

RECEIVED

Apr 12 2021

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
VOLUME 6**

Daniel J. Westbrook
Travis Dayhuff
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor (29201)
Post Office Box 11070 (29211-1070)
Columbia, SC 29211
(803) 799-2000

*Attorneys for Appellant Medical University
Hospital Authority d/b/a MUSC Health Emergency
Services*

David B. Summer
William R. Thomas
Amy S. Flanary-Smith
Parker Poe Adams & Bernstein LLP
1221 Main Street, Ste. 1100
Columbia, SC 29201

*Attorneys for Respondent Trident Medical Center,
LLC d/b/a Trident Medical Center and Summerville
Medical Center*

Ashley C. Biggers
Vito M. Wicevic
SC DHEC
2600 Bull Street
Columbia, SC 29201

*Attorneys for Respondent South Carolina
Department of Health and Environmental Control*

Jennifer J. Hollingsworth
Shannon Vogan Lipham
Nexsen Pruet, LLC
1230 Main Street, Ste. 700 (29201)
Post Office Box 2426
Columbia, SC 29202-2426

*Attorneys for Petitioner/Respondent 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*

**RECORD ON APPEAL
INDEX**

VOLUME 1

ORDERS

Order Denying MUHA’s Motion to Alter and Amend dated July 6, 2020	1
Order Denying MUHA’s CON for a Freestanding Emergency Department dated May 28, 2020.....	10
Amended Order Denying Summary Judgment (Standard 2 of South Carolina Health Plan) & Order Denying Motion for Reconsideration dated May 24, 2019	74
Order Denying MUHA’s Motion to Lift the Automatic Stay dated May 4, 2019.....	85
Order Denying Roper’s Motion for Summary Judgment (Standard 2 of South Carolina Health Plan) dated April 11, 2019	93
Order Denying Summary Judgment (Substantial Change) dated April 11, 2019.....	103

PLEADINGS

Roper’s Request for a Contested Case Hearing dated December 15, 2017, with exhibits:	110
Exhibit A – DHEC’s Decision Letter granting a Certificate Of Need to MUHA dated September 25, 2017;.....	114
Exhibit B – Roper’s Request for Final Review of DHEC Decision regarding MUHA’s application dated October 6, 2017;	122
Exhibit (A) – DHEC’s Decision Letter Granting a Certificate of Need to MUHA dated September 25, 2017;	125
Exhibit (B) – Roper’s Opposition letters to MUHA’s CON; Letter from Kathy Platt dated July 21, 2017 Letter from Ralph Barbier dated July 31, 2017;	133
Exhibit C – DHEC’s November 15, 2017 letter denying a final review of DHEC’s decision regarding MUHA’s application;	183
Exhibit D – Letter from Kathy Platt dated July 21, 2017 in opposition to MUHA’s CON	186
Exhibit E – Letter from Ralph Barbier dated July 31, 2017 in opposition to MUHA’s CON	199

Exhibit F – Roper’s August 24, 2017 PowerPoint presentation in opposition to MUHA’s CON	203

TRANSCRIPTS

Transcript of the 30(b)(6) Deposition of Thomas Matthew Hermann as Corporate Representative of Intuitive Health	238
Exhibits 1-71 to the Hermann Deposition Transcript <u>(FILED UNDER SEAL)</u>	397

VOLUME 2

Contested Case Hearing Transcript July 22, 2019 – August 2, 2019	747

Testimony:

Gregory Hall, MD

• Direct Examination	864
• Cross-Examination.....	953
• Re-Direct Examination	1040
• Re-Cross Examination	1079

Stephen D. Porter

• Direct Examination	1090
• Cross-Examination.....	1141

VOLUME 3

• Cross-Examination (CONT'D).....	1151
• Re-Direct Examination	1179
• Re-Cross Examination	1184

Joy Huntington

• Direct Examination	1186
• Cross-Examination.....	1264
• Re-Direct Examination	1299

Kathryn M.T. Platt

• Direct Examination	1316
• Cross-Examination.....	1513

VOLUME 4

• Cross-Examination (CONT'D).....	1551
• Re-Direct Examination	1582

Lisa Valentine

•	Direct Examination	1589
•	Cross-Examination.....	1636
•	Re-Direct Examination	1702
Joan Eccleston		
•	Direct Examination	1717
•	Cross-Examination.....	1748
•	Re-Direct Examination	1791
Richard Preston Wendell, MD		
•	Direct Examination	1792
•	Cross-Examination.....	1837
•	Re-Direct Examination	1855
Daniel Sullivan		
•	Direct Examination	1860

VOLUME 5

•	Direct Examination (CONT'D)	1951
•	Cross-Examination.....	1981
•	Re-Direct Examination	2053
Margaret Parham Murdock		
•	Direct Examination	2062
•	Cross-Examination (MUHA).....	2120
•	Cross- Examination (Roper)	2144
•	Cross-Examination (Trident)	2347

VOLUME 6

•	Cross-Examination (Trident) (CONT'D)	2351
Patrick Cawley, MD		
•	Direct Examination	2443
•	Cross-Examination (Trident)	2507
•	Cross-Examination (Roper)	2559
•	Re-Direct Examination	2610
David Louder, MD		
•	Direct Examination	2621
•	Cross-Examination.....	2663
•	Re-Direct Examination	2690
David Levitt		
•	Direct Examination	2692

VOLUME 7

- Direct Examination (CONT'D) 2751
- Cross-Examination (Roper) 2917
- Cross-Examination (Trident) 2952

Kathryn M.T. Platt

- Direct Examination 2973
- Cross-Examination.....3038

Daniel Sullivan

- Direct Examination 3060
- Cross-Examination.....3122
- Re-Direct Examination 3145

VOLUME 8

- Re-Direct Examination (CONT'D).....3151

TRIAL EXHIBITS

Joint Trial Exhibit 1 – MUSC’s CON Application for the Development of a Freestanding
Emergency Department 3155

VOLUME 9

Joint Trial Exhibit 1 – MUSC’s CON Application for the Development of a Freestanding
Emergency Department (CONT'D).....3551

MUSC Exhibit 02 – CV of Gregory Hall, MD 3718

MUSC Exhibit 03 – CV of David Levitt 3724

MUSC Exhibit 07 – April 9, 2018 Trident Medical Center, LLC CON for the
Construction of a Freestanding Emergency Department to be Located in James Island, SC
.....3728

VOLUME 10

MUSC Exhibit 07 – April 9, 2018 Trident Medical Center, LLC CON for the
Construction of a Freestanding Emergency Department to be Located in James Island, SC
(CONT'D).....3951

MUSC Exhibit 08 – April 12, 2017 Summerville Medical Center CON for the Construction of a Freestanding Emergency Department to be Located in Summerville, SC	4040

VOLUME 11

MUSC Exhibit 08 – April 12, 2017 Summerville Medical Center CON for the Construction of a Freestanding Emergency Department to be Located in Summerville, SC (CONT'D).....	4351

ROA 4531 through 5405 were removed from the Record by consent of all parties and a placeholder was inserted in their place

MUSC Exhibit 12 – November 7, 2017 Summerville Medical Center CON for Emergency Department and Ancillary Support Services Expansion	5406

VOLUME 12

MUSC Exhibit 12 – November 7, 2017 Summerville Medical Center CON for Emergency Department and Ancillary Support Services Expansion (CONT'D).....	5626

MUSC Exhibit 18 – LWOT Rate versus Patient Visits	5694A-B

MUSC Exhibit 30 – 2019-2024 MUSC Freestanding ED Service Area Population Growth	5694C

MUSC Exhibit 31 – 2019-2024 MUSC Freestanding ED Service Area Population Growth	5694D

MUSC Exhibit 32 – Map showing service area population growth	5694E

MUSC Exhibit 33 – Map showing the original and current proposed FED sites	5695

MUSC Exhibit 34 – FY 2015-2018 MUSC Downtown ED Patient Origin Growth.....	5695A

MUSC Exhibit 35 – Chart showing Tri-County Area and Berkeley County Resident ED Visit Growth 2015-2017	5696

MUSC Exhibit 36 – Chart showing Top 10 Fastest Growing Counties in SC 2019-2024.....	5697

MUSC Exhibit 37 – Chart showing Tri-County Area Hospitals Trend in ED Visits 2012-2017.....	5698

ROA 5699 and 5700 were removed from the Record by consent of all parties and a placeholder was inserted in their place

MUSC Exhibit 40 – Chart showing Proposed FS ED Service Area is Based on Shift of Existing MUSC Patients Resulting in More Convenient Access to Services they Already Seek at MUSC.....	5701

ROA 5702 was removed from the Record by consent of all parties and a placeholder was inserted in its place

MUSC Exhibit 42 – Map showing MUHA FSED Service Area Shift and Other Facility Locations.....	5703
MUSC Exhibit 44 – Chart showing MUSC Actual FY 2016 ED Visits and Projected Shift of Existing Patients	5704
MUSC Exhibit 49 – FY 16 MUSC ED Visits by Acuity Level, Berkeley FED Service Area compared to MUSC Total	5704A
MUSC Exhibit 50 – Chart showing MUSC FY 2016 MUSC ED Visits and Admissions by Level	5705
MUSC Exhibit 51 – Chart showing Comparison of FY 2016 Actual MUSC ED Patient Payor Mix.....	5706
MUSC Exhibit 60 -- Trial Exhibits of David S. Levitt (pp. 16-19; 30, 31).....	5707
Roper Exhibit 05 – February 24, 2017 Letter to Louis Eubank from Shannon Cantwell (Quarterly Progress Report regarding CON SC-16-01).....	5712
Roper Exhibit 06 – Page 8 of Data provided in native format	5719
Roper Exhibit 07 – Draft Deposition Exhibits of Kathryn M.T. Platt.....	5720
Roper Exhibit 19 – 08/30/2018 Email to Margaret P. Murdock from Louis Eubank attaching CON tracker	5743
Roper Exhibit 55 – 2015 South Carolina Health Plan	5809
Roper Exhibit 55 – 2015 South Carolina Health Plan	5951
Roper Exhibit 56 – 2017-2018 South Carolina Health Plan.....	5962

VOLUME 13

Roper Exhibit 56 – 2017-2018 South Carolina Health Plan (CONT'D).....	6026
Roper Exhibit 57 – 2018-2019 South Carolina Health Plan.....	6108
Roper Exhibit 59 – Kathryn M.T. Platt Exhibit and Demonstrative Presentation.....	6258
Roper Exhibit 62 – January 22, 2015 Letter to Mark Sims from Vonja Szatkowski deeming CON application 2105 complete	6292
Roper Exhibit 63 – Kathryn M.T. Platt Reply Exhibits.....	6293

Trident Exhibit 03 – February 19, 2019 Affidavit of Patrick J. Cawley, MD	6323
Trident Exhibit 20 – Charleston County map and three pages of handwritten notes of DHEC staff.....	6326
Trident Exhibit 47 – MUSC Freestanding ED Analysis Tri-County March 2016	6330
Trident Exhibit 53 – Charts showing capacity and utilization for MUSC facilities	6341
Trident Exhibit 62 – August 31, 2018 Summerville FSED Alternative Site.....	6344
Trident Exhibit 65 – Slide regarding the new ground lease for 1310 North Main, Summerville for Approval	6350
Trident Exhibit 67 – December 20, 2018 Minutes of MUSC Strategic Ventures Board of Directors meeting.....	6351
Trident Exhibit 68 – Intuitive Health ER & UC Program Joint Venture Package Presented to MUSC <u>(FILED UNDER SEAL)</u>	6353
Trident Exhibit 76 – July 2, 2019 E-mail to Greg A. Hall from Patrick J. Cawley.....	6367
Trident Exhibit 101 – Exhibits of Daniel J. Sullivan.....	6369

VOLUME 14

Trident Exhibit 102 – July 1, 2019 MUSC CON for 29 Additional Beds.....	6416

MOTIONS

Roper’s Motion for Summary Judgment dated February 8, 2019	6468
Exh. A 2015 South Carolina Health Plan, Chapter XI	6483
Exh. B 2017-2018 South Carolins Health Plan, Chapter 10.....	6491
Exh. C Referenced Excerpts from DHEC CON Record.....	6497
Exh. D 2018-2019 South Carolina Health Plan, Chapter 10	6526
Exh. E Affidavit of Kathryn M.T. Platt, Expert in Health Planning.....	6532
Att. 1 Curriculum Vitae	6537
Exh. F Summary Judgment Order in Berkeley Medical Center CON Extension Dispute	6541

Exh. G MUSC’s Memorandum in Opposition to Trident/Berkeley Medical Center’s Motion for Summary Judgment in Berkeley Medical Center CON Extension Dispute	6574
Exh. H DHEC’s Memorandum in Opposition to MUSC’s Motion for Summary Judgment in Berkeley Medical Center CON Extension Dispute.....	6591
MUSC’s Memorandum in Opposition to Roper’s Motion for Summary Judgment dated February 19, 2019	6600
Exh. A 09/25/2017 Decision Letter from M. Murdock to P. Cawley.....	6606
Exh. B 02/18/2019 Affidavit of David S. Levitt	6614
Exh. 1 Curriculum Vitae	6622
Exh. C Licensed Hospital List	6627
Roper’s Reply in Further Support of Motion for Summary Judgment dated February 25, 2019.....	6640
Exh. A 2015 Health Plan Excerpts as to Hospital Inventory	6648
Exh. B 2017-2018 Health Plan Excerpts as to Hospital Inventory	6658
Exh. C 2018-2019 Health Plan Excerpts as to Hospital Inventory	6668
MUSC’s Motion for Protective Order and Motion to Seal dated June 3, 2019.....	6678
Exh. A Commission for the Issuance of a Subpoena in Texas Compelling Intuitive Health, LLC to Produce Documents and to Appear and Provide Testimony	6685
Exh. 1 Subpoena Duces Tecum to Intuitive Health, LLC	6687
Exh. 2 Petitioner Trident Medical Center, LLC’s Notice of 30(B)(6) Deposition of Intuitive Health, LLC	6691
Exh. B Consent Confidentiality Order.....	6696
Roper’s Memorandum as to the Joint Defense Agreement Between Respondents dated July 30, 2019.....	6706
Trident’s Brief on the Joint Defense Agreement dated July 30, 2019.....	6713
Exh. A 03/04/2018 Email from Ashley Biggers.....	6721
Exh. B Excerpt from the deposition of Margaret Murdock	6724

MUSC’s Proposed Final Order dated November 8, 2019	6731
MUSC’s Proposed Final Order dated November 8, 2019 (CONT’D).....	6751
MUSC’s Motion to Alter and Amend dated June 8, 2020.....	6778
Roper’s Response in Opposition to MUSC’s Motion to Alter or Amend dated June 19, 2020.....	6785
 <u>OTHER</u>	
MUHA’s Notice of Appeal, dated July 31, 2020.....	6794
2020 South Carolina Health Plan, pages 85-88	6870
 CERTIFICATE OF COUNSEL	

TMC, ET AL. V. SC DHEC, ET AL.

1605

1 experience in health planning is limited to
2 what you have learned on the job. Is that a
3 fair statement?

4 A: The lion share of it, yes.

5 Q: Okay. And I think you may have gotten some
6 one-on-one training with, maybe, Sam Phillips
7 as well? Your -- your -- well, one of your
8 predecessors at the CON office?

9 A: Yes.

10 Q: And then Sam wasn't a CON lawyer prior to
11 taking the helm of the CON department, was he?

12 A: No.

13 Q: Okay.

14 A: He often commented on that.

15 Q: And it's fair to say you -- you haven't had
16 any formal course work in healthcare planning
17 in the past?

18 A: No.

19 Q: Okay. Same question with regard to healthcare
20 finance?

21 A: That's correct.

22 Q: Okay. And it's fair to say you haven't had any
23 healthcare-specific accounting or finance
24 classes?

25 A: Right. Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1606

1 Q: Now I know you -- you mentioned that you travel
2 down to MUSC -- or, excuse me, to the, I guess,
3 I'm gonna call it, the north area.

4 A: Yeah.

5 Q: Which is North Charleston, Berkeley,
6 Dorchester, kind of up in that area -- the MU-
7 -- MUHA service area for this project. Were
8 you prompted by MUSC to do that?

9 A: No.

10 Q: Okay. That was something you decided to do on
11 your own?

12 A: Yes.

13 Q: Okay.

14 A: Well, I think Lewis and I were talking about
15 it.

16 Q: Okay.

17 A: And so we decided to -- to drive down there.
18 I was struggling with trying to make a map.

19 Q: Okay. And Lewis helped you with that, maybe?

20 A: Well he -- he helps me -- yeah, he helps me
21 tried to put triangles on a map so that we
22 could see -- have a visual.

23 Q: Okay.

24 A: I think you have that map. I think we produced
25 that.



TMC, ET AL. V. SC DHEC, ET AL.

1607

1 Q: And -- and, obviously, we talked about one
2 purpose of the CON Act is to prevent the
3 unnecessary duplication of services.

4 A: Yeah.

5 Q: Okay. And -- and you would kind of -- you
6 would agree with me that the reasoning behind
7 this concept is to prevent the -- the unchecked
8 development of facilities that may result in
9 facilities standing idle or, kind of, running
10 in an inefficient manner?

11 A: Well I think a prevention of waste is
12 definitely a part of it.

13 Q: Okay. And another -- the purpose is,
14 obviously, cost containment, correct?

15 A: Yes.

16 Q: And -- and the concept, as I understand that,
17 behind that is that the department seeks to
18 avoid unnecessary cost and construction and the
19 purchase of healthcare equipment that would
20 unnecessarily inflate the overall cost of
21 healthcare?

22 A: That's part of it, yes.

23 Q: Okay. And you would agree with me if -- if a
24 health system is losing money, one way they may
25 try to remedy that is to raise rates in their



TMC, ET AL. V. SC DHEC, ET AL.

1608

1 negotiations with insurers, correct?

2 A: That's certainly something that they could do
3 -- or might do.

4 Q: That's one strategy, correct?

5 A: Yes.

6 Q: Okay. Now you -- did you carefully review the
7 CON application prior to making your decision
8 ---

9 A: Yes.

10 Q: --- in this case? And, obviously, if you
11 deemed it complete and I believe -- and I'm not
12 gonna try to rehash too much of this, but you
13 chose four project review criteria that were
14 not the exact same as -- as what was in the
15 state health plan, correct?

16 A: Correct.

17 Q: And -- and in the state plan health, it issued
18 the 2015 plan, right?

19 A: Yes.

20 Q: Okay. And we've heard your testimony with --
21 with respect to resource availability. But
22 what you essentially did is you got rid of
23 resource availability and replaced it with
24 medically under-served groups, is that fair?
25 I put -- I put Joint 1 up there if you need a



1 refresher ---

2 A: Well that's the -- yeah, that's what's in the
3 deemed complete letter, and I believe that's
4 the substitution and -- from the 2015.

5 Q: And -- and the term, medically under-served
6 groups, refers to folks who have, kind of,
7 traditionally experience difficulty in
8 accessing the healthcare system, is that a ---

9 A: General.

10 Q: --- fair statement?

11 A: Yes.

12 Q: And in the South Carolina health plan actually
13 -- actually defines who those groups are,
14 right? And I'll -- I'll -- I'll list them out
15 for you but this is right out of SC reg 6115
16 section 803 31. It says, low income persons is
17 considered a medically under-served group. Is
18 that right?

19 A: I believe so. I don't think that's what's on
20 the screen though.

21 **MR. THOMAS:** Yeah, Vicki Lynn, see if you can't find
22 -- I think you might have to go to the next
23 page. This is gonna be PRC 31. To put a
24 record, Your Honor, sometimes I say PRC instead
25 of project review criteria. It's shorter.



TMC, ET AL. V. SC DHEC, ET AL.

1610

1 A: I have a copy of the regulation here ---

2 Q: Okay. That's 31, let's -- go to that one for
3 me.

4 A: Yes. It gives a -- a parenthetical e.g. low
5 income persons, racial and ethnic minorities,
6 women, the elderly and -- and handicapped
7 persons.

8 Q: Okay. So those are some of the traditional --
9 traditionally ---

10 A: Yes.

11 Q: --- medically under-served groups? Now did you
12 review any size studies or analyze any data
13 that indicated to you that those types of
14 medically under-served groups were actually
15 unable to access ED services in the proposed
16 service area for MUSC's project?

17 A: Well I reviewed what was included in the
18 applications and some other information that we
19 had with the department but I didn't undertake
20 an independent study to seek out data regarding
21 -- I didn't do any -- any additional research
22 in that respect.

23 Q: Okay. But I -- I didn't see anything, that's
24 why I'm asking you. Did you see anything that
25 showed, in the applications, or submissions



TMC, ET AL. V. SC DHEC, ET AL.

1611

1 there after -- actually showed that these
2 particular groups, that were define in 803 31
3 were really having difficulty accessing ED
4 services in the area?

5 A: Well, I -- I want to clarify, this is a list --
6 this is a -- an EG list. So the lists of -- of
7 -- of types of persons in this ---

8 Q: Sure.

9 A: --- project review criteria is not exclusive,
10 it -- but ...

11 Q: What other types of groups other than these
12 folks, just to your knowledge and, maybe, for
13 the application of The Court in the courtroom
14 -- other than those groups, have really had
15 some difficult access to the- -- to these ED
16 services in the north area?

17 A: Well, none in particular. In general, I don't
18 have much more to -- really to add to this list
19 of traditionally under-served groups. I think
20 this is -- this is a good list. It's a good
21 example.

22 Q: Okay. And I'm just asking if you've seen
23 anything -- any studies that -- that show that
24 these folks -- these type of folks, that are
25 defined in 31 as -- as an EG, are really



TMC, ET AL. V. SC DHEC, ET AL.

1612

1 struggling to get to ED services in the nurse
2 area -- North area.

3 A: Not -- not anything that's not already in
4 writing.

5 **MR. THOMAS:** Okay. Let's go to MUSC Exhibit 42.

6 Q: I'm showing you respondent MUSC's trial Exhibit
7 42 and I want to, first, look at -- at the blue
8 section here of these ZIP Codes up here -- I
9 don't know, it's a darker blue. But -- would
10 you agree with me that many of them have pretty
11 good access to Roper Hospital freestanding ED
12 in Moncks Corner and the Trident -- what's also
13 known as Moncks Corner Medical Center
14 freestanding ED? Would they have access to
15 those two facilities?

16 A: Okay. Ask me that --- you are asking me about
17 everything that's dark blue?

18 Q: Yeah. Kind of the darker blue area above and
19 north of the Roper Hospital freestanding ED and
20 the -- and I'm -- I -- they've got it called
21 Berkeley Medical Center freestanding ED, and
22 also called the Moncks Corner Medical Center.

23 A: That -- that's what I know it as.

24 Q: Yeah. And those folks, generally, in this area
25 are gonna have pretty good access to those



TMC, ET AL. V. SC DHEC, ET AL.

1613

1 facilities ---

2 A: Well -- that depends on what you mean by pretty
3 good. It looks like they are, compared to the
4 other ED facilities listed on here, the ones at
5 the top, kind of in that top mark, but it
6 appears as though it would be easier for them
7 to travel to those two freestanding ED's ---

8 Q: Right.

9 A: --- getting to the facility is only part of
10 access. They -- they also have to be able to
11 actually receive services there, too. And that
12 could be influenced by multiple things
13 including how busy the facilities are and --
14 and, not so much in the case of ED services
15 because of EMTALA but there -- there would be
16 payment issues ---

17 Q: Right.

18 A: --- as well.

19 Q: Well, I was going to get into EMTALA with you.
20 But I -- I want to -- I want to talk about some
21 of the other areas on this map. If we go down
22 here, it becomes the southern area of the
23 darker blue, we've got Trident Medical Center,
24 which is pretty close by, is that -- is that
25 correct? 29445?



TMC, ET AL. V. SC DHEC, ET AL.

1614

1 A: Yeah. It is close by to 29445.

2 Q: Okay. And that's a freestanding, I mean,
3 that's not a freestanding ED, that's the
4 hospital-based ED with level II trauma Center,
5 right? As far as you know?

6 A: That -- yes. Tri- -- Trident Medical Center
7 is.

8 Q: Okay. And then if we look at -- at some of the
9 red over here, Summerville Medical Center is in
10 that area, correct?

11 A: Yes.

12 Q: The southern part of that?

13 A: Yes, it is.

14 Q: Okay. And then Summerville's freestanding ED
15 is right there on 26, it looks like MUHA's
16 proposed freestanding ED and what SMC has been
17 approved to build -- almost on top of each
18 other there, right?

19 A: Yes. Those projects are very close together.

20 Q: Okay. And this -- this map that MUSC has --
21 has made has left out two -- two separate
22 areas, correct? I mean, two separate
23 freestanding ED's. That of Center Pointe,
24 which exists in the 29418 ZIP Code and the
25 Roper Northwoods freestanding ED, which is



TMC, ET AL. V. SC DHEC, ET AL.

1615

1 existing down here, kind of in the smaller
2 blue, kind of orange, area there, correct?

3 A: Yeah. I don't see those two listed on here.

4 Q: Right. But those are freestanding EDs that --
5 that folks and medically under-served groups
6 who live in and around those areas, they would
7 have access to that, right?

8 A: Well, it looks like the folks in those areas
9 would be close to those facilities. Again they
10 would have to -- there are other things they
11 would need to -- to have access.

12 Q: Now you're familiar with the 1986 Emergency
13 Medical Treatment Act -- and Labor Act,
14 correct?

15 A: Yes. I am.

16 Q: Okay. So what happens to a hospital or an E-
17 -- with an ED, whether it be freestanding or
18 regular, if they dump a patient? In other
19 words, a patient comes in, they fail to
20 stabilize and they simply just either send the
21 patient out or transfer that patient. Do you
22 know what the ramifications are for that?

23 A: I know they're not good for the hospital and
24 hospitals but -- and freestanding EDs work very
25 hard to not do that because it would violate



TMC, ET AL. V. SC DHEC, ET AL.

1616

1 EM- -- EMTALA.

2 Q: And if they -- if they do it to a certain
3 degree, they can actually lose their ability,
4 under CMS, to receive payment for Medicare and
5 Medicaid, correct?

6 A: That's correct.

7 Q: And that is somewhat of a death sentence for a
8 hospital, isn't it?

9 A: It wouldn't be good.

10 Q: Yeah.

11 A: At all.

12 Q: So we know that medically under-served groups
13 and anybody -- you and me and anybody in this
14 courtroom -- one of the obligations these
15 freestanding ED's and hospital-based ED's have
16 is they have to treat us, at least stabilize
17 us, before they transfer, correct? Under the
18 la- -- under Federal Law.

19 A: That is what the -- yes. They -- they are
20 supposed to do that.

21 Q: Okay. And, I know you were here for some of
22 the expert testimony of Ms. Platt and Mr.
23 Sullivan, but did you happen to hear any of the
24 two nursing experts who were up on the stand,
25 at all?



TMC, ET AL. V. SC DHEC, ET AL.

1617

1 A: No. Those are the only two witnesses that I
2 was able to -- to -- to listen to.

3 Q: Okay. And -- and I know Ms. Hollingsworth
4 covered this with you -- with you a little bit
5 but was it relayed to you by your lawyer on --
6 don't -- don't answer that question. Are you
7 familiar that there's a nursing shortage, not
8 only in the state of South Carolina but in this
9 particular service area?

10 A: I'm familiar that there's a -- a nursing
11 shortage nationwide and it's a concern that's
12 a, sort of, overarching concern of all
13 healthcare, everywhere. At least in this
14 country.

15 Q: That -- and you didn't hear Ms. Eckleston say
16 that she's already lost ED nurses to Roper
17 Berkeley even though it hasn't opened yet?

18 A: I did not hear her say that.

19 Q: And would you expect a nursing shortage in the
20 service area to be exaster- -- exacerbated by
21 a brand-new, 50 bed hospital?

22 A: Well it's, I mean, I would expect the -- the
23 math, you know, if -- if there are more
24 positions than there are norses -- nurses,
25 that'll be problematic, anywhere. As long as



TMC, ET AL. V. SC DHEC, ET AL.

1618

1 the staffing plan is reasonable and the -- the
2 facilities aren't trying to hire too many
3 nurses, which I don't think is in the case of
4 either Summerville or MUSC's project.

5 Q: And I understand that's your position but given
6 the fact that medically under-served groups are
7 protected by federal law with at- -- with
8 respect to access to emergency departments,
9 don't you think it might've been a better idea
10 to include staff resources, given the nursing
11 shortage national, statewide and service area
12 wide in your deemed complete letter rather than
13 medically under-served groups?

14 A: I -- I chose the -- the project review criteria
15 that I chose based on these projects. I -- I
16 -- clearly, you don't share my opinion.

17 Q: Okay. I'm gonna hand up this and I think you
18 may have it. Vickie Lynn may be able to put it
19 on the screen, please. It's just a copy of
20 447180.

21 Q: And you're familiar with this statute, aren't
22 you?

23 A: I am.

24 Q: I thought you might say that. And what this
25 statute is -- this -- this addresses the health



TMC, ET AL. V. SC DHEC, ET AL.

1619

1 planning committee, among other things,
2 correct?

3 A: Yes.

4 **MR. THOMAS:** Okay. And -- I don't know if you've
5 got the 2015 health plan up there, can we --
6 can we put that up there? Oh, it's Roper 55.
7 If you could put the next page up. Okay.

8 Q: This is the South Carolina Health Planning
9 Committee that was in existence in 2015. Do
10 you recognize some of the names on that list?

11 A: I do.

12 Q: Okay. Now the types of folks that served on
13 the South Carolina health planning committee,
14 they typically have backgrounds and healthcare
15 -- some of them.

16 A: Some of them.

17 Q: From being providers, administrators, insurance
18 folks, correct?

19 A: Yes. Some of them.

20 Q: Right. And some of them maybe even have a
21 background in healthcare finance, correct?

22 A: Some might, yes.

23 Q: Right. Now, for instance, I don't -- do you
24 know who Phyllis Buie is?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1620

1 Q: Okay. And she's a CPA who actually works for
2 the Public Employee Benefits Association,
3 right?

4 A: That sounds right. I -- I don't recall these
5 folks resume's off the top of my hand, but --
6 but that is not surprising. That sounds right.

7 Q: But as a CPA she may know a little bit of
8 something about accounting and finance,
9 correct?

10 A: I would hope so.

11 Q: And do you know who Ms. Rusetar (ph) is?

12 A: Yes. I do.

13 Q: And she is the chief operating officer of
14 Tideland Health, correct?

15 A: I believe so.

16 Q: And she may know a few things about how to
17 staff hospitals, correct?

18 A: Correct.

19 Q: And per the statute, 44-7-180, that I've handed
20 you, you would agree with me that it is up to
21 the state health planning committee to provide
22 advice to the department of health and
23 environmental control, with respect to which of
24 the 33 given PRC's, project review criteria,
25 are considered the most important to the



TMC, ET AL. V. SC DHEC, ET AL.

1621

1 respective services? Isn't it?

2 A: Well I believe it's the -- it's the -- the
3 requirement that the health planning committee
4 provide advice in preparing the whole plan,
5 which includes the general statement regarding
6 project review criteria, as well.

7 Q: So, that's a good -- thank you, for filling
8 that in. So one of the things that they've got
9 to do is provide advice to the department about
10 which of the PRCs are most important to the
11 given services that are listed in the state
12 health plan, correct?

13 A: Like I said, regarding the -- the plan and
14 whatever form or content they -- they choose to
15 provide that advice.

16 Q: Okay. And nothing in the statutory -- in the
17 statute that I've given you, 44-7-180, permits
18 you, as the director of the program, to remove
19 a criteria from the list of the most important
20 criteria, which are found in the state health
21 plan, does it? If it does, I just ask you to
22 point me to the language.

23 A: Are you asking if I can, by my own accord, edit
24 the state health plan, itself?

25 Q: I'm asking if you ---



TMC, ET AL. V. SC DHEC, ET AL.

1622

1 A: Make changes to the plan, itself?

2 Q: --- I'm asking if -- if you can point me to the
3 language, in 44-7-180, that allows you as a CON
4 director, or reviewer of any type, to remove
5 from the state health plans list of TRC that
6 are deemed most important for those particular
7 health services when you decide to deem a
8 project complete. How about that?

9 A: My authority actually comes from 44-7-190(b) --
10 -

11 Q: Okay.

12 A: --- which is the next subsection.

13 Q: And what is that -- what does that say?

14 A: That says that the Department should choose
15 from the list of pr- -- that -- that the
16 department should review all CON applications,
17 pursuant to the review criteria that are set
18 forth in the regulation. Which I -- I believe
19 is referring to 61-15. And then that section
20 goes on to say that, once the department has
21 determined which project review criteria are
22 most important for that specific project -- and
23 it uses the term specific project ---

24 Q: Okay.

25 A: --- then the Department may reorder those



1 criteria only once. Again I assume that, when
2 it talks about reordering those criteria, it's
3 referring to the prior sentence or statement
4 but it refers to the criteria in the -- in the
5 regulations.

6 Q: So you're anticipating my next question, which
7 is good. You look at re-ordering as being able
8 to remove and replace, is that fair?

9 A: Re-ordering -- I -- I'm looking at the entire
10 list of criteria provided for in the
11 regulation. So -- and then the ones at the top
12 of the list are the ones that are the most
13 important. It doesn't necessarily mean that
14 the rest are not as important at all, it just
15 means that the list is going to be ordered and
16 the most important ones will be at the top.
17 But it doesn't actually remove the -- the --
18 the project review criteria all together which
19 is why, at the beginning of every application
20 review, I do look at the project review
21 criteria to make sure that that specific
22 project doesn't have some elements that require
23 a -- a different order from the list of 33 in
24 the regulation.

25 Q: Okay. So it's your testimony that the



TMC, ET AL. V. SC DHEC, ET AL.

1624

1 regulation in the statute allows you -- if
2 there are -- the most important PRC listed in
3 the state health plan, to actually discard one
4 of those, when deeming a project complete in
5 terms of that being the most important project
6 review criteria?

7 A: I believe it allows me to put it farther down
8 the list.

9 Q: Okay. Even -- even on a list that may not be
10 included on a deemed complete letter, correct?

11 A: That's correct.

12 Q: Okay. Now I -- I think it's settled, but I'm
13 gonna ask you the question anyway. That MUHA,
14 in its CON application, did not address other
15 specific providers in the service area, in
16 terms of their respective ED resources,
17 correct?

18 A: They ---

19 Q: I think -- I think we've heard the testimony.

20 A: --- we've been through what they submitted in
21 the original document ---

22 Q: And that's all I'm asking about.

23 A: Right. No. Other than a summary, kind of,
24 statement about them generally, they did not
25 list them and -- and address them separately,



1 no.

2 Q: Right. And you didn't see a single map that
3 actually put one of those specific providers in
4 the CON application on a -- on a service area
5 amount, correct?

6 A: I -- I -- I don't recall. I know that I've
7 seen maps, but I'm -- I -- I don't recall
8 whether there was ones in the original
9 document, submitted with the department or not,
10 so -- I think if they didn't list them -- I --
11 I wouldn't be surprised if there wasn't one.

12 Q: Okay. Let's just show you, so -- so I'm
13 putting the map right in front of you here and
14 what we have -- I'm gonna open this. I can't
15 see that. I won't be able to see it with the
16 door closed. Well the -- the two providers
17 that are listed here in this three county
18 service area are the proposed freestanding ED
19 MUHA wants to build and its MUSC downtown ED,
20 is that a fair statement?

21 A: Yes.

22 Q: Okay. And that is Joint Exhibit 1-23, correct?

23 A: That's correct.

24 Q: And we know that in between those two there are
25 many providers, correct -- ED providers.



TMC, ET AL. V. SC DHEC, ET AL.

1626

1 Center Pointe. Roper Northwoods. Trident
2 Medical Center. Summerville Medical Center.

3 A: Those are the ones that are generally in
4 between those two areas ---

5 Q: Okay.

6 A: --- some are, sort of, off to the side, I
7 guess, but, generally, in between those two.

8 Q: Okay. And MUSC did not discuss, anywhere in
9 the CON application, the fact that Summerville
10 had, actually, applied for a freestanding ED
11 about a quarter mile away from where it was
12 gonna provide a freestanding ED, did it?

13 A: Again I -- I -- and I'm not trying to be
14 difficult. I -- I look at the whole record of
15 what MUSC submitted from beginning to end and
16 I don't, in my mind, differentiate between what
17 we got with the original document and then what
18 they sent later so I -- I can't say for sure.
19 And I'm not trying to be difficult ---

20 Q: Right.

21 A: --- but it -- it wouldn't surprise me if it
22 wasn't in the original document that they
23 submitted.

24 Q: Okay. You're not aware of -- sitting here
25 today -- that they ever reference the



TMC, ET AL. V. SC DHEC, ET AL.

1627

1 freestanding ED that Summerville was going to
2 build. And that applied -- and Summerville
3 applied first, right? About two months before
4 MUSC did, correct?

5 A: I think so.

6 Q: Okay. If you don't -- you -- you can't
7 remember sitting here today and they actually
8 referenced a fact that another freestanding ED
9 had been applied for about a quarter of a mile
10 away?

11 A: I can't recall. I -- I -- but again, I -- I
12 don't remember.

13 Q: Okay. But you know that to be the case, right?
14 That that ---

15 A: I believe that's right.

16 Q: Okay.

17 A: That on the initial document, they didn't
18 address that.

19 Q: Right. Now, you would agree with me and I know
20 Ms. Hollingsworth went over this with you, but
21 the standard six in the 2015 state health plan
22 for freestanding ED services specifically asks,
23 not only state where it's proposed patients are
24 gonna come from, but why they are not being
25 adequately served by the existing services,



1 right?

2 A: Yes.

3 Q: Okay. And -- any existing services -- and I
4 think I heard you testify to this yesterday --
5 in this case, would be those that are in the
6 proposed service area, correct?

7 A: Generally, it yes.

8 Q: Okay. And would you agree with me, knowing
9 what you know now, and this may actually
10 require you to, kind of, consider more of the
11 record because we know on the CEO and
12 application proper, but the other service -- ED
13 services in the service area -- in MUHA's
14 proposed service area, are Roper Northwoods
15 freestanding ED, does that sound right?

16 A: Yep.

17 Q: Center Pointe freestanding ED, is that right?

18 A: I -- that sounds right.

19 Q: Okay. Moncks Corner Medical Center
20 freestanding ED, correct?

21 A: Well if you look at the -- if -- if you're
22 talking about the tri- -- the tri-county area,
23 which is the -- in the initial statement in the
24 application, that's what the service area is,
25 then yes, that one's in there as well.



TMC, ET AL. V. SC DHEC, ET AL.

1629

1 Q: Let -- let's make sure we get this right for
2 The Court and the record. Let's go back to
3 Exhibit 42. MUSC Exhibit 42 for the record.

4 A: MUSC's opening statement about the service area
5 talks about it being the tri-county area.

6 Q: Right.

7 A: So all of those would be included in there.
8 Yes.

9 Q: Well this one is actually the -- the truncated
10 service area. You see, this is -- this has
11 actually got the ZIP Codes, color codes, so
12 anything that's not -- my understanding is that
13 anything that's not in this color-coded area is
14 -- is outside their proposed freestanding ED
15 services. That's not the tri-county area, the
16 tri-county area would -- almost all of that
17 would be ---

18 A: They're all in this, yes.

19 Q: Right.

20 A: In this -- this collection of ZIP Codes, yes.

21 Q: Okay. And just -- and just -- so I can
22 complete the list, Roper Northwoods is in the
23 service area, correct?

24 A: Yes.

25 Q: Okay. Center Pointe's in there as well?



TMC, ET AL. V. SC DHEC, ET AL.

1630

1 A: Yes.

2 Q: Moncks Corner Medical Center freestanding ED is
3 within that ser- -- service area, right?

4 A: Yes.

5 Q: Okay. Roper Moncks Corner freestanding ED's
6 within that service area, correct?

7 A: Yes.

8 Q: Okay. Trident Medical Center ED --
9 hospital-based ED's in that service area?

10 A: Yes.

11 Q: Okay. And then Summerville Medical Center ED's
12 in that service area, right?

13 A: Right.

14 Q: Okay. Now do you know whether MUSC, in its CON
15 application or the other documents it would
16 have submitted after the fact that are now in
17 the -- in the record, ever indicated that one
18 of those ED's was unable to serve the residents
19 in the service area because it was overcrowded?

20 A: If memory serves me correctly, MUSC did submit
21 some documentation regarding capacity and
22 utilization indicating that the capacity of the
23 existing facilities in the area was either met
24 or -- or close to -- to met.

25 Q: Okay.



TMC, ET AL. V. SC DHEC, ET AL.

1631

1 A: Maximum capacity.

2 Q: But let -- and maybe I didn't ask the question
3 very well. Let me rephrase it. Did it ever
4 say that because they had reached capacity,
5 that for one reason or another, those patients
6 could not get ED services in a timely manner
7 from just those other existing EDs?

8 A: Okay. Ask me that again ---

9 Q: Yeah.

10 A: --- please.

11 Q: So, you said that they'd provided some
12 information regarding capacity, and I believe
13 that they did.

14 A: Uh-huh.

15 Q: But did they ever say -- did they ever go that
16 extra one step and say that because those --
17 those freestanding ED's, that one or two of
18 them may be at capacity? That they were unable
19 to take care of residents in that service area
20 in a timely and a high-quality manner?

21 A: I don't recall, one way or the other, whether
22 they made that particular statement.

23 Q: So you can't remember if they -- if they ---

24 A: I can't.

25 Q: Okay. Would it surprise you that they didn't?



TMC, ET AL. V. SC DHEC, ET AL.

1632

1 A: Again I -- I really -- I -- I don't know. I --
2 I can't say for sure -- I don't -- I don't
3 remember every statement they made. I may have
4 made an assumption based on what I was seeing
5 in a chart.

6 Q: Okay.

7 A: But, no, I don't recall the specific words that
8 were in there, no.

9 Q: Okay. And you deemed the project complete --
10 and go back to the complete letter, but I
11 believe it was sometime, maybe, in July. Yeah.
12 Let's see, July 10th, 2017, is that right?

13 A: Yes. That's the date on the letter.

14 Q: Okay. But at least by this time you hadn't
15 requested of MUSC any additional documents
16 related to other ED providers in the service
17 area. Is that a fair statement?

18 A: Yes.

19 Q: Okay. Is it fair to say that, at the time, you
20 made the decision to approve MUSC's
21 freestanding ED, you also knew that you were
22 going to approve the freestanding ED for
23 Summerville Medical Center?

24 A: Yes.

25 Q: Is it -- is it fair to say that, at the time



TMC, ET AL. V. SC DHEC, ET AL.

1633

1 you approved MUHA's freestanding ED, you knew
2 that Roper was going to, or was, in the process
3 of building a new hospital that would have
4 hospital-based ED?

5 A: Yes.

6 Q: Okay. And at the time that you approved the
7 MUHA's freestanding ED you also knew that
8 Trident had a CON application approved for an
9 ED expansion, correct? I believe, that was
10 approved a couple of years earlier.

11 A: I think they were close to finishing that
12 project, at that point in time.

13 Q: Okay.

14 A: I had already been down to Trident to see it
15 and saw all the patients in recliners waiting
16 for that -- that expansion. We were very, very
17 full.

18 Q: Right.

19 A: As Jim Reardon to make sure to tell us.

20 Q: And the -- and -- and those recliners, they are
21 very comfortable aren't they?

22 A: Yeah. They looked more comfortable than even,
23 perhaps, this witness chair.

24 Q: You also knew that Roper Northwoods was
25 building a new freestanding ED that would have



TMC, ET AL. V. SC DHEC, ET AL.

1634

1 five more ED rooms as well, with that MUHA
2 freestanding ED, correct?

3 A: I knew that they were replacing a freestanding
4 ED that they had had for some time -- they were
5 adding five bays.

6 Q: Fair enough. And you would agree with me that
7 part of health planning is tracking when you've
8 approved CON applications and what you have
9 approved them for. Is that a fair statement?

10 A: Yes.

11 **MR. THOMAS:** Okay. Let's go to Joint 1 and -- and
12 if you want to turn the pa- -- the copy, you
13 can. But I'll see if I can't get Vicki Lynn to
14 put up there DHEC's CON 5.4.

15 Q: All right. Do you recognize this document as
16 the -- one of the pages from the MUSC project
17 review presentation?

18 A: Yes.

19 Q: Okay. And this is one where they, MUSC,
20 actually listed out the different providers and
21 -- and it looks like a five year analysis of
22 utilization, is that fair?

23 A: That's fair.

24 Q: Okay. And this was something that was provided
25 you -- to you after some oppositions letter --



TMC, ET AL. V. SC DHEC, ET AL.

1635

1 letters went in from Roper and Trident,
2 correct?

3 A: It was later in the -- in the process. Yes.

4 Q: Okay. Now, other than East Cooper Medical
5 Center on this utilization chart, which tri-
6 county area provider has the slowest five year
7 growth?

8 A: According to this chart, MUSC does.

9 Q: Okay. And what is -- what is MUHA's 2016
10 volume of visits on that slide?

11 A: It's 81,260 visits.

12 Q: All right. I'm all right that down. 81260.
13 That's 2016. Now you -- you -- you've used the
14 term, explosive growth, a few times in your --
15 in your direct and maybe even your cross with
16 Ms. Hollingsworth, but would you agree with me
17 that the two providers who have, truly
18 explosive growth -- and there may be a third,
19 but two of them are Trident Medical Center and
20 Summerville Medical Center. Is that a fair
21 statement?

22 A: If you account -- if you count explosive growth
23 by, simply, the number of ED visits then, yes,
24 that is a fair statement.

25 Q: Okay. Do you consider growth that's less than



1 2 percent a year, over a five year period,
2 explosive? And if you do, that's fine, I just
3 want to know.

4 A: Well, it depends on what you're measuring.
5 MUSC's growth -- I think, it was clear from
6 Kathy Platt's -- in one of her exhibits, I
7 remember her showing us that the number of very
8 high acuity visits for MUSC had gone up
9 dramatically. I think it was something like 22
10 percent. That growth and that acuity of
11 patients would cause those patients to stay in
12 the ED for much longer, so I think there are
13 some circumstances for which you wouldn't want
14 to use just ED visits as a measure of explosive
15 growth, but again, as a raw measure, I would
16 say that the growth was the fastest and I still
17 believe that the growth was the fastest in the
18 area closest to where the -- both Summerville
19 and MUSC's proposed projects are to be located.
20 And the closest two facilities to those areas
21 are Trident and Summerville.

22 Q: Okay. And -- and so, did you mention earlier
23 -- and, if you did, I apologize, because I
24 missed it but do you consider that growth from
25 2012 to 2016 explosive because of the high



1 acuity patients?

2 A: Not necessarily.

3 Q: Okay.

4 A: I was looking more at the area close to the
5 projects.

6 Q: Okay. Fair enough. I just wanted to -- to
7 make that clear, for the record. And -- and
8 you may have seen some slides yesterday, but
9 would it surprise you to know that, despite the
10 projections of continued growth in its CON
11 application, MUSC's ED visit utilization has
12 actually been declining since 2016?

13 A: That -- based on what I know about its capacity
14 constraints, that doesn't surprise me at all.
15 Especially since the -- the growth is all in
16 higher acuity patients that will stay in the
17 bays longer, so that will make it harder for
18 them to have individual visits to count on the
19 ED visit count.

20 Q: What capacity number does MUSC use for its per
21 bay, or per room, capacity?

22 A: I think I recall, off the top of my head, it's
23 something like 1,200 -- I think it's a little
24 under 1,500. Which is what -- which is what I
25 usually look at.



TMC, ET AL. V. SC DHEC, ET AL.

1638

1 Q: And that's what -- what -- in that 1,200
2 number, do you believe that that is appropriate
3 for MUSC?

4 A: I think it -- it's possible. Again, I -- I
5 tend to use -- I tried to standardize my review
6 and that's why use the 1,500 for -- per year,
7 annual visit. MUSC, if I had been concerned
8 about -- if I had suspected that MUSC was being
9 untruthful about its capacity issues at its
10 hospital, I might've drilled down farther into
11 that, but I didn't have a reason to doubt their
12 concerns regarding their capacity at the
13 hospital.

14 Q: Fair enough. How many CON applications have
15 you gotten from, and with, MUSC since you've
16 been at DHEC to expand, renovate its ED
17 downtown on this -- this existing ED downtown?

18 A: I don't recall that I've -- unless you count
19 the Sean Jenkins hospital, whether they're
20 going to move the pediatric ED.

21 Q: Right. And that's -- that's not an existing --
22 -

23 A: And that wasn't my case.

24 Q: Right.

25 A: But it would be that one myself.



TMC, ET AL. V. SC DHEC, ET AL.

1639

1 Q: Okay. Let's go to MUSC Exhibit 46. Okay, so
2 MUSC uses 1,250 capacity per bay, correct?

3 A: Yes.

4 Q: And they have actually gone from 80,856 in 2016
5 to 78,213 in 2018, correct?

6 A: Yes.

7 Q: That's about a 2,600 ED visit deficit.

8 A: I don't doubt your math.

9 Q: Okay.

10 A: That sounds about right.

11 Q: And would you agree with me that at least one
12 reason the department has continually approved
13 Trident and Summerville's ED expansions and
14 their freestanding ED's, is because they have
15 actual experience with explosive growth?

16 A: And capacity constraints, yes.

17 Q: And you would agree with me that, for a time,
18 in the application process between MUSC and
19 Summerville Medical Cen- -- Center for their
20 two freestanding EDs, that the department was
21 trying to determine whether these were not --
22 whether or not these were CONs -- were
23 competing applications.

24 A: Yes.

25 Q: Is that fair? Okay.



TMC, ET AL. V. SC DHEC, ET AL.

1640

1 A: That's fair.

2 Q: And MUSC even made sure it got its application
3 in within 15 days of it being deemed complete.
4 And that's one element that -- that you would
5 use to, at least, make sure that there would be
6 repeat definition of competing applications.

7 A: Both the applications met that definition.
8 Yes.

9 Q: Okay. And there would be ---

10 A: And not that part of the definition.

11 Q: Right. And they and they were also going to be
12 very close together, right? I think, at that
13 time, when MUSC was gonna locate Nexton and
14 Summerville was gonna locate where it still was
15 gonna locate, they were about a quarter of a
16 mile apart?

17 A: I don't know exactly, but they were pretty
18 close.

19 Q: Okay. And you did -- did the drives pretty
20 recently, right?

21 A: Yes. And so that -- I -- they were -- they
22 were closer, the original proposed location for
23 the MUSC project was closer than what I believe
24 to be the current base locations.

25 Q: Okay.



TMC, ET AL. V. SC DHEC, ET AL.

1641

1 A: To the Trident -- to the Summerville project.

2 Q: Well me and Mr. Reardon used to talk about, if
3 we got the ball just right we could drive a
4 golf ball from MUSC's location to Trident's
5 location.

6 A: If I were a golfer, I might evaluate that
7 statement with more flair, but I like to -- I
8 -- I would enjoy watching y'all try.

9 Q: And I -- I believe that I'm not gonna make you
10 read the definition of competing applications,
11 but would you agree with me that at the project
12 review meeting, one of the things that MUSC
13 tried to do -- let me set it up, you were at
14 the project meeting that ---

15 A: I was at the project meeting.

16 Q: Okay. And Sarah Bacik was somebody there from
17 MUSC, correct?

18 A: I believe she was there, yes.

19 Q: But you would agree with me that one of the
20 things they did was they tried to distinguish
21 their project from Trident's project. Is that
22 a fair statement?

23 A: Yes.

24 **MR. THOMAS:** Okay. Well let's put up, if we could,
25 Joint 1 at DHEC CON 516. And this is just



TMC, ET AL. V. SC DHEC, ET AL.

1642

1 going to be a slide from the project review
2 meeting.

3 Q: And you remember this slide don't you ---

4 A: Yes.

5 Q: --- Ms. Murdock?

6 A: I do.

7 Q: I believe it's the second slide for the project
8 overview, but one of the things that -- and
9 just for the record, this is Joint Exhibit
10 1-516. One of the things that, kind of right
11 out of the gate, that MUSC talks about is -- is
12 the CDU, right?

