing any other data
13 regarding acuity of patients proposed to be
14 redirected by MUSC, right?

15 A: I don't -- I don't recall any additional acuity
16 data.

17 Q: Okay. And you didn't receive any data
18 regarding patient age, did you?

19 A: Gosh. I don't -- I don't remember. I can't --
20 I can't remember one way or the other if the
21 age cohort information was included with the
22 MUSC's submissions.

23 Q: So, what is it -- what level of detail did you
24 have about the -- the patients proposed to be
25 redirected to the freestanding emergency



1 department?

2 A: The patient origin data and that's data
3 regarding acuity, some general narrative
4 information, you know, all the zip code shift
5 data that we've been through already. And
6 then, whatever I -- whatever I reviewed in the
7 JARS that I looked at in connection with my
8 review of this map.

9 Q: Is it your belief or testimony that there's
10 acuity information in the JAR reports?

11 A: No. Well, poss -- generally. But I -- I did
12 not rely on that data and I'm specifically
13 referring to the true emergency, non-emergency
14 data in the JAR that's included in every --
15 every JAR. I know that's in the JAR, but I
16 didn't rely on that in this case.

17 Q: As I understood you just looked at the volumes
18 for the hospital emergency departments that
19 were reported, right?

20 A: Right. The emergency -- true emergency, non-
21 emergency data is right under that including in
22 addition to the percentage of the mission data,
23 which I -- I actually did look at that and I --
24 I -- I didn't say that earlier because I had
25 forgotten that I looked at percent admissions



1 data as well.

2 Q: Okay. And how did that factor in your
3 analysis?

4 A: Well, I was looking at kind of in general to
5 see across the providers, you know, what the
6 general percentage of patients that were
7 admitted, how that -- how that percentage
8 related to volumes to see if I could analyze
9 that to -- to sure up any questions I had about
10 the -- the projections in the application.

11 Q: And you agree with me, don't you, that the
12 proposed three county service area that is the
13 service area for MUSC's downtown ---

14 **MR. WESTBROOK:** Objection. Mischaracterization of
15 the service area. It's -- the service area
16 that MUSC projected was not a three-county
17 service area. It was zip codes within a three-
18 county -- identified zip codes within a three-
19 county service area.

20 **THE COURT:** Could you rephrase?

21 **MS. HOLLINGSWORTH:** Well, Your Honor, if I could
22 clarify. In the CON application, the proposal
23 was a three-county service using MUSC's
24 historical utilization. That -- that was my
25 question, which -- and there's a response to



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1 it. That was what was proposed in the
2 application, perhaps will never find the
3 project review, but I'm asking the witness
4 about the CON application. And we -- I'd be
5 happy to go that page.

6 **THE COURT:** Okay.

7 **MS. HOLLINGSWORTH:** Page 22 of the application, Your
8 Honor. Right under service area.

9 Q: Ms. Murdock, the CON application that you
10 reviewed, is this -- at the time of -- that you
11 reviewed the application, what was the service
12 proposed by MUSC for the freestanding ED
13 project?

14 A: All right. The initial service area is
15 described in -- on this Page 22, it says based
16 on MUSC's historical patient origin trends for
17 the ED, the service area is comprised of
18 Berkeley, Charleston, and Dorchester counties.

19 Q: And below this graph describing the 2016 ED
20 patient origin, what -- what did the
21 application provide?

22 A: It says, the proposed project will have the
23 same service area. Following is a map of the
24 service area.

25 Q: And Ms. Murdock, it's -- is it your opinion



1 that a service area such as that proposed on
2 DHEC's CON 22 is very large for a freestanding
3 ED?

4 A: It depends on -- it really depends on how the
5 service area factors into the analysis in
6 utilization. It appeared from the data that
7 MUSC provided that at least some patients come
8 from, you know, the various corners of the
9 service area. So, if the service area in and
10 of itself was identified, but in analyzing, you
11 know, whether or not it was large for the
12 project, I -- I didn't necessarily need to make
13 that determination because that wasn't how it
14 factored into the -- the -- the projections
15 that there was more detail as to how each part
16 of the service area actually factored into the
17 utilization. So, I -- I didn't really evaluate
18 is it big, is it too big, it is too small. It
19 was identified as a three-county service area
20 and then, I moved on to the rest of the
21 analysis. So, I didn't -- I didn't really
22 evaluate it that way.

23 Q: Thank you. My question though is the three-
24 county service area described on Page 22 for
25 the freestanding emergency department, did you



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1 think that that was very large for a
2 freestanding ED service area?

3 A: I wouldn't say very large. And I -- and at the
4 time, I didn't make that determination one way
5 or the other. It -- I suppose it is large.
6 Maybe I did say it was large.

7 Q: Ms. Murdock, if you could look at the top of
8 Page 169 of your deposition.

9 A: Okay.

10 Q: My question is to you was, and then they say
11 the proposed project will have the same service
12 area as their level 1 trauma center's emergency
13 department. That's what they proposed, right?
14 And your answer?

15 A: Yes.

16 Q: My question, do you think that was reasonable.
17 Your answer.

18 A: I thought that was very large for a
19 freestanding ED service area. So, I was wrong.
20 I did think it was very large.

21 Q: Thank you. Your decision letter, you lists the
22 standards 1 through 6 in the 2015 Health Plan,
23 right?

24 A: Yes.

25 Q: Okay. Where in your decision letter did you



1 address the balancing test of the accessibility
2 improvement and adverse effects required by the
3 Health Plan?

4 A: Well, that balancing test occurs throughout
5 review of the -- of the project. So, each
6 finding includes an element of that balancing
7 test.

8 Q: Go to 551. Page 552, you lay out the standards
9 and it goes to the top of 553. Where in your
10 decision letter would we find that you address
11 the benefits of improved accessibility with
12 equally weighted with the effects of
13 duplication?

14 A: Are you asking if I -- if I quoted that
15 language in the -- in the decision? Because my
16 -- my entire analysis of the project involved
17 that balancing test. So, in finding whether or
18 not there was need for the project, I needed to
19 evaluate accessibility and -- and whether or
20 not there was duplication. And the only way to
21 evaluate whether or not there's unnecessary
22 duplication is to evaluate whether or not
23 there's need. Same thing with distribution.
24 The whole analysis involves weighing one
25 against the other. So, in evaluating need, in



1 evaluating whether or not there's unnecessary
2 duplication of a project, that whole analysis
3 involves a balancing test. If there had been
4 a close call, if there was -- if there were any
5 significant adverse effects that -- if I
6 determined that there were adverse of
7 duplication that needed to be addressed and
8 weighed against improved access, then I would
9 likely have -- have addressed that. Or if
10 there was a situation where there was a close
11 call and the requirement was that the benefits
12 of approved accessibility would outweigh the
13 adverse effects of duplication, which is
14 ultimately what -- what the balancing test is
15 in the next plan. If the benefits improved
16 accessibility actually outweigh any adverse
17 effects of duplication. If that were the case
18 and I was using the extra weighting on one side
19 or another to -- if that had an effect or a
20 material effect on which way the decision was
21 going to go, then I would have made a finding
22 in the decision letter. But in this case, the
23 -- the whole process of evaluating a CON
24 application involves that balancing test and
25 since they're equally weighed and I didn't need



1 to use access weight on one side or the other
2 in making the determination, I did not include
3 a finding in that regarding in the decision
4 letter.

5 Q: Okay. As I understood how we -- so, the
6 language in the plan is the benefit improves
7 accessibility will be equally weighted with the
8 adverse effects of duplication evaluating
9 certificate of need application for the
10 services provided?

11 A: Yes.

12 Q: Is that correct?

13 A: That's correct.

14 Q: And is another way of saying that, that
15 improving accessibility is not more important
16 or given greater weight than consideration of
17 adverse effect of duplication?

18 A: I think that's a fair other way to say it.

19 Q: Okay. And in looking at your decision letter
20 though, I -- I hear your testimony that you
21 considered this balancing, but you don't make
22 a finding in your decision, do you, in response
23 to this provision in the Health Plan standards?

24 A: In the decision letter, there's not a specific
25 paragraph or subheading or subsection of the



1 decision that refers to the balancing test.

2 Q: Okay. And in fact, nowhere in your decision
3 letter do you mention adverse effects or other
4 providers of similar services at all, do you?

5 A: Okay. There's adverse effects and then there's
6 other providers. I don't believe that the
7 adverse effects to which that balancing test
8 refers is the same as the project review
9 criteria in number 23 that refers to adverse
10 effects on other facilities. I think the
11 adverse effects language in the balancing test
12 is a broader analysis of whether or not there
13 are adverse effects on not only existing
14 facilities, but market, the public, the
15 patients, the applicant. So, I think that's a
16 much broader analysis than the specific project
17 review criteria that refers to adverse effect
18 on other facilities, which if we use that
19 project review criteria, that would only would
20 require me to make a finding or an analysis
21 regarding existing facilities. So, I would not
22 be permitted by that regulatory language to
23 include the Roper-Berkeley project in that
24 analysis. So, in order to consider approved,
25 but not licensed for existing facilities, I



1 need to back out of that specific project
2 review criteria and do a broader analysis,
3 which I did do, taking into account Roper-
4 Berkeley and other approved, but not existing
5 facilities.

6 Q: Now, isn't it true that you consider existing
7 facilities to include approved facilities when
8 you're reviewing CON applications?

9 A: I consider approved facilities as approved
10 potential facilities, but I -- not necessarily
11 existing facilities. Not -- not by virtue --
12 not the way the regulation refers to existing
13 facilities.

14 Q: Okay.

15 A: I know that we've -- we've had an improved cath
16 lab that's been deemed by a court as not an
17 existing facility even though it's approved.
18 So, I -- you know, there's some question about
19 -- I take into account the projects that have
20 been approved. I'm not convinced that the term
21 existing facilities includes those, but since I
22 -- since I analyzed and consider them anyway in
23 this case, then you know, the -- crisis
24 averted, I consider approved facilities,
25 existing facilities and licensed facilities to



1 the extent that there is a difference amongst
2 any of those things.

3 Q: Sure. Because when you're evaluating
4 compliance with the Health Plan, it is your
5 position that existing and approved facilities
6 are part of the whole picture, right?

7 A: Yes.

8 Q: Okay. And that you don't ignore projects that
9 have already been approved when you're looking
10 at an overall service area and the distribution
11 of facilities, right?

12 A: Generally, no.

13 Q: Okay. And so, when we're looking at
14 duplication or the effects of duplication in
15 your letter, nowhere in your decision letter do
16 you identify or address any of the existing or
17 approved providers of emergency services, do
18 you?

19 A: No. Not specifically in the letter. No.

20 Q: Okay. And you agree with me that standard 6 is
21 actually talking about current capacity
22 constraints, when it's evaluating need for
23 proposed service, right?

24 A: I -- I believe that's what the language is.

25 Q: Okay. It's not only evaluating future



1 constraints, correct?

2 A: Again, I believe the language says -- I'd need
3 to look at again. I'm kind of stickler for
4 that. If we could go back to the prior page.

5 Q: Sure.

6 A: Yeah. In this case it refers to existing
7 services in the area.

8 Q: We -- we talked about that there's two
9 components to standard 6, right?

10 A: Yes.

11 Q: Demonstrating the need for the service and
12 documenting where the patients are coming from,
13 right?

14 A: Yes.

15 Q: And demonstrating why the patients are not
16 being adequately served by existing services in
17 the area, right?

18 A: Yes.

19 Q: And that's existing and current capacity
20 constraint, right?

21 A: Being adequately served by existing services in
22 the area doesn't specify whether that adequate
23 -- you know, whether that analysis of whether
24 the patients are or are not being adequately
25 served, it doesn't specify capacity in this



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1 language. So, that certainly could be part of
2 the analysis and was part of the analysis here.

