STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 13 DHR 19690

UNITED HOME CARE, INC., d/b/a UNITED HOME HEALTH, INC. d/b/a UNITED HOME HEALTH Petitioner, vs. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent, and MAXIM HEALTHCARE SERVICES, INC., Respondent-Intervenor	)	**FINAL DECISION**

This matter came for hearing before the Honorable Donald W. Overby, Administrative Law Judge, on November 5-8, 2013, November 12-15, 2013 at the Office of Administrative Hearings ("OAH") in Raleigh, North Carolina and on January 27-28, 2014 and February 3-4, 2014 at the North Carolina State Bar in Raleigh, North Carolina.

Having heard all the evidence presented in the contested case hearing, considered the testimony, admitted exhibits, the arguments of the parties, and the relevant law, the Undersigned finds by the greater weight of the evidence the following Findings of Fact and makes the following Conclusions of Law based upon those facts, and issues this Final Decision. N.C. Gen. Stat. § 150B-34.

APPEARANCES

For Petitioner United Home Care, Inc. d/b/a UniHealth Home Health, Inc. d/b/a UniHealth Home Health ("United"):

Noah H. Huffstetler, III
Nelson Mullins Riley & Scarborough LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, North Carolina 27612

Denise M. Gunter
Nelson Mullins Riley & Scarborough LLP
The Knollwood, Suite 530
380 Knollwood Street
Winston-Salem, North Carolina 27103

For Respondent North Carolina Department of Health and Human Services (the "Department"), Division of Health Service Regulation (the "Division"), Certificate of Need Section (the "CON Section" or the "Agency"):

Joel L. Johnson
Bethany A. Burgon
Assistant Attorneys General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

For Respondent-Intervenor Maxim Healthcare Services, Inc. ("Maxim"):

Renee J. Montgomery
Robert A. Leandro
Parker Poe Adams & Bernstein LLP
Post Office Box 389
Raleigh, North Carolina 27602-0389

ISSUES PRESENTED

Whether the Agency: (1) substantially prejudiced United's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in denying the United certificate of need ("CON") application to develop a Medicare-certified home health agency ("HHA") in Mecklenburg County, North Carolina, identified as Project I.D. No. F-10011-12; and (2) substantially prejudiced United's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in approving the Maxim CON application to develop a Medicare-certified HHA in Mecklenburg County, North Carolina, identified as Project I.D. No. F-10003-12.

APPLICABLE LAW

1. The procedural law applicable to this contested case hearing is the North Carolina Administrative Procedure Act ("APA"), N.C. General Statutes § 150B-1 *et seq*., to the extent not inconsistent with the CON Law, N.C. Gen. Stat. § 131E-175 *et seq*.

2. The substantive law applicable to this contested case is the North Carolina CON Law, N.C. Gen. Stat. § 131E-175 *et seq*.

3. The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Regulations, 10A N.C.A.C. 14C.2002 *et seq*. and the Office of Administrative Hearing Rules, 26 N.C.A.C. 3.0101 *et seq*.

STIPULATED FACTS

In the Prehearing Order, the parties agreed and stipulated to the following undisputed facts:

1. On July 16, 2012, United filed a CON application with the Agency proposing to develop a Medicare-certified HHA in Mecklenburg County, North Carolina, identified as Project I.D. No. F-10011-12 (the "United Application").

2. On July 16, 2012, Maxim filed a CON application with the Agency proposing to develop a Medicare-certified HHA in Mecklenburg County, North Carolina, identified as Project I.D. No. F-10003-12 (the "Maxim Application").

3. By decision letters dated December 27, 2012 and findings also dated December 27, 2012, the Agency which approved the Maxim Application and denied the United Application.

4. On January 28, 2013, United filed a petition for contested case hearing with the Office of Administrative Hearings ("OAH"), 13 DHR 02567, appealing the Agency's denial of the United Application and the approval of the Maxim Application.

5. By Consent Order and Voluntary Dismissal Without Prejudice filed May 7, 2013 in contested case 13 DHR 02567, Chief Administrative Law Judge Julian Mann, III, with the consent of all Parties, dismissed contested case 13 DHR 02567 without prejudice pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure.

6. Pursuant to the Consent Order and Voluntary Dismissal Without Prejudice, United re-filed its petition for contested case hearing on May 31, 2013, designated File No. 13 DHR 13166, appealing the Agency's denial of the United Application, and the approval of the Maxim Application.

7. By Consent Order and Voluntary Dismissal Without Prejudice filed December 2, 2013 in contested case 13 DHR 13166, Administrative Law Judge Donald W. Overby, with the consent of all Parties, dismissed contested case 13 DHR 13166 without prejudice pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure.

8. Pursuant to the Consent Order and Voluntary Dismissal Without Prejudice, United re-filed its petition for contested case hearing on December 2, 2013, designated as File

No. 13 DHR 19690, appealing the Agency's denial of the United Application, and the approval of the Maxim Application.

PROCEDURAL HISTORY

No party objected to designation of the Administrative Law Judge, notice of hearing, or the dates and location of hearing. On October 24, 2013, Maxim filed a Motion for Summary Judgment against United asserting the United Application could not be approved as a matter of law because the United Application failed to include UHS-Pruitt Corporation ("UHS-Pruitt") as an applicant.

Following a hearing on November 4, 2013, the Undersigned denied Maxim's motion on November 5, 2013 based upon the existence of a genuine issue of material fact. The decision on Maxim's motion for summary judgment was delivered in open court and is not otherwise contained in this Final Decision.

BURDEN OF PROOF

With regard to whether the Agency erred by approving the Maxim Application and by not approving the United Application, United bears the burden of showing by the greater weight of the evidence that the Agency substantially prejudiced it rights, and that the Agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule when the Agency disapproved the United Application and approved the Maxim Application. N.C. Gen. Stat. § 150B-23(a); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 455 S.E.2d 455, 459 (1995), *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

On the specific issue of whether UHS-Pruitt should have been named as an applicant, Maxim bears the burden of showing by the greater weight of the evidence that the Agency substantially prejudiced it rights, and that the Agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule in not requiring UHS-Pruitt to be an applicant on the United Application. N.C. Gen. Stat. § 150B-23(a); *Britthaven, Inc. v. N.C. Dep't of Human Resources*, 118 N.C. App. 379, 455 S.E.2d 455, 459 (1995), *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

WITNESSES

Witnesses for United:

1. Janet Proctor. Ms. Proctor is the administrator of the United HHA in Wake County, North Carolina. Proctor, Vol. 1, p. 41. Ms. Proctor as been employed with United since November 2011. Proctor, Vol. 1, p. 47. Ms. Proctor is a licensed registered nurse in North Carolina. Proctor, Vol. 1, p. 52. Ms. Proctor was qualified as an expert in staffing for Medicare-certified home health agencies. Proctor, Vol. 1, p. 61.

2. Craig R. Smith (adverse). Mr. Smith serves as the Chief of the CON Section. Smith, Vol. 1, p. 165. Mr. Smith held the position of project analyst from June 1988 through August 1994. Smith, Vol. 1, pp. 165-166. Mr. Smith held the position of Assistant Chief from

1994 through November, 2009. Smith, Vol. 1, p. 166. Mr. Smith had a limited role in the decision with the Project Analyst, Mr. Michael McKillip and the Assistant Chief Martha J. Frisone, in approving the Maxim Application and denying the United Application. Smith, Vol. 1, p. 167.

3. Martha J. Frisone (adverse). Ms. Frisone serves as the Assistant Chief of the CON Section. Frisone, Vol. 2, p. 318. She has held that position since March 2010. *Id.* Ms. Frisone is currently the Interim Chief of the CON Section. Frisone, Vol. 12, p. 2009. Ms. Frisone has been employed at the CON Section for 19 years. Frisone, Vol. 3, p. 430. Ms. Frisone was assigned to the Mecklenburg home health review as co-signer with Project Analyst, Mr. Michael McKillip. Smith, Vol. 2, p. 246.

4. Michael J. McKillip (adverse). Mr. McKillip was the Project Analyst who conducted the review of the United Application and the Maxim Application. McKillip, Vol. 3, p. 493. Mr. McKillip reviewed the United Application and the Maxim Application in their entirety. McKillip, Vol. 3, p. 494. Mr. McKillip has been employed as a Project Analyst at the CON Section for 13 years. McKillip, Vol. 3, p. 491.

5. Teresa Hancock (adverse). Ms. Hancock is the Director of Clinical Services for Maxim in its Charlotte home care agency. Hancock, Vol. 3, p. 386. Ms. Hancock has been employed at Maxim for 5 years. *Id.* Ms. Hancock is a registered nurse in North Carolina. Hancock, Vol. 3, p. 387. Ms. Hancock participated in obtaining letters of support for the Maxim Application. Hancock, Vol. 3, p. 391.

6. Rita Southworth. Ms. Southworth is the Vice President of Home Care for UHS-Pruitt Corporation. Southworth, Vol. 5, p. 770. She has held this position since May 2012. Southworth, Vol. 5, p. 783. Ms. Southworth is a registered nurse. Southworth, Vol. 5, p. 771. Ms. Southworth was qualified as an expert in staffing for Medicare-certified home health agencies. Southworth, Vol. 5, p. 792.

7. Robert (Trey) Stark Adams, III. Mr. Adams is currently employed with The Lundy Group in Raleigh, North Carolina. Adams, Vol. 5, p. 927. Mr. Adams was previously employed with PDA, Inc., a consulting firm specializing in the healthcare industry. Adams, Vol. 5, p. 929. While employed with PDA, Inc., Mr. Adams prepared the United Application. Adams, Vol. 5, pp. 932; 942-43. Mr. Adams has prepared approximately 30 CON applications. Adams, Vol. 5, p. 931. Mr. Adams was qualified as an expert in CON preparation and health planning and analysis. Adams, Vol. 5, p. 946.

8. Aneel S. Gill. Mr. Gill is the Manager of Health and Financial Planning with UHS-Pruitt Corporation. Gill, Vol. 6, p. 1066. Mr. Gill served as liaison between PDA, Inc. and UHS-Pruitt in the preparation of the United Application. Gill, Vol. 6, p. 1079. Mr. Gill also assisted in the drafting of the United Application. *Id.* Mr. Gill has participated in the preparation of approximately 13 CON applications. Gill, Vol. 6, pp. 1070; 1075. Mr. Gill was qualified as an expert in CON preparation and health planning and analysis. Gill, Vol. 6, p. 1089.

9. Tara R. Larson. Ms. Larson is a Senior Healthcare Policy Specialist with Cansler Collaborative Resources, Inc. Larson, Vol. 8, p. 1366. From May 2008 to February 2013, Ms. Larson was the Senior Deputy Director (Chief Clinical Operating Officer) with the North Carolina Department of Health and Human Services, Division of Medical Assistance. United Ex. 136. Ms. Larson was qualified as expert in North Carolina Medicaid operations, the organization of the North Carolina Department of Health and Human Services and its divisions and offices, healthcare fraud, misuse and abuse and the impact that healthcare fraud, misuse and abuse has on the Medicaid program and Medicaid recipients. Larson, Vol. 8, p. 1374.

Witnesses for Maxim:

1. Karin Sandlin. Ms. Sandlin is a partner with Keystone Planning Group. Sandlin, Vol. 9, p. 1508. She has held this position for almost 9 years. *Id.* Ms. Sandlin has been involved in the preparation of approximately 160 CON applications. Sandlin, Vol. 9, p. 1510. Ms. Sandlin has been involved in the preparation of 7 CON applications for Medicare-certified home health agencies. Sandlin, Vol. 9, p. 1511. Ms. Sandlin was qualified as an expert in CON preparation and analysis and health planning. Sandlin, Vol. 9, p. 1513. Ms. Sandlin was responsible for preparing Sections I through V of the Maxim Application. Sandlin, Vol. 9, p. 1516.

2 David Meyer. Mr. Meyer is the senior partner with Keystone Planning Group, and has been with Keystone Planning Group since 2005. Meyer, Vol. 9, p. 1597. Mr. Meyer has been involved in the preparation of approximately 220 CON applications. Meyer, Vol. 9, p. 1599. Mr. Meyer was qualified as an expert in CON preparation and analysis and health planning. Meyer, Vol. 9, p. 1600. Mr. Meyer was responsible for preparing Sections VI through XII, and the pro forma projections of revenue and expenses ("pro formas") in the Maxim Application. Meyer, Vol. 9, p. 1603.

3. Michael James Raney. Mr. Raney is the Vice President of Operations for the southeastern region for Maxim. Raney, Vol. 11, p. 1881. Mr. Raney has been employed with Maxim for approximately 15 years. Raney, Vol. 11, p. 1880. Mr. Raney was the chief contact person and liaison between the Maxim Mecklenburg County branch office, Maxim headquarters and the consultants in the preparation of the Maxim Application. Raney, Vol. 11, p. 1893.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of each witness by taking into account the appropriate factors for judging the credibility, including but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (the "CON Section" or "Agency") is the agency of the State of North Carolina that administers the Certificate of Need Law (the "CON Law"), codified at Article 9 of Chapter 131E of the North Carolina General Statutes.

2. The CON Section is the agency within the Department that carries out the Department's responsibility to review and approve the development of new institutional health services under the CON Law. The CON Law establishes a regulatory framework under which proposals to develop new health care facilities or services or purchase certain regulated equipment must be reviewed and approved by the Agency prior to development. The CON Law has multiple purposes, including providing access to services and ensuring quality. *See* N.C. Gen. Stat. § 131E-175.

3. Petitioner United is a Georgia corporation authorized to do business in the State of North Carolina.

4. Respondent-Intervenor Maxim is a Maryland corporation authorized to do business in the State of North Carolina.

5. The 2012 State Medical Facilities Plan ("SMFP") declared a need for two Medicare-certified home-health agencies (HHAs) in Mecklenburg County. (Jt. Ex. 1, p. 2029). Ten applicants applied, including United and Maxim. *Id.* Because the need determination in the SMFP acts as a determinative limitation on the number of CONs that could be awarded in the 2012 Mecklenburg County home health review, the Agency could award a maximum of two CONs. (*Id.*; N.C. Gen. Stat. § 131E-183(a)(1)).

6. The Agency reviewed the ten applications competitively which meant that the approval of any two applications would result in the denial of the remaining eight applications. The Agency awarded the two CONs to Carolinas Medical Center @ Home, LLC and The Charlotte-Mecklenburg Hospital Authority (collectively, "Carolinas") and Maxim. (Jt. Ex. 1, p. 2171).

7. As provided under the CON review process, the applicants, including United and Maxim, filed written comments and exhibits concerning the proposals submitted by other applicants. (N.C.G.S. § 131E-185(a1); Jt. Ex. 1, pp. 100-978). The CON Section also held a public hearing in Mecklenburg County as required under the CON law. (*Id*. at pp. 981-82).

8. Both United and Maxim made presentations at the public hearing and submitted responses to the written comments. (Jt. Ex. 1, pp. 981-89; 1075-87; 1267-78; 1279-1303).

9. On or around December 27, 2012, the CON Section notified the applicants of its decision to approve the applications of Maxim and Carolinas. The applications submitted by United and the other seven applicants were not approved. (Jt. Ex. 1, pp. 2028-2171).

10. The CON Section found the applications of both Maxim and United conforming with all the statutory and regulatory criteria. (Jt. Ex. 1, pp. 2028-2159) (hereinafter "Maxim Application" and "United Application"). Maxim was approved instead of United because Maxim was determined to be comparatively superior to United based upon the Agency's comparative analysis. (*Id*. at pp. 2168, 2170).

11. Respondent Agency and Respondent-Intervenor Maxim presented testimony and other evidence that the Agency did not violate any of the standards of N.C. Gen. Stat. § 150B-23(a) by approving Maxim's Application and denying United's Application.