13 A: Well that's not slide number five, so sure.

14 Q: All right.

15 A: Or page 5, I don't know -- I don't know ---

16 Q: Yeah. That -- there's ---

17 A: --- they were numbered properly, but yeah.

18 Q: It's the second project overview slide, if you
19 want to look at it you can but ---

20 A: Sure.

21 Q: They talk about the CDU will be included in the
22 proposed project, right?

23 A: Right.

24 Q: And -- yeah, that's the first -- that's the
25 first of the project overview slide. So they



1 talk about continued growth in space, project
2 scope, the patient population and then they get
3 into the actual components of the freestanding
4 ED, correct?

5 A: Right. The -- they talk about some features of
6 it, yes.

7 Q: Right.

8 **MR. THOMAS:** Go to the next page. There you go.

9 Q: And so, they spend a little bit of time talking
10 about CDU, right?

11 A: Right.

12 Q: And when one of those things is gonna decrease
13 unnecessary admissions, improve patient
14 outcomes, reduce waits of stay and enhance
15 patient satisfaction, right? That's ---

16 A: That's what they say.

17 Q: --- third bullet down. And -- and I believe
18 that I remember Sarah Bacik was very excited
19 about this last point, it's unique to the
20 existing and proposed FEDs in South Carolina.
21 She -- I believe she said, there's nothing else
22 like this in South Carolina, right?

23 A: That -- I -- I believe so.

24 Q: Okay.

25 A: And that -- that's certainly what it says here.



TMC, ET AL. V. SC DHEC, ET AL.

1644

1 Q: In the very next bul- -- big bullet is,
2 helipad.

3 A: Yes.

4 Q: And that's what's gonna improve patient
5 morbidity and mortality rates and decrease in
6 out of hospital time, right?

7 A: That's what it says.

8 **MR. THOMAS:** Okay. Now let's go to TMC 20, if we
9 could. Trident Medical Center Exhibit 20.

10 Q: All right. Do you recognize this?

11 A: Yes, I do.

12 Q: Okay. And these are your notes?

13 A: Those are my notes.

14 Q: And you took these notes at -- while --
15 contemporaneously while at the project review
16 committee meeting, do you remember that?

17 A: Yes.

18 **MR. THOMAS:** Okay. Your Honor, I'd like to move TMC
19 20 into evidence at this time.

20 **MS. BIGGERS:** No objection.

21 **MR. WESTBROOK:** No objection.

22 **THE COURT:** I'll admit it.

23 **(Petitioner TMC's Exhibit Number 20 was admitted into**
24 **the record at this time.)**

25 Q: Okay. So let's, kind of, go through these a



TMC, ET AL. V. SC DHEC, ET AL.

1645

1 little bit because there's one word, I've got
2 to get you to tell me what it is because I
3 couldn't figure it out ---

4 A: There's no guarantee that I'll know, I was
5 trying to listen and make eye contact -- to
6 contact and write things down at the same time.
7 I think I eventually just gave up.

8 Q: All right. So if you go down and -- see where
9 I'm pointing, where it says, this project
10 equal. Do you see that?

11 A: Yep.

12 Q: What's that next word?

13 A: It says, much different.

14 Q: Okay. We thought it meant muddy hood. Much
15 different. I can see it now, I -- I really
16 can. It's not muddy hood at all. But right
17 after much different, okay -- and then you --
18 and if you've done it in quotes, that means
19 somebody else said it, right?

20 A: That's -- that's usually what that means.
21 Again, if I remembered it right and was writing
22 it down at the same time and I -- I confess
23 that my project review meeting notes are never
24 that reliable. I just have to -- to say that,
25 but I -- yeah, I -- it sounds like something



TMC, ET AL. V. SC DHEC, ET AL.

1646

1 that she did say and if -- and -- and that's
2 why I -- why I would've put it in quotes.

3 Q: Okay. And then right after that you've got
4 first in SC hybrid urgent/ED, right?

5 A: Right.

6 Q: And then, right after that, clinical decision
7 unit-observe?

8 A: I think that's what -- yes.

9 Q: Okay.

10 A: That looks like that's what it says.

11 Q: And you have helipad there, too, right?

12 A: Right.

13 Q: And you wrote down, exactly, what was on that
14 slide we just looked at. That CDU will be
15 unique and that, maybe, is something that Sarah
16 might have said?

17 A: Yes.

18 Q: Okay.

19 A: That -- that makes sense.

20 Q: And then it says MUSC does lots of triage to
21 outside hospitals, right?

22 A: That's what that says, yes.

23 Q: Okay. You noted that was in Nexton and then
24 you -- you spoke to the ACO patient population.
25 Would -- would it be fair to say, I mean, that



TMC, ET AL. V. SC DHEC, ET AL.

1647

1 these were, at least as MUSC was going through
2 their presentation, that what you wrote down
3 was somewhat important to you? Or otherwise
4 you wouldn't have written it down?

5 A: I -- I was just I was just writing down what
6 they were saying wri- -- in the hopes that I
7 would be able to -- to remember it later
8 because, if I don't write it down, it's ---

9 Q: Now you get a copy of -- of this, right?

10 A: Well the -- the slides, but I tried to -- to
11 write down some of the things that they say
12 because I'm not sure if that's gonna be on the
13 slides. So I -- I really am taking notes as if
14 I was in class. They say it and I write it.
15 I don't have time to evaluate because, again,
16 I'm also trying to make eye contact and nod and
17 be host, sort of, to this meeting ---

18 Q: Sure.

19 A: --- so.

20 Q: And you -- I think you noted, down here -- if
21 you go down towards -- a little bit on the
22 page, D. Carroll, is that David Carroll?

23 A: I -- I don't know. If David Carroll was at the
24 meeting then that's, likely, what that means --
25 -



TMC, ET AL. V. SC DHEC, ET AL.

1648

1 Q: Okay.

2 A: --- it's likely who that was, I mean, it -- it
3 -- I'm referring to a person.

4 Q: Right.

5 A: Probably a person speaking or it could be a --
6 a person who was referred to by someone else
7 who is speaking.

8 Q: Okay. Well David Carroll, he's -- he was
9 there. He was the executive director of
10 Palmetto Primary Care, right?

11 A: I think so.

12 Q: Do you recall that?

13 A: Yes.

14 Q: Yes. And -- and he -- MUSC brought him into
15 this to provide a physician's perspective, is
16 that fair?

17 A: I -- I believe so.

18 Q: Okay. And Mr. Carroll -- go back to that,
19 yeah, that next page. I'll get a little closer
20 so I can read it. It says, large independent
21 primary care groups and then campus with
22 primary -- well, wait -- with something,
23 primary care, urgent care and freestanding ED,
24 right? Oh, imaging. All right. Campus with
25 imaging, do you see that?



TMC, ET AL. V. SC DHEC, ET AL.

1649

1 A: I see that.

2 Q: And then, Mr. Carroll -- or doc- -- I don't
3 know if he's a doctor or not, we'll assume
4 mister. Mr. Carroll actually made sure he
5 noted to you that he approached Trident and
6 Roper to do this model and both said no, right?

7 A: I believe that's -- I believe I wrote that down
8 because he said that, yes.

9 Q: Okay. Now have -- have you ever made a
10 decision, Ms. Murdock, on a competing
11 application situation where one applicant was
12 not chosen?

13 A: Was not what?

14 Q: Was not chosen -- was not approved -- the
15 project was not approved?

16 A: Let me think. Yes.

17 Q: Okay. And I would imagine you did that because
18 you thought the applicant that you did approve,
19 their CON application better met the goals of
20 the CON act, project review criteria, the
21 regulations and statutes, is that fair?

22 A: Well that's the analysis that I'm required to
23 do ---

24 Q: Right.

25 A: --- in that case, so ...



TMC, ET AL. V. SC DHEC, ET AL.

1650

1 Q: Well that's why I asked you the question.

2 A: Yes.

3 Q: And a question I've got for you is -- is, let's
4 assume that you've got a competing application,
5 like the one you were just thinking of. I
6 assume you might've been just thinking of one,
7 right?

8 A: Yes.

9 Q: Okay.

10 A: I was. I had wanted to make sure that I was
11 right -- that I had ---

12 Q: If you have two CON applicants, and one is
13 going to do a better job of providing access
14 and services to the particular patient
15 population, which the two applicants are
16 competing over, and you approve that -- that
17 applicant, because of that, if -- if it were to
18 come back to you, four or five months later,
19 and say, well, we don't -- we can't really
20 provide the same access, we've got to scale
21 back our services, would you consider that to
22 be a substantial change given that you denied
23 another applicant on a similar basis?

24 A: That depends completely on the circumstances.

25 Q: Okay and it -- it does, doesn't it?



TMC, ET AL. V. SC DHEC, ET AL.

1651

1 A: Uh-huh.

2 Q: And that could be manifestly unfair to another
3 applicant, if one comes back -- and I'm talking
4 about a competing applicant situation, but if
5 one comes back and says, we can't do this
6 project anymore. We gotta do something more
7 like the other guys -- do you think that -- do
8 you think the other guys would get pretty upset
9 about that?

10 A: Again, that's a hypothetical -- it depends on
11 the circumstances, I mean, it sounds like you
12 could -- you could come up with a -- a fact
13 pattern that would meet it as you had presented
14 it.

15 Q: Right.

16 A: It's possible, yes.

17 Q: And so this CEO and applicant, who you
18 initially approved, who came back with a change
19 project, they might still be able to meet all
20 of those project review criteria from before
21 but what you've done, right, is that you've
22 kind of disadvantaged another applicant,
23 haven't you?

24 A: Again, it depends. It depends on the
25 circumstances.



TMC, ET AL. V. SC DHEC, ET AL.

1652

1 Q: But you could see, in your mind, that one
2 applicant could see that being as manifestly
3 unfair. And that situation it -- you approved
4 that one, you just came back and said, I'm
5 downscaling, I'm downsizing, I don't got the
6 money, gotta do it smaller, less access. And
7 that's exactly what this guy -- this applicant
8 that you've denied, was doing. Right? And you
9 could see it?

10 A: It wouldn't surprise me if the other applicant
11 told me that it was manifestly unfair because
12 I get told that a lot, in my position.

13 Q: Right. Now we've -- we've seen your notes, we
14 -- we know what MUSC's representatives, at
15 least some of them, said at the project review
16 meeting, right? Because you wrote some of it
17 down, right?

18 A: Yes.

19 Q: We've seen their slides, too, haven't we?

20 A: Yes.

21 Q: From the project review meeting? Is it your --
22 is it really your testimony that -- that MUSC's
23 representations about the CDU, about the
24 helipad, about how great Nexton was gonna be,
25 about all the medical services that were gonna



1 be in Nexton -- that none of that had any
2 effect on your decision that these weren't
3 competing applications, given how close they
4 were together in the same service area and the
5 same type of project?

6 A: All right. There are a bunch of things in that
7 question. If you want to ask me those things
8 one by one, I'd be happy to answer. The
9 helipad and the CDU, those were things that I
10 thought, that's great, but I can't quantify it
11 when I'm looking at need. And so, I didn't
12 think that it was within my authority to use a
13 helipad as an excuse to determine whether or
14 not need would be met. I didn't think that
15 that was a good measure. It was an apples to
16 oranges scenario ---

17 Q: But ---

18 A: --- and so ---

19 Q: --- but didn't MUSC represent to you, that they
20 were gonna be able to, kind of, do a little bit
21 more, higher level of service because they're
22 gonna have air transport?

23 A: They talked about that. The applicants talk
24 about things a lot of times that -- that are --
25 are, you know, things that they are proud of



TMC, ET AL. V. SC DHEC, ET AL.

1654

1 about the project. That, often times, they
2 deserve to be proud of about a project, but it
3 might not necessarily have any specific
4 certificate of need implications regarding need
5 projections ---

6 Q: Let's access it.

7 **MR. WESTBROOK:** Objection. That's two questions in
8 a row that Mr. Thomas has inadvertently
9 interrupted before she finished her answer. I
10 object to let her -- ask that you let her
11 answer.

12 **MR. THOMAS:** And I would like to know, Your Honor, I
13 believe this is the Department's witness. I'm
14 not sure that Mr. Westbrook -- I just don't
15 want to get ganged up by these two ---

16 **THE COURT:** I ---

17 **MR. THOMAS:** --- so I want one of them to actually
18 log the objections, if we could do that.

19 **THE COURT:** Okay. With the ---

20 **MR. THOMAS:** I think that's per rule.

21 **THE COURT:** --- yes. With the Department's witness,
22 yeah.

23 **MS. BIGGERS:** I -- I was actually about to make the
24 same objection. Mr. Westbrook beat me to it --
25 beat me to it.



TMC, ET AL. V. SC DHEC, ET AL.

1655

1 **THE COURT:** But the -- the objection is sustained
2 and, please, allow the witness to finish ---

3 **MR. THOMAS:** Yes, ma'am.

4 Q: Go ahead, Maggie. I apologize, Ms. Murdock.

5 A: I forgot where I was. I'm sorry.

6 Q: That's okay. Let me -- maybe I can wrap it up
7 and we can move on out of this one. You would
8 agree with me that MUSC presented a different
9 application to you back in August, whenever the
10 project review meeting was back in the summer
11 of 2017, than what you understand it to be
12 today?

13 A: I am aware that there are some proposed changes
14 to the project.

15 Q: Right. It's about a third smaller, right?
16 Going from 15,000 square feet to 10,000 square
17 feet?

18 A: I believe that's the reduction in size, yes.

19 Q: They are spending less money?

20 A: Yes.

21 Q: They've eliminated this idea of helipad, which
22 would allow them to, maybe, treat a higher
23 level of service right there from that
24 location?

25 A: My understanding is that they're eliminating



TMC, ET AL. V. SC DHEC, ET AL.

1656

1 the heli- -- helipad and that the helicopter
2 can land in the parking lot if it needs to.

3 Q: Okay. Well ---

4 A: I haven't even evaluated that statement but ---

5 Q: Okay.

6 A: --- and I didn't think it was important because
7 the helipad did not factor into my decision as
8 to whether or not this project was either
9 competing or compliant with the plan or the
10 project review criteria.

11 Q: Who told you that the helicopter -- helicopter
12 could land in the parking lot?

13 A: I do not remember.

14 Q: Okay because Dr. Hall said, in his testimony --
15 -

16 A: I thought Kathy Platt, or one of the -- one of
17 the -- I thought somebody referred to it during
18 the testimony, because I -- I remember
19 thinking, oh, well that's even better.

20 Q: Okay. Dr. Hall actually said he needed to get
21 the fire department to come and survey the area
22 to see if they could find a landing zone.

23 A: Okay.

24 Q: Were you aware of that?

25 A: I wasn't aware of that and, again, the -- the



TMC, ET AL. V. SC DHEC, ET AL.

1657

1 -- it -- maybe they can, maybe they can't land
2 in the parking lot but I thought I heard a
3 witness say that.

4 Q: Okay.

5 A: There -- there -- it was not -- I hadn't heard
6 any MUSC witnesses in this case, so -- so,
7 again, I -- if they can break, if they can't --
8 it doesn't have CON implications for -- for
9 what I would consider important in this
10 particular project.

11 Q: And then at one point in time, you thought that
12 this might be in a urgent care, kind of a
13 hybrid, project, right? And I think we got
14 that off of Dr. Cawley's affidavit.

15 A: Right. I know that that concept has been
16 floating around and I -- I realize, somebody
17 must've -- must've mentioned it during the
18 project review meeting because I wrote down
19 hybrid urgent/ED.

20 Q: Okay. And -- and calling his affidavit
21 actually, kind of, committed to that -- that
22 model, right? It's gonna be, kind of, an
23 urgent care freestanding ED hybrid model? Is
24 that ---

25 A: I believe that's right. I believe that's what



1 the affidavit said.

2 Q: And do I understand your earlier testimony,
3 with Ms. Hollingsworth or otherwise, that, at
4 some point, somebody came and told MUSC that
5 that wasn't workable from a licensing sta- --
6 standpoint?

7 A: That there would be -- that -- that there -- it
8 was problematic. I know that when we discussed
9 that issue -- when I was a part of discussion
10 about that issue with other DHEC bureaus . I
11 know that there was some -- some concerns
12 raised about that model and it sounded -- my
13 understanding was, we had not, as a group,
14 thought of a way to overcome those hurdles to
15 a project as presented in the -- in the meeting
16 by this person who we were discussing that
17 model with.

18 Q: And -- and was that Mr. Deal?

19 A: Yes. I -- I believe his name is Mason Deal.
20 Again, I would need to look, maybe -- maybe I
21 can find a calendar invite or -- or Eva Johnson
22 was the one who set up that meeting and -- and
23 I -- I'm nearly positive that's his name, Mason
24 Deal.

25 Q: And -- and do you recall that Mr. Deal worked



1 for a company called Intuitive Healthcare?

2 A: I don't know one way or the other. I know that
3 I Googled his name and, I think, his name
4 popped up with -- it, somehow or another,
5 connected him to Intuitive but we can't access
6 LinkedIn from our state computers so, it might
7 have come up in a Google search list and that's
8 as far as I got.

9 Q: Okay. But you were curious enough -- you kind
10 of wanted to know who this guy was, you were
11 Google stalking him?

12 A: A little bit. Yeah. He -- he didn't say who
13 he was working with and so I was curious as to
14 -- to who -- and -- and you know what, he -- he
15 might've said the company he was from and I
16 just didn't -- didn't write it down. I don't
17 think I took a lot of notes during that
18 meeting. And it didn't occur to me -- it
19 didn't occur to me to wonder where he was from
20 until later.

21 Q: Sure. Okay and -- and to date, have you seen
22 the, what I'll call the Applebee's project with
23 the floor plan -- with the new floor plan, that
24 I think we may hear about sometime this week?

25 A: I believe someone pulled up some slides during



TMC, ET AL. V. SC DHEC, ET AL.

1660

1 the witness testimony, I -- I think. Maybe
2 during Kathy Platt's testimony or -- or Dan
3 Sullivan's, but I -- I don't -- I haven't held
4 them in my hands and looked at them myself, but
5 I think I've seen them.

6 Q: Is it fair to say that the only pro forma that
7 you've seen for a CON project for MUHA's
8 freestanding ED is the one that was in the CON
9 application, is that right?

10 A: Yes.

11 Q: Okay. At the time that you made the decision,
12 in this case, did you know that the Medical
13 University Hospital Authority had plans to
14 build a hospital with a full-service ED also in
15 the Nexton area? Had that been revealed to you
16 yet?

17 A: I can't say for sure in the timeline, I -- I
18 don't remember whether or not they had
19 submitted that subsequent application or not,
20 at the time I made this decision.

21 Q: Do you recall that in the CON application for
22 that new MUHA Berkeley Hospital in the next an
23 area, I believe they actually indicated within
24 the application, that they were going to close
25 down the freestanding ED on the opening of the



TMC, ET AL. V. SC DHEC, ET AL.

1661

1 Medical University Hospital Authority's
2 hospital?

3 A: I don't remember exactly. I think -- I think
4 that -- that it may have said that, but I can't
5 recall, specifically.

6 Q: And I may have just misrepresented that. That
7 they were going to actually close down the
8 freestanding ED and, maybe, converted into an
9 urgent care. Does that ring a bell?

10 A: I, again, I can't -- it rings a bell, but I'm
11 not sure specifically what is said in that
12 application.

13 Q: Do you know if that's still the case, one way
14 or the other? What they're gonna do if they
15 open up the new hospital in Berkeley County,
16 what they would do with the freestanding ED,
17 regardless of where it is?

18 A: Off the top of my head, I don't know.

19 Q: Do you think it takes a fairly lengthy amount
20 of time to plan for a new hospital?

21 A: I would -- I would think so.

22 Q: Do you think it's reasonable to assume that
23 MUHA had an idea that it was gonna apply for a
24 new hospital in Berkeley County about the time,
25 in June 2017, it applied for a freestanding ED



1 at Nexton?

2 A: I -- I can't say what MUSC was -- was planning
3 and when they were planning it. It -- it would
4 not be a surprising thing for them to have
5 known about their plans in advance. But I --
6 but I can't speak to what they were planning.

7 Q: But MUHA never disclosed that new hospital to
8 you in the context of that freestanding ED that
9 it applied for, did it?

10 A: I don't recall. I -- I don't think that that
11 was part of the -- the application for this --
12 this project.

13 Q: Okay.

14 (Off the Record)

15 Q: Have you seen anything in MUHA's CON
16 application or since that analyzes exactly why
17 patients have gone downtown to the ED campus,
18 on the Charleston peninsula, and passed by
19 multiple ED resources along the way -- have you
20 seen anything that really drills down on those
21 reasons, others than, they go down there, they
22 think they'll shift?

23 A: I -- I don't remember, off the top of my head,
24 all the details of what they said about that.
25 I know that that shift was part of the



TMC, ET AL. V. SC DHEC, ET AL.

1663

1 analysis, but if they wanted a list of reasons
2 as to why patients would or wouldn't, I -- I
3 don't, necessarily, recall ---

4 Q: And I'm not talking about ---

5 A: --- that.

6 Q: --- the -- the shift, per se. I was really
7 talking about -- did you ever see any analysis
8 or reasons giving why patients were driving all
9 the way downtown and possibly in a -- you know.
10 We know and some of them were driving, some of
11 them were being transported by EMS, right, but
12 actually bypassing available freestanding ED
13 resources. Do you recall ---

14 A: You mean, the patient's reasoning as to ---

15 Q: Yeah.

16 A: --- for example, are we going down to MUSC
17 because of MUSC's reputation or because we've
18 been there before ---

19 Q: Right.

20 A: --- or because MUSC makes us feel safe,
21 something like that? I didn't -- there wasn't
22 a -- a -- they didn't provide, kind of, a data
23 analysis on reasons given for bypassing other
24 facilities, we just knew that they were.

25 Q: Let me -- let me give you just a primary



TMC, ET AL. V. SC DHEC, ET AL.

1664

1 example of this. I've got two bad knees right
2 now. I've gotta get them both scoped. And
3 they're, you know, there -- there are many, and
4 -- and you can disagree with that, but are you
5 aware that there are orthopedic surgeons in the
6 Lexington Richland area?

7 A: I believe there are.

8 Q: Yeah. Midlands Orthopedic. Moore Orthopedic.
9 There is -- there's a nice resource of
10 orthopedic surgeons for those who want to get
11 their knees scoped. Is that a fair statement?

12 A: Knees, spinal fusion, all kinds of things, it's
13 ---

14 Q: Right. But if I decided that instead, I wanted
15 to go to Greenville Hospital system, and drive
16 90 miles -- I guess that's West. That doesn't
17 necessarily mean that there are inadequate
18 resources in the Columbia area. Is that a fair
19 statement?

20 A: I -- without knowing why you would do that, I
21 -- I don't know.

22 Q: Exactly. You'd want to know why I did that,
23 right?

24 A: I would need to ask you why.

25 Q: Right. And -- and you weren't -- I believe you



TMC, ET AL. V. SC DHEC, ET AL.

1665

1 said, you were not here for the testimony of
2 Dr. Hall and Dr. Wendell?

3 A: No.

4 Q: Okay. But would you agree with me, they both
5 testified that -- that freestanding ED's
6 primarily treat triage level fours and fives
7 and some level threes. Does that comport with
8 your understanding of what freestanding ED's
9 typically treat, in terms of a triage level?

10 A: I know that I've heard some testimony about
11 those things and there's a little bit of
12 disagreement as to what levels to use and what
13 levels would go to a freestanding ED, but my
14 understanding is that the very high acuity
15 patients would, likely, not be treated under
16 freestanding ED and that the lower acuity
17 patients would be more likely.

18 Q: And I'll represent to you that Dr. Hall and Dr.
19 Wendell testified both that, emergency care
20 services are pretty much delivered in the same
21 manner, whether they're in a freestanding ED or
22 a hospital-based ED. Have you heard anything
23 different ---

24 A: I ---

25 Q: --- than that?



TMC, ET AL. V. SC DHEC, ET AL.

1666

1 A: --- I haven't heard anything different. That
2 sounds like, I mean they -- they have
3 requirements that they need to meet, regardless
4 of where they're serving their patients.

5 Q: Right. In fact, I think Dr. Wendell and Dr.
6 Hall actually testified that, often times,
7 things that are treated in a freestanding ED
8 are -- are illnesses or problems that could
9 also be handled even in an urgent care center,
10 but sometimes urgent care centers aren't open
11 at all times of the night. Have you -- have
12 you heard -- does that comport with your
13 understanding?

14 A: That is not a surprising statement.

15 Q: Okay. And I can't remember who testified about
16 it, but one of the physicians stated that a
17 level 5 patient, which is, I guess, the lowest
18 level of triage, does that sound ---

19 A: Depending on which scale you're using.

20 Q: Right. Right. But I think, if you use a
21 triage level 5, that's lower and a billing
22 level, like, 285 would be higher, but let's --
23 let's just assume, for purpose of the question,
24 that level 5 is the lowest level triage. That
25 some people who are actually put into that



TMC, ET AL. V. SC DHEC, ET AL.

1667

1 category only need a prescription medicine
2 refill. Does that comport with your
3 understanding?

4 A: I -- I mean it, again, it doesn't surprise me.
5 I'm -- I didn't hear that testimony, but it
6 wouldn't -- I have no reason to disagree with
7 that.

8 Q: Okay. I think you've -- you've already
9 admitted Trident, you know Trident is a level
10 2 trauma center, correct?

11 A: Yes.

12 Q: And you would agree with me that that means
13 that they are not only capable of treating
14 something as -- say as benign as, maybe, a
15 sprained ankle, but they could actually treat
16 someone who's been involved in a horrible car
17 accident or even a gunshot wound? Is that what
18 you're ---

19 A: At a level 2 trauma Center, Trident would be --
20 Trident would be equipped to -- to handle more
21 complicated cases than, you know, a lower level
22 trauma center, yes.

23 Q: Would you agree with me that just because a
24 patient with a very low triage level makes a
25 decision to bypass several emergency



TMC, ET AL. V. SC DHEC, ET AL.

1668

1 departments to get a low level emergent -- or
2 urgent medical issue? Does it necessarily mean
3 that they want closer resources -- emergency
4 medicine resources, that you could've utilized?

5 A: I -- I think that that's a hypothetical
6 situation that could occur, yes.

7 Q: Right. Okay. And someone could go to MUSC
8 because that's where their mother and father
9 always went, right?

10 A: It could be.

11 Q: But that doesn't mean that, if they live in
12 Mount Pleasant, East Cooper Medical Center or
13 Roper, which would be, maybe, closer, could
14 naturally provide the same service, if they're
15 driving all the way downtown. Is that a fair
16 statement?

17 A: Well as long as those other facilities weren't
18 full. Again, it depends on the circumstances.
19 There's more to access than just proximity.

20 Q: Well, I mean, what we're hearing today is that
21 MUSC is, you know, at its limits, but people
22 are still going down there, right?

23 A: Right. Which is also true with Summerville and
24 Trident.

25 Q: Okay. And we'll talk about that. You would



TMC, ET AL. V. SC DHEC, ET AL.

1669

1 agree with me that any reasonable health
2 planning analysis must look into the future?

3 A: Yes.

4 Q: Okay. Now you indicated that you did some
5 analysis where you looked at JARs for a couple
6 of the facilities for a period of years, is
7 that right, I mean, in this case?

8 A: I was at JARs and I looked at other submissions
9 to the department and application files that
10 the department ---

11 Q: Okay. But you agree with me that you didn't
12 write any of that information down as you were,
13 kind of, going through it, is that fair? Or at
14 least, I hadn't -- I hadn't gotten any ---

15 A: No. No, I didn't -- I didn't take any notes
16 while I was doing that. I had -- I was
17 basically troubleshooting and doing sort of the
18 targeted devil's advocate analysis of the
19 service area.

20 Q: Okay. What is a JAR?

21 A: It's a Joint Annual Report of hospitals.

22 Q: Okay. And what kind of information is included
23 in a JAR report?

24 A: Yes. As I mentioned yesterday, the Joint
25 Annual Report of hospitals is a report that



TMC, ET AL. V. SC DHEC, ET AL.

1670

1 each hospital has two -- to complete and
2 submit. It's, in part, because of DHEC
3 requirements and also because of South Carolina
4 Hospital Association requirements, that the
5 facilities, including hospitals, submit these
6 JAR's and those reports include all sorts of
7 information including utilization information.

8 Q: Thanks. I just wanted to make sure that that
9 was on the record and I forgot that you
10 actually said that yesterday.

11 A: Okay. I'm sorry, I wasn't trying to be
12 flippant.

13 Q: Now one thing that the Joint Annual Report does
14 not include is the number of ED bays per ED, is
15 that right?

16 A: I don't believe it does.

17 Q: Okay. So if you're looking at a volume, or a
18 visit number, it's kind of hard to determine
19 the capacity just by looking at a JAR, unless
20 you would know the number of ED beds. Is that
21 a fair statement?

22 A: Generally, yes.

23 Q: Okay. Now one -- one thing I heard you might
24 -- I just want to get this straight for the
25 record because yesterday, I think you -- you



TMC, ET AL. V. SC DHEC, ET AL.

1671

1 stated that when you're doing your analysis
2 and, kind of, looking at the JAR's and some of
3 the other information that you just referenced
4 -- that you looked at the Trident Medical
5 Center CON to expand its ED. Was that one of
6 the ---

7 A: That was one of them.

8 Q: Okay. I believe you indicated that something
9 that stood out to you was that, even though
10 Trident had a projection of 60,000 ED visits
11 for 2016, when you look at its JAR report, it
12 indicated a utilization number in the 90,000
13 range.

14 A: I think it was 98,000.

15 Q: 98,000. That's what I have written down. And
16 I believe you said, this led you to believe
17 that there was -- that was an indication of
18 explosive growth at Trident.

19 A: Well that definitely aroused my suspicion so I
20 looked farther. I was assuming that some of
21 that volume was being seen at Trident's two
22 other ---

23 Q: Right.

24 A: --- ED facilities, Center Pointe and Moncks
25 Corner.



TMC, ET AL. V. SC DHEC, ET AL.

1672

1 Q: Right.

2 A: Center Pointe, I don't recall off the top of my
3 head, exactly, how many ED bays it has but I've
4 been there and I believe it's somewhere between
5 10 and 12.

6 Q: Right.

7 A: And the ---

8 Q: 12.

9 A: --- the Moncks Corner facility, I think, has,
10 maybe, eight.

11 Q: Right.

12 A: So I would've had to have taken into con- --
13 taken into account those, but I was hoping that
14 it wasn't all Trident, otherwise that would
15 have been very concerning, but yeah, I -- I --
16 I knew all of those 98,000 -- I -- I think it's
17 safe to assume all 98,000 of those patients
18 weren't actually seen at the main hospital.

19 Q: Okay. I just wanted to make that clear for the
20 record, that you -- you understood that there
21 was, maybe, 25 to 30 that were being seen
22 between Moncks Corner and Center Pointe.

23 A: Right. I took into account ---

24 Q: Okay.

25 A: --- the other two, and when you took all ---



TMC, ET AL. V. SC DHEC, ET AL.

1673

1 Q: Just making sure.

2 A: --- take all the bays, it was still, at that
3 time, by -- by 2016, each of those facilities
4 had used a 1,500 patient per -- or 1,500 visit
5 per -- per bay capacity. The whole Trident
6 system was already at, or over, capacity by
7 2017.

8 Q: And -- and that's if you use a 1,500 ---

9 A: Yes.

10 Q: --- visit capacity. Roper, itself, uses 3,000
11 per room visit.

12 A: I believe Roper has amended that to 2,000, but
13 -- and I -- I know that Roper uses that and has
14 used it multiple times in other sub- --
15 submissions, but that is not a capacity that we
16 use. And, in fact, Trident -- well I can't say
17 this, because Summerville, after this
18 particular -- after submitting its application
19 for a freestanding ED that at -- that was an
20 issue, along with the MUSC application.
21 Summerville subsequently submitted an
22 application for expansion of its ED ---

23 Q: Hospital-based, correct?

24 A: Hospital-based ED and then mentioned that it
25 was -- it was overcapacity and I think it was



TMC, ET AL. V. SC DHEC, ET AL.

1674

1 using -- I think that Summerville and Trident
2 have reference to 1,500 patient per day, or
3 1,800 -- I think Trident uses 18 per day ---

4 Q: Well ---

5 A: --- and ---

6 Q: Go ahead, I don't want to cut you off.

7 A: No. Yes. So -- so I was aware of, you know,
8 there's some discrepancy, but even in looking
9 at the 1,500 per day capacity for the Trident
10 health system, then by 2016, it was already
11 over capacity for the whole system, if you use
12 -- if you count all the bays and use that
13 capacity and count all the visits, but even
14 with an 1,800 per bay capacity, it's either
15 approaching, or at, capacity ---

16 Q: And ---

17 A: --- and -- and that -- that's as of 2017.

18 Q: Okay.

19 A: So, Trident expanded to meet what was occurring
20 at the market right then and there with -- with
21 -- so that was what led me to believe that its
22 expansion was not going to sit idle. That
23 those patients that I saw in April 2017,
24 sitting in recliner's, were finally gonna have
25 a place to go to be treated and that this



TMC, ET AL. V. SC DHEC, ET AL.

1675

1 wasn't going to be, you know, a wasted
2 expansion project, in the event that future
3 growth and future FSED projects like this one
4 were approved.

5 Q: If MUSC were not to build its freestanding ED,
6 okay. Is it your testimony that the service
7 area, as a whole, would not have the available
8 capacity to serve the demand in the area?

9 A: Generally, yes. I think if you look at a
10 combination of the patients in the areas that
11 are leaving the area to travel to MUSC for
12 whatever reason and you look at the market
13 growth and you look at the -- the ED experience
14 at the two closest facilities, which are
15 Trident and Summerville, both of which have
16 admittedly, and I've seen it with my own eyes,
17 had overcrowding and, I think -- I don't want
18 to put words in his mouth, but I think Jim
19 Reardon may have used -- said something like,
20 bursting at the seams or even alluded to the
21 fact, while we were down there, that this new
22 project is just gonna meet the need that we
23 have now and we're gonna have to turn around
24 and -- and do something about future growth.
25 He acknowledged that -- that Trident was



TMC, ET AL. V. SC DHEC, ET AL.

1676

1 already busy enough to fill up everything that
2 they were in the process of building and were
3 about to complete.

4 Q: Okay. So, note, MUSC people are in trouble.
5 They are not gonna be able to access a
6 freestanding ED in the area, any hospital-based
7 ED in the area -- we are gonna have big
8 problems. Is that -- is that your testimony
9 today?

10 A: Okay. I'm not sure if I've said what you just
11 said, but if you want to try again, I can ---

12 Q: I was just gonna ask that question. And, you
13 know, I -- I heard your answer to the other
14 one. This is the new question.

15 A: I don't understand.

16 Q: Without MUHA's 10 bay, freestanding ED, are we
17 gonna have any people that cannot access
18 freestanding ED or a hospital ED in a timely
19 manner and get timely, efficient and
20 high-quality care?

21 A: I think that it will -- I think that it -- that
22 it will decrease the chances that those
23 patients will be able to get that.

24 Q: Berkeley -- Roper Berkeley's adding the 15 bay
25 ED in about two or three months, right? That's



TMC, ET AL. V. SC DHEC, ET AL.

1677

1 hospital-based, correct?

2 A: Well, October of '19, I hope. If not sooner.

3 Q: Okay. So the answer's yes?

4 A: Yes.

5 Q: Okay. That's 15 ---

6 A: Now ---

7 Q: --- that's 15 ED bays?

8 A: Yes.

9 Q: Summerville has been approved and it's gonna
10 start breaking ground on tentative bays, a mile
11 from MUHA's freestanding ED proposed location,
12 correct?

13 A: Correct.

14 Q: Summerville Medical Center is adding another 10
15 ED bays between adult and pediatric patients,
16 right? In their expansion?

17 A: According to their application, they are. And
18 if you do that calculation, Summerville doesn't
19 have any freestanding ED's and by their own
20 capacity numbers and their JARs, they are --
21 are already over that capacity without even
22 having finished ---

23 **MR. THOMAS:** Your Honor ---

24 A: --- that ---

25 **MR. THOMAS:** --- that's not the question I asked,



1 you know ---

2 A: Okay.

3 **MR. THOMAS:** I'm happy that Ms. Biggers can ask on
4 cross -- she can follow up on that -- or
5 redirect -- she can follow up on that but I --
6 but I just asked her the number of ED bays that
7 she understood Summerville Medical Center was
8 offering -- or was adding and that number is
9 10. And then, so she's talking about things
10 right now that I didn't even ask a question
11 about. So I'd like to strike that portion as
12 nonresponsive.

13 **THE COURT:** We'll strike the, I'm sorry, did ...

14 **MS. BIGGERS:** No. Your Honor, I -- I think she was
15 providing additional explanation to her answer,
16 but I will defer to Your Honor's ruling.

17 Q: All right. So Summerville's adding 10 at its
18 hospital. Summerville freestanding ED is
19 adding 10 at exit 199?

20 **MR. WESTBROOK:** Your Honor, I'm sorry. I just have
21 a question. I'm confused. What portion of her
22 answer has been stricken?

23 **MR. THOMAS:** Oh, I thought you did rule. I'm sorry.
24 I -- I apologize.

25 **THE COURT:** I -- I ---



TMC, ET AL. V. SC DHEC, ET AL.

1679

1 **MR. THOMAS:** My bad.

2 **THE COURT:** I -- I didn't ---

3 **MR. THOMAS:** Okay.

4 **THE COURT:** --- I did not rule. I did not rule.
5 And, I'm sorry, but give me the response that
6 -- can you repeat the response that you gave to
7 him? Well, let me ask the Court Reporter. If
8 you would read her response, just prior to the
9 objection.

10 **COURT REPORTER:** I can, but we have to go off of the
11 record and let me back up the recording for a
12 minute.

13 **THE COURT:** Okay. Okay.

14 **MR. THOMAS:** I -- I do remember, Your Honor, my
15 question was -- was the number of ED bays that
16 were being added at Summerville Medical Center.
17 I was asking her if she realized that that was
18 10.

19 **THE COURT:** I understand that, yeah.

20 **MR. THOMAS:** And so I didn't think that it really
21 required much more than a yes or no answer. I
22 mean, it's kind of like asking ---

23 **THE COURT:** Okay ---

24 **MR. THOMAS:** --- and she tells me where she's born
25 her name and where she went to college and high



TMC, ET AL. V. SC DHEC, ET AL.

1680

1 school and ---

2 **THE COURT:** --- when you asked the question and she
3 answered the question and she was following up.
4 Okay. I'm going to allow her response to
5 remain on the record.

6 Q: Okay. All right. Let me get back to where I
7 was. 15 bays at Roper Berkeley, is that your
8 understanding?

9 A: Well, they're adding five. They've had 10 for
10 quite some time.

11 Q: I'm talking about Roper Berkeley Hospital ---

12 A: Oh, I'm sorry. Yes. The new hospital, yes.
13 15.

14 Q: Okay. 10 bays at Summerville Medical Center
15 freestanding ED, is that your understanding?

16 A: Yes.

17 Q: Okay. 10 additional bays at the Summerville
18 hospital-based ED?

19 A: I -- I know the total, but I don't know exactly
20 how many they are adding. I think the total's
21 44, but I -- I don't know what they started
22 with.

23 Q: Okay. Five to be added at Roper Northwoods
24 when it -- it's replacement facility comes
25 online?



TMC, ET AL. V. SC DHEC, ET AL.

1681

1 A: Yes.

2 Q: Okay. And by my math that's an additional 40
3 ED bays in the area, correct?

4 A: I won't doubt your math.

5 Q: Okay. And Trident, actually, increased its ED
6 bays to 36 with a 12 bay fast track area. Is
7 that your understanding based on its expansion
8 projects?

9 A: I have to go back and look.

10 Q: Okay.

11 A: But, again, I won't -- I won't doubt it.

12 Q: Okay. So by 40 -- and let's just -- and not
13 counting Trident, we are talking about 40 ED
14 bays right there, and if we use a 1,500 ED
15 visit capacity per room, that's 60,000 visits
16 of new capacity coming online in the next, I
17 don't know, three months to two years? Does
18 that sound about right?

19 A: Again I -- I don't want to doubt your math on
20 that.

21 Q: All right. Did you -- did you hear -- well, I
22 don't think you heard it but did -- did you --
23 would it surprise you that Trident Medical
24 Centers door to doctor time is in the 10 minute
25 ---



TMC, ET AL. V. SC DHEC, ET AL.

1682

1 A: I -- I don't know what Trident's door to doctor
2 time is.

3 Q: Okay. Would -- would that be a -- one measure
4 of the capacity of a freestanding ED? It's
5 door to doctor time, being able to come in the
6 door and the time that you actually see a
7 physician who can treat you at this function of
8 capacity?

9 A: It could be a factor. Yeah. I can see how
10 that would be a factor you could use in
11 measuring something like capacity. I've never
12 evaluated it as -- it's usefulness as a factor.

13 Q: Okay. In your experience, Ms. Murdock, do
14 providers like MUSC participate in the
15 commenting process when a new state health plan
16 is about to be published?

17 A: Sometimes.

18 Q: Have you ever known MUSC to engage in that
19 practice before?

20 A: To participate in the state health planning
21 public comment process?

22 Q: Yes.

23 A: I believe so.

24 Q: Okay. And you would agree with me that the --
25 the department actually makes a draft of the



TMC, ET AL. V. SC DHEC, ET AL.

1683

1 health plan available for all to look at well
2 in advance of when it actually publishes the
3 state health plan. Is that a fair statement?

4 A: That is a fair statement.

5 Q: Okay. And the reason you do that is so that
6 everybody -- all the providers who may be
7 affected by that health plan would -- would
8 have notice of what's coming out, in terms of
9 new standards or standards that may be removed
10 from the health plan. As for -- as for one
11 example. Is that a fair statement?

12 A: That's for the public, including the providers.

13 Q: Fair enough. And you would agree with me that,
14 in this case, MUHA filed its CON application
15 for its freestanding ED about three or four
16 days from when the 2017 state health plan was
17 published. Does that sound about right?

18 A: Yes.

19 Q: Yeah.

20 A: I think so. I think the three days is the --
21 the time period that's been used.

22 Q: I don't want to take longer ---

23 A: I think it was June -- June 9 ---

24 Q: Okay.

25 A: --- was when the plan came out. That's my



1 husband's birthday.

2 Q: Okay. And the -- the application, in this
3 case, was actually submitted on, maybe, June 6
4 ---

5 A: That sounds right.

6 Q: Okay. And the 2017 plan included a standard
7 that requires the applicant to demonstrate need
8 for the ED service by documenting capacity
9 constraints within the existing ED, in a
10 service area and or aid travel time of greater
11 than 15 minutes in the service area. Does that
12 sound right?

13 A: I believe that's what the standard says in the
14 -- in the 2017 ---

15 Q: And that standard's, I guess, replaced what we
16 knew as standard six before, from the 2015
17 plans? Does that sound right?

18 A: Yes.

19 Q: Okay. Did you ever see any information from
20 and you H a regarding the percentage of its ED
21 patients that are actually dropped off via EMS?

22 A: I don't recall.

23 Q: Okay. Do you think that would be one a measure
24 of the acuity of those patients, whether or not
25 they're actually being transported by EMS



TMC, ET AL. V. SC DHEC, ET AL.

1685

1 versus driving themselves to an emergency
2 department?

3 A: I -- I'm not sure. I'm not sure how to use
4 that to -- to measure. So I haven't used that
5 before, I don't think. Maybe it's a good
6 measure, but I'm not sure. People call
7 ambulances for various reasons.

8 Q: Do you understand that MUSC has a fairly robust
9 admit rate in permits downtown ED?

10 A: I think that the -- the last time I looked at
11 that information on a JAR, I think the highest
12 admit rate I saw on any of the JARs that I
13 looked at -- just the ones that I looked at,
14 was approaching 20 percent for MUSC.

15 Q: Okay. Now MUHA represents in its application
16 that's not gonna actually get any new market
17 share, but it's -- it's simply gonna redirect
18 existing market share that it already has to
19 its freestanding ED in Summerville, correct?

20 A: That's in theory, yes.

21 Q: Okay. Do you really believe, Ms. Murdock, that
22 MUHA, in starting a new freestanding ED at exit
23 199, will not cause it to increase its market
24 share in that area?

25 A: I believe it will increase its market share,



TMC, ET AL. V. SC DHEC, ET AL.

1686

1 but I don't think that that's an adverse
2 affects.

3 Q: Well if it increases its market share, that
4 means that somebody's gotta lose market share,
5 right?

6 A: Again, if it's an adverse affect it would need
7 to be an unreasonable reduction in market share
8 that's not balanced out by the benefits and the
9 accessibility. If we're using the adverse
10 impact project review criteria. A decrease in
11 the utilization rates of existing facilities
12 must be measured against the increase then the
13 increased benefits of accessibility. And so,
14 I would review that, kind of, on a non- -- a --
15 a reasonable standard and again, that's with
16 existing facilities. So if the reduction in
17 market share was unreasonable and unnecessary,
18 I believe, it may include the term unnecessary
19 but I'm not sure -- that would be -- that would
20 be something that I would look at but a change
21 in market share by itself is not automatically
22 adverse and -- and CON is not charged with
23 detecting the status quo of the facility's
24 market share.

25 Q: I understand that, but MUSC actually



TMC, ET AL. V. SC DHEC, ET AL.

1687

1 represented to the department that it wasn't
2 going to increase its market share at all.
3 Isn't that right?

4 A: It's -- it represented that it was not going to
5 -- that the -- that the -- there was going to
6 be redirection of patients from other
7 facilities.

8 Q: Okay. And that means that it's not going to
9 take any market share from anyone, correct?

10 A: Yes that -- that -- that was its theory.

11 **MR. THOMAS:** Okay. Can you -- can you put up that
12 slide just showing that exit 199, where the two
13 facilities are going to be located? Please.

14 Q: Okay. Have you seen this slide before?

15 A: It -- I don't think so.

16 Q: Okay. Well do you recognize this is exit 199?

17 A: I -- I don't know the exit number, but I -- I
18 recognize that as the -- the location of the
19 two projects ---

20 Q: Okay. Fair enough.

21 A: --- if that's north Main Street, Summerville.

22 Q: Okay. And that's what it says, North Main
23 Street. I-26. Sangaree over here. Sleep --
24 Sheep Island Road over there.

25 A: That looks like the -- the two -- the two



TMC, ET AL. V. SC DHEC, ET AL.

1688

1 facilities at issue here.

2 Q: All right. And I represent to you that that's
3 about a mile between those two facilities.

4 A: I believe that's right.

5 Q: Okay. And you actually made that drive, right?

6 A: Yes. Well I -- I -- I rode in the van while
7 Louis Miller drive, but yes.

8 Q: Okay. And before -- am I correct that, MUSC
9 was going to have their freestanding ED about
10 right there?

11 A: That looks about right. We -- we tried to,
12 based on the description of -- in the
13 application, we tried to find it. We think we
14 got close. That -- that's Simon (ph) Drive and
15 Main Street. Those are two of the streets that
16 were mentioned.

17 Q: So they were gonna be on the same side of I-26
18 off of exit 199? Prior to the, kind of, recent
19 changes?

20 A: Yes.

21 Q: Okay. And so, that's gonna be two facilities,
22 about the same size, right

23 A: Right.

24 Q: And you're gonna have duplicated operating
25 expenses, right?



TMC, ET AL. V. SC DHEC, ET AL.

1689

1 A: What do you mean by duplicated?

2 Q: Well they're -- they're gonna have ---

3 A: They'll both have operating expenses.

4 Q: Right.

5 A: Yes.

6 Q: Okay. So these two operating expenses are
7 going to be somewhat duplicated, correct?

8 A: Well ---

9 Q: For the two facilities?

10 A: --- yeah. Each one will have operating
11 expenses. I don't know that they'll be
12 identical so, it's I don't know if it's one
13 expense times two, but they'll both have
14 operating expenses.

15 Q: All right. They're gonna have -- both have a
16 certain level of overhead, correct?

17 A: Correct.

18 Q: They're both gonna have, you would think,
19 similar staff if they're gonna see a similar
20 number of patients, correct?

21 A: I -- I assume both are gonna have staff
22 according to their staffing plan, whatever
23 their -- whatever the regulations and other
24 regulations and their own, internal, process
25 requires.



TMC, ET AL. V. SC DHEC, ET AL.

1690

1 Q: Did you know ---

2 A: I would be surprised if they were similar.

3 Q: Right.

4 A: Similar staffing.

5 Q: Di- -- but did you notice on the CON
6 application that MUSC actually had double the
7 staff of Trident Medical Center?

8 A: Off the top of my head, I don't -- I don't
9 recall, exactly, what the differences were
10 between the two.

11 Q: Okay. When you made the drive, did you do any
12 -- did you do any drive times? Like, how close
13 these two would be together?

14 A: No. I -- I tried to start the clock, but I --
15 I failed miserably. I was trying to navigate
16 and I was doing a terrible job.

17 Q: Okay.

18 A: So, no.

19 Q: But you would think that you could get to those
20 two locations in a fairly quick amount of time,
21 wouldn't you?

22 A: Assuming there's no traffic, absolutely.

23 Q: Okay. Have you have any discussions with MUHA,
24 either in your meetings with counsel that we --
25 that are -- we du- -- discussed this morning,



TMC, ET AL. V. SC DHEC, ET AL.

1691

1 or otherwise, about the ownership structure for
2 this freestanding ED at Exit 199.

3 A: No.

4 Q: Okay. Did you have any idea -- I know you've
5 mentioned this -- this fellow, Deal. Did you
6 say his first name was Mason?

7 A: I think so.

8 Q: Okay. That Intuitive had, actually, something
9 to do -- Intuitive Healthcare had something to
10 do with the location change? Was that ever
11 explained to you?

12 A: In -- in -- in connection with Mason Deal?

13 Q: Yeah. Or -- or -- or otherwise.

14 A: I am still not aware that Mason Deal has
15 anything to do with this project, or
16 Intuitive's involvement with it.

17 Q: Okay.

18 A: Again, I'm not even sure Mason Deal is -- is
19 currently, or was with, Intuitive. Other than
20 the fact that I Googled his name and -- and
21 Intuitive, kind of, popped up on the Google
22 search list next to it, but as far as I know,
23 Mason Deal, is not associated, at all. But I
24 have no idea ---

25 Q: And as far as -- as far as you know, the way



TMC, ET AL. V. SC DHEC, ET AL.

1692

1 MUSC determined what its population was going
2 to be -- patient population at the freestanding
3 ED, was that it was going -- it is going to
4 treat patients that already go downtown, a
5 certain portion of those from the service area.
6 Is that -- is that right?

7 A: That was MUSC's theory, yes. A civilization
8 theory.

9 Q: And if you found out that, perhaps, they did a
10 different analysis, one that just looked at a
11 straight drive time from the Applebee's
12 location that also looked at high-income areas
13 -- would that cause you any concern, Ms.
14 Murdock?

15 A: That MUSC did an alternate analysis of the
16 project?

17 Q: Right.

18 A: Of the area?

19 Q: Yes. And how it was actually going to get its
20 patients. Would that have be- -- be concern of
21 you -- concern to you based on what you know
22 that they represent in the CON applications.
23 Potentially a patient shift.

24 A: What MUSC did in alternate analysis of the
25 service area, no. That in of itself, does not



TMC, ET AL. V. SC DHEC, ET AL.

1693

1 cause me concern.

2 Q: Okay. If you knew that it was based on market
3 capture and not patient switching, or
4 redirection, would that be of concern to you?

5 A: I ---

6 Q: Based on the representations and the CON
7 applications?

8 A: --- I would not be surprised if any applicant
9 did an assessment of the market. Whether or
10 not that was the assessment that they ended up
11 using as their, you know, basis for
12 projections, I -- I don't know. If it was an
13 alternate analysis, it -- it wouldn't, by
14 itself, cause any concern. If you're asking me
15 whether or not I think they falsified their
16 data in the ---

17 Q: I didn't ask you that ---

18 A: --- CON application ---

19 Q: --- I didn't ask you that ---

20 A: --- I don't think they did that.

21 Q: Okay. I didn't ask you that question, did I?

22 A: Okay. So, an independent analysis of the
23 market does not concern me.

24 Q: Okay. But you're not aware of one being done,
25 right?



TMC, ET AL. V. SC DHEC, ET AL.