3 Q: What we are discussing though is current and
4 opposed to future. You will agree with me that
5 standard 6 is asking the applicant to address
6 current constraints?

7 A: I believe so. Yes.

8 Q: And you'll agree with me, those current
9 constraints are in the area to be served,
10 correct?

11 A: Yes.

12 Q: You'll agree with me that the Department
13 overall, more often than not, approves CON
14 applications, right?

15 A: Yes.

16 Q: And in fact, they approved significantly few --
17 yeah. They denied significantly fewer than they
18 approved, right?

19 A: I would say so. Yes.

20 Q: Less than a quarter. Does that still sound
21 accurate?

22 A: That -- that is not a surprising number.

23 Q: Okay. And in your review of these
24 applications, as I understood your testimony,
25 you had not reviewed the applications for the



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1 freestanding emergency department projects in
2 the same proposed service area, had you?

3 **MR. WESTBROOK:** Objection. Asked and answered.

4 **THE COURT:** She has responded to that.

5 Q: In late May 2019 ---

6 **MS. HOLLINGSWORTH:** Sorry, Your Honor. Let me back
7 that up.

8 Q: That's not correct. What I'm talking about is
9 viewing the locations, the geographical
10 locations. My apologies. Let me correct my
11 question. Prior to your deposition, you had
12 not traveled to any of the locations where
13 these projects were proposed to be located, had
14 you?

15 A: Prior to my deposition?

16 Q: Right.

17 A: I did travel.

18 Q: I'm sorry.

19 A: Yes.

20 Q: As of your deposition?

21 A: Since then?

22 Q: Have you gone again?

23 A: Oh, not on purpose. I've driven down to 26 to
24 Charleston, but no. Not -- not specifically.
25 No.



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1 Q: Okay. And so, your impression of the needs in
2 this north area were not based on you going and
3 viewing those locations prior to making a
4 decision?

5 A: Well, I had gone -- okay. Are you talking
6 about the -- the proposed locations of the
7 freestanding EDs or any of the other existing
8 facilities?

9 Q: Before you approved these applications, you had
10 not gone to any of those -- the geography of
11 where they were proposing to provide services?

12 A: No.

13 Q: Okay. And you'll agree with me that during the
14 opposition that Roper Saint Francis addressed
15 concerns about the impact this project would
16 have on the -- the utilization of our current
17 freestanding ED utilization of Roper-Berkeley
18 Hospital that would be opening soon, right?

19 A: Yes.

20 Q: Okay. And I think you described to me that the
21 reason you went and took this field trip, I
22 think we called it, was it field trip, would
23 that be fair?

24 A: Yes.

25 Q: That you wanted to get a feel for the different



1 facilities in the area, right?

2 A: Yes. Including these and -- and other projects
3 as well.

4 Q: Okay. And the separate review you did of
5 capacity, you described pulling the JARS and
6 evaluating ED utilization in the service area,
7 right?

8 A: Right.

9 Q: How did you calculate capacity for those
10 hospitals who JAR data also reports
11 freestanding emergency departments?

12 A: Well, generally, and this was kind of a broad
13 analysis, but I -- I used the 1,500 treatments
14 per day general capacity number. And then,
15 because the JARS report all ED visits for --
16 for that particular hospital department, then I
17 -- in the case of Summerville, I don't believe
18 there were any other EDs associated with that
19 JAR, but in the case of Trident, that would
20 have included Center Pointe and the other
21 Berkeley County ED. And so, I don't recall off
22 the top of my head what the number of available
23 bays or treatment rooms or anything. I don't
24 recall the specific numbers, but that would --
25 I would've assumed that some of that volume was



1 being seen at the hospital proper and the --
2 the off-campus facilities.

3 Q: How could you calculate capacity per bay if you
4 didn't know the number of bays that were in any
5 of the freestanding emergency departments?

6 Q: Well, I've been to Center Pointe, so I did the
7 best I could. I don't recall of the top of my
8 head where I -- I'm somewhat familiar with
9 facilities. And I think I had to estimate
10 generally how many bays -- I don't remember
11 exactly how I did it with the Berkeley
12 facility, but I -- I relied on what -- what I
13 know and then, having been in the facilities.
14 And I don't recall specifically if the number
15 of bays in each of those Trident Health
16 facilities are -- are included in the
17 documentation that I looked at, but I do know
18 that -- that information about Roper's ED bays,
19 the Roper Northwoods facility was included in
20 some of the documentation of the back and forth
21 involved in the opposition. That was -- that
22 was an issue brought up during the project
23 review for this case.

24 Q: Okay. But you -- you didn't have the actual
25 numbers for any of Trident satellite



1 departments? Is that ---

2 A: I'm not -- I'm not -- I'm not -- I don't recall
3 specifically whether or not I had a concrete
4 number of -- I had a number that I used, but I
5 don't -- I don't recall exactly where I got
6 that number. I -- and I had numbers that I was
7 using for the other two -- for the hospitals as
8 well. But the ED bay number is not usually
9 included in the JARS, so often time in order to
10 find that information, I've got to go to
11 applications or other submission to the
12 Department. So, that was the -- that was the
13 analysis that undertook to do. And I found
14 everything that I could find.

15 Q: Okay.

16 A: But I can't sitting here tell you today -- tell
17 you exactly where I got information regarding
18 Center Pointe and the -- the Moncks Corner
19 facility.

20 Q: Okay. And where are your work papers that show
21 us what those calculations were to evaluate
22 whether the bay or count was correct?

23 A: What do you mean?

24 Q: Where are the work papers that have the
25 calculations to show how many -- what the



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1 number of bays were that you used to calculate
2 utilization and capacity?

3 A: You have everything that I -- that I -- every
4 document that I used in doing this analysis.

5 Q: Okay. So, it would be fair to say you don't
6 have any work papers where you did this
7 capacity or utilization analysis?

8 A: No. I would have used a calculator.

9 Q: Okay. All right. In terms of the -- the
10 project review criteria, you did select
11 distribution accessibility, right?

12 A: Yes.

13 Q: Okay. And distribution accessibility are one
14 of the things that's evaluating is unnecessary
15 duplication of services and unnecessary
16 modernization of services will not be approved,
17 right?

18 A: Right.

19 Q: And so, in your decision, where did you address
20 your findings that this project was not an
21 unnecessary duplication of services?

22 A: I believe it's under the distribution
23 accessibility heading.

24 Q: And do you address what services are in the
25 area in evaluating whether or not this one



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1 would be unnecessary?

2 A: I did not list them. No.

3 Q: Okay. You testified this morning about changes
4 that MUSC proposing to make to their
5 application, is that right?

6 A: Yes.

7 Q: You gave testimony this morning about ---

8 A: Right.

9 Q: --- certain changes, right?

10 A: Yes.

11 Q: And you'll agree with me that when an applicant
12 make changes to a proposed project that changes
13 the information that's required as part of the
14 CON application to be deemed complete, DHEC
15 should be notified?

16 A: I might need a break -- break that down a
17 little bit because it assumes -- are you
18 assuming certain information to be required?
19 I -- I don't know whether or not we would agree
20 necessarily on all that, so.

21 Q: Will you agree with me that if the applicant
22 makes changes to a proposed project that
23 changes the information that's required as part
24 of the CON application to be deemed complete
25 that DHEC should be notified?



1 A: If -- if -- I'm not sure I -- I can -- again,
2 the information required for an application to
3 be deemed complete -- as I stated before,
4 sometimes we don't have all of the -- all of
5 the information associated with the application
6 when we deem it complete. We have information
7 that we think is sufficient to begin review.

8 Q: Okay. So, generally, if a change is made to an
9 application that changes the manner in which
10 the responses were given to the CON
11 application, should the Department be notified?

12 MR. WESTBROOK: Objection. Asked and answered.

13 MS. HOLLINGSWORTH: Your Honor, I don't think it was
14 answered.

15 MR. WESTBROOK: She just got through answering it.

16 THE COURT: Overruled. Ms. Murdock, would you
17 respond to the question, please?

18 A: Okay. You're asking me changes the information
19 or changes the manner in which the information
20 is -- is received ---

21 Q: I'll ask it again so that we can have it all
22 together.

23 A: You said the same vocabulary.

24 Q: Sure.

25 A: I -- I know we can get there.



1 Q: So, would you agree generally when an applicant
2 changes it's project that changes the manner in
3 which it's answering the CON application, the
4 form of the document -- so, there are changes
5 that change the manner in which those answers
6 are given, should the Department be notified?

7 A: I don't understand what you mean by changes in
8 the manner in which the application are -- I
9 mean, in which the answers are given. Are you
10 talking about if they change the format or they
11 change the font?

12 Q: The information or the answers provided in
13 response to the regulation.

14 A: So ---

15 Q: My question is if they -- as generally, they
16 make changes that changes either the answer or
17 the documents ---

18 A: Okay.

19 Q: --- they provided to you for review, should the
20 Department be notified?

21 A: It depends. It depends on the changes.

22 Q: Okay.

23 A: And it depends on the information.

24 Q: Okay. All right. And you testified this
25 morning about the substantial in office,



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1 correct?

2 A: Yes.

3 Q: Okay. And would you agree with me that where
4 an applicant changes a project in a manner that
5 had that been the initial proposal, you might
6 have selected different criteria as most
7 important that that could be substantial?

8 A: You don't need to change what you asked, just
9 ask me one more time because I got lost.
10 Sorry. Same words. Sorry.

11 Q: You would you agree with me that if the changes
12 to an application, had that been the initial
13 application that you were provided -- do you
14 agree with me that if the change would alter
15 the project review criteria that you select for
16 purposes of reviewing the application, that
17 that could be substantial?

18 A: It could be. Yes.

19 Q: Okay. Let's look at Roper 22, please. You
20 discussed this morning some meetings that took
21 place after you approved the project?

22 A: Yes.

23 Q: And this is an email -- do you recall generally
24 a meeting in February of 2018?

25 A: I'm not trying to be difficult. I don't know



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1 if it occurred in February 2018, but I -- but
2 I do recall a meeting that I think is -- is
3 ref- -- is alluded to in this email.

4 Q: You described this morning, did you not, that
5 Mr. Westbrook as counsel for MUSC called you on
6 the phone to talk to you about the project?

7 A: Yes.

8 Q: And I think you testified to you that he talked
9 to you about potential changes to the project,
10 right?

11 A: Yes. Yes.

12 Q: And was there subsequently a meeting between
13 and you and other members of the Department
14 staff and MUSC and its representatives?

15 A: Yes.

16 Q: And would it have been some time after this
17 email, which is dated February 20, 2018?

18 A: I believe so. Yes.

19 Q: Okay. And were affected person notified of
20 this meeting?

21 A: I don't believe so. No.

22 Q: Okay. As we sit here from the perspective of
23 the Department, if you were -- if your office
24 was to issue a CON today, would MUSC be
25 permitted to proceed with implementation of the



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1 projects set forth in the CON application that
2 was reviewed and approved?

3 A: If I issued a CON to MUSC, then it would
4 authorize implementation of the project that
5 was approved?

6 Q: Right. The project set forth in the CON
7 application, correct?

8 A: Yes.

9 Q: If we could look at Trident's Exhibit 20.

10 **MS. HOLLINGSWORTH:** Your Honor, I would move to
11 admit Roper 22 if it's not already in evidence.

12 **MR. WESTBROOK:** No objection.

13 **MS. BIGGERS:** No objection.

14 **THE COURT:** It's admitted.

15 **MS. HOLLINGSWORTH:** Thank you, Your Honor.