12. Maxim presented evidence that United's application was fatally flawed because United failed to name UHS-Pruitt as an applicant. Maxim contends that because UHS-Pruitt proposed to be involved in developing and offering the services described in the United Application, UHS-Pruitt Corporation was required to be named as an applicant under the CON law.

13. The CON Section recognized Maxim's contention that UHS-Pruitt should be named as an applicant; however the CON Section does not agree that the application was fatally flawed because UHS-Pruitt was not named as an applicant.

14. United has appealed the denial of its application and the award of one of the CONs to Maxim. The award of the CON to Carolinas is not at issue in this contested case. Maxim did not appeal the Agency's decision.

Agency Review

15. Mr. McKillip reviewed the entirety of both the United Application and the Maxim Application, the comments in opposition and responses to comments in opposition submitted by the applicants and attended the public hearing in conducting his review and analysis in this matter. (McKillip, Vol. 3, p. 494) Mr. McKillip was responsible for drafting the Agency Findings and worked in collaboration with Ms. Frisone in finalizing the Agency Findings. (McKillip, Vol. 3, pp. 510-511)

16. Ms. Frisone, the CON Section Assistant Chief, approved and signed the Agency's decision in this review. She also reviewed the comments in opposition and response to comments from all applicants in this review. (Frisone, Vol. 2, p. 319; Vol. 3, p. 473) Ms. Frisone also consulted with Mr. McKillip during the course of the review and preparation of the Agency Findings. (Frisone, Vol. 2, p. 341)

17. Maxim did not appeal the Agency decision. Maxim did not offer evidence at trial that the United Application was non-conforming with any review criteria or administrative rules.

United's Contentions Regarding Maxim's Past Billing Issues

Because United contends that Maxim's past fraudulent billing relates to several statutory criteria, this issue will be addressed first.

18. United witness, Aneel Gill, a Health Planner with UHS-Pruitt Corporation at the time of the review, contends on behalf of United that the fraudulent billing by Maxim that ended in 2009 was grounds for finding the Maxim Application non-conforming with Criterion 1, 4, 5, 13(b), 18(a) and 20.

19. At the time of the review, the CON Section was aware of the past billing fraud and determined that it did not result in Maxim's Application being non-conforming with any of the review criteria. (Frisone, T. Vol. 2, pp.325-26; McKillip T. Vol. 4, pp.635-36).

20. Beginning in the spring of 2009, Maxim engaged in extensive reforms and remedial actions as a result of the disclosure of fraudulent billing practices that lead to a criminal investigation. Maxim fully cooperated with the investigation. (Maxim Ex. 324).

21. These reforms and remedial actions included terminating senior executives and other employees the company identified as responsible for the misconduct; establishing and filling the positions of Chief Executive Officer, Chief Compliance Officer, Chief Operations Officer/Chief Clinical Officer, Chief Quality Officer/Chief Medical Officer, Chief Culture Officer, Chief Financial and Strategy Officer, and Vice President of Human Resources; and hiring a new General Counsel. (Maxim Ex. 324). Maxim significantly increased the resources allocated to its compliance programs and identified and disclosed to law enforcement the misconduct of former Maxim employees. (*Id*.).

22. Because of Maxim's remedial actions, willingness to cooperate, and its identification and disclosure to law enforcement of the misconduct of former Maxim employers that assisted the Government in obtaining convictions, the Department of Justice was willing to enter into a Deferred Prosecution Agreement ("DPA") with Maxim in September 2011. (United Ex. 117, p 5).

23. The DPA required Maxim's acceptance and acknowledgement of full responsibility for the conduct that led to the government's investigation and Maxim agreed to more than fully compensate federal and state agencies, including North Carolina, for the fraud. (Maxim Ex. 324).

24. The Government's willingness to enter into a DPA instead of seeking to put Maxim out of business demonstrates that the Government wanted Maxim to remain in business and continue to provide services.

25. In the DPA, the Department of Justice acknowledged that neither the DPA nor the criminal complaint alleges that Maxim's conduct adversely affected patient health or patient care. (United Ex. 103, ¶ 2).

26. Maxim also entered a Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services. (United Ex. 120).

27. The CON Section is charged with determining whether a CON applicant is conforming with relevant statutory and regulatory criteria. (Smith, Vol. 2, p. 293). It is not the role of the CON Section to punish applicants for past actions. (*Id.*). Thus the CON Section's review of the fraud that ended in 2009 was limited to determining if and how the fraud related to the statutory and regulatory review criteria. (*Id.*).

28. In making its decision, the Agency was aware of the past billing fraud, carefully considered how the past billing fraud might apply to its review of the statutory criteria, and determined that the billing fraud, which ended in 2009, was not relevant to any of the statutory and regulatory criteria it is charged with applying under the CON Statute. (McKillip, T. Vol. 4, pp. 635-36; Frisone, T. Vol. 2, pp. 324 – 26; T. Vol. 3, pp. 471 – 73, 477-78; Smith, T. Vol. 1, pp. 168, 224, 266-67, 277).

Maxim's Past Fraud and Criterion 20

29. United contends that Maxim's history of having been involved in the billing fraud should have been a basis for the CON Section finding Maxim's Application nonconforming with N.C. Gen. Stat. § 131E-183(a)(20) ("Criterion 20") relating to past quality of care.

30. In its competitive comments United did not contend that Maxim's past billing fraud would have any effect on the Agency's Criterion 20 analysis. (Jt. Ex. 1, pp. 887-97; Frisone, T. Vol. 3, pp. 477-78).

31. Criterion 20 states:

> *An applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past.*

32. The Agency considers quality history under Criterion 20 by determining if the Licensure and Certification Section, which is charged with quality of care oversight, has found that the applicant provided poor quality of care within the eighteen (18) months prior to the submission of its application. (McKillip, T. Vol. 4, pp. 716-17).

33. The Agency found that because Maxim had not experienced any adverse actions against its license for its Mecklenburg County home care agency for eighteen months preceding the date of the decision, Maxim was conforming with Criterion 20. (*Id.*, Jt. Ex. 1, p. 2145). Maxim had no penalties or licensure limitations imposed during the past eighteen (18) months on any of its North Carolina licensed home care offices. (*Id.*; Jt. Ex. 2, p. 34).

34. The eighteen month "look-back" is a standard that has been being used by the Agency for quite some time and no one seems to know exactly when it came into use. It is not a promulgated rule, but rather an arbitrary time frame that has been used for quite some time. Criterion 20 does not set any particular standard of time within which to "look-back" for prior poor quality of care, and thus it is within the discretion of the Agency to determine an

appropriate look-back period under the facts and circumstances of the particular case. This is not to say that an arbitrary eighteen months look-back period is appropriate in every case.

35. Section II of Maxim's Application further addressed quality of care by responding to the questions set forth in this section of the application form. (Jt. Ex. 2, pp. 10-39; Sandlin, T. Vol. 9, pp. 1520, 1523-28).

36. Section II.7(a) asked Maxim to describe the methods used or to be used by the applicant to ensure and maintain quality care. (Jt. Ex. 2, p. 28; Sandlin, T. Vol. 9, pp. 1527-28). Maxim responded that all of its offices, including its agency in Mecklenburg County, are accredited by the Accreditation Commission for Health Care and Maxim intends to continue that accreditation. (Jt. Ex. 2, pp. 28, 233). Maxim also described in detail all of the quality measures that would be used to ensure the proposed services maintain quality care. (Jt. Ex. 2, pp. 28-34; Sandlin, T. Vol. 9, pp. 1520, 1523–1528).

37. The Chief of the CON Section, Craig Smith, and the Assistant Chief of the CON Section, Martha Frisone, both testified that the Agency had determined that the past billing fraud was not relevant to Criterion 20 because the Agency believed the fraud relates to billing issues and not quality of care. (Smith, T. Vol. 1, p. 182; Frisone, T. Vol. 2, pp. 328, 330). The Agency's position is supported by the DPA. (United Ex. 103, ¶ 2).

38. Even if the past billing fraud were relevant to Criterion 20, in applying Criterion 20 the CON Section's practice has been to limit its review of negative quality of care events to those that occur within eighteen months of its decision. (Smith, T. Vol. 2, pp. 288-90; Frisone, T. Vol. 2, p. 328). In some circumstances, the Agency has shortened the look back period but has never extended it beyond eighteen months. (Smith, T. Vol. 2, p. 258; Frisone, T. Vol. 3, p. 463).

39. Even if the past billing fraud were relevant to Criterion 20 and even if the eighteen month look-back is an arbitrary standard and unpromulgated rule, to consider the past billing fraud in this case, the Agency would have needed to look back more than 3 years. (Smith, T. Vol. 2, p. 289). The efforts undertaken by Maxim were available to the Agency during the review period, and in light of the efforts of Maxim and the intervening amount of time, it would not have been reasonable under the facts of this case to have considered such fraud.

40. United attempted to use the Congressional testimony of Richard West to show that patient care was involved because Mr. West did not receive certain services that were billed for by Maxim. (Smith, T. Vol. 2, p. 201). However, the conduct discussed by Mr. West in his Congressional testimony occurred in New Jersey more than three years prior to the CON Section's decision. (United Ex. 126, p. 816). United's argument that Mr. West's testimony demonstrated poor quality of care under Criterion 20 is also contradicted to a degree by the Government's representation in the DPA (United Ex. 103, ¶ 2).

41. United presented no evidence that any billing fraud continued after 2009 or that there were any other negative quality of care events at Maxim's Mecklenburg County agency or at any other Maxim agency that would support a finding of nonconformity with Criterion 20.

42. United's expert witness, Tara Larson, testified that if the North Carolina Department of Health and Human Services, Division of Medical Assistance ("DMA"), believed that Maxim's fraud had not ended 2009, it would not have signed the settlement agreement that was a part of the DPA. (Larson, T. Vol. 8, p. 1455).

43. If DMA had information of even a credible allegation of fraud by Maxim since 2009, DMA would have been required by law to immediately suspended Maxim's Medicaid payments. (Larson, T. Vol. 8, pp. 1452-54).

44. There has been no credible allegation of fraud or resulting suspension of payment action taken against Maxim. (Larson, T. Vol. 8, pp. 1452-54; Raney, T. Vol. 11, p. 1928).

45. Ms. Larson testified that after 2009, because Maxim was being monitored under the DPA, if Maxim had continued the fraud there was a high probability that such fraud would have been uncovered and Maxim would have been closed. (*Id.* at p. 1488). Maxim's witness Mike Raney confirmed that the DPA has expired without further actions being taken by the Government against Maxim. (Raney, T. Vol. 11, p. 1928).

46. In a recent audit conducted by DMA, the auditors concluded after a reconsideration review that Maxim's administrative and clinical documentation was completely error free. (Larson, T. Vol. 8, pp. 1464-69).

47. United argued at the hearing that the Agency's decision in 2012 in the *Cape Fear Valley* CON application supported its position that Maxim should have been found nonconforming with Criterion 20. Because Cape Fear Valley was under a System Improvement Agreement and Maxim remained under a Corporate Integrity Agreement at the time the decision was made by the Agency, United argued that Maxim also should have been found non-conforming with Criterion 20.

48. In the *Cape Fear Valley* decision, the Licensure Agency determined that Cape Fear Valley Hospital had provided poor patient care resulting in the death of one (1) patient. As a result of this finding, Cape Fear Valley Hospital was subject to a System Improvement Agreement. (Maxim Ex. 332, pp. 53-54; Smith, T. Vol. 2, pp. 254, 307).

49. The CON Section found that Cape Fear Valley Hospital's CON Application was nonconforming with Criterion 20 because it was found to have provided poor quality of care within eighteen months of the application decision. (Smith, T. Vol. 2, p. 253). However, in hospital CON reviews, the Agency has been willing to find a hospital conforming with Criterion 20, even if the poor quality of care occurred within the 18-month look back period, if the hospital receives a full validation survey in the intervening time period. (*Id.* at p. 255). In Cape Fear Valley's case, the hospital had not received the full validation survey with no conditions. The CON Section was therefore not willing to ignore the quality of care event that occurred within the 18-month look back period as a result. (*Id.*). Again, eighteen months is not a hard and fast rule, but under the circumstances of this case it is a reasonable time.

50. The findings in *Cape Fear Valley* are not applicable to the Maxim Application because the poor quality of care findings that led to the system improvement agreement in *Cape Fear Valley* occurred within a reasonable look back period and there was no full validation survey. (Smith, T. Vol. 2, pp. 254, 307; Maxim Ex. 332, pp. 53-54)). In Maxim's case, the past fraud occurred more than three years prior to the decision and therefore unlike *Cape Fear Valley*, fell well outside any reasonable look back period. (Smith T. Vol. 2, p. 289; Frisone, T. Vol. 2, p. 328).

51. The *Cape Fear Valley* decision is also not relevant because the events at issue in *Cape Fear Valley* directly related to poor quality of care and included a patient death. (Smith, T. Vol. 2, pp. 253, 308; Maxim Ex. 332, pp. 53-54). In Maxim's case, the issue that United contends disqualifies Maxim's Application involved billing fraud that ended in 2009 which the Agency determined was not related to its Criterion 20 analysis. The Department of Justice specifically acknowledged in its agreement with Maxim that the past fraud did not involve poor patient care (United Ex. 103, ¶ 2).

52. Based on the above, the Agency was correct to find Maxim conformed with Criterion 20. (Meyer, T. Vol. 9, pp. 1640-43; Frisone, T. Vol. 2, pp. 325-26).

Maxim's Past Fraud and Criteria 4 and 5

53. N.C. Gen. Stat. § 131E-183(a)(4) ("Criterion 4") states:

> *Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.*

54. N.C.G.S. §131E-183(a)(5) ("Criterion 5") states:

> *Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.*

55. United contended that because of the fraud that ended in 2009, Maxim could not be certified to provide Medicare and Medicaid home health services or that the risk of potential exclusion from Medicare and Medicaid makes Maxim's Application nonconforming with Criteria 4 and 5. N.C. Gen. Stat. § 131E-183(a)(4) and (5). (Gill, T. Vol. 7, pp. 1161-63).

56. In its competitive comments, United only contended that the past fraud related to Criterion 5. (Jt. Ex. 1, p 892).

57. United presented no evidence that Maxim could not be certified by Medicare or Medicaid or that it has had any difficulty obtaining certification to provide services to Medicare and Medicaid beneficiaries since 2009.

58. Maxim's existing 17 offices in North Carolina have remained certified for participation in the North Carolina Medicaid program and Maxim has been re-credentialed by DMA since the past fraud case was settled. (Raney, T. Vol. 11, p. 1928).

59. Maxim has also developed new Medicare-certified home health agencies and added Medicare-certified home health services to existing agencies since 2009. Maxim has not had any problems obtaining certification for participation in Medicare and Medicaid during this time period. (*Id.* at p. 1927).

60. Regarding the "risk" of future disqualification, the Agency recognizes that there is a risk that any CON applicant may face future sanctions, including disqualification from Medicare and Medicaid. (Smith, T. Vol. 2, p. 278) The Agency does not make its decisions based upon speculation of what might or could happen to an applicant in the future. (Frisone, T. Vol. 3, p. 439).

61. Maxim's past billing fraud was not a reason for finding Maxim's Application non-conforming with Criteria 4 and 5 or any other criteria. (Meyer, T. Vol. 9, p. 1543).

Maxim's Past Fraud and Other Criteria

62. Mr. Gill with UHS-Pruitt Corporation also testified that there were other criteria with which Maxim's Application should have been found non-conforming based upon the past billing fraud, including Criteria 1, 13(b) and 18a. Mr. Gill stated the same reasons that he gave in connection with the criteria addressed above for his opinion regarding the criteria.