1694

1 A: I have no idea.

2 Q: And as far as you know, what's been presented
3 to you as a patient shift analysis, which will
4 capture no new market shares, correct?

5 A: That was the theory of the -- the projection --
6 of -- of utilization that presented in the
7 application.

8 **MR. THOMAS:** Okay. Home stretch. Let's go to Joint
9 1 at 29.

10 Q: This is the alternative facilities and or
11 services considered. You're familiar with
12 this, aren't you?

13 A: Yes.

14 Q: Okay. Now MUSC did -- did not list Mount
15 Pleasant as an alternative, did it?

16 A: As an alternative site for the FSED?

17 Q: Sure.

18 A: I don't believe they did.

19 Q: Okay. It didn't list West Ashley as an
20 alternative location either, did it?

21 A: I don't -- it doesn't appear that they did.

22 Q: Okay. And as far as you know, as the CON
23 director, are there are any freestanding ED's
24 in Mount Pleasant -- the fourth largest city in
25 South Carolina?



TMC, ET AL. V. SC DHEC, ET AL.

1695

1 A: I -- I'm not disputing it's the fourth largest
2 city in South Carolina, or what measure you're
3 using for that, but I don't know that there is
4 a -- I don't believe that there is a
5 freestanding ED in Mount Pleasant.

6 Q: If there was, it -- it should appear in the
7 inventory in the state health plan, correct?

8 A: If not, I'd have lots of questions.

9 Q: And -- and West Ashley, you're -- you're
10 familiar with the Charleston area, right?

11 A: Yes, I am.

12 Q: West Ashley is a fairly high-density populated
13 area in Charleston County, isn't it?

14 A: I -- I believe it's pretty close to downtown
15 Charleston and, therefore, is one of the many
16 highly -- densely populated areas.

17 Q: Okay. Are you aware of any freestanding ED's
18 in the West Ashley area?

19 A: No.

20 **MR. THOMAS:** Okay. Bear with me, Your Honor. I
21 have no further questions, Your Honor.

22 **THE COURT:** Okay. We'll take a two minute break
23 before we come back for Ms. Biggers' redirect.

24 **(Off the Record)**

25 **THE COURT:** Everyone ready? Ms. Biggers, you can



1 proceed with your redirect.

2 **MS. BIGGERS:** Your Honor, I don't have any redirect.

3 **THE COURT:** Oh, you don't?

4 **MS. BIGGERS:** No, Your Honor.

5 **THE COURT:** Okay.

6 **MS. BIGGERS:** Then, with your permission, may the
7 witness be excused?

8 **THE COURT:** Yes.

9 **MS. BIGGERS:** And ---

10 **THE COURT:** Thank you for coming, Ms. Murdock.

11 **MS. BIGGERS:** The Department rests.

12 **THE COURT:** Okay. Now we're at 4:00. Do we have
13 time for -- how many witnesses do you have?

14 **MR. DAYHUFF:** Well we have Dr. Cawley here, the CEO
15 of MUSC and he's prepared to take the stand and
16 we're prepared to open our case if that suits
17 the Court.

18 **THE COURT:** Okay. And I fully expect that Dr.
19 Cawley's testimony is going to be a -- this I
20 understand is going to be rather lengthy.

21 **MR. DAYHUFF:** Well my direct will be an hour, I
22 would guess, maybe an hour and a half. I
23 suppose if history is our precedent here that,
24 yeah, the cross would be lengthy. But I've
25 missed some of it. I've heard a lot about it.



TMC, ET AL. V. SC DHEC, ET AL.

1697

1 **THE COURT:** Well I tell you what. Let's go ahead
2 and let's do Dr. Cawley's direct.

3 **MR. DAYHUFF:** Thank you.

4 **THE COURT:** And we'll get to his cross. Okay, Dr.
5 Cawley, before you take your -- your seat would
6 you face the court reporter, raise your right
7 hand and he'll swear you.

8 **PATRICK CAWLEY, M.D.,** having been duly sworn,
9 testifies as follows:

10 **DR. CAWLEY - DIRECT EXAMINATION BY MR. DAYHUFF:**

11 Q: Dr. Cawley, how are you?

12 A: Good.

13 Q: Where do you reside?

14 A: Mount Pleasant.

15 Q: It's my understanding, Dr. Cawley, that you are
16 the Executive Director and CEO of the MUSC
17 Medical Center. Is that correct?

18 A: Yes.

19 Q: And we've asked you here today to talk about a
20 few things, MUSC, generally, MUSC's ED
21 facilities and, last but not least, our
22 proposed FED in Summerville. Are you prepared
23 to offer testimony on those topics today?

24 A: I am.

25 Q: All right. And certain demonstratives have



TMC, ET AL. V. SC DHEC, ET AL.

1698

1 been prepared that will help you provide that
2 testimony in court today.

3 A: Yes.

4 Q: All right. Let's begin with our first
5 demonstrative, Dan, and that's a general ...
6 So it's my understanding that there are three
7 main elements at MUSC. We have this
8 demonstrative. Could you, briefly, explain the
9 different MUSC entities?

10 A: Sure. Each of these entities are entities that
11 are at MUSC. We have Medical University of
12 South Carolina in the middle, which is the main
13 entity. And then the other entities exist to
14 help fulfill the mission of the Medical
15 University of South Carolina.

16 Q: All right. We'll start in the middle. Do you
17 have a leadership role in the -- with Med U?

18 A: I do. I'm a vice president of Health Affairs
19 within the University.

20 Q: What are your main duties as the VP of Health
21 Affairs for the Med U?

22 A: At -- in that role, it's mainly to make sure
23 that any other entity or anything that happens
24 within the University in regards to clinical
25 care is appropriately coordinated.



TMC, ET AL. V. SC DHEC, ET AL.

1699

1 Q: And do you also have a professorship through
2 the Med U?

3 A: I do.

4 Q: All right. What's -- what is your
5 professorship ---

6 A: I'm an Associate Professor of Medicine.

7 Q: All right. Do you teach at the Med U?

8 A: I do.

9 Q: In what medical specialty?

10 A: Internal medicine.

11 Q: All right. Let's talk about -- well we
12 mentioned earlier, the hospital. You are the
13 ED and CEO of the MUSC Medical Center. What
14 are your main duties and responsibilities as
15 the ED and CEO of that institution?

16 A: As the ED and CEO my main duties are to make
17 sure that the hospital, which is the main
18 clinical site for the -- for MUSC that fiscally
19 and quality are at its peak.

20 Q: All right. And tell us about the last big box,
21 practice plan. What is that?

22 A: That is the physician practice plan. That's
23 very common in many health systems now.
24 Physicians in separate legal entity. That's
25 done mainly for governance -- self-governance



TMC, ET AL. V. SC DHEC, ET AL.

1700

1 reasons, amongst the physicians. And my role
2 there is, I sit on the board. University of
3 Medical Associates, also known as MUSC
4 Physicians.

5 Q: Now you mentioned you taught, do you also
6 practice, medicine?

7 A: I do.

8 Q: All right. And what type of medicine do you
9 practice?

10 A: Hospital medicine.

11 Q: All right. And is that practice done through
12 the practice plan?

13 A: It is.

14 Q: All right. Where did you go to medical school?

15 A: I went to Georgetown University in Washington
16 DC.

17 Q: And did you do a residency up in medical
18 school?

19 A: I did. At Duke University Medical Center in
20 Durham, North Carolina.

21 Q: And what was the specialty area for your
22 residency?

23 A: In- -- Internal Medicine.

24 Q: All right. These three entities, or three
25 elements, at MUSC that we've discussed,



TMC, ET AL. V. SC DHEC, ET AL.

1701

1 hospital, Med U, practice plans. Will they all
2 three have a role in the FED, if it's
3 established?

4 A: Yes.

5 Q: All right. Let's talk about that role a little
6 bit later. Let's talk, first, about our
7 current ED resources. Now, because Dr. Hall,
8 our ED director for the adult main ED,
9 testified last week, Monday, he went through a
10 lot of detail about the MUSC ED resources, so
11 I want to keep it to a brief overview today if
12 that's all right. How many ED facilities do we
13 have at MUSC?

14 A: We have three facilities.

15 Q: All right. And this demonstrative was put
16 together, related to those. What's -- tell us
17 about the rooms in each of the facilities.

18 A: Sure. All three of those facilities are on the
19 peninsula in Charleston, within a city, or --
20 or city block of each other. The adult ER's in
21 the University Hospital. It's for the one
22 beds. The Peds ER is also in the University
23 Hospital. They will be moving, and the next
24 few months, to the new Shawn Jenkins Children's
25 Hospital. And the chest pain ER is over in



TMC, ET AL. V. SC DHEC, ET AL.

1702

1 Ashley River Tower, which is about a block away
2 from the University Hospital.

3 Q: All right. And you mentioned the -- the new
4 Shawn Jenkins, or the -- moving the Peds ED
5 over to Shawn Jenkins. When is that gonna
6 occur?

7 A: It's gonna occur at the beginning of October of
8 this year.

9 Q: All right. What's gonna happen to the Peds ED
10 when you open the new Peds ED in the Children's
11 Hospital?

12 A: That hasn't been fully decided yet, but we're
13 looking at using that current Peds ED space in
14 University Hospital and using it to expand the
15 adult ER. We're looking at that -- if we do
16 that, we, likely, will not get the full 16
17 beds. But we're looking at it. We might have
18 to, actually, decrease it to 12 beds. And
19 we're mainly looking at it to use as a pop off
20 area for mental health patients that are -- are
21 boarding.

22 Q: All right. And we heard Dr. Hall testify about
23 something called E pod, and four rooms in E
24 pod. What's your understanding of E pod in
25 those four rooms?



TMC, ET AL. V. SC DHEC, ET AL.

1703

1 A: Well there -- there are two pods -- two mental
2 health pods in the adult ER today, a D pod and
3 E pod. Both are used for mental health
4 patients and so, the thought is that we will
5 move all of E pod or -- or part of D pod, as
6 well, to this Peds ED space. How many patients
7 we could fit in there, is not quite determined
8 yet.

9 Q: So Dr. Hall testified that the E pod may be
10 shut down as a result of its condition. What's
11 your understanding of what that?

12 A: Once again, we haven't fully determined that
13 yet. That's been discussed. They are small.
14 We -- we do get overwhelmed with mental health
15 patients almost every day. We have, probably,
16 20 to 30 patients, every single day, seven days
17 a week, boarding in the emergency department
18 so, there's a lot of talk to shut it down
19 because those rooms are small, but it hasn't
20 been determined yet.

21 Q: All right. Well if those rooms are shut down,
22 that would leave you 14 spaces. Is that
23 correct?

24 A: That would leave us 12 spaces in the Peds ED
25 space or what ---



TMC, ET AL. V. SC DHEC, ET AL.

1704

1 Q: I'm sorry ---

2 A: --- that says Peds ED. Yeah.

3 Q: That's great, the arithmetic I just did.

4 A: Yeah.

5 Q: 12 spaces. In those 12 spaces, and I
6 understand the plan hasn't been finalized ---

7 A: Correct.

8 Q: --- what type of ED patients would those 12
9 spaces, likely, take care of?

10 A: At the moment, we are mainly looking at mental
11 health patients.

12 Q: All right. All right. Do you know how many
13 total ED visits your facilities in the downtown
14 get per year?

15 A: About 80,000.

16 Q: All right. In your role, as the CEO of the
17 hospital, are you generally familiar with the
18 geographic areas for which you receive ED
19 patients?

20 A: Yes.

21 Q: And are you generally familiar with the volume
22 of patients you receive in these areas?

23 A: Yes.

24 Q: All right. Approximately what percent of
25 MUSC's ED visits come from the tri-county area,



TMC, ET AL. V. SC DHEC, ET AL.

1705

1 Berkeley, Dorchester and Charleston?

2 A: About 80 percent of those 80,000.

3 Q: All right. And then the 20 percent presumably
4 come from elsewhere, where is that?

5 A: It comes from outside the tri-county area,
6 which is really spread across the rest of South
7 Carolina.

8 Q: All right. Why does MUSC draw ED patients from
9 the broader area with that percentage of heart
10 patients?

11 A: In overall we -- about -- a little more than
12 half of our patients come from outside the
13 tri-county area and I think a lot of that has
14 to do with our sub-specialty care and some of
15 the other services we provide that no one else
16 provides.

17 Q: All right. And that half of patients that you
18 just mentioned to me, is all hospital patients?

19 A: Correct.

20 Q: Okay. All right. Understood, but with respect
21 to ED patients it's 20 percent?

22 A: Correct.

23 Q: All right. So we've been talking in this trial
24 about the north area, and we've defined that as
25 Berkeley County, Dorchester County and the



TMC, ET AL. V. SC DHEC, ET AL.

1706

1 North Charleston area. Do you have an estimate
2 of about what percent of your 80,000 visits
3 come from the north area?

4 A: About 20 -- 25 percent.

5 Q: All right. And if it's 25 percent -- I'll try
6 some arithmetic again, and if it's 80,000
7 folks, that's how many visits?

8 A: 20,000.

9 Q: 20,000 visits. So for those 20,000 visits to
10 our ED services, those folks are traveling from
11 the north area all the way downtown?

12 A: Correct.

13 Q: All right. Is that an easy distance and an
14 easy area to travel, from the north area down
15 to our EDs?

16 A: It used to be. It's no longer that easy.

17 Q: All right. What -- what are the issues that --
18 that folks face?

19 A: Well, in the last six, seven years it's just
20 been the total number of people on the road and
21 Charleston is more crowded. So that distance,
22 during non-peak travel time, easily, is 25 to
23 30 minutes. During any other time it could be
24 -- it could be an hour to an hour and a half.

25 Q: As the CEO of MUSC Health -- CEO of the



TMC, ET AL. V. SC DHEC, ET AL.

1707

1 hospital, are you generally familiar with the
2 population and the geographic areas where we
3 discussed where we get patients from?

4 A: Yes, I am.

5 Q: Over the past five years, has the tri-county
6 area experienced growth?

7 A: It has.

8 Q: All right. Is that tri-county area projected
9 to continue experiencing growth?

10 A: Yes.

11 Q: Now let's focus more narrowly on the north area
12 -- Berkeley, Dorchester, North Charleston. Has
13 that smaller area and experience population
14 growth in the past five years?

15 A: Yes.

16 Q: And is it projected to continue?

17 A: Yes.

18 Q: Now, are the -- where is the -- thinking about
19 the north area, for a minute. Where is the
20 growth and projected growth focused in the
21 north area? Are there particular parts of it?

22 A: Yes. It's heavily aro- -- along the I-26
23 corridor and a few miles on each side.

24 Q: All right. We've got a demonstrative. There's
25 the I-26 corridor. Are there particular areas



TMC, ET AL. V. SC DHEC, ET AL.

1708

1 along that corridor or that are experiencing
2 the high-growth? And could you identify some
3 of those?

4 A: Yeah. I mean -- I mean -- it -- the growth
5 actually goes from 526 all the way up to, you
6 know, just a little bit north of where that
7 Nexton -- the sign is and -- but the heaviest
8 growth is in that Summerville and kind of going
9 across 26.

10 Q: What -- do you know what's driving the
11 population growth in those particular areas?

12 A: It's people moving to Charleston for -- there's
13 a lot of new housing development going on up
14 there. There's a lot of new businesses, you
15 know. On this slide there's Boeing, Mercedes,
16 Volvo and -- and all other kinds of associated
17 companies. And just all that together is,
18 just, putting a lot of pressure in that area.

19 Q: Now with respect to the specific growth rates
20 and specific projected growth rates for the
21 north area and the tri-county, would you defer
22 to Mr. Levitt being a healthcare planner on the
23 ---

24 A: Yes.

25 Q: --- on that?



TMC, ET AL. V. SC DHEC, ET AL.

1709

1 A: Yes, I would.

2 Q: All right. In your role as CEO of the
3 hospital, are you made aware of challenges that
4 face your hospital EDs?

5 A: Yes.

6 Q: All right. We heard Dr. Hall testify about the
7 adult main ED. Is it your understanding that
8 that ED is experiencing issues -- challenges?

9 A: Yes.

10 Q: What are those challenges?

11 A: I -- I would say there's three things affecting
12 the -- that ED. First, it's its access, just
13 patients getting to it -- patients that want to
14 come to us. Given everything we just talked
15 about, in terms of timing to get there. That's
16 -- that'd be the first thing. The second thing
17 is capacity. It is -- it is jammed, it's --
18 frequently we have, like I said before, 20 to
19 30 patients, almost every single day, boarding.
20 A lot of mental health patients as well. And
21 then the third issue is heavy constraint on
22 teaching.

23 Q: All right.

24 A: So ---

25 Q: I don't think we've heard that. Explain that



1 to me.

2 A: So we, at MUSC, we have many kinds of students
3 we teach. We also have fellows and residents.
4 And students could be medical students, nursing
5 students, pharmacy students -- we have a lot of
6 students, as well, and given that the ER is a
7 very common place for all of them to work in
8 the future, we have to provide an ER which has
9 that capability to teach them in that
10 environment. And it -- that is just heavily
11 constrained. You know, we have more students,
12 more residents, more fellows, it's just -- that
13 means more people. And it's already jam-packed
14 with patients. It's hard to have that number
15 of learners as well.

16 Q: How long has the MUSC adult main ED been
17 experiencing these capacity issues you're
18 describing?

19 A: It's -- it's been steadily increasing over the
20 last five, six years.

21 Q: All right. And would you defer to Dr. Hall's
22 testimony about the -- we've heard a lot about
23 ED metrics, the quantification of these
24 capacity issues and things like length of
25 waiting time, left without treatment -- those



TMC, ET AL. V. SC DHEC, ET AL.

1711

1 things. Would that be Dr. Hall's ---

2 A: Yes. He can give you much more -- much better
3 specifics.

4 Q: All right. Let's shift and talk about our
5 proposed FED. Now, if the CON application's
6 approved by this Court, where will our FED be
7 located?

8 A: It'd be located -- you're looking on that map
9 right there, right at the 199 exit, which is
10 just to the right of that Summerville dot.

11 **MR. DAYHUFF:** All right. Dan could you move to our
12 next demonstrative? Look at that, that's
13 bigger than ---

14 A: Wow.

15 Q: But is that approximately where our FED would
16 be located?

17 A: It is.

18 Q: All right. Now where is that FED in relation
19 to the high-growth and projected growth areas
20 that we talked about in the north?

21 A: It's just about right in the middle of it.

22 Q: All right. Now we talked about this FED a lot.
23 You told me there were three main reasons that
24 MUSC is interested in establishing this FED.
25 What are those reasons?



TMC, ET AL. V. SC DHEC, ET AL.

1712

1 A: Well, as I just said a few minutes ago, number
2 one would be access, so getting our patients to
3 a more convenient site. The second reason is
4 the capacity. The downtown ERs are full. And
5 then the third reason is having capacity to
6 teach.

7 Q: Gotcha. What responsibility, if any, do you
8 feel as the CEO of the hospital to provide MUSC
9 patients with the ED facilities that they need?

10 A: Oh, I think it's my prime -- prime duty.

11 Q: All right. Have other major hospital systems
12 in the three county area been able to establish
13 FEDs to expand the geographic reach of their
14 services and increase access for people?

15 A: Yes.

16 Q: All right. Let's go back to that first
17 demonstrative, just to touch on this. Again,
18 you mentioned, in your testimony and I held off
19 talking about it, or having you talk about it,
20 that each MUSC element plays a part, or will
21 play a part, in our FED if it gets approved.
22 So start with the hospital. What will the
23 hospital's role be with ---

24 A: So, the hospital's role is to hold the license
25 and, ultimately, run the freestanding ER. We



TMC, ET AL. V. SC DHEC, ET AL.

1713

1 provide staff, we provide supplies, some -- you
2 know, all the things necessary to, basically,
3 run and operate that freestanding ER.

4 Q: What role, if any, will the hospital plate with
5 respect to processes and policies and
6 procedures for the ---

7 A: It would all -- it would be 100 percent
8 hospital ER -- hospital and hospital ER
9 policies and procedures.

10 Q: What role, if any, would be MUSC Hospital play,
11 with respect to quality assurance, quality
12 improvement?

13 A: The FED would be subject to our quality process
14 within the medical center and the hospital.

15 Q: All right. How about the Med U, the school?
16 What role would the school have?

17 A: The school would provide learners, students,
18 pharmacy students, nursing students, residents,
19 fellows. The school would also provide
20 attending physicians. We would oversee them
21 and see patients and teach them.

22 Q: All right. So, I suppose, the benefit to the
23 students is pretty obvious, they get to learn.
24 Is there a benefit -- what benefit is there to
25 the patients that would be at that FED from



TMC, ET AL. V. SC DHEC, ET AL.

1714

1 having, let's say, residents working with
2 professors and practicing together?

3 A: Yeah. I've worked in and out of academic
4 systems for almost 30 years, and, I think,
5 there's a different kind of care is that you
6 get when you're subject to all that
7 interdisciplinary involvement of many kinds of
8 students and I -- I think it actually enhances
9 care.

10 Q: All right. And -- what's the last one --
11 practice plan. What role with the practice
12 plan have, if any, in our ---

13 A: The practice plan would operate the physician
14 practices. So the physicians from the
15 University would practice there. It's up to
16 the practice plan to operate that practice, do
17 the billing, you know, etcetera -- anything
18 that's done to run a physician practice.

19 Q: And will the emergency medicine physicians, in
20 the practice plan at MUSC, staff the FED?

21 A: Yes.

22 Q: All right. And those are folks that, in
23 addition to practice, they teach?

24 A: Yes.

25 Q: They write, they research?



TMC, ET AL. V. SC DHEC, ET AL.

1715

1 A: Yes.

2 Q: All right. Take a look at Exhibit 28 and
3 identify that for the court.

4 **(Respondent MUSC's Exhibit Number 28 was introduced**
5 **into the record at this time.)**

6 A: This is a schematic of our proposed emergency
7 department.

8 Q: All right. And let's look at Exhibit 29. What
9 is this?

10 **(Respondent MUSC's Exhibit Number 29 was introduced**
11 **into the record at this time.)**

12 A: It's the same schematic, it's just a different
13 pictorial -- make it easier to read.

14 Q: Easier to read. All right. So this schematic
15 describes what we plan to establish in
16 Summerville. Is that right?

17 A: Yes.

18 Q: How many treatment rooms do we have in this
19 FED?

20 A: I believe there's 12.

21 Q: All right. Now some of those treatment rooms
22 are labeled exam on here and some of them are
23 fast track. What is fast track?

24 A: Well, in any ER, there are patients that have
25 a lower acuity -- all the ER's see two types of



TMC, ET AL. V. SC DHEC, ET AL.

1716

1 patients, low acuity and higher acuity. Lower
2 acuity patients are often called fast track
3 patients, other names given to them, as well,
4 and it's basically an area where the patients
5 can be seen quicker and get out faster.

6 Q: All right. Now will this FED utilize
7 telehealth?

8 A: Yes it will.

9 Q: How will it utilize telehealth?

10 A: Well we -- we use telehealth a lot. MUSC is
11 heavily involved in telehealth and we see
12 bringing our almost full range telehealth
13 services to this emergency room. We use
14 telehealth with other emergency rooms today,
15 that are not ours, in that circumstance, we
16 expect doing that as a minimum and being able
17 to take many more telehealth services to this
18 facility as well.

19 Q: So what do we do for other facilities,
20 primarily? Is it neurology?

21 A: We do neurology, critical care, pediatric
22 critical care, a number of services.

23 Q: So we would do all that at this FED?

24 A: Yeah. We would do all those things and
25 actually bring more. It's very similar to the



TMC, ET AL. V. SC DHEC, ET AL.

1717

1 new hospitals that we purchased. You know,
2 it's hard to get hospitals to take on new
3 telehealth services. They tend to take on,
4 maybe, one or two a year, but if we could bring
5 our full suite of services, which is about 80-
6 something programs -- faster, since they're us
7 now. So we expect to bring all kinds of
8 telehealth services to this FED.

9 Q: Well just give us an example of the more. I
10 understand neurology, I understand the -- the
11 psych- ---

12 A: The rheumatology consults, the endocrinology
13 consults, I -- I mean, any kind of specialty
14 you can think of, we can deliver telehealth
15 services through.

16 Q: What effect, if any, would our ability to have
17 a more robust telehealth presence have on our
18 ability to treat more acute patients at the
19 FED?

20 A: I -- I think it, completely, expands our
21 ability to do that.

22 Q: All right. Let's take a few minutes and talk
23 about the FED CON application. Let's go to
24 page 1, the beginning of this adventure. When
25 did we file our CON application for the FED?



TMC, ET AL. V. SC DHEC, ET AL.

1718

1 A: June of 2017.

2 Q: June of 2017. Now did you draft this CON
3 application?

4 A: I did not.

5 Q: Who was the primary author of this CON
6 application?

7 A: David Levitt was the primary author.

8 Q: All right. And did David Levitt -- was he
9 provided information from your folks, your
10 staff?

11 A: Yes. Our office is strategic in supplying him
12 data and information to help write that
13 application.

14 Q: And before this CON application was filed, did
15 you review it?

16 A: Yes.

17 Q: All right. Let's just look at some parts of
18 it. Let's look at page 27. So this is a
19 figure from the CON application, and --
20 historical and projected ED volume for the FED.
21 Now, with respect to -- who -- who created the
22 analysis in this figure, by the way?

23 A: David Levitt.

24 Q: All right. Now, with respect to total growth,
25 total ED visits, what is this figure



TMC, ET AL. V. SC DHEC, ET AL.

1719

1 demonstrating? What is its point, with respect
2 to ---

3 A: It shows, over time, that the -- the total ER
4 services at MUSC is going to grow.

5 Q: All right. And there's this -- another
6 phenomenon in their that -- that Dan has
7 helpfully highlighted -- shift. What is that
8 -- what is that?

9 A: Sure. So this -- if this ER were available to
10 be opened in 2019, I think we would begin to
11 see a shift of patients not going all the way
12 down to the peninsula to be seen, but being
13 seen in this -- in this facility.

14 Q: Now you're not a health planner, in this case,
15 and we've got lots of health planners here, but
16 from your perspective as an administrator, is
17 the projection of continued growth in ED visits
18 a reasonable one?

19 A: Yes.

20 Q: Why?

21 A: Mainly due to the population growth in
22 Charleston.

23 Q: All right. With respect to the shift, I
24 imagine you can't opined about whether 15,129
25 has been an appropriate number, but as an



TMC, ET AL. V. SC DHEC, ET AL.

1720

1 administrator, does a shift make sense?

2 A: Yes.

3 Q: Why?

4 A: Well, I -- this -- this facility will be closer
5 for a number of patients, as we talked about
6 earlier, and they are gonna go to MUSC as a
7 facility right there. Instead of coming all
8 the way down, they're gonna -- they're gonna
9 stop at this facility rather than come on down
10 the peninsula.

11 Q: All right. Let's take a look at the pro forma
12 of CON. Now, Dr. Cawley, did you create this
13 pro forma?

14 A: I did not.

15 Q: All right. Who did?

16 A: This was done with David Levitt and John
17 Cooper.

18 Q: Now I recall from your deposition, there was a
19 little a little confusion about the title of
20 this pro forma, do you want to explain that?

21 A: Sure. I think during the deposition, I was
22 shown the sheet and it says, MUSC help
23 emergency services at the top and, I think I
24 was asked the question, was this all ERs or was
25 this -- what did this represent, and at the



1 time I didn't know. I thought it was, maybe,
2 the entire ER services.

3 Q: Well what is your understanding after reviewing
4 that, after the deposition, what is this a pro
5 forma for?

6 A: Yeah. This is simply the pro forma for this
7 freestanding ER.

8 Q: All right.

9 **MR. DAYHUFF:** Now let's go down to the footnotes
10 there, Mr. Buff, and revenue, volume -- there's
11 some volume numbers embedded in this.

12 Q: Are those the volume numbers we just looked at?

13 A: Yes.

14 Q: All right. Now, generally, even setting this
15 one aside -- this pro forma aside. When you
16 have a CON project, as the CEO of the Medical
17 Center, what's the nature of your review of the
18 pro forma?

19 A: Well the -- the main thing I look for is,
20 what's on the net income line and if it's
21 positive that makes it an easier decision. If
22 it's not positive then it leads to other
23 discussion.

24 Q: Now do you analyze the line items of expenses
25 and supplies and all that kind of thing for



TMC, ET AL. V. SC DHEC, ET AL.

1722

1 your review?

2 A: Not -- not specifically. I may scan them and
3 look just to make sure it doesn't -- there's
4 nothing odd, but -- but, in general, I usually
5 go to the bottom.

6 Q: All right. And you reviewed this pro forma, as
7 part of your review, before you signed the CON
8 application?

9 A: Yes.

10 Q: Well let's look at that area that you're
11 interested in, net income. What conclusion, if
12 any, did you draw from your review of the net
13 income figure for this?

14 A: That this facility would make money and it
15 should be, from a financial perspective, it
16 should be good to go.

17 Q: All right. Good. All right. Now we noted a
18 moment ago that this was filed in June of 2017.
19 It is now July of 2019, are there some
20 differences in what we proposed back in June of
21 2017 and what we proposed to do now?

22 A: Yes. There are some changes.

23 Q: Well let's -- let's talk about this, let's
24 compare some of this. Unless just -- we can
25 talk about it, generally, at first. Is the



TMC, ET AL. V. SC DHEC, ET AL.

1723

1 location the same?

2 A: No.

3 Q: All right. Is the size the same?

4 A: No.

5 Q: Cost?

6 A: No.

7 Q: All right. Let's put up a demonstrative. Now
8 let's talk about the location. How did the
9 location change?

10 A: We moved, as the demonstrative says, about
11 three quarters of a mile from the original
12 site.

13 **MR. DAYHUFF:** Okay. Let's look at 33 please. MUSC
14 33 that, I think, is in evidence.

15 Q: So does this map accurately represent the
16 original FED site and the current FED site?

17 A: It -- yes, it has both.

18 Q: So was the old location in Berkeley County?

19 A: Yes.

20 Q: Was the -- is the new location?

21 A: Yes.

22 Q: Was the old location accessed from exit 199?

23 A: Yes.

24 Q: How about the new?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1724

1 Q: All right. And I think you just mentioned the
2 old and new are how far apart?

3 A: Three quarters of a mile.

4 Q: All right. Why did MUSC change the location
5 from the original site to the current?

6 A: Over the last two years -- year and a half,
7 really -- you know, as things have taken a
8 while to go through the process here, we've
9 done some additional analysis and have felt
10 that this site would be a little better in
11 terms of access and that was the primary reason
12 we made that change. We also didn't think the
13 change was that significant, given that it's
14 where it's at.

15 Q: Okay. Let's go back to that demonstrative and
16 see what the second line was. Size and cost.
17 Talk to me about the difference in size and
18 cost.

19 A: Well the cost is, simply, less now and that's
20 mainly driven by the third line there, is that
21 the Clinical Decision Unit, which is the CDU,
22 was in the original application. We decided to
23 remove that, we also decided to remove the
24 helipad.

25 Q: Okay. And so, if I understood you, the CDU is



TMC, ET AL. V. SC DHEC, ET AL.

1725

1 the primary driver of the decrease in size. Is
2 that right?

3 A: That is correct.

4 Q: And what, roughly, the decrease in size that we
5 are experiencing through that?

6 A: I mean, it goes from 15,000 square feet to just
7 shy of 11,000.

8 Q: And I think I understood you to say that CDU
9 and helipad being deleted -- is that the
10 primary driver of the decrease in costs?

11 A: Yes.

12 Q: And what is that, 2 million ---

13 A: Yes.

14 Q: --- 2.3 million? All right. So I understand
15 eliminating items for cost, do we need a CDU?
16 What was your conclusion about the need for the
17 CDU?

18 A: Well, at the beginning, when we were looking at
19 this we felt there was a need for a CDU. As we
20 further looked into it and further did analysis
21 and -- and talked with others in -- who run and
22 operate emergency departments, particularly
23 freestanding, that the addition of a CDU didn't
24 give us a lot of extra advantage.

25 Q: All right. How about the helipad? Did we --



TMC, ET AL. V. SC DHEC, ET AL.

1726

1 did we need a helipad -- do we need a helipad?

2 A: Well, I mean, we may need a helipad on rare
3 occasion, but a dedicated helipad is what we're
4 talking about here. So, we removed the
5 dedicated helipad, and we can make a helipad,
6 if needed, by using the parking lot. So, once
7 again, we did some additional analysis and felt
8 that the helipad could be safely removed.

9 Q: All right. Now did the number of treatment
10 rooms -- 12 treatment rooms, I believe you said
11 our FED has, did that change?

12 A: No.

13 Q: MUSC filed the CON application for the FED in
14 2017, June. When did we file the CON
15 application for the community hospital?

16 A: I think that was in December of the same year,
17 2017.

18 Q: 2017. And just for the record, where is the
19 community hospital proposed to be located?

20 A: It's -- go back to the other demonstrative.
21 It's to ---

22 **MR. DAYHUFF:** Go to 33, please.

23 A: It's to -- it's up -- well you see that Nexton
24 sign, it's a -- just -- just about there.

25 Q: All right. Now that CON application says that



TMC, ET AL. V. SC DHEC, ET AL.

1727

1 the FED will be folded into the community
2 hospital, if and when it opens. Is that still
3 the plan?

4 A: No.

5 Q: Why not?

6 A: Well, once again, as we did some additional
7 analysis, we found that a freestanding ER
8 that's -- even if it's close to your own
9 hospital, it serves a different patient
10 population often and then, if we're keeping it
11 open, would be -- would be reasonable.

12 Q: Now, from your perspective as an administrator,
13 what is your overall assessment of the original
14 FED compared to the one we propose today?

15 A: Well I think, overall, it's a better ---

16 Q: Why is it better?

17 A: --- proposal. It's cheaper, number one.
18 Number two, it's also smaller. Number three,
19 it's better access for patients and both,
20 actually, still gave us capacity and gave us a
21 chance to teach.

22 Q: All right. So achieving your goals for less
23 cost?

24 A: Yep.

25 Q: All right. So there is been a lot of talk, and



TMC, ET AL. V. SC DHEC, ET AL.

1728

1 a lot of documents related to an entity called
2 Intuitive Health. What is Intuitive Health?

3 A: Intuitive Health is a operator and manager of
4 emergency room service -- emergency department
5 service.

6 Q: Now -- and have MUSC folks had discussions and
7 communications with Intuitive folks?

8 A: We have.

9 Q: Have those discussions and communications
10 included emails?

11 A: Yes.

12 Q: Telephone calls?

13 A: Yes.

14 Q: Sharing of data -- MUSC sharing data with
15 Intuitive?

16 A: Yes.

17 Q: How about webinars?

18 A: Yes.

19 Q: How about visits?

20 A: Yes.

21 Q: All right. Approximately when did those
22 discussions and communications begin?

23 A: Sometime in the Fall of 2017.

24 Q: All right. And are you familiar with a non-
25 disclosure agreement that was entered into?



TMC, ET AL. V. SC DHEC, ET AL.

1729

1 A: Yes.

2 Q: Between Intuitive and MUSC?

3 A: Yes.

4 Q: Why would you have entered into a non-
5 disclosure agreement with Intuitive?

6 A: Well anytime we talk to any external party and
7 we think we may share information, we always
8 sign an NDA. So it's fairly common for us to
9 sign NDAs with anybody were talking to about
10 pretty much any reason.

11 Q: And that -- does that protect something?

12 A: Yeah. It protects, and particularly, MUSC.
13 I'm assuming it protects the other entity as
14 well, but it protects MUSC from indiscriminate
15 disclosure of our plans and things we're
16 working on.

17 Q: All right. And how about data, did you
18 provide?

19 A: We did.

20 Q: Now when did you enter into that NDA with
21 Intuitive?

22 A: It was in November of 2017.

23 Q: All right. Now we talked about, kind of, the
24 mode of communications, I suppose. I want to
25 ask about topics and whether MUSC and Intuitive



TMC, ET AL. V. SC DHEC, ET AL.

1730

1 folks talk about topics. How about potential
2 sites for FEDs?

3 A: We did.

4 Q: How about the size and layout of FEDs,
5 generally?

6 A: Yes. We do.

7 Q: How about the size and layout of the
8 Summerville FED, in particular?

9 A: Yes.

10 Q: How about elements like the CDU and helipad,
11 were those discussed?

12 A: Yes. They were.

13 Q: All right. How about the Intuitive urgent care
14 ED hybrid model, was that discussed?

15 A: Yes. It was discussed.

16 Q: We'll talk more about that model in a minute.
17 How about did you -- what communications, if
18 any -- were there communications about
19 potentially working together in South Carolina?

20 A: Yes.

21 Q: Did Intuitive provide MUSC with a package that
22 outlines Intuitive proposals?

23 A: Yes. They did.

24 Q: All right. Did that package include site
25 information?



TMC, ET AL. V. SC DHEC, ET AL.

1731

- 1 A: It did.
- 2 Q: Market analysis?
- 3 A: It did.
- 4 Q: Pro forma?
- 5 A: It did.
- 6 Q: Staffing?
- 7 A: Yes.
- 8 Q: How many calls and meetings with Intuitive did
9 you personally participate in?
- 10 A: I personally participated in, I believe, two.
- 11 Q: All right. Do you have any doubt that the
12 folks from strategic planning, or any of the
13 other divisions from MUSC, had many more calls
14 and emails ---
- 15 A: Sure.
- 16 Q: --- with Intuitive?
- 17 A: Absolutely.
- 18 Q: All right. I think you did participate in a
19 site visit. You went to visit it.
- 20 A: I did.
- 21 Q: When was that?
- 22 A: That was in the Fall of 2018.
- 23 Q: 2018. All right. Who all went, if you recall?
- 24 A: Several of us went. Matt Wayne, our chief
25 operating officer, went. Tom Crawford, at the



TMC, ET AL. V. SC DHEC, ET AL.

1732

1 time was our administrator over the ER. Sarah
2 Bacik. I think a few others went.

3 Q: All right. Now I've reviewed the Intuitive
4 documents that were produced by Intuitive, and
5 it looked to me like the email communications,
6 and if not completely ceased, nearly did at the
7 end of the year -- 2018. Is that your
8 understanding of when the communications about
9 the Summerville ---

10 A: Approximately. Yeah -- yes.

11 Q: Now -- so how long did you communicate with
12 them then? I think we began this saying there
13 was an NDA and some initial contact in late
14 2017 ---

15 A: Yeah. It's 12 -- 12 to 14 months.

16 Q: All right. Now after all this communications
17 and discussions, that mostly your folks have --
18 sharing of information, did MUSC agree to enter
19 into a business venture with Intuitive related
20 to the Summerville FED?

21 A: No. We did not.

22 Q: All right. Let's look at a -- a deposition.
23 Have you reviewed the deposition of Tom Herman
24 or part -- parts of that deposition?

25 A: I -- I saw parts of it.



TMC, ET AL. V. SC DHEC, ET AL.

1733

1 Q: All right. Well let's look at this for a
2 minute. I want to see if the timing makes
3 sense to you. So Mr. Herman -- and who is Mr.
4 Herman, by the way?

5 A: He's the CEO of Intuitive Health.

6 **MR. DAYHUFF:** All right. Let's scroll down a little
7 bit. Right. Keep going. Here at the end.

8 Q: The question for Mr. Summer is, so what
9 developer were you working with on this
10 project?

11 A: I don't think we got far enough to engage a
12 developer on this, so this was just
13 speculation. Like, help us do some research --
14 -

15 **MR. DAYHUFF:** Let's go to the next page.

16 Q: Did you all work with Equity, LLC? We've heard
17 about them. Well, we worked with them in
18 Indiana, in Florida. You were working with
19 them in South Carolina.

20 **MR. SUMMER:** I -- I'm gonna object. If he wants to
21 ask the same question I asked Mr. Herman, he
22 can ask that question, but to read a deposition
23 of another witness with his witness on direct,
24 I mean it's totally inappropriate. Number one,
25 it's leading, but number two is, this is a ley



TMC, ET AL. V. SC DHEC, ET AL.

1734

1 witness, it's not an expert. He doesn't need
2 to be commenting on the testimony of Mr.
3 Herman. Any of these questions I asked Mr.
4 Herman, he could also ask Mr. Cawley.

5 **MR. DAYHUFF:** Mr. Herman's deposition, I think, has
6 been admitted into evidence by agreement of the
7 parties. I'm getting to a question. I haven't
8 asked him to comment on Mr. Herman's testimony.
9 I'm very close to making my way to where, I
10 believe, there will be a question, so if you
11 will entertain that a few seconds longer, I'm
12 sure we'll be in and out of this.

13 **THE COURT:** Okay. Objection is overruled.

14 Q: All right. So what were getting to hear, Dr.
15 Cawley, is -- so there's a question about, are
16 you working in South Carolina, and we are not
17 doing anything, we have no business in South
18 Carolina, okay? And then he answers MUSC told
19 us they are not moving forward with us on
20 Summerville, so we don't have anything in South
21 Carolina -- and then he's gonna give us a time
22 frame, right below this. When were you told
23 that? It's been over six months, probably, do
24 you know the exact date? And then a little
25 further he says, early 2019. Probably early



TMC, ET AL. V. SC DHEC, ET AL.

1735

1 2019. Does that make sense to you as a date
2 that they would have been told, or understood,
3 that there wasn't going to be a project in
4 Summerville that they were going to be
5 participating in?

6 A: Yes. It was either late 2018 or early 2019 ---

7 Q: All right.

8 A: --- right around that time.

9 Q: Now who communicated to Intuitive that there
10 wouldn't be a Summerville -- a role for them in
11 the Summerville project?

12 A: Sarah Bacik.

13 Q: And who's Sarah Bacik?

14 A: Sarah Bacik is our chief strategy officer.

15 Q: All right. Let's look at your affidavit. So,
16 Dr. Cawley, first of all, this has been marked
17 as an exhibit.

18 **MR. DAYHUFF:** Is this in evidence?

19 **MR. DAN:** I believe so. It's Trident Exhibit 3.

20 Q: Trident Exhibit 3. So take a minute and Dan
21 will, kind of, scroll you on this affidavit.
22 And then I'm gonna ask a couple of questions
23 about a couple elements of it. Do you recall
24 filling out an affidavit -- signing an
25 affidavit, in this case?



TMC, ET AL. V. SC DHEC, ET AL.

1736

1 A: I do.

2 Q: Approximate date you did that?

3 A: It was in February of this year.

4 Q: All right. I think that's right.

5 **MR. DAYHUFF:** Dan, just go to the end of this to
6 make sure we have the dates right. All right
7 looks like February -- scribbled some date
8 there. Okay. Let's go back. So, I want to
9 look at ---

10 **MR. DAN:** This is not admitted.

11 **MR. DAYHUFF:** Your Honor, this is, apparently, not
12 admitted. I -- I asked that this be admitted
13 into evidence. I think it's on the court's
14 record, pursuant to a motion we had, but I'd
15 like it to be in evidence.

16 **MR. SUMMER:** Without objection.

17 **MR. DAYHUFF:** Thank you.

18 **THE COURT:** It's admitted.

19 **(Petitioner TMC's Exhibit Number 3 was admitted into**
20 **the record at this time.)**

21 **MR. DAYHUFF:** All right. Now, let's see. Your
22 affidavit. I want to look at just a couple of
23 provisions in here. Let's look at 10th. Okay.
24 I want to look at the bottom of that section.
25 If you'll pull that out.



TMC, ET AL. V. SC DHEC, ET AL.

1737

1 Q: So, we just heard from -- through Mr. Herman's
2 deposition at MUSC, had told them no. He
3 thought early 2019, you said that they were
4 told no, maybe late 2018, early 2019. Look at
5 the last sentence in this affidavit and what is
6 it -- what does it say about a joint venture
7 type arrangement with Intuitive?

8 A: It says we are not entering into that type of
9 structure with Intuitive.

10 Q: All right. And that was as of February of
11 2018, is that right?

12 A: 2019.

13 Q: 2019. Right. Well let's move forward to
14 today. We talked about what Intuitive has to
15 say, what you had to say in February. Will
16 MUSC and Intuitive be joint venture partners in
17 the Summerville FED?

18 A: No.

19 Q: Will Intuitive have an ownership interest in
20 any element of the Summerville FED?

21 A: No.

22 Q: Will Intuitive provide capital or financing for
23 it the Summerville FED?

24 A: No.

25 Q: All right. Let's go to the affidavit and let's



TMC, ET AL. V. SC DHEC, ET AL.

1738

1 stay in the same paragraph. There is mention
2 of a management contract and I just want to
3 have you explain that. It says -- first
4 sentence -- another change we're considering --
5 this is in February -- we may contract with a
6 management services company. Common type of
7 arrangement and you've been talking to
8 Intuitive, so is there a management contract
9 with Intuitive or anybody ---

10 A: No ---

11 Q: --- related to the ---

12 A: --- there ---

13 Q: --- Summerville FED?

14 A: No there's not.

15 Q: Any negotiations on going between Intuitive or
16 other management companies related to the
17 Summerville FED?

18 A: No. Not -- not at all.

19 Q: Current plans to begin such negotiations?

20 A: No.

21 Q: If -- well, who makes the decision about
22 whether to enter into management agreement?

23 A: I -- I would. I would.

24 Q: All right. Would you, on behalf of MUSC, enter
25 into a management agreement whereby the



TMC, ET AL. V. SC DHEC, ET AL.

1739

1 management company could determine elements of
2 the nature and quality of services you provide?

3 A: No. No, we would retain that.

4 Q: What, if any, control would you give over a
5 management company to control whether it's MUSC
6 physicians or other physicians in the facility?

7 A: We wouldn't do that. We'd retain that right.

8 Q: How about charity care? Would you enter into
9 a management agreement that would allow the
10 management company to change your charity care
11 policies?

12 A: No.

13 **MR. DAYHUFF:** All right. Let's go back to the
14 affidavit. Just want to talk about that model
15 that we didn't talk a whole lot about, the
16 urgent care hybrid model. Let's look at -- I
17 think it is -- let's see -- eight. Paragraph
18 eight.

19 Q: So read that for a minute, Dr. Cawley, and I'll
20 ask a couple questions about it. So -- now
21 explain to us what you are stating here, it
22 looks to me that you're interested in, or
23 you've decided to, provide urgent care and FED
24 together. Is this the Intuitive urgent care
25 FED hybrid model?



TMC, ET AL. V. SC DHEC, ET AL.

1740

1 A: Yes. It is.

2 Q: All right. Now did you also testify at your
3 deposition about the urgent care FED hybrid
4 model?

5 A: Yes.

6 Q: I think this says, you know, well -- why -- why
7 did you want to provide that model in February?

8 A: Well, that model we are -- we are very, very
9 interested in, mainly, because it provides --
10 it's a different kind of way to provide
11 services. It's mainly -- not -- not provide
12 services, it's mainly a billing issue, but it
13 provides a less expensive way for patients to
14 receive such services. So anything that lowers
15 the cost to patients is something we are very
16 interested in.

17 Q: All right. Now Dr. Hall had his deposition
18 taken, I think, in July and do you recall
19 sending him an email about the Intuitive hybrid
20 ED model?

21 A: I did.

22 Q: All right. What did that email say? What was
23 the purpose of that email?

24 A: Yeah. The -- the purpose was, you know, after
25 my deposition in June it -- a couple things



TMC, ET AL. V. SC DHEC, ET AL.

1741

1 happened, I think. Number one, there seemed to
2 be confusion around this label of urgent care.
3 The second thing was that DHEC raised some
4 issues that they were concerned about the model
5 and, you know, rather -- and it was clear to us
6 then, we thought that DHEC would not have a
7 problem with the model, but it became clear in
8 June that they would have a problem with the
9 model and therefore we felt we needed to take
10 a step back and spend some time talking to DHEC
11 about that. And so, we simply, returned to the
12 original -- the original plan.

13 Q: And the original plan is what type of model?

14 A: It is a straightforward emergency room.

15 Q: All right.

16 A: With -- with normal emergency level billing.

17 Q: And let's be clear right now, if the Court
18 grants the CON application, what model will --
19 -- MUSC establish?

20 A: I will call it the traditional emergency room
21 billing methodology.

22 Q: All right. What you ever consider, in the
23 future, thinking about that urgent care FED
24 model and other FEDs?

25 A: Yes, but it's clear that we would need to talk



TMC, ET AL. V. SC DHEC, ET AL.

1742

1 to DHEC about that and if DHEC was not
2 comfortable with that, then -- then we would
3 not move forward.

4 Q: All right. Now I have heard the notion
5 advance, maybe in openings that you didn't get
6 to hear, that Intuitive's making decisions
7 about the changes to the FED -- or maybe you
8 heard that in your deposition as well. What do
9 you think about that notion? Is Intuitive
10 making these decisions to change elements of
11 your FED?

12 A: No. Intuitive has made no decisions to modify
13 our FED. We looked at their data and the
14 evidence of how they do certain practices and
15 then, yes, we adopted some of those practices
16 but those were -- those were our decisions
17 after review.

18 Q: All right. There's also been some notion that
19 maybe MUSC's adopted the Intuitive model and
20 philosophy about ED services. Is that
21 accurate?

22 A: I mean, we adopted certain aspects that, after
23 study, we felt would be very reasonable to put
24 in our ER, but there are many things that we
25 did not adopt.



TMC, ET AL. V. SC DHEC, ET AL.

1743

1 Q: And let me give, maybe, some specific examples
2 of Intuitive ideas and you tell me whether the
3 those have been incorporated or not. I think
4 we understood there was a package that was
5 submitted to you, right? In that package, do
6 you recall, it had legal structures for joint
7 venture agreements. Will MUSC utilize any of
8 those structures?

9 A: No.

10 Q: A staffing plan. Will MUSC utilize the
11 Intuitive staffing plan for our FED?

12 A: No.

13 Q: Where does our staffing plan appear that we
14 will utilize?

15 A: We have a staffing plan today for our emergency
16 room, that's the staffing plan we will use.

17 Q: All right. Is that staffing plan reflected in
18 the CON application?

19 A: It is.

20 Q: And Intuitive materials have a pro forma in it.
21 Is that the pro forma for our Summerville FED?

22 A: It is not.

23 Q: Why -- why not?

24 A: Well, I mean, we submitted a pro forma for, you
25 know, back when we submitted the CON.



TMC, ET AL. V. SC DHEC, ET AL.

1744

1 Intuitive came up with their own pro forma,
2 based on some data they -- they got from us.
3 But that's there pro forma, that is not
4 MUSC-approved pro forma with MUSC-approved
5 assumptions.

6 Q: What, if anything -- what, if any, element of
7 the Intuitive pro forma relates to their hybrid
8 model?

9 A: At -- at the moment, we are not adopting that
10 at all.

11 Q: I understand that, but their Intuitive pro
12 forma, does it utilize the hybrid model? The
13 -- their -- the urgent care ---

14 A: Yes. It does.

15 Q: --- FED?

16 A: Yes. It does.

17 Q: Does your pro forma utilize that model in the
18 CON application?

19 A: It -- it does not.

20 Q: I think the Intuitive analysis -- they did a
21 market analysis at a smaller catchment area for
22 -- for patients. Did you adopt that as the
23 appropriate catchment in?

24 A: No. No, we did not.

25 Q: All right. Who has analyzed our data and



TMC, ET AL. V. SC DHEC, ET AL.

1745

1 analyzed the zip codes where we get patients
2 and come up with a catchment area for our
3 project?

4 A: David Levitt.

5 Q: Where -- and did we retain those projections in
6 the CON application?

7 A: We did.

8 Q: The Intuitive models mentioned market capture.
9 Did market capture become the purpose of the
10 FED?

11 A: It is not.

12 Q: What are those three purposes of the FED again?

13 A: Better access, relieving constraints and access
14 to more teaching.

15 Q: Did the Intuitive model speak any of teaching
16 and incorporate residents?

17 A: No.

18 Q: We're going to incorporate residence, right?

19 A: We will.

20 Q: So, I think I understand, MUSC and Intuitive
21 are not business partners with respect to
22 Summerville. We didn't adopt those elements
23 you just went through. Did MUSC, nonetheless,
24 get a benefit from talking to Intuitive from,
25 maybe, late 2017 until December 2018?