16 **(Petitioner Roper's Exhibit Number 22 was admitted**
17 **into evidence.)**

18 Q: The second page of this Exhibit, Trident 20.
19 Ms. Murdock, are these your work papers?

20 A: Those are my notes. Yes.

21 Q: Okay. And I believe it's three pages of a
22 spiral bound notepad?

23 A: I -- I think it's three.

24 Q: Or two maybe. This is everything that
25 comprises your work papers, correct?



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1 A: I -- I'm not sure what you mean by work papers.
2 These are the notes that I wrote down in --
3 while I was reviewing the project and during
4 project review.

5 Q: Okay.

6 A: These are the only notes that I wrote down in
7 -- in connection with this project during
8 project review.

9 Q: So, these are the only notes related to the
10 freestanding emergency department projects that
11 you took at any point, right?

12 A: Yes.

13 Q: And you'll agree with me that all three pages
14 are from the project review meeting, right?

15 A: I -- I don't know. It -- it looks like this
16 page definitely is.

17 Q: And you can look at the paper in front of you.
18 There's a notebook.

19 A: In this one is.

20 Q: Okay. You can look at all three of them. All
21 three of them are from project review, correct?

22 A: Yeah. If -- if this is the -- the third in the
23 sequence, then -- then yes, it appears this one
24 is too. Yes.

25 Q: Okay. And do you recall that Roper Saint



1 Francis brought up staffing problems during the
2 project review presentation?

3 A: I -- I believe they did. I can't recall
4 specifically. If it's in my notes, then -- then
5 they probably did.

6 Q: All right. Did you -- did you hear the
7 testimony or Ms. Huttington or Ms. Eckleston
8 about the nursing shortage?

9 A: No.

10 Q: Did you do any research or other analysis
11 regarding staffing shortages following the
12 comments at project review?

13 A: Specifically, no. I'm already aware of the --
14 the general concern nationwide regarding
15 nursing shortages.

16 Q: Okay.

17 **MS. HOLLINGSWORTH:** Pull up the demonstrative.

18 Q: You state you're generally aware. As I
19 understood Ms. Ballentine, South Carolina ranks
20 fourth in the nursing shortages across the
21 country. Is that -- is that the general
22 understanding that you have?

23 A: I don't know. I've never seen this document.
24 I do not know.

25 Q: What is the general understanding you have



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1 about the -- the shortage?

2 A: I have a general understanding that there is a
3 nationwide nursing shortage and that it's a
4 concern in South Carolina as well as other
5 areas of the country.

6 Q: Okay. But you don't have any knowledge of how
7 we rank compared to other states?

8 A: No.

9 Q: Okay. All right. And in addressing the new
10 location, I believe you drove by when you did
11 the trip in May of this year, you drove by the
12 Applebee's location, the former restaurant that
13 MUSC proposes to use for the proposed project?

14 A: I drove by what I believe to be the -- the
15 current proposed location. Yes. And I think
16 it was the -- I think it used to be an
17 Applebee's.

18 Q: Okay.

19 A: And we did drive by it.

20 Q: Down North Main Street, right?

21 A: Yes.

22 Q: Okay. And I think you -- you described that
23 you were concerned about access and how hard it
24 might be to get to off the highway, right?

25 A: I -- I wouldn't -- I don't think I -- I don't



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1 believe I said I was concerned. I think I --
2 I noted that it seemed easier to get to -- the
3 new location seemed easier to get to than the
4 old location. Not by a lot, but it was just
5 something that struck me.

6 Q: Okay. What other review or analysis have you
7 done of the new proposed location?

8 A: Not much.

9 Q: Okay. Have you done any analysis of the
10 proposed location?

11 A: Other than -- other than in connection with
12 this lawsuit or you know, generally thinking
13 about it or in answering questions about what
14 I think, and what -- what I have discussed with
15 Mr. Westbrook, as far -- I haven't done any
16 other specific analysis about the current
17 proposed location, what I believe to be the
18 current proposed location.

19 Q: Okay. It's the applicant's burden, isn't it,
20 to provide information to establish compliance
21 with the Health Plan?

22 A: I believe it's the applicant -- it's the
23 applicant's best interest to supply that
24 information because the project can't be
25 approved without it. So, burden -- by -- by



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1 that, is it the applicant's burden? Sure.
2 Yes.

3 Q: Okay. And I -- I think you described that the
4 applicant has -- has -- is the one to fill the
5 record for the project, right?

6 A: The applicant is in the driver's seat, but the
7 Department can consider other information
8 available to it or provided to it by other
9 parties or other sources.

10 Q: Okay. So, Ms. Murdock, in -- in your testimony
11 this morning when you were being asked
12 questions about whether or what type of changes
13 -- what impact your review in the project
14 review criteria and if you received a -- if you
15 receive a CON application and for example -- if
16 you can go to the 5th page. If you receive a
17 CON application and it doesn't provide you
18 information about that address or the owner of
19 the property would that -- would that prevent
20 you from reviewing or making a determination on
21 the project?

22 A: I would want to know where the -- where the
23 proposed project is going to be located so that
24 I can analyze the need in the area.

25 Q: Okay. And is it your understanding -- on the



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1 next page. Is it your understanding that all
2 of this information on the Part A questionnaire
3 that was -- that is the DHEC record right now,
4 is all changed as a result of the changes to
5 the project?

6 A: I don't know the specifics about what info --
7 what information may or may not be different.

8 Q: Okay.

9 A: In general, I know the cost is lower and the
10 square footage of the facility is smaller, and
11 the location is roughly a mile away from the
12 original proposed location.

13 Q: Okay.

14 **MS. HOLLINGSWORTH:** Turn to 11.

15 A: And none of those things are unusual.

16 Q: Okay. And so, it is unusual that you would
17 have a change to sort of the entirety of the
18 project cost information that was proposed in
19 the application?

20 A: It depends -- what do you mean by the entirety
21 of the project cost information? I mean, if
22 you -- if you have a spreadsheet with numbers
23 that rely on other numbers, you can change one
24 number and it's going to change every other
25 line, but that doesn't necessarily mean that



1 the general sense or meaning or import of the
2 -- of the spreadsheet itself has changed
3 fundamentally. There may be lots of
4 differences, but whether or not they are
5 material changes is -- they're not necessarily
6 going to be the same -- one doesn't necessarily
7 mean the other.

8 Q: Okay. But when the -- when a location or a
9 project is explained in a manner -- for
10 example, focusing on certain unique features
11 like a CDU or a helipad and when those features
12 are changed, you would agree with me that that
13 can impact what the application narrative looks
14 like once it's changed, is that fair?

15 A: What the narrative looks like? If the words
16 are different, the words are different.

17 Q: The answers to the questions, right?

18 A: It -- it can impact -- the changes -- different
19 language will be different. I'm not sure what
20 you're asking. I can tell you that there are
21 a lot of things included in the narrative of a
22 project that don't got to the fundamental
23 analysis of a need or the CON concerns with a
24 project. So, the narrative, you know, in the
25 initial -- you know, in the answer number 2 and



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1 in the introduction to the CON application, may
2 say a lot of things about the project, but
3 unless it's relevant to what I look at as the
4 CON reviewer, a change to that narrative may or
5 may not significant and it really depends on
6 the project and what the changes are.

7 Q: And it -- it depends on the information that's
8 provided to the Department to review the
9 change, right?

10 A: I -- I don't understand that last question.

11 Q: Well, doesn't it depend on what information
12 you're given on which you can base a
13 determination of whether or not the change is
14 substantial?

15 A: Right. I have to have the -- the choice 1 and
16 choice 2 in order to evaluate whether there's
17 a difference and what difference means.

18 Q: Okay. But in terms of a CON application, if
19 they -- if you no longer know or propose
20 project who is funding part of the project, is
21 that not material to you?

22 A: It depends on the project.

23 Q: Okay. What -- how does it depend on the
24 project? If -- if a project has to have
25 funding information, is it not material if you



1 then lack funding information?

2 A: If I have reason to be concerned about the
3 funding of the project based on the information
4 or the change in information, then I will seek
5 further answers to what that is, but I mean, it
6 all depends on the project. I'm not trying to
7 be difficult, but it really does depend on the
8 specific information and the changes in the
9 information whether or not it's material to the
10 project.

11 Q: Okay. All right. And so, as I understand it,
12 all that you have that you've been able to give
13 us your thoughts on is whatever either
14 statements have been made in court for, I think
15 you described an affidavit for Dr. Cawley,
16 right?

17 A: And conversations that I had with MUSC
18 representatives and Mr. Westbrook, which we've
19 already gone over.

20 Q: Do you have any conversations with MUSC or any
21 of MUSC's representatives or counsel since your
22 deposition?

23 A: Yes.

24 Q: Okay. And how many times have you conferred
25 with them?



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1 A: About -- I mean, I've conferred with them a lot
2 of time -- times about various things. But in
3 connection with this project ---

4 Q: Yes, ma'am.

5 A: --- I -- I honestly can't say -- I know at
6 least -- at least one, probably more.

7 Q: You've had at least one or probably more
8 meetings or phone calls or?

9 A: I -- I promise you I'm not trying to be
10 difficult, but I -- regarding conversations
11 with MUSC's representatives about this project
12 since my deposition, I may have had
13 insignificant conversations in passing in
14 conversations, for example David Levitt about
15 something where we mentioned this project. But
16 anything of import that sticks out in my head,
17 I've had one conversation that I consider
18 significant.

19 Q: Okay. When was that?

20 A: That was Friday.

21 Q: Two days ago?

22 A: This past Friday.

23 Q: Okay. And what -- what was the purpose of that
24 conversation?

25 **MS. BIGGERS:** Your Honor, I'm going to object at



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1 this time. On Friday, the Department and MUSC
2 entered into a joint defense agreement and so
3 going into those specific contents of that
4 conversation would be going into attorney-
5 client privileged area.

6 **MS. HOLLINGSWORTH:** Your Honor, I certainly at a
7 minimum would ask we have a copy of this joint
8 defense agreement. We didn't know it existed.

9 **MS. BIGGERS:** It -- it was an oral agreement that we
10 entered into on Friday.

11 **THE COURT:** In the middle of the hearing?

12 **MS. BIGGERS:** At the close of the first week of
13 trial.

14 **THE COURT:** I have some concerns here.

15 **MR. WESTBROOK:** If I may?

16 **THE COURT:** Yes, Mr. Westbrook.

17 **MR. WESTBROOK:** I don't have a case that I can cite
18 you right now, but I believe there is case law
19 that parties can enter into oral common
20 interest and joint defense agreements even
21 during a litigation, particularly when a
22 witness related to a particular witness is
23 about to testify comes up. And that -- if Your
24 Honor would like us to send a brief on that, we
25 can.



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1 **MS. BIGGERS:** And, Your Honor, we'd be happy to do
2 any research to submit a brief on that as well.
3 We -- the Department has in prior CON cases
4 entered into joint defense agreements that were
5 oral and not in writing. We've not briefed the
6 issue before, but we have entered into joint
7 defense agreements orally before.

8 **THE COURT:** I want the issue briefed then. And I'm
9 going to adjourn the hearing at this point
10 until we resolve this.

11 **MS. BIGGERS:** Okay.

12 **THE COURT:** Okay.

13 **MS. BIGGERS:** Thank you, Your Honor.

14 **(Monday, July 29, 2019 of the administrative hearing**
15 **ended at 4:47 p.m. and reconvened on July 30, 2019 at**
16 **11:38 a.m.)**

17 **DAY SEVEN - JULY 30, 2019**

18 **THE COURT:** Good morning and, please, be seated.
19 And I'm sorry I was delayed getting -- coming
20 -- coming in. I wanted to read the briefs that
21 everyone submitted before. Okay. Before we
22 move back into the testimony stage I want to
23 hear from the attorneys. I've got your briefs
24 but I want to hear some oral comments from you
25 all, as it relates to the bombshell that Ms.