63. Maxim's Application was properly found conforming with Criteria 1, 13(b) and 18a. (Meyer, T. Vol. 9, pp. 1606-07, 1638-40; Maxim Ex. 303; Jt. Ex. 1, pp. 2130-31, 2126, 2139). Maxim's past billing fraud was not a reason for finding Maxim's Application non-conforming with these Criteria. (*Id.*; Meyer, T. Vol. 9, p. 1643).

No Requirement for Fraud Disclosure in Maxim Application

64. United also argued that Maxim's application should not have been approved because Maxim did not disclose its past billing fraud in its application.

65. The past billing fraud was a matter of public knowledge and the Agency was aware of the billing fraud through competitive comments, considered the issue, and determined it was not relevant to any of the statutory or regulatory criteria. (Raney, T. Vol. 11, p. 1918; Frisone ,T. Vol. 2, pp. 325-26, 363, 367-69; Smith, T. Vol. 2, pp. 283, 290).

66. There are no questions in the CON application form that address prior history of billing fraud. (Jt. Ex. 2, pp. 10-38; Sandlin, T. Vol. 9, p. 1528).

67. Maxim's Certified Financial Statement, which was included as an exhibit in Maxim's Application, provided information regarding the past billing fraud. (Jt. Ex. 2, App. Ex. 16, p. 344; Meyer T. Vol. 9, pp. 1645-46). Moreover in its Application, Maxim addressed in detail all of the compliance and quality assurance programs, policies, and procedures that have been put in place beginning in 2009. (Jt. Ex. 2, pp. 20-24, 28-34; Jt. Ex. 2, App. Ex. 11; Sandlin, T. Vol. 9, p. 1587; Raney, T. Vol. 11, pp. 1920-27). Maxim provided all the measures that it currently uses to ensure quality of care as requested in Section II.7(a) of the application form. (*Id*.).

68. United presented evidence that in subsequent applications, Maxim has provided information regarding its past billing fraud to the Agency. The decision to address the past billing fraud in Maxim's subsequent applications was a strategic decision made by Maxim to discourage competitor comments on the subject, not because it was error to exclude such information. (Sandlin, T. Vol. 9, p. 1588; Raney, T. Vol. 11, p. 1918; Meyer, T. Vol. 9, p. 1645).

69. Although perhaps prudent in order to not have to continually explain in forums such as OAH, it was not required for Maxim to discuss its past billing fraud or the agreements that resulted from it in Maxim's CON Application. (McKillip, T. Vol. 3, pp. 505-07; Frisone, T. Vol. 2, p. 360; Smith, T. Vol. 2, pp. 250–51, 273; Meyer, T. Vol. 9, p. 1645).

70. United failed to demonstrate by a preponderance of the evidence that the Agency erred or violated any of the other standards of N.C. Gen. Stat. §150B-23(a) in its consideration of Maxim's past billing fraud.

Criterion 3

71. N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3") provides:

> *The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.*

72. The CON Section determined that Maxim's Application conformed with the requirements of Criterion 3. (Jt. Ex. 1, p. 2044).

73. Aneel Gill testified that the Maxim Application should have been found nonconforming with Criterion 3 because he believes that Maxim's ramp-up projections were too aggressive and the anecdotal information provided in Maxim's application regarding estimated referrals should have been more specifically documented. (Gill, T. Vol. 6, p. 1135). Mr. Gill also found Maxim's projected market share to be unreasonable. (*Id.* at p. 1146).

74. Maxim proposed serving 426 patients in Year 1 and 503 patients in Year 2 of the project. This would result in a market share of Mecklenburg County patients of 2.3% in Year 1 and 2.6% in Year 2. (Jt. Ex. 2, pp. 51, 67 and 68; Sandlin, T. Vol. 9, p. 1537).

75. There are 10 Medicare-certified home health agencies currently located in Mecklenburg County and the average Mecklenburg County home health market share for those agencies is 9.6%. (Jt. Ex. 2, p. 52). Maxim proposed that in Year 2, its market share would be well below the average market share of other existing home health agencies in Mecklenburg County. (*Id.*; Sandlin, T. Vol. 9, p. 1537).

76. Maxim's projected Year 2 market share was also more conservative than United's projected market share. United proposed serving 548 patients in Year 2 of its project as compared to 503 patients projected by Maxim, making its Year 2 market share projection higher than Maxim's (Jt. Ex. 3, p. 159; Sandlin, T. Vol. 9, pp. 1593 – 94).

77. United proposed that its initial admissions or "ramp up" would be slower than Maxim's in Year 1 of the project. (Jt. Ex. 3, p. 156). However, Maxim's ramp up projections are not unreasonable, particularly considering that Maxim has operated in Mecklenburg County for almost 20 years and has an established referral base. (Sandlin, T. Vol. 9, pp. 1522,1529, 1535-36). United's expert, Aneel Gill, admitted that in considering whether an applicant's proposed ramp up is reasonable, every circumstance is different. (Gill, T. Vol. 7, p. 1250-51).

78. Maxim's patient projections, including ramp up, are very similar to the projections included in United's 2010 application for Wake County. (McKillip, T. Vol. 4, p. 680; Gill, T. Vol. 7, p. 1254; Sandlin, T. Vol. 9, p. 1536; Maxim Ex. 301, Attachment 1). Mr. Gill's testimony that Maxim's projected market share of 2.3% in Mecklenburg County was not reasonable is contradicted by United's projections in its winning 2010 Wake County application. In comparing Maxim's projections in its Mecklenburg County Application to United's projections in its Wake County Application, both projected the same market share of 2.3% in Year 1 with a similar number of agencies already serving each county. (Jt. Ex. 2, p. 51; Sandlin, T. Vol. 9, p. 1535-38; Maxim Ex. 301, Attachment 1; McKillip, T. Vol. 4, p. 680).

79. United also contended that Maxim should have been found nonconforming with Criterion 3 because of anecdotal referral information included in its application.

80. Maxim's Application estimates that out of its 125+ patients (served by its Charlotte office), it would be able to provide at least 31 of these patients with additional therapy via Medicare certification. Additionally, Maxim stated that it currently refers approximately 100 patients to other Medicare-certified home health agencies each year because its lack of Medicare certification prevents Maxim from providing needed services. (Jt. Ex. 2, p. 50; Sandlin, T. Vol. 9, p. 1540).

81. Maxim offered that the estimates were compiled by an employee in Maxim's home care office, Nikky Littlejohn, who reviewed patient medical records and intake with the recruiters. (Hancock, T. Vol. 3, pp. 398-99; Raney, T. Vol. 11, p. 1963). An e-mail between Nikky Littlejohn and Mike Raney confirms Ms. Littlejohn's involvement. (Jt. Ex. 2, p. p. 321).

82. Maxim's need and patient projections are not based upon the anecdotal information. The application clearly states that the anecdotal information was not used to project the specific patient projections for the proposed project. (Jt. Ex. 2, p. 50). Maxim's anecdotal estimates were not required as a part of Maxim's patient projections and were provided only as additional support for Maxim's project. (Jt. Ex. 2, p. 50; Sandlin, T. Vol. 9, pp. 1540, 1591–93).

83. United's contention that Maxim's Application was deficient for failing to provide documentation with its application supporting these estimates has no merit. As the project analyst McKillip testified, he did not expect that Maxim would provide such documents with its Application. (McKillip, T. Vol. 4, p. 683). Likewise, there also were statements in United's Application that were not supported by documentation. (*Id.* at p. 684).

84. The CON Statute and the CON Home Health Application Form do not require that applicants provide documentation to support every statement or representation made by the applicant. (McKillip, T. Vol. 4, p. 683). Some assertions in the applications are accepted on faith and that the applicant is being truthful. It would be an overwhelming task to put to test every single statement within an application; and thus, a test of reasonableness must be applied to the applications in determining upon which statements may be relied. The public comment and written responses are excellent sources of information pointing the reviewer to areas of concern that might warrant further scrutiny.

85. United has failed to prove, based on a preponderance of the evidence, that the Agency erred or otherwise violated the standards of N.C. Gen. Sat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 3.

Criterion 5

86. N.C. Gen. Stat. § 131E-183(a)(5) ("Criterion 5") provides:

> *Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.*

87. The CON Section determined that Maxim's Application conformed with the requirements of Criterion 5. (Jt. Ex. 1, p. 2080).

88. United contends that Maxim overstated its Medicaid and Medicare revenues in its application and therefore should have been found nonconforming with Criterion 5.

89. United set forth this contention in its competitive comments. Prior to making its decision to approve Maxim's Application, the Agency reviewed all the competitive comments. (McKillip, T. Vol. 3, p. 494; Frisone, T. Vol. 12, p. 2027).

90. Ms. Frisone reviewed and considered United's comments on the issue of whether Maxim overstated its Medicare and Medicaid revenue but concluded that the comments did not justify finding Maxim's Application nonconforming with Criterion 5. (Frisone, T. Vol. 12, p. 2027).

91. In determining the financial feasibility of a proposal, the CON Section determines whether net revenue is projected to exceed the total operating costs by Project Year 2. (Jt. Ex. 1, p. 2079; Meyer, T. Vol. 9, pp. 1616-17). Thus the applicable analysis is whether Maxim reasonably projected that its proposed agency would be profitable in Year 2 of the project. (*Id.*).

92. Maxim's expert witness David Meyer testified that due to an error in selecting the proper cell in the spreadsheet, he had mistakenly used "visits" instead of "episodes" to calculate revenues for the projected patients that would be Low Utilization Payment Adjustment (LUPA) and Partial Episode Payment (PEP). (Meyer, T. Vol. 9, pp. 1616-17).

93. If Mr. Meyer had used episodes instead of visits in projecting Medicare revenues for LUPA and PEP, Medicare revenues would have been approximately $90,000.00 less than projected by Maxim in Year 2. (Meyer, T. Vol. 9, pp. 1618, 1666). With this adjustment, Maxim still would have shown a profit in Year 2, so this error made no material difference in Maxim's conformity with Criterion 5. (Meyer, T. Vol. 9, pp. 1616-18; T. Vol. 11, pp. 1864-65).

94. Mr. Gill contends that Maxim's Medicare revenue was over budgeted by $163,348.00 (Combining Years 1 and 2) and that Medicaid revenue was over budgeted by $24,007.00. (Gill, T. Vol. 7, p. 1178). Maxim's CON Application projects a net profit in Year 2 that exceeds the amount that Mr. Gill contends was overstated for Medicare and Medicaid revenue in Years 1 and 2 combined. (Jt. Ex. 2, p. 130). Neither Mr. Gill nor any other United witness contended that as a result of the calculation error, Maxim's proposed project would not be profitable in Year 2.

95. Mr. Gill's opinion regarding Maxim's Medicaid revenue was not correct and was based on an erroneous understanding of Maxim's Pro Forma. In Maxim's Application, some of the Medicaid revenue shown on Maxim's pro forma was reduced by its charity care deductions, which resulted in the Medicaid revenue projected in Maxim's Application. (Meyer, T. Vol. 9, pp. 1615-17, 1663-64).

96. Three comparative factors in the comparative analysis relied upon revenues as part of the calculation. Maxim's overstatements of its net revenues placed Maxim in a <u>less</u> favorable position regarding these comparative criteria. (Meyer, T. Vol. 9, pp. 1617-18; Meyer, T. Vol. 11, pp. 1865-67). Consequently, this error was not material to the Agency's determination that Maxim's application was comparative superior to United's application. (*Id.*).

97. It is not uncommon for CON applicants to make errors in their applications. (Meyer, T. Vol. 11, p. 1873). Mr. Meyer pointed out several examples of applicant errors that were determined by the Agency to be immaterial, including errors by applicants in this review. (Meyer, T. Vol. 11, pp. 1867-71; Jt. Ex. 1, pp. 2105, 2132, 1964, 2010). In each of these cases

of applicant error, the Agency found the applicant conforming with the criterion because the error was not material to the Agency's analysis. (*Id.*).

98. United's expert, Aneel Gill, acknowledged that the Agency should consider the materiality of an error when he testified that United's Application included erroneous and overstated referral projections. Mr. Gill testified that this error was not material because United had projected sufficient utilization even if these erroneous projections were removed from the analysis. (Gill, T. Vol. 7, pp. 1245-46; Meyer, T. Vol. 11, pp. 1872-1873).

99. The CON Section did not err by finding Maxim conforming with Criterion 5. The error that was made by Maxim made no material difference because Maxim still showed a net profit in Year 2 and Maxim still would have been found comparatively superior on at least 9 of the 15 comparative factors that were used in the review. (Meyer, T. Vol. 11, p. 1867).

100. United also contends that Maxim should be found non-conforming with Criterion 5 because it alleges that Maxim did not provide its most recent audited financial statements.

101. United presented no evidence that Maxim did not present its most recent audited financial statement. The audited financials submitted with Maxim's application were the most recent financials. (Meyer, T. Vol. 9, p. 1608).

102. It is noted that United failed to even provide a complete audited financial statement in its application. (McKillip, T. Vol. 4, p. 690; Meyer, T. Vol. 9, p. 1610). Instead, United provided only the cash flow portion of its financial statement. United's cash flow statement was completed only six months closer in time to the application filing date than the full audited financial statement submitted by Maxim. (Meyer, T. Vol. 9, pp. 1609-10).

103. United also contends that Maxim was not conforming with Criterion 5 because certain projected expenses were understated by Maxim. Mr. Gill testified that Maxim failed to allocate any expenses for medical records. (Gill, T. Vol. 6, p. 1124). Mr. Gill's testimony is not credible. Maxim's Application clearly explains that medical record expenses are included in its corporate overhead. (Meyer, T. Vol. 10, p.1768; Jt. Ex. 2, p. 130).

104. United contends that Maxim should also have allocated additional funds for marketing in its financial projections. (Gill, T. Vol. 6, p. 1140). Maxim budgeted $9,000.00 for marketing in Year 2, which is a reasonable projection, particularly considering that Maxim already has a home care agency in Mecklenburg County and an established referral basis. (Raney, T. Vol. 11, p. 1912; Meyer, T. Vol. 10, p. 1784). Maxim also projected that corporate overhead would include marketing (Jt. Ex. 2, p. 134).

105. United has failed to prove, based on a preponderance of the evidence, that the Agency erred or otherwise violated the standards of N.C. Gen. Sat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 5.

Criterion 7

106. N.C. Gen. Stat. § 131E-183(a)(7) ("Criterion 7") provides:

> *The applicant shall show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided.*

107. In reviewing Maxim's proposed staffing under Criterion 7, the CON Section determined that Maxim proposed sufficient clinical and administrative staff for its project, and conformed with the requirements of Criterion 7. (Jt. Ex. 1, p. 2105).

108. Criterion 7 does not prescribe any specific job titles or specific management positions that must be proposed in order for an applicant to be found conforming with the requirement of the statute. N.C. Gen. Stat. § 131E-183(a)(7).

109. United contended that Maxim's Application did not conform with Criterion 7 because of its proposed administrative staffing. United's experts contended that: (1) Maxim failed to propose one FTE administrator for the proposed agency; (2) Maxim did not have a separate job title for a nurse supervisor; (3) Maxim's administrative staffing in total was not sufficient; and (4) Maxim did not propose a separate marketing position.

110. United conceded that Maxim proposed sufficient clinical staff to care for its patients and thus its challenge only related to administrative staffing. (Southworth, T. Vol. 5, p. 901).

Maxim's Agency Administrator

111. United's experts testified that Maxim's Application should have proposed one (1) FTE employee to serve as the administrator of only the Medicare-certified home health services distinct from the administrator over the other services offered by Maxim at its Mecklenburg agency. (Southworth, T. Vol. 5, p. 835).