TMC, ET AL. V. SC DHEC, ET AL.

1746

1 A: Well we -- we think we did. We think we
2 understand and -- and adopted some -- some best
3 practices in freestanding ER operations and
4 management, but only time will tell.

5 Q: All right. All right. And then location was
6 one of those ---

7 A: Yes.

8 Q: --- suggestions they had for you and the cost
9 reductions and scope reduction, right?

10 A: Yes.

11 Q: Why did Intuitive take all that time and, it
12 looked to me like a lot of effort, to talk to
13 you guys from late 2017 until December 2018?

14 A: Well I -- I can't speak on behalf of of
15 Intuitive, but I know that when -- anytime
16 you're talking to a partner, or there's a
17 potential deal, there's a lot of talking going
18 on and -- and we have talked with partners for
19 sometimes years and gotten nothing out of it.
20 So it's not surprising to me that they -- they
21 try to grow around the United States, that
22 they're spending a lot of time talking to
23 partners. It doesn't surprise me at all.

24 Q: Okay. Now before you arrived, you missed a
25 lot, we talked about -- a little bit about MUSC



TMC, ET AL. V. SC DHEC, ET AL.

1747

1 SV. What is MUSC SV?

2 A: That is MUSC's Strategic Ventures.

3 Q: All right. What does it do?

4 A: It -- it's a separate 501(c)3 who, part of
5 their organizing principles, serve the mission
6 of MUSC.

7 Q: All right. I've seen, at least, in the CON --
8 not in the CON application, the documents
9 produced in discovery. Does SV play a role,
10 with respect to a lease that's related to the
11 Summerville FED?

12 A: Yes.

13 Q: All right. What role does SV play?

14 A: SV currently holds the option for a ground
15 lease for -- on which the FED will be built.

16 Q: All right. Is it an option or is it a lease?

17 A: It's a lease.

18 Q: All right. Now let me ask a few other
19 questions about SV. Should SV be the CON
20 applicant, in this case?

21 A: No. Not at all.

22 Q: Why not?

23 A: That's not a -- it's not a hospital. This is
24 a freestanding ER, it has to be a part of a
25 hospital and, therefore, Medical University



TMC, ET AL. V. SC DHEC, ET AL.

1748

1 Hospital Authority should be the CON applicant
2 and holder of the CON.

3 Q: What control, if any, will SV have over the
4 clinical healthcare provided at the FED, if we
5 get to establish it?

6 A: It -- it won't have any.

7 Q: What role, if any, will SV have in the
8 non-clinical, day to day management of the FED?

9 A: It won't have any.

10 Q: And if the CON is approved, will we seek to --
11 will MUSC seek to have the CON certificate or
12 the health licensing in the name of SV?

13 A: No.

14 Q: Who will be on those permits, if they're
15 granted?

16 A: Medical University Hospital Authority.

17 Q: Now Judge Funderburk, heard a case that
18 happened not too long ago, issued an order that
19 found SV to be ultra vires. Are you familiar
20 with that order?

21 A: Yes.

22 Q: Does the issuance of that order mean that MUSC
23 SV will not be the entity that leases from Luco
24 to provide the ground lease for our FED?

25 A: Well that -- so, that ruling, that's currently



TMC, ET AL. V. SC DHEC, ET AL.

1749

1 on appeal. I -- we hope to win that, but if we
2 don't win that in the Court of Appeals, or
3 that's not overturned, then what we put
4 together is that that -- that ground lease
5 already has the ability to assign somewhere
6 else, to another MUSC entity. But what we put
7 together in the last few days is to have an --
8 if MSV were to be declared legal, then it would
9 -- MUHA would automatically substitute for MSV.

10 Q: All right. Will let me make sure I understand.
11 So SV is still the leasee today?

12 A: Correct.

13 Q: So that has not changed? Is ---

14 A: Correct.

15 Q: --- that correct? And the leasee for the
16 ground lease for the FSED and the Summerville,
17 right?

18 A: Correct.

19 Q: All right. But what I think I understood you
20 to say was, you have entered into an agreement,
21 in the last couple days -- let me hand this to
22 you -- and that agreement ---

23 **MR. SUMMER:** Your Honor, we are getting to a point
24 where there will be a subsequent objection
25 regarding the document, but I've given Counsel



1 a lot of latitude for leading questions so we
2 can move quickly. From this point forward, I'd
3 appreciate if, Your Honor, if you'd instruct
4 him to ask direct, open-ended questions with
5 his witness.

6 **MR. DAYHUFF:** Your Honor, I will attempt to ask more
7 open-ended questions. I don't think I've been
8 leading. I think the questions required a yes
9 or no answer and I do like moving forward at
10 this hour of the day. So I would ask that, to
11 the extent that you find those questions
12 leading and I don't think they are, you allow
13 that leeway.

14 **THE COURT:** At this time of the day I'm gonna allow
15 him some leeway.

16 **MR. DAYHUFF:** Thank you.

17 Q: So, that document I handed to you, what's the
18 date on that document?

19 A: It was July 29.

20 Q: All right. And that is an agreement between
21 what parties?

22 A: Between Luco Realty and Medical University
23 Hospital Authority and Strategic Ventures.

24 Q: All right. And, if, sometime down -- does that
25 -- if, sometime down the road an Appellate



TMC, ET AL. V. SC DHEC, ET AL.

1751

1 Court holds that MUSC as to the is ultra vires,
2 or has to be dissolved, what occurs with the
3 Luco lease pursuant to that agreement? In your
4 understanding.

5 A: That MUHA -- Medical University Hospital
6 Authority, is automatically substituted as the
7 leasor of the ground lease.

8 Q: All right. That only happens if ---

9 A: MSV is declared legal.

10 Q: Has that happened yet?

11 A: It has not.

12 Q: Has there been a final, non-appealable order
13 that MUSC SV is ultra vires?

14 A: No.

15 **MR. DAYHUFF:** Your Honor, this is a document that
16 was produced today, signed yesterday. It's an
17 agreement that does what Dr. Cawley says it
18 does. Of course, it does whatever the Court
19 finds it does. It's a legal instrument that
20 has the legal a fact that you give it. We
21 would like to have this entered into evidence
22 as, whatever our next exhibit is.

23 **MR. DAN:** 59.

24 **MR. DAYHUFF:** 50?

25 **MR. DAN:** Nine.



1 **MR. DAYHUFF:** Nine.

2 **(Respondent MUSC's Exhibit Number 59 was introduced**
3 **into the record at this time.)**

4 **MR. SUMMER:** Obviously, Your Honor, we object and,
5 I'm disappointed, because I thought from
6 opening we were gonna have any more productions
7 and new documents. Here we are, in the second
8 week of trial. Obviously we object to this,
9 the subject of deposition, it wasn't produced,
10 during discovery it wasn't even produced before
11 trial. I defer to Your Honor's ruling, but I do
12 want my objection noted, for the record.

13 **THE COURT:** Okay. It is noted and I'm entering the
14 document.

15 **MR. DAYHUFF:** Thank you, Your Honor.

16 **(Respondent MUSC's Exhibit Number 59 was admitted**
17 **into evidence.)**

18 Q: Dr. Cawley, with respect to the change in
19 location from Nexton to Summerville, did the
20 MUSC Hospital Board approve that relocation?

21 A: They did not.

22 Q: Why not?

23 A: Well, with -- with the original CON application
24 move forward, which is what the board did
25 approve back in 2017, I believe that gives me



TMC, ET AL. V. SC DHEC, ET AL.

1753

1 the authority to carry out the board's action,
2 which was approved at that time and, as long as
3 it remained in Berkeley County and it was not
4 a substantial change, I believe it was
5 reasonable to make that move.

6 **MR. DAYHUFF:** Let's look at joint Exhibit 1, which
7 is already in record down there. Let's look at
8 the CON application, page 4.

9 Q: You just mentioned a board approval? Just take
10 a moment and review that. Is that the board
11 approval that you are speaking of?

12 A: Yes.

13 Q: All right. And where does that approval
14 authorize MUSC to establish a FED?

15 A: Berkeley County.

16 Q: All right. And we're still in Berkeley County?

17 A: Yes.

18 Q: When we file the CON application, was it our
19 intent to establish the FED in Nexton?

20 A: Yes.

21 Q: All right. When -- well are we planning to
22 other -- establish other services that are
23 public in Nexton?

24 A: Yes.

25 Q: What are those services?



TMC, ET AL. V. SC DHEC, ET AL.

1754

1 A: Well, I mean, the -- the radiation treatment
2 facility, we'd like to have in Nexton. I
3 understand that's under dispute, but we do also
4 plan to have other oncology services there,
5 beyond radiation therapy. We also plan to have
6 -- we -- we have a lease for physician office
7 services and we'll actually be seeing
8 physicians in that medical office building
9 there, that's right in Nexton, starting in
10 January 2020.

11 Q: And, remind me, is it your community hospital
12 cited -- propose to be cited in the Nexton
13 area?

14 A: Yes. But not -- not at that exact location.
15 It's about a mile and a half, almost 2 miles --
16 -

17 Q: I understand.

18 A: --- farther away, into Nexton.

19 Q: All right. So it sounds like MUSC is going to
20 have a variety of services, with facilities in
21 Nexton and in Nexton-adjacent areas.

22 A: Yes.

23 Q: All right. Let's talk about the funding of
24 this project. This project is, roughly -- how
25 much funding required?



TMC, ET AL. V. SC DHEC, ET AL.

1755

1 A: It's between 10 and 12 million dollars.

2 Q: All right. How will MUSC fund this project?

3 A: Well that -- that has not been completely
4 determined.

5 Q: What are the options?

6 A: Well, I mean, there's many options. We could
7 pay for it right out of operational cash flow,
8 we could borrow it, we could lease from a
9 developer who has built it.

10 Q: And when would you make the decision about what
11 -- which of those options to pursue?

12 A: Well, we would actually wait to make sure it's
13 closer to a time in which we -- those options
14 were clear, to see what the best benefits were.
15 After the CON was received and -- and there's
16 no further opposition to it.

17 Q: And, I guess, I want to understand what the
18 bene- -- best benefits are. So that's the --
19 there's different vehicles and the choice of
20 vehicles would change over time, based on what?

21 A: Sure. I mean, based really upon interest rate
22 and what is the interest rate, at that time.
23 So it may be the best thing for us to do is to
24 borrow the money or -- or lease it or take it
25 right out of operational cash flow, but that'll



1 be largely determined by the interest rate, at
2 that time.

3 Q: Can MUSC afford this project?

4 A: Yes.

5 Q: And I've heard the phrase -- I think one of the
6 healthcare planners said, net negative
7 position, and I don't know what that means but,
8 I think, the argument was, because we have a
9 net negative position, we can't afford this
10 FED. Do you have any thoughts on that?

11 A: No. That -- that is not true, at all. The net
12 negative position, which MUSC has had for a few
13 years, is 100 percent related to some
14 accounting rules that were affected by that --
15 that require the state pension to be put on our
16 financials.

17 Q: All right. Well, explain to me, it sounds like
18 you think that's, you know -- doesn't -- it's
19 not reflective of ---

20 A: No. Because I -- it's not -- it's -- it -- it
21 doesn't affect our ability to borrow. It
22 doesn't affect cash -- cash flow. So the
23 biggest determinant borrowing is cash flow and
24 -- inputting the pension on our financial
25 statements does not affect our cash. It's what



TMC, ET AL. V. SC DHEC, ET AL.

1757

1 they call a non-cash hit to your financial
2 statements. So it really doesn't affect our
3 ability to borrow, at all.

4 Q: And that patient -- or that pension hit on your
5 financial statements, does that happen all at
6 once?

7 A: That did -- that -- that did happen all at
8 once, when the accounting rules were changed a
9 few years ago, but it didn't require us to put
10 any dollars out at the time. And -- and that
11 pensions paid out over 50, 60 years and it's --
12 it's really a liability of the state.

13 Q: So we've had some large dollar projects lately,
14 I suppose. The Children's Hospital, how much
15 -- how much did that cost?

16 A: Almost 400 million.

17 Q: Were you able to afford that through financing
18 or other methods?

19 A: Yes, through financing.

20 Q: All right. We've done an outpatient Peds
21 facility in North Charleston relatively
22 recently, do ---

23 A: Yes.

24 Q: --- you recall the numbers on that?

25 A: Almost 50 million.



TMC, ET AL. V. SC DHEC, ET AL.

1758

1 Q: And were we able to finance that or afford it?

2 A: Yes.

3 Q: We bought a bunch of hospitals ---

4 A: Yes.

5 Q: --- recently. Were you able to purchase those
6 hospitals?

7 A: Yes.

8 Q: You testified earlier that one of the reasons
9 -- one of the three main reasons you want to
10 establish an FED in Summerville is to help with
11 those difficulties that you talked about
12 generally and Dr. Hall talked about at our main
13 F- -- at our main ED downtown. So our friends
14 at Trident and Roper, the health planners, are
15 advancing the notion, we should just fix the
16 main ED rather than doing a FED. First
17 question, I suppose, is have we tried
18 improvements to our main hospital ED?

19 A: We -- we've been looking at the main hospital
20 ED for almost 15 years and it's -- it's gotten
21 expanded as much as it can be on the first
22 floor of our hospital over time. So we've done
23 a lot of expansion over the last 15 years.
24 It's -- it's not helped with any of the issues
25 I talked about earlier. Things have only



1 gotten more crowded, more constrained. So
2 there's no easy solutions anymore. We filled
3 up all of the adjacent space so that would
4 require us to move to, what I would call, hard
5 solutions or -- or bigger, broader, more
6 expensive solutions.

7 Q: And one of those solutions would be what,
8 redesigning the ED or ---

9 A: Yeah. We'd have to -- we have to completely
10 redo the ER, at this point, and we looked at
11 this -- it's been, probably, you know -- could
12 be, almost 10 years since we looked at that,
13 but at the time it was almost a 30 million
14 dollar project then and I could easily see that
15 moving into, at this point, probably a 50
16 million dollar project.

17 Q: How does that compare to the FED's cost?

18 A: Well, I mean, obviously that's much more costly
19 than -- than building a freestanding ER.

20 **MR. DAYHUFF:** All right. Before I sit down, I'd
21 like to ask to admit MUSC 29. 29 was the
22 easier-to-read schematic of our FED. The
23 layout.

24 **THE COURT:** The layout of the -- okay.

25 **MR. SUMMER:** Again, Your Honor, it's one of these



TMC, ET AL. V. SC DHEC, ET AL.

1760

1 documents produced, you know, after the
2 discovery period, but to that one, I have no
3 objection.

4 **MS. HOLLINGSWORTH:** No objection, Your Honor.

5 **THE COURT:** Okay. Let's admit it.

6 **(Respondent MUSC's Exhibit Number 29 was admitted**
7 **into evidence.)**

8 **Q:** Mr. Cawley -- Dr. Cawley, please answer any
9 questions opposing counsel may have for you.

10 **THE COURT:** At this point, we're going to adjourn
11 for the day because it's 5:00 o'clock and we've
12 already determined that cross examination is
13 going to be rather lengthy. So, Dr. Cawley, we
14 will see you back here, tomorrow morning, at
15 9:00 a.m.

16 **A:** Thank you.

17 **MR. WESTBROOK:** Can I ask something, Your Honor?

18 **THE COURT:** Yes.

19 **MR. WESTBROOK:** Dr. Cawley is going to have to drive
20 back to Charleston tonight and drive back here
21 in the morning, given that, can we start at
22 9:30, just to give him an extra half hour?

23 **THE COURT:** I don't have a problem with that.
24 That's good. 9:30 then.

25 **DR. CAWLEY:** Very much appreciate it.



TMC, ET AL. V. SC DHEC, ET AL.

1761

1 (Tuesday, July 30, 2019 of the administrative hearing
2 ended at 5:05 p.m. and reconvened on Wednesday, July
3 31, 2019 at 9:39 a.m.)

4 DAY EIGHT - JULY 31, 2019

5 THE COURT: Is there anything we need to address
6 before we get started with the hearing?

7 MR. DAYHUFF: Not from us, Your Honor.

8 THE COURT: Okay. Very good. Dr. Cawley. And, Dr.
9 Cawley, you're still under oath.

10 DR. CAWLEY: Yes.

11 THE COURT: Okay.

12 MR. SUMMER: Thank you, Your Honor.

13 THE COURT: Okay, Mr. Summer.

14 MR. SUMMER: If it's all right, Your Honor, I
15 discussed this with counsel, and I'm going to
16 go first and they're going to go second with
17 Dr. Cawley.

18 THE COURT: Okay.

19 DR. CAWLEY - CROSS-EXAMINATION BY MR. SUMMER:

20 Q: Dr. Cawley, how are you doing today?

21 A: Good. How are you?

22 Q: Doing well. Thank you for making the trip
23 again. What I'd like to do before we dive into
24 the stuff about your testimony yesterday is
25 just talk a little bit about your organization.



TMC, ET AL. V. SC DHEC, ET AL.

1762

1 **MR. SUMMER:** I'd like to put up that chart please if
2 you will.

3 **Q:** This is off of your website and I just ask you
4 if this -- if you recognize this document?

5 **A:** I don't recognize the exact document but I'm
6 familiar with the components.

7 **Q:** Okay. So, yesterday you were discussing the
8 three facets of the organization that you
9 manage. And I think three that you mentioned
10 were the hospital part, the university, and the
11 physicians practices, right?

12 **A:** Yes.

13 **Q:** Okay. And so if we look at this chart you go
14 to the third level you have the hospital
15 authority, that a MUHA op correct?

16 **A:** Yes.

17 **Q:** All right. And then you have university
18 medical associates. Is that the physician
19 group?

20 **A:** Yes.

21 **Q:** Okay. And then the university you actually
22 have as being over all of this. I'm looking at
23 how MUSC strategic ventures is described.
24 Could you read that foot note number seven?
25 And if you can't I'm happy for you to read this



TMC, ET AL. V. SC DHEC, ET AL.

1763

1 one.

2 A: MUSC strategic ventures was formed in September
3 2015 to allow affiliation with tax exempt
4 entities to support the missions and programs
5 of the Medical University of South Carolina,
6 UMA, and MUHA.

7 Q: Is that what you understand the purpose of
8 Ventures is?

9 A: Yes, generally.

10 Q: Okay. All right. Then the other thing I just
11 want to see if you can acknowledge this for me
12 and that is I'm handing you what is from South
13 Carolina Code. This is South Carolina Code
14 annotated section 59-123-10. This is the
15 enabling statute for your various
16 organizations. Isn't that correct?

17 A: I don't know the answer to that.

18 Q: Okay.

19 A: I'm assuming that's, that is correct but I
20 couldn't speak to that.

21 Q: The way that it reads in the statute, the
22 authority, MUHA and the university, MUSC, are
23 two separate distinct entities. Is that your
24 understanding?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1764

1 Q: Okay. And they're both governmental entities.
2 Are they not?

3 A: Yes.

4 Q: They are, bodies politic and subdivisions of
5 the State of South Carolina, correct?

6 A: Yes.

7 Q: Okay. I believe that you currently utilize a
8 single board but it convenes separately when
9 it's doing business for either MUHA or the
10 University, is that correct?

11 A: Well, I would describe it as two boards. And
12 -- but they both serve on -- they have two
13 entities upon which they serve.

14 Q: Okay. So another way of putting it, there are
15 two boards but the composition is the -- are
16 the same individuals for each board? Is that
17 a fair statement?

18 A: Yes.

19 Q: Okay.

20 **MR. SUMMER:** Next I'd like to go to -- can you pull
21 up Roper St. Frances 47?

22 **(Petitioner Roper's Exhibit Number 47 was introduced**
23 **into the record at this time.)**

24 Q: This is a document that was produced in
25 discovery. It's an interim financial



TMC, ET AL. V. SC DHEC, ET AL.

1765

1 statement. I'll hand you hard copy just to ask
2 you if you can identify that.

3 A: These are the interim financials for last year,
4 fiscal year 2018.

5 Q: All right. And that is for the hospital
6 authority?

7 A: Yes.

8 Q: Okay. So this doesn't include the university
9 financial does it?

10 A: It does not.

11 Q: Okay. Your Honor, at this time we would move
12 into evidence Roper St. Frances 47.

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

14 **THE COURT:** Admitted.

15 **(Petitioner Roper's Exhibit Number 47 was admitted**
16 **into evidence.)**

17 Q: Thank you. If you turn over page three,
18 actually that's where we are. Well, what's
19 your, on these financials your net operating
20 loss for the 12 months ending June 30, 2018?

21 A: 2.5 million.

22 Q: Okay.

23 A: I'm sorry. Are we're looking at page three?

24 Q: Yes, sir.

25 A: I just wanna make sure I'm right. The next



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

TMC, ET AL. V. SC DHEC, ET AL.

1766

1 operating loss is 2.8 million.

2 Q: Okay. Thank you. I've gotta return this or
3 I'll get in trouble. Thank you. All right.
4 What I'd like to do know, Dr. Cawley, is to try
5 to put everything into a chronological order
6 regarding this project. So the first thing I'd
7 like to do is start with documents, some of
8 which we got from MUSC, many of which we got
9 from third parties, but to walk through for the
10 Court in chronological order the evolution of
11 this project 'cause I think you'll acknowledge
12 that there have been some changes, correct?

13 A: There've been changes.

14 Q: Okay. What I'd like to start with first is
15 Trident exhibit 47. I believe we discussed
16 this in your deposition. Do you recognize this
17 document?

18 A: Yes.

19 Q: Okay. It reports to be a freestanding ED
20 analysis with a date of March 2016. Is that
21 correct?

22 A: Yes.

23 Q: Okay. What I'd like to do is take you over to
24 page four of that document MUSC 3942. This is
25 a market score card for freestanding ED. Is



TMC, ET AL. V. SC DHEC, ET AL.

1767

1 that correct?

2 A: Yes.

3 Q: And it is your understanding that your planning
4 staff basically identified a score card of most
5 favorable to least favorable opportunities for
6 freestanding ED for your hospital?

7 A: Yes.

8 Q: Okay. And on this it shows that East Cooper
9 was the highest scoring opportunity. Is that
10 correct?

11 A: Yes.

12 Q: And that North Charleston was number two. Is
13 that correct?

14 A: Yes.

15 Q: Okay. So that would've been done in 2016
16 before this project was initiated, correct?

17 A: Yes.

18 Q: Next what I'd like to do, this is in evidence
19 as Trident 36.

20 **MR. SUMMER:** Is that correct? Is Trident 36 in? Is
21 that correct?

22 Q: This is an excerpt from that. I think what's
23 going to be easier is if you share this. We
24 didn't get this document until a few weeks ago.
25 This is a document from Health Facility



TMC, ET AL. V. SC DHEC, ET AL.

1768

1 Planning Partners but it appears to be a
2 worksheet created by Caroline Cotter. Who's
3 Caroline Cotter?

4 A: Caroline Cotter is someone who works under the
5 strategic planning department at MUSC.

6 Q: Okay. I did not have this document when you
7 were deposed. I wish I had. But what it
8 purports to be from the cover email, I don't
9 believe you were copied on this, but it does
10 say that there was a presentation to senior
11 leadership today that went extremely well. And
12 this would've been Monday the 15th of May 2017.
13 I assume that you would be included in senior
14 leadership. Is that a fair assessment?

15 A: It could've been but actually knowing -- not
16 knowing exactly what meeting that was I may or
17 may not have been part of it. Senior
18 leadership could be others in senior
19 leadership.

20 Q: So this is to David Carroll. Who is David
21 Carroll?

22 A: David Carroll is someone who works for Palmetto
23 Primary Care.

24 Q: Okay. And Palmetto Primary Care was originally
25 one of your affiliates or partners in the



TMC, ET AL. V. SC DHEC, ET AL.

1769

1 project at Nexton. Is that correct?

2 A: Yes.

3 Q: And they are a very large physician group in
4 the low country. Is that correct?

5 A: Yes.

6 Q: They have approximately 100 providers of
7 physicians and extenders, correct?

8 A: I don't know the exact number but that may be
9 in the ball park.

10 Q: Okay. Copied on this email is someone named
11 Andy Johanni? Who is Andy Johanni?

12 A: I don't know who that is. Looks like someone
13 who works for Equity ---

14 Q: Okay.

15 A: --- coming from the email.

16 Q: But what is Equity, LLC?

17 A: They're a developer that Palmetto Primary Care
18 had been using.

19 Q: Okay. Were they originally involved in this
20 project when it was gonna be in Nexton?

21 A: In the FED project?

22 Q: Yes.

23 A: No, we had not involved them in the FED
24 project.

25 Q: Okay. And then I think we know who David



TMC, ET AL. V. SC DHEC, ET AL.

1770

1 Levitt is. Who is Georgann Burns?

2 A: I don't know who that is.

3 Q: Okay. She has an address with Health Facility
4 Planning Partners. Does she not?

5 A: Yes.

6 Q: Okay. So let's look at the attachment. Now,
7 I'm not gonna go through it but throughout the
8 production that is -- throughout the production
9 that is Trident 36, there are probably seven
10 iterations of this document. In other words
11 it's the worksheet that is constantly updated
12 and edited in that exhibit. I'm not gonna walk
13 you through all of those. But I pick this
14 because it was presented or at least the
15 concept that's in it was presented to senior
16 leadership. If you look at this spreadsheet it
17 appears to have point persons and actions for
18 putting together certificate of need
19 application. Doesn't it?

20 A: Well I -- normally some of this would be --
21 these are a point people to, you know, pull
22 data together to give it to the person who's
23 gonna write the application. So that's how
24 that would work.

25 Q: So I'm looking down where at Andy Johanni and



TMC, ET AL. V. SC DHEC, ET AL.

1771

1 it has beside him type of ownership, list of
2 owners, organizational chart for the entity.
3 And Andy Johanni we said was with Equity, LLC.
4 So it appears that in 2017, May or June of 2017
5 there was a contemplation that Equity, LLC was
6 gonna have some kind of ownership stake in
7 this. Is it?

8 A: Well, I think there was some contemplation and
9 it could be one of any number of things. It
10 could be the facility itself, it could be a
11 lease, it could be building it. I think that
12 was -- those were some early discussions that
13 did not materialize.

14 Q: In similar fashion when I look above right
15 under number two, provide ownership
16 information. That's what you have to do on a
17 CON application. If I go to the notes on the
18 far right hand side it has corporation question
19 mark. And what is the ownership breakout? Who
20 were you discussing was gonna have an ownership
21 interest in the entity in June of 2017?

22 A: I can't answer that. Those are notes and
23 that's not what we decided to do.

24 Q: Okay. Looking at the bottom of the notes on
25 the first page, it's the next to the last note



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

TMC, ET AL. V. SC DHEC, ET AL.

1772

1 and it says MUSC internal call scheduled for
2 5/22 if JV for imagining would need to go under
3 MSV. Is that strategic ventures?

4 A: Yes.

5 Q: And it says because of HUD. Did you have some
6 kind of restriction with HUD where you had to
7 take this off your balance sheet for some
8 reason?

9 A: I can't answer that. I'm not familiar with
10 that.

11 Q: I think you talked to me in your deposition
12 that because you're in a HUD facility financing
13 that all financing has to be approved by HUD.
14 Isn't that a fair statement?

15 A: For MUHA, yes.

16 Q: So in order to have any kind of borrowings
17 either from HUD or a third party, you must have
18 consent from HUD. That's a fair statement?

19 A: Yes. That is correct. This says something
20 about JV for imagining. I don't know what that
21 is about at that time. And I don't know if
22 it's related to the FED or not.

23 Q: Okay. But just to summarize, in order for you
24 to borrow money you must either borrow it from
25 HUD or get permission from HUD to borrow it



TMC, ET AL. V. SC DHEC, ET AL.

1773

1 from a third party. Fair statement?

2 A: For MUHA, that is correct.

3 Q: And this is MUHA project is it not?

4 A: Yes.

5 Q: Turn over to the second page of this
6 spreadsheet.

7 **MR. SUMMER:** And again I apologize to the Court,
8 this is a bit of a discovery deposition in a
9 trial. I did not have this document until
10 three weeks ago. So, I'm just trying to find
11 out what it all means.

12 Q: On this page it appears that Georgann Burns has
13 a significant amount of responsibility here.
14 Doesn't she?

15 A: It appears she's assigned some aspects of this
16 worksheet, yes.

17 Q: Okay. And we said that her address is with
18 Health Facility Planning Partners so she's got
19 things she has to do. And then down here with
20 Andy Johanni he's got a lot of responsibility
21 for sites and architectural and site
22 acquisition, things of that nature, correct?

23 A: Yes.

24 Q: All right. We may come back to this but I
25 wanted to at least try to get an idea. Do you



TMC, ET AL. V. SC DHEC, ET AL.

1774

1 have any idea why this document or any of the
2 iterations of this document were not produced
3 in discovery?

4 A: I, you know, I can't answer that. You know, we
5 do best we can to produce all the documents we
6 can and I think we produced the overwhelming
7 majority. I can't answer why this wasn't
8 discovered.

9 Q: Okay. I'm assuming as CEO that you're not in
10 charge of handling document request. Would
11 that document request have been handled in your
12 legal department or would it have been handled
13 by Ms. Bacik or Ms. Cotter? Do you know who
14 was handling production of documents?

15 A: I think our legal department handles everything
16 that comes in for document requests and then
17 works with others in the organization.

18 Q: Okay. So, Nelson Mullins who is your outside
19 counsel would have made that document request
20 to your legal document? Is that your
21 understanding?

22 A: I would assume so but I really don't know the
23 details of how the document request process
24 works other than I do know it goes through our
25 legal general counsel's office



TMC, ET AL. V. SC DHEC, ET AL.

1775

1 Q: Okay. Want to turn your attention, if you
2 would, to the DHEC record as we move from this
3 Health Facility Planning Partners work list
4 that was in May and June of 2017 and then the
5 document that is the joint record one and is
6 the DHEC exhibit entered as evidence. What's
7 the date that it was filed? Can you read that?

8 A: June 6th of 2017.

9 Q: June 6, 2017. If you'd be so kind as to, let's
10 see, can you go over to the signature page.
11 Can you pull that up? Is that your signature?

12 A: Yes.

13 Q: Okay. I think we covered this in your
14 deposition, you don't physically put this
15 together but you do review it ---

16 A: Yes.

17 Q: --- and you are responsible for its content.
18 Is that correct?

19 A: Yes.

20 Q: Okay. And you would've signed that document on
21 the 27th, it looks like, '17. Is that correct?

22 A: Yes.

23 Q: Okay. Next I wanna, while we're in this
24 exhibit, I wanna go over to, if we could, let's
25 go over and start with page project overview



TMC, ET AL. V. SC DHEC, ET AL.

1776

1 which begins on 516. And if you can, hang on
2 just a minute, go back one page. Can you go to
3 515? Start with 515 since that's the first
4 page of the project overview. You did not
5 attend project review in the case did you?

6 A: I did not.

7 Q: This is the power point from project review and
8 I just wanna ask you a few questions about what
9 your understanding is of what the project was.
10 You talked about space constraints in the ED as
11 being one of the reasons you wanted this
12 project, correct?

13 A: Yes.

14 Q: And I think we heard your testimony to the
15 Court yesterday and your testimony was that on
16 any given day you have 20 to 30 boarders in
17 your ED, right?

18 A: Yes. That's typical. It's not uncommon to
19 have 20 to 30 boarders in our ED everyday.

20 Q: Okay. And I think it's fair to explain to the
21 Court that a boarder is someone who is going to
22 be admitted but you don't have a bed upstairs
23 for them yet. Fair statement?

24 A: Well not always admit. I mean there are
25 patients that are what we call observation



TMC, ET AL. V. SC DHEC, ET AL.

1777

1 patients, just need to be monitored for a
2 period of time and they can't be either
3 observed or they can't be admitted.

4 Q: Because you don't have bed upstairs?

5 A: Right. We either don't have an observation bed
6 or we don't have an inpatient bed.

7 Q: Okay. All right. So let's go over to the next
8 page which is 516 of the DHEC record. And it
9 says that you're gonna have a CDU. We
10 discussed this in your deposition, I think the
11 Court is well aware of what it is but the
12 fourth bullet point says this feature is unique
13 to the existing and proposed FEDs in South
14 Carolina, correct?

15 A: Yes, at that time I -- yes.

16 Q: Okay. You also had and then FED would also
17 include a helipad. Air medical access provides
18 rapid delivery of advanced medical treatment
19 improving patient morbidity and mortality rates
20 and decreasing out of hospital time, correct?

21 A: Yes.

22 Q: Okay. Go to the next page which is 517. Great
23 bit of discussion about Nexton and I think it's
24 good for the Court's edification just to go
25 through this a little bit. First bullet point,



TMC, ET AL. V. SC DHEC, ET AL.

1778

1 Nexton is a 4,500 acre mixed use plan unite
2 development HUD located near Summerville and it
3 planned to include 10,000 homes, 6 million
4 square feet of commercial space, several
5 schools and hotels, and 50 miles of bike and
6 walking trails when the community completes its
7 30 year build out. Is that your understanding
8 of what Nexton is?

9 A: Yes.

10 Q: Okay. Several office buildings, retail space,
11 and apartment complexes, elementary school, two
12 Marriot hotels, phase one of a new home
13 community, and initial infrastructure are
14 already underway. Is that your understanding?

15 A: Yes.

16 Q: Okay. And then the third bullet point from
17 project review is additionally Palmetto Primary
18 Care Physicians recently started construction
19 in Nexton for the first phase of a new medical
20 campus in the Berkeley County community with a
21 32 million dollar project that includes primary
22 care and specialty care services as well as an
23 imaging center and lab. Is that your
24 understanding of what Palmetto Primary Care is
25 doing?



TMC, ET AL. V. SC DHEC, ET AL.

1779

1 A: Yes.

2 Q: Okay. And you, when I say you I'm referring to
3 this project was going to be located in that
4 medical complex was it not?

5 A: Yes.

6 Q: Okay. And that's what you told DHEC or at
7 least your staff told DHEC in the Summer of
8 2017, correct?

9 A: Yes.

10 Q: Okay. Do you know when you first started
11 discussing this project with Intuitive?

12 A: It was sometime in the Fall of 2017.

13 Q: Okay. Do you recall Mr. Dayhuff having a line
14 of questions and taking you through certain
15 portions of the Intuitive deposition yesterday?

16 A: Yes.

17 Q: Okay. I wanna go to Exhibit 2 from the
18 Intuitive deposition. This was a document Mr.
19 Herman testified was presented to your
20 organization. And what I'd like to do, I think
21 in fairness to you, let's just hand you a copy.
22 And ask you do you recognize this document?

23 A: I do not.

24 Q: Never seen it before?

25 A: No, I've never seen it.



TMC, ET AL. V. SC DHEC, ET AL.

1780

1 Q: Okay. Who in your organization would have
2 reviewed that document in the Fall of 2017?

3 A: I assume it would be Sarah Bacik or somebody on
4 her team.

5 Q: Okay. You mentioned that you actually got on
6 a plane, took a trip, went to Dallas, met with
7 the Intuitive folks and we'll get to that as go
8 through our chronology. But Caroline Cotter
9 was on that trip was she not?

10 A: On the trip that I went on ---

11 Q: Yes,

12 A: --- in '18? I believe she was, yes.

13 Q: Okay. 'Cause I think you neglected to mention
14 her yesterday but she did go with you on that
15 trip, correct?

16 A: Yes.

17 Q: Okay. I'm gonna come back to this document.
18 Let's go next to Trident 60 please.

19 **(Petitioner TMC's Exhibit Number 60 was introduced**
20 **into the record at this time.)**

21 Q: All right. I think you made reference to this
22 document yesterday. This is a non-disclosure
23 agreement between Intuitive a Texas company and
24 MUHA, correct?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1781

1 Q: And if we look over on the last page, I just
2 want you to acknowledge that that is your
3 signature on page six of this document.

4 A: Yes, it is my signature.

5 Q: And you're signing on behalf of the hospital
6 authority not the medical university, correct?

7 A: Yes.

8 Q: Okay. And what's the date of your signature?

9 A: November 30, 2017.

10 Q: Okay. So at this point in time you are
11 interest enough in Intuitive to sign a NDA and
12 start sharing data. Fair statement?

13 A: Yes.

14 Q: Okay. We have been able to ascertain that
15 there was quite a bit of data that was
16 transmitted through shared sites, shared file
17 sites. Do you recall what types of data were
18 sent from your hospital to Intuitive?

19 A: As to the details, no.

20 Q: Okay. What was the purpose of sharing data
21 with Intuitive?

22 A: Well anytime we have a company like this we're
23 trying to see if we wanna work together or they
24 or maybe we learn something from each other.
25 It could be any number of reasons.



TMC, ET AL. V. SC DHEC, ET AL.

1782

1 **MR. SUMMER:** Your Honor, I would like to move into
2 evidence Trident number 60.

3 **MR. DAYHUFF:** No objection.

4 **THE COURT:** It's admitted.

5 **(Petitioner TMC's Exhibit Number 60 was admitted into**
6 **evidence.)**

7 **MR. SUMMER:** Thank you, Your Honor.

8 Q: So during the course of 2018, I think Mr.
9 Herman's deposition or his testimony is in the
10 record so the court will be able to refer to
11 that. There's a great deal of activity between
12 the two organizations during 2018. Data shared
13 back and forth, information shared back and
14 forth. I'd like to turn your attention to
15 Trident Exhibit 62.

16 **(Petitioner TMC's Exhibit Number 62 was introduced**
17 **into the record at this time.)**

18 Q: This is a document entitled Summerville
19 freestanding ED alternative site August 31,
20 2018. Do you recognize that document?

21 A: You know, not in particular but I'm probably
22 familiar with it in some ways.

23 Q: Okay. If you would go to page 64 of that
24 document. Recommended site option one. If you
25 don't mind, read that second bullet into the



1 record for me please.

2 A: Intuitive recommends that we move forward with
3 the site within six miles of the community
4 hospital because the high volume will offset
5 the potential reduction in reimbursement for
6 FSED proposed by CMS.

7 Q: Okay. Intuitive actually helped you pick the
8 site that the project is currently planned for,
9 correct?

10 A: Yeah, I mean, we used Intuitive data and
11 recommendations and -- but came to the decision
12 ourselves.

13 Q: You refer to Intuitive data that helped you
14 make that decision. We've never been provided
15 with any Intuitive data that your organization
16 looked at. Do you know why?

17 **MR. DAYHUFF:** Your Honor, I object to that, the
18 premise of that question. We've seen the
19 Intuitive package. The Intuitive package
20 contains data about locations, in fact, Your
21 Honor reviewed that data as part of an in
22 camera review. So there has been data. So I
23 think the premise of that question
24 mischaracterizes our record is my objection.

25 **MR. SUMMER:** Your Honor, I've already submitted a



1 privilege log and it's in Mr. Herman's
2 deposition. He did not provide us with data
3 because he -- until he had MUSC's permission he
4 wasn't going to honor the subpoena. So all I'm
5 asking this witness is, he claims that he's
6 relied upon data from Intuitive to make this
7 decision. I just want to know what it is and
8 where it is because I haven't seen it.

9 **MR. DAYHUFF:** Your Honor, the data that is referenced
10 in the Herman deposition that was withheld from
11 the subpoena was MUSC data that was sent to
12 Intuitive. So that's the data Mr. Herman was
13 referring to. Not some trove of data that went
14 from Intuitive to MUSC. The data that, and my
15 objection is, there was data. There was
16 location information. There was market
17 information, site information. And that data
18 was provided in discovery. So that was my
19 objection to the premise of that question that
20 there's some element of data or information
21 that hasn't been provided to him related to the
22 sites that MUSC was considering.

23 **MR. SUMMER:** I appreciate your speaking objection
24 and telling us what the witness needs to
25 testify to. I'll withdraw that question and



TMC, ET AL. V. SC DHEC, ET AL.

1785

1 I'll ask it another way, Your Honor.

2 **THE COURT:** Okay. Thank you.

3 **MR. SUMMER:** Yes, ma'am.

4 Q: When you refer to data from Intuitive about
5 move -- your decision to move the site based
6 upon Intuitive data, what did that data look
7 like?

8 A: I would characterize it as -- maybe it's a miss
9 characterization by me about Intuitive data.
10 I'll say Intuitive interpretation of data that
11 we gave them would probably be the best way of
12 characterizing that.

13 **MR. SUMMER:** Your Honor, at this time we move
14 Trident 62 into evidence.

15 **MR. DAYHUFF:** Your Honor, I suppose the only issue I
16 have with 62 is it's been labeled a draft. But
17 as long as we know for the record that that is
18 a draft document I'm okay with it being
19 submitted in, it being given the way that a
20 draft should be good.

21 **THE COURT:** Okay. Thank you. It's admitted
22 (Petitioner TMC's Exhibit Number 62 was admitted into
23 evidence.)

24 **MR. SUMMER:** It speaks for itself, Your Honor.

25 Q: So that alternative site presentation was dated



TMC, ET AL. V. SC DHEC, ET AL.

1786

1 August 31, 2018. So is it fair to say that by
2 August of 2018 you had decided on the
3 Applebee's site?

4 A: I don't think that's accurate. I think we
5 decided sometime in the fall. I can't tell you
6 exactly when. But I think that was an early
7 suggestion and then it kind of went back and
8 forth for a while.

9 Q: Okay. Next I want to go to Exhibit 52 and the
10 Intuitive deposition which has been admitted
11 into evidence. This is a packet from your site
12 visit to Intuitive and I want to see if this
13 document page one of this document Intuitive
14 251. Does this refresh your recollection about
15 your site visit?

16 A: Yes.

17 Q: Okay. So what day did you and your group visit
18 Intuitive?

19 A: I think from the document says September 5th.

20 Q: 2018?

21 A: Yes.

22 Q: Okay. And who from your group attended?

23 A: Looks like myself, Matt Wayne our Chief
24 Operating Officer, Tom Crawford who is an
25 administrator over our emergency departments at



TMC, ET AL. V. SC DHEC, ET AL.

1787

1 that time, Sarah Bacik Chief Strategy Office,
2 and Caroline Cotter who works for Sarah.

3 Q: Okay. And what did you do while you were
4 there?

5 A: We toured the facilities. You see the
6 facilities we toured there and then we had
7 discussion around mainly their approach to
8 managing ERs as well as their unique
9 methodology when it comes to billing ER
10 services.

11 Q: Okay. They have a hybrid model, correct?

12 A: They do.

13 Q: And in that hybrid model they triage patients
14 between ED and Urgent Care. Is that a fair
15 statement?

16 A: Yes.

17 Q: Okay. And you found that to be an attractive
18 model did you not?

19 A: Yes.

20 Q: Okay. While we're in the document lets go over
21 to page 276 please. 286. Sorry, 276. I mean
22 we can't have a line of questioning if we don't
23 have the document.

24 **MR. SUMMER:** Can I beg the courts indulgence for two
25 minutes please?



TMC, ET AL. V. SC DHEC, ET AL.

1788

1 Q: All right. There we go. Do you recognize this
2 document?

3 A: Yes.

4 Q: Okay. This is the information presented to you
5 during your site visit and I'd like to turn
6 your attention over to page 279. And do you
7 remember Intuitive's commentary regarding this
8 page?

9 A: Not this page exactly, no.

10 Q: Do you remember the discussion about how they
11 select sites?

12 A: In general, yes.

13 Q: Okay. Turn over to page 280 please. This is
14 the footprint or layout proposed by Intuitive,
15 correct?

16 A: One of the layouts, yes.

17 Q: Right.

18 A: But that's their two standard layouts.

19 Q: Right. And the one on the left is the one that
20 you adopted, correct?

21 A: Correct.

22 Q: Okay. This layout does not include CDU beds,
23 right?

24 A: That is correct.

25 Q: Okay. And the reason it doesn't include CDU



TMC, ET AL. V. SC DHEC, ET AL.

1789

1 beds is because Intuitive said you didn't
2 really them 'em did you?

3 A: Well Intuitive came -- said that and then we
4 re-looked at it, we looked at how we would use
5 them and we came around to the fact that we
6 didn't think we needed CDU beds.

7 **MR. SUMMER:** Look over on page 283 please. We can
8 expand that top title, top two lines. There we
9 go, that's much better.

10 Q: This is the market capture analysis performed
11 by Intuitive. Is it not?

12 A: Yes.

13 Q: And this is part of the data that you reviewed
14 from Intuitive in making your decision about
15 site selection. Was it not?

16 A: We reviewed it. I mean, it's not exactly how
17 we would do an analysis of this. So it's a
18 factor in the things we looked at.

19 Q: You considered it did you not?

20 A: Yes.

21 Q: Okay. So when you returned from Dallas you
22 made a decision to move to the new site did you
23 not?

24 A: Well, once again, I don't think it was
25 immediate. It was kind of an off and on



TMC, ET AL. V. SC DHEC, ET AL.

1790

1 discussion over a series of months.

2 Q: Okay. Let's go over to Trident 67 please.
3 These are some heavily redacted minutes from
4 Strategic Ventures board of directors. Do you
5 remember testifying yesterday that Ventures
6 actually made the decision to move forward with
7 this site, correct?

8 **MR. DAYHUFF:** Your Honor, I don't think that was his
9 testimony yesterday. So I object to that
10 question on the factual premises is not
11 accurate.

12 **MR. SUMMER:** I think it's accurate but I'll rephrase
13 it for counsel.

14 Q: This is Strategic Ventures minutes from
15 December 20, 2018, correct?

16 A: Yes.

17 Q: Okay. Why don't you read item five in the
18 record please.

19 **MR. SUMMER:** Go over to the next page please. Can
20 you blow up item five? It's the only thing
21 that's not redacted.

22 A: Doctor Johnson moved for approval of the new
23 ground leases located at 1310 North Main
24 Street, Summerville for the freestanding ER.
25 The purpose of this lease request is to move



TMC, ET AL. V. SC DHEC, ET AL.

1791

1 the location of the currently contested
2 freestanding ED.

3 Q: Okay. So it is the Strategic Ventures board
4 that entered into the ground lease or approved
5 you to enter into the ground lease for 1310
6 North Main Street in Summerville, right?

7 A: That is correct.

8 Q: Okay.

9 **MR. SUMMER:** 67 in?

10 Q: On February one of this year your counsel
11 submitted a supplement to the first request for
12 production in this case and produced Trident's
13 68.

14 **MR. SUMMER:** Can we put Trident 68 up?

15 Q: That's the package that was presented to you in
16 September of 2018, correct?

17 A: I assume so.

18 Q: Okay.

19 A: What page?

20 Q: All right. So my first question to you is, why
21 did your counsel not produce this in September
22 of 2018 when you received it?

23 A: You know, I can't answer that. I don't know
24 who had copies of it from the September visit.
25 I didn't maintain a copy but maybe others



TMC, ET AL. V. SC DHEC, ET AL.

1792

1 didn't as well. I don't know. I don't know
2 the answer to that.

3 Q: Let's go over to the second page of this
4 document. Which again was not produced until
5 February the 1st of this year. And you see it
6 purports to have a legal structure including a
7 joint venture in it. You see that?

8 A: Yes.

9 Q: Okay. Now based upon this document, there were
10 multiple motions for summary judgment that were
11 filed in this case and in response to those we
12 filed your affidavits.

13 **MR. SUMMER:** Can we pull up his affidavit please?

14 Q: Let's go over the second page of the affidavit.
15 Do you recall discussing this in your direct
16 yesterday?

17 A: Correct. Yes.

18 Q: Let's look at number four in your affidavit.
19 And it says the site for the FED with be
20 relocated .74 miles from the original site
21 submitted in CON application, .45 miles from
22 the Nexton boarder, .4 miles from I-26, and .32
23 miles from the Roper St. Frances Urgent Care
24 center. Is that correct?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1793

1 Q: All right. And that site change was made based
2 upon information and data provided to you by
3 Intuitive, correct?

4 A: Yes, I would say it was the bases of a decision
5 or part of a decision but in the end it's our
6 decision to decide what to use and what not to
7 use.

8 Q: Okay. Number five, it says the reason for the
9 relocation is to provide better patient access,
10 correct?

11 A: Yes.

12 Q: Okay. Again, this is based upon data provided
13 to you by Intuitive, correct?

14 A: Once again, this is Intuitive interpretation of
15 data that we gave them. Yes.

16 Q: Okay. Number six, the new site is in a
17 shopping center in a space now occupied by a
18 closed restaurant which will be demolished
19 before the freestanding ED is built. Is that
20 correct?

21 A: Yes.

22 Q: All right. Number seven, to save on cost MUSC
23 also decided to reduce the size of the
24 freestanding ED from 15,300 square feet to
25 10,700 square feet. Instead of 10 exam rooms



TMC, ET AL. V. SC DHEC, ET AL.

1794

1 we now plan to have seven rooms. Also, to save
2 on cost we have decided to eliminate a proposed
3 clinical decision unite and a proposed helipad.
4 Is that correct?

5 A: Yes.

6 Q: Now part of the reason that you had to reduce
7 the size was to get it to fit on the footprint
8 for this site, correct?

9 A: Well, I would turn that around and say the
10 primary reason we selected the site was because
11 it fit. Not we selected the site and then cut
12 the helipad and cut the CDU. We cut the CDU
13 and helipad first.

14 Q: Okay. But this is a much smaller site than
15 what you were gonna be using in Nexton,
16 correct?

17 A: That is correct.

18 Q: Okay. And it says you're gonna have seven exam
19 rooms. Is that correct?

20 A: Yeah, I'm not exactly sure but I think that's
21 the current plan, yes.

22 Q: Okay. Let me go to number eight. Or before we
23 go to number eight let's just say that we
24 established already that based upon information
25 you received from Intuitive you abandoned the



TMC, ET AL. V. SC DHEC, ET AL.

1795

1 clinical decision unite and the helipad for
2 this project, correct?

3 A: Once again we -- in conversation with Intuitive
4 about reasons they don't recommend a CDU and a
5 helipad, we made the decision ourselves to not
6 do that.

7 Q: Okay. Number eight, another change to the
8 project that MUSC intends to make is to provide
9 urgent care services which are not subject to
10 CON requirements in the same building as the
11 freestanding ED. Is that correct?

12 A: Yes.

13 Q: Okay. That is the hybrid model for Intuitive,
14 right?

15 A: Yes.

16 Q: Okay. Then number nine references the decision
17 we just discussed about the strategic board,
18 right? Venture's board.

19 A: Yes.

20 Q: Okay. And then number 10, another change that
21 MUSC is considering but has not yet made is
22 whether it will contract with a management
23 services company to manage the freestanding ED,
24 correct?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1796

1 Q: Okay. And even up to the time of your
2 deposition you indicated the Intuitive, if you
3 had a management company, Intuitive was likely
4 to company that would manage this project,
5 correct?

6 A: Yes.

7 Q: Okay. When did you give your deposition? Do
8 you recall?

9 A: Sometime in June.

10 Q: June the ---

11 A: Of this year.

12 Q: --- 11th? Does that ring a bell?

13 A: Yes, that was the date.

14 Q: Okay. While we're in the affidavit on this
15 paragraph, Intuitive is a Texas based company,
16 correct?

17 A: Yes.

18 Q: In fact the vast majority of their freestanding
19 EDs are located in Texas, correct?

20 A: I don't know exactly where they're all at but
21 that's an accurate statement.

22 Q: And Texas is a state that has no certificate of
23 need, correct?

24 A: Correct.

25 Q: All right. And the vast majority of



TMC, ET AL. V. SC DHEC, ET AL.

1797

1 Intuitive's freestanding EDs are not hospital
2 based EDs are they?

3 A: I don't know the answer to that.

4 Q: Okay.

5 **MR. SUMMER:** Your Honor, at this time we'd like to,
6 if we don't have it in can you move Dr.
7 Cawley's affidavit in yesterday?

8 **MR. DAYHUFF:** I think I did. But if I didn't I've
9 got no objection to it.

10 **COURT REPORTER:** It's in.

11 **MR. SUMMER:** Okay. Thank you.

12 **THE COURT:** It's in?

13 **MR. SUMMER:** It is. It is in, Your Honor. Thank
14 you.