1 Biggers -- Ms. Biggers, I'm gonna start with
2 you. Specifically, you're saying that you won't
3 enter into this joint defense agreement and, as
4 a result of that, the testimony that we're
5 about to hear was covered by the attorney-
6 client privilege.

7 **MS. BIGGERS:** Well the question that was asked just
8 before I made the objection was asking -- I
9 believe, it was worded, asking about the
10 purpose of the meeting, and so I ---

11 **THE COURT:** If you'd like, I can have the Court
12 Reporter read the question back, so that we'll
13 know, specifically, what that last question
14 was.

15 **MS. BIGGERS:** Well I -- I believe that it was -- it
16 was getting ready to go into the content of the
17 -- of that discussion -- that meeting. And the
18 meeting that we had was in anticipation of the
19 fact that we would both -- both Respondents
20 would be presenting their Respondent's cases
21 this week. Beginning, in particular, with DHEC
22 calling Maggie Murdock as a witness. And it
23 was -- and the Respondents felt that their
24 interests were aligned and that they had a
25 common interest in -- in preparing for Ms.



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1 Murdock's testimony. So that was really what
2 it covered. Their, I think, testimony about,
3 I know, prior meetings between the -- our
4 conversations that Ms. Murdock had with anyone
5 from MUSC would not fall under the scope of the
6 joint defense privilege. So it was very
7 limited in nature.

8 **THE COURT:** Okay. Now when was the meeting that ---

9 **MS. BIGGERS:** This past Friday afternoon, after the
10 conclusion of both Petitioner's cases in chief.

11 **THE COURT:** And who was at the meeting?

12 **MS. BIGGERS:** Mr. Westbrook, Mr. Dayhuff, myself and
13 Ms. Murdock.

14 **THE COURT:** And the -- now explain to me the -- you
15 feel that you and MUSC, Mr. Westbrook's client,
16 that y'all have a common interest in ---

17 **MS. BIGGERS:** Yes.

18 **THE COURT:** Explain that common interest to me, I
19 mean, keeping in mind that you are the agency
20 that reviews these application and, in my mind,
21 you should always remain neutral. I don't care
22 we're in litigation, if we've got someone who
23 oppose your decision, it still doesn't, in any
24 way, alter your responsibility to remain
25 neutral.



1 **MS. BIGGERS:** I'll agree, Your Honor, and the -- the
2 interest was, simply, in prepar- -- in
3 presenting and preparing for the presentation
4 of the Respondent's case through its witness.
5 It was primarily witness preparation for trial.
6 It did not involve, you know, any substantive
7 -- anything related to the actual substantive
8 decision-making that has -- that the witness
9 for the department had previously undertaken.
10 And after thinking over, last night and this
11 morning, the discussion on Friday and exactly
12 what we ended up discussing -- while we entered
13 into the joint defense agreement at the
14 beginning of the conversation in order to -- to
15 protect the attorney-client privilege and --
16 and hold confidential, any discussions that --
17 that we may have regarding presenting our --
18 our case this week, I don't believe that there
19 was any substantive DHEC-attorney to DHEC-
20 client -- attorney-client legal advice that was
21 provided in the meeting in front of the other
22 attorneys, the counsel for MUSC. And I -- if
23 it would help to expedite this process and
24 allow us to go ahead and continue with the
25 testimony, and -- and if it could be done



1 subject to the department not waiving its own
2 attorney-client privilege between its in-house
3 counsel and its client -- in-house client then
4 I don't have -- I would be willing to withdraw
5 the objection and have Ms. Hollingsworth
6 continue with the questions regarding the
7 meeting on Friday, subject to it not waiving
8 the Department's attorney-client privilege
9 regarding, again, communications between just
10 the Department's in-house counsel and just the
11 Department.

12 **THE COURT:** Okay. Mr. Westbrook?

13 **MR. WESTBROOK:** Your Honor, first of all, I don't --
14 what Ms. Biggers just proposed is -- I don't
15 have a problem with. It was -- it's our
16 position though, and I respectfully disagree
17 with The Court on -- on -- on the things that
18 you said, I think there is a common interest
19 between the parties here that -- that, while,
20 I mean it's -- it's -- in a way, I think DHEC
21 has to wear two hats. I think DHEC is,
22 certainly at the time, during staff review is
23 -- is -- is neutral. After staff review I
24 would take the away -- it -- it's sort of a two
25 hat situation. Neutral with respect to some



1 things, but when you're on the same side of a
2 case in litigation, I would say that there is
3 a common interest there and the common
4 interest, because they're a state agency, would
5 be -- exist when there is a public interest,
6 it's common to both. And -- and in this -- in
7 this case, and other CON cases, I would submit,
8 that DHEC's interest is to fulfill the purposes
9 of the CON Act. And that sort of thing, things
10 like improved quality and access to public
11 needs, except with the other purposes of the
12 Act. Which they would not be in this position
13 if they didn't believe that this application
14 would not further that -- those purposes.
15 Obviously MUSC, or any applicant in any CON
16 case, would take the position that, approving
17 this application, or approval of this
18 application would further those purposes as
19 well, so.

20 **THE COURT:** There's some -- there is an unusual
21 aspect to this particular case and that is that
22 MUSC's made changes to its project since DHEC
23 completed its review. And one of the things
24 that you all are now arguing is that those
25 changes aren't substantial and DHEC -- and, if



1 I recall Ms. Murdock's testimony, she hasn't
2 reviewed those changes to make that
3 determination.

4 **MR. WESTBROOK:** That -- that is correct. Not in any
5 sort of formal way, I think that's -- that's
6 correct. We have not requested, I think that
7 was her testimony, there's been no request from
8 MUSC and she is not endeavored to undertaking
9 a formal analysis of those changes. I -- I --
10 that is correct, but -- I'm sorry, but your --
11 your question -- I'm afraid I didn't quite
12 follow.

13 **THE COURT:** It wasn't really a question, it was a
14 comment.

15 **MR. WESTBROOK:** Okay. It was just a comment.

16 **THE COURT:** Yeah. Okay.

17 **MS. HOLLINGSWORTH:** Your Honor, I certainly
18 appreciate the position, particularly of Ms.
19 Biggers and her goal to facilitate continuing
20 the hearing and waive the objection, I -- I
21 think, though, I would submit, Your Honor, we
22 just have a larger issue here, that there is a
23 prejudice to the Petitioners now that, at this
24 stage of the proceeding, there has been
25 interactions, or involvement, of the applicant



1 in presentation of the Department's case. And
2 I -- I think, perhaps it -- it might've
3 certainly been, somewhat, seen in how yesterday
4 went, both in our objections on direct and,
5 sort of, how far the testimony went in
6 addressing changes. And then, I think on the
7 cross-examination, there was just -- and
8 certainly we can ask the witness, it -- it
9 seems that that was acceptable to the Court
10 about the nature of the meeting, but I think,
11 at the end of the day, we have a circumstance
12 where the applicant, or their attorneys involve
13 themselves in the preparation of the
14 departments witness, on the eve of her
15 testimony, after we had taken her deposition.
16 And so, it is -- there is a difference, Your
17 Honor, in -- in the nature and the manner in
18 which we were hearing testimony yesterday then
19 was in the deposition and I think that that's
20 reflective of strategy that came in as part of
21 that preparation. And I -- I, Your Honor, I
22 just would submit there's just an unfairness
23 here. There is -- there is -- I -- I'm not
24 really even sure how we get past that, Your
25 Honor, because I -- I do think that the



1 entirety of Ms. Murdock's deposition testimony
2 and the -- the manner in which her court
3 testimony came in, reflects a very different
4 tenor and tone and information that just is not
5 entirely consistent with our understanding from
6 having it -- her deposition, Your Honor, is
7 lengthy. We explored every- -- everything that
8 we could and -- and the information yesterday
9 was just -- I -- I will submit, Your Honor, the
10 -- the preparation by the applicant, following
11 the entry of our cases, and before Ms. Murdock
12 took the stand, I think, Your Honor, it really
13 did infuse into yesterday's testimony an
14 unfairness and I -- I -- I will submit, Your
15 Honor, I don't know that it's enough to just
16 allow us to examine her as to the nature of the
17 meeting because I don't think we'll ever really
18 truly know. We certainly -- we weren't
19 present, we can ask questions in her
20 recollection but, I think, to some -- at some
21 point this is putting Ms. Murdock in a
22 difficult position, as well. So I -- I, you
23 know, I -- I think just on the matter of
24 briefing, because I do think it's worth
25 pointing out, this is not an instance in which



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1 there is a common interest between the
2 regulator and the regulated party, in fact,
3 everyone at these tables has a shared interest
4 in deference of the CON Act's goals and we
5 believe, of course, here that the agency erred
6 in approving the application for those same
7 purposes and, you know, they disagree with us
8 and we -- that's what this process is for, but
9 to have -- and, again, in the middle of the
10 litigation, on the eve of the presentation --
11 and I note, Your Honor, it was only Ms. Murdock
12 in the room with all of the lawyers. I -- I
13 didn't hear that there was MUSC's witnesses
14 were there. It didn't -- didn't sound as
15 though there was preparation multiple witnesses
16 with a common plan or strategy. This was --
17 this was the applicant coming in and preparing
18 the Department staff reviewer on the testimony
19 that has been provided in court and after a
20 very lengthy substantive to deposition. So I
21 just -- Your Honor, I would submit, and we
22 addressed in our brief, it's just simply -- not
23 only is the common interest concept
24 inapplicable, but, I think, we have here -- I
25 don't -- I'm not entirely sure how the Court



1 might address where we find ourselves with the
2 testimony.

3 **THE COURT:** Okay.

4 **MR. THOMAS:** I don't have too much more to add to
5 that, other than, I -- I think you hit the nail
6 on the head. I do agree with Ms. Biggers that
7 they would have a common interest in terms of
8 the approval of the CON application but,
9 unfortunately, what Ms. Murdock approved is --
10 well we, you know, obviously the Petitioners
11 content is much different than what is before
12 you today and, you know, in some way, shape, or
13 form -- and I guess we're gonna learn more
14 about that when MUSC presents its case, but the
15 common interest goes out the door once the
16 substantial change issue comes about because,
17 at that point, we need the inde- -- we need the
18 independent agency acting as, kind of, a
19 neutral arbiter to take that -- that
20 information in on a factual basis, review it,
21 and then make a determination of whether there
22 is a substantial change, which, by the way, all
23 of that is subject to the Freedom of
24 Information Act. We are allowed to FOIA that
25 information, get the information and even -- I



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1 had a deal with this last year, Your Honor,
2 there can be opposition to the substantial
3 change request, as well, but they are very
4 transparent. They're not done behind closed
5 doors and, you know, typically opposing parties
6 can call the Department and off- -- and offer
7 some of their reasoning why it's not a
8 substantial change, but as -- as Ms.
9 Hollingsworth stated, on Friday we don't know
10 what they talked about with respect to
11 substantial change but we do know, to some
12 degree, that they discussed the CDU and Ms.
13 Murdock's direct. They discussed the helipad
14 and some of the other changes, the location
15 change, which, she stated, she was not prepared
16 to discuss, under oath, in her deposition.
17 So, we're wondering if, perhaps, that -- that
18 discussion took place there and at that point,
19 that is when she ceased to be a neutral
20 arbiter, in our minds, because she was, in one
21 way, shape or form, perhaps getting advice --
22 we don't know that to be the case, but if, you
23 know, if she told them what she was gonna say
24 and we had no idea, that obviously puts us in
25 -- in a position, you know, in -- in a position



1 we wouldn't normally be in. So, we would ask
2 that testimony be stricken, at the very least,
3 but if the Court -- and that the Court,
4 obviously, not uphold the JDA in respect to
5 that issue because that -- that's not in the
6 common interest -- interest of MUSC and the
7 Department, Your Honor.