112. Because Maxim already operates a home care agency in Mecklenburg County and proposes only to add Medicare-certified home health services to this existing agency, Maxim allocated its administrator's time between its Medicare-certified services and its non-Medicare-certified services in its administrator projection. (Jt. Ex. 2, pp. 102-03).

113. United presented two individuals, Rita Southworth and Janet Proctor, who were accepted as experts in staffing Medicare-certified home health agencies. Ms. Southworth is employed by UHS-Pruitt Corporation ("UHS-Pruitt") as its Director of Home Care and Janet Proctor is the Administrator of United's Wake County Medicare-certified home health agency. (Southworth, T. Vol. 5, p. 770; Proctor, T. Vol. 1, p. 41). Neither Ms. Southworth nor Ms. Proctor have any experience in developing staffing, or operating Medicare-certified home health services as an addition to an existing home care agency. (*Id.* at 788-90; *Id.* at 59, 114).

114. Ms. Southworth admittedly has little familiarity with North Carolina's home care licensure regulations and both Ms. Southworth and Ms. Proctor admitted that Medicare conditions of participation do not require one (1) FTE administrator. (Southworth, T. Vol.5, pp. 880, 906; Proctor, T. Vol. 1, p. 115).

115. Under North Carolina law, Medicare-certified home health agencies are licensed as home care agencies. N.C. Gen. Stat. § 131E-136. A provider that provides Medicare-certified home health service and non-Medicare-certified home care services from the same site operates under a single license. (Ex. 1, pp. 1428-35, Interim Licensure Renewal Application).

116. 10A NCAC 13 J.1001(b) entitled Agency Management and Supervision, requires that a home care licensee "designate an individual to serve as agency director. (10A NCAC 13J. 1001(b); Jt. Ex. 2, p. 218; Meyer, T. Vol. 11, pp. 186-62). If Maxim had a separate administrator for its Medicare-certified home health service and non-Medicare-certified home care service, it would not comply with licensure regulations that require the agency to designate an individual to serve as the agency director. *Id.*

117. Ms. Southworth, United's expert on staffing, admits that under the State regulations, an agency can only have one Administrator. (Southworth, T. Vol. 5, p. 905). Ms. Southworth, however, did not know that home care and home health agencies are licensed as a single agency. (*Id.* at 905-06).

118. In its staffing chart for project Years 1 and 2, Maxim indicated that the Administrator position would be .33 FTE and that there would be a Manager of Branch Operations of .5 FTE. (Jt. Ex. 2, pp. 102-03). Thus Maxim allocated .88 administrative time for administrator services.

119. The Manager of Branch Operations supports the Administrator in his or her role. (Raney, T. Vol. 11, pp. 1903-04; Meyer, T. Vol. 9, p. 1630; T. Vol. 11, pp. 1860-61). The Year 2 salary of $51,781 shows that the Manager of Branch Operations performs more than clerical functions and will have substantial administrative responsibilities. (*Id.*).

120. Both the Administrator and the Manager of Branch Operations would be full-time employees and would be on-site during agency operating hours. The FTE projections proposed by Maxim represent an estimate of the average time each of these administrative staff members would dedicate to the Medicare-certified home health agency. In some weeks, Maxim expects that the Administrator and Manager of Branch of Operations would dedicate more time to the Medicare-certified home health agency and in some weeks they may dedicate less time. (Meyer, T. Vol. 10, pp. 1781-82).

121. Mike Raney who oversees Maxim's operations in the southeastern United States currently oversees eight (8) offices in Tennessee that provide Medicare-certified home health services and non-Medicaid certified home care services. In each of those offices, Maxim operates with a single administrator that oversees both Medicare-certified home health and non-Medicare-certified home care services. (Raney, T. Vol. 11, pp. 1900-1901). Maxim's business model is built on having a single administrator who oversees the entire agency. (*Id.*).

122. Maxim also stated in its application that administrative support would be provided at the proposed agency by regional and corporate staff. Regional and corporate administrative support staff would provide essential administrative functions including education, training, billing accounting, central referral, human resources support, IT support, quality assurance support and medical records support (Jt. Ex. 2, p. 9; Raney, T. Vol. 11, pp. 1906-1907). Ms. Teresa Hancock, an employee at Maxim's Mecklenburg home care office, testified that she feels very well supported by the corporate and regional administrative resources that Maxim provides to the Agency. (Hancock, T. Vol. 4, p. 422).

123. The instructions for completing the staffing charts in the CON Application form provide that FTEs be divided between the time the person devotes to the new service or office and the time devoted to existing services or offices. The application form states, "If the administrator is projected to devote 30% of his or her time to management of the proposed new office, 0.3 of a FTE position should be entered in the table below [1.0 FTE x 30% = 0.3 FTE]." (Jt. Ex. 2; McKillip, T. Vol. 3, pp. 562-563).

124. Medicare's Conditions of Participation provide that the administrator may also be the supervising physician or registered nurse and therefore the administrator is permitted to spend less than one (1) FTE on providing administrative services (32 CFR §484.14(c); Maxim Ex. 305). There is no requirement in the Conditions of Participation that an agency employ one (1) FTE administrator for its Medicare-certified services. (*Id.*; Southworth, T. Vol. 5, p. 880; Proctor, T. Vol. 1, p. 115).

125. The staffing experts for United never addressed the fact that North Carolina licensure regulations would not allow a separate administrator to oversee only the Medicare-certified services that are operated as part of a home care agency. 10A NCAC 13J .1001(b).

126. Ms. Southworth and Ms. Proctor also incorrectly assumed that all the patients currently served by Maxim are not acutely ill and testified that the administrative and clinical oversight currently provided is totally different than would be required for the proposed home health agency. (Southworth, T. Vol. 5, pp. 824 – 825; Proctor, T. Vol. 1, p. 51). However, Maxim's Application explains that it currently serves skilled patients, most of whom are classified as catastrophic care, receiving 8 to 24 hours per day of hospital-level nursing care in their homes. (Jt. Ex., 1, p. 9; Raney, T. Vol. 11, pp. 1884, 1888-89).

127. Both Ms. Southworth and Ms. Proctor testified that their opinions regarding the need for one (1) FTE administrator were based on their review of licensure renewal applications submitted by other Mecklenburg County home health agencies. (Southworth, T. Vol. 5, pp. 841-42; Proctor, T. Vol. 1, pp. 88-89, 98-106). All of these licensure renewal applications, with the exception of the licensure application of Interim Healthcare, indicate that these agencies do not provide non-Medicare-certified home care services, as Maxim proposed in its application. (Jt. Ex. 1, pp. 1403-1530; Meyer, T. Vol. 10, p. 1780).

128. Interim's licensure renewal application was the only application that documented that it provides both Medicare-certified home health services and non-certified home care

services. (Jt. Ex. 1, pp. 1828-35). Thus the only renewal application relied upon by United's experts that reflects the service model proposed by Maxim is the Interim Licensure Renewal Application.

129. Interim's application indicated that it allocates its administrative staff including its Agency administrator between the home care and home health services. (Jt. Ex. 1, pp. 1828-35). David Meyer, an expert witness for Maxim, contacted Interim's owner and confirmed that Interim allocates its one FTE administrator between its Medicare-certified and non-Medicare-certified services, exactly as Maxim proposes in its application. (Meyer, T. Vol. 10, p. 1780-81).

Maxim's Clinical Supervision

130. United's experts testified that Maxim should have been found nonconforming with Criterion 7 because it did not specifically list a nurse supervisor position in the application staffing chart in its application and Maxim would not be providing required clinical supervision.

131. There is no requirement that applicants specifically list a nurse supervisor position in the staffing chart and the Agency does not necessarily expect to see a position labeled "Nurse Supervisor." (Frisone, T. Vol. 12, p. 2012). Other applicants in this review in addition to Maxim did not use the title Nurse Supervisor in their staffing charts. (*Id.* at 2019; Jt. Ex. 1, pp. 2107, 2110, and 2113).

132. The Home Care Licensure Regulations require that a home care agency provide clinical supervision. *See* 10A NCAC 13 J.1001(c) and J.1102(a).

133. Maxim's Application states that it will be in compliance with all licensure requirements, which includes the requirement to provide clinical supervision. (Jt. Ex. 2, pp. 27, 211, 219, 222).

134. The Medicare Conditions of Participation provide: "The skilled nursing and other therapeutic services furnished are under the supervision and direction of a physician or a registered nurse (who preferably has at least one year of nursing experience as a public health nurse)." 42 CFR §484.14(d) (Maxim Ex. 305). As Rita Southworth testifying for United admitted, the Conditions of Participation do not require that a specific title be given to the clinician providing supervision. (Southworth, T. Vol. 5, pp. 896-97).

135. Maxim intends to have one of its Registered Nurses provide clinical supervision. (Raney, T. Vol. 11, pp. 1911-12; Meyer, T. Vol. 9, pp. 1619-20, Vol. 10, p. 1722). In its Application, Maxim included a job description for the clinical supervision to be provided by a Registered Nurse. The job description sets forth the qualifications and responsibilities that the RN providing clinical supervisor would have at the proposed agency. (Jt. Ex. 2, App. Ex. 9, p. 274; Raney, T. Vol. 11, pp. 1909-10; Frisone, T. Vol. 12, p. 2030).

136. It is consistent with the Medicare Conditions of Participation to have an RN responsible for clinical supervision. (Meyer, T. Vol. 9, pp. 1627-28).

137. Maxim also budgeted additional FTE time for its RNs. (Jt. Ex. 2, pp. 102-03; Jt. Ex. 1, p. 2105). In the Agency's Findings, the Project Analyst calculated that Maxim required 3.37 FTE registered nurses for its projected visits in Year 2, but proposed having 3.75 registered nurses. (Jt. Ex. 1, p. 2105).

138. Ms. Frisone, testified that with the additional FTE RN capacity, it was reasonable to expect that one of the RNs on Maxim's staffing chart would provide supervision. (Frisone, T. Vol. 12, p. 2012; Meyer, T. Vol. 9, pp. 1626-29). Ms. Frisone testified that based on her experience, it was reasonable for a RN Supervisor to also provide direct patient care. (Frisone, T. Vol. 12, p. 2013).

139. The Agency evaluated Maxim's current and projected staffing and concluded that Maxim would comply with the Medicare Conditions of Participation, including the requirement for clinical supervision. (Frisone, T. Vol. 12, pp. 2014–2015).

140. Maxim also projected one FTE Oasis Coordinator as a member of its administrative staff. The Oasis Coordinator is part of the administrative oversight in measuring and recording quality, and thus the position alleviates some of the administrative requirements that otherwise would be assumed by the nurse who provides clinical supervision. (Meyer, T. Vol. 9, p. 1620, 1627).

141. Maxim also has corporate and regional support for each of its offices, including support of Maxim's Director of Clinical Operations and a team of clinicians responsible for quality assurance and clinical compliance. (Raney, T. Vol. 11, pp. 1906-07; Jt. Ex. 2, pp. 22, 33, 134; Meyer, T. Vol. 9, pp. 1620-21).

142. United's witnesses, Ms. Southworth and Ms. Proctor, opined that Maxim would not be providing the required clinical supervision. (Southworth, T. Vol. 5, p. 882; Proctor, T. Vol. 1, p. 90). However, neither witness addressed the additional FTE RN capacity shown in Maxim's staffing projections and both failed to acknowledge that Maxim's Application specifically contained a job description documenting that an RN will provide clinical supervision.

143. Both Ms. Southworth and Ms. Proctor admitted that it was not necessary to use the term "nurse supervisor" or "clinical supervisor" in the staffing tables. (Southworth, T. Vol. 5, pp. 896–898; Proctor, T. Vol. 1, p. 135). Other applications did not use these titles. (Jt. Ex. 1, pp. 2107, 2110, 2111; Frisone, T. Vol. 12, p. 2019-20). Ms. Southworth admitted that registered nurses who provide visits can also provide the required supervision. (Southworth, T. Vol. 5, p. 898).

144. In its Application, United did not list any FTEs for medical records (Jt. Ex. 1, p. 2116). However, because United must manage its medical records, it is reasonable to assume that United will have a person responsible for medical records just as it is reasonable to conclude that Maxim will provide clinical supervision. (Meyer, T. Vol. 9, pp. 1621-22; Frisone, T. Vol. 12, p. 2029).

145. Most of the applications did not list a position for Oasis Coordinator as Maxim did. (Jt. Ex. 1, pp. 2103-2119). However, it is equally reasonable to assume that these responsibilities will be assumed by one of the listed job titles because Oasis reporting is required for Medicare-certified home health services. (Meyer, T. Vol. 9, p. 1621).

146. United also contended that Maxim could not be using one of its RN care providers to provide supervision because there is no differentiation in salary in the staffing table showing that the nurse supervisor would be paid a higher salary for providing supervision. (Gill, T. Vol. 7, p. 1185). However, as Maxim expert Mr. Meyer testified, the staffing chart in the application form asks for an average salary which means some RNs would make more and some less than the average. (Meyer, T. Vol. 10, p. 1737). Because the CON Section's chart requested average salaries, it was not necessary for Maxim to list individual salaries that would be paid to each RN. (*Id.*).

147. United also contends that Maxim's additional FTE capacity could not be used for both supervision and on call coverage. However, United presented no witnesses to support its position.

148. Furthermore, United also projected using its existing RNs for on call coverage but proposed considerably less additional FTE capacity than Maxim. Maxim proposed .38 additional FTE capacity in Year 2 and United proposed only .19. (Jt. Ex. 1, pp. 2105 and 2117; Jt. Ex. 3, p. 210). Therefore, United's application supports that there is additional RN time available in Maxim's Application for clinical supervision.

149. United also contends that two applications submitted by Maxim after the Application for Mecklenburg County show that Maxim did not intend to provide clinical supervision with the staffing proposed in the Mecklenburg County Application. (United Exs. 122-23). The staffing proposed in a subsequent application cannot be compared as each application depends upon the unique circumstances of that application. For example, in Brunswick County, Maxim does not currently operate a home care agency as it does in Mecklenburg County, so its staffing would not be the same as in Mecklenburg. (*Id.*). (Meyer, T. Vol. 10, p. 1743).

150. United also argues that an organizational chart included in Maxim's Application shows that Maxim intended to have a separate position for Clinical Supervisor. (Jt. Ex. 2, p. 176). This chart was a template used for branch operations that are fully operational, including both Medicare-certified and non-Medicare-certified services and was not intended as an exact staffing chart for the proposed additional services. (Raney, T. Vol. 11, pp. 1907-09).

Need to Propose A Specific Marketing Staff Member

151. United also challenged Maxim's administrative staffing for not designating a marketing person. (Gill, T. Vol. 7, pp. 1182-83).

152. Maxim does not hire a marketing person but instead community outreach is done by numerous individuals within Maxim's Mecklenburg office as well as by the support services

offered by Maxim's corporate office. (*Id.*; Jt. Ex. 2, pp. 10, 134). Maxim's clinicians and other staff are involved with marketing through their interactions with referral sources, patients and families. (Meyer, T. Vol. 9, p. 1634).

153. Maxim's Application documents that it has existing referral relationships because it has provided home care service in Mecklenburg County since 1995. (Jt. Ex. 2, pp. 9, 10, 82–84, Jt. Ex. 2, App. Ex. 18–21). Maxim will use its existing relationships to educate the public and current referral sources about the addition of Medicare-certified home health services once these services can be offered. (Raney, T. Vol. 11, pp. 1912-13).

154. There is no requirement in Criterion 7, the licensure regulations or the Conditions of Participation that an agency designate a person who will be dedicated to marketing or community relations. (Jt. Ex. 2, App. Ex. 6, p. 305).