15 Q: Okay. Go over to Trident 72 please.

16 **(Petitioner TMC's Exhibit 72 was introduced into the**
17 **record at this time)**

18 Q: Ask you if you recognize what's been marked as
19 Petitioner's 72?

20 A: Yes.

21 Q: Okay. What is this?

22 A: It's an agreement that we completed in the last
23 several days.

24 Q: This is the ground lease between Wood Co.
25 Reality and Strategic Ventures?



TMC, ET AL. V. SC DHEC, ET AL.

1798

1 A: What's -- I'm still seeing the front sheet.
2 I'm assuming that's what that is.

3 Q: Sure.

4 A: Yeah. This is the original. I can tell by the
5 thickness of it. This is the original ground
6 lease, yeah.

7 Q: And you referenced and what was admitted into
8 evidence yesterday was an addendum to this
9 document ---

10 A: Correct.

11 Q: --- correct?

12 A: Yes. Excuse me on that.

13 Q: It's fine. And this was executed in April of
14 this year, correct?

15 A: Yes. This ground lease?

16 Q: Yes.

17 A: Yes.

18 Q: And you signed it on behalf of Strategic
19 Ventures did you not?

20 A: Yes.

21 Q: All right. Your Honor, at this time we move
22 Trident Exhibit 72 into evidence.

23 **MR. DAYHUFF:** No objection.

24 **THE COURT:** Admitted.

25 **(Petitioner TMC's Exhibit Number 72 was admitted into**



1 **evidence.)**

2 **MR. SUMMER:** Thank you, Your Honor.

3 Q: Now your deposition was taken on June the 11th
4 of this year at MUSC. Was it not?

5 A: Yes.

6 Q: Okay. And at the time of the deposition I
7 asked you about eight or nine questions
8 regarding Intuitive. You indicated that
9 Intuitive may manage the project, correct?

10 A: They might but that decision hasn't been made.

11 Q: Okay. You indicated that you had adopted the
12 Intuitive model for this project, correct?

13 A: Yes.

14 Q: Okay. And that model was a combination of both
15 ED and urgent care under one roof, correct?

16 A: Yes.

17 Q: Okay. And again this is at the time of your
18 deposition on June 11th of this year. You also
19 indicated that based upon data you received
20 from Intuitive you made the decision to move
21 the site to where the Applebee's is, correct?

22 A: Yes. Once again, and I think I clarified that
23 in my deposition that based upon the
24 information that we got from Intuitive we then
25 made the decision ourselves.



TMC, ET AL. V. SC DHEC, ET AL.

1800

1 Q: You also indicated that Intuitive actively
2 assisted you in selecting a site, correct?

3 A: Yes.

4 Q: Okay. You also indicated at the time of your
5 deposition and again here today that the
6 decision not to include a CDU was based upon
7 advice from Intuitive, correct?

8 A: Yes.

9 Q: You've also indicated that the decision not to
10 include a helipad was based upon information
11 you received from Intuitive, correct?

12 A: Yes.

13 Q: Okay. You also have indicated that floor plan
14 you seek to utilize was provided by Intuitive,
15 correct?

16 **MR. DAYHUFF:** Asked and answered, Your Honor. We've
17 been through this I think twice and this would
18 be the third time.

19 **MR. SUMMER:** That's the last question I have on that
20 one, Your Honor. Correct?

21 A: Yes.

22 Q: Okay. Now at the time of your deposition it
23 was your testimony that you were going to
24 utilize this hybrid model in the facility that
25 you intend to build in Summerville, correct?



TMC, ET AL. V. SC DHEC, ET AL.

1801

1 A: Yes.

2 Q: Okay. And do you recall that I asked you had
3 you or anyone on your behalf had discussion
4 with DHEC regarding the licensure issues of
5 having an urgent care inside of a freestanding
6 emergency department. Do you remember that
7 line of questions?

8 A: Yeah, vaguely. Yes.

9 Q: Okay. Well, let's go back.

10 **MR. SUMMER:** Can we pull up 83 from the deposition
11 please? We're gonna start -- is that as big as
12 we can get it?

13 Q: Can you ---

14 A: I can see it.

15 Q: All right. You on page 83?

16 A: I can see it from here.

17 Q: Okay. So my question was have you had any
18 discussions with DHEC regarding whether or not
19 their going to permit this dichotomy inside
20 this facility. And what was your response?

21 A: I said I personally had not talked to them.
22 Whether somebody on the team has had an early
23 discussion with them, I did not know the answer
24 to that.

25 Q: My question was, you don't know whether or not



TMC, ET AL. V. SC DHEC, ET AL.

1802

1 licensure would have an issue with this do you?

2 And what was your response?

3 A: And I'm sorry, you guys are moving around
4 there. And I said I didn't think they would.

5 Q: Okay. And then my next question on line 15
6 would you agree with me that for all intense
7 and purposes an urgent care center is a
8 physician's office, correct? And what was your
9 response?

10 A: My response was I think some urgent care
11 centers are physician offices some are not.
12 Some urgent care centers are actually
13 freestanding ERs built and shown as such. So
14 I think it's a gray area in a lot of people's
15 minds.

16 Q: And my next question is you could understand
17 why there may be a licensure issue regarding
18 whether or not you can function as basically a
19 physician's office inside of a licensed
20 healthcare facility. Have you had any internal
21 -- have you had any internal discussions with
22 anyone about whether or not licensure would
23 have a problem with this? And what is your
24 response?

25 A: I said I think if we were holding up the urgent



TMC, ET AL. V. SC DHEC, ET AL.

1803

1 care centers as an emergency center I think
2 licensure would have a definite problem with
3 that. But we're not saying the urgent care
4 side is an emergent side.

5 Q: Okay. That was on June the 11th. And then we
6 got your email.

7 **MR. SUMMER:** Can we pull the email up please?

8 Q: The email was from three weeks later and is
9 dated July the 2nd. And you recall discussing
10 this email yesterday in your direct?

11 A: Yes.

12 Q: Okay. Clearly something transpired between the
13 date of your deposition and me asking you those
14 questions. And July the 2nd when you -- your
15 counsel produced this document on the same day
16 that you authored it. What is your
17 understanding of what transpired in that
18 interim regarding this issue?

19 A: Well what happened after the deposition, it
20 became clear to us that DHEC had some concerns
21 with this. Concerns with the hybrid model and
22 we tried to have some early discussions about
23 what does this mean. But it became clear to us
24 that we had some work to do to explain this
25 model to DHEC and therefore was not the time to



1 do that. And we decided we'd simply retreat
2 back to the original plan, the original
3 building plan for the freestanding ER and
4 that's basically what occurred in that period
5 of time.

6 Q: Okay.

7 A: And it was my email to Greg Hall, who I believe
8 was going for deposition in a day or two, to
9 him to clarify what was going on.

10 Q: You wanted to make sure he got the memo?

11 A: Well, I wanted to make sure that he understood
12 what was going on. I mean, he's not the
13 ultimate decision maker about what the ER would
14 be.

15 Q: Who at DHEC contacted your organization
16 regarding this issue?

17 A: I don't know who. I just know there was
18 conversations and concerns.

19 Q: Okay. Is it your understanding that DHEC
20 contacted either you or your attorneys
21 regarding this issue?

22 A: I was not contacted. It was somebody in the
23 organization whether it was the attorneys or
24 somebody in our organization else. I don't
25 know the answer to that. But it got passed on



TMC, ET AL. V. SC DHEC, ET AL.

1805

1 to me that there was concerns.

2 Q: Now, looking at this email on the second. You
3 don't reference DHEC in here do you?

4 A: I don't think so. I don't have the second page
5 but I don't believe so.

6 Q: Let's look at it. It says Greg, which is I
7 assume is Dr. Hall, some confusion has
8 developed around our freestanding ED project in
9 Summerville. I believe this confusion stems
10 from -- stems come from the MUSC and Intuitive
11 Care discussions that have come up during the
12 trial discovery phase and subsequent wrong
13 interpretations of these discussions by
14 attorneys for those opposing the project.
15 Actually DHEC raised this issue with you. Did
16 they not?

17 A: I would say in the deposition after they heard
18 some comments and different ways it was
19 interpreted, I think they raised concerns, yes.

20 Q: There's something I'm puzzled about. We know
21 from the Intuitive deposition that folks from
22 your staff were prepared by Intuitive and went
23 and met with DHEC on December the 7th of 2018.
24 All of this information was disclosed at that
25 time. Why did DHEC all of a sudden have a



1 problem with this?

2 **MR. DAYHUFF:** So, I object to, again, the factual
3 premise that it mischaracterizes evidence that
4 Intuitive prepared our folks to go see DHEC and
5 go talk about the hybrid model. He ---

6 **THE COURT:** The objection is sustained.

7 **MR. SUMMER:** Okay. I can rephrase it, Your Honor.

8 **THE COURT:** Okay.

9 Q: We know from discovery now that was taken at
10 Intuitive that on December the 7th, 2018 a
11 meeting was held between members of your
12 facility and DHEC regarding all of these
13 changes that we've been talking about. Were
14 you aware of that meeting?

15 A: Not directly aware of it. And whether there
16 was discussion about the hybrid model at that
17 time I'm not aware of it, no.

18 Q: So let's continue to look at this ED. I'm
19 confused by the third paragraph. It's the
20 middle paragraph on page 76.

21 **MR. SUMMER:** If you can pull that up again, this was
22 the original plan.

23 **(Petitioner TMC's Exhibit Number 102 was introduced**
24 **into the record at this time.)**

25 Q: This was the original plan and remains the plan



TMC, ET AL. V. SC DHEC, ET AL.

1807

1 for this facility. Nothing has changed in the
2 nature or types of services that will be
3 performed at this freestanding ED and
4 everything remains consistent with a
5 certificate of need application. We plan to
6 bill as per normal emergency services
7 freestanding ED expectations. Does that mean
8 that you're not gonna use the Intuitive
9 footprint now?

10 A: No, what this says is we're not gonna use the
11 hybrid model.

12 Q: Okay. So all the other changes that we've
13 discussed are still gonna take place. It's
14 only the hybrid model that is not gonna take
15 place.

16 A: Correct.

17 Q: Okay. Let's talk about this issue of on any
18 given day 20 to 30 boarders are in your ED. I
19 think your testimony is that that clogs your ED
20 up. In other words, there's patients are stuck
21 in ED bays and you can't get patients upstairs
22 so you can't get ED patients into those bays.
23 Fair statement?

24 A: Yes.

25 Q: I'm gonna hand you certificate of need filed on



TMC, ET AL. V. SC DHEC, ET AL.

1808

1 July the first by your organization. I got
2 this last night. I would like to have gotten
3 this in discovery. It was filed on July the
4 1st, 2019. I assume you are familiar with this
5 application?

6 A: Yes.

7 Q: If we turn over to page two, the second page.
8 Is that your signature?

9 A: It is.

10 Q: Above your signature it says the applicant
11 hereby certifies that the information obtained
12 in this application including all assurances
13 and attachments are correct to the best of his
14 knowledge and belief. Is that true?

15 A: Yes.

16 Q: Okay. And you signed it on May the 29th of
17 2019, correct?

18 A: Yes.

19 Q: Some two weeks before your deposition with me
20 on June the 11th of this year, correct?

21 A: Yes.

22 Q: But this document was not produced.

23 **MR. DAYHUFF:** Your Honor, so we're gonna have this
24 alleged discovery abuse hashed out in briefing
25 as I understood it. We don't know that Mr.



TMC, ET AL. V. SC DHEC, ET AL.

1809

1 Summer requested a CON application for
2 additional beds at the hospital which is what
3 this appears to be. So I don't know why he is
4 asserting that this should have been produced
5 when I'll bet the discovery request pertained
6 to ED services. So I'd appreciate it if we
7 could hold those arguments until we brief them
8 with Your Honor after this trial.

9 **MR. SUMMER:** Your Honor, I may not have this witness
10 again. I only have a few questions but I would
11 like to get them on the record.

12 **THE COURT:** But how is that relevant to this
13 proceeding?

14 **MR. SUMMER:** I'm gonna show how it's relevant because
15 there are statements that are made in this
16 document. I beg the Courts indulgence.

17 **THE COURT:** Okay. Mr. Summers -- Summer you can ask
18 questions about the document but as far
19 comments about when or when it was delivered to
20 you, just proceed on without those comments.

21 **Q:** Turn if you will to page 22 of this document.
22 First this is an application to add 29 beds to
23 your downtown campus, correct?

24 **A:** Yes.

25 **Q:** Okay. And you have, on prior testimony, 20 to



TMC, ET AL. V. SC DHEC, ET AL.

1810

1 30 boarders per day in your ED, correct?

2 A: Yes.

3 Q: If you look at the middle of the third
4 paragraph, furthermore constraints on bed
5 capacity have led to extensive boarding hours
6 in both the operating rooms and emergency
7 department. Boarding hours are defined hours
8 are defined as hours a patient is waiting or
9 boarding within the hallways for an inpatient
10 bed. Patients that access MUSC medical center
11 through the ED and require inpatient admission
12 wait an average two hours to be placed into an
13 inpatient bed to receive treatment. Is that
14 accurate?

15 A: Yes.

16 Q: Okay. And the purpose of this application is
17 to add beds to get the boarders out of the ED,
18 correct?

19 A: Well, that's one piece. It's about the ER but
20 it's also about other areas of the medical
21 center that are just jammed in many ways.

22 Q: All right. Look at the first paragraph. It
23 says that you will back fill beds vacated by
24 Peds when that facility opens in October of
25 this year. You will have 33 back filled beds



TMC, ET AL. V. SC DHEC, ET AL.

1811

1 available, correct?

2 A: Yes.

3 Q: Okay. And those beds are gonna be available to
4 you in October of this year when the children's
5 hospital opens, correct?

6 A: That's correct.

7 Q: Okay. You did not mention that to the Court in
8 your direct examination yesterday did you?

9 A: In terms of what question? I'm not sure what
10 that ---

11 Q: What -- well, let's look at this. You're going
12 to solve the boarder question in October of
13 this year when you have 33 new beds.

14 A: No, I would disagree with that statement. That
15 that's -- we have many -- we have boarding
16 problems not only in the ER, we have it in the
17 ORs, we have boarding problems getting patients
18 in. It's typically to have -- it's typical to
19 have 15 to 20 patients waiting to get into MUSC
20 from the outside. So we have boarding issues
21 beyond just the emergency room.

22 Q: You'll have 33 new beds, adult beds, in October
23 of this year, correct?

24 A: That is correct.

25 Q: And you will get 29 new beds once this CON



TMC, ET AL. V. SC DHEC, ET AL.

1812

1 application is approved by the Department,
2 correct?

3 A: That is correct.

4 Q: Okay. So that's gonna be a total of 62 new
5 beds downtown.

6 A: That is correct. But that may not completely
7 solve the ER boarding issue.

8 Q: Okay.

9 A: Just to be clear about that.

10 Q: So the 20 to 30 boarders are not gonna be taken
11 care of with 62 new beds. Is that the
12 testimony you want this Court to believe?

13 A: We have boarding problems not only in the
14 emergency room. We just talked about the
15 emergency room, that's all we've been talking
16 about. We have boarding problems, patients
17 waiting to come into MUSC and we have patients
18 who can't get out of the operating room in
19 order to get into a bed. So we have boarding
20 problems in multiple places. We will solve
21 some of that ER when we have immediate beds but
22 we're not gonna solve all of it.

23 **MR. SUMMER:** Beg the Court's indulgence.

24 Q: Dr. Cawley, thank you very much for your time.
25 Please answer any questions other counsel may



TMC, ET AL. V. SC DHEC, ET AL.

1813

1 have. Yes, Your Honor, I neglected to move
2 this last exhibit into evidence, 29 & app would
3 be our number 102.

4 **MR. DAYHUFF:** No objection Your Honor.

5 **THE COURT:** Okay. Admitted.

6 (Petitioner TMC's Exhibit Number 102 was admitted
7 into evidence.)

8 **MR. SUMMER:** Thank you Your Honor.

9 **THE COURT:** Before we hear from Ms. Hollingsworth's
10 questions, we'll take a 15 minute break.

11 **(Off the Record)**

12 **THE COURT:** Okay. Thank you all. Okay, Ms.
13 Hollingsworth.

14 **MS. HOLLINGSWORTH:** Thanks, Your Honor.

15 **DR. CAWLEY - CROSS-EXAMINATION BY MS. HOLLINGSWORTH:**

16 Q: Good morning, Dr. Cawley.

17 A: Good morning.

18 Q: I will, I promise, I will be succinct and
19 concise and not retread the ground that you've
20 just gone through. We appreciate your time
21 here this morning. But I have do have some
22 things I want to ask you both related to the
23 direct testimony you had yesterday afternoon
24 and your discussions with Mr. Summer this
25 morning. One of the last things you talked



TMC, ET AL. V. SC DHEC, ET AL.

1814

1 about at the end of the day yesterday, if we
2 could look at Roper Exhibit 36.

3 **(Petitioner Roper's Exhibit Number 36 was introduced**
4 **into the record at this time.)**

5 Q: Late in the day yesterday you testified about
6 that years ago you had evaluated options and
7 opportunities to renovate the existing ED space
8 downtown. Do you recall that testimony?

9 A: Yes.

10 Q: And I think you said that back then it was
11 roughly 30 million dollars and that you guess
12 that could be up to 50 million dollars if done
13 today. Is that right?

14 A: Yes.

15 Q: Okay. This document that we received in
16 discovery has a date of 2014 MUSC adult
17 emergency department proposed plan phasing and
18 budget meeting. And somewhere in here it has
19 sort of a total project all in number the high
20 20 million. So that -- does that sound
21 consistent with what you were testifying to
22 yesterday afternoon?

23 A: Roughly, I don't recall this document exactly
24 but we've looked at it multiple times over the
25 years.



TMC, ET AL. V. SC DHEC, ET AL.

1815

1 Q: You -- it might be easier since it is a very
2 lengthy document. You should have a notebook
3 over there with a yellow cover. I have a key
4 I can show it to you. This document appears to
5 be a multi phase proposal. Is it your
6 recollection that when you were evaluating sort
7 of renovating the entire ED that it would have
8 to take place in several phases?

9 A: Yes. Yes.

10 Q: And those several phases were, I'm sure, to
11 sort of accommodate patients while you're
12 working in one area on the changes while still
13 being able to meet patient demand. Is that
14 fair?

15 A: Yes.

16 Q: Okay. And do you recall sort of setting a side
17 the cost issue that sounds like that had caught
18 your attention, what were your thoughts
19 otherwise with regard to sort of a renovation
20 of the adult ED downtown?

21 A: Well, I think at the time, you know, just once
22 again, this is about five years ago so I'm
23 thinking through the bigger items. Number one
24 is was cost, so the cost at the time. Number
25 two, you know, if I recall there were issues



TMC, ET AL. V. SC DHEC, ET AL.

1816

1 around how we would phase it or could we phase
2 it. Other than that I can't give you specifics
3 as to why that was the issue at the time but I
4 remember there was a conversation -- there were
5 conversations about how we could phase, whether
6 that was practical.

7 Q: Okay. If you'll go to the fifth slide of the
8 document. There we go. It would be 36-5 at
9 the top of the page. You agree that MUSC ED
10 defines value to include market share?

11 A: In this slide it says that.

12 Q: Okay. Well, what is your opinion? Does MUSC
13 consider market share an important value for
14 the ED?

15 A: I think that seeing our patients where they
16 want to be seen and when they want to be seen
17 is the most important thing.

18 Q: Okay. There are six sort of -- pie graph and
19 there are six pieces of the pie. If you take
20 a look at them. In your opinion as the
21 administrator for this facility, do you agree
22 that sort of the six components of how your ED
23 would define value would be growth, service,
24 excellence, alignment and integration,
25 operational efficiency, fiscal stewardship,



1 quality and outcomes?

2 A: I mean, we would probably term a little
3 different today. This is a 2014 slide so we
4 have a different way of defining how we measure
5 things today. It's across six different
6 pillars. Some of those overlap some of those
7 are different.

8 Q: Okay. Is it consistent though with your
9 recollection from five years ago that the MUSC
10 target in bold for growth was market share?

11 A: Well, once again, it says market share. I
12 don't know what that means. Does that mean
13 real market share? Does that mean maintain
14 market share? Without look at the rest of the
15 document and understanding what that means,
16 can't answer that.

17 Q: Sure. But in terms of the document itself,
18 where market share is indicated it's the growth
19 piece of the pie. Is that right?

20 A: Once again, having testified in a lot of CON
21 trials, growth could mean also maintaining our
22 current market share. So if we have market
23 share of x percent that's maintaining it.

24 Q: Okay.

25 A: There's a lot of growth in Charleston and if we



TMC, ET AL. V. SC DHEC, ET AL.

1818

1 have 30 percent market share we would want to
2 maintain that. That's also growth.

3 Q: As administrator -- as the chief executive for
4 the Medical University, is that a metric that
5 you monitor frequently, your market share?

6 A: Not frequently. Probably once a year we look
7 at it. It's not one of those things that moves
8 a lot. So we look at it I would say about once
9 a year. Particularly when new state data comes
10 out.

11 Q: Okay. And do you look at it just sort of as
12 one single value or are you looking at it
13 broken out through perhaps different large
14 category of services?

15 A: When it comes out we look at it across our
16 service lines, we -- many different ways.

17 Q: Okay. If you could look at the seventh page.
18 I guess actually the eighth page. I'm sorry.
19 You recall having discussions or as part of the
20 discussions surrounding renovations of the ED
21 sort of analyzing what capacity you needed or
22 how you proposed it would be used? Do you
23 recall having discussions about that?

24 A: You know, at the time from this document, no I
25 don't recall the exact details, no.



TMC, ET AL. V. SC DHEC, ET AL.

1819

1 Q: Okay. What about the time -- you testified
2 yesterday about the renovation proposal or
3 plans from several years ago and their total
4 amount. What do you recall with regard to sort
5 of analyzing what you would like to get out of
6 that proposal? More rooms, more space, what
7 have you.

8 A: Yeah, the main issue is that, once again, this
9 is a 2014 document and there's been many
10 different things that have happened between
11 2014 and 2019 in terms of our ER space. So we
12 have gone and done some, I wouldn't say
13 renovation, we've taken on additional space and
14 done some things to make more space. So, from
15 my assessment is that this, number one, was
16 very expensive. And number two there were
17 issues around flow. I can't remember exactly
18 but I think this -- there were some concerns
19 about how this would happen.

20 Q: Okay. So you mentioned that between 2014 and
21 2019 that you made additional space. Do you
22 believe you have enough space at your adult
23 main ED downtown?

24 A: No.

25 Q: Okay. So you believe you need more space ---



TMC, ET AL. V. SC DHEC, ET AL.

1820

1 A: Yes.

2 Q: --- at the adult main? Okay.

3 A: Despite the additions to the space downtown
4 that we've done the last five to seven years.

5 Q: Okay. And I believe yesterday afternoon your
6 description was that you expanded as much as
7 you can and that it didn't help with the
8 issues, right?

9 A: Correct.

10 Q: When you were looking at various pieces of
11 information for your emergency department
12 though, sort of consistent with the
13 representations in this slide, do you, are you
14 aware of sort of a blended capacity number that
15 you all used for the adult ED here it's 1379
16 based on the forecasted FY 2019 volume at 75
17 percent?

18 A: I can't speak to the exact numbers per room,
19 no.

20 Q: Okay. Do you have any reason to question the
21 numbers on this slide? The calculations?

22 A: You know, once again this is an external group
23 that did this. I don't know the analysis that
24 we felt internal. I couldn't answer that. I
25 mean, our group may have been fine with it.



TMC, ET AL. V. SC DHEC, ET AL.

1821

1 Our group may have said it's not us. I can't
2 answer to it.

3 Q: Okay. Who in your agency would be the person
4 that could testify about this, these plans or
5 your response to these plans back in around the
6 time period?

7 A: Sorry. I'm hearing two different questions
8 from you. I'm hearing questions about metrics.
9 I think Dr. Hall could answer that best.
10 Whether that is an adequate metric or not that
11 we would look at. And then in terms of the
12 plan and what we did with it, probably Sarah
13 Bacik our Chief Strategy Officer.

14 Q: Okay. All right. It would be your decision
15 ultimately though whether or not to proceed
16 with renovation of the adult main downtown,
17 right?

18 A: Yes.

19 Q: Okay. And do you recall conversations with Ms.
20 Bacik about this presentation by whomever it
21 was, I believe you just told me someone else
22 prepared this.

23 A: Yeah, it looks like it's an external company
24 called Cannon Design.

25 Q: Okay. Do you recall talking with her about



1 Cannon Designs presentation or proposal?

2 A: You know, once again, this is a document a
3 while ago and a decision a while ago. I recall
4 many conversations probably Sarah amongst
5 including our ER leadership and other senior
6 leadership. I sort of told you what the --
7 what my recollection of those are. Number one
8 was cost and number two was that the flow and
9 the phasing wasn't gonna work.

10 Q: Okay. And the -- why do you have that
11 recollection about the flow and the phasing?
12 What is it that stands out if otherwise this
13 document isn't familiar to you?

14 A: Well, I've been at MUSC a long time, 16, 17
15 years at this point. I've worked in the ER,
16 understand the ER and how it flows, how it
17 works. And I remember the conversation around
18 that we -- it was just not gonna give us the
19 optimal flow that we would like to see to take
20 care of patients and see the right numbers. So
21 it's an ER that's very chopped up, it's not
22 centralized. It's just hard to work with.

23 Q: Okay.

24 A: In terms of the building space.

25 Q: Okay. And in June of 2014 do you know, do you



TMC, ET AL. V. SC DHEC, ET AL.

1823

1 recall in what planning phase the Shawn Jenkins
2 Children Hospital, Women and Children's was in?

3 A: We were several years down the road at that
4 point. Probably two years officially.

5 Q: So at the time you were having discussions
6 about renovating the adult main ED, would that
7 have been knowing that the Peds ED would
8 eventually be relocated to that new facility?

9 A: Yes but I think the Peds ED was in a different
10 spot than it is today and back in 2013, '14.
11 So, we actually eventually moved them to some
12 different space. But yes, we would know that
13 the Peds ER was gonna move out.

14 Q: Okay. All right. And then talking about Shawn
15 Jenkins, my understanding is that phase two of
16 sort of a three phase plan related to your
17 downtown structures, does any of your -- do you
18 have any other plans regarding the ED space
19 downtown in terms of renovation or repurposing
20 downtown?

21 A: Not at this time.

22 Q: Okay. How much is the -- that CON application
23 that you just filed for the 29 beds, do you
24 recall what the total project cost is for that?

25 A: I do not. Looks like the total cost, I'm



TMC, ET AL. V. SC DHEC, ET AL.

1824

1 looking at page six, is 7.3 million.

2 Q: 7.3 million? Okay. So the 7.3 million that's
3 to add the 29 beds in space being vacated as
4 part of Shawn Jenkins project?

5 A: Yes.

6 Q: And how much was the Shawn Jenkins roughly?

7 A: Almost 400 million dollars.

8 Q: Let me ask you about Roper's Exhibit 46. As I
9 understand it the acute critical and trauma
10 care ICCE, is sort of the, what I would kind of
11 traditionally clear like a service line or a
12 group that would include the adult ED services.
13 Is that right?

14 A: Yes. An ICCE or an ice is a service line in
15 many other organizations. That's our term.

16 Q: And are you involved in any of the strategic
17 planning for your ICCE within the facility?

18 A: Some of it. It depends on what it is and how
19 big it is. So some of it I'm part of and some
20 of them I am not.

21 Q: Okay. To the best of your recollection back in
22 August of 2017, would the fiscal year 2018
23 strategic initiative for the acute critical and
24 trauma care, ICCE include things like improving
25 patient satisfaction?



TMC, ET AL. V. SC DHEC, ET AL.

1825

1 A: Yes.

2 Q: Okay. And how about improving physical and
3 care team member engagement?

4 A: Yes.

5 Q: What about optimizing inpatient and out patient
6 volumes?

7 A: Yes.

8 Q: And improving the operations of the emergency
9 department?

10 A: Yes.

11 Q: As well as contributing to the financial
12 performance of MUSC Health?

13 A: Yes.

14 Q: To the best of your knowledge, and again this
15 would be for fiscal year 2018 in terms of
16 initiative and measures for success. Do you
17 recall whether or not the Summerville
18 freestanding ED for MUSC was one of those
19 initiatives or measures for success?

20 A: I don't recall exactly but it looks like we got
21 the measures of success in front of us here.

22 Q: Okay. Is what you see here on MUSC 4139
23 consistent with what you understood the fiscal
24 year 2018 initiatives and measures for success
25 to be that ICCE?



TMC, ET AL. V. SC DHEC, ET AL.

1826

1 A: Yeah, you know, once again, I don't directly
2 sign off on the initiatives and measures of
3 success. There's someone in between me and the
4 service line leaders. But in general I would
5 say this is consisting with what all of our
6 ICCE or all of our service lines do.

7 Q: And a document like this is just something that
8 you expect the, sort of, the senior leadership
9 for those specific ICCE to develop for those
10 areas as part of their job responsibilities?

11 A: Yes.

12 Q: And those individuals ultimately they report up
13 to you. Is that right?

14 A: The ICCE leaders do not. The ICCE leaders
15 report to somebody else and then those people
16 report to me.

17 Q: You're at the top of the food chain ultimately
18 though for the clinical care side, right?

19 A: Yes.

20 Q: Okay. And in terms of the emergency
21 department, enhancing the emergency department
22 to IOP throughput. Does that continue to be an
23 initiative for the emergency department?

24 A: Yes.

25 Q: And what about increasing CPC volume?



1 A: Yes.

2 Q: The CPC volume, that's a little different isn't
3 it then the adult main in terms of the patients
4 it sees and the metrics that you are aware of
5 in performance wise?

6 A: Well, historically it has been different. It's
7 tentative to see lower acuity patients but what
8 we were trying to do is actually raise the
9 acuity level over there. And actually they can
10 see any acuity, it's a full emergency room but
11 historically they've seen lower acuity. And
12 since we've been full we've been trying to, you
13 know, move patients over there and get them
14 through quicker.

15 Q: Okay. And we've talked about this, sort of to
16 remind us all the chest pain center, that's in
17 the Ashley River Tower, right?

18 A: Yes.

19 Q: And is -- was that developed -- well, when was
20 that developed and opened?

21 A: It was opened in 2008.

22 Q: Okay. And in terms of the fiscal year '18
23 initiative and measure for success in terms of
24 increase profitable inpatient, outpatient
25 volumes, is increasing MUSC's capture of trauma



TMC, ET AL. V. SC DHEC, ET AL.

1828

1 volume an important piece of that?

2 A: Looks like that was a metric for that year,
3 yes.

4 Q: Is that consistent with your, how you sort of
5 view that initiative and measure for success
6 for that area?

7 A: Sure.

8 Q: Your Honor I ask that Roper 46 be admitted.

9 **MR. DAYHUFF:** No objection.

10 **THE COURT:** Admitted.

11 **(Petitioner Roper's Exhibit Number 46 was admitted**
12 **into evidence.)**

13 Q: If we could look at -- Mr. Summer asked you a
14 question about the, I think it was the 2018
15 unaudited financials. Do you recall seeing
16 that? Dr. Cawley, Roper 41 is on the screen.

17 **(Petitioner Roper's Exhibit Number 41 was introduced**
18 **into the record at this time.)**

19 Q: Those are the financial produced in discovery
20 for the time period ending June 30, 2017.
21 You're familiar with these financials aren't
22 you?

23 A: Yes, roughly.

24 Q: And I just really, I just had one question. So
25 for the, this is again, MUSC is your fiscal



1 year ends June 30. Is that right?

2 A: Correct.

3 Q: Okay. So for that fiscal year that ended June
4 30, 2017, do you recall or are you aware that
5 the emergency trauma visits decreased in 2017
6 from 2016?

7 A: You know, vaguely I recall it. The details I
8 couldn't speak to.

9 Q: Okay. Let's go to page eight of the document.
10 An outpatient business activities paragraph
11 right in the middle of the document. And these
12 financial statements they are something that
13 you review, certainly, Dr. Cawley. Is that
14 right?

15 A: Yes.

16 Q: Okay. Having that information in front of you,
17 does it refresh your recollection that
18 emergency/trauma visits decreased to 82,337 in
19 2017 from the 2016 level of 84,060?

20 A: Yes, roughly. Yes.

21 Q: Okay. That's certainly consistent with other
22 information you've received?

23 A: Yes.

24 Q: Okay. Your Honor, I would move to admit Roper
25 41.



TMC, ET AL. V. SC DHEC, ET AL.

1830

1 **MR. DAYHUFF:** No objection.

2 **THE COURT:** Admitted.

3 **(Petitioner Roper's Exhibit Number 41 was admitted**
4 **into evidence.)**

5 Q: And Dr. Cawley, is it your understanding or
6 recollection that for the unaudited financials
7 that you reviewed with Mr. Summer fiscal year
8 ended June 30, 2018 that ER visits are down 2.4
9 percent?

10 A: Once again, roughly I'm familiar with the
11 trend, yeah.

12 Q: Okay. All right. And what is your
13 understanding in terms of kind of where you
14 ended at June 30 of 2019 with the trend?

15 A: Once again, I think we're about the same. Down
16 maybe just a tad. But roughly, you know, to me
17 that's -- this year, the one that we just
18 closed out was about the same.

19 Q: About the same as last years number?

20 A: Yes.

21 Q: Okay. And you think if it was down at all it
22 would be a percentage similar to this 2.4 or
23 less?

24 A: I don't think it's as great as that but I think
25 it's down a little bit.



TMC, ET AL. V. SC DHEC, ET AL.

1831

1 Q: Okay. Now would that be the total volume or is
2 that specific to any particular sort of ED
3 area, one ED of course?

4 A: I think it's on the adult side.

5 Q: Okay.

6 A: But this is predominately being affected the
7 Peds side.

8 Q: Okay. And what about sort of that CPC what
9 you're seeing there so that -- those volumes to
10 the extend they've sort of separate out ---

11 A: Yeah, I don't typically separate that out. You
12 know, to me it's adult and whether seen in the
13 CPC or they're seen in the university hospital,
14 it doesn't really matter it's the total number
15 that. And it's supposed to be working as a
16 team anyway.

17 Q: Okay. All right. So, you discussed with Mr.
18 Summer and some yesterday afternoon about sort
19 of the Intuitive model and their
20 recommendation. As I understand it the plan as
21 we're here today, is that you are adopting the
22 model or the recommendations based on your
23 independent review of information but without
24 the urgent care component. Is that fair?

25 A: We're adopting certain items that Intuitive



1 helped us look at but not all of the, I would
2 say all of the Intuitive recommendations.

3 Q: Okay. Well, let's sort of break down the model
4 piece of it because certainly you agree with me
5 not doing the urgent care component as
6 Intuitive has that set up. Is that right?

7 A: We are not doing the hybrid model that
8 Intuitive does, yes.

9 Q: And by hybrid model though to be specific, it
10 is having space designated as urgent care and
11 for billing purposes billed as urgent care,
12 right?

13 A: Yes. I mean, all ERs have space for urgent
14 care, less acute, fast track, whatever you want
15 to call it. So, once again, to us the space is
16 the space and it's a billing issue. But I
17 would agree, we're not pursuing that at this
18 time.

19 Q: Okay.

20 **MS. HOLLINGSWORTH:** And let's look, pull up Trident
21 68. I just wanna go to a particular page with
22 the footprint schematic. Yeah, that page.

23 Q: Dr. Cawley, we're looking at page five of
24 Trident Exhibit 68 and this is familiar to you
25 isn't it?



TMC, ET AL. V. SC DHEC, ET AL.

1833

1 A: Yes.

2 Q: Okay. And specifically looking at that image
3 to the left. You'll agree with me that this is
4 the schematic floor plan that was included as
5 part of Intuitive's package materials that MUSC
6 has adopted and will be using that schematic or
7 floor plan?

8 A: Yes. We've taken a look at this. We like it
9 and we would use it.

10 Q: Okay. And I think we saw yesterday during your
11 direct some demonstrative or maybe they'll be
12 an exhibit but I can't recall, showing sort of
13 the floor plan today. But you'll agree with me
14 that we are looking at the Intuitive footprint,
15 that's the word they use, but the word have
16 been changed for those five spaces on the right
17 from urgent care to fast track. Is that your
18 understanding?

19 A: Yeah, I can't see what it says on this.

20 Q: Poor quality I'm sorry.

21 A: But the other schematic we used yesterday we
22 did ...

23 Q: And the Intuitive combined model, that space --
24 -

25 A: Yeah, I think that says urgent care, yes. Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1834

1 Q: And the space you're using currently or the
2 current plan is the same footprint but those
3 five rooms are the fast track rooms, right?

4 A: Yes.

5 Q: And now we discussed at your deposition
6 specifically about staffing. And as I
7 understood it Intuitive had a staffing model
8 that went along with this footprint, right?

9 A: They did. It's not something that we looked at
10 in detail. And, I mean, I'd have to defer to
11 Dr. Hall on exactly how we would staff this
12 unit.

13 Q: Do you recall when we discussed at your
14 deposition, which was of course before the July
15 2nd email when it became clear you wouldn't do
16 the urgent care model following some sort of
17 discussions with DHEC, but at the time we
18 talked that there was a staffing model that
19 went with this footprint and that you were
20 going to follow Intuitive's staffing model,
21 right?

22 A: Once again, I don't recall that exactly. You
23 know, I can't comment exactly on the staffing
24 plan.

25 Q: Okay. So, what knowledge if any do you have



TMC, ET AL. V. SC DHEC, ET AL.

1835

1 about how this footprint should be staffed?

2 A: I couldn't give you any details on how it
3 should be staffed. I would say this is a very
4 typical ER footprint and it would be staffed
5 according to how we, you know, we would see to
6 staff that. I would defer to Dr. Hall on the
7 details there.

8 Q: And I think you discussed with Mr. Summer but
9 you did decide after having reviewed the
10 information from Intuitive and their analysis
11 of some potential locations you did decide to
12 pursue the one of the sites that they
13 recommended to you, right?

14 A: We did.

15 Q: Okay. And so we know that you determined to
16 use their site recommendation and you're going
17 to use their footprint but you have no other
18 plans related to Intuitive's model or their,
19 how they would have run the project.

20 A: We do not.

21 Q: So as you sit here today it is somewhat unclear
22 to me. Are you or are you not considering any
23 sort of management services relationship with
24 Intuitive?

25 A: Well, I think I've said that before that yes we



1 will consider a management services but we have
2 not made that decision and there's no plan to
3 go forward.

4 Q: Okay. Understanding that there's no plan in
5 place or even if anything is formalized but as
6 I understood your direct yesterday, you haven't
7 had communications with Intuitive since,
8 perhaps, December 2018 or shortly thereafter,
9 right?

10 A: I have not personally talked to Intuitive since
11 we had the visit or shortly thereafter the
12 visit. And I think our team, mainly through
13 Sarah Bacik, notified Intuitive that we are not
14 going to do any of the models they proposed.

15 Q: So to your knowledge, has anyone had
16 discussions with Intuitive about what a
17 management services agreement relationship
18 would look like?

19 A: I'm not aware that anybody in our organization
20 has had that since we told them clearly that we
21 were not going to move forward with that.

22 Q: And you say we told them clearly we're not
23 gonna move forward with that. Are you being
24 specific to the joint venture model that they
25 suggested?



TMC, ET AL. V. SC DHEC, ET AL.

1837

1 A: Well, any model. I mean, they suggested
2 several models including a management services,
3 a joint venture and we said we are not moving
4 forward.

5 Q: Okay. So what did the management services
6 model look like?

7 A: That they would manage the emergency room.

8 Q: Okay. Did it have any details with regard to
9 sort of what their pricing structure is or what
10 services would be included?

11 A: I don't think it ever got to the point of
12 actually monetary discussions.

13 Q: Okay. All right. Is it your understanding,
14 either at the time you were discussing with
15 them or by the time you selected the proposed
16 site that they had developed for you, were you
17 aware of the components or the bases on which
18 they evaluate a preferred location?

19 A: Yeah. I mean, we were -- we became familiar
20 with how they look at locations and I think we
21 use that information to select that site.

22 Q: And was it Ms. Bacik that was primarily the
23 point of contact in all of that Intuitive
24 discussions?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1838

1 Q: This document is an exhibit to the 30-B-6
2 deposition of Intuitive Health and in that
3 exhibit, in that deposition, sorry, it's
4 Petitioner's Exhibit 7. Is it consistent with
5 your recollection of the discussions that Ms.
6 Bacik would've had with you that the big
7 decision drivers for selecting a site location
8 were quantity of traffic counts, quality of
9 traffic counts, relative success of surrounding
10 retailers, relative population, and relative
11 population growth?

12 A: Yes.

13 Q: And is that -- were those important drivers for
14 you in determining whether you wanted to pursue
15 one of the sites they recommended?

16 A: Yeah, I think those are some of the factors and
17 there would be other things that we would do as
18 well.

19 Q: Okay. Did Intuitive provide you with any
20 analysis of the capacity or utilization of
21 other providers of emergency services in this
22 proposed service area?

23 A: I don't recall the details. They may have
24 shared them with Sarah but I didn't see it.

25 Q: Okay. So it's not information you recall



TMC, ET AL. V. SC DHEC, ET AL.

1839

1 having when ---

2 A: No.

3 Q: --- you supported the decision to move the
4 project, right?

5 A: No.

6 Q: Do you otherwise recall seeing any data or
7 analysis of the capacity or utilization of
8 other providers of emergency services in that
9 proposed service area?

10 A: Me personally, no.

11 Q: So you didn't review any data like that as part
12 of your decision making process in moving the
13 project?

14 A: Correct.

15 Q: What, if any, discussions or analysis did you
16 do sort of surrounding this higher strategy
17 then you could've had putting a FSED in a
18 retail location?

19 A: I'm sorry, clarify the question.

20 Q: Intuitive Health model, would you agree with me
21 that Intuitive Health focused on retail
22 locations when they were evaluating potential
23 sites for the project?

24 A: Yes.

25 Q: And had you -- what analysis or study had you



TMC, ET AL. V. SC DHEC, ET AL.

1840

1 done of a proposal that focused on retail sites
2 for a potential freestanding emergency
3 department?

4 A: Well, I think we took that information based on
5 what Intuitive had said in their model and we
6 looked at it our self. I mean, that's
7 basically what we did. We took our data, their
8 model and developed that.

9 Q: Okay. You'll agree with me that a retail site
10 location is very different than the Nexton
11 proposal that was in the CON application. Is
12 that fair?

13 A: Yes. I mean, they're both freestanding ERs but
14 there's no difference there. One, the one we
15 moved .75 miles away is in a, what I would
16 call, a higher retail, higher accessible area.

17 Q: Okay. But it's not gonna be in a medical
18 campus with like an imagining center in the
19 same campus, right?

20 A: I mean, that is correct. I mean, I think, you
21 know, just a different way of placing ERs. I
22 think historically health systems have not used
23 that kind of data to place facilities. We
24 typically think or had thought a campus, a
25 medical campus was the best thing to do and we



1 used the Intuitive model to alter that thinking
2 and suggest that, you know, maybe a retail
3 model is a better place to put a freestanding
4 ER.

5 Q: Okay. And in terms of the data that was
6 compiled that Intuitive provided the
7 information for their package that they
8 provided you with any of the proposed locations
9 or even the model proposals, what analysis did
10 they provide you of medically under-served
11 groups approximate to where they suggested you
12 put the project?

13 A: I don't recall details around medically under-
14 served groups.

15 Q: Okay. And then what about in terms of sort of
16 analyzing your patient origin information or
17 data? Do you recall what they might have given
18 you with regard to sort of where your patients
19 were that would be served by the retail
20 location?

21 A: I don't recall exactly what Intuitive gave us
22 or what Intuitive said about it but that was
23 sort of information we already knew where our
24 patients were. As I think I testified
25 yesterday so we knew our patients were already



TMC, ET AL. V. SC DHEC, ET AL.

1842

1 there. Moving .75 miles away wasn't a
2 significantly gonna change that.

3 Q: Okay. Do you have any of the physician
4 practices that are associated with the Medical
5 University in that same -- in that retail
6 location or nearby?

7 A: We do not have -- not right around. I mean, we
8 do plan and we'll be opening up in January of
9 2020 some physician practices up in the Nexton
10 area.

11 Q: Okay. Are they primarily primary care or some
12 specialty care as well?

13 A: It's a mix of physicians.

14 Q: Mr. Summer was asking you about that work plan
15 document that I think work plan circulated it
16 a good bit and I think there were some
17 questions about some of the notes. Let me show
18 you Trident 36. It's in Trident 36 and I'd
19 like you to look at, has a Bates HFPP67. This
20 document is an email that was to Ms. Cotter and
21 Mr. Levitt and involved several of those names
22 you were discussing earlier with Mr. Summer.
23 I wanna ask you about the second page which is
24 HFPP58 is the Bates number on it within Trident
25 36 which is in evidence. But this appears to



TMC, ET AL. V. SC DHEC, ET AL.

1843

1 me to be a space plan for the proposed
2 freestanding emergency department and at the
3 top of the document MUSC-PPCP prosed FSED. And
4 who is PPCP?

5 A: I assume it's Palmetto Primary Care.

6 Q: So is it consistent with your recollection that
7 at least at some point there was a possibility
8 that the FSED would be MUSC-PPCP's proposed
9 FSED?

10 A: No. It was never gonna be a PPCP involvement.

11 Q: Okay. So you don't have any recollection of
12 any potential joint venture discussions with
13 PPCP, Palmetto ---

14 A: Not with PPCP on a freestanding ER, no.

15 Q: Okay. Were they going to be on other
16 components of this project? Is that why the
17 title is that or what JV would it be talking
18 about then?

19 A: Probably, there's a lot of things we work with
20 PPCP on and including ---

21 **MR. DAYHUFF:** So, as long as -- I don't think we
22 should use this to get into other projects.
23 Dr. Cawley, if they're confidential,
24 proprietary, or not public I would think that
25 would not be something we would go into for



TMC, ET AL. V. SC DHEC, ET AL.

1844

1 that second reason. Certainly if they're
2 public I have no problem with Dr. Cawley
3 talking about it. I guess my primary objection
4 is why are Palmetto Primary Care joint ventures
5 with MUSC, if they exist, relevant to what
6 we're doing here today? And the second point,
7 I don't want to get into proprietary
8 confidential stuff that's not public.

9 **MS. HOLLINGSWORTH:** Okay. Your Honor, the document
10 is in evidence and is not marked attorney
11 expert so it's already in the record and this
12 is the CON, Certificate of Need, Nexton
13 freestanding emergency department. These
14 documents are all related to the project that
15 was submitted to the Department so I think it's
16 fair game for me to try to explore the proposal
17 because that's how we evaluate the changes.

18 **THE COURT:** The response to your question was that he
19 gave a response to your question about the
20 relationship to the project that we're here on.
21 And I think your question actually related to
22 any other relationship between, I think PPC and
23 MUSC and other projects.

24 **MS. HOLLINGSWORTH:** And so, Your Honor, let me try a
25 different question, see if this helps.



TMC, ET AL. V. SC DHEC, ET AL.

1845

1 **THE COURT:** Okay. Rephrase ---

2 **MS. HOLLINGSWORTH:** I think it pertains within the
3 documents, Your Honor.

4 **THE COURT:** Okay.

5 Q: In the discussions with Mr. Summer when he was
6 asking you about a note on HFPP112, it was a
7 spreadsheet he showed you earlier with the task
8 list and he asked you if we do not JV could we
9 still use this as an affiliate. So I'm just
10 trying to understand on the Certificate of Need
11 Nexton freestanding emergency department
12 checklist and these notes if it's not PPCP-
13 MUSC FSED that this document addresses, what
14 would the work plan be addressing that the
15 Certificate of Need Nexton freestanding
16 emergency department or do you know?

17 A: Well, my interpretation of this is a title. I
18 don't think it says MUSC-PPCP and, once again,
19 it's prepared by a different company not us.
20 I can definitely say there was never a PPCP-
21 MUSC joint venture around a freestanding ER.
22 We have many different relationships with PPCP.
23 Some of which are public and then we have other
24 things we're talking about and discussing as
25 well.



TMC, ET AL. V. SC DHEC, ET AL.

1846

1 Q: Okay. Dr. Cawley, this in an email chain
2 that's involving Ms. Cotter, Ms. Bacik, and
3 some folks with it looks like Intuitive. This
4 is in evidence through the 30-B-6 deposition of
5 Intuitive Health. My first question, actually
6 page 372, August 21 of 2018 and thinking back
7 to our timeline, is that roughly that period of
8 time where the proposed North Main Street
9 location was being considered for relocation?

10 A: I mean, I can't tell you exactly. But it's,
11 you know, in that time period.

12 Q: And you looked just a little while ago with Mr.
13 Summer at that, let me find it, August 31,
14 2018, it was a power point of Summerville FSED
15 alternative site. Do you recall seeing that?

16 A: Yes.

17 Q: So in terms of that time period in this email
18 is addressing from Ms. Cotter in your
19 organization to Mr. Azar Daidy (ph) at
20 Intuitive Health and he copies Ms. Bacik and
21 the subject is Summerville location and she
22 asks him, as she mentioned yesterday we will
23 need a few key items from your team for our
24 location change submissions to DHEC. And at
25 the bottom says we hope to submit to DHEC by



TMC, ET AL. V. SC DHEC, ET AL.

1847

1 September 7, which I assume is September 7,
2 2018. Were you involved in any meetings or
3 proportion of materials to submit to DHEC
4 around September of 2018 related to the changes
5 to the FSED project?

6 A: Sure. I mean, I recall the conversation and as
7 I said before, once again, this is -- Caroline
8 Cotter is several layers below me and someone
9 that works in strategic planning and you know,
10 that may have been a plan but then to try to
11 get it in by September 7th, but as I said
12 before that during the Fall we kind of went
13 back and forth whether we wanted to do this or
14 not.

15 Q: Okay.

16 A: And so the final final decision was never made
17 until later.

18 Q: Okay. Well, do you recall when the change
19 submissions were given to DHEC?

20 A: We gave the change submissions, I believe, in
21 December of '18.

22 Q: December of '18? Did you attend a meeting or
23 were part of that?

24 A: I was not.

25 Q: Who would've done that for your organization?



TMC, ET AL. V. SC DHEC, ET AL.

1848

1 A: Sarah Bacik in general or someone on her staff.

2 Q: Okay. I guess go back to that first page so I
3 can update our timing a little bit down here at
4 the bottom, December 5th, 2018, Ms. Cotter
5 copies Ms. Bacik, we are meeting with the DHEC
6 CON team on Friday to discuss the relocation of
7 the FSED in Summerville to the Applebee's land.
8 Is that your recollection that you were just
9 mentioning?

10 A: Yes.

11 Q: Do you know what materials were submitted or
12 what information was submitted?

13 A: I do not.

14 Q: You testified yesterday that the approval by
15 the board of trustees for the Medical
16 University Hospital Authority that was in the
17 CON application, that that approval encompassed
18 you making the changes to the project. Is
19 that my understanding what your testimony was?

20 A: Yeah, I mean, as long as any changes were
21 consistent with what the board of trustees
22 approved.

23 Q: Okay. And so what does that mean? In
24 consistent with the board of trustees approved?

25 A: Meaning what the board approved was submitting



1 a CON for a freestanding ER in Berkeley County
2 and, you know, that gives me the latitude to
3 say as long as it's a freestanding ER, as long
4 as it's in Berkeley County, and it meets all
5 the requirements for a CON application that I
6 have latitude within in that but continue to
7 meet those three main criteria.

8 Q: Okay. At the time, during that meeting of the
9 board of trustees when you, I assume -- did you
10 have to do some sort of presentation or
11 discussion of what the proposed project was?

12 A: Yes.

13 Q: And to the best of your recollection, is what
14 you described the Nexton proposal that we see
15 well documented in the CON application?

16 A: I'd have to go back and look. Sometimes we
17 present the board with more concepts and we may
18 not have picked out land at point. So I'd have
19 to go back and look to see if we presented the
20 land or not at that time.