8 **THE COURT:** Okay. I am going to, at this point, let
9 the hearing continue and let Ms. Murdock
10 continue her testimony and, I think, you all
11 heard Ms. Biggers is withdrawing her objection
12 so you would be able to question her about that
13 meeting on Friday, keeping in mind that there
14 is -- she's not waiving the confidentiality
15 between the agency's attorneys and the witness.

16 **MS. HOLLINGSWORTH:** Your Honor, so that I understand
17 that, certainly that position being in other
18 instances that direct communication between
19 DHEC's lawyer and the witness, but as to that
20 meeting, everything that took place in that
21 meeting, and all of the discussions, would be
22 -- the witness would need to testify about
23 that, correct?

24 **THE COURT:** Yes. Ms. Murdock. And just to remind
25 you, Ms. Murdock, you are still under oath.



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1 MS. MURDOCK: Yes, Your Honor. Thank you.

2 MS. MURDOCK - CROSS-EXAMINATION BY MS. HOLLINGSWORTH:

3 Q: Good morning, Ms. Murdock.

4 A: Good morning, still.

5 Q: Ms. Murdock, when we last spoke, we were
6 discussing communications, or meetings, that
7 you might've had with MUSC or any of its agents
8 or representatives since your deposition, do
9 you recall that?

10 A: Yes.

11 Q: So, if you could, and -- and certainly we can
12 talk about the most recent meeting, but are
13 there any other meetings or conversations that
14 you've had, since your deposition, which was
15 the end of May, with MUSC, its attorneys or any
16 agents of MUSC regarding this project?

17 A: Yes. There was one additional conversation
18 and, I'd forgotten about at the DHEC offices on
19 Bull Street. Mr. Westbrook came on -- it was
20 before the beginning of the trial -- to speak
21 with myself and Ashley Biggers, briefly.

22 Q: Okay. And do you -- do you recall -- you said,
23 before trial. Do you have any other
24 recollection when it might've been?

25 A: I believe it was, I -- I think it was, maybe,



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1 Friday. The Friday before we began the trial.
2 But, I don't -- I don't recall. It was the
3 last few days at the end of the week, because
4 I had gone to Ms. Biggers' office to prepare.

5 Q: Okay. So close in time to the first day of
6 trial?

7 A: Yes.

8 Q: You had a meeting with counsel for Medical
9 University and Ms. Biggers?

10 A: Well, I had a meeting with Ms. Biggers and
11 then, during the time that she and I were
12 meeting, counsel for MUSC stopped in and spoke
13 with the two of us for a while. And then ---

14 Q: Okay. And, of course, not the portion of your
15 meeting in which it was just you and your
16 lawyer, but once Mr. Westbrook joined your
17 meeting, can you describe for me what the
18 meeting was about and the discussions?

19 A: I -- I'll try. He had asked me what I thought
20 about a few different, I guess, elements of the
21 -- the project. Including what I thought,
22 based on what I knew about some of the proposed
23 changes and I told him what I thought. Which
24 is very similar to -- to how I -- which should
25 be the same, as how I testified so far,



1 probably. We spoke specifically about location
2 and what I thought about the change in
3 location, if I had to make a decision. We
4 talked about the -- I believe we talked about
5 whether or not I thought the helipad and CDU
6 were significant. I don't remember if that was
7 what we talked about that day, or not. And I
8 -- I did most of the talking and, basically,
9 just -- just answering -- just saying what I
10 thought about the project, in general.

11 Q: Okay. You did most of the talking, but ---

12 A: Yes.

13 Q: --- what information were you provided by MUSC
14 in order for you to give response to what did
15 you -- what were you told?

16 A: I wasn't told anything. He just asked what I
17 thought. Just asking me, generally, what I
18 thought about the project and th- -- it was a
19 very general, just, kind of, what do you think
20 about what you know so far, and I told him.

21 Q: Okay. So, since your deposition, have you
22 reviewed any other documents or seen any other
23 information regarding changes from the project
24 that you got reviewed and approved?

25 A: The only documents that I have seen since then,



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1 that I had not seen before, may -- and -- and
2 I don't -- the -- the sequence, I -- I know
3 that I have seen, or at least been made aware
4 of, the information in an affidavit by Dr.
5 Patrick Cawley. That was attached to -- to a
6 -- a submission to The Court, I believe it was
7 a summary judgement motion, but I'm not sure.
8 Other than that, I can't recall any additional
9 documentation that I have reviewed. Let me
10 think just a sec- -- I -- I can't recall any
11 other documentation that I reviewed.

12 Q: Okay. So the meeting that you had in which
13 attorneys for the department and the applicant
14 were present, you didn't view any other
15 documents or you weren't provided any other
16 documents to look at as part of that
17 discussion?

18 A: No.

19 Q: And so, you've not been provided any of the,
20 even, documents in discovery describing changes
21 to the project?

22 A: No.

23 Q: So any thoughts you had about changes have all
24 -- have they continued to be in a hypothetical
25 -- you called them proposed changes, is it your



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1 understanding that they are or are not
2 implemented?

3 A: Well nothing's implemented because the project
4 doesn't have a CON yet. So these are just
5 adjusted plans, I suppose. So, I don't -- so
6 they are still hypothetical for me, other than
7 the fact that I -- I believe -- I believe the
8 proposal of location might have been -- it was
9 either included in Dr. Cawley's affidavit or in
10 -- or in the document prepared by -- or
11 submitted by Mr. Summer regarding the project
12 itself and so I -- I read the address and
13 that's how I knew where to go -- or I read a
14 description of where the project was, I think,
15 saying which -- between a Mellow Mushroom and
16 a Chick-fil-a or something like that so, I knew
17 where to go when I went to see the project.
18 But that -- actually that was probably in my
19 deposition so, since then I -- I haven't seen
20 anything else and I haven't -- other than what
21 I saw during, either, Kathy Platt or Dan
22 Sullivan's testimony, I haven't seen any other
23 documents regarding the -- the ---

24 Q: Okay.

25 A: --- possible changes.



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1 Q: Approximately how long was the meeting once it
2 was a joint meeting with Medical University?

3 A: No more than 20 minutes.

4 Q: And no one else was present, by phone or in
5 person?

6 A: Lewis Eubank might have been there for that
7 part, but I -- I -- he was there for a while
8 but I -- he -- I think he may have left before
9 hand. I -- I don't recall.

10 Q: And then what about the other meeting -- the
11 most recent meeting last Friday?

12 A: That -- we -- we had that meeting at -- at the
13 -- at Nelson Mullins office on Friday,
14 immediately after court. After the hearing.
15 And the -- the people there were myself, Ms.
16 Biggers, Travis Dayhuff and Dan Westbrook.
17 David Levitt was at -- was with us initially
18 but after discussion about the -- the defense
19 agreement, he left and after that it was just
20 the -- the -- the four of us.

21 Q: Okay. How long was the meeting, in total?

22 A: I wanna say, that was no more than 30 minutes,
23 but I can't be sure. I'd say, roughly, 30
24 minutes, I think.

25 Q: Okay. The entire meeting?



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1 A: Again, I -- you know, we parked, walked up,
2 waited for the attor- -- Mr. Westbrook and Mr.
3 Dayhuff and the 17th floor and then went into
4 the club room and there were some cookies and
5 a glass of Coke and so, by the time we sat
6 down, I think, in between the time that we sat
7 down and the time that we got up and left, it
8 was maybe 20 -- 30 minutes.

9 Q: Okay. And how long -- or how long was your
10 meeting with Mr. Levitt with you?

11 A: By the time we sat down and started talking --
12 or got ready to talk about the case, just a --
13 a couple of minutes, maybe less than five.

14 Q: And what was the purpose of the meeting?

15 A: To talk about the -- the case so far and
16 thoughts about the testimony that I had heard
17 so far.

18 Q: So the purpose was to discuss the testimony
19 that had taken place already?

20 A: In part.

21 Q: Okay.

22 A: And then what I thought about certain elements
23 of the project and the -- the case moving
24 forward.

25 Q: Okay. And so, was part of the purpose, also,



1 to talk about your testimony yesterday?

2 A: It's -- we didn't state that as a purpose, but
3 I'm -- but I'm sure that during the meeting, I
4 -- I alluded to be -- by -- by saying what I
5 thought about certain parts of the project, it
6 was at least implied that that is what I would
7 say, if asked, about those particular things.

8 Q: Okay. So were there discussions or suggestions
9 about your testimony in any -- in any way or on
10 any of the issues?

11 A: None of the attorneys made any suggestions to
12 me. Again, I did most of the talking, and I
13 did not receive any advice about how to testify
14 or what to say and so I don't -- I don't recall
15 receiving any instruction. There was nothing
16 that happened during the meeting that -- or
17 nothing said during the meeting that caused me
18 to want to say anything different than I would
19 have said anyway.

20 Q: Okay. Well what was your understanding, then,
21 of the -- of the strategy that was considered
22 to be the common strategy for this portion of
23 the case?

24 A: I didn't give the common strategy element of it
25 that much thought. My position was, and always



1 has been, that -- that my job is to remain
2 faithful to the purposes of CON and, to the
3 extent a project becomes damaging to or fails
4 to comply with my mission, then I will be the
5 first to say so. Regardless of where the
6 project is. So, I believe that my
7 interpretation of the -- of the facts and the
8 testimony and I -- I didn't have this confirmed
9 outright, but I believed that my interpretation
10 of the testimony that I had heard by the two
11 experts was probably similar to what the other
12 folks at the meeting thought about the -- the
13 testimony that I had heard. And so, I believed
14 at that point, that we probably agreed a lot
15 about what was happening but I didn't base that
16 on a -- on a sense of alliance, I just -- I
17 thought that it -- it was such that my opinion
18 was shared by MUSC about a lot of those things.

19 Q: Okay. But then -- so, help me understand then,
20 what was it about the meeting discussion that
21 reflected a joint plan or a common plan for
22 this case?

23 A: I -- I didn't make that evaluation. I was at
24 the meeting to talk about the case and the
25 attorneys talked about whether or not to have



1 a joint defense agreement and so I -- but that
2 -- and -- and that was my understanding. It
3 made sense to me at the time because I thought
4 that my opinion of the testimony we had heard
5 was probably similar to the opinion of the MUSC
6 attorneys and -- and, I suppose, their witness,
7 but that was not confirmed to me other than
8 some nodding and, kind of, affirmative
9 grunting. I don't mean to sound flippant, but
10 it really wasn't -- again it was me doing most
11 of the talking. And so those -- those were my
12 assumptions. It was not confirmed. We did not
13 overtly discuss a common plan.

14 Q: Did you review any documents while you were
15 there?

16 A: No.

17 Q: You didn't review any parts of the application
18 or the -- the Department record?

19 A: No. It was a very general discussion. Mostly
20 about what -- what we had -- what we had heard
21 from the two experts.

22 Q: And was it also about what you intended to talk
23 about from your perspective at the hearing?

24 A: Probably because I was giving my thoughts -- my
25 interpretation -- what I thought about the



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1 expert's testimony, so I -- I would've assumed
2 that the people at the meeting would -- would
3 assume that that was what I was going to say,
4 but that's ...

5 Q: Did you have a similar meeting like that before
6 your deposition?

7 A: Not -- no. I've never had a meeting like that.

8 Q: Is this the first contested case that you've
9 testified at trial?

10 A: No.

11 Q: How many have you -- how many times have you
12 testified in the Administrative Law Court on
13 the Certificate of Need?