Maxim's Total Administrative Staffing

155. Maxim's administrative staffing was determined by individuals within the Maxim organization who have significant experience staffing Medicare-certified home health services. (Raney, T. Vol. 11, pp. 1896-97, 1937-39; Meyer, T. Vol. 10, p. 1779). The consultants who prepared Maxim's Application provided Maxim with current and projected staffing charts that Maxim completed and returned to the consultants for inclusion in Maxim's Application. (Meyer, T. Vol. 9, p. 1604-05; Raney, T. Vol. 11, pp. 1896-97, 1937-39).

156. The CON Section found that Maxim's administrative staffing was sufficient. (Jt. Ex. 1, p. 2105). Ms. Frisone also testified that she would expect efficiencies in administrative staffing for Maxim because it is proposing to add Medicare-certified services to an existing agency (Frisone, T. Vol. 1, p. 466) As Ms. Frisone testified, the Agency saw no evidence that Maxim had downplayed its administrative staffing to reduce its costs. (*Id.*).

157. Maxim's plan to allocate staff between its Medicare-certified home health services and its other services is cost effective and relates to the CON objectives of value and cost effectiveness. (Meyer, T. Vol. 9, p. 1631).

158. Maxim proposed more administrative staff than some other applicants in the review who have experience providing Medicare-certified home health services in North Carolina. (Meyer, T. Vol. 9, pp. 1632-33; Jt. Ex. 1, pp. 2107, 2110).

159. Ms. Southworth and Ms. Proctor testified that Maxim's administrative staffing was not sufficient. However, neither Ms. Southworth nor Ms. Proctor have had any experience adding Medicare-certified home health services to an existing home care agency. (Southworth, T. Vol. 5, pp. 789-90; Proctor, T. Vol. 1, pp. 59, 114).

160. Both Ms. Southworth and Ms. Proctor admitted that other applicants in the review with experience offering Medicare-certified home health services proposed fewer administrative staff than Maxim. (Southworth, T. Vol. 5, pp. 90-102; Proctor, T. Vol. 1, pp. 131-32; Jt. Ex. 1, pp. 2107 (The HKZ Group) and 2110 (Assisted Care)). The administrative staffing

of these other applications was also found to be sufficient by the Agency. (Jt. Ex. 1, pp. 2109, 2111).

161. Ms. Southworth further admitted that she did no comparison of Maxim's projected total administrative staffing to the total administrative staffing of other Medicare-certified home health agencies currently operating in Mecklenburg County. (Southworth, T. Vol. 5, pp. 907-08). Carolinas, the other winning applicant in this review, currently operates a Medicare-certified home health agency in Mecklenburg County. Carolinas current administrative staff to patient ratio is lower than the administrative staff to patient's ratio that Maxim projects in its application. (Compare .36% for Healthy at Home to .45% for Maxim) (Southworth, T. Vol. 4, pp. 908-911).

162. Maxim also proposed administrative staff positions that were not proposed by United. Maxim proposed to have a dietitian and a medical records clerk while United's proposed agency would not have staff members dedicated to either of these responsibilities. (Jt. Ex. 2, p. 102; Jt. Ex. 3, p. 213).

163. Maxim's applications set forth that regional and corporate staff would provide significant support for many of the administrative functions that may be provided in-house by other agencies. (Raney, T. Vol. 11, pp. 1906-07; Jt. Ex. 2, p. 21). Ms. Proctor admitted that she did not review and did not consider the administrative support available to Maxim through its corporate and regional staff. (Proctor, T. Vol. 1, p. 139)

164. As Ms. Southworth admitted, it is very difficult to compare administrative staff because some companies outsource certain activities and some companies call staff different names. (Southworth, T. Vol. 4, p. 904).

165. Maxim's Application proposed sufficient administrative staffing, including staff to provide clinical supervision, to conform to Criterion 7.

166. United has failed to prove, based on a preponderance of the evidence, that the Agency erred or otherwise violated the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 7.

Other Criteria

167. Prior to the hearing, United also contended that Maxim failed to conform with Criteria 8, 13(c) and 14.

168. Maxim was properly found to be conforming with Criterion 8. (Meyer, T. Vol. 9, p. 1635-36; Jt. Ex. 1, p. 2120; Maxim Ex. 303). Maxim demonstrated that it would have available the necessary ancillary and support services and that Maxim's proposed service would be coordinated with the existing health care system. (*Id.*).

169. Maxim was properly found conforming with Criterion 13(c). (Meyer, T. Vol. 9, pp. 1636-37; Jt. Ex. 1, p. 2129; Maxim Exh. 303). Maxim demonstrated that the elderly and

medically underserved groups will have adequate access to the proposed home health services. (*Id.*). Contrary to United's contention, Maxim indicated throughout its Application that it would accommodate those who speak a foreign language. (Meyer, T. Vol. 9, p. 1637; Jt. Ex. 2, p. 12).

170. Maxim was properly found conforming with Criterion 14. (Meyer, T. Vol. 9, p. 1637; Jt. Ex. 1, p. 2135; Maxim Exh. 303). Maxim provided a letter to a health professional training program which satisfies the requirements of Criterion 14. (*Id.*).

Regulatory Criteria

171. In this review, the Agency also applied certain regulatory criteria and standards applicable to home health services. 10A NCAC.2000 *et seq*. (Jt. Ex. 1, pp. 2146-59). Maxim's Application was found conforming with all of the regulatory criteria. (*Id.*).

172. United's witness, Aneel Gill, testified that Maxim's Application should have been found non-conforming with 10A NCAC.2002(a)(3)-(6), .2003, and .2005(a) (Gill, T. Vol. 7, pp. 1192-95). Mr. Gill testified that the same reasons that he believed that Maxim's Application did not conform with Criteria 3 and 7 were reasons that it failed to conform with these regulatory criteria. (*Id.*).

173. Based on the findings above addressing Criteria 3 and 7, United has failed to prove, based on a preponderance of the evidence, that the Agency erred or otherwise violated the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's Application conformed with all of the regulatory criteria, 10A NCAC 14C.2000 *et seq.*

174. Maxim's Application was properly found conforming with all the regulatory criteria. (Meyer, T. Vol. 9, pp. 1543-44; Maxim Exh. 303).

Whether UHS-Pruitt Was Required to be an Applicant

175. Under North Carolina's Certificate of Need law, a person that proposes to develop or offer a new institutional health service must apply for and receive a CON. (N.C. Gen. Stat. § 131E-178(a)).

176. Prior to the hearing on the merits of this contested case, Maxim filed a motion for summary judgment asserting that UHS-Pruitt Corporation ("UHS-Pruitt"), a sister company under the broad corporate umbrella with United, should be required to be an applicant for the United Application.

177. UHS-Pruitt and United are each subsidiaries of United Health Services, Inc. ("UHS"). UHS-Pruitt and United are two separate and distinct corporations, having been duly incorporated under existing law. *(*Jt. Ex. 3, pp. 283-292; United Ex. 176, ¶ 3; Affidavit of Aneel S. Gill).

178. When the contested case was called for hearing on the merits, Maxim's motion for summary judgment was denied by this Tribunal, having found as fact and concluded as a matter of law that a genuine issue of material fact existed. At trial, Maxim continued to pursue the issue

that UHS-Pruitt should have been an applicant. Evidence on that issue was allowed in order to have a full and complete discourse on the issue of who is the appropriate party in CON's. Maxim bears the burden of proof on this issue.

179. Maxim contends that statements in the United Application, the deposition testimony and the hearing testimony show that UHS-Pruitt's involvement in the proposed project constitutes both the "development" and "offering" of a new institutional health service. Consequently, the United Application is not approvable because UHS-Pruitt was required to be an applicant.

180. United and the Agency contend that UHS-Pruitt was not required to be an applicant because its role in the project is only to provide "administrative services", pursuant to a management agreement between the parties.

181. Maxim's comments on the United Application do not state that UHS-Pruitt needed to be an applicant. (Jt. Ex. 1, p. 206; Meyer, Vol. 9, p. 1675).

182. The Agency's decision did not find that UHS-Pruitt should have been an applicant. (Jt. Ex. 1, pp. 2028-2171). The Agency does not support Maxim's argument that UHS-Pruitt should have been an applicant. (Frisone, Vol. 2, pp. 319-323; Vol. 3, pp. 467-469; United Ex. 177).

183. Maxim did not appeal the Agency's decision which is critical in rendering this decision. However, this issue has the potential to be a recurring issue which commands full discourse in order to not only answer the issue herein, but to offer potential resolution of the issue prospectively.

184. To receive a CON, a person must file an application with the CON Section using the application form created by the Agency. N.C. Gen. Stat. § 131E.-182. The CON Statute provides the Agency with the authority to create the application form and to request information that it believes is required to determine conformity with the applicable review criteria. N.C. Gen. Stat. §182(b).

185. Section I, Question 1 of the CON application form asks the applicant to identify the legal name of the applicant. The question further states that: "the applicants are the legal entities (i.e., persons or organizations) that will own the facility and any other persons who will offer, develop or incur an obligation for a capital expenditure for the proposed new institutional health service."

186. This question derives from N.C. Gen. Stat. §§ 131E-178(a) and (c) which state "[n]o person shall <u>offer or develop</u> a new institutional health service without first obtaining a certificate of need from the Department" and "[n]o person shall incur an <u>obligation for a capital expenditure</u> which is a new institutional health service without first obtaining a certificate of need from the Department." (Emphasis added)

187. The statute defines "develop" as "undertake[ing] those activities which will result in the offering of institutional health service or incurring of a financial obligation in relation to the offering of such service." N.C. Gen. Stat. § 131E-176(7).

188. When used in connection with health services, the CON Statute defines "offer" to mean "that the person holds himself out as capable of providing, or as having the means for the provision of specified health services." N.C. Gen. Stat. § 131E-176(18).

189. In creating the Home Health CON Application Form, the Agency has determined that under the CON Statute, there can be more than one applicant. Specifically, Section 1.1 of the application form requests that the applicant provide:

> Legal Name of the Applicant(s): The applicants are the legal entities (i.e., persons or organizations) that will own the facility and any other person who will offer, develop, or incur an obligation for a capital expenditure for the proposed new institutional health service. (Exhibit A, Jt. Ex. 3, p. 7).

190. The directions in Section 1.1 acknowledge that more than one legal entity can be required to be named as an applicant in a CON review. Section 1.1 of the application also makes clear that an "applicant" is not only the entity that will own the facility or will be issued a license to provide the health service at issue, but also includes any entity that will offer or develop the new institutional health service.

191. In determining whether the necessary applicant(s) has been named, Martha Frisone testified that the CON Section looks only at the entity that will obtain licensure and certification and does not analyze which entities are offering and developing the proposed health service. (Frisone, T. Vol. 3, pp. 467, 469).

192. While Ms. Frisone states that's how the CON Section interprets the law, it is not in keeping with the plain language of the statute which requires more than just who is getting the license and certification. (Frisone, T. Vol. 3, p. 469). Neither the CON Application form nor the CON law define the entities that must be named as applicants as only those entities that will obtain licensure and certification for services. (Jt. Ex. 3, p. 7; N.C. Gen. Stat. § 131E-176(7) and (18) and § 131E-178(a)).

193. It is recognized by this Court that the model used by United has been used many times over many years without question. The model of setting up a corporation that will become the working entity although not staffing it in any regard until the CON is awarded seems to make sense, in some regard. Conversely, it does not seem to make sense to fully staff a corporate entity which is contingent on the award of a CON before the CON is awarded. However, one must look to see who or what entity is actually going to do the work of offering or developing a new institutional health service or incurring an obligation for a capital expenditure.

194. Maxim's expert witness Mr. Meyer's company Keystone Planning, as well as others, has previously employed a similar structure based on a management agreement for an

MRI application in Onslow County. The applicant was Onslow MRI, LLC and the manager was Eastern Radiologists, Inc. Only Onslow MRI, LLC was the applicant. *See* Meyer, Vol. 9, pp. 1678-1679.

195. Mr. Meyer acknowledged that he did not disagree in any way with the Agency's review of the United and Maxim Applications, and that he agreed with the Agency's findings. (United Ex. 157, pp. 206-207). Maxim's expert witness Ms. Sandlin offered no opinion that the Agency erred in any respect in its findings, and offered no opinion that United was not the proper applicant. (Sandlin, Vol. 9, p. 1546) Maxim confirmed in its written discovery responses that it did not disagree with the Agency's decision. (United Ex. 145, p. 3).

196. As noted above many items within the various applications are to be taken on faith in the truthfulness of the applicants. The rhetorical question then becomes should the Agency accept on faith that the entity to be license and certified is the proper applicant. The further question would be whether or not there are sufficient indicia within the application to call into question the proper applicant—again, a test of reasonableness.

197. The answer to that question within the confines of the application in this contested case is that "yes" there is sufficient evidence within the application to examine further what entity offering or developing a new institutional health service or incurring an obligation for a capital expenditure.

198. United points to many examples within its application that tend to show that United is "offering and developing" the project and not UHS-Pruitt. For example, that "United is proposing to establish a new Medicare-Certified Home Health agency in Mecklenburg County". Further, that United "proposes to offer all Medicare/Medicaid home health agency covered services" and then lists numerous services that it proposes to offer and to develop. (Jt. Ex. 3, Section II, p. 30 *et. seq*.).

199. Likewise, there are numerous statements and exhibits contained in the United CON application which represent that UHS-Pruitt will be directly involved in the development and offering of the home health agency as defined in N.C. Gen. Stat. §131E-176(7) and (18).

200. United's Application expressly states that "UHS-Pruitt has all the necessary corporate resources in place to effectively manage and ***develop*** the proposed agency…" (Jt. Ex. 3, p. 27). (Emphasis added). Rita Southworth, UHS-Pruitt's Vice President for Home Care Services, confirmed that based on her understanding of UHS-Pruitt's operations, this statement was accurate. (Southworth, T. Vol. 8, p. 870).

201. Trey Adams, the consultant who was principally responsible for drafting the United Application, tried to explain why the words "develop" and "UHS-Pruitt" are in the same sentence by saying that Pruitt was not developing the agencies but providing services to assist in the development of those agencies. (Adams, Vol. 6, p. 999).

202. Mr. Gill said that it was merely "lingo" when trying to explain the relationship between Pruitt and its ownership and/or management of other facilities when it implied or stated

in the attachments to the application that Pruitt was in a superior position and controlling the entities. (Gill Vol. 7, page 1337).

203. When questioned further by the Court about the instances in the application where it pointed to quality of care by Pruitt as well as other numerous instances where the application very pointedly and plainly identified Pruitt as being the driving force, Mr. Gill conceded that "we could have been more precise." (Gill Vol. 7, page 1336; Ex. 44 and Ex. 69 to Jt. Ex. 3.). Exhibit 44 to the United Application is a document entitled "UHS-Pruitt Corporation 2011 Quality Report."

204. Mr. Gill then offered that one should merely look to the statement on page 10 of the application which identifies United as being the entity who will actually develop and provide the services. That in no way explains or answers the question. His answer merely asserts that this trier of fact should accept United as the proper applicant without testing to see who the proper applicant is. (Gill Vol. 7, page 1336-1343).

205. United acknowledges that at certain points Exhibit 44 uses the names of UHS-Pruitt and other UHS subsidiaries interchangeably, but contends that there are other places within the document that states that UHS-Pruitt does not provide care. At best this is contradictory and confusing as to exactly what UHS-Pruitt actually does.

206. Mr. Gill's acknowledgement that some of the language in the application and that sometimes the names "United" and "UHS-Pruitt" are used interchangeably in these documents could have been more precise is of no consequence to the agency reviewer who would have been looking at these documents. (Gill, Vol. 7, p. 1335, p. 1357). That there was no intent to mislead is not the point.