21 Q: If the board of trustees says the approval was
22 in late May and the application was filed June
23 6th, is it consistent with your recollection
24 that you would've already had land information
25 figured out?



TMC, ET AL. V. SC DHEC, ET AL.

1850

1 A: Yes, but as I said we don't always present to
2 the board exactly what land we are talking
3 about. The board approval is an approval to
4 move forward and submit a CON.

5 Q: Sure, I understand. What I'm just -- my
6 question is, to the best of your recollection
7 though, the discussion that you had before you
8 sought by motion of approval would the
9 discussion had been about the project that was
10 proposed for the Nexton development?

11 A: You know, once again, I'd have to go back and
12 look at my notes to see if we talked to the
13 board specifically about, we're thinking about
14 Nexton. You know, I'd just have to go back and
15 look.

16 Q: Okay. And you typically keep notes of your
17 presentations to the board of trustees for
18 MUHA, right?

19 A: Well, I have hand written notes that I use to
20 remind myself what I presented.

21 Q: Okay. You mentioned on your cross with Mr.
22 Summer that it was, I think you said, a period
23 of time after that September 5th meeting with
24 Intuitive before you proceeded with sort of
25 engaging the proposed site location, I think



TMC, ET AL. V. SC DHEC, ET AL.

1851

1 you said.

2 A: I think I said we spent most of the Fall
3 talking about whether we wanted to do this or
4 not.

5 Q: Okay. September 5th, that is when you went out
6 to Texas, right?

7 A: I think that was the date, yes.

8 Q: Okay. We'll get the document pulled up, put
9 does it refresh your recollection if you began
10 negotiating a letter of intent for a proposed
11 ground lease by September 21 of 2018?

12 A: You know, the details I think Sarah Bacik was
13 on that. Whether we had completed it by then or
14 not. I knew it was kind of going back and
15 forth.

16 Q: Okay. And that was signed somewhere, probably,
17 I think in late November, right?

18 A: Yes.

19 Q: Okay. But there were, it looks like, several
20 iterations of the letter of intent for a good
21 long while maintained that initial date of
22 September 21 of 2018. Is that consistent with
23 your recollection?

24 A: You know, once again, I don't have the details.
25 I know there was, it was going back and forth.



1 What was the timing on it, I can't say exactly.
2 I'm sure there are, I'm sure that's in the
3 documents.

4 Q: And you looked with Mr. Summer at the December
5 20, 2018 approval by the board of directors for
6 MUSC Strategic Ventures to enter that proposed
7 ground lease, right?

8 A: Yes.

9 Q: Okay. Let's pull up Trident 65 please. This
10 document, new ground lease for 1310 North Main,
11 Summerville for approval. That's the location
12 where there had been an Applebee's restaurant,
13 right?

14 A: Yes.

15 Q: And the -- for approval is this the document
16 you would've used in conjunction with seeking
17 MUSC Strategic Venture's board's approval to
18 enter the lease?

19 A: It looks similar to what we would show.
20 Whether this is the exact document I do not
21 know.

22 Q: Okay. But this -- in terms of the property
23 description and the landlord, that's all
24 consistent isn't it with your understanding of
25 the project?



TMC, ET AL. V. SC DHEC, ET AL.

1853

1 A: Yes.

2 Q: Okay. The funding, the funding that's noted
3 here, it says MSV or its affiliates and then
4 there's an asterisk once operational MUHA will
5 sublease from JV Manage Co. JV Manage Co was
6 the joint venture entities that was included
7 into the Intuitive model that you are not going
8 to pursue, right?

9 A: Yes.

10 Q: So, what is the funding now that you will not
11 be pursuing the Intuitive joint venture that's
12 reflected here and connected to the funding for
13 this location?

14 A: So if you're asking a question of how the
15 funding is going to happen for this ground
16 lease, MUHA would lease from -- sublease from
17 MSV.

18 Q: Okay. And is that something that's in place or
19 that you have assurances of here today?

20 A: Yes. Yes, I mean, that is the plan that MSV
21 has done the ground lease and then MUHA, if the
22 CON were received, would proceed with operating
23 a freestanding ER there and we'd sublease the
24 ground from JSV.

25 Q: Okay. Do you need the Medical University board



TMC, ET AL. V. SC DHEC, ET AL.

1854

1 of trustees permission or approval in order to
2 enter this funding relationship?

3 A: Yes. And at the time that we're ready to
4 proceed with building the FSED we would bring
5 all of this to the board for approval.

6 Q: Just a couple more questions. The
7 demonstrative that we have on the screen, it's
8 just a low tech Google image shot from January
9 of 2019. Are you -- you're familiar with the
10 location of the proposed project, right?

11 A: Yes.

12 Q: Have you been by that area?

13 A: Yes.

14 Q: Have you or has anyone at your direction had
15 discussions with the Chick-fil-a restaurant
16 about their use of the closed Applebee's
17 parking lot as additional parking?

18 A: I'm not aware. There may have been someone in
19 our organization talking to them but I am not
20 aware of that.

21 Q: Okay. Is that something that someone will
22 address at some point?

23 A: Once again, somebody may already be on this and
24 I'm just not familiar with it. But I would --
25 if those are cars that are parked for the



TMC, ET AL. V. SC DHEC, ET AL.

1855

1 Chick-fil-a that will, and the CON goes
2 forward, that's something that's something
3 we'll have to address.

4 Q: Does it concern you that Chick-fil-a is
5 advertising the parking lot of your proposed
6 FSED to be additional parking for their
7 restaurant.

8 A: Once again, I don't know anything about that.
9 That's with current relationship with the
10 current owner and that will, that -- if this
11 project goes forward that would obviously
12 change.

13 Q: Okay. Let's look at -- if we could turn to, I
14 think it's, well we probably need to start at
15 the bottom of 60. And this is the
16 demonstrative using what is in evidence as
17 joint one of the CON application that was
18 submitted to DHEC for the proposed freestanding
19 emergency department by Medical University.
20 And looking at that very bottom question eight,
21 question eight subpart H asking the information
22 about, the question is is the land and or
23 building on or in which the proposed facility
24 or services to be conducted owned by the
25 applicant and the answer was no. And if no



TMC, ET AL. V. SC DHEC, ET AL.

1856

1 provide information on the land and building
2 similar to that required above. And at the top
3 of the next page the response on the CON
4 application, of course, is for Nexton FSED,
5 LLC. It's your understanding is it if Nexton
6 FSED, LLC is no longer involved in this
7 project, correct?

8 A: Correct.

9 Q: And so at the time in the submission to the
10 Department Nexton FSED, LLC would be funding
11 and developing the land and the building. Is
12 Nexton FSED, LLC going to be funding and
13 developing the land and building for the new
14 location?

15 A: That is not determined at this point.

16 Q: So ---

17 A: We have not selected the developer or whether
18 we would even potentially build this our self.

19 Q: Okay. So you do not know what the information
20 would be in response to 8H in the CON
21 application?

22 A: Correct.

23 Q: Okay. In terms of, if we look at page 50 of
24 the demonstrative. This is in part C and the
25 response is to part C in the CON application



TMC, ET AL. V. SC DHEC, ET AL.

1857

1 that is the DHEC record for the project, do you
2 know or do you have for the response to number
3 six documentation of zoning for the proposed
4 project?

5 A: I can't give you the details on that. I'm
6 assuming that is has been evaluated by our team
7 and it's appropriate.

8 Q: Okay. What about for number seven, the
9 documentation for appropriate sources of
10 utilities such as electricity, gas, water, and
11 sewage?

12 A: Once again, I don't have the details on that
13 but I assume that our team has looked at that
14 and determined appropriate.

15 Q: Have you or has anyone at your direction gone
16 out into the community and sought letters of
17 support for the FSED that's going to be
18 developed North Main Street in Summerville?

19 A: I'm not familiar. I think we got letters of
20 support when started the first freestanding ER
21 project. I don't believe we -- I'm not aware
22 that we went out and got additional letters of
23 support after we moved it the .75 miles away.

24 Q: Okay. And are you aware that every one of the
25 letters of support, specifically identifies the



TMC, ET AL. V. SC DHEC, ET AL.

1858

1 Nexton location for the proposed freestanding
2 emergency department?

3 A: Not exactly but I wouldn't be surprised.

4 Q: Okay. But to your knowledge, no one on behalf
5 of the Medical University has gone out and
6 sought letters of support identifying the
7 project location at North Main Street?

8 A: I am not aware of that.

9 Q: Okay. The only other thing I want to ask you
10 about is -- Dr. Cawley I just want to ask you
11 -- what I'm handing you are just a couple pages
12 from the DHEC record for the Certificate of
13 Need application filed by Trident Medical
14 Center to expand its emergency department, ORs,
15 post anaesthesia care unites and add a CT
16 scanner. Parts of this application are in the
17 record already but the pages cut off at a
18 certain part. Discuss -- we discussed them
19 with another witness but I wanted to ask you
20 about them and go ahead and have it included in
21 the record. You recall the CON application
22 that Trident filed related to expanding the
23 emergency department and some other services?

24 A: Yes, roughly.

25 Q: And as, you know, sort of, the Chief Executive



1 for the Medical University it would be you
2 ultimately that would authorize whether or not
3 that project would be opposed on behalf of the
4 university. Is that fair?

5 **MR. DAYHUFF:** Your Honor, can I offer an objection
6 here? There was opposition filed to a Trident
7 project in 2015. I don't see that that's
8 particularly relevant to what we're doing here
9 particularly when the focus of this was
10 Trident's trauma activation fees and the fees
11 were higher was our assertion in that case and
12 thus we didn't support the trauma. I don't
13 think we need to get into that for this case.
14 This has nothing to do with this case. So I
15 guess my objection would be relevance. That's
16 my objection.

17 **MS. HOLLINGSWORTH:** Your Honor, my response would be,
18 of course, that already almost all of the
19 application is in the record. There's certain
20 pages of it that were left out so first I would
21 say that it's a DHEC record but this
22 application specifically in this project has
23 been discussed repeatedly over the last week
24 and a half with numerous witnesses. And so the
25 Medical University has used this project in



TMC, ET AL. V. SC DHEC, ET AL.

1860

1 discussing various aspects of this case. I
2 certainly think that discussing this is
3 relevant as well, what I'm going to ask about
4 if of course separate from counsel's
5 characterizations about the nature of their
6 objection to it because we don't have evidence
7 of that yet other than counsel. There have
8 been a number of ---

9 **MR. DAYHUFF:** I'll withdraw my objection. I didn't
10 know that this entire application, I guess, was
11 in -- I still think we ought to talk about this
12 project and not try to trauma activation
13 project. But I'll withdraw my objection.

14 **THE COURT:** Okay. Proceed.

15 **MS. HOLLINGSWORTH:** Thank you, Your Honor.

16 Q: Dr. Cawley, would you ultimately have been the
17 person to determine whether or not the Medical
18 University would oppose a project in your
19 community?

20 A: Yes.

21 Q: Okay. And there has been a lot of discussion
22 in the case particularly in addressing Trident
23 and Roper's witnesses about prior opposition to
24 various projects among the providers. Would
25 you agree with me that Medical University also,



TMC, ET AL. V. SC DHEC, ET AL.

1861

1 at times, opposes projects with other providers
2 in your community?

3 A: Yes. Unusual but we have done it.

4 Q: Okay. And in this case, which of course, in
5 this instance of the CON application of Trident
6 to expand it's emergency department, ORs, post
7 anaesthesia care unite, and add a third CT,
8 would you agree with me that your opposition
9 was that the Trident project will have an
10 adverse impact on the operation and utilization
11 of MUSC's trauma center including the dilution
12 and possible forfeiture of the training program
13 and potential negative impact of quality of
14 outcomes due to lower volumes?

15 A: Yes.

16 Q: And is that, at that time, was that your belief
17 and a reason to oppose Trident's project to
18 expand its emergency department, ORs, and
19 related services?

20 A: Yes.

21 Q: Okay. And to the best of your recollection,
22 did you ultimately decide to challenge or
23 appeal the Departments approval, the
24 Department's staff approval of that CON
25 application?



1 A: I don't believe we did.

2 Q: Okay. If you'll take a look at the bottom of
3 CON 372. Letter in the record for the CON
4 application. Does this refresh your
5 recollection that the Medical University filed
6 a request for final review with the DHEC board
7 of that project's approval?

8 A: Yes.

9 Q: And if you look at the next page, to the best
10 of your recollection, did the Medical
11 University and Trident resolve their
12 disagreement and consent to dismiss a contested
13 case challenge to the project?

14 A: Yes.

15 Q: Is that also something that happens in the
16 community between providers?

17 A: I think it happens. It's unusual for it to be
18 MUSC to be in the middle of that.

19 Q: Okay. More recently you were in the middle of
20 a dispute with Trident over NICU beds, right?

21 A: Yes.

22 **MS. HOLLINGSWORTH:** Your Honor, if I can have one
23 minute. I think I am done.

24 **MR. DAYHUFF:** While Ms. Hollingsworth is looking over
25 her notes, if it's possible I would like to do



TMC, ET AL. V. SC DHEC, ET AL.

1863

1 a very short redirect of Dr. Cawley and then
2 send him on his way. If the court will allow
3 it. I know we're getting close to lunch time.

4 **THE COURT:** Okay.

5 **MR. DAYHUFF:** I anticipate this being short.

6 **THE COURT:** Okay.

7 **MS. HOLLINGSWORTH:** Well, apparently all I need to
8 do, Your Honor, is clear up a couple admitting
9 exhibits. We would move to admit Trident 47,
10 actually discussed with Trident's a
11 freestanding ED analysis of March of 2016 with
12 the score card. Just want to make sure that
13 gets in.

14 **MR. DAYHUFF:** No objection.

15 **MS. HOLLINGSWORTH:** And then the only other document,
16 Your Honor, if that's document is acceptable to
17 you ---

18 **THE COURT:** It's admitted.

19 **(Petitioner TMC's Exhibit Number 47 was admitted into**
20 **evidence.)**

21 **MS. HOLLINGSWORTH:** --- is the CON pages
22 supplementing ---

23 **MR. DAYHUFF:** No objection.

24 **THE COURT:** Admitted.

25 **MS. HOLLINGSWORTH:** And we will get the court



TMC, ET AL. V. SC DHEC, ET AL.

1864

1 reporter the documents electronically. I don't
2 have any other questions. Dr. Cawley, thank
3 you for your time.

4 **THE COURT:** Mr. Dayhuff.

5 **MR. DAYHUFF:** Thank you.

6 **DR. CAWLEY- RE-DIRECT EXAMINATION BY MR. DAYHUFF:**

7 Q: Dr. Cawley, let's start, I suppose, where we
8 left off. Apparently MUSC challenged Trident's
9 ED expansion project, and do you still have
10 that in front of you?

11 A: Yes.

12 Q: All right. And you think Ms. Hollingsworth
13 pointed out the first element that MUSC was
14 concerned about its trauma program and the
15 dilution of volume and the affect that could
16 have, right?

17 A: Yes.

18 Q: What affects -- what negative affects could the
19 dilution of volume have on a level one trauma
20 program?

21 A: Well, from a quality perspective it could
22 decrease the number of patients, it's been
23 shown in the trauma programs that total volume
24 is a measure of success. That was one piece.
25 The other piece we were concerned with was just



1 maintaining the trauma training program and
2 that if the numbers fall below a certain level
3 then it would put that program at risk.

4 Q: All right. There's also another concern listed
5 at the very bottom of that first paragraph. It
6 also does not support cost containment given
7 Trident's high trauma activation fees. What
8 does that mean?

9 A: Well, when a trauma -- when somebody comes in
10 and is a trauma patient, if a trauma code is
11 called and part of that billing of that is that
12 an activation fee is then put in the bill.
13 Trident historically has high trauma activation
14 fees.

15 Q: How does Trident's activation fee compared to
16 MUSC?

17 A: You know, the exact numbers I can't tell you --
18 -

19 **MR. SUMMER:** I'm gonna object, Your Honor. If he
20 doesn't know exact numbers I don't think the
21 witness should be allowed to speculate.

22 Q: Do you have an approximation, a reasonable
23 approximation of how our trauma activation fees
24 compared to Trident's? Were they higher or
25 lower?



TMC, ET AL. V. SC DHEC, ET AL.

1866

1 **MR. SUMMER:** Same objection, Your Honor.

2 **THE COURT:** I'm going to allow him to -- he's
3 rephrased it and I'm going to allow him to ask
4 that question.

5 Q: Higher or lower?

6 A: They are higher.

7 Q: Much higher or do you not know?

8 A: I -- they're much higher historically. I can't
9 give you the exact number though.

10 Q: All right. And as I understood it, this
11 opposition was ultimately withdrawn by MUSC?

12 A: Correct.

13 Q: All right. Letters of support, is there any
14 reason to believe, do you have any reason to
15 believe that the support letters if they say we
16 support an FED in Nexton, is there any reason
17 to believe that those folks who support an FED
18 in Nexton would not support one .74 miles away?

19 **MR. SUMMER:** I'm gonna object, Your Honor because
20 that'd be pure speculation on his part. There
21 are probably 100 letters of support. All of
22 them specifically reference Nexton. Whether or
23 not those individuals would give a letter of
24 support is a fact outside of this knowledge.
25 There's no way he could give that testimony.



TMC, ET AL. V. SC DHEC, ET AL.

1867

1 Q: Fair enough. I'll withdraw it. I promise to
2 keep this short. The new location, 1310, you
3 mentioned yesterday that you like that location
4 or MUSC chose that location to move because of
5 visibility and accessibility. Is that correct?

6 A: That is correct.

7 Q: What -- did MUSC choose that location to
8 capture market share from others? Was that a
9 factor?

10 A: No.

11 Q: That document that I think had Cannon Design on
12 it and it had the phrase market share in it,
13 that was an external group's document?

14 A: Yes.

15 Q: With respect to our ED, downtown, the main ED,
16 as I understood your testimony in response to
17 the questions. There were two concerns about
18 expanding that ED or renovating that ED. One
19 is cost, right?

20 A: Correct.

21 Q: And what do you anticipate or estimate the cost
22 of that would be?

23 A: I think it would be probably, as I said
24 yesterday, somewhere in that low end 30
25 million, high end 50 million.



TMC, ET AL. V. SC DHEC, ET AL.

1868

1 Q: And one other concern too which is phasing.
2 What did you mean by that? Why is phasing is
3 an issue?

4 A: Well, we already have full ER. In order to
5 take things offline to make it better that was
6 going to be a problem. But I really can't
7 answer much more than I knew there were issues
8 with how that proposed design was going to
9 actually accomplish the renovation. So ---

10 Q: I understand.

11 A: --- that's -- and it was meant to be phased and
12 different pieces and parts and I think we
13 questioned whether that was even possible.

14 Q: So is the primary issue with phasing that we'd
15 have to shut down some of the ED that is full
16 ---

17 A: Yes.

18 Q: --- if we were to do that construction? Now
19 you were shown a CON application that we filed,
20 I guess, in July of this year that adds 29
21 beds, right?

22 A: Yes.

23 Q: What kind of beds are those that we're adding?

24 A: Med surg beds.

25 Q: All right. So those are inpatient ---



TMC, ET AL. V. SC DHEC, ET AL.

1869

1 A: Inpatient.

2 Q: --- right? All right. The boarder issue we
3 have in the ED, some of those boarders are
4 waiting for inpatient beds?

5 A: Yes.

6 Q: What other kind of boarders do we have in the
7 ED?

8 A: Well, we have two kind of boarders in the ER.
9 One is for inpatient beds, people being
10 admitted for inpatient services. And the other
11 kind is for what we call observation beds.
12 They're not gonna be inpatients, they're gonna
13 be just observed for a period of time.

14 Q: What, if any, boarder problem do we have with
15 mental health folks in the ED?

16 A: Significant.

17 Q: All right. And if those mental health folks
18 are boarding in the ED do they go to inpatient
19 beds?

20 A: Once again, some of the boarders go to
21 inpatient beds, some of them go to observation
22 beds.

23 Q: All right. Where would a psych patient go if
24 they were being admitted to our hospital?
25 Would they go to one of the 29 beds or would



1 they go somewhere else?

2 A: You know, the plan would not be to put them in
3 the 29 beds because we would not be able to --
4 you need a locked unite, need special
5 renovations and that could not be accomplished.
6 Not in the short term.

7 Q: Don't we have a psychiatric ---

8 A: Right. We have 100 beds psychiatric hospital.

9 Q: All right. And are those 29 beds adding to
10 that psych hospital?

11 A: No.

12 Q: So would those 29 beds have a material affect
13 on our psychiatric boards issue in the ED?

14 A: Well, once again, as I said before, we have
15 other kind of boarding problems so it might
16 solve some of them mental health problems but
17 we have other kind of boarding issues that
18 would be relieved first by those 29 beds. And
19 it's not the ER.

20 Q: Would those 29 beds relieve the capacity
21 constrain issues that Dr. Hall testified that
22 he was experiencing?

23 A: No.

24 **MR. DAYHUFF:** Can you put up 28 please?

25 Q: I just want to make sure we're clear on this.



TMC, ET AL. V. SC DHEC, ET AL.

1871

1 I think I heard you testify that we have seven
2 rooms in our proposed ED. So I want you to
3 just take a look at this because I think we
4 have more than that. I think Mr. Buff has put
5 in blue dots ---

6 A: I was trying to count.

7 Q: Please, I was gonna ask you to count but I
8 didn't want you to deface my exhibit but go
9 ahead.

10 A: No, go ahead pull it off 'cause I didn't
11 realize I was doing that.

12 **MS. HOLLINGSWORTH:** Your Honor, I'd like to object to
13 directing of the witness, the marking up of the
14 exhibit and if he has a question ask it. But
15 otherwise I think the testimony was clear.

16 **MR. DAYHUFF:** I don't understand the objection. I
17 ask that you overrule it.

18 **THE COURT:** You want the mark up of the exhibit ---

19 **MS. HOLLINGSWORTH:** Yeah, if he has a question, Your
20 Honor, I ask that he just ask the question and
21 let that be it. There's been a lot of
22 directing to try to get an answer here on
23 redirect and I'd ask that that just be resolved
24 quickly.

25 Q: So, I'm gonna clarify with you right now. Are



TMC, ET AL. V. SC DHEC, ET AL.

1872

1 there seven rooms that will treat ED folks in
2 this layout or 12? And if you need to count
3 the rooms please do. And if you need to -- we
4 can blow it up for you and maybe we can remove
5 your blue markers.

6 A: Well, sorry if I caused the blue marks. I
7 didn't mean to do that I was just counting.
8 It's actually easier to look on the other
9 demonstrative.

10 Q: All right. Let's go to 29. All right. So how
11 many exam and treatment rooms do we have on the
12 left side of that layout?

13 A: There's five.

14 Q: All right. You see the five? Five exams?

15 A: Yeah, well, there's four exams plus and ISO
16 exam.

17 Q: All right.

18 A: That means an isolation room.

19 Q: And how about treatment? Do you see those at
20 the bottom?

21 A: There's two treatment rooms at the bottom.

22 Q: All right. So that'd be how many? Five and
23 two, right?

24 A: Yeah. Seven.

25 Q: Now take a look ---



TMC, ET AL. V. SC DHEC, ET AL.

1873

1 A: Seven acute.

2 Q: Gottcha. And we have fast track as well right?
3 How many of those do we have?

4 A: Five.

5 Q: So all totaled for clarity of our record, how
6 many rooms do we have where folks would be
7 treated at that FED that we proposed to build?

8 A: 12.

9 Q: Perfect. Excellent. We don't have to pull
10 this up but you were shown -- well, one
11 question for that, we entered into an NDA or
12 MUSC with Intuitive and I think it was December
13 or November of 2017. Is that a common
14 occurrence to enter into NDA's with folks that
15 seek to do business with us?

16 A: Yes.

17 Q: All right. You looked at a project review
18 slide from the project review for the FED and
19 do you recall that it's reflected that we were
20 going to place our FED in a place with high
21 residential growth, businesses, Palmetto
22 Primary Care? Do you recall that slide?

23 A: Yes. Yes.

24 Q: How close is our FED to those, our new site, to
25 all of those things?



TMC, ET AL. V. SC DHEC, ET AL.

1874

1 A: Three quarters of a mile.

2 Q: You looked at financial statements from some of
3 your audited unaudited OR numbers of 2.8
4 million dollar loss. Do you recall that?

5 A: Yes.

6 Q: Does that mean MUSC cannot afford to do this
7 FED project?

8 A: No, not at all.

9 Q: Why not?

10 A: Because that's just an income statement. It's
11 not a measure of our debt capacity. MUSC uses
12 about half of our debt capacity today and so we
13 have additional debt capacity we could utilize
14 to build this. The other thing is I think a
15 project of this size could easily be in our
16 capital budget.

17 Q: Good. One last question. If we get to
18 establish this FED at 1310, the new location,
19 will that affect my ability to get a Chick-fil-
20 a sandwich at exit 199?

21 A: I can't answer that.

22 Q: No further questions.

23 **THE COURT:** Mr. Dayhuff, you want this patient, you
24 want -- I'm sorry, not patient.

25 **MR. DAYHUFF:** He's not a patient yet.



TMC, ET AL. V. SC DHEC, ET AL.

1875

1 THE COURT: This witness to be excused.

2 MR. DAYHUFF: We would appreciate that.

3 THE COURT: Does anyone have a problem with ---

4 MR. SUMMER: No objection.

5 THE COURT: --- Dr. Cawley being excused. Thank you
6 Dr. Cawley. You are excused. And we're going
7 to break for lunch and be back at 2:00.

8 (Off the Record)

9 THE COURT: Okay. Back on the record. Are you
10 ready to call your next witness?

11 MR. DAYHUFF: We are, Your Honor. We call Dr. David
12 Louder to the stand.

13 THE COURT: Is it Dr. Louder?

14 MR. DAYHUFF: Dr. Louder, yes.

15 THE COURT: Yes, okay. If you'll come up. And
16 before you take your seat face the court
17 reporter and raise your right hand and he will
18 swear you.

19 DAVID LOUDER, M.D., having been duly sworn, testifies
20 as follows:

21 DR. LOUDER - DIRECT EXAMINATION BY MR. DAYHUFF:

22 Q: Good afternoon, Dr. Louder.

23 A: Good afternoon.

24 Q: Dr. Louder, where do you live?

25 A: I live on Johns Island, South Carolina.



TMC, ET AL. V. SC DHEC, ET AL.

1876

1 Q: And where do you work?

2 A: I work at the Medical University of South
3 Carolina.

4 Q: And what do you do at MUSC?

5 A: I'm a Chief of the MUSC Health Alliance.

6 Q: What is the MUSC Health Alliance?

7 A: It is a clinically integrated network that runs
8 a Medicare Accountable Care organization.

9 Q: Now, Dr. Louder, I asked you to come to
10 Columbia today to provide some testimony about
11 MUSC's clinically integrated network, an ACO,
12 and how that ACO would be benefitted by the
13 addition of a FED in Berkeley County, are you
14 prepared to offer that testimony today?

15 A: I am.

16 Q: Have certain demonstrative Exhibits been
17 prepared with your input that would help you
18 provide that testimony?

19 A: Yes.

20 Q: All right. And before we get to that testimony
21 let's discuss your education and experience.
22 If we could go to our first demonstrative that
23 will appear on your screen. So, Dr. Louder, I
24 usually don't start with high school, but since
25 you're a local guy, where did you go to high



TMC, ET AL. V. SC DHEC, ET AL.

1877

1 school.

2 A: I don't remember that guy from when I went to
3 high school but that looks like a Spring Valley
4 Viking.

5 Q: And is that indeed where you graduated from?

6 A: That is indeed where I graduated from.

7 Q: When you went off to the big wide world?

8 A: Something like that.

9 Q: Great, and he looks -- and I don't know if you
10 can tell -- he looks rather forlorn. It looks
11 like he's just lost a game to maybe the
12 Cardinal Newman Cardinals, can you tell from
13 that picture?

14 A: I don't recall any of those losses.

15 Q: Fair enough. Where did you go to undergraduate
16 and medical school?

17 A: The University of Virginia.

18 Q: And what year did you graduate from medical
19 school?

20 A: 1989.

21 Q: And I understand after medical school you
22 served in the U.S. Air Force Medical Corp.?

23 A: That's correct.

24 Q: All right. Did you complete a medical
25 residency program and fellowship while in the



TMC, ET AL. V. SC DHEC, ET AL.

1878

1 Air Force?

2 A: I did.

3 Q: All right. Tell us about what your residency
4 ---

5 A: Sure.

6 Q: --- was in.

7 A: I completed a residency in general pediatrics
8 in 1992 at Keiser Air Force in Buloxi,
9 Mississippi and then completed a fellowship in
10 neonatal perinatal medicine at Wilford Hall
11 Medical Center in San Antonio, Texas.

12 Q: Did you obtain Board certification in either
13 pediatric medicine or neonatal medicine?

14 A: I obtained Board certification in both. Since
15 that time I've maintained my neonatology Boards
16 and I've left my general pediatric Boards go.

17 Q: Could you provide the Court some highlights of
18 the medical roles and positions you had while
19 in the Air Force?

20 A: Certainly. In 1997 I was fortunate to transfer
21 to Germany and a year after that I became Chief
22 of Pediatrics there where I became a consultant
23 for pediatrics to the Air Force and the Army in
24 Europe. In 2003 I transferred to Altus Air
25 Force Base Oklahoma where I served as a



TMC, ET AL. V. SC DHEC, ET AL.

1879

1 squadron commander, and then in 2005 to 2009 I
2 served a variety of roles in the Air Force
3 Surgeon General's office in Washington, D.C. to
4 include Chief Consultant and Director of
5 Medical Operations.

6 Q: Now I understood from your deposition that when
7 you were in Germany you developed an interest
8 in population health?

9 A: I did, yes.

10 Q: What is population health?

11 A: So population health means a lot of different
12 things to different people but in this sense
13 what I felt was a sense of responsibility for
14 the health and healthcare of all of the
15 military children in Europe and in the Middle
16 East.

17 Q: I see. And when you were at the Surgeon
18 General's office in Washington, D.C. give us an
19 idea of what your main responsibilities and
20 duties were there.

21 A: Sure. I oversaw medical operations. The Air
22 Force had 74 facilities scattered throughout
23 the world. Roughly responsible for about
24 300,000 patients across those, and this was
25 both military healthcare -- the healthcare that



TMC, ET AL. V. SC DHEC, ET AL.

1880

1 you think of when people are deployed to combat
2 situations -- as well as taking care of the
3 beneficiaries and the children of those
4 soldiers, airmen and the folks in the Navy and
5 the healthcare that they receive on base.

6 Q: How long were you in the Air Force?

7 A: 20 years.

8 Q: So I presume you retired from the Air Force?

9 A: I did.

10 Q: What year was that?

11 A: 1980 -- or 2009, excuse me.

12 Q: 2009. And what rank had you achieved at the
13 time of your retirement?

14 A: Full Colonel.

15 Q: All right. What did you do after serving in
16 the Air Force?

17 A: I spent one year at the University of Maryland
18 Medical System as an Associate Professor for
19 Pediatrics and Medical Director for their
20 neonatal intensive care unit.

21 Q: Did you teach and practice ---

22 A: I did.

23 Q: --- neonatology?

24 A: Yes.

25 Q: All right. Where did you go after the



TMC, ET AL. V. SC DHEC, ET AL.

1881

1 University of Maryland?

2 A: In 2010 I moved to Carroll Hospital Center
3 which is in Westminster, Maryland. It's a 200
4 bed community hospital. I went there
5 essentially as the Assistant Chief Medical
6 Officer. Migrated over to running the
7 physician practice and then developing
8 partnerships with physicians there.

9 Q: All right. And I understood you had some
10 clinically integrated network ACO experience at
11 Carroll Hospital?

12 A: Right, serving ---

13 Q: Tell me about that.

14 A: Yeah, so shortly after the Affordable Care Act
15 was put into law one of the opportunities in
16 that was to develop accountable care
17 organizations. So Carroll, as is true with a
18 lot of community hospitals, didn't have a lot
19 of employed physicians but a lot of community
20 physicians, and developing a clinically
21 integrated network provided the ability to help
22 align those physicians with the health needs of
23 the community, align them with the hospital
24 itself, and deliver care to those patients.
25 And we did that, we developed a clinically



TMC, ET AL. V. SC DHEC, ET AL.

1882

1 integrated network. We then joined the
2 accountable care Medicare Shared Savings
3 Program in 2016 and started to work together in
4 that fashion.

5 Q: Now I understand you also obtained some
6 additional education while at Carroll Hospital.

7 A: I did. I finished my master's in business
8 administration at the University of
9 Massachusetts in 2014.

10 Q: All right. Now I understand you left Carroll
11 Hospital for MUSC?

12 A: I did.

13 Q: When did you begin working at MUSC?

14 A: 2016.

15 Q: And what were you brought to MUSC to do?

16 A: Sure. I was brought to MUSC to develop the
17 clinically integrated network that MUSC has and
18 within that to stand up a Medicare shared
19 savings program accountable care organization.

20 Q: Were you able to establish a clinically
21 integrated network and ACO at MUSC?

22 A: We did. We established the network in 2016 and
23 the ACO went live in 2017.

24 Q: Now I understand there are Medicare, Medicaid
25 and commercial ACOs, is that right?



TMC, ET AL. V. SC DHEC, ET AL.

1883

1 A: Yes, there are.

2 Q: What type of ACO does MUSC have?

3 A: It's a Medicare ACO.

4 Q: All right. And we established earlier I think
5 that this ACO is called what?

6 A: It's the MUSC Health Alliance.

7 Q: All right. And you're the Executive Director
8 or Chief?

9 A: Executive Director or Chief, yeah.

10 Q: All right. Now before we talk specifically
11 about MUSC's clinically integrated network and
12 ACO I want to talk more generally about what
13 those networks and ACO's are. And, first,
14 where did the concept of a Medicare integrated
15 network and ACO come from?

16 A: Sure. It was part of the legislation that went
17 with the Affordable Care Act, and it gave
18 Medicare the opportunity to start to transition
19 away from fee for service to value-based
20 reimbursement.

21 Q: All right. What is a clinically integrated
22 network?

23 A: A clinically integrated network is a group of
24 healthcare organizations that come together to
25 work together often to be successful in



TMC, ET AL. V. SC DHEC, ET AL.

1884

1 succeeding against the triple aim, and the
2 triple aim is improving the health of
3 populations, decreasing the cost of care and
4 improving the experience provided to patients
5 and beneficiaries.

6 Q: What type of healthcare facilities are in
7 clinically integrated networks?

8 A: It could be a variety. Most people think in
9 terms of physician practices and hospitals but
10 you can also have home health agencies, skilled
11 nursing facilities, ambulatory surgical
12 centers, all sorts of different types of
13 organizations.

14 Q: All right. And what is an ACO?

15 A: Sure. An ACO is an accountable care
16 organization, and the idea there is that that
17 organization is responsible for the quality and
18 cost of care for a defined group of patients.

19 Q: All right. What's the difference between a
20 network and an ACO?

21 A: Yeah, so if you think of the network as the
22 group of participants and think of the ACO as
23 that group of participants now focusing on a
24 particular group of patients.

25 Q: All right. Because I suppose you could have a



TMC, ET AL. V. SC DHEC, ET AL.

1885

1 network without an ACO?

2 A: You can.

3 Q: All right. How does a Medicare beneficiary --
4 and we're talking about MUSC is a Medicare ACO,
5 right?

6 A: Right.

7 Q: How does a Medicare beneficiary become an ACO
8 beneficiary?

9 A: Under the rules for Medicare a Medicare fee for
10 service beneficiary is attributed to an ACO
11 when that patient sees a physician, typically
12 a primary care physician, in a physician office
13 setting. That physician then bills Medicare,
14 Medicare says, oh, that physician is a
15 provider within the participant in this ACO so
16 it says, okay, this patient saw this doctor,
17 this doctor is in this ACO, therefore, this
18 beneficiary is now attributed to this ACO.

19 Q: All right. Does the patient have to do
20 anything in that attribution process?

21 A: Yes. That attribution process is automatic.
22 There is an opportunity for patients to
23 actually call 1-800-Medicare and say I would
24 like to be attributed to this doctor who's in
25 this ACO. I've had a handful of patients do



TMC, ET AL. V. SC DHEC, ET AL.

1886

1 that.

2 Q: All right. And can folks call 1-800-Medicare
3 and say I don't want to be in this ACO?

4 A: If they did what Medicare would tell them is
5 that they would need to switch their physician
6 to be a physician who's not in that ACO.

7 Q: I see. All right. Well with respect to this
8 attribution idea, it seems ---

9 A: Uh-huh.

10 Q: --- as though -- if I understand it it's a
11 result of going to a primary care physician and
12 then you -- you're a Medicare beneficiary and
13 then you're attributed ---

14 A: Uh-huh.

15 Q: --- to the ACO. What if I'm a Medicare
16 beneficiary and I go to a MUSC physician who's
17 in your ACO and the next week I go to a
18 physician that's not MUSC affiliated?

19 A: Yes. So during the attribution window which is
20 roughly the year prior to a performance year,
21 Medicare looks at all the claims for care
22 provided to that patient and they look
23 specifically for care provided by providers who
24 are in specialties that they consider to be
25 primary care, family medicine, internal



TMC, ET AL. V. SC DHEC, ET AL.

1887

1 medicine, pediatrics, general practice. They
2 then if that patient has seen more one of those
3 it then looks to see which provider provided
4 the plurality of care. If a patient has not
5 seen any primary care providers during that
6 period but has seen office visits with non-
7 primary care physicians, it then uses a
8 plurality process to attribute that patients
9 through a speciality care provider who also
10 might be part of that ACO.

11 Q: I see. Okay. Now do ED visits, visits to
12 emergency departments, factor into this
13 attribution process?

14 A: They do not.

15 Q: All right. Why not?

16 A: Medicare's intent is to try to identify who is
17 the most likely to be the quarterback or
18 primary care provider for that individual
19 patient, and their presumption is is that ED
20 care is not primary care, that's not that
21 patient's primary care provider so therefore
22 those visits should not count.

23 Q: All right. And you mentioned -- actually
24 described -- the triple aim of ACOs and CINs
25 earlier.



TMC, ET AL. V. SC DHEC, ET AL.

1888

1 A: Uh-huh.

2 Q: I think we have the demonstrative that you
3 spoiled by giving aids first.

4 A: I was so excited.

5 Q: That's all right. But let's talk about each of
6 these and make sure we understand them. So the
7 first is improve the quality of care. How do
8 networks in ACOs work together to improve the
9 quality of care?

10 A: Yeah, so we end reporting quality of care
11 measures to Medicare and they also measure some
12 of these, but largely this is built around
13 providing preventative care such as flu
14 vaccines, early detection and screening such as
15 cancer screenings as well as disease management
16 for chronic illnesses. So for example managing
17 a diabetic well. So there are a lot of other
18 ways that we can measure quality and -- but for
19 Medicare's purposes the way that the assure
20 that we're delivering high quality care is by
21 measuring that care that we deliver to these
22 patients.

23 Q: And how do Medicare ACOs with networks lower
24 the cost of care?

25 A: Well again a number of different ways. One is



1 that if we keep patients healthier they're
2 generally less likely to use expensive
3 resources such as inpatient care. They're less
4 likely to use resources in general. So keeping
5 people healthy keeps them out of the hospital
6 which decreases the cost of care. We also know
7 that if we do prevention that prevents people
8 from getting sick, and if we have early
9 detection quite often it's better and less
10 costly to intervene with something like cancer
11 earlier than later.

12 Q: Do you see a lowering of the utilization of ED
13 through a well managed ACO?

14 A: I would like to think so, and actually that's
15 been the experience nationally with ED
16 utilization for Medicare ACO patients, and
17 that's also something that we've seen as well
18 as we've endeavored in this.

19 Q: All right. So that would be a goal of an ACO
20 is to decrease those episodic ED visits?

21 A: Yes.

22 Q: And get the visits and the care where?

23 A: Primary care office, telehealth, specialty care
24 office. Anywhere that we actually have more
25 time and it's less urgent.



TMC, ET AL. V. SC DHEC, ET AL.

1890

1 Q: What affect if any does an ACO have on
2 duplicative unnecessary healthcare procedures?

3 A: Yeah. So one of the things that we recognize
4 in U.S. healthcare is there's a lot of waste in
5 the system, a lot of repeated testing. Classic
6 examples are MRIs that get done in one place
7 and when it gets referred the referral doc
8 doesn't have that MRI so it gets reordered so
9 that that physician can see that. So by ACOs
10 focusing on communicating amongst its
11 practicing providers and by assuring that
12 health information is available to those folks,
13 we're better able to prevent repeated use of
14 high expense services.

15 Q: I understand. I've heard that ACOs are
16 patient-centered, what does that mean?

17 A: That means that we're as -- we're focused on
18 the needs of the patient, we're focused on
19 providing education for that patient. We're
20 trying to enable the patients to make great
21 decisions for themselves to improve their
22 health. So this isn't just cookbook medicine
23 but rather taking the best practices and
24 applying those to the individual patients.

25 Q: And how are those best practices and -- how are



1 they getting applied to the patients?

2 A: Yeah. So we certainly look to the literature
3 to understand best practices, research news
4 about that. Being educators help forces us to
5 be evidence-based I the way that we apply care.
6 And then we figure out how can we make it easy
7 for the providers to deliver that care so we
8 use decision support with the electronic
9 medical record, we make sure that information's
10 available at the time of care for providers so
11 that they can make the right decisions, and
12 then the last thing that we do is we recognize
13 that giving information to patients is
14 important so we enrich the education that they
15 receive. They get feedback on their health
16 status so that they too can make decisions that
17 are good for themselves.

18 Q: And I've heard the ACOs provide the right care
19 at the right time, what does that mean?

20 A: Absolutely. And what that means is that if we
21 have a patient -- let's say it's a patient with
22 a chronic illness who needs routine testing --
23 if that patient no-shows we might pick up the
24 phone and call and say, hey, we want to see
25 you, let's get you back in. So that's one



1 example. The other is is knowing when to
2 expect patients to show up, making sure they
3 get there. If we haven't seen them in a while
4 -- even if it's for a wellness visit -- calling
5 them up and getting them back in to make sure
6 that everything's going okay.

7 Q: So if your ACO is operating efficiently and
8 reducing some of the services that your ACO
9 beneficiaries are receiving, right?

10 A: Uh-huh. Yes.

11 Q: And I think we all know in here that healthcare
12 providers get paid in part based on doing
13 procedures. How does -- does the ACO have a
14 negative effect on the healthcare providers
15 then?

16 A: It -- without the legislation that went to
17 create ACO's that would be the case. You -- if
18 the goal of the ACO is to improve quality and
19 reduce cost -- and the way it reduces cost is
20 to reduce utilization -- it makes perfect sense
21 that decreased utilization would mean decreased
22 reimbursement to providers. Medicare
23 recognized that there's an incentive in the
24 Medicare fee for service system to just produce
25 more care and more care. So if we decrease the



TMC, ET AL. V. SC DHEC, ET AL.

1893

1 cost of care and Medicare sees savings it then
2 shares back up to 75 percent of that savings to
3 the ACO as an incentive to work on those in
4 savings. So Medicare wins, the patients wins
5 because of decreased out of pocket cost, and
6 the provider largely remains whole through this
7 whole process.

8 Q: All right. Here's what I understand so far.
9 So networks are groups of healthcare providers
10 and facilities that work together to care for
11 patients, the ACO then is an organization with
12 the network.

13 **MR. THOMAS:** Your Honor, I'm objecting. Mr. Dayhuff
14 has done this a couple times. He is
15 summarizing the witnesses testimony on the
16 record. He's already elicited this testimony
17 but as he started he says, here's what I
18 understand you said and he's going to launch
19 into -- and I'm cutting him off before he got
20 through it all -- but this is not a setup
21 question, it's a summary of the witness's
22 testimony and I don't think it's proper. I
23 think it's cumulative and duplicative.

24 **MR. DAYHUFF:** It's a transition to another line of
25 questioning.



TMC, ET AL. V. SC DHEC, ET AL.

1894

1 **MR. THOMAS:** Then say let's transition to another
2 line of questioning.

3 **MR. DAYHUFF:** I could create my direct in any way I
4 want I think, Mr. Thomas. But before I get to
5 through with that transition then I want to try
6 again. I forgot one bullet point, though, so
7 thank you for not judging.

8 Q: Increased patient satisfaction?

9 A: Absolutely. We ---

10 Q: Tell me about that.

11 A: Yeah. We want our patients to come back and
12 see us. We want them to enjoy -- not just
13 enjoy but consider -- that they get high
14 quality care. So we actually measure --
15 Medicare requires that we measure the
16 satisfaction of care delivered, and what's
17 unique about that tool is that it actually asks
18 a couple questions around stewardship of
19 resources that you normally don't get in the
20 patient satisfaction survey. So Medicare
21 really wants patients to be satisfied with
22 being in accountable care organizations.

23 **MR. DAYHUFF:** Now I'm ready to transition, Your
24 Honor. How did you feel about that transition?
25 Did you like it or not?



TMC, ET AL. V. SC DHEC, ET AL.

1895

1 **THE COURT:** You don't need to summarize.

2 **MR. DAYHUFF:** Thank you.

3 Q: Why ---

4 **THE COURT:** His objection is sustained.

5 **MR. THOMAS:** It was good though.

6 Q: Why do we need ACOs in networks? In other
7 words doesn't the Medicare system already do
8 this?

9 A: It doesn't. The Medicare fee for service
10 largely relies upon providers to bill for
11 services. It doesn't have a lot built around
12 utilization, and it doesn't have incentives
13 built around delivering high quality care, it's
14 built around volume of care.

15 Q: Understood. All right. Let's talk about
16 MUSC's ACO. We've talked about ACOs generally
17 -- transition -- let's talk about MUSC's ACO,
18 and we've got another demonstrative, and I want
19 to talk about each of these line items. First,
20 beneficiaries. How many beneficiaries do we
21 have in MUSC's ACO?

22 A: In 2014 we had roughly 14,000 Medicare
23 beneficiaries.

24 Q: Okay. 14,000. And your ACO is relatively new
25 I think we learned?



TMC, ET AL. V. SC DHEC, ET AL.

1896

1 A: Yes.

2 Q: Has that number been increasing?

3 A: It's increased by about one percent per year.
4 So there were about 13,000 the first year -- a
5 little under 13,000, moved closer to 14 in the
6 second year and a little over 14 the third
7 year.

8 Q: And I think we've talked about this generally
9 but how did these patients get in MUSC's ACO?

10 A: Sure. Largely those patients -- 90 percent of
11 those patients -- have a visit with an MUSC
12 health primary care provider and so those 90
13 percent came to the ACO through those primary
14 care providers, the other 10 percent came to
15 the MUSC Health Alliance through visits with
16 specialty care providers, and what that means
17 is during that period of time through the
18 attribution window they did not see a primary
19 care provider that billed Medicare anywhere
20 else.

21 Q: All right. Let's take a look at our Joint
22 Exhibit 1 which is the DHEC record. And there
23 was a page in the project review presentation
24 that related to the ACO. Take a look at what
25 we have before you, Doctor, are you familiar



TMC, ET AL. V. SC DHEC, ET AL.

1897

1 with this slide?

2 A: I am familiar with this slide.

3 Q: All right. What does this -- what are the
4 points that this slide is making?

5 A: So in 2017 when we received our initial list of
6 patients, one of the interesting things is
7 Medicare doesn't tell you where these patients
8 live, they presume that you probably know
9 better than they do. So I received my list of
10 patients, we pushed that into our electronic
11 medical record that then looked at what the
12 home address is for those patients and this is
13 a heat map that ties those home addresses to
14 Medicare beneficiaries.

15 Q: So your medical record would have the address
16 of your patients, right?

17 A: Correct.

18 Q: And that's tied to the information you get from
19 Medicare to generate that map?

20 A: Correct.

21 Q: All right. Understood. So there's where your
22 patients are. What is the 34 percent? What is
23 the ---

24 A: Yeah.

25 Q: --- how is that ---



TMC, ET AL. V. SC DHEC, ET AL.

1898

1 A: So looking at where those dots are, where the
2 heat map is, what we can see is that 34 percent
3 of those patients at that time lived in areas
4 that were considered to be North Charleston,
5 Moncks Corner or Summerville.

6 Q: All right. And that 34 percent is 34 percent
7 of what total?

8 A: Roughly 13,000 in 2017.

9 Q: All right. And -- all right -- well why is the
10 map making a point that 34 percent of the
11 patients that are in your ACO -- or in what
12 we've been calling I guess in this trial the
13 north area?

14 A: Well what this tells us is that our ACO
15 patients aren't living exclusively on the
16 peninsula within five miles of the MUSC campus
17 but rather we deliver primary care services and
18 healthcare services to patients who are
19 scattered throughout the tri-county region and
20 to a lesser degree throughout the state.

21 Q: All right. Let's go back to demonstrative that
22 we were just on. What facilities are part of
23 the MUSC network?

24 A: Sure. We have -- MUSC Health is the Medical
25 University Hospitals -- the hospitals which are



TMC, ET AL. V. SC DHEC, ET AL.

1899

1 -- originally it was the hospitals that were in
2 the peninsula and now include the hospitals
3 that we acquired in Florence, Lancaster, Marion
4 and Chester. And then we have three employed
5 physician practices. One is a faculty practice
6 which you think of as the traditional
7 specialist and primary care folks who have
8 largely worked on the peninsula. We have a
9 community practice that's -- its legal name is
10 Carolina Family Care -- that is a group of
11 largely family practice and internal medicine
12 physicians who have offices throughout the
13 Charleston County and adjacent counties. And
14 then we have one very small physician practice
15 called MUSC Health Partners that is a
16 neurosurgeon who works up in Murrells Inlet.

17 Q: Let me just break that down a little bit. So
18 the facilities, you mentioned MUSC Medical
19 Center ---

20 A: Uh-huh.

21 Q: --- and the other hospitals. Let's focus on
22 MUSC Medical Center. Does that mean all the
23 various services that are provided through the
24 MUSC Medical Center are available to your ACO
25 beneficiaries?



TMC, ET AL. V. SC DHEC, ET AL.

1900

1 A: They are, yes.

2 Q: Is that inpatient and outpatient?

3 A: Inpatient and outpatient, ambulatory surgery,
4 outpatient therapies that are provided at
5 offices throughout the county.

6 Q: All right. And then let's break down the
7 practitioners a little bit. The faculty
8 practice that you mentioned ---

9 A: Uh-huh.

10 Q: --- is that MUSC physician?

11 A: That -- yes, that is.

12 Q: Which we've also heard called UMA?

13 A: Right, University Medical Associates.

14 Q: All right. How many physicians are in that
15 practice that are then able to be seen by ---

16 A: Right. There are roughly ---

17 Q: --- they're part of the network?

18 A: Yeah, there are roughly 1,400. Most of them
19 practice as fractional so they're not full-time
20 physicians so it's not 1,400 full-time, but
21 there are 1,400 noses there.

22 Q: And then you mentioned -- I guess the other
23 major one was Carolina Family Care?

24 A: Carolina Family Care.

25 Q: How many practitioners approximately?



TMC, ET AL. V. SC DHEC, ET AL.

1901

1 A: About 40.

2 Q: All right. Coordinated care is the next bullet
3 point. Is this network coordinating the care
4 of -- for your ACO beneficiaries?

5 A: It is. We've got -- within our primary care
6 practices we've got care coordinators that
7 help manage patients who have moderate or
8 rising risk of illness. We have another group
9 of nurses whose focus is on patients who've
10 been discharged from the hospital to call to
11 make sure that they're doing okay. And then we
12 have a -- and then we have the discharge
13 planners from the hospital. And finally we
14 have a couple of dedicated nurses and a social
15 worker who focus on our highest risk patients
16 in our accountable populations that are at high
17 risk for admission during the next few months,
18 and what they try to do is figure out what can
19 we do to keep them healthy so that they don't
20 need inpatient care.

21 Q: And those folks that are coordinating care they
22 work for you?

23 A: They work -- they don't work directly for me
24 but we all work together.

25 Q: Do you have a role in the coordination of care?



TMC, ET AL. V. SC DHEC, ET AL.