14 A: At least three.

15 Q: At least three, okay. And ---

16 A: Well, the three that I can name off the top of
17 my head.

18 Q: And were any of those other cases -- in any of
19 those other cases, did you have meetings with
20 the applicant attorney prior to your trial
21 testimony?

22 A: I believe, before there -- the -- probably, not
23 necessarily for the purpose of discussing --
24 discussing testimony, but I'd certainly met
25 with the applicant and their attorneys before



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1 -- before testifying in cases and -- and -- in
2 the -- in a linear accelerator case, I know
3 that -- that I discussed some new facts that
4 might be relevant to the case that the
5 applicant had brought to me so that I would
6 have current information. Not favorable to
7 them, but they brought it to me because they
8 thought I should know.

9 Q: Okay.

10 A: That information was also provided in
11 discovery, during that case.

12 Q: With regard to communication, so we've talked
13 about these two meetings and so, it's the
14 understanding in your testimony, there haven't
15 been any other conversations or meetings with
16 MUSC or any of its agents or counsel that you
17 haven't discussed with me now?

18 A: No. Not -- not that I recall.

19 Q: Okay.

20 A: We may have discussed things in passing -- I
21 talk to these folks all the time about all
22 kinds of cases and, often times, the arguments
23 and -- and opposing parties are very similar,
24 so I can't say, for sure, that there haven't
25 been offhand comments in passing, but certainly



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1 nothing substantive that has anything to do
2 with how I would testify or what I was planning
3 to -- to say -- or instruction on how to
4 testify.

5 Q: Okay. You -- at your deposition, you -- you
6 mentioned -- you explained to me that you had
7 reviewed Dr. Cawley's affidavit that was part
8 of the summary judgment material ---

9 A: Okay. So, that was before the deposition.
10 Yeah.

11 Q: Right. And so, that wa- -- that was, I think
12 you described, one of the few documents you've
13 seen where changes are addressed by the
14 applicant, is that right?

15 A: Yeah. Before the expert's testimony, yes.
16 That's right.

17 Q: Okay. What do you mean by, before that? Oh you
18 ---

19 A: In -- in court.

20 Q: Okay. Understood. Okay. So -- so Dr.
21 Cawley's affidavit then, in terms of the things
22 that you're aware of, that are in The Court's
23 record, what is your knowledge, or what -- have
24 you had discussions with MUSC about the urgent
25 care services that would be provided in the



1 proposed project?

2 A: I -- I remember your question and I'm about to
3 answer that, but I -- I need to say, I did
4 actually -- I read some of -- some deposition
5 testimony after my deposition. I forgot to
6 mention that. I -- I read some of -- some of
7 Dr. Cawley's deposition, some of David Levitt's
8 deposition and some of Kathy Platt's
9 deposition. I don't recall how much of all
10 those, but I -- I did review some of that
11 testimony. I didn't want to forget that. So,
12 back to the urgent care model. I -- I just
13 have a general idea about -- based, I think, on
14 what the affidavit said, regarding what the
15 urgent care model was and I think I read some
16 things in those depositions I just mentioned,
17 but I still have not too much of an
18 understanding about that particular element of
19 this project. I do know that, independently of
20 this whole litigation, there was a meeting at
21 DHEC -- and I don't recall when, but it was --
22 it was some months ago, where a -- a person
23 asked to meet with some representatives from
24 DHEC to discuss a hypothetical urgent care
25 model. And so, we had an opportunity at that



1 meeting -- I wanna say it was in April, but I
2 can't be sure. And so, we actually did discuss
3 whether or not a -- an urgent care inside of a
4 -- of an ED model may or may not work, and we
5 hashed through some of the potential barriers
6 associated with a project like that. At this
7 other separate meeting, I -- it did not then --
8 had no reason then and had no reason now to
9 believe that it had anything to do with MUSC,
10 but my understanding is that this person was a
11 representative of some non-South Carolina
12 entity that was looking to possibly partner
13 with the hospital and wanted to know if this
14 model of care would work. So, I have some
15 familiarity with a concept like that, but I
16 have no idea whether or not that is the same
17 concept that's being proposed -- or that had
18 been proposed in this case.

19 Q: And why do you say, had been proposed?

20 A: I believe, from the testimony and -- and I may
21 have -- I may be wrong, but I -- I believe that
22 the urgent care model is now no longer a part
23 of the plan, but I don't know that for sure.

24 Q: Okay. Whose testimony did -- are you drawing
25 that from?



1 A: I'm not sure. I may be wrong and it may be
2 somehow -- some other way that I know that
3 because I do know that -- that my supervisor,
4 Lewis, had had some conversations about the
5 urgent care model and, because we knew about --
6 because we as a department had already
7 discussed the pro- -- the potential problems
8 with that kind of model of care, somehow and I
9 don't know how, the -- I -- I'm assuming it
10 came from Lewis through our attorney -- perhaps
11 not, perhaps some other way -- that we let MUSC
12 know that -- that that could cause problems
13 with their project. And not necessarily CON
14 problems, but it might cause problems later
15 down the road with certification and licensing
16 and -- that our assessment at that -- at that
17 earlier meeting, that was unrelated to this,
18 was even though the -- the idea -- or the
19 purpose, it seemed, of this model was to reduce
20 cost to the patient, to the payor and im- --
21 improve efficiency, the flow of patients in and
22 out of a -- of an ED. That there might be some
23 problems with compliance, with certain CMS and,
24 or DHEC licensing regulations that would make
25 that type of project difficult to implement.



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1 And so, since we had already gone through that
2 analysis, it seemed prudent to -- to let any
3 applicant know that -- that may or may not be
4 planning to do something like that, that there
5 may be some problems with the model like that.
6 There's no reason to attempt to go down that
7 road without -- if -- if it's not gonna work.

8 Q: And so, did the department tell MUSC that the
9 urgent care model proposed and completed in Dr.
10 Cawley's affidavit would be a substantial
11 change to the project?

12 A: I don't know. I'm not -- I'm ---

13 Q: Who would ---

14 A: --- I don't know.

15 Q: --- who would know that?

16 A: Lewis Eubank might know and I believe our
17 attorney, Ashley Biggers, would -- would --
18 would know. But I don't know if that
19 communication -- if -- if the substantial
20 change element of it was but I think -- my
21 understanding is that CON, because of our
22 responsibility, is part of the greater DHEC,
23 that we would be concerned if a project that we
24 knew could not make it all the way through the
25 licensing or certification process, we would --



1 we would discourage that kind of project. So
2 whether or not substantial change was the term
3 used, I don't know. I'm not -- I -- I wouldn't
4 necessarily disagree with that assessment, but
5 I don't know if that's what was -- exactly what
6 was communicated to MUSC.

7 Q: So you don't know who had the conversations
8 with MUSC regarding the proposed urgent care FS
9 ED hybrid model?

10 A: I believe, ultimately, it was a communication
11 between the attorneys. Our attorney and MUSC's
12 attorneys, but I'm not sure.

13 Q: I understand counsel's role, but I'm wanting to
14 know within the department and the CON program
15 or the Bureau, who would've been the person in
16 the organization to be having these
17 conversations?

18 A: It would've been Lewis Eubank.

19 Q: And so is it common for him not to include you
20 in discussions that involved an application
21 that you've reviewed and are testifying in
22 court regarding?

23 A: No. He and I talked about that. But I don't
24 re- -- I don't remember what he said about
25 whether or not he said -- he told anyone it was



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1 a substantial change. I just remember him
2 telling me something to the effect of, MUSC is
3 not going to do the urgent care model. They
4 are backing off that.

5 Q: And you don't recall when that was?

6 A: It was before the trial started. I believe it
7 was -- it -- it was after my deposition and --
8 I'm trying to remember, I -- I -- I don't
9 recall whether or not there was some, maybe the
10 -- the deadline to file dispositive motions I
11 had something to do with the timing, but I
12 don't remember how that came into play.

13 Q: Okay. The deadline in this court scheduling
14 order for dispositive motions?

15 A: I think that was -- but I don't -- I don't
16 remember if that communication happened before
17 or after that deadline.

18 Q: Okay.

19 A: But it was around -- it was around that
20 deadline.

21 Q: Okay. But it was after your deposition?

22 A: Yes.

23 Q: Okay. And so, in the meetings that you had
24 right before the start of trial and then the
25 one that you had on Friday, was urgent care



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1 discussed at all?

2 A: Probab- -- probably.

3 Q: Okay. In what way?

4 A: Again, it was probably me telling the story of
5 how I knew about the urgent care model from
6 this other entity that had -- that had
7 approached us and that we had had a discussion
8 amongst DHEC personnel about a model that
9 included an urgent care inside of a -- of an ED
10 and whether or not that would work. And there
11 was no confirmation and, at the meeting on
12 Friday with the DHEC attorneys, neither --
13 neither of the D- -- of the -- sorry, the MUSC
14 attorneys, neither of them were aware of who
15 the person was that -- that -- they weren't
16 familiar with the name of the person that had
17 requested and attended the meeting with DHEC.
18 I believe he attended on the phone, this --
19 this person. His name, I -- I think was Mason
20 Deal.

21 Q: Mason Deal?

22 A: Mason Deal. D-E-A-L. But, again, I'm not
23 entirely sure. I can check. Eva Johnson would
24 know, she is the one who set up that meeting.
25 She is the one who had communications with Mr.



1 Deal.

2 Q: And this is the third party, unrelated to MUSC
3 that had -- that was inquiring with the
4 department about a hybrid urgent care model?

5 A: Yes.

6 Q: And it's your understanding that, following
7 that discussion and engagement with the
8 department, that it was conveyed to the MUSC
9 that their model, as described to The Court,
10 was not -- was problematic? Was that -- I
11 can't remember the word you used.

12 A: Well, again the -- the -- the relationship
13 between that other discussion with DHEC and --
14 in this case is -- it wasn't that direct. It
15 was -- because the -- the discussion of the --
16 of the urgent care model was ringing a bell
17 with -- it sounded familiar to me so, at some
18 point, I went back and checked my notes because
19 I -- I seemed to recall talking about something
20 very similar to that. So I went back and
21 looked at my notes and said, hey, this --
22 here's this April meeting -- I think it was
23 April -- with this Mason Deal person. It
24 sounds a lot like what might be being proposed
25 here. If that's the case, we know that there



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1 is some potential problems with a model like
2 that. So my hope, at the time, and my tip, at
3 the time, was, I don't -- to the -- unl- -- I
4 don't believe that this conversation came from
5 MUSC, I don't believe this person was
6 representing MUSC. He wouldn't say who he was
7 there -- which hospital, or hospitals, he was
8 in discussions with or, I -- I don't even know
9 if he was in discussions with them or was
10 looking to solicit business or -- or what. But
11 since we had already had that initial
12 evaluation, and we didn't come to any
13 conclusions -- my understanding, from the end
14 of the meeting, with the other DHEC personnel
15 was, well we'll look into it, but here are some
16 potential problems. The fact that we had
17 already been down that road and I had heard
18 folks from other departments who have more
19 knowledge about those other -- I'm sorry, other
20 bureaus -- who had knowledge about those other
21 bureau require- -- requirements, the CMS
22 regulations and the licensing regulations. The
23 fact that I had heard from them that there
24 might be some problems with implementing a
25 model like this, I wasn't sure if MUSC knew



1 that and if they didn't know that, they needed
2 to know that so they didn't waste any time
3 trying to pursue a similar model. And so my --
4 my intent in making that link, was to make sure
5 that, if MUSC didn't know that we had already
6 seen some potential roadblocks to -- to -- to
7 this, that -- that they should know. I would
8 rather them know then not know so that no time
9 was wasted trying to pursue a model that might
10 not work. And then that would be up to -- to
11 MUSC to decide whether or not it wanted to do
12 the legal research or -- or have further --
13 further discussions with our other DHEC bureaus
14 to see whether or not they wanted to pursue
15 something like that. But since I knew it might
16 not work, I thought, in the event this is a
17 similar thing -- and I still don't know if it's
18 the -- if it's a similar thing, that -- that
19 they should know.