207. The representations, justifications, and rationalizations by Mr. Gill and other United witnesses does not change the fact that the application is replete with manifold acknowledgments of UHS-Pruitt's very deep involvement in the affairs of United in obtaining the CON as well as establishing the functioning entity of United. The statements are in plain understandable English and are not "lingo." The representations go beyond the bounds of a management arrangement.

208. United refers often to the management agreement between United and UHS-Pruitt which it contends addresses many of the problems herein. Such reliance is problematic. First and foremost there is no actual agreement in existence. The only agreement in evidence is at best a "sample."

209. In its Certificate of Need application to establish a home health agency in Wake County, United Home Care, Inc. was the only named applicant, just as it was in the Mecklenburg application. (Maxim Ex. 312, p. 7). As in the Mecklenburg application, United represented in the Wake application that it would enter into a management agreement with UHS-Pruitt. (Maxim Ex. 312, 314) The management agreement submitted with the Wake application is the same draft agreement submitted with the Mecklenburg application.

210. Janet Proctor has been the administrator of the Wake County agency since its opening in November of 2011. (United Ex. 160, p. 37; United Ex. 161, p. 36-39). Ms. Proctor testified that the agreement accurately reflects how her agency operates; however, she was not aware of any management agreement for the Wake County home health agency. (Proctor, Vol. 1 p. 151, United Ex. 161, p. 39).

211. Given that Ms. Proctor is the highest ranking management/executive employee at the United Wake County Office, her lack of knowledge regarding the management agreement is some evidence the agency is not going to execute the agreement. There is other evidence that the Wake agency does not adhere to the conditions within the management agreement, despite Ms. Proctor's contentions to the contrary.

212. There is no evidence to the contrary that the agreement was ever executed for Wake County. Once the CON is awarded, there is no sanction for not following through with a representation contained within the application.

213. United's Home Health 2013 Licensure Renewal Application also states that the United Wake County Agency has no management agreement. (Maxim Ex. 313, p. 5; United Ex. 161, p. 37).

214. Mr. Gill repeatedly referred to the management agreement as having been fully executed in the Mecklenburg application , which it has not. He ultimately concedes that it was never executed and could not since there was no one on staff for United with which to contract.

215. United wanted to use Neil Pruitt's name or the name of UHS-Pruitt because Pruitt is a well-known name in the healthcare industry; i.e., it was felt that using the Pruitt name would be of greater benefit in the application process and getting United off the ground than if Pruitt's association were not known.

216. The purported management agreement allows United to use the UHS-Pruitt name because of the name recognition. (Jt. Ex. 3, pp. 294-313; Jt. Ex. 2, Section 5.10, p. 312).

217. There are other examples in evidence of the involvement of UHS-Pruitt. Janet Proctor stated at the public hearing in support of the United Application that "It has been exciting to be a part of UHS-Pruitt Corporation in the development and operation of a new Certified Home Health Agency in North Carolina" (Jt. Ex. 1, p. 1275). (Emphasis Added).

218. United's Application also contains a listing of the corporate leadership that will be involved with the project. The corporate leadership team listed in the United Application is comprised only of UHS-Pruitt employees and does not include a single individual employed by United. (Jt. Ex. 3, p. 22)

219. The corporate leadership team listed in the application includes Ms. Rita Southworth. United Application represents that Ms. Southworth's role in the proposed project will be to "supervise the operational, clinical, sales, and billing components." The Application also represents that Ms. Southworth will be responsible for "maintaining customer relationships

and industry networks." (Jt. Ex. 3, p. 22). Based on these representations, Ms. Southworth would be ultimately responsible for the development and operations of the Mecklenburg County home health agency if it were approved. (Jt. Ex. 3, p. 22; United Ex. 160; p. 22; United Ex. 160, p. 24).

220. Ms. Southworth testified that UHS-Pruitt would be responsible for: (1) setting budgets for the home health agencies; (2) approving capital expenditures; (3) creating and approving any policies for the home health agencies including policies relating to the types of patients that will be admitted; (4) setting employee salaries and determining the benefits that will be offered and (5) paying all of the home health agencies bills. (Southworth, T. Vol. 5, pp. 869-70; United Ex. 160, pp. 33, 40-42). Ms. Southworth also confirmed that she will oversee the work of the administrator and that the administrator directly reports to her. (Southworth, T. Vol. 5, pp. 867, 872). There is no individual at United to whom the agency administrator will report.

221. As part of her role, Ms. Southworth approves all new policies, including policies regarding patient admissions. (Southworth, T. Vol. 5, p. 864). Ms. Southworth also has the authority to hire and fire the agency administrator. (*Id.* at 873; Proctor, T. Vol. 1, pp. 140-41, 146, 149; United Ex. 161, pp. 24-34).

222. Maxim's expert witnesses, David Meyer and Karin Sandlin, testified that they have been involved in previous CON reviews in which a management company was not named as an applicant. However, both Mr. Meyer and Ms. Sandlin testified they had never seen a management agreement which gave the management company the authority to fire the highest ranking executive of the company it manages. (Meyer, T. Vol. 9, p. 1647; Sandlin, T. Vol. 9, p. 1594). Mr. Gill, United's expert and an employee of UHS-Pruitt, was not sure if other management agreements provided management companies with this type of authority. (Gill, T. Vol. 7, p. 1244).

223. The exhibits attached to the United Application also show the extensive involvement that UHS-Pruitt will have in the development and offering of the proposed services. United included an exhibit in its application that purports to be UHS-Pruitt's "Client Policies and Procedures." (Jt. Ex. 3, App., Ex. 5, pp. 373-478). United included no exhibit regarding its Client Policies and Procedures. By including the Pruitt policies and procedures in its application, the reasonable inference is that United will use the policies and procedures of UHS-Pruitt.

224. United also included as one of its exhibits UHS-Pruitt's Performance Improvement Policy and Procedure Manual. There was no such policy included in the application that was authored by United. (Jt. Ex. 3, App. Ex. 7, pp. 373-478). The reasonable inference is that United will use that policy and procedure manual of UHS-Pruitt.

225. A job description for the Regional Home Care Administrator included in United's Application is titled "UHS-Pruitt Corporation" and describes United Home Care as merely a "division" of UHS Pruitt. (Jt. Ex. 3, App. Ex. 57, pp. 1342-1425). Similarly, United Application Exhibits, 23, 29, 44, 54 and 72 document UHS-Pruitt's involvement in the development of the home health agency.

226. The United Application also contains several representations showing that UHS-Pruitt holds itself out as capable of or having the means for the provision of health services. United's Application states: "[s]ustained evidence of UHS-Pruitt's ability to provide quality client care is documented by the American Health Care Association's National Quality Award Program for Nursing Facilities." (Jt. Ex. 3, p. 79)(Emphasis added).

227. The Application also represents that "[o]ver the years, UHS-Pruitt has made its workforce and its clients a priority. Its various programs and initiatives will help enhance the workforce in Mecklenburg County and ensure quality care to the home care clients in Mecklenburg County." (Jt. Ex. 3, p. 92).

228. The "2011 Quality Report" published by UHS Pruitt , an exhibit in United's Application, contains numerous representations that UHS-Pruitt will offer or is capable of offering health services." (Jt. Ex. 3, App. Ex. 44, pp. 939-75). The report begins by stating that UHS-Pruitt is a "leader in the delivery of post-acute care service" and represents that "throughout our [UHS-Pruitt's] history, our focus has been and always will be delivering quality health care. (*Id.* at p. 943) (Emphasis added). The 2011 Quality Report goes on to state that "[w]e [UHS-Pruitt] provide services that promote not only physical health, but mental and spiritual well-being as well; treating the whole person and not the symptom. (*Id.* p. 945) (Emphasis added). The quality report acknowledges that "it is a great responsibility to provide appropriate care and/or services to each one of our clients." (*Id*. at p. 947) (Emphasis added). This exhibit makes no mention of United.

229. Mr. Gill, himself an employee of UHS-Pruitt, testified that this exhibit was misleading and should have stated that United Home Care provides services, not UHS-Pruitt. (Gill, T. Vol. 7 pp. 1340-41). However, the numerous statements contained in Exhibit 44 can only be viewed on their face as representations that UHS-Pruitt holds itself out as offering health services which is included in the definition of "offer" under the CON statute. N.C. Gen. Stat. § 131E-176(18).

230. United Application Exhibit 32 also documents that UHS-Pruitt holds itself out as a provider of services. This exhibit, which is drafted by Richard Gephart, Senior Vice-President of Health Services at UHS-Pruitt, states "I understand that UHS-Pruitt Corporation has a reputation for providing quality healthcare services in North Carolina. (Jt. Ex. 3, App. Ex. 32, p. 873)(Emphasis added). Given Mr. Gephart's high ranking position at UHS-Pruitt, his statement is an admission by UHS-Pruitt that UHS-Pruitt considers itself to be an entity that provides healthcare services.

231. The draft management agreement in the United Application between United and UHS-Pruitt is titled "Health Care Provider Services Contract". (Jt. Ex. 3, App. Ex. 2, pp. 293-313). UHS-Pruitt argued during the hearing that this agreement documents that UHS-Pruitt will only serve in the capacity of a "management company" and as such will only provide "administrative support" services to United. (Proctor, T. Vol. 1, p. 111; Gill, T. Vol. 6, p. 1089).

232. United's testimony that UHS-Pruitt only provides "administrative support" services is contradicted by other credible evidence of the supervisory control and authority that

Ms. Southworth exercises over Ms. Proctor as the administrator of the United Wake County Home Health Agency.

233. The draft management agreement on its face provides UHS-Pruitt with extensive control over the agency. Under the agreement UHS-Pruitt has the authority to develop policies and procedures for the operation of the facility. (Jt. Ex. 3, App., Ex. 2, p 294 Section 1.1(a)). UHS-Pruitt pays all accounts payable of the home health agency. (*Id*. at 295, Section 1.1(a)). UHS-Pruitt also develops standards and procedures for admitting patients, for charging patients for services, and for collecting charges from patients. (*Id*.).

234. In addition, the draft management agreement specifically provides that United shall have no right to control the manner in which UHS-Pruitt's work is performed. (Jt. Ex. 3, App., Ex. 2, p. 307, Section 5.2). If this were an arms-length transaction between a CON applicant and a management company, the CON applicant, as the entity responsible for regulatory compliance, would have some control over the manner in which the management company's work is performed.

235. The testimony of UHS-Pruitt and United witnesses shows that the representations in the management agreement cannot be taken at face value because the control UHS-Pruitt exercises over the home health agencies within its system goes well beyond what is anticipated in the draft management agreement. As stated above, the draft agreement was never executed for the Wake County facility.

236. Based on the testimony United and UHS-Pruitt appear to ignore many of the provisions of the management agreement that require United to approve "recommendations" of UHS-Pruitt. Section 1.1(a) of the Agreement states that UHS-Pruitt will only recommend policies and that any recommended policies must be approved by United (Jt. Ex. 3, App. Ex. 2, p. 294). The testimony of Ms. Southworth and Ms. Proctor shows that UHS-Pruitt dictates policies to United and that any policy changes must be approved by UHS-Pruitt. (Proctor, T. Vol. 1, pp. 140-41; Southworth, T. Vol. 5, p. 868).

237. Section 1.1(b) also states that UHS-Pruitt must receive approval from United before it makes any personnel changes regarding the administrator. (Jt. Ex. 3, App. Ex. 2, p. 294). Ms. Southworth testified that the agency administrator is the highest executive level staff member employed by United. Thus the administrator would be responsible for approving any personnel changes involving her position. Ms. Southworth testified that she is responsible for the hiring and termination of agency administrators. (Southworth, T. Vol. 5, pp. 862-73). This expressly contradicts the management agreement.

238. The agreement contains numerous other provisions in which ultimate control should be vested with United. For example the agreement requires that United approve: (1) employee benefits; (2) capital expenditures; and (3) standards for admitting patients. The testimony shows that UHS-Pruitt approves and ultimately determines each of these aspects of agency operations. (Jt. Ex. 3, App. Ex. 2, pp. 294-95).

239. United's practice of ignoring the terms of the agreement is significant because the Agency reviewed and relied on the agreement in making its determination that UHS-Pruitt was not required to be a named applicant. (United Ex. 117; Frisone Aff., ¶ 7; Frisone, T. Vol. 2, p. 322).

240. The evidence also shows that it is doubtful that the management agreement submitted with the Mecklenburg County application would be executed or its terms implemented.

241. It is important that applicants not knowingly misrepr esent to the Agency the nature of their relationships with other parties in a CON application because the Agency relies on these representations.

242. It is also important that the correct applicants be named because the obligations of the CON statute such as Criterion 20, apply to the applicants. United's expert witness Aneel Gill, who supervises CON submissions for UHS-Pruitt, when asked by the Court if excluding UHS-Pruitt would result in there never being a situation where the applicant will have any sort of past history for having provided any bad services under Criterion 20 answered that such was the case – "they do not have a history." (Gill, T. Vol. 7, pp. 1355-56). This admission indicates that excluding UHS-Pruitt as a named applicant may have the effect of limiting the Agency's review of past quality.

The CON Section's Comparative Analysis

243. After reviewing each of the applications under the statutory and regulatory criteria, the Agency conducted a comparative analysis of the Applications to determine which proposal was a comparatively more effective alternative. The Agency used a total of fifteen comparative factors. (Jt. Ex. 1, pp. 2166-70). The Agency determined that the Applications of Maxim and Carolinas Health at Home were comparatively the most effective alternatives. (*Id.*).

244. One of the factors used by the Agency's comparative analysis was licensed practical nurse salary which did not apply to either Maxim or United; therefore, Maxim and United could only be compared on fourteen factors. (Jt. Ex. 1, p. 2168)

245. United contended the Agency should have found United's Application comparatively superior to Maxim's Application. United's expert testified that the Agency should have used additional and different factors than it choose to use in this review. (United Ex. 109).

246. In its review, the CON Section used factors that had been used in other home health agency reviews. Maxim's Application was comparatively superior to United's application in nine of the fourteen remaining factors used by the Agency. (Jt. Ex. 1, pp. 2160-70; Meyer, T. Vol. 9, pp. 1648-55). Thus United ranked higher on five factors.

247. Specifically, Maxim's application was superior to United in: (1) access to Medicaid recipients; (2) average number of visits per unduplicated patients; (3) average net revenue per unduplicated patients; (4) average total operating costs; (5) average direct care operating costs; (6) average administrative operating costs; (7) average direct care costs per visit as a percentage of average total operating cost per visit; (8) registered nurse salaries and (9) nursing aide salaries. (Jt. Ex. 1, pp. 2160-70).

248. The factors used in this review are almost identical to the three previous home health agency reviews, including a review in which United was awarded the CON. (Maxim Ex. 304; Meyer, T. Vol. 9, pp. 1649-50).

249. In deciding on the comparative factors to use in a CON review, the Agency chooses factors that are measurable, rather than subjective factors that are not measureable. (Meyer, T. Vol. 9, pp. 1651, 1658).

250. Each of the comparative factors used in this review relate to the CON objectives of access, value, and quality. (Jt. Ex. 1, pp. 2160-68; Meyer, T. Vol. 9, p. 1659-61).

251. Principally, United's argument concerning the factors wherein Maxim was found to be superior was a restatement of arguments in other criteria. For example, United argues that Maxim should not have been found superior because its projections were unreliable, the past billing fraud issue and the staffing issue.

252. United's expert witnesses, Trey Adams and Aneel Gill, testified that the CON Section should have used different comparative factors in its review of the applications, such as staffing levels and demonstration of need. (United Ex. 109). These are factors which United had already contended in other criteria that Maxim had been non-conforming. Some of the comparative factors that United's witnesses testified should have been used are more subjective and not measurable. (Meyer, T. Vol. 9, pp. 1655-58).