1902

1 A: Absolutely.

2 Q: What is that?

3 A: What I'm really working on is coordinating the
4 coordination and developing tools so that those
5 folks can communicate about specific patients
6 within the medical record so that their hand-
7 offs from one to another because you could
8 imagine that these patients move amongst these
9 services all the time, that those hand-offs are
10 seamless and that we are having to repeat the
11 understanding of where the patient is rather if
12 a patient is assessed in one area today, next
13 week that assessment can carry forward and we
14 can move from there.

15 Q: Could you give us an example or two so we can
16 understand how this care coordination happens?

17 A: Certainly. Yes. So if you -- if you're an
18 inpatient at MUSC in one of our accountable
19 care programs, at the time of discharge the
20 transition coordinator, transition discharge
21 planner, is working on helping to get you set
22 up for future appointments and what you think
23 that you need to have, and to be honest if
24 anybody here has recently been an inpatient,
25 that's a flurry of information that you --



TMC, ET AL. V. SC DHEC, ET AL.

1903

1 you're happy to get out of the hospital and you
2 go home and say, okay, now what do I do now.
3 So with a program that we call transition care
4 management, if that patient belongs to one of
5 our primary care practices about day two or so
6 that primary care practice calls back and says,
7 okay, hey, we see that you've just left the
8 hospital, we need to get you set up to come
9 back in to see your primary care provider. By
10 the way, let's talk about your medicines and
11 which ones are new and which ones have been
12 dropped, have you been able to get those meds?
13 So what we're trying to do is create a seamless
14 hand-off. And then another example that in
15 terms of the coordination of care is if we
16 focus on patients who have chronic illnesses --
17 and I'll pick on diabetes here for second --
18 one of the goals of care for diabetics is to
19 maintain a blood level called a hemoglobin A1C
20 below a level of nine typically for Medicare
21 patients, and that -- what that nine references
22 is basically somebody's average sugar level and
23 if it's above nine then it's high and it it's
24 below nine then it's appropriate. So we
25 monitor that anywhere from every three to six



TMC, ET AL. V. SC DHEC, ET AL.

1904

1 months. But if we have patients who are
2 diabetics who are having trouble managing their
3 A1Cs then what we can do is we can use our care
4 coordinators to identify is this a problem
5 obtaining medicines? We know that insulin's
6 gotten expensive recently. Is this a problem
7 with just understanding diabetes, do we need to
8 do education? Is there something else that's
9 complicating this patient's life like they
10 really don't know what foods to eat. So there
11 are a lot of different opportunities that we
12 have to impact the care of these chronically
13 ill patients.

14 Q: Is the MUSC ACO the only ACO in the tri-county?

15 A: It's not. There are three other ACO --
16 Medicare ACOs within the county. The oldest
17 one is the Accountable Care Coalition of the
18 tri-counties which is independent of any health
19 system. In 2016 Palmetto Primary Care stood up
20 a Medicare ACO, it too is independent of any of
21 the health systems. And then in 2017 -- the
22 same year that MUSC was standing up -- it's
23 Medicare ACO, the Roper system, did the same
24 for it's patients.

25 Q: So while we're not the ACO in the tri-county



TMC, ET AL. V. SC DHEC, ET AL.

1905

1 area, I understand we're unique in some way.
2 Explain that.

3 A: We are. We are -- within the Medicare program
4 you can pick what sort of financial risk that
5 you take. So most accountable care
6 organizations pick Track 1, and what that means
7 is that if the -- and the way Medicare
8 calculates your financial results is they
9 provide a benchmark. They say your average
10 patient's gonna cost 11,000 bucks for this
11 year. And then at the end of the year they
12 sort of true that out, and if that -- if your
13 average patient costs less than that then
14 that's the savings that Medicare has received
15 and they share some of that back. Similarly,
16 for some ACOs, if your beneficiaries cost more
17 than your benchmark the ACO ends up writing a
18 check back to Medicare. Track 1 ACOs are just
19 upside which means that if they're -- if they
20 come in over their benchmark -- in other words
21 if Medicare experiences losses -- the ACO
22 doesn't pay Medicare back. MUSC chose at the
23 very beginning to be Track 3 ACO which means
24 that it has downside risk. And we're the only
25 Track 3 ACO in the state over one of about 30



TMC, ET AL. V. SC DHEC, ET AL.

1906

1 or 35 in the country. And so what that did for
2 us is that it pushed us forward to be thinking
3 about, okay, if things don't work out we're
4 okay, but rather if things don't work out we're
5 still on the hook.

6 Q: Now let's -- our last bullet point is shared
7 savings and losses. I assume we have a record
8 of shared savings or losses?

9 A: We do.

10 Q: Tell me about that record.

11 A: Yeah. So 2017 was our first year of
12 performance, and as it turns out, we --
13 Medicare experienced losses so the -- our
14 beneficiaries when they summed up all of the
15 spending came in over what that benchmark was.
16 It was a fraction of percent over the
17 benchmark, but nonetheless what it meant was
18 that we needed to write a check back to
19 Medicare for \$291,000 in 2018 based upon our
20 2017 performance.

21 Q: And help me understand why Medicare had losses
22 as a result.

23 A: That's because the -- when they summed up all
24 the claims for our ACO beneficiaries -- and
25 let's just say for example the benchmark for



TMC, ET AL. V. SC DHEC, ET AL.

1907

1 all of those beneficiaries was about 150
2 million bucks, so let's say it was a 150
3 million. What happened was when they summed up
4 the actual claims we came in at a 151 million,
5 they experienced a million dollars losses. We
6 pay back 40 cents on the dollar -- so I'm using
7 round figures, but ---

8 Q: Sure.

9 A: --- we're sort of in the ballpark of what this
10 was all about.

11 Q: All right. Well does that mean that MUSC as a
12 result of the ACO came out of pocket 300
13 thousand dollars?

14 A: In the short term it would look like that, but
15 because MUSC chose to be a Track 3 ACO the
16 physician practices that are part of the ACO
17 will receive -- and this is any day now -- a
18 five percent bonus from Medicare on physician
19 -- basically five percent of the physician
20 claims paid by Medicare during 2018. So that
21 five percent bonus that we're gonna get for
22 performance year '17 will more than counter
23 balance the losses that we saw in shared
24 losses, and that five percent bonus is
25 something that's not available to Track 1



TMC, ET AL. V. SC DHEC, ET AL.

1908

1 participants.

2 Q: All right. And even though I guess we're being
3 made whole to some extent by this bonus is the
4 goal to have Medicare experience losses?

5 A: No. The goal is to -- for -- the goal is for
6 Medicare to experience savings. It's the goal
7 for the patients to experience less out of cost
8 -- out of pocket costs -- and if we're able to
9 do those things then we would experience shared
10 savings and receive some of that money back.

11 Q: All right. If this Court approves MUSC's FED
12 CON application, MUSC will get to establish a
13 12 room FED in Berkeley County, is that your
14 understanding?

15 A: That is my understanding.

16 Q: Will the establishment of that FED benefit
17 MUSC's ACO beneficiaries and the ACO?

18 A: I would hope so, and the reason for that is as
19 I've described there's a lot of opportunity to
20 coordinate care so having a an emergency room
21 that's part of our network is very relevant.
22 The other things that we're working on within
23 our currently emergency room that I would
24 imagine that we're going to continue to do with
25 the freestanding ED is we have imbedded social



TMC, ET AL. V. SC DHEC, ET AL.

1909

1 workers and care coordinators who work in the
2 emergency room who are working to actually help
3 transition patients out of the emergency room
4 to go back home so that they can have continued
5 care so that they don't turn into inpatients.

6 Q: All right. And I think you were just again
7 jumping ahead of the bullets. So that's -- I
8 think you just explained how the ACO would
9 improve quality and care coordinate in the ED
10 setting ---

11 A: Yes.

12 Q: --- is that correct? All right. How about
13 bullet two?

14 A: Yep.

15 Q: Decreased costs and unnecessary duplicative
16 services.

17 A: Well the -- yeah, so the nice thing about the
18 freestanding ED being part of the MUSC system
19 is that all of our medical records are kept
20 together and so if we have a patient who let's
21 say has congestive heart failure who is seen by
22 the cardiologist one week or two weeks ago and
23 embarked on a new plan of care but
24 unfortunately that care isn't working quite the
25 way it should be and that patient lands in the



TMC, ET AL. V. SC DHEC, ET AL.

1910

1 emergency room, the emergency room staff is
2 able to see what that plan of care was, see
3 what the modifications were, work from that
4 plan and potentially also identify if they
5 treat that patient's exacerbation in the
6 emergency room rather than admitting the
7 patient, they can then turn right back around
8 and plug that patient back into the
9 cardiologist's office in the next day or two so
10 that the patient's able to go home and
11 experience better health.

12 Q: All right. And you've talked to me about
13 treating exacerbation rather than treatment and
14 admit ---

15 A: Right.

16 Q: --- what does that mean?

17 A: So it's very common with emergency rooms, the
18 goal is built a lot around through play and so
19 what you want to -- and, you know, drive up
20 Interstate 95 and you can see the number of
21 minutes and the access to EDs along the way.
22 So emergency rooms typically are looking to
23 make a rapid disposition of the patient. So if
24 the patient's gonna require ongoing care for
25 the reason why they're there they often get



TMC, ET AL. V. SC DHEC, ET AL.

1911

1 admitted to be -- to have access to that care.
2 The way I would like to see this work is that
3 if we can tuck them back into an outpatient
4 care system and we can sort of fix or start to
5 fix what dropped them in the emergency room to
6 begin with we can continue that care as an
7 outpatient so that the patients can go home, we
8 can decrease the cost of care, and more
9 importantly, it's quite often the behaviors at
10 home that are driving some of the challenges,
11 and if we can work on the patients while
12 they're at home and get them -- get their
13 chronic diseases optimized in their home
14 setting then they're more likely to be
15 successful.

16 Q: Now I've heard some describe the ED as a long
17 hallway to the hospital. Give me your thoughts
18 about the ACO and that descriptive, please?

19 A: Well I would like to think that I've got a lock
20 to that hallway.

21 Q: What do you mean?

22 A: In other words, what I would like to see is
23 that the hallway to admission is the -- is
24 really for the folks that we can't manage
25 acutely within the emergency room who really



TMC, ET AL. V. SC DHEC, ET AL.

1912

1 need inpatient nursing care. In fact, we're
2 working on being able to admit patients from
3 the emergency room and have them moved to
4 nursing homes, and we can do this under a
5 waiver that we have with Medicare so that again
6 we're able to treat them effectively but in a
7 lower cost setting than traditional inpatient
8 care.

9 Q: All right. Let's look at the next
10 demonstrative, MUSC 04634, which is I believe
11 a document that you were showed at your
12 deposition. What is this?

13 A: So what I did was I looked at our Medicare ACO
14 patients for the 12 month period ending
15 September 30th of 2018 and identified the
16 number of unique patients who visited each of
17 these emergency rooms as well as the numbers of
18 times that they visited in aggregate those
19 emergency rooms.

20 Q: All right. And you mentioned our beneficiaries
21 so these are the 14,000 or so?

22 A: Correct.

23 Q: All right. And so what's the point of this?
24 Why collect that data? What's the use of it?

25 A: Well so it can help me understand what the



TMC, ET AL. V. SC DHEC, ET AL.

1913

1 patterns of care are. So what I can see here
2 is where these patients are more likely to
3 engage with care outside of our network. What
4 opportunities would I be able to have to better
5 place services so that we can keep them in
6 network and better coordinate their care. It
7 also tells me -- because I can measure this
8 repeatedly -- if my goal is to reduce the
9 amount of emergency care delivered to these
10 patients am I successful in those goals.

11 Q: All right. So what's the problem with our
12 beneficiaries getting care out of network?

13 A: It's an isolated care episode if it's not tied
14 in to the continuing of care for those
15 patients.

16 Q: Why? Why is that isolated?

17 A: Because they're disconnected, they're not
18 working for our medical record. We don't have
19 the care coordination processes that in other
20 emergency that we do within MUSC.

21 Q: All right.

22 **MR. DAYHUFF:** Let's go back to our demonstrative,
23 Dan? Lest I forget a bullet point. Improved
24 ACO performance. How will the MUSC FED improve
25 ACO performance?



TMC, ET AL. V. SC DHEC, ET AL.

1914

1 A: Yeah. Well if our goal is to reduce inpatient
2 care, which that's one of my goals is to keep
3 people healthier so that they don't require
4 inpatient care, then providing robust emergency
5 room care at a place where a patient is gonna
6 choose to get their care allows me to do
7 exactly that.

8 Q: All right. Now Trident Medical Center, the
9 Trident Health System, have they been invited
10 to participate in the MUSC ACO?

11 A: They have not.

12 Q: All right. Why not?

13 A: Trident doesn't have a broad primary care
14 employed physician base so if we included
15 Trident as a hospital within the ACO they
16 really wouldn't bring patients to that ACO.

17 Q: And I think you mentioned to us earlier Roper
18 has an ACO?

19 A: That's correct.

20 Q: Does Trident participate in that ACO?

21 A: Not to my knowledge.

22 Q: All right. So we saw that list of patients and
23 folks going to other hospitals. Doctor, this
24 -- is this all about MUSC wanting to get other
25 folks -- other hospital systems, ED patients,



TMC, ET AL. V. SC DHEC, ET AL.

1915

1 and bring them to us?

2 A: I don't think so.

3 Q: Why not?

4 A: Well two things, one is is that especially when
5 it comes to Medicare, one of the things that
6 Medicare really wants me to do as I communicate
7 with our beneficiaries is to remind them that
8 they freedom to choose. So these patients --
9 and what I would suspect -- is that as we look
10 at emergency room care for these patients that
11 happens in other emergency rooms, quite often
12 it's because they're driving past that other
13 emergency room and they're choosing to pick the
14 one that's nearby. And so beyond the fact that
15 what I would really like to do is reduce their
16 need or their expectations that they need
17 emergency room care, what I would then like
18 them to do -- or what I would like to offer --
19 is the alternative that if they're seeking
20 emergency room care in the North Charleston,
21 Summerville area that we have something that is
22 in network that can be offered to them.

23 Q: And these are patients that are already
24 choosing us for their primary care services?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1916

1 Q: All right. So do you want more ED services for
2 MUSC's ED?

3 A: We are at capacity right now, and in fact
4 everything that I'm trying to do is trying to
5 decrease the amount of demand for those
6 services.

7 Q: All right. Okay. You have not been involved
8 in the planning for the FED but do you
9 understand there are some changes that were
10 made?

11 A: I understand that there were some changes. If
12 you ask me to tell you what they were I
13 couldn't do that.

14 Q: How about this, are you aware of a change in
15 location?

16 A: My understanding is is that the -- there was an
17 original site and there was a new site.
18 They're half, three quarters of a mile apart.
19 That sort of represents moving across an
20 interstate I believe.

21 Q: All right. Well is that changing location
22 material from your perspective from the ACO
23 perspective?

24 A: No, because ---

25 Q: Why not?



TMC, ET AL. V. SC DHEC, ET AL.

1917

1 A: --- what I look is I see a population that is
2 using emergency room services that are -- that
3 who live in that greater Summerville, Moncks
4 Corner, Goose Creek, North Charleston area and
5 if that freestanding emergency room is on one
6 side or the other of Interstate 26 I don't see
7 that materially affecting their decisions.

8 Q: If we improve ACO performance who benefits? If
9 we approve it through the FED?

10 A: Patients do because they're going to receive
11 that coordinated, high quality care.
12 Ultimately if that results in shared savings
13 that means that patients also probably are
14 paying less out -- for co-pays for inpatient
15 care and MUSC's ACO would also -- it could
16 contribute to shared savings there.

17 Q: And who else shares those savings with MUSC?

18 A: So the MUSC ACO -- so Medicare -- first
19 Medicare experiences the savings, then they
20 give some of that to the ACO would distribute
21 it amongst its participants which is the
22 hospital and the physician practices.

23 Q: Thank you, sir. Please answer any questions
24 opposing counsel has. Thank you, sir.

25 **DR. LOUDER - CROSS-EXAMINATION BY MR. THOMAS:**



TMC, ET AL. V. SC DHEC, ET AL.

1918

1 Q: Dr. Louder, how are you?

2 A: I'm well. How are you?

3 Q: I'm good. We haven't met. My name is Will
4 Thomas. I am -- represent Trident Health in
5 this contested case hearing. I've got a few
6 questions for you today. At the time that you
7 were deposed you hadn't nor had you actually
8 ever seen the CON application for the MUHA
9 freestanding ED projects in Summerville, do I
10 have that right?

11 A: I had never received or reviewed that, correct.

12 Q: You actually had no role in planning the
13 freestanding ED in Summerville, is that right?

14 A: That is correct.

15 Q: Nobody ever consulted you about the idea of
16 expanding the emergency services department to
17 include a freestanding ED did they?

18 A: Other than having the -- that one slide --
19 helping to generate that heat slide without
20 having a full appreciation as to what was that
21 about but rather the addressed -- one of the
22 things when we first got our ACO population was
23 to say so who are these people and where do
24 they live, and that generated that heat map and
25 that then was something that was considered as



TMC, ET AL. V. SC DHEC, ET AL.

1919

1 MUSC move forward in determining whether or not
2 it wanted to set up a freestanding ED.

3 Q: Is it your testimony today that you did that
4 knowing that they were going to set up a
5 freestanding ED?

6 A: No.

7 Q: Okay.

8 A: No.

9 Q: And you actually have no prior experience with
10 respect to freestanding EDs, correct?

11 A: Correct.

12 Q: Okay. And just for the record you haven't had
13 any discussions about this case or this project
14 with Dr. Cawley, correct?

15 A: Not directly, no.

16 Q: Okay. Nor with Ms. Sarah Bacik, MUHA's Chief
17 Strategy Officer, correct?

18 A: All right.

19 Q: And although you haven't had any discussions
20 about this case with Dr. Cawley it's fair to
21 say you meet with him on a somewhat regular
22 basis, maybe bi-monthly or something along
23 those lines?

24 A: Correct.

25 Q: Okay. And just for the record you hadn't



TMC, ET AL. V. SC DHEC, ET AL.

1920

1 spoken to Dr. Hall, MUHA's ED Director, about
2 this case either?

3 A: Correct.

4 Q: Okay. Is -- since you provided a letter I
5 believe for the CON application that's at issue
6 here is it fair to say that you haven't had an
7 interactive discussion about the freestanding
8 ED with anyone at MUSC?

9 A: Yeah, so at the time that MUSC was pursuing
10 it's certificate of need it not surprisingly
11 was looking for letters of support for the
12 concept. I was provided a template. I
13 actually modified that. The first paragraph or
14 two were ones that I tailored to address the
15 needs of the ACO population.

16 Q: Okay. But is it fair to say since you've
17 written that letter you haven't had an
18 interactive discussion about the freestanding
19 ED with anyone?

20 A: Correct. Yes.

21 Q: Okay. Now would you agree with me that MUSC
22 hasn't spent much money on it's existing
23 emergency department located on it's downtown
24 campus since you have arrived at MUSC?

25 A: I can't answer that question.



TMC, ET AL. V. SC DHEC, ET AL.

1921

1 Q: Okay, so you don't know?

2 A: I don't know.

3 Q: Okay. But do you know how many visits a year
4 that MUSC actually sees on the downtown campus,
5 ED visits?

6 A: Not -- not off the top of my head. I know it's
7 measured -- it's probably less than 100,000 and
8 more than 30.

9 Q: Okay. So somewhere in between there.

10 A: Somewhere -- I think.

11 Q: Pretty good range though, right? Did -- I know
12 you haven't been here but do you realize that
13 Trident Health has spend nearly 60 million on
14 its ED services in the last five years?

15 A: I'm not aware.

16 Q: Okay. And I think I heard you say that MUSC
17 Health Alliance ACO has a little over 14,000
18 Medicare beneficiaries?

19 A: That's correct.

20 Q: Okay. And how many is that out of all the
21 Medicare beneficiaries that MUSC actually
22 treats in a given year?

23 A: So I actually know that number, it's 35 percent
24 of the unique Medicare patients seen by MUSC.

25 Q: Okay. So if I do the rough math on that we're



TMC, ET AL. V. SC DHEC, ET AL.

1922

1 looking at perhaps somewhere in the order of
2 42, 43,000 Medicare ---

3 A: Roughly.

4 Q: --- overall?

5 A: Yeah. Yeah.

6 Q: Okay. And those aren't all fee for service are
7 they?

8 A: In this case it is. The reason why I know that
9 number is Medicare calculates where the
10 denominator is attribution eligible Medicare
11 fee for service patients.

12 Q: Okay. So there may be even more Medicare
13 patients that are like Part C?

14 A: Correct, yes.

15 Q: Okay. Now just for the record so those are
16 Medicare I guess Part A and B patients ---

17 A: Correct.

18 Q: --- that you're looking at the fee for service
19 kind. And so none of the folks who use MUSC
20 and rely on say commercial insurance like Aetna
21 and United would be included in that number,
22 correct?

23 A: Some people may have both coverages.

24 Q: Excluding supplemental coverage.

25 A: Right. Yeah. Largely it's people who Medicare



TMC, ET AL. V. SC DHEC, ET AL.

1923

1 would be the primary payer for these patients.

2 Q: Okay. Now my understanding -- and I think you
3 confirmed it today -- but just get it for the
4 record is that if a patient sees an MUHA
5 affiliated provider in an office visit they're
6 almost automatically in the ACO unless they opt
7 out, is that a fair statement?

8 A: No, it's not. And as a simple example if a --
9 if during the attribution window if a patient
10 were to see an MUSC health provider, primary
11 care provider, once, ---

12 Q: Right.

13 A: --- and a Roper primary care provider twice,
14 that patient would be attributed into the Roper
15 ACO.

16 Q: Okay. So -- but in terms of getting into the
17 ACO at MUSC it's more of an opt in rather than
18 an opt out situation, correct?

19 A: Opt in only in the sense that the patient has
20 chose to see an MUSC provider.

21 Q: Correct. They don't know when necessarily
22 walking through that door that that person's in
23 the MUSC ACO, correct?

24 A: The would know they're in MUSC, they probably
25 wouldn't know that -- the ACO relationship.



TMC, ET AL. V. SC DHEC, ET AL.

1924

1 Q: Fair enough. Now I believe your ACO was
2 established with CMS in January of 2017 or at
3 least that was the first kind of period start?

4 A: Correct.

5 Q: Okay. And you would agree with me that with
6 respect to the savings the distributions, you
7 haven't gotten a distribution from CMS on the
8 savings but I believe you said maybe your
9 physicians got a five percent payment?

10 A: Right. So again our first year we experienced
11 losses ---

12 Q: Right.

13 A: --- so we didn't generate savings and for that
14 year of participation we're waiting for the
15 five percent bonus, yes.

16 Q: Okay. So we're almost -- well we're seven
17 months into July 2019 and you still haven't
18 seen the five percent from your 2017-2018 year?

19 A: Welcome to Medicare.

20 Q: All right. Do you have any ideal what that
21 number's going to be?

22 A: I'm hoping it's well north of two million
23 dollars.

24 Q: Okay. And so at least in 2017, right now, at
25 the end of 2017 MUSC had to right a check back



TMC, ET AL. V. SC DHEC, ET AL.

1925

1 to CMS for nearly two -- of 291,000, I believe
2 you testified to that?

3 A: Yeah. So we wrote that check in November of
4 2018 for 2017 performance.

5 Q: Well at least you didn't have to do it right at
6 the end like they're making you wait for your
7 five percent, right? And I believe 2018 you
8 also testified you don't anticipate the shared
9 savings portion but you're also going to get
10 some type of payment maybe in 2021 for this
11 year?

12 A: For 2020, yeah, for 2018.

13 Q: Okay. All right. Do you know if the MUSC
14 Health Alliance ACO rolls up into MUHA's
15 financials?

16 A: What I would -- and that's actually a
17 discussion that we've had about how to -- so
18 MUSC Heal Alliance is an LLC, it's a nonprofit
19 -- but that would maintain it's own financial
20 books. I terms of the income and outgo of
21 actual monies that account -- we have one
22 account in the MUHA books and one account in
23 the UMA books. So -- and part of that just has
24 to do with which programs are resourced out of
25 which system. So what I would say that it's



TMC, ET AL. V. SC DHEC, ET AL.

1926

1 not entirely within MUHA but it is entirely
2 within MUSC Health.

3 Q: Fair enough. All right. Let's go to TMC
4 Exhibit 16, please. I think you're familiar
5 with this document. Mr. Dayhuff just went over
6 it with you. Okay. You recognize this
7 document, correct?

8 A: It looks vaguely familiar.

9 Q: All right. And you created this document,
10 correct?

11 A: Yes.

12 Q: Okay. And this document marked TMC Exhibit 69
13 I would like admitted into evidence.

14 **(Petitioner TMC's Exhibit Number 69 was introduced**
15 **into the record at this time.)**

16 **MR. DAYHUFF:** No objection.

17 **THE COURT:** Admitted.

18 **(Petitioner TMC's Exhibit Number 69 was admitted into**
19 **the record.)**

20 **MR. THOMAS:** Thank you.

21 Q: All right. So as I understand it, this slide
22 shows where the MUHA Health Alliance ACO
23 patients utilize ED services, is that right?

24 A: That's correct.

25 Q: Okay. And you would agree with me that as far



TMC, ET AL. V. SC DHEC, ET AL.

1927

1 as this slide goes you do not know anything
2 about -- or this slide tells us nothing about
3 the level of service that these particular
4 patients used or were triaged at these
5 particular EDs, fair?

6 A: That would be correct.

7 Q: Okay. Now you've got an asterisk down at the
8 bottom of the page, eight facilities near
9 proposed location, correct?

10 A: Correct.

11 Q: Now for the record is the proposed location the
12 proposed location of the MUHA freestanding ED
13 off of Exit 199 in Summerville?

14 A: Yes.

15 Q: Okay. Good. All right. Now is it your
16 contention, Dr. Louder, that the Roper Mt.
17 Pleasant ED -- and I'm assuming that's what Mt.
18 Pleasant means, is that right? Is that your
19 standing?

20 A: Yes.

21 Q: Okay. Is near MUSC's proposed freestanding ED
22 on Exit 199?

23 A: Closer than Walterboro I think maybe.

24 Q: Well we're going to get to Walterboro. Do you
25 know where Roper Mt. Pleasant's hospital is?



TMC, ET AL. V. SC DHEC, ET AL.

1928

1 A: Yes.

2 Q: Okay. Do you know where Wando High School is?

3 A: No.

4 Q: Okay. Well it's nearly in Allendale, South
5 Carolina, do you know where that is?

6 A: Yes.

7 Q: Okay. Do you think that people that live in
8 the area of Roper Mt. Pleasant Hospital and
9 currently utilize that hospital's ED are going
10 to drive 33 miles from Mt. Pleasant all the way
11 to Exit 199 in Summerville to utilize a
12 freestanding ED for low acuity medical
13 treatment?

14 A: Yeah, and that wasn't the intent of this
15 document but rather to simply measure the
16 utilization of emergency room care for our ACO
17 population, so ---

18 Q: Okay, go ahead.

19 A: --- yeah, I'm not making any conjectures as to
20 where folks would go for care if we set up a
21 freestanding ED for Exit 199.

22 Q: Okay. But you say it's near the proposed
23 location. You would admit 33 miles isn't
24 really near MUHA's freestanding unit, is it?

25 A: I guess it gets to what's near -- what I did



TMC, ET AL. V. SC DHEC, ET AL.

1929

1 was I focused on emergency facilities that are
2 in the tri-county region ---

3 Q: Okay, so that ---

4 A: --- and also Orangeburg County.

5 Q: Yeah, 'cause Orangeburg, I did that on Google
6 Maps too, that's 56 miles away from the
7 freestanding ED location, correct?

8 **MR. DAYHUFF:** Your Honor, this witness just
9 testified he didn't create this for purposes of
10 some sort of market shift or patient shift
11 analysis, that's not what he did. This is for
12 his use in ACO so continuing the questions
13 about health planning is beyond this expert's
14 -- or beyond this witness's purview clearly, we
15 didn't offer him for that.

16 **MR. THOMAS:** Well, Your Honor, first of all, it's in
17 evidence, okay? Second of all, he created this
18 to get an idea of where his patients were going
19 and he wants to put it in MU- -- you know he
20 looks at all the facilities near the proposed
21 location as if they patients and unique visits
22 could somehow -- I think -- somehow shift over
23 that are in his ACO. I think it's perfectly
24 good cross and ---

25 **MR. DAYHUFF:** I don't remember that opinion, Your



TMC, ET AL. V. SC DHEC, ET AL.

1930

1 Honor.

2 **MR. THOMAS:** Well he's not an expert.

3 **THE COURT:** The objection is overruled.

4 **MR. THOMAS:** Thank you.

5 Q: Now you would agree with me that Colleton
6 Medical Center in Walterboro which is 34 miles
7 away on rural roads that's not exactly near
8 this freestanding ED, is that fair?

9 A: I don't know what the distance is.

10 Q: Okay. Well interestingly you kind of compared
11 -- but you at least said you thought it was
12 farther away than Roper Mt. Pleasant, correct?

13 A: Right.

14 Q: Okay. Good. And again, you don't expect the
15 Regional Medical Center -- patients who are
16 using the Regional Medical Center in Orangeburg
17 of Calhoun County's ED to necessarily drive 56
18 miles east -- or sometimes more than that or
19 depending on traffic on I-26 -- to actually use
20 the MUHA freestanding ED, did you?

21 A: I've made no conclusions about any ---

22 Q: Okay.

23 A: --- proposed shifts in care.

24 Q: All right. It's fair to say that a lot of the
25 location on here are not necessarily near the



TMC, ET AL. V. SC DHEC, ET AL.

1931

1 proposed location of MUHA, is that fair? And
2 I'll just go on from there.

3 A: Again, I would -- I think the term near in this
4 case is just meant to mean within the counties
5 or adjacent counties. It wasn't meant to be a
6 specific distance.

7 Q: Okay. Fair enough. I'm with you there. And
8 based on what I'm seeing in this chart -- and
9 I did kind of the rough math -- is that MUSC
10 the number of unique patients they have, 1,821
11 divided by 4,053 is about 45 percent in that
12 area?

13 A: Yes.

14 Q: Okay. So means that 55 percent of the patients
15 that MUHA kind of considers are -- that are in
16 its ACO have chosen to use another ED in this
17 service area for one reason or another, is that
18 a fair statement?

19 A: No, it's not because that -- if you will the
20 3,179 patients who used ED services -- or
21 whatever the difference between the 4,000 and
22 1,800 is -- those services can also include
23 services when they're on vacation or traveling
24 so I actually see a wide disbursement of services
25 -- ED services for these patients across the



TMC, ET AL. V. SC DHEC, ET AL.

1932

1 country.

2 Q: Okay. But you didn't produce that data today
3 did you?

4 A: No, I didn't.

5 Q: Okay. And just -- if these patients just had
6 gone to an MUHA physician one time in the
7 previous 12 months, and I guess no other
8 physicians affiliated with other ACO's more
9 than that, they are attributed to MUHA's ACO
10 correct?

11 A: No. If the patient ---

12 Q: You need to explain this to me because I am
13 confused.

14 A: Yeah, okay. So as an example let's say a
15 patient went to a primary care provider for
16 Medicare -- so a Medicare patient goes to a
17 primary care provider who's not in an ACO
18 whatsoever twice and in that same attribution
19 year sees an MUSC primary care provider once,
20 that patient's not attributed to an ACO.

21 Q: And I think I said that just in a different
22 way. You would agree with me it takes
23 sometimes five times just to understand this
24 ACO stuff, doesn't it?

25 A: 10 times sometimes.



TMC, ET AL. V. SC DHEC, ET AL.

1933

1 Q: Okay. It's fair to say that one of the reasons
2 you want to get a freestanding -- or you want
3 MUHA to get a freestanding ED at Exit 199 is so
4 you can perhaps divert patients to utilize
5 MUHA's freestanding ED instead of using say
6 another ED provider?

7 A: What I would say is I would like our patients
8 to be able to choose to have an in-network
9 emergency room close to where they live.

10 Q: Okay. But the more patients you can get to use
11 the MUHA freestanding ED the more patients you
12 can coordinate care and perhaps save money
13 with, correct?

14 A: Correct.

15 Q: All right. Now do you have any evidence to
16 suggest that Trident Summerville -- Trident
17 Medical Center, Summerville Medical Center,
18 Roper Healthcare, Roper St. Francis Healthcare
19 don't try to do the same things with their
20 patients and coordinate their care?

21 A: I don't have any evidence one way or the other.

22 Q: Okay. And you do agree with me, Doctor -- and
23 if you don't know you can tell me that and it's
24 perfectly okay to say in the courtroom -- but
25 that freestanding EDs on the most part -- and



TMC, ET AL. V. SC DHEC, ET AL.

1934

1 for the most part -- treat a much lower triage
2 level of service than a hospital-based ED?

3 A: I don't know.

4 Q: You don't know that? Okay. Now you did
5 acknowledge in your deposition that folks who
6 use a freestanding ED often have acute minor
7 illnesses that don't require hospitalization,
8 you agree with that statement?

9 A: That is true.

10 Q: Okay. And I think you later testified that you
11 had not studied the types of patient
12 populations who are appropriate for
13 freestanding EDs, correct?

14 A: Correct.

15 Q: All right. Do you know that folks who may be
16 triaged at a level four or five in a
17 freestanding ED or even a hospital based ED may
18 not have an acute illness at all?

19 A: I -- to be honest I don't know what a level
20 four or level five means.

21 Q: Okay. But you would agree with me that a lot
22 of care that's delivered in a ED, hospital-
23 based ED, and more particularly a freestanding
24 ED, is sometimes just a one off visit?

25 A: I would agree that that's probably true for all



TMC, ET AL. V. SC DHEC, ET AL.

1935

1 EDs. Whether it's more true for one type of ED
2 than another I don't know.

3 Q: Okay. Because you haven't studied that,
4 correct?

5 A: Correct.

6 Q: All right. Now with respect to -- if we could
7 put Trident Medical Center Exhibit 69 back up.
8 Just a couple more questions about that. My
9 understanding from reading your deposition is
10 that you don't know where these particular
11 patients who used these particular EDs actually
12 reside, correct?

13 A: Correct.

14 Q: All right. And you don't know how many of
15 these patients are lower versus higher
16 acutities, correct?

17 A: Correct.

18 Q: Okay. Do you know what is typical in terms of
19 the percentage of patients who are admitted to
20 the hospital who initially present to a
21 freestanding ED?

22 A: So for my ACO population we have roughly 800 ED
23 visits per year per thousand ACO beneficiaries
24 and roughly 200 of those ED visits result --
25 200 of those 800 result in inpatient care



TMC, ET AL. V. SC DHEC, ET AL.

1936

1 thereafter.

2 Q: Okay.

3 A: So I would then suggest that it's probably
4 about a quarter.

5 Q: Okay. And the question I may not have phrased
6 it as well as I could have, but do you know
7 what the -- what is typical in terms of the
8 percentage of patients who are admitted into a
9 hospital out of a freestanding ED, s they first
10 present to the freestanding ED and then go to
11 the hospital?

12 A: I have no knowledge.

13 Q: Okay. Do you think that that may be something
14 important to know when analyzing which of your
15 ACO patients might be using the MUHA
16 freestanding ED n Summerville?

17 A: I guess maybe yes. I haven't thought about it
18 that way, but on the other hand I think that
19 what we need to recognize is that there's also
20 the opportunity to deliver that to have the
21 patients choose to have that in-network care
22 that also could change that calculation. So
23 it's not simply a presentation of which type --
24 or it's not simply a function of which type of
25 ED you present to but rather is that ED



TMC, ET AL. V. SC DHEC, ET AL.

1937

1 invested in an approach to accountable care.

2 Q: Okay. But the question is -- I believe you
3 answer it -- that it may be something important
4 to know in terms of who may be using that
5 freestanding ED?

6 A: Right. And I don't believe there are any
7 freestanding EDs out there right now. Maybe --
8 I certainly don't have one for 2018 so -- and
9 the way the tax ID's are set up I don't know if
10 I could actually discern that with the data
11 that I have.

12 Q: Okay. In the area -- in the service area that
13 MUHA's plans to put it's freestanding ED did
14 you not realize there are already four
15 freestanding EDs in its service area?

16 A: I wasn't participating in that decision making.

17 Q: Okay. Did you know that in 2016 22 percent of
18 MUHA -- MUSC's patients were actually
19 transported to its ED downtown via ambulance?

20 A: I don't know that.

21 Q: Okay. I think you testified today that your --
22 and I call it a heat map -- here -- it was one
23 Exhibit 1 I believe. This particular document
24 here, the heat map, you testified that 34
25 percent or 4,000 or so patients of the MUSC ACO



TMC, ET AL. V. SC DHEC, ET AL.

1938

1 patients who lived in the tri-county area
2 originate from North Charleston, Moncks Corner
3 and Summerville, correct?

4 A: Correct.

5 Q: Do you know how many of those patients
6 originate from 29406?

7 A: We could get to that, I don't know that number.

8 Q: Okay. You -- but you -- at least as far as
9 this heat map goes you would agree with me that
10 you didn't produce any of the underlying data,
11 for instance the zip code data that would allow
12 us to drill down and find out exactly where in
13 the north area these patients are from?

14 A: Correct.

15 Q: Okay. And with respect to TMC -- I believe
16 this is 69 -- would you agree with me that you
17 don't have any evidence that the patients who
18 are MUSC Health Alliance patients, you don't
19 have any evidence to suggest that they weren't
20 taken well -- you know, taken care of well at
21 these EDs correct?

22 A: No, I don't have any evidence.

23 Q: And you would agree with that the more of the
24 patients you can capture in your ACO to use
25 MUSC's freestanding ED the more successful your



TMC, ET AL. V. SC DHEC, ET AL.

1939

1 ACO is going to be, is that a fair statement?

2 A: I would hope that that's the case, that the
3 more in-network care that we can provide the
4 better case, yes.

5 Q: I think one of the things you testified in your
6 deposition was that one of the things MUSC is
7 working on with the ED is taking the time to
8 deliberately treat the patient and being able
9 to return them home rather than admitting them
10 for a two or three hospital stay, does that
11 sound right?

12 A: Correct.

13 Q: Okay. Would that also be the goal at MUSC's
14 freestanding ED in Summerville?

15 A: Yes.

16 Q: Okay. Did you have any discussions with Mr.
17 Levitt in this case?

18 A: None.

19 Q: Okay. Do you know that if he took into account
20 that the folks who are treating the patients in
21 the freestanding ED may take a little bit more
22 time with them than they may normally so that
23 they're not necessarily going to have a two or
24 three hospital stay?

25 A: I don't know.



TMC, ET AL. V. SC DHEC, ET AL.

1940

1 Q: Okay. Do you have any evidence to suggest that
2 Trident and Roper and their ED -- that their ED
3 physicians are not trying to do the same exact
4 thing?

5 A: I don't.

6 Q: Okay. Do you have any evidence to suggest that
7 Trident or Roper aren't trying to coordinate
8 their patient's care -- or follow-up care --
9 after they come into their freestanding EDs or
10 their hospital-based EDs?

11 A: Yeah, only in the sense that we certainly don't
12 get phone calls from those other facilities
13 saying, hey, we have one of your ACO patients
14 here, let's work on a transition plan.

15 Q: Okay. Well a lot of those patients don't even
16 know their in the ACO, correct?

17 A: They certainly don't get a card so they may not
18 know, yes.

19 Q: Just a few more questions, Dr. Louder. And you
20 would agree with me that in order to improve
21 the quality of care an ACO had to get patient
22 buy-in, is that a fair statement?

23 A: I'm not sure what you would mean by buy-in but
24 certainly what we would like to do is to try to
25 increase the engagement that we have with



1 patients, yes.

2 Q: Correct. In other words, knowing a lot of
3 physicians -- my dad being one of them -- one
4 of the complaints you typically hear is that,
5 as you mentioned, sometimes the patient doesn't
6 show up for the appointment that they have been
7 scheduled with, correct?

8 A: Correct.

9 Q: Okay. And you'd like to give everybody a flu
10 shot, right?

11 A: And we do. 97.8 percent of our ACO patients.

12 Q: Okay. But then there's still that certain
13 percentage who thinks that the Build a Bear
14 group is out to, you know, infect everybody
15 with the flu virus, correct?

16 A: That could be what they ...

17 Q: All right. Did I hear you correctly -- and I
18 just to make this straight for the record --
19 did you say that you've already seen less
20 visits at MUSC's ED downtown because of the
21 ACOs?

22 A: Actually, I'm seeing fewer ED visits per
23 thousand ACO beneficiaries. All ED visits, not
24 just MUS -- well I actually parsed that out to
25 see if there's a difference but rather I'm



TMC, ET AL. V. SC DHEC, ET AL.

1942

1 looking for decreased ED utilization across the
2 entire population for all EDs.

3 Q: Okay. I see what you're saying. I believe you
4 said that -- is MUSC -- all right -- MUSC
5 Health Alliance ACO the only Track 3 ACO in the
6 state?

7 A: Correct.

8 Q: Okay. And that means you're -- as a state
9 agency MUSC thought it was a good idea to go
10 with risk, right?

11 A: Well so the Health Alliance is not a state
12 agency, it's an LLC that is co-owned between
13 MUHA, which is the state agency, and UMA, which
14 is the faculty practice plan which is also a
15 nonprofit. So our executive committee and our
16 board made the decision to go at risk, yes.

17 Q: Okay. Do you know that because it is a joint
18 venture that involves a state agency that is
19 has state agency properties?

20 A: I haven't asked that question of legal. I've
21 heard some rumors around that but I don't have
22 any clear legal opinion on that.

23 Q: Okay. I believe you said -- who are the types
24 of employees that are embedded in the EDs to
25 make -- to ensure follow-up care?



TMC, ET AL. V. SC DHEC, ET AL.

1943

1 A: Care coordinators.

2 Q: Okay. And did you say those were social
3 workers?

4 A: Nurses and social workers.

5 Q: How many do you expect to be at the MUSC
6 freestanding ED?

7 A: We haven't determined that yet.

8 Q: Okay. You haven't had any discussions with
9 anyone about that?

10 A: Correct.

11 Q: Okay. And those folks you expect that they get
12 paid for their services don't they?

13 A: They do.

14 Q: Okay.

15 A: It's also something that could be provided by
16 the folks who are working the main ED as well
17 through telephonic and telehealth
18 communications.

19 Q: So they may not be embedded, correct?

20 A: Correct. That's a fair point.

21 Q: Okay. Answer any questions that the Roper
22 attorneys have for you, sir. Thank you for
23 your time today.

24 **THE COURT:** Let's take a quick ten before we go to
25 Ms. Hollingsworth.



TMC, ET AL. V. SC DHEC, ET AL.

1944

1 MS. HOLLINGSWORTH: Your Honor, actually, it's Ms.
2 Glober's witness and I don't think she had any
3 questions to ask.

4 MR. DAYHUFF: I'd like to have one more brief
5 redirect.

6 THE COURT: Well, if that's the case.

7 MR. DAYHUFF: If you like, but I could also wait if
8 you prefer.

9 THE COURT: No, no, no, if that's the case, go on.

10 MR. DAYHUFF: Then we can send Dr. Louder on his
11 way.

12 MR. THOMAS: One question in 37 sub-parts?

13 DR. LOUDER - RE-DIRECT EXAMINATION BY MR. DAYHUFF:

14 Q: Dr. Louder, so I heard your testimony. If the
15 FED is established, you want it established
16 because that would give MUSC's ACO patients in
17 the north area an in-network choice, right?

18 A: Correct.

19 Q: Now if they have that opportunity to have an ED
20 and they make that choice what effect will that
21 have on your ability to coordinate their care,
22 your organization's ability?

23 A: It will improve that ability to coordinate
24 their care as those patients approach the
25 emergency room. We'll be able to see their



TMC, ET AL. V. SC DHEC, ET AL.

1945

1 plans of care that have already originated
2 within other MUSC specialties and providers.
3 We can work from the plan of care. We can
4 integrate the plan that's derived from the
5 emergency room into the plan of care that's
6 going to be continued when the patient leaves.

7 Q: And if that care is coordinated well would you
8 expect to see more or less ED visits by those
9 folks?

10 A: Fewer ED visits.

11 Q: More or less inpatient admits by those folks?

12 A: Fewer.

13 Q: And if those two things happen what benefit
14 accrues?

15 A: The patient will experience fewer out of cost
16 -- or out of pocket -- expenses. Medicare will
17 see lower expenditures, and if we achieve our
18 share of savings threshold the ACO would
19 receive a portion of the savings Medicare sees.

20 Q: Thank you, Doctor.

21 **MR. DAYHUFF:** Nothing further, Your Honor.

22 **MR. THOMAS:** Just for the record, that was four
23 questions.

24 **MR. DAYHUFF:** Your Honor, may Dr. Louder be excused?

25 **THE COURT:** If there is no objection.



TMC, ET AL. V. SC DHEC, ET AL.

1946

1 MR. THOMAS: No objection.

2 THE COURT: Okay. Thank you, Dr. Louder.

3 DR. LOUDER: Thank you.

4 THE COURT: And you are excused.

5 MR. DAYHUFF: Your Honor, I believe that Mr. Summer
6 and Mr. Westbrook have agreed to move forward
7 or not this afternoon?

8 MR. SUMMER: I think that we were starting Mr.
9 Levitt in the morning.

10 MR. DAYHUFF: Okay.

11 (Wednesday, July 31, 2019 administrative hearing
12 ended at 3:28 p.m. and reconvened on Thursday, August
13 1, 2019 at 9:07 a.m.)

14 DAY NINE - AUGUST 1, 2019

15 THE COURT: Okay. You can call your next witness.

16 MR. WESTBROOK: All right. Thank you. Our next
17 witness is David Levitt.

18 THE COURT: Okay. Mr. Levitt, I think you know the
19 drill. You've been here.

20 MR. LEVITT: I do. Yes, ma'am.

21 DAVID LEVITT, having been duly sworn, testifies as
22 follows:

23 MR. LEVITT - DIRECT EXAMINATION BY MR. WESTBROOK:

24 Q: Mr. Levitt, how are you?

25 A: I'm well.



TMC, ET AL. V. SC DHEC, ET AL.

1947

1 Q: Good. Would you state your full name, please?

2 A: David S. Levitt.

3 Q: And where do you live?

4 A: I live in Beaufort, South Carolina.

5 Q: And what do you do for a living, Mr. Levitt?

6 A: I'm a health care consultant.

7 Q: All right.

8 **MR. WESTBROOK:** Sam, let's put up MUSC's proposed
9 Exhibit 3. I don't know -- I don't think this
10 is into evidence yet.

11 **(Respondent MUSC's Exhibit Number 3 was introduced**
12 **into the record at this time.)**

13 Q: Up on the screen -- and Mr. Levitt, what is
14 this document?

15 A: It's my CV or my resume.

16 Q: All right. Did you prepare this?

17 A: Yes, I did.

18 Q: And is it fairly current?

19 A: Yes.

20 Q: Current as of when do you think? It says
21 present. What's the present? When did you --
22 it says July of 20 -- 2006 to present.

23 A: Yeah, I would say it's generally accurate. I
24 probably prepared this a few months ago.

25 Q: Okay. And as of that time, that the time you



TMC, ET AL. V. SC DHEC, ET AL.

1948

1 prepared it is it accurate to the best of your
2 knowledge?

3 A: It is. The only changes would be, you know,
4 additional projects I've worked on. Number of
5 -- if there's any numbers in here it would be
6 a little higher.

7 Q: All right. And this accurately summarize then
8 your educational and work history.

9 A: It does.

10 Q: All right. You Honor, at this point I'd like
11 to move to admit MUSC Exhibit 3, Mr. Levitt's
12 CV, into evidence.

13 **MS. HOLLINGSWORTH:** No objection.

14 **MR. SUMMER:** No objection.

15 **THE COURT:** Okay. It's admitted.

16 **(Respondent MUSC's Exhibit Number 3 was admitted into**
17 **evidence.)**

18 Q: All right. Mr. Levitt, do you have a copy of
19 your CV up there with you?

20 A: I do, yes.

21 Q: Okay. All right. I'm going to -- let's start
22 off by going through your educational
23 background starting with undergraduate school.
24 Where did you go and what was your major?

25 A: I had a bachelor of science in industry



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

TMC, ET AL. V. SC DHEC, ET AL.

1949

1 psychology from the George -- from Virginia
2 Tech, and then I went ---

3 Q: Go ahead. I'm sorry.

4 A: --- and then I went on to get a Master's in
5 health administration from the George
6 Washington University.

7 Q: And when did you get that Master's?

8 A: I finished the didactic portion in 1990 and
9 then did a one year residency so I think the
10 degree was actually issued in 1991.

11 Q: All right. And when did you start working at
12 Potomac Hospital?

13 A: So I started in Potomac Hospital in December of
14 1990 so when I finished school work I started
15 my administrative residency and stayed on as an
16 administrative resident and that role sort of
17 changed. So rather than being the traditional
18 administrative resident one of the vice
19 presidents when on maternity leave and then
20 ultimately took an extended sabbatical so I
21 took over the responsibilities that she had in
22 the hospital, administrative responsibilities.
23 So it was really more of an assistant
24 administrator vice president role at the
25 hospital.



TMC, ET AL. V. SC DHEC, ET AL.

1950

1 Q: And where is Potomac Hospital?

2 A: It's in Woodbridge, Virginia, and ironically, -
3 --

4 Q: Yeah.

5 A: --- it is the hospital that the former CEO of
6 the new Roper Hospital was an administrator --
7 I think he was a CEO there -- 15 years after I
8 was there.

9 Q: Okay. So when were you there?

10 A: I was there from basically 1991 through April
11 of '92 so a little over a year.

12 Q: All right. And is it -- and is this -- in this
13 role that you just described are you analogized
14 to being an assistant administrator? What were
15 your duties?

16 A: They gave me the -- the departments that sort
17 of nobody else wanted -- so it was admitting,
18 medical records, pharmacy, rehab, support
19 services, utilization review, things like that.

20 Q: All right. And then when you left Potomac when
21 was that where did you go, please?

22 A: In April of '92 I left Potomac to become a
23 health care consultant. I went to Atlanta to
24 work at a firm called Fowler Healthcare
25 Affiliates where we did strategic planning,



TMC, ET AL. V. SC DHEC, ET AL.

1951

1 project support, data analysis consulting
2 services for sort of the full array of
3 healthcare providers, hospitals, nursing homes,
4 home health agencies. It had a focus --
5 initially when I got there the focus was on
6 post-acute care ---

7 Q: Uh-huh.

8 A: --- so I did a lot of post-acute strategy and
9 implementation. We would do feasibility
10 studies for services. We would do process
11 improvement for post-acute services that would
12 include skilled nursing care, back then what's
13 called sub-acute care which was a skilled
14 nursing care in a hospital setting, acute
15 rehabilitation. We'd also develop acute
16 rehabilitation hospitals. We developed
17 policies and procedure manuals. We'd do
18 implementation certification. We'd get CMS
19 certification for providers. Sort of the full
20 gambit of consulting. There was also a -- an
21 element of the consulting firm that was
22 associated with certificate of need. I was
23 involved in those as well and that was
24 basically Fowler Healthcare. I was there for
25 about two years.



TMC, ET AL. V. SC DHEC, ET AL.

1952

1 Q: All right. So you arrived in '92, left around
2 '94, is that right?

3 A: Yeah, so in -- somewhere around June of 1994 we
4 had some organizational issues so six of us
5 left the firm and started Gill/Balsano
6 Consulting.

7 Q: Gill -- did you say Gill?

8 A: Gill, G-I-L-L, Balsano Consulting. And so I
9 was a partner at that firm for a number of
10 years. That firm continued to do what we had
11 done previously -- what I had done previously,
12 post-acute care of Harriet Gill, the named
13 partner -- that was her specialty, still is.
14 I think she's doing a few projects, not many.

15 Q: Uh-huh.

16 A: Post-acute care and rehab and then Balsano, the
17 other named partner Armand Balsano, focused in
18 certificate of need. So I continued to do
19 those sorts of projects, post-acute planning,
20 certificate of need, financial feasibility,
21 financial projections, compliance and things
22 along those lines until 2006.