20 Q: Okay. Then when you read Dr. Cawley's
21 affidavit and his discussion of the plan to
22 provide urgent care services, at that time, you
23 didn't have concerns -- or this issue didn't
24 come to your mind and you felt compelled to
25 raise the issue for MUSC?



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1 A: Well, as soon as I made the link, I -- I did
2 have concerns. As soon as it was -- the
3 discussion of urgent care model was -- came up
4 I -- it took me a while to put two and two
5 together, I'm afraid, but once I finally did --
6 as soon as I made the link in my head that that
7 -- that there wa- -- that that sounded familiar
8 because we had talked about that in the
9 meeting, I don't recall exactly when I made
10 that link but, as soon as I did, I tried to
11 make sure that everyone who needed to know
12 about it, knew about it. And so it was a -- it
13 was -- it was in order to prevent a waste of
14 time and effort.

15 Q: When you say, when we talked about it at the
16 meeting, you're talking about the April meeting
17 with Mr. Dial?

18 A: Deal.

19 Q: Deal.

20 A: And I believe it was April, but yes, that's
21 what I meant when we talked about it at the
22 meeting.

23 Q: But your -- you did not have a conversation,
24 either prior to the April approximate meeting
25 or after, with MUSC or their representatives



1 about an urgent care hybrid model?

2 A: Well, ultimately, at these recent meetings, and
3 certainly in the Friday meeting, I did talk
4 about that.

5 Q: Okay. And why did you talk about that on
6 Friday?

7 A: Well I thought I was, kind of, just filling in
8 the blanks of information that MUSC already
9 knew. I wasn't sure if they -- I knew, or
10 thought I knew, so much about a potential
11 hybrid model. And I think I was -- I even
12 made -- had asked if they knew who this person
13 was and there was no indication if -- the MUSC
14 attorneys did not -- his name did not ring a
15 bell and so they weren't aware that he was --
16 that MUSC was -- was, in fact, a hospital with
17 which Mr. Deal was having these discussions.
18 We still don't know that.

19 Q: Did you have any conversations with Mr. Levitt
20 about any of the changes, currently or
21 previously proposed?

22 A: I don't know. Maybe at some of these other
23 meetings that have already been brought up, you
24 know, when MUSC had proposed, or had asked,
25 what do you think about these possible changes



1 in location and scope and size. I believe that
2 David Levitt was there for, at least, one if
3 not more discussions. But not -- but that
4 wasn't part of the -- the -- I don't think I've
5 -- I don't recall discussing with Mr. Levitt
6 the -- the hybrid -- the urgent care model --
7 whatever we're calling it, I'm not sure what --
8 what it even is.

9 Q: Okay.

10 A: Certainly nothing sub- -- substantive. I don't
11 -- I don't remember having any conversation
12 with him about that.

13 Q: In your discussion, the last two meetings, were
14 -- did you -- did the conversations include
15 discussions of the project review criteria and
16 compliance with the project review criteria?

17 A: Probably. I know I talked about need. I
18 talked about -- about what I believed was
19 Trident's misinterpretation of what an adverse
20 affect is. That I did not believe the purpose
21 of CON was to prevent a shift in market share
22 and, with respect to -- so -- so, things like
23 that, talking about what I heard in the
24 testimony and whether or not I thought it
25 comported with what I was supposed to look at



1 when I was reviewing whether or not the project
2 was compliant to the plan. I discussed what I
3 thought I was supposed to review and that, in
4 several instances in which what I thought I was
5 supposed to look at and consider important
6 might -- didn't seem to be the same as a lot of
7 the things that the consultants were discussing
8 as important.

9 Q: In terms of your discussions, were there
10 discussions around some of the cases or some of
11 the language used in cases that -- the few
12 cases that we have -- that include discussion
13 of post approval changes to an application?

14 A: I'm sure. I mentioned the MRI Belfair case
15 because I always do, and I probably mentioned
16 the Providence case because I always do. And
17 those are usually the first two things I throw
18 out when I talk about potential -- about
19 changes to a project and what I would need to
20 look at in order to review them.

21 Q: Ms. Murdock, is it your testimony that you were
22 the only one that spoke during these two
23 meetings ---

24 A: No.

25 Q: --- that took place.



1 A: No.

2 Q: Okay. So there was engagement with both of the
3 other attorneys -- or all of the other
4 attorneys, I guess, regarding what you had to
5 say? Is that fair?

6 A: Yes. It was and -- I -- I didn't give a
7 speech, but I did most of the talking. I -- I
8 tend to be a little pushy and inte- -- and
9 interrupt a lot, so I -- maybe they didn't want
10 me to do most of the talking but I did most of
11 -- of the talking.

12 **MS. HOLLINGSWORTH:** Your Honor, I -- I -- it would
13 not be my desire to have to engage in a
14 lengthy, additional cross -- we spent a long
15 time yest- -- I guess it was yesterday, going
16 through cross before realizing that there had
17 been discussions unknown to us about strategy.
18 I would -- certainly I had considered
19 requesting, actually striking, the testimony
20 and I -- but I -- I very much appreciate the
21 department's position and MUSC's agreement
22 regarding pulling down that objection. I would
23 ask, Your Honor, though, permit me designate
24 portions of Ms. Murdock's deposition on what I
25 think are some of the important points that,



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1 with -- with all that we went through
2 yesterday, I think that it would be important
3 for The Court to know that was provided prior
4 to some of these strategy meetings that took
5 place with the applicant, so I would like the
6 ability to designate portions of her deposition
7 for you to consider in the record.

8 **MS. BIGGERS:** Your Honor, I -- I don't believe that
9 I understand what the purpose would be. I
10 think if -- if there was something that, in a
11 deposition that was -- that Ms. Hollingsworth
12 wanted to -- to bring up in order to impeach
13 the witness, that would be one thing, but I --
14 as far as the testimony that's been provided in
15 this courtroom, by the witness, including her
16 testimony today, she has testified that she, in
17 the meetings -- or the meeting on Friday was
18 mostly responding to questions and talking
19 about things that she thought, and believed,
20 that people in the room probably understood
21 were things that she was also going to say on
22 the stand. So I don't understand what the
23 purpose would be of having to designate
24 anything from this deposition.

25 **MS. HOLLINGSWORTH:** With respect, Your Honor, it --



1 it's my position that we -- we can't unring the
2 bell, we can't remove the influence that I
3 believe we heard yesterday in the testimony
4 that was effect of the strategy and planning
5 from the applicant, so I would -- the reason I
6 request that is because, I think -- it's not my
7 intent to try to engage in a battle of
8 impeachment and take another several hours. I
9 think, Your Honor, though, that the examination
10 from the deposition did not have that influence
11 prior to the examination. I think the
12 examination was in due course. I -- I wouldn't
13 even say there is very many points that I would
14 ask to designate, but I think, Your Honor,
15 can't -- we cannot undo the influence that
16 occurred and so I'm just simply asking that I
17 be able to submit that information to The Court
18 to consider in addition to the testimony that
19 you've heard from this witness.

20 **THE COURT:** Now, I'm still -- I'm -- I'm -- I'm
21 clear. Are you saying that the testimony that
22 this witness gave on yesterday was influenced
23 by her meetings, or her meeting, with Mr.
24 Westbrook and Ms. Biggers?

25 **MS. HOLLINGSWORTH:** Yes, Your Honor. Intentionally



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1 or not. I think that what we heard yesterday
2 from this witness, in many ways, was different.
3 I certainly think that it is absolutely the
4 witnesses testimony and same as it was at her
5 deposition but, Your Honor, I think there's an
6 influence to what we heard yesterday that is
7 not consistent to the information we were
8 provided at the deposition regarding thoughts
9 and considerations during the review process.
10 And I'm just asking The Court to consider that.
11 You're the finder of the fact that you -- you
12 don't wanna con- -- considerate it, you don't
13 have to, but I think, Your Honor, that it's --
14 it's the only way that I know that -- to at
15 least feel like there's been some means to
16 address what I -- I truly perceive as a
17 prejudice to my client with these meetings that
18 took place that we were not aware of.

19 **THE COURT:** But Ms. Murdock was here, present, when
20 she heard testimony that was given by your
21 expert -- Mr. Thomas's expert. Do you not
22 think that that might have had some influence
23 on the testimony that she gave, that was
24 subsequent to those witnesses?

25 **MS. HOLLINGSWORTH:** Sure, Your Honor, I -- well



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1 first I'd point out, she's not an expert. So
2 she's not been designated as an expert, she is
3 a fact witness.

4 **THE COURT:** I understand that.

5 **MS. HOLLINGSWORTH:** And the points that I -- the --
6 the points that I truly have an issue -- they
7 go to her thoughts during the review, her
8 thoughts regarding the application, her
9 thoughts regarding the plan and the standards
10 and I will submit, Your Honor, that there is --
11 at some -- that the influence of the applicant
12 in trying to position that testimony, cannot be
13 undone despite the -- the good faith answers
14 and discussions that we've engaged in with this
15 witness. I -- I think, Your Honor, that --
16 that means that I have to try to address the
17 prejudice in these positions as their -- I'd be
18 permitted to designate those, maybe 10,
19 portions of the transcript question and answer
20 for The Court to consider. And it -- and it --
21 and again, these are things that, at the time
22 of her deposition, as well, she's simply a fact
23 witness testifying as to her personal matters,
24 so I -- I don't think it's inappropriate she's
25 not an expert. But I, again, Your Honor, just



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1 think it -- in order to give The Court some of
2 the testimony that did not have the strategic
3 influence of the applicant prior to the
4 testimony being given. That would be the
5 reason that I -- -

6 **THE COURT:** Okay. Something to say?

7 **MR. THOMAS:** Yes, ma'am. Thank you for The Court's
8 indulgence. There's a rule, Your Honor, 32,
9 South Carolina Rules and Civil Procedure. It's
10 used in depositions and court proceedings, so
11 32(A)3(E). Deposition of a witness, whether or
12 not a party, may be used by any party for any
13 purpose The Court finds, upon application and
14 notice -- and I think you're getting that --
15 that such exceptional cir- -- circumstances
16 exist as to make it desirable in the interests
17 of justice and with due -- due regard to the
18 importance of pres- -- presenting the testimony
19 of witnesses orally in open court to allow the
20 deposition to be used. And that seems to be,
21 perhaps, one of the exceptional circumstances,
22 Your Honor, given all that has transpired in
23 the last 24 hours.

24 **THE COURT:** Yes?

25 **MS. BIGGERS:** Your Honor, I don't understand what --



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1 I -- I still think I don't understand the
2 purpose of it. And the testimony about the
3 meeting on Friday, I think, from the witness,
4 has shown that it was a short meeting at which
5 she did most of the talking by way of
6 responding to some -- some general questions
7 about what she thought. As far as her
8 testimony in court yesterday as opposed to in
9 deposition, in deposition she was responding to
10 questions that were being asked by the
11 attorneys taking the deposition. In court
12 yesterday, she was providing her testimony from
13 her point of view, having prepared herself, a
14 lot, for -- for this case, going back and
15 looking back at materials and having sat
16 through a full day of having listen to Ms.
17 Platt's testimony and a full day of listening
18 to Mr. Sullivan's testimony. So I, to an
19 extent, I -- I -- I suppose I don't under- --
20 I don't believe that there are any
21 extraordinary circumstances that would warrant
22 having her deposition be designated on top of
23 having her here and having her testify in front
24 of you, live.