253. United's witnesses Mr. Adams and Mr. Gill testified that the Agency should not have compared RN and aide salaries but instead should have compared salaries combined with taxes and benefits for each of these positions. United could not point to any example of a comparative analysis in which the Agency combined salaries with taxes and benefits to conduct its comparative analysis. In previous Medicare-certified home health agency reviews, the Agency compared RN and aide salaries, just as it did in this review. (Jt. Ex. 1, pp.1623, 1707-08, 1772, 1832-33, 2022-23; Meyer T. Vol. 9, pp. 1652-53; Maxim Ex. 303).

254. United's experts testified that past quality of care should have been used as a comparative factor in this review. United had otherwise contended that Maxim was non-conforming because the fraud issue was a quality of care issue. Quality of care has only been used as a comparative factor in a 2005 review of Medicare-certified home health services when one of the applicants was found nonconforming with Criterion 20, which is not applicable here. (Meyer, T. Vol. 9, p. 1652; Frisone, Vol. 3, p. 457).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Undersigned Administrative Law Judge makes the following Conclusions of Law:

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.

2. The parties are properly before the Office of Administrative Hearings. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.

3. United timely filed its petition for contested case hearing pursuant to N.C. Gen. Stat. § 131E-188(a).

4. Maxim did not file a petition for contested case hearing challenging any aspect of the Agency's decision in this matter.

5. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in this matter as required by N.C. Gen. Stat. § 150B-23.

6. A court need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 449, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

7. The subject matter of this contested case is the Agency's decisions to disapprove the United Application and to approve the Maxim Application. N.C. Gen. Stat. § 131E-188(a) provides for administrative review of an Agency decision to issue, deny or withdraw a certificate of need. *Presbyterian Hospital v. N.C. Dep't of Health & Human Services*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). ("The subject matter of a contested case hearing by the ALJ [administrative law judge] is an agency decision.").

8. "The correctness, adequacy or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." 10A N.C.A.C. 14C .0402. This means that the CON Law and the SMFP cannot be challenged in this review.

9. Under N.C. Gen. Stat. § 131E-183(a), the Agency "shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued."

10. To obtain a CON for a proposed project, a CON application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an applicant fails to conform with

any one of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law. "[A]n application must comply with *all* review criteria." (emphasis in original). *Presbyterian-Orthopaedic Hospital v. N.C. Dep't of Human Res.*, 122 N.C. App. 529, 534-535, 470 S.E.2d 831, 834 (1996) "[A]n application must be found consistent with the statutory criteria before a Certificate of Need may be issued." *See Bio-Medical Applications of North Carolina, Inc. v. N.C. Dep't of Human Res.*, 136 N.C. App. 103, 109, 523 S.E.2d 677, 681 (1999).

11. The CON Section determines whether an application is consistent with or not in conflict with the review criteria set forth in N.C. Gen. Stat. § 131E-183 and any applicable standards, plans and criteria promulgated thereunder in effect at the time the review commences. *See* 10A N.C.A.C. 14C.0207.

12. An applicant may not amend an application. 10A N.C.A.C. 14C.0204.

13. Upon the Agency's decision to issue, deny or withdraw a certificate of need, pursuant to N.C. Gen. Stat. § 131E-188, any affected person is entitled to a contested case hearing. The statute also allows affected persons to intervene in a contested case hearing. *See* N.C. Gen. Stat. § 131E-188(a).

14. United asserted that the Agency erred in approving the Maxim Application and disapproving the United Application. United also asserted that the Agency erred in finding the Maxim Application comparatively superior to the United Application. Maxim did not appeal and did not assert in its discovery responses or in the testimony of any of its witnesses that the Agency erred in any aspect of its decision.

15. When challenging the CON Section's decision to approve a Certificate of Need application, a Petitioner must establish, by a preponderance of the evidence that: (1) the Agency's decision deprived Petitioner of property, ordered the Petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the Petitioner's right and (2) the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law. *Britthaven v. N.C. Dep't of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995); *see also* N.C.G.S. § 150B-23(a).

16. As the Petitioner, United had the burden of proving the facts required by N.C. Gen. Stat. §150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. §150B-29(a). Under N.C. Gen. Stat. §150B-34(a), "[A]n administrative law judge shall decide the case based upon a preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."

17. Petitioners bear the burden of proof on each and every element of their case. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006).

18. The Agency does not have a burden of proof in this contested case.

19. An ALJ is not limited to information that the CON Section actually reviewed or relied upon in making its decision regarding an application. *Dialysis Care of North Carolina, LLC v. N.C. Dept. of Health and Human Services*, 137 N.C. App. 638, 648, 529 S.E.2d 257, 262, *affirmed per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000). *See also In re Wake Kidney Clinic, PA.*, 85 N.C. App. 639, 643-644, 355 S.E.2d 788, 791 (1987). In determining these issues, the undersigned considered evidence that was presented or available to the Agency during the review period.

20. The appellate authorities do not preclude the consideration of evidence not available at the time of the review for impeachment purposes.

21. The administrative law judge may only set aside the initial agency decision if the petitioner proves, by the greater weight of the evidence, one of the stated grounds for overturning an agency decision. The administrative law judge may not overturn the initial agency decision because the judge might have made a different judgment if he or she had been the person making the initial agency decision. N.C. Gen. Stat. § 150B-23(a).

22. Administrative Agency decisions may be reversed as arbitrary and capricious only if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate any course of reasoning in the exercise of judgment." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (internal citation and quotations omitted). The "arbitrary and capricious" standard is a difficult one to meet. *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001).

AGENCY FINDINGS

Criterion (1) and Policy GEN-3

23. United's contentions as to how Maxim should have been found non-conforming in Criterion 1 and Policy Gen-3 principally rely upon staffing issues, omission of a specific position of nurse supervisor, and Maxim's past history of billing fraud.

24. Those issues are addressed elsewhere in the Conclusions of Law within this Final Decision.

25. Based upon the findings of fact and the further conclusions of law, the Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure; act arbitrarily or capriciously or fail to act as required by law or rule in determining that the Maxim application was conforming to Criterion 1 and Policy Gen-3.

26. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion (1) and Policy GEN-3.

Criterion 3

28. Criterion 3 requires that an applicant identify the population to be served by the proposed project and demonstrate the need this population has for the services proposed. N.C. Gen. Stat. § 131E-183(a)(3).

29. United failed to meet its burden of proving that the Agency erred in finding that Maxim's ramp up and market share projections were reasonable. Maxim's ramp up and market share are also in line with past ramp up and market share projections made by United in a previous application and its Year 2 market share is lower than the market share projected by United in this review.

30. The Agency did not err or otherwise violate any of the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's market share and utilization projections conformed with Criterion 3.

31. United's contention that Maxim should have provided documentation to support the anecdotal information it included in its application regarding the number of current Maxim patients it could serve if it had Medicare certification is without merit. There is no statutory or regulatory requirement that Maxim provide any anecdotal information in its application. There is also no statutory or regulatory requirement that required Maxim to provide supporting documentation to confirm anecdotal information provided in an application.

32. Maxim's utilization projections clearly and reasonably set forth the basis for its projections. United has not met its burden of showing that the anecdotal information provided in Maxim's application made it nonconforming with Criterion 3.

33. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule in determining that the Maxim Application was conforming with Criterion (3).

34. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion (3).

Criterion 4

35. Criterion (4), N.C. Gen. Stat. § 131E-183(a)(4), requires the applicant to demonstrate that it has selected the least costly or most effective alternative.

36. The Maxim Application is premised on the HHA's ability to become Medicare-certified and to receive Medicare funds. *See* Jt. Ex. 2, pp. 3; 10; 130.

37. An HHA must have either a Nurse Supervisor or Physician Supervisor to meet the Medicare CoPs. United contends that the evidence shows that Maxim's project does not include a Nurse Supervisor. Those issues are addressed elsewhere in the Conclusions of Law within this Final Decision.

38. Based upon the findings of fact and the further conclusions of law, the Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule in determining that the Maxim Application was conforming with Criterion (4).

39. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion (4).

Criterion 5

40. Criterion (5), N.C. Gen. Stat. § 131E-183(a)(5), requires the applicant to demonstrate the immediate and long-term financial feasibility of its project based upon reasonable projections of costs and charges.

41. The Agency has determined that under Criterion 5 an applicant must demonstrate that it will make a profit in the second project year in order for the project to be financially feasible.

42. It is undisputed that Maxim's projected Medicare revenue was overstated due to a mathematical error in its application. However, the fact that an applicant makes a mathematical error in its application standing alone is not a sufficient basis for determining that the applicant failed to conform with the statutory criteria.

43. The issue becomes whether or not the error is "material." In the context of Criterion 5, one must consider if the mathematical error results in the applicant not showing a profit in the second project year. The error must be such that the error results in the application failing to meet the standards of the statutory or regulatory criteria to be material in nature as applied in Criteria 5. Materiality is a relative term and subject to other standards for other criteria.

44. Maxim's error in its projected Medicare revenue was not material because Maxim's revenue projections show that it would be profitable in the second year of its project, notwithstanding this error. Similarly, United's error in overstating its utilization projections did not cause it to be nonconforming with any of the statutory criteria.

45. Ms. Frisone conceded that the Agency was aware of the overstatement of Medicare revenues in the Maxim Application because of competitive comments submitted. Frisone, Vol. 12, p. 2027; Jt. Ex. 1, pp. 938-939.

46. United's contention that Maxim will not be capable of receiving licensure because of the lack of a specified position of nurse supervisor and thus will be unable to receive Medicare reimbursement is not persuasive as discussed in the findings of fact and other conclusions of law.

47. The Agency did not violate the standards of N.C. Gen. Stat. § 150B-23(a) by finding that Maxim's project would be profitable in the second project year and was conforming with Criterion 5.

48. United also cannot demonstrate that it was substantially prejudiced by Maxim's error because regardless of this calculation error, Maxim's proposal demonstrates that it would be profitable in the second project year.

49. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule in determining that the Maxim Application was conforming with Criterion (5).

50. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion (5).

Criterion 7

51. Criterion 7 requires that an applicant show evidence of the availability of health manpower and management personnel. Criterion 7 does not require that an applicant propose specific staff positions in its application or that specific staff members dedicate a specific amount of time to managing the proposed service.

52. Criterion 7 does not require that an applicant propose a 1.0 FTE administrator. 10A NCAC 13J .1001(b) states that each licensed home care office must designate an individual to serve as the Agency director. Based on the requirements of this regulation, Maxim would not be permitted to have more than one administrator for its home care agency as United contended.

53. Criterion 7 does not require that an applicant propose a 1.0 FTE nurse supervisor. The Medicare Conditions of Participation and the licensure regulations require that a home health agency provide clinical supervision. Under the Medicare Condition of Participation, clinical supervision is not required to be a 1.0 FTE position and can be provided by a physician or registered nurse. 42 C.F.R. § 484.14(d)

54. Maxim's application adequately addresses the availability of clinical supervision and sets forth that clinical supervision will be provided by a Registered Nurse who must meet specific qualifications. Maxim's Application conforms with the Medicare Conditions of Participation and Licensure regulations requiring clinical supervision.

55. Criterion 7 does not require that an applicant identify a marketing staff member. The Medicare Conditions of Participation and the home care licensure rules do not require that agencies have a dedicated marketing staff person. Under Criterion 7, Maxim was not required to name a dedicated marketing person.

56. Criterion 7 does not require that an applicant propose a specific number of FTEs to provide administrative support to the agency. Under Criterion 7, administrative support can be provided both by agency staff and by corporate and regional level staff members. Maxim's proposed administrative support is conforming with the requirements with Criterion 7.

57. The Agency did not violate the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 7.

58. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or failed to act as required by law or rule in determining that the Maxim Application was conforming with Criterion 7.

59. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion 7.

Criterion 20

60. Criterion 20 specifically addresses quality of care in the past. Quality of care is also incorporated into Criterion 18 and Policy GEN-3. (N.C. Gen. Stat. §§ 131E-183(a)(1), (18a) and (20)). Quality of care is important in CON review. (McKillip, Vol. 3, p. 495).

61. United contends that Maxim should be found to be non-conforming on the issue of quality of care based on the past fraud. In assessing whether or not the past fraud should be considered by the Agency, the reviewers used an eighteen month "look-back" rule.

62. The practice of looking back eighteen months from the date of the Agency's decision to see if the applicant has had quality issues is not found in any statute or rule; it is simply a standard that has been being used by the Agency for a number of years. It has been so long standing that no one seems to know exactly when it came into use. The fact that the practice is long-standing does not make it compliant with general principles of statutory construction or with the North Carolina Administrative Procedure Act.

63. The eighteen month time period has no basis in law or rule. Ms. Frisone and Mr. McKillip both acknowledged that there is no statute or rule regarding the eighteen month look-back for assessing the quality of care provided by an applicant. Criterion 20 is "open-ended." (Frisone, Vol. 2, p. 329; McKillip, Vol. 4, p. 633) Mr. Smith acknowledged in his deposition that the Agency has discretion to look back longer or shorter than eighteen months. (Smith, Vol. 1, p. 192; United Ex. 156, pp. 25; 83).

64. What constitutes a "rule" is defined by the North Carolina Administrative Procedure Act in N.C. Gen. Stat. § 150B-2(8a) as:

"Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule.

65. The term does not include "[N]onbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule." Likewise, "rule" does not include "[S]tatements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; . . ."

66. Criterion (20) is a statute, N.C. Gen. Stat. § 131E-183(a)(20). The plain language of the statute contains no time period. " . . . [A] statute clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419-420, 451 S.E.2d 284, 289 (1994). Since Criterion 20 does not set any particular standard of time within which to "look-back" for prior poor quality of care, it is within the discretion of the Agency to determine an appropriate look-back period for Criterion (20) under the facts and circumstances of the particular case.

67. The Agency is empowered "to adopt rules pursuant to Chapter 150B of the General Statutes, to carry out the purposes and provisions of [the CON Law]," to "[d]efine, *by rule*, procedures for submission of periodic reports by persons or health service facilities subject to Agency review," and to "[i]mplement, *by rule*, criteria for project review." N.C. Gen. Stat. § 131E-177 (emphasis added).

68. Nevertheless, the Agency "has no power to promulgate rules and regulations which alter or add to the law which it was set up to administer or which have the effect of substantive law." *Hall v. Toreros, II, Inc.*, 176 N.C. App. 309, 319, 626 S.E.2d 861, 868 (2006).

69. The eighteen month look-back has been applied by the Agency as a "rule." It is not a properly promulgated rule, but rather an arbitrary time frame that has been in use by the Agency for quite some time. The "rule" is not "non-binding" as provided as an exception in the definition, but rather is applied uniformly as binding. Likewise it does not qualify as an exception because the staff of this agency is not "performing audits, investigations, or inspections."

70. Even if the past billing fraud were relevant to Criterion 20 and even if the eighteen month look-back is arbitrary and an un-promulgated rule, to consider the past billing fraud in this case, the Agency would have needed to look back more than 3 years. (Smith, T. Vol. 2, p. 289). The Agency had discretion to determine the length of time within which to look back.

71. The efforts undertaken by Maxim to address the fraud were available to the Agency during the review period. In light of the efforts of Maxim and the intervening amount of time, it would not have been reasonable under the facts of this case to have considered such fraud.

72. United contends that the DPA, CIA and federal, as well as the North Carolina state settlement agreement, were all in effect during the review period and therefore should have been considered. (United Ex. 102-103; 120-121). However, the existence of those documents during the review period is not the controlling test. The question is when, if at all, the lack of proper care would have taken place, not when the agreements were entered.