23 Q: And at some point was the name changed from
24 Gill/Balsano to something else?

25 A: Yeah, so from 2000 -- from -- let's see it



TMC, ET AL. V. SC DHEC, ET AL.

1953

1 would be 1994 to 2006 -- during that period of
2 time we sold part of the company, we bought it
3 back. We sold the whole company to a firm
4 called Cross Country Consulting, a publicly
5 traded nurse staffing. Initially it's a nurse
6 staffing company. They wanted to get into
7 healthcare consulting so they hired -- they
8 bought our firm. We -- that was then sold to
9 Mitretek, a not-for-profit governmental
10 consulting firm that did healthcare as well as
11 telecommunications and IT and lots of other
12 things. I did not want to stay with that firm
13 so I left in 2006 and started my own firm.

14 Q: All right. And before we talk about your own
15 firm, when you were at Gill/Balsano or Mitretek
16 during that period of time, whatever it called,
17 at some point you've had contract work with the
18 State of Tennessee, is that correct?

19 A: Yeah, so when I was at Gill/Balsano we were --
20 I -- was retained to review the certificate --
21 to perform the basically the DHEC function in
22 Tennessee. Review of the certificate of need
23 applications that were submitted to the State
24 of Tennessee for post-acute care services. As
25 I said, that was something that we had done a



TMC, ET AL. V. SC DHEC, ET AL.

1954

1 lot of -- that I had done a lot of, and so they
2 contracted that out for me to review the CON
3 applications for a year. So for a one year
4 period all CON's that were submitted for sub-
5 acute care I reviewed.

6 Q: All right. And so then -- let me go back to
7 where you left off a moment ago when you left
8 Mitretek to form your own company it was 2006,
9 is that right?

10 A: Correct, 2006.

11 Q: And what is the name of your company?

12 A: Levitt Healthcare Affiliates.

13 Q: All right. And since 2006 with Levitt
14 Healthcare Affiliates what have you been doing?

15 A: Much of the same work. Certificate of need,
16 regulatory assistance, compliance, financial
17 feasibility, strategic planning, the full
18 gambit of healthcare consulting for, again,
19 similar client base. Hospital's health
20 systems, nursing homes, home health agencies,
21 physician practices, ambulatory surgery
22 centers, the full array.

23 Q: All right. So that's the array of things that
24 you've done but in terms your kinds of services
25 and facilities you've worked for. What about



TMC, ET AL. V. SC DHEC, ET AL.

1955

1 the areas, though. You've talked a lot about
2 the different areas that you've worked in but
3 since you started healthcare consulting,
4 healthcare consulting back in the early '90s
5 over the last whatever -- however many years
6 that's been -- those areas of work would
7 include health planning?

8 A: Yes. Health planning, healthcare, financial --
9 which would -- healthcare financial planning
10 which would also include financial feasibility
11 and projections along those lines.

12 Q: All right.

13 A: Regulatory assistance which would include
14 certificate of need as well as also --
15 depending on the licensure and compliance.

16 Q: Uh-huh.

17 A: And litigation support. I've helped attorneys
18 provide their expert witness testimony,
19 obviously, as well as support for litigation
20 such as civil suits and things like that.

21 Q: All right. Let's drill down specifically to
22 your CON experience, okay? Certificate of need
23 experience. Can you give us an estimate of how
24 many CON applications you've worked on in your
25 career?



TMC, ET AL. V. SC DHEC, ET AL.

1956

1 A: I would say over a thousand.

2 Q: And I think you've already talked about the
3 kinds of projects you worked on, the kinds of
4 services and facilities you've worked on. The
5 list you gave does that include the kinds of
6 CON projects you've worked on or is there any
7 difference between what you earlier testified
8 about?

9 A: Yeah, so for CO- -- it would be inclusive, you
10 know. For CON projects I've worked on I think
11 just about every kinds of service that
12 regulated under CON. Certainly, in South
13 Carolina I've worked -- I've done a CON for
14 every service that's in the health plan and
15 used to be in the health plan. I've done acute
16 care hospitals, long term acute care hospitals,
17 skilled nursing care, hospice, home health,
18 services within hospitals including
19 cardiovascular services, open hearth, cardiac
20 cath, psychiatric services, substance abuse,
21 residential treatment facilities. Back when it
22 was regulated, MRIs, CT ---

23 Q: What about your -- I'm sorry. Go ahead.

24 A: CCRs. So I think just about every service
25 that's regulated in some way.



TMC, ET AL. V. SC DHEC, ET AL.

1957

1 Q: What about emergency departments?

2 A: Yes, emergency departments. I've done
3 certificate of need applications for hospitals
4 as part of a renovation of an emergency
5 department or expansion of an emergency
6 department at a hospital as well as
7 freestanding emergency department CON
8 applications in South Carolina.

9 Q: How many states have you had projects in?

10 A: Well I've worked as a consultant in 48 states.
11 Haven't done North Dakota and Alaska yet.
12 Hopefully at this point in my career I won't
13 have to travel to those facilities -- those
14 states. But from a CON -- or from a CON
15 perspective I've -- I think probably a dozen
16 states, mostly in the Southeast. I've done a
17 little bit of work in -- you know, I think I've
18 done one or two projects in New York. Maryland
19 and D.C. one or two projects, but for the most
20 part the Southeast which would include North
21 Carolina, South Carolina, Florida, Alabama,
22 Mississippi, Tennessee, Kentucky, the
23 Southeast.

24 Q: Specifically South Carolina approximately how
25 many CON applications have you worked on?



TMC, ET AL. V. SC DHEC, ET AL.

1958

1 A: Several hundred.

2 Q: Okay. In South Carolina?

3 A: Yeah, in South Carolina, yes.

4 Q: Okay. So how many times have you been
5 qualified as an expert witness?

6 A: I don't have a record. My estimate would be 40
7 or 50.

8 Q: All right. And how many states does that
9 include?

10 A: I think except for North Carolina all those
11 states we just talked about.

12 Q: All right. The ones where you've done CON
13 work?

14 A: Yes.

15 Q: The Southeastern states?

16 A: Yes.

17 Q: And how many -- approximately how many times,
18 if you know, in South Carolina?

19 A: South Carolina probably 25, 20.

20 Q: All right. Would that all be in the
21 Administrative Law Court of South Carolina?

22 A: Yes. Uh-huh. Yes.

23 Q: Got you. All right.

24 **MOTION TO QUALIFY AS EXPERT:**

25 **MR. WESTBROOK:** Your Honor, at this point I'd like



TMC, ET AL. V. SC DHEC, ET AL.

1959

1 to move to qualify Mr. Levitt as an expert. I
2 think I'm going to use the same designations,
3 and request the same designations as those for
4 Ms. Platt and Mr. Sullivan, as an expert in the
5 fields of health planning, healthcare finance
6 and the CO- -- South Carolina CON process.

7 **MR. SUMMER:** Without objection.

8 **MS. HOLLINGSWORTH:** No objection.

9 **THE COURT:** Okay.

10 **MR. WESTBROOK:** All right.

11 **THE COURT:** I find you qualified.

12 **MR. WESTBROOK:** Thank you, Your Honor.

13 Q: Mr. Levitt, let's talk about your work on this
14 particular matter, the MUSC application for the
15 Berkeley Freestanding Emergency Department.
16 But one preliminary question, how long have you
17 -- has MUSC been a client of your's?

18 A: I've done work with them -- excuse me -- with
19 MUSC for 20 to 25 years I would think.

20 Q: All right.

21 A: I have a number of clients that I have long
22 term relationships where I do a wide variety of
23 services for them.

24 Q: In South Carolina?

25 A: In South Carolina and other states, yes.



TMC, ET AL. V. SC DHEC, ET AL.

1960

1 Q: All right. So when did -- approximately when
2 did you first start working on this particular
3 project, the Berkeley FED project?

4 A: Well specifically the Berkeley County FED CON
5 project ---

6 Q: Uh-huh.

7 A: --- I started working on probably about six
8 months before we submitted it. Not a lot of
9 work.

10 Q: Uh-huh.

11 A: --- I had talked to them about the concept.
12 They were planning on developing some
13 freestanding ED's.

14 Q: Uh-huh.

15 A: So I talked to them for some period of time
16 about that, you know, probably six months
17 before we filed. The identified we're going to
18 file a CON, let's get goin' on it. And we
19 probably, you know, slowly ramped up working on
20 it so probably four months before we submitted
21 we were working in earnest on the application.

22 Q: All right. So the application was submitted in
23 June of 2017 so six months would have been like
24 late 2016? The end of 2016?

25 A: Yeah, end of 2016, early '17, yeah.



TMC, ET AL. V. SC DHEC, ET AL.

1961

1 Q: Okay. And when you say you -- you were
2 referring to MUSC, you referred to they. Who
3 were your principal contacts at MUSC on this
4 project?

5 A: You know, like I said I work with them on a lot
6 of projects. I don't know that I have a
7 principal contact. Generally, I deal with Dr.
8 Cawley and Sarah Bacik who's the -- now the
9 chief planning officer, and then she has a
10 department of a number of people. I've worked
11 with all of those individuals, and then also
12 worked with finance. It used to be John Cooper
13 I used to work with mostly on these CON
14 projects.

15 Q: And who is John Cooper?

16 A: John Cooper was the controller for MUHA, the
17 medical center of the hospital. I've also --
18 I also work with the CFO of MUHA and ---

19 Q: Let me stop you for just a minute. Where --
20 what's Mr. Cooper doing now? Is he still the
21 controller?

22 A: He's retired.

23 Q: Okay. And who is the CFO you're talking about?

24 A: Well through the years I used to work with Lisa
25 Montgomery. She was the CFO for a very long



TMC, ET AL. V. SC DHEC, ET AL.

1962

1 period of time. She was promoted to be the CFO
2 of the bigger university.

3 Q: Uh-huh.

4 A: And then Lisa Goodlit (sic). Mike Dackas
5 (sic). When they replaced her there was a few
6 people in the interim and now frankly I'm not
7 sure who the current CFO is, but I worked with
8 that person too. And then other individuals
9 throughout the organizations.

10 Q: All right.

11 A: But for the most part for this project it's Dr.
12 Cawley and the planning department.

13 Q: All right. Ms. Bacik's department?

14 A: Ms. Bacik and her department, yes.

15 Q: All right. Now what was your principal role
16 with respect to this CON application?

17 A: I was the principal author. I -- in sponsoring
18 a CON application I developed it and it's my
19 work product.

20 Q: All right.

21 **MR. WESTBROOK:** Let's take a look at -- Dan if you
22 could pull up for us a document that we have
23 seen before I believe. It's Trident Exhibit --
24 and I believe this is admitted into evidence --
25 Trident Exhibit 36-196.



TMC, ET AL. V. SC DHEC, ET AL.

1963

1 Q: Do you recognize this, Mr. Levitt?

2 A: Yes.

3 Q: And what is this?

4 A: This is the -- this is the list of information
5 that I asked MUSC for ---

6 Q: Uh-huh.

7 A: --- to develop the CON application. These are
8 areas that I need information on to complete
9 the application and respond to the questions in
10 the form.

11 Q: All right. And when did you make -- when did
12 you request this information?

13 A: I don't know specifically the date I requested
14 it but generally it would have been in a
15 conversation probably around the time they said
16 we need to file a CON application. Let's get
17 workin' on it, and I would say here's what I
18 need.

19 Q: All right. And do -- is this -- is there --
20 are there dates on this document?

21 A: Yeah, so my recollection is that this went out
22 -- you know, obviously right prior to the 5/8
23 date so the end of April this was distributed
24 saying here are the dates. We're targeting a
25 June 5th submission so backing into that here's



TMC, ET AL. V. SC DHEC, ET AL.

1964

1 the information we need and here are the
2 individuals that are the, as it says on the
3 document, point people.

4 Q: Uh-huh.

5 A: To pull that information together and get it to
6 me.

7 Q: All right. And how many versions of this
8 document exist to your knowledge?

9 A: I've only seen two.

10 Q: All right. Are there -- have you seen multiple
11 copies of those two versions?

12 A: Those appear to be the same. There's multiple
13 versions -- multiple copies of the two
14 versions.

15 Q: All right. And who created this document, do
16 you know?

17 A: I believe Caroline Maloof (sic), now. She got
18 married. It used to Caroline Cotter.

19 Q: And remind us who Ms. Cotter or who Ms. Maloof
20 is?

21 A: It was the same person. She was the -- she is
22 in Ms. Bacik's department and she's the one
23 that would have compiled this information that
24 I asked for into this work plan document.

25 Q: All right. And I'm going to refer to this just



TMC, ET AL. V. SC DHEC, ET AL.

1965

1 for short as the work plan if that's okay.
2 Just so we all know what I'm talking about. So
3 this document references Health Facilities
4 Planning Partners which I'm going to refer to
5 HFPP. What is HFPP? What kind of organization
6 is that?

7 A: HFPP is a facilities planning, space planning
8 organization. I think it's just Georgann
9 Burns. Just one person. It's a small firm
10 that does space planning with equity partner --
11 for Equity Partners.

12 Q: All right. So did MUSC engage HFPP on this
13 project?

14 A: No.

15 Q: Who engaged them?

16 A: She works for Equity Partners. She helps them
17 design the buildings that they're building.

18 Q: All right. And we've heard the name Equity
19 before. We've seen it in documents. I've seen
20 it as Equity LLC. I've seen it as Equity, Inc.
21 and now you're saying Equity Partners. Are
22 these related or unrelated entities?

23 A: They're all related entities. It's the
24 developer, one of the developers. The
25 developer -- one of the developers and the



TMC, ET AL. V. SC DHEC, ET AL.

1966

1 developer that was initially developing the
2 building.

3 Q: Uh-huh.

4 A: I believe it's the developer developing the
5 Palmetto Primary Care medical office building.

6 Q: All right. And the -- it was the developer --
7 when you say the building you mean for the MUSC
8 FED's original site?

9 A: Yes.

10 Q: Okay. All right. Now was this document part
11 in your -- in your file?

12 A: No, I didn't keep this document so this was
13 emailed to me prior to a call so I would open
14 it during the call.

15 Q: Uh-huh.

16 A: And we'd talk about it and I never saved it to
17 my file.

18 Q: All right. And is that because it was not
19 important or why didn't you save it?

20 A: Well a little bit -- it's not important to me
21 'cause I'm not that interested on who's getting
22 me the information. I'm interested on getting
23 the information so as long as I get the
24 information I'm happy. And -- so it was just
25 more of a tracking document on their end about



TMC, ET AL. V. SC DHEC, ET AL.

1967

1 who was supposed to do what. I didn't rely on
2 it to develop the CON application, I relied on
3 what they sent me to develop the CON
4 application so I wouldn't have kept this in my
5 files.

6 Q: All right. Let's look at -- just for the
7 record, last night we sent out to opposing
8 counsel what's been labeled as David Levitt
9 File Exhibits. We have some of those which are
10 a series of slides that we're going to go
11 through in this presentation and then at the
12 end of the present- -- end of the direct we
13 will move to have those admitted into evidence,
14 but I'm just -- rather than trying to them --
15 rather than move to having the admitted one at
16 a time we'll wait 'til the end of that and then
17 see if there are objections and we'll go from
18 there. Let's start with slide 2 from that
19 document, and this is a slide that has the
20 heading People Who Gather Information. Is this
21 a slide that you -- did you oversee the
22 creation of this?

23 A: Yes.

24 Q: All right. And where did you get the -- what
25 is the relationship between those names -- or



TMC, ET AL. V. SC DHEC, ET AL.

1968

1 between this document and the document we just
2 looked at?

3 A: These are individuals listed as point people on
4 that previous document.

5 Q: All right. And are all of these MUSC
6 employees?

7 A: No.

8 Q: All right. So let's look at the three names at
9 the bottom first. Are those three names the
10 non-MUSC employees?

11 A: Correct. The last three are not employees of
12 MUSC.

13 Q: All right. Let's start with Andy Johanni. Who
14 was -- who is Andy Johanni and what was his
15 role in this case?

16 A: So Andy Johanni was my contact at Equity.

17 Q: Uh-huh.

18 A: Yeah, the developer of the building. And
19 obviously since he's building the building he
20 would be the contact person for building
21 information including costs and things like
22 that.

23 Q: All right. And was Mr. Johanni identified in
24 the DHEC record?

25 A: Yes. I believe a letter from him I think is in



TMC, ET AL. V. SC DHEC, ET AL.

1969

1 the CON application.

2 Q: All right. And the next name on there it says
3 David Carroll. His name has come up in the
4 hearing so far. Remind us who David Carroll
5 is?

6 A: He was at the time -- I assume he still is --
7 the administrator of Palmetto Primary Care.

8 Q: Uh-huh.

9 A: He's not a physician, he's a administrator.

10 Q: All right. And I believe it's already been
11 mentioned in this hearing that he was one of
12 the project review speakers for MUSC?

13 A: He did. He presented on behalf of Palmetto
14 Primary Care supporting the MUSC Freestanding
15 ED application.

16 Q: All right. And a moment ago you mentioned
17 Georgann Burns. Who is George- -- remind us
18 who that is?

19 A: So Georgann Burns, again, is the space planner,
20 facility planner for Equity.

21 Q: All right. Now the other names on the list,
22 the ones at the top starting in alphabetical
23 order from Abernathy down through -- I'm not
24 sure how to pronounce that -- Riccardione
25 perhaps. Do you know how to pronounce that



TMC, ET AL. V. SC DHEC, ET AL.

1970

1 name?

2 A: No, I call him the physician radiologist.

3 Q: All right. Mr. Riccardione. I don't know.
4 Anyway, are -- I guess my question is of those
5 people listed I want to ask you -- well just
6 initially of those -- with each one of them --
7 is -- or I'm sorry, with several of them it
8 says identified in CON application or
9 identified in discovery. I want to focus on
10 the ones who were not identified, or at least
11 according to your chart there they weren't --
12 there's no reference to them being identified
13 in discovery or in the CON application. The
14 first one is Jessica Gage. Who is Jessica
15 Gage?

16 A: She's Sarah Bacik's administrative assistant.
17 She's the one that schedules meetings and ---

18 Q: All right.

19 A: --- sets up a phone call.

20 Q: Well actually they have three names in a row.
21 The one right after that is -- again, I'm not
22 sure about the pronunciation -- I'm going to
23 say Karan Kumar.

24 A: That's correct. It's Karan Kumar. He was an
25 employee. I think he was in Ms. Bacik's



TMC, ET AL. V. SC DHEC, ET AL.

1971

1 department for a very short period of time. He
2 was -- I think he was -- the intent was he was
3 going to perform financial support for the
4 planning department. He wasn't with the
5 organization very long.

6 Q: Did he play a significant role in assisting you
7 with the project?

8 A: No.

9 Q: And the next name is Eric McClane. Who is Mr.
10 McClane?

11 A: Eric McClane was an administrative resident or
12 a fellow that was in the department. I think
13 he came to the project review meeting but he
14 was just more -- he was learning not providing
15 resources.

16 Q: And did you refer to him in your deposition by
17 chance?

18 A: I did. I couldn't remember his name but I
19 referred to him as the resident who was working
20 with MUSC.

21 Q: All right. Now who was -- you mentioned John
22 Cooper before. He's -- his name is on here
23 isn't it?

24 A: Yes.

25 Q: John Cooper. I think you testified a moment a



TMC, ET AL. V. SC DHEC, ET AL.

1972

1 go is the retired former COO, is that right?

2 A: Controller.

3 Q: Controller. I'm sorry. Right. And what was
4 Mr. Cooper's role in this application?

5 A: John and I developed the financial projections
6 as we do for all of the CON applications before
7 he retired.

8 Q: Uh-huh.

9 A: And that was his role.

10 Q: All right. And for these other people, the
11 ones that we -- well the ones we've talked
12 about and the ones we haven't talked about, how
13 would you characterize their roles, putting Mr.
14 Cooper aside because you just told us about Mr.
15 Cooper's role, but all the other people, how
16 would you characterize their roles?

17 A: Again, they were -- as it said on the work
18 plan, they were the point people to collect
19 information to get to me so I could write the
20 CON application.

21 Q: Did any of them draft, participate in the
22 drafting of the application?

23 A: Not specifically. You know, for instance David
24 Carroll would have given me a paragraph about
25 Palmetto Primary Care ---



TMC, ET AL. V. SC DHEC, ET AL.

1973

1 Q: Uh-huh.

2 A: --- I would have used in the CON application,
3 and if it was good I wouldn't have rewritten
4 it, if it was not good I would have, you know,
5 paraphrased and changed it slightly.

6 Q: Do you recall whether you did that?

7 A: I don't. I think it was probably something I
8 inserted. I don't know that he even wrote
9 something up. It might have been bullet points
10 or something he gave me so that I wrote the
11 narrative around that. But I was responsible
12 for developing the application, finalizing the
13 application and submitting the application to
14 DHEC.

15 Q: All right. And who was -- so would it be
16 accurate to say that you were the author of the
17 application?

18 A: I am, yes. And I guess -- I don't know if it's
19 important -- Pat Cawley's not on the list here
20 ---

21 Q: Uh-huh.

22 A: --- I did -- I've done a thousand CON
23 applications. I work with hundreds of health
24 systems. He won't sign the signature page
25 until he reads the application so he will --



TMC, ET AL. V. SC DHEC, ET AL.

1974

1 he reviewed the application, he signed it, sent
2 it to me. So he's not on here. He didn't make
3 any changes but he read it.

4 Q: All right. Okay. Now you filed -- remind us
5 when you filed the application to -- with DHEC?

6 A: June of 2017.

7 Q: June of 2017. And we can put that up there but
8 does June 6th ring a bell or do you want us to
9 ---

10 A: Yeah, no, it was June 6th.

11 Q: Okay. And why did you file it on June -- was
12 there any particular reason you filed it on
13 June 6th as opposed to say a few days later?

14 A: Yes.

15 Q: What was that reason?

16 A: The -- in an abundance of caution I suggested
17 that we file it within the time frame for which
18 it would be reviewed if DHEC determined the
19 Summerville FED application and this
20 application to be competing ---

21 Q: Uh-huh.

22 A: --- that it would be reviewed as a competing
23 application.

24 Q: All right. Now remind us when was the
25 Summerville freestanding ED application filed



TMC, ET AL. V. SC DHEC, ET AL.

1975

1 in relation to this application?

2 A: It was filed in April ---

3 Q: All right.

4 A: --- so it was published as complete the fourth
5 Friday of May. I don't have a calendar handy
6 but -- so the fourth Friday of May, 15 days
7 from the fourth Friday of May, so that's the
8 timeline. An application has to be submitted
9 within 15 days of the other application being
10 -- published as being deemed complete -- so 15
11 days would have been that Friday. We submitted
12 it -- well I think it would be that Friday.
13 Sometimes there's a question on is the day it's
14 published day one or is the next one day one,
15 so in an abundance of caution I wanted to get
16 it in a day early, so that would have been
17 Thursday. I fedexed it out from my office in
18 Beaufort, again, in an abundance of caution, a
19 day early ---

20 Q: Uh-huh.

21 A: --- so it got there on Wednesday instead of
22 Thursday or Friday which would have been -- I
23 think -- the deadline.

24 Q: All right. And you -- as I understand -- you
25 heard Mr. Sullivan testify a few days ago,



TMC, ET AL. V. SC DHEC, ET AL.

1976

1 right?

2 A: Yes.

3 Q: He used the term batching. Is this what you're
4 talking about?

5 A: Yeah. So batching is a term in other states,
6 South Carolina comparative review. If they
7 determine the applications to be competing they
8 review them together. If they determine them
9 to be competing meaning there's a need for only
10 one and we had missed that deadline, a scenario
11 could be that one -- the first application gets
12 approved, the second one gets denied because
13 there's only a need for one and there's
14 recourse.

15 Q: All right.

16 A: So I would advise my clients always be in the
17 timeline if -- 'cause DHEC doesn't really make
18 that determination until they issue a letter,
19 the approval or denial. So it's prudent to be
20 within that time frame and sort of plan for the
21 worst and hope for the best.

22 Q: All right. And this particular case what was
23 DHEC's decision with respect to whether these
24 two applications were competing?

25 A: They -- I did not think they were competing,



TMC, ET AL. V. SC DHEC, ET AL.

1977

1 and DHEC did not think they were competing.

2 Q: All right. So when you filed this did you
3 believe, did you have any opinion or any
4 knowledge or a reason to believe that DHEC was
5 going to find them competing?

6 A: No. No. Again, my assessment was they're not
7 competing but I wanted to make sure we wouldn't
8 be at any sort of disadvantage had -- if I were
9 wrong and DHEC determined that they would be
10 competing.

11 Q: All right.

12 **MR. WESTBROOK:** All right. Let's look at Levitt
13 slide 3, please. And this is a little charge.

14 Q: It says at the top Reasons for the Project.
15 Can you tell us what this is about, Mr. Levitt?

16 A: Yes, this sort of summarizes the broad reasons
17 for the MUSC freestanding ED in Summerville.

18 Q: Uh-huh.

19 A: And I basically -- the biggest reason, or the
20 first reason on the list ---

21 Q: Uh-huh.

22 A: --- is to improve access for MUSC patients from
23 the north area.

24 Q: All right. And I'm going to ask you in a few
25 minutes -- we'll go through this is some



TMC, ET AL. V. SC DHEC, ET AL.

1978

1 detail, but let's just give us an overview
2 right now. Underneath that improve access, the
3 first reason you've got indented, population
4 growth and growth in ED volume. What's your
5 point there?

6 A: So those two sort of sub-elements that's the
7 population we want to increase access to. So
8 the population in that area is growing rapidly.
9 It's the growth area in the tri-county area.
10 ED volume grown is occurring in that area as
11 well and the access to the peninsula is pretty
12 great. There's a lot of traffic -- great
13 meaning long, not good. There's long traffic
14 delays and it's, you know, 20-some miles from
15 that area to access care from the peninsula
16 which a large number of people are doing.

17 Q: All right. And then we've heard a lot about
18 capacity constraints. That's your next reason.
19 Anything to add at this point? Again, we'll go
20 into some detail about your opinions.

21 A: No, just generally that, you know, obviously
22 we're on a peninsula so geographically
23 constrained. We can't go out into the water.
24 It's in a developed city area so there's no
25 land available around MUSC, no more land



TMC, ET AL. V. SC DHEC, ET AL.

1979

1 available. MUSC's done what it can do to
2 acquire more land for a broader footprint on
3 the peninsula. I've been involved in all of
4 those projects. It goes back to the Ashley
5 River Tower where they were able to acquire and
6 consolidate the Charleston Memorial and the
7 McClennan Banks hospitals that were adjacent to
8 MUSC and incorporate that into the services, so
9 it's landlocked basically.

10 Q: All right. And you were here for Dr. Cawley's
11 testimony the last couple of days?

12 A: Yes.

13 Q: All right. And did -- when you -- your next
14 point up there reason for the project, teaching
15 element. Is -- how does that relate to what
16 Dr. Cawley was talking about?

17 A: Well I think in two ways. The teaching element
18 is -- it allows MUSC to have a new teaching
19 venue, a freestanding ED venue to teach
20 residents and fellows and nurses and all those
21 other individuals that are taught at MUSC as
22 well as that's an element to their operations
23 on the peninsula.

24 Q: All right. All right, good. Mr. Levitt, in
25 this application, in this submissions to DHEC,



TMC, ET AL. V. SC DHEC, ET AL.

1980

1 did you consider existing emergency providers
2 in the north area?

3 A: Of course.

4 Q: And let's look at Joint Exhibit 1, Bates page
5 524, please. What is this, Mr. Levitt?

6 A: This is the trend and utilization at the time
7 we did the project review presentation 2016 was
8 the newest information available and it shows
9 that from 2012 to 2016 all of the existing tri-
10 county providers had an increase of 80,000
11 additional ED visits ---

12 Q: Uh-huh.

13 A: --- in that very short period of time.

14 Q: All right. Now most of those were from Trident
15 Health System, the two Trident Medical Center
16 and Summerville Medical Center, is that
17 correct?

18 A: Correct. For that same time period those two
19 facilities had an increase of 54,000 additional
20 treatments. So more than have of the growth in
21 the market were at those two facilities, and
22 remember those two facilities -- and we have a
23 map in a minute -- are the two closest to the
24 area to which we are proposing to put our
25 facility.



TMC, ET AL. V. SC DHEC, ET AL.

1981

1 Q: And those facilities consist of -- each one of
2 them is a hospital, right?

3 A: Well for those two -- well for Summerville it's
4 a hospital, but for Trident that also includes
5 their freestanding EDs. So it includes the
6 Center Pointe volume and it includes the Moncks
7 Corner ED volume.

8 Q: And when did the Center Pointe freestanding ED
9 become operational?

10 A: So Center Pointe opened in late 2014 and you
11 can see that's the jump. So if you go across
12 for Trident Medical Center 2014 the had 70,148
13 visits. Center Pointe opened, the next year
14 they had 90,000 visits or 20,000 more visits
15 after Center Pointe opened.

16 Q: All right. And did I hear you say that this is
17 part of your project review presentation to
18 DHEC?

19 A: Yes. This was presented to DHEC in 2017.

20 Q: All right. Now in your experience working in
21 South Carolina with DHEC on CON matters does
22 DHEC allow applicants to supplement their
23 applications?

24 A: Of course.

25 Q: And in fact let's take a look and see if --



TMC, ET AL. V. SC DHEC, ET AL.

1982

1 you're familiar with Regulation 61-15, are you
2 not?

3 A: Yes, I am.

4 Q: And that is a -- as a -- when you work in South
5 Carolina as a health planner how frequently do
6 you rely and refer to that regulation?

7 A: Maybe daily, definitely weekly.

8 Q: All right.

9 **MR. WESTBROOK:** Let's look at Section 308 of 61 dash
10 15, Dan, if you could put that up on the screen
11 just to remind us what it says.

12 Q: How about reading that into the record, Mr.
13 Levitt.

14 A: This is Section 308. On the basis of staff
15 review of the record established by the
16 Department including but not limited to the
17 application, comments from affected persons and
18 other persons concerning the application, data,
19 studies, literature and other information
20 available to the Department, the staff of the
21 Department shall make a proposed decision to
22 grant or deny the certificate of need.

23 Q: Mr. Levitt, in your experience working with
24 DHEC is it common or have you run across the
25 situation where DHEC would limit its review to



TMC, ET AL. V. SC DHEC, ET AL.

1983

1 the original application, the initial
2 application?

3 A: No, that would be a -- I think a procedural
4 error. That they are required to review
5 everything that's submitted. You know, I think
6 the first sentence there is the basis of the
7 staff review of the record so the DHEC record
8 is what they review which would include the
9 application, any amendments to the application,
10 the additional information submitted, the
11 project review information, the follow-up to
12 project review, and I think it's important that
13 sort of everyone understands that -- so
14 sometimes the project occurs, the project
15 review would occur very close to the decision
16 date and so DHEC always offers the warning,
17 listen, if you want us to review this you gotta
18 get it in quickly because we have to issue the
19 decision meaning we'll review it and consider
20 it before issuing the decision.

21 Q: And in your -- again in your experience working
22 in South Carolina does DHEC weigh, give less
23 weight or more weight to supplemental
24 information provided to it than the information
25 -- say a project review than to information



TMC, ET AL. V. SC DHEC, ET AL.

1984

1 submitted in the application?

2 A: No, and I think frankly it would give more
3 weight because if it's a change then they're
4 going to discount the initial information and
5 look at the new information.

6 Q: In drafting the CON application Section 12 of
7 the application asked the applicant to list for
8 all -- list alternatives to the proposed
9 project, is that right?

10 A: Yes.

11 Q: And in your application why didn't you list as
12 alternatives West Ashley or Mount Pleasant or
13 any other locations?

14 A: Well the -- normally in the practice in South
15 Carolina usually just a few options are listed
16 for alternatives. We listed four I believe in
17 this application. That's more than most, more
18 than usual, and I thought it was adequate to
19 address the alternatives for this project.

20 Q: All right. Okay. Mr. Levitt, how would you --
21 how common is it for projects, CON projects, to
22 change over time?

23 A: Very common.

24 Q: What happens -- well, let me rephrase that. In
25 your experience what's the process in South



TMC, ET AL. V. SC DHEC, ET AL.

1985

1 Carolina that is followed when a project
2 changes during DHEC's staff review period?

3 A: You would submit that information to DHEC so
4 either you would meet with DHEC, the applicant
5 would meet with DHEC and say we want to make
6 this change and what I would do generally is I
7 would make an assessment of how substantial
8 that change was and then develop something in
9 writing to submit that change to DHEC and then
10 go to DHEC and give it to them, or, you know,
11 I may give them a call and then just send it to
12 them letting them know this is a supplement to
13 the CON application.

14 Q: Have you ever called DHEC in other projects
15 when -- about changes during the staff review
16 process that haven't been fully decided on yet
17 to get DHEC's views on it?

18 A: Yes, because that sort of helps guide the
19 decision. So if we're working on a project,
20 we've submitted the project, and they say oh,
21 you know, actually we need to change that,
22 either we say -- I would say that's -- that
23 won't be a problem or I would say, you know, I
24 don't know we can change that, we may be to
25 submit a new application. I honestly can't



TMC, ET AL. V. SC DHEC, ET AL.

1986

1 think of any scenario in my mind where I've
2 ever thought during the review period it was a
3 big issue. It just hasn't come up because at
4 that point it just doesn't happen.

5 Q: Let's go back to Regulation 61-15 for a minute
6 and look at Section 310. Why don't you read
7 that into the record, Mr. Levitt?

8 A: If an applicant amends his application during
9 the review process the Department will
10 determine whether or not the amendment is
11 substantial or constitutes a new application.
12 If the changes result in an increase in cost
13 the fees will be adjusted accordingly.

14 Q: And this particular case did MUSC amend its
15 Berkeley County FED project during the staff
16 review period?

17 A: No.

18 Q: All right. Let's -- so what happens or what's
19 your experience with respect to project changes
20 that occur after the CON -- after a CON has
21 been issued?

22 A: Yeah, so it's very similar -- so in this one,
23 this is during the review period and so the CON
24 filing fee is calculated based off the project
25 costs and so what this standard says is if you



TMC, ET AL. V. SC DHEC, ET AL.

1987

1 change your costs and if it were 1.4 million is
2 the threshold, if it's below that then you pay
3 a percentage of the project costs. So the
4 scenario would be if you had a 1.2 million
5 dollar project submitted to DHEC, you are
6 deemed complete, you pay the filing fee based
7 on the 1.2 million dollars, and then during
8 review you say, well, actually we want to buy
9 this other MRI that costs 2 million dollars.
10 DHEC says, okay, that's fine but you're gonna
11 have to pay a little bit of extra in your
12 filing fee because it's more, so that's what
13 this is. If it occurs after you've been
14 approved ---

15 Q: Uh-huh.

16 A: --- your ---

17 Q: After you've been approved? What do you mean
18 when you say approved?

19 A: After you've been issued the certificate of
20 need ---

21 Q: All right.

22 A: --- you've been approved, you have the
23 certificate, you're working the project,
24 developing it, you submit quarterly reports and
25 in those quarterly reports you identify any



TMC, ET AL. V. SC DHEC, ET AL.

1988

1 modifications to the CON application as
2 approved and why it was modified.

3 Q: Let's look at, again, the same Regulation 61
4 dash 15 Section 6.05 first. It says Project
5 Changes After Receipt of Certificate of Need.
6 That's what you were just talking about, right?

7 A: Correct.

8 Q: Read that please, sir?

9 A: If an applicant amends or alters his project
10 after receipt of a Certificate of Need, the
11 Department will decide whether or not the
12 amendment is substantial and thereby
13 constitutes a new project.

14 Q: Now let's go to Section 6.07. We've seen this
15 before in the hearing but tell us -- it says --
16 the heading is Periodic Reporting of
17 Certificate of Need Implementation. Again, you
18 were just referring to quarterly reports a
19 moment ago, is this what you're talking about?

20 A: Yeah, so as it says you have to submit
21 quarterly progress reports every 90 days after
22 receipt of the Certificate of Need. So in that
23 you can see under 6.07 (2) -- 6.07(2)(4) says
24 that the applicant shall report on any
25 deviations from the submitted application with



TMC, ET AL. V. SC DHEC, ET AL.

1989

1 supporting documentation. So this would be the
2 mechanism where you DHEC know you want to build
3 less square footage or you want to eliminate a
4 service or you want to add a service to the CON
5 application if it wasn't initially in the
6 approved CON application.

7 Q: All right. And now -- so the two scenarios
8 you've been talking about are when changes
9 occur or when the project is amended during
10 DHEC staff review which -- in which the first
11 Reg that we looked at would apply -- and then
12 the second scenario talking about is after the
13 CON has been issued, correct?

14 A: Yes.

15 Q: But neither of those -- that's not where we are
16 here, correct?

17 A: We are not.

18 Q: All right. We're during -- we're in litigation
19 before the ALC or in the ALC, right?

20 A: Correct.

21 Q: Now what has been your practice with respect to
22 changes that occur to a project in this
23 situation? After staff review has ended but
24 before the -- any CON has been issued?

25 **MR. SUMMER:** Your Honor, at this point I'm going to



TMC, ET AL. V. SC DHEC, ET AL.

1990

1 object because we've had multiple motions about
2 where we are here. This is a legal issue for
3 the Court. First we had a motion for summary
4 judgment saying that it was a substantial
5 change. Obviously that motion was denied.
6 We've also asked for remand so the Department
7 could have made a decision in the Department
8 but now he's asking the witness to comment upon
9 what is in your jurisdiction, and I don't think
10 it's appropriate for this witness to be
11 testifying about what he things you ought to
12 do.

13 **MR. WESTBROOK:** I don't believe that was my
14 question, Your Honor, and I don't -- certainly
15 not going to ask him what you ought to do or
16 what this Court ought to do. I'm going to ask
17 him -- in fact I think I worded the question
18 what has been your practice when -- with
19 respect to changes during -- while a case or a
20 project is in litigation.

21 **THE COURT:** Your objection is overruled.

22 **MR. WESTBROOK:** Thank you, Your Honor.

23 Q: Mr. Levitt, so what's your practice, your
24 advice to clients, when changes occur or have
25 occurred during the course of ALC litigation?



TMC, ET AL. V. SC DHEC, ET AL.

1991

1 A: Well I would suggest that we go and let DHEC
2 know about our intent ---

3 Q: Uh-huh.

4 A: --- and see if they thought it was an issue
5 because ultimately the Administrative Law Judge
6 determines whether or not it's a substantial
7 change or not at that point.

8 Q: Right. And at an ALC hearing would you want
9 DHEC on your side or against you?

10 A: Well I would generally want them to agree. You
11 know, they may not. If I felt strongly that
12 something was not a substantial change and DHEC
13 thought it was I would hope that the ALJ would
14 agree with my perspective, but ultimately, you
15 know, just on any of these changes, what I
16 always advise the client and what they have
17 always said to me, you know, if we think it's
18 gonna be a substantial change don't do it. You
19 know, why would you void a CON on something,
20 just don't make that change. And I've not ever
21 had a client say I don't care, I want to do it.

22 Q: All right. In this particular case did you
23 notify anybody at DHEC about potential changes
24 to this project?

25 A: Yes.



TMC, ET AL. V. SC DHEC, ET AL.

1992

1 Q: When was that?

2 A: December of 2018.

3 Q: All right. Now do you have any knowledge,
4 first hand knowledge, of any other contacts
5 about changes between MUSC and DHEC?

6 A: No.

7 Q: All right. So -- but you just referenced
8 notifying him in December of 2018, is that
9 right?

10 A: Yeah, I had a meeting ---

11 Q: Do you recall -- I'm sorry, go ahead.

12 A: I had a meeting in December -- I think it was
13 the 18th of December -- with DHEC to talk about
14 proposed changes, as I said, to see if they
15 thought it was substantial and if they didn't
16 then I would suggest we move forward with it
17 because I would feel that the Administrative
18 Law Judge would agree that it's not substantial
19 if DHEC didn't think it was substantial.

20 Q: All right. Who did you talk with at that
21 meeting?

22 A: Maggie Murdock and Vito Wicevic.

23 Q: All right. Mr. Wicevic is a DHEC attorney,
24 right?

25 A: He is, and he's here today.



TMC, ET AL. V. SC DHEC, ET AL.

1993

1 Q: I see that. And who is there on behalf of MUSC
2 besides you?

3 A: You were there and Sarah Bacik and Andrea
4 Brisman (sic).

5 Q: And who is Andrea Brisman?

6 A: Andrea Brisman works in the General Counsel's
7 office of MUSC.

8 Q: All right. And without going into detail -- I
9 mean, you can if you want to -- but generally
10 what did you tell DHEC? Let me ask you this,
11 the meeting that we're talking about -- let me
12 withdraw that question and ask you this, what
13 was the -- was the subject of that meeting
14 limited to the FED project?

15 A: No we were there to talk to them about two
16 projects.

17 Q: All right. And so the portion of the meeting
18 that was about the FED project what did you
19 tell them?

20 A: The FED project we talked to them about the
21 potential relocation. Moving it from the
22 initial site less than a mile away to the new
23 proposed site. We talked to them about
24 reducing the square footage, making it a
25 smaller facility. We talked to them about ---



TMC, ET AL. V. SC DHEC, ET AL.

1994

1 Q: Did you mention any other reductions, Mr.
2 Levitt?

3 A: Oh, we talked about eliminating the CDU and the
4 helipad because of the relocation.

5 Q: Did you talk to them about costs at all?

6 A: Oh, yeah, I'm sorry, yeah. I don't believe we
7 talked to them about the CDU and the helipad.
8 We talked to them about costs because we're
9 moving it. It was gonna be a smaller facility,
10 it was gonna cost less to build.

11 Q: All right.

12 A: And we asked if we thought those would be
13 substantial changes and they did not feel as
14 those would be -- as I did not feel those would
15 be substantial changes.

16 Q: Did you -- did you or anybody else from MUSC
17 request a formal analysis of the substantial --
18 of whether these were substantial changes by
19 DHEC?

20 A: Well no because their determination would sort
21 of be moot at that point that we -- it's
22 ultimately up to the Administrative Law Judge
23 to decide whether or not those would be
24 substantial changes.

25 Q: All right. And did -- was any -- were any



TMC, ET AL. V. SC DHEC, ET AL.

1995

1 documents or data left -- given to DHEC at that
2 meeting?

3 A: No.

4 Q: Are you aware of any other meetings that where
5 documents and data were given to DHEC?

6 A: There -- I didn't have any other meetings so
7 I'm not aware of anything provided to them.

8 Q: All right. Now Roper Berkeley Hospital, the
9 one that's about to open this Fall and
10 discussed at this hearing, are you familiar
11 with that project?

12 A: Yes.

13 Q: And what's the basis of your familiarity with
14 that project?

15 A: Well I reviewed the application, and I'm aware
16 of the details of the project.

17 Q: All right. Give us just a -- based on your
18 knowledge give us a brief history of that
19 project when the application was filed and
20 what's happened to it?

21 A: So I believe -- I think 2008 -- I think both
22 Roper and Trident filed applications for 50 bed
23 hospitals in Berkeley County. Trident's
24 application was a result of need in the plan
25 for additional beds at Trident.



TMC, ET AL. V. SC DHEC, ET AL.

1996

1 Q: Uh-huh.

2 A: Roper was relocating existing beds from the
3 main hospital downtown to Berkeley County and
4 ---

5 Q: Roper's main hospital downtown you're referring
6 -- you're talking about downtown Charleston?

7 A: Yes. Right across the street from MUSC.

8 Q: All right. Go ahead and continue. I'm sorry
9 for interrupting.

10 A: They were relocating beds from there to
11 Berkeley County to increase geographic access
12 for the residents that have to travel all the
13 way down to the peninsula for services at Roper
14 Hospital.

15 Q: And so it's -- you said it was approximately
16 2008 when the application was filed?

17 A: I think that's right. Yes.

18 Q: And we're in 2019. What's transpired over the
19 last 11 years? How come that hospital isn't
20 built yet?

21 A: Well Roper and Trident appealed one -- well I
22 think actually I think Trident appealed Roper,
23 Roper didn't appeal Trident. But they were in
24 a disputed case and ultimately -- so DHEC
25 approved them both, and ultimately both



TMC, ET AL. V. SC DHEC, ET AL.

1997

1 decisions were upheld.

2 Q: All right. The -- earlier in the hearing we --
3 there's been some discussion about a quarterly
4 report. You were talking about quarterly
5 reports ---

6 A: Yes.

7 Q: --- that are issued -- or excuse me, that are
8 required after a CON is issued that an
9 applicant would have submit to DHEC, correct?

10 A: Correct.

11 Q: And there's a 2017 quarterly report that's been
12 discussed at this hearing and in fact I believe
13 it's in evidence. The Roper Exhibit 5. Roper
14 Exhibit 5. Is this admitted into evidence? Is
15 that yes? Okay. We think it is. Are you --
16 have you read this?

17 A: Yes.

18 Q: What's the date on it, please?

19 A: February 24th, 2017.

20 Q: All right. And it is a letter sent to Mr.
21 Eubank and who's it signed by?

22 A: Shannon Cantwell.

23 Q: And who is Ms. Cantwell, please?

24 A: She's the regulatory affair specialist for
25 Roper.



TMC, ET AL. V. SC DHEC, ET AL.

1998

1 Q: All right. And so we'll go back to this but I
2 want to go to something else first that's
3 related.

4 **MR. WESTBROOK:** Let's go to slide 4, Dan.

5 Q: Mr. Levitt, is this a slide that you created?

6 A: It is.

7 Q: And it says at the top changes to the Roper
8 Hospital Berkeley. Isn't that supposed to be
9 Roper Berkeley Hospital Project -- or no Roper
10 Hospital Berkeley Project. Okay. It's in
11 Berkeley County, correct?

12 A: It is.

13 Q: All right. And so what's your source for this
14 chart?

15 A: Yeah, if we can go back to that letter ---

16 Q: Uh-huh.

17 A: --- it was the third page of that letter, this
18 grid.

19 Q: Uh-huh.

20 A: That grid that they submitted summarizing the
21 changes in the CON project. So the first
22 column there that's what was approved in the
23 CON ---

24 Q: Right.

25 A: --- so this I guess refreshes my memory. It



TMC, ET AL. V. SC DHEC, ET AL.

1999

1 was filed 11/14/2018 -- or 2008.

2 Q: Uh-huh.

3 A: So this is what was originally proposed in the
4 CON application and then there to the right is
5 after schematic design, you know, with user
6 groups and the architects and the engineers.
7 This is what they developed to build in 2017.

8 Q: Okay. Let's go back to your chart, please?
9 You created this chart?

10 A: I did.

11 Q: And will it help explain your testimony?

12 A: Yes.

13 Q: And so walk us through this. What have you got
14 there?

15 A: So these area -- the column area ---

16 Q: Uh-huh.

17 A: --- corresponds to each of those rows in that
18 grid and it shows what the changes were from
19 what was originally approved in the CON
20 application to what they reported to the state
21 that they were going to build. And, you know,
22 looking row by row, so the lobby -- they
23 reduced the size of the lobby, made it smaller.
24 The atrium they eliminated -- they originally
25 proposed an atrium, they took that out.



TMC, ET AL. V. SC DHEC, ET AL.

2000

1 Administration, they originally had square
2 footage in the hospital for administration ---

3 Q: So when you say -- let me stop you there. They
4 didn't eliminate the administrators did they?
5 What are -- you're talking about ---

6 A: They moved their offices out of the hospital so
7 they're no longer building space in the
8 hospital for administration. They moved it out
9 to a medical office building so that was
10 eliminated from the project.

11 Q: All right.

12 A: They had infusion space in the hospital. That
13 was eliminated from the hospital, moved to a
14 medical office building. The imaging
15 department they added an ultrasound equipment
16 so the additional piece of equipment that they
17 didn't originally have approval for in the CON
18 application. The emergency department
19 interestingly they reduced the square footage
20 and they reduced the number of treatment rooms.

21 Q: Uh-huh.

22 A: The surgery department they had originally four
23 specialty ORs and the reduced that and they ---

24 Q: What's PACU?

25 A: Post anesthesia care unit.



TMC, ET AL. V. SC DHEC, ET AL.

2001

1 Q: What does that mean?

2 A: They changed the configuration.

3 Q: What is a post anesthesia care unit.

4 A: That's where individuals go after surgery to
5 recover, to sort of have the effects of
6 anesthesia wear off.

7 Q: All right.

8 A: They added a special procedures lab that wasn't
9 originally approved in the CON application.
10 The med surg and ICU beds they reduced the med
11 surg beds by 12 beds. The labor and delivery
12 they eliminated 4 LDRPs so I think they
13 originally had 8 LDRPs.

14 Q: What is an LDRP?

15 A: Labor, delivery, recovery and postpartum.

16 Q: Are those rooms?

17 A: Those are beds.

18 Q: Beds. Okay.

19 A: And well bedrooms.

20 Q: Uh-huh.

21 A: That's where a woman would go and have labor
22 and deliver a baby and then stay in that same
23 room after they had the baby.

24 Q: All right.

25 A: And then they added 16 postpartum GYN rooms.



TMC, ET AL. V. SC DHEC, ET AL.

2002

1 So that's where they got from the med -- they
2 said we're gonna build less med surg but we're
3 gonna add to the -- basically the OB. We're
4 gonna add 6 postpartum GYN rooms.

5 Q: Okay.

6 A: And then the overall square footage, the
7 building gross square footage went from almost
8 a 139,000 square feet to 115,000 square feet so
9 they reduced the size of the hospital.

10 Q: And that last -- on the last line BGSF stands
11 for what?

12 A: Building gross square footage.

13 Q: Building gross square footage. Okay. Now in
14 your opinion, Mr. Levitt, do these constitute
15 individually or collectively a substantial
16 change to this project?

17 A: No.

18 Q: All right. Why not?

19 A: Because these are all changes that are
20 consistent with the original CON application.
21 It's a reduction ---

22 Q: Uh-huh.

23 A: --- so DHEC has always taken the perspective --
24 and I have always taken the perspective --
25 building less is okay. Sometimes building more



TMC, ET AL. V. SC DHEC, ET AL.

2003

1 is okay. So they were originally approved for
2 somewhere around 140,000 square foot hospital.
3 If they wanted to somehow through design they
4 came out at say 145,000 square feet that could
5 potentially be allowed by DHEC. So obviously
6 going down is certainly allowable. It's
7 consistent with the purposes of the plan, cost
8 containment, building less, making it more
9 efficient, and the result hopefully is if you
10 build less square footage it cost less to
11 build.

12 Q: All right. Okay. Thank you, Mr. Levitt.
13 Let's talk about the project changes to the
14 MUSC Berkeley County freestanding ED. Let's
15 start with your slide 5. Changes to the
16 project. All right. Let's talk about -- why
17 don't you walk us through this?

18 A: So the relocation of the site we've talked a
19 lot about so we're going less it's easy to talk
20 about some things since it's been talked about
21 for two weeks. So it's about three quarters of
22 a mile from the original site across I-26.

23 Q: Uh-huh.

24 A: Since it is a different site Andy Johanni and
25 Equity won't be developing it, it would be a



TMC, ET AL. V. SC DHEC, ET AL.

2004

1 different developer. The size and costs were
2 reduced from 15,000 square feet to 10,000
3 square feet similar to the Roper Hospital
4 square footage reduction and the costs were
5 reduced from 13.6 to 11 million dollars.

6 Q: Okay. And then what's the last one?

7 A: And then the helipad and the CDU were
8 eliminated as part of cost savings. You, the
9 CDU would be part of the square footage
10 reduction and the helipad would be a cost
11 reduction.

12 Q: Let me go back, just digress for just a minute
13 back to when you were talking a moment ago
14 about the meeting at DHEC in late December of
15 2018. It seemed like seemed like -- I wasn't
16 sure of what your testimony was with respect to
17 the CDU and helipad. Did you discuss that with
18 DHEC at that meeting if you recall?

19 A: I don't recall. I don't think that we did but
20 we may have. Oh, no, we would have because
21 that would have been the square footage
22 reduction.

23 Q: Okay.

24 A: It would have been the CDU.

25 Q: All right. The -- let's see, let's take these