25 **MR. WESTBROOK:** Could I just -- the premise -- I



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1 mean, it seems to me that the -- the, sort of,
2 the -- the -- the foundation on which Ms.
3 Hollingsworth's request since, is that she was
4 influenced in this meeting. Based on the
5 testimony that she just gave, there was no
6 evidence that she was influenced by the
7 meeting, in fact, I think what she b- -- said,
8 and I'll paraphrase a little bit, is that
9 neither Mr. Dayhuff, nor I, advised her or
10 suggested any answers to her or gave her any
11 information. I believe what she said is, that
12 we asked general questions and that she
13 responded as she said, several times, doing
14 most of the talking. No evidence of being
15 influenced, it was not -- I don't think there's
16 any evidence it was that kind of meeting where
17 we were trying to -- or did, in fact, influence
18 her. I think that question could be put
19 directly to her, if there's any doubt about it,
20 but it's my understanding of what she said.

21 **MS. HOLLINGSWORTH:** And, Your Honor, it is not -- I
22 have no desire to accuse anyone of influencing
23 or directing or forming testimony and I -- I
24 appreciate the witness's summary of what
25 happened, but all I'm asking, is that I be



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1 permitted to designate -- if -- if the
2 witness's responses -- these are questions
3 underscoring her personal knowledge that she
4 was asked. And, by the way, open ended
5 questions, so it's -- it's simply questions
6 that I asked in her testimony and response. I
7 think the alternative, Your Honor, we -- we
8 engage in a very long cross-examination about
9 any knowledge or reason to further, perhaps,
10 address answers that did not seem to comport
11 with her deposition. And I -- I do not want to
12 take another day with this one and I don't
13 think it's necessary, but I think we should be
14 entitled -- and there's a rule saying fully
15 that addresses it -- to give The Court some
16 additional information as to this witness and
17 her prior sworn testimony in this case on some
18 of the key points at issue. And I, again ---

19 **THE COURT:** So are you now saying that the
20 deposition testimony, that it contradicts -- or
21 her testimony yesterday contradicts her
22 deposition testimony?

23 **MS. HOLLINGSWORTH:** I don't want to say it
24 contradicts, Your Honor, I don't want to -- I
25 don't want to say that this witness is being



1 not truthful or inaccurate. But I would say
2 that the testimony she is giving -- that she
3 gave, includes within it -- or -- or addresses
4 things just different then what she stated in
5 her deposition, Your Honor. So I'm just -- I'm
6 not trying to im- -- impeach her in every
7 instance, because I, again, I -- I -- I think
8 the witness has done exactly what The Court
9 expects, but without having known about this
10 meeting, that I had no ability during that
11 cross-examination to further inquire or try to
12 understand why the things -- the testimony that
13 she gave yesterday was different, and not
14 inclusive, of her deposition. So, I'm just
15 asking that I be permitted to designate
16 portions, in this in unusual circumstance, so
17 that you would have it to consider along with
18 her other testimony.

19 **THE COURT:** And you said 10 pages? About --
20 approximately -- -

21 **MS. HOLLINGSWORTH:** Maybe 10 pages, Your Honor, I
22 just meant, sort of, maybe 10 areas of
23 testimony. It would not be even 10 pages. I
24 mean, I would desi- -- again, I'm not
25 designating the entire thing, it's just



1 certain, specific issues that I feel that her
2 deposition, testimony and her answers, would be
3 important to The Court's review.

4 **THE COURT:** Okay.

5 **MR. WESTBROOK:** I'll just say that, if Ms.
6 Hollingsworth felt yesterday during that --
7 that cross that Ms. Murdock was giving answers
8 contrary to her deposition testimony, why
9 didn't she impeach her with that deposition
10 testimony yesterday? That would've been the
11 time to do it and completely appropriate as
12 they -- they were inconsistent with her
13 deposition testimony. That's the process that
14 you follow. So that -- that seems to be, then,
15 the alternative for Ms. Hollingsworth.

16 **MS. HOLLINGSWORTH:** And, Your Honor, there's the
17 unfairness because I did not know yesterday
18 that Ms. Murdock had had two meetings with
19 MUSC's attorneys, both on the eve of her
20 testimony and prior to the start of the case
21 and had discussions that apparently, and
22 certainly, the attorneys believed that those
23 would be in the context of some sort of joint,
24 or common, strategy. Had I known that, Your
25 Honor, then, absolutely, I could've been --



1 handled my questions differently. I -- it is
2 just simply unfair to try to go back in time
3 and now say that I should have done something
4 differently with this, again, prejudicial
5 impact that it's had on this testimony. I did
6 not know that we would be here for another full
7 day and I just don't think that's necessary,
8 Your Honor, because I think there's a mechanism
9 to allow us to give you some additional
10 information that's relevant and important to
11 your inquiry. That's all I'm asking The Court.
12 It's -- I believe it compels the unfairness to
13 say that I should've handled examination
14 different when nobody, neither the respondents
15 or the witness, identified that there had been
16 discussions on the eve, for the purpose of
17 addressing her testimony here in court.

18 **THE COURT:** Okay. Ms. -- how -- Mr. Thomas, do ---

19 **MR. THOMAS:** Just -- just one other thing that -- we
20 keep hearing that -- and we heard from Mr.
21 Westbrook that she wa- -- she said she wasn't
22 influence, she did most of the talking, but we
23 know there were questions asked and were not
24 gonna be able to get the exact tenor of those
25 questions and -- or what they were. And I



1 would say that, just asking those questions in
2 these two meetings is -- it could be enough to
3 influence someone, we want you to be thinking
4 about this in advance, think about this, think
5 about this, and if that goes to substantial
6 change issue, which is the one where we have --
7 we're on record now, saying that we don't
8 believe that is covered under the common
9 interest doctrine, that to me is -- is where
10 there is a big problem, Your Honor. And I
11 don't see what, you know -- why DHEC or -- or
12 -- or MUSC is upset about what Ms. Murdock has
13 already said under oath, in her deposition.
14 And we've got the rule that -- that would
15 permit this because it is somewhat of an
16 exceptional circumstance.

17 **MS. BIGGERS:** Your Honor, I think it's the
18 implication that -- that she had somehow
19 changed her testimony in a way that is
20 prejudicing the other side as a result of -- of
21 meetings that she had versus simply she had
22 come to court prepared and -- on her own -- and
23 ready to testify and explain things here. That
24 -- it's that -- it's that implication that
25 something inappropriate has happened or that



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1 she has somehow changed her testimony and, in
2 a way, that is prejudicing the other parties
3 that -- that I have an issue with.

4 **THE COURT:** And based on that I'm fact finder, I
5 mean, that implication is already out there so
6 it doesn't matter whether she is allowed to
7 designate portions of -- of this deposition.
8 I don't think that it -- I'm gonna allow her to
9 -- to do it 'cause I don't think it -- you
10 know, like I said, I'm the fact finder.

11 **MS. HOLLINGSWORTH:** Yes, Your Honor.

12 **THE COURT:** We don't have anyone else here except me
13 and it's already -- the implication is out
14 there.

15 **MS. HOLLINGSWORTH:** Thank you, Your Honor. No
16 further questions, Your Honor.

17 **THE COURT:** I'm sorry, Mr. Thomas, do you have any
18 idea of the length of your cross?

19 **MR. THOMAS:** I mean, a -- a little bit.

20 **THE COURT:** That doesn't sound good. Because, if
21 it's gonna be a little bit, rather than stop in
22 the middle of it, let's just -- let's break for
23 lunch. It's a good time. Although we did
24 start late. Let's reconvene, let's say, at ---
25 Let's just make it 1:45.



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1 MR. THOMAS: 1:45?

2 THE COURT: Yes, 1:45.

3 (Off the Record)

4 THE COURT: Mr. Thomas.

5 MR. THOMAS: May it please the Court, Your Honor.

6 MS. MURDOCK - CROSS-EXAMINATION BY MR. THOMAS:

7 Q: Good afternoon, Ms. Murdock.

8 A: Good afternoon.

9 Q: I'm Will Thomas, for Trident Health, we know
10 each other.

11 A: Yes, we do.

12 Q: And -- and I'm gonna have to ask you some
13 questions that may cover some similar ground as
14 Ms. Hollingsworth, but I'm gonna try to get us
15 through that as quickly as I can.

16 A: Okay.

17 Q: You -- you are a lawyer by training and you are
18 still licensed in the state of South Carolina,
19 correct?

20 A: Yes.

21 Q: Now, one question I have for you, based on some
22 of the questions that Ms. Hollingsworth asked
23 you about the meeting with the -- Nelson
24 Mullins attorneys that you attended a meeting
25 with on Friday of last week. Did you provide



1 any opinions or comments on substantial changes
2 to the project?

3 A: I don't -- I am not aware of any substantial
4 changes to this project, so I talked about
5 whether I thought there -- what -- what I
6 thought about proposed changes.

7 Q: Okay. So did you provide any comments to the
8 attorneys as to whether you thought a CDU would
9 constitute a substantial change -- or lack of
10 the CDU?

11 A: Well, I -- I don't know if I use that
12 terminology, but I -- I believe I did discuss
13 it and I -- it may have even been at the -- at
14 the prior meeting to that. How much I'd
15 considered, at all, the CDU when I evaluated
16 the -- the application. And -- and so, whether
17 or not that -- its presence in the original
18 pro- -- proposed facility made a difference,
19 one way or the other, regarding whether or not
20 I found the project compliant.

21 Q: How about -- same question -- helipad?

22 A: Sure. Yeah. Same thing, I -- I -- I commented
23 about how I did not use the helipad as a basis
24 to make my initial findings regarding whether
25 a project is compliant. I didn't think the



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1 helipad, itself, was relevant.

2 Q: Same question. Size of the foot print of the
3 project, going from 15,000 square feet to
4 10,000 square feet?

5 A: I would imagine so, I certainly discussed that
6 at the meeting that didn't occur on Friday, but
7 the earlier meeting with ---

8 Q: The Friday before the trial began?

9 A: Well, I think -- I think it was a Friday. But,
10 yes, that meeting that -- that wasn't the
11 subject of this recent kerfuffle where, as you
12 know because you've done it with some of my
13 employees, the attorney for the -- the
14 applicant will come and discuss testimony prior
15 to trial.

16 Q: Okay. And the same question, not the -- that
17 the change of location from Nexton to, what
18 I've been calling, the Applebee's location?

19 A: Yeah, the -- the -- the fact that the project
20 was -- was gonna be in a different place than
21 -- than originally proposed, you have -- I
22 have, multiple times, discussed my -- my
23 thoughts on that with MUSC representatives,
24 including Friday, that I said the same thing
25 that I've said every other time, basically.



1 Q: Which was?

2 A: I did not think that, in of itself, would --
3 would be significant as far as how that project
4 would comply with what I thought was -- comply
5 with the project review criteria of the plan.

6 Q: But you hadn't gotten anything in writing from
7 Medical University, have you?

8 A: No.

9 Q: Okay. You haven't been designated as an expert
10 in healthcare planning by the department, have
11 you?

12 A: No.

13 Q: Or in healthcare finance?

14 A: No.

15 Q: Okay. And you don't consider yourself an
16 expert in any of those areas, do you?

17 A: I have- -- haven't evaluated myself, in that
18 respect, but I don't sit here today at -- I'm
19 not trying to put myself, today, as an expert
20 in either of those.

21 Q: Okay. You haven't been qualified by a South
22 Carolina court as an expert in either one of
23 those?

24 A: No.

25 Q: Okay. You would admit that your education and