73. The Agency found that because Maxim had not experienced any adverse actions against its license for its Mecklenburg County home care agency for eighteen months preceding the date of the decision, Maxim was conforming with Criterion 20. (*Id.*, Jt. Ex. 1, p. 2145). Maxim had no penalties or licensure limitations imposed during the past eighteen months on any of its North Carolina licensed home care offices. (*Id.*; Jt. Ex. 2, p. 34).

74. The Agency did not violate the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 20.

75. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or failed to act as required by law or rule in determining that the Maxim Application was conforming with Criterion 20. The Agency relied upon the eighteen month look-back which is not a properly promulgated rule and thus is non-binding. The Agency had discretion to determine the length of the look-back and even a look back of two years in this case would not have produced a different result. A longer look back than two years would not have been reasonable under the facts and circumstances of this contested case.

76. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion 20.

Comparative Criteria

77. In a competitive review, the Agency may conduct a comparison of the applications to determine which applicant should be awarded the CON. *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 58, 625, S.E.2d 837, 845 (2006). There is no statute or rule which requires the Agency to utilize certain comparative factors. *Id.* The Agency has discretion to select comparative factors which it believes is appropriate for each particular review. *WakeMed v. N.C. Dep't of Health and Human Resources*, 750 S.E.2d 186, 196 (2012).

78. Because the Agency has the discretion to select the comparative factors that will be used in each review, Petitioners have the burden of demonstrating that the Agency acted arbitrarily and capriciously in the selection of the factors it uses to compare the applicants.

79. The comparative factors used by the Agency in this review were appropriate, measurable, and objective. These factors in no way were whimsical and the Agency did not fail to indicate any course of reasoning in choosing these factors. The CON Section had no obligation under the CON Statute to use the comparative factors suggested by United in its determination of which applicant proposed the comparatively superior project.

80. Petitioners failed to meet their burden of proving that the Agency was arbitrary or capricious in the selection of the comparative factors used to determine that Maxim's Application was comparatively superior.

81. The Agency did not err or otherwise violate the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's application was comparatively superior to United's Application.

UHS- Pruitt's Failure to Be Named as an Applicant

82. Under North Carolina's Certificate of Need law, a person that proposes to develop or offer a new institutional health service must apply for and receive a CON. (N.C. Gen. Stat. § 131E-178(a)).

83. The General Assembly, through the enactment of N.C. Gen. Stat. § 131E-178(a), determined that "no person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department." (Emphasis added). The CON Statute defines a person to include a corporation. *See* N.C. Gen. Stat. 131E-176(19).

84. A CON is valid only for the "defined scope, physical location and person named in the application." N.C. Gen. Stat. § 131E-181(a). Based on the plain language of the statute, if a corporation proposes to undertake activities that will result in the development or offering of a new institutional health service, it must first apply for and receive a CON.

85. The CON Statute provides the Agency with the authority to create the application form and to request information that it believes is required to determine conformity with the applicable statutory review criteria. N.C. Gen. Stat. § 131E-182(b). Consistent with its statutory authority, the CON Section has determined that proposed projects can have more than one applicant.

86. Likewise, in creating the Home Health CON Application Form, the Agency properly determined that under the CON Statute there can be more than one applicant. Section I, Question 1 of the CON application form asks the legal name of the applicant. The question further states in the plural that: "the applicants are the legal entities (i.e., persons or organizations) that will own the facility and any other persons who will offer, develop or incur an obligation for a capital expenditure for the proposed new institutional health service."

87. This question derives from N.C. Gen. Stat. §§ 131E-178(a) and (c) which state "[n]o person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department" and "[n]o person shall incur an obligation for a capital expenditure which is a new institutional health service without first obtaining a certificate of need from the Department." (Emphasis added)

88. Thus the statute and the application form make clear that more than one legal entity can be required to be named as an applicant in a CON review, and that an "applicant" includes any entity that will offer or develop the new institutional health service or one who will incur an obligation for a capital expenditure. The "applicant" is also the entity that will own the facility or will be issued a license to provide the health service at issue.

89. The CON statute defines "develop" as "undertake[ing] those activities which will result in the offering of institutional health service or incurring of a financial obligation in relation to the offering of such service." N.C. Gen. Stat. § 131E-176(7).

90. When used in connection with health services, the CON Statute defines "offer" to mean "that the person holds himself out as capable of providing, or as having the means for the provision of specified health services." N.C. Gen. Stat. § 131E-176(18).

91. In determining whether the necessary applicant(s) has been named, the CON Section has looked only at the entity that will obtain licensure and certification and does not analyze which entities are offering and developing the proposed health service. (Frisone, T. Vol. 3, pp. 467, 469).

92. The CON Section's interpretation of the law is not in keeping with the plain language of the statute which requires more than just who is getting the license and certification. (Frisone, T. Vol. 3, p. 469). In limiting its determination of the appropriate applicant(s) to only that entity or entities that will be the named licensee and certified to receive Medicare and Medicaid, the CON is failing to follow the requirement in the CON law that the entity or entities that will be offering or developing the new institutional health service must apply for the Certificate of Need. (Jt. Ex. 3, p. 7; N.C. Gen. Stat. § 131E-176(7) and (18) and § 131E-178(a)).

93. It is recognized by this Court that the model used by United has been used many times over many years without question. The model of setting up a corporation that will become the working entity although not staffing it in any regard until the CON is awarded would seem to make sense, in some regard. Conversely, it would not seem to make sense to fully staff a corporate entity which is contingent on the award of a CON before the CON is awarded. However, one must look to see who or what entity is actually going to do the work of offering or developing a new institutional health service or incurring an obligation for a capital expenditure.

94. The Agency simply cannot take on faith that the entity to be license and certified is the proper applicant. The Agency should not accept United as the proper applicant without testing to see who the proper applicant is. Inquiry must be made as to whether or not there are sufficient indicia within the application to call into question the proper applicant.

95. In the United application in this contested case there is sufficient evidence within the application wherein the Agency should have examined further what entity is offering or developing a new institutional health service or incurring an obligation for a capital expenditure.

96. UHS-Pruitt and United are each subsidiaries within the corporate structure of United Health Services, Inc. ("UHS"). UHS-Pruitt and United are two separate and distinct corporations, having been duly incorporated under existing law. (Jt. Ex. 3, pp. 283-292; United Ex. 176, ¶ 3; Affidavit of Aneel S. Gill). Neil Pruitt is the only individual associated with United in any regard. The mere fact that there is a corporate entity in existence does not in and of itself answer the underlying question.

97. In its Certificate of Need application to establish a home health agency in Wake County, United Home Care, Inc. was the only named applicant, just as it was in the Mecklenburg application. (Maxim Ex. 312, p. 7). As in the Mecklenburg application, United represented in the Wake application that it would enter into a management agreement with UHS-Pruitt.

(Maxim Ex. 312, 314) The management agreement submitted with the Wake application is the same draft agreement submitted with the Mecklenburg application.

98. Maxim presented evidence that many of the provisions in the purported United Management Agreement with UHS-Pruitt will not be followed. Instead, UHS-Pruitt Corporation dominates and controls the Medicare-certified home health agency in Wake County and intends to have the same dominion and control over the agency proposed for Mecklenburg County.

99. Even if the draft management agreement is executed and followed strictly, on its face the agreement provides UHS-Pruitt with extensive control over the agency. Under the agreement UHS-Pruitt has the authority to develop policies and procedures for the operation of the facility. (Jt. Ex. 3, App., Ex. 2, p 294 Section 1.1(a)). UHS-Pruitt pays all accounts payable of the home health agency. (*Id*. at 295, Section 1.1(a)). UHS-Pruitt also develops standards and procedures for admitting patients, for charging patients for services, and for collecting charges from patients. (*Id*.).

100. In addition, the draft management agreement specifically provides that United shall have no right to control the manner in which UHS-Pruitt's work is performed. (Jt. Ex. 3, App., Ex. 2, p. 307, Section 5.2). If this were an arms-length transaction between a CON applicant and a management company, the CON applicant, as the entity responsible for regulatory compliance, would have some control over the manner in which the management company's work is performed.

101. The testimony of UHS-Pruitt and United witnesses shows that the representations in the management agreement cannot be taken at face value because the control UHS-Pruitt exercises over the home health agencies within its system goes well beyond what is anticipated in the draft management agreement.

102. The agreement contains numerous other provisions in which ultimate control should be vested with United, but is not. For example the agreement requires that United approve: (1) employee benefits; (2) capital expenditures; and (3) standards for admitting patients. The testimony shows that UHS-Pruitt approves and ultimately determines each of these aspects of agency operations. (Jt. Ex. 3, App. Ex. 2, pp. 294-95).

103. The draft agreement submitted with the Wake County Application has never been executed for the Wake County facility.

104. United's practice of ignoring the terms of the agreement is significant because the Agency reviewed and relied on the agreement in making its determination that UHS-Pruitt was not required to be a named applicant. (United Ex. 117; Frisone Aff., ¶ 7; Frisone, T. Vol. 2, p. 322).

105. Based on a preponderance of the evidence, the management agreement included in the United Application did not accurately represent the authority and control that UHS-Pruitt would exercise over the proposed agency, even if it were to be fully executed. Therefore, although the agreement could be considered when determining whether UHS-Pruitt was required

to be an applicant in this proposed project, the "sample" agreement should be given very little weight, if any.

106. By including a management agreement in the Mecklenburg application that does not accurately represent the relationship between the parties, United and UHS-Pruitt Corporation have misrepresented their relationship.

107. United contends that UHS-Pruitt was not required to be an applicant because UHS-Pruitt was only a management company. There is no legal authority in either in the statute or applicable case law to support a position that a management company operating under a services agreement need not be named as an applicant. *See Hope – A Women's Cancer Center v. N.C. Department of Health and Human Services*., 203 N.C.App.276, 691 S.E.3d 421 (2010). Instead, the test under the statute is whether the activities provided by the management company constitute the development or offering of a proposed health service.

108. The evidence has clearly shown that UHS-Pruitt will have more of a relationship with United than just as a management company operating within the confines of a management agreement.

109. United's argument that all contractors, including CON attorneys and consultants, would be required to be an applicant under Maxim's interpretation of the CON Statute is not persuasive and has no basis in the law. The CON Statute has a very specific definition of "develop" and "offer" which clearly excludes contractors that do not have control of a project or hold themselves out as having the ability to provide the proposed health service.

110. North Carolina's CON statute provides that "No person shall incur an obligation for a capital expenditure which is a new institutional health service without first obtaining a certificate of need. . . ." N.C. Gen. Stat. § 131E-178(c). An "obligation for a capital expenditure" includes "[A]n enforceable contract, excepting contracts which are expressly contingent upon issuance of a certificate of need, is entered into by a person for the construction, acquisition, lease or financing of a capital asset; . . ." N.C. Gen. Stat. § 131E-178(c)(1)

111. N.C. Gen. Stat. § 131E-178(c) expressly recognizes "contracts which are expressly contingent upon issuance of a certificate of need." United is currently unstaffed since its staffing was contingent on the grant of the CON. There is no contract in effect between United and UHS-Pruitt, nor anyone else. The sample contract has not been followed and was never executed as part of the Wake application. The sample contract has little to no significant bearing on this application.

112. When there is a corporation created only for the potential outcome of a CON grant with no existing employees dominated by the corporate control of the funding entity and no enforceable contract between the parties exists, it follows that the parent corporation, not the shell, is the correct applicant. By its own evidence, UHS-Pruitt is in almost complete corporate control of United.

113. The legal doctrine of piercing the corporate veil does not apply to this case. The question before this court is not whether UHS-Pruitt should be liable for United's actions or whether United should not have been a named applicant. Instead, the question is whether UHS-Pruitt should have also been included as an applicant in this review. Therefore it is not necessary to pierce the corporate veil in order to determine under the CON Statute that UHS-Pruitt's involvement in the proposed project meets the definition of to offer and develop the proposed service.

114. Based on a preponderance of the evidence as contained in the Findings of Facts, UHS-Pruitt's involvement in the United's proposed project meets the statutory definition of "develop" under N.C. Gen. Stat. § 131E-176(7).

115. Based on a preponderance of the evidence as contained in the Findings of Fact, the United Application contains multiple representations where UHS-Pruitt holds itself out as capable of providing or having the means for the provision of specified health services.

116. Based on a preponderance of the evidence presented in this contested case, United's Application would not have been approvable because UHS-Pruitt was not named as an applicant as required under the CON law; however, Maxim did not appeal the Agency's decision.

117. By not having appealed, Maxim agreed with the Agency decision and agreed that the Agency had not erred. The substance of Maxim's argument has been addressed for a complete record. Inasmuch as the model and corporate structure used by United has been in use for quite some time by many CON applicant's, the Undersigned felt it appropriate to address the underlying issues in that this issue will likely be recurring.

118. The holding in this instant contested case is not to be interpreted to mean that the model used by United is per se a bad model, but merely that the Agency should look behind the representation to ascertain who the real applicant is.

119. Whether or not UHS-Pruitt should also have been an applicant in addition to United is not determinative, and is not the point of this instant holding. The primary point to be made is that the Agency should make a determination in CON applications as to who is the appropriate party to apply not based solely on who is going to receive a license or certification. The determination should be based on the statutory requirements, which was not done in this review; however, that is of no consequence since Maxim did not appeal the Agency decision in any regard thereby agreeing that the Agency did not err.

120. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule by not requiring UHS-Pruitt to be an applicant.

121. Maxim did not meet its burden to demonstrate that the Agency erred by not requiring UHS-Pruitt to be an applicant.

122. Because Maxim did not meet its burden to demonstrate that the Agency erred by not requiring UHS-Pruitt to be an applicant, the ALJ need not and does not reach the issue of

whether the Agency substantially prejudiced Maxim's rights by not requiring UHS-Pruitt to be an applicant.

123. Based on the foregoing, the Undersigned concludes that UHS-Pruitt did not need to be an applicant. The Agency did not err by not requiring UHS-Pruitt to be an applicant.

BASED UPON the foregoing Findings of Fact and Conclusions of the Law, the Undersigned makes the following:

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned enters the following Final Decision pursuant to N.C. Gen. Stat. § 150B-34 and N.C. Gen. Stat. § 131E-188, based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on the Findings of Fact and Conclusions of Law set forth above, the undersigned determines that Petitioner, United Home Care, Inc. d/b/a United Home Health, Inc. d/b/a United Home Health, failed to carry its burden of proof by the greater weight of the evidence. The CON Section's Decision to approve Maxim's Application and to deny United's Application is affirmed.

On the issue of whether UHS-Pruitt Corporation should have been a named applicant in the review at issue, Maxim has failed to carry its burden of proof by a preponderance of the evidence. Maxim failed to appeal the Agency decision thereby agreeing with the Agency decision, including who the proper parties were or should have been. UHS-Pruitt Corporation is not required to have been named as an applicant in the review at issue.

Based upon the holdings in this case, the Agency Decision is **AFFIRMED**.

NOTICE

Under the provisions of North Carolina General Statute § 131E-188(b): "Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision shall be taken within 30 days of the receipt of the written notice of final decision, and notice of appeal shall be filed with the Office of Administrative Hearings and served on the Department [North Carolina Department of Health and Human Services] and all other affected persons who were parties to the contested hearing."

Pursuant to N.C. Gen. Stat. § 131E-188(b1): "Before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court

of Appeals. The bond requirements of this subsection shall not apply to any appeal filed by the Department."

In conformity with the Office of Administrative Hearings' Rule 26 N.C.A.C. 03.012 and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

IT IS SO ORDERED.

This is the 5th day of June, 2014

Donald W. Overby
Administrative Law Judge