

# ***NORTH CAROLINA REGISTER***

**VOLUME 23 • ISSUE 16 • Pages 1555 - 1729**

**February 16, 2009**

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## **Contact List for Rulemaking Questions or Concerns**

For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

### **Rule Notices, Filings, Register, Deadlines, Copies of Proposed Rules, etc.**

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### **Legislative Process Concerning Rule-making**

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### **County and Municipality Government Questions or Notification**

NC Association of County Commissioners  
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**NORTH CAROLINA REGISTER**  
Publication Schedule for January 2009 – December 2009

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 <sup>th</sup> day from publication in the Register
23:13	01/02/09	12/08/08	01/17/09	03/03/09	03/20/09	05/01/09	05/2010	09/29/09
23:14	01/15/09	12/19/08	01/30/09	03/16/09	03/20/09	05/01/09	05/2010	10/12/09
23:15	02/02/09	01/09/09	02/17/09	04/03/09	04/20/09	06/01/09	05/2010	10/30/09
23:16	02/16/09	01/26/09	03/03/09	04/17/09	04/20/09	06/01/09	05/2010	11/13/09
23:17	03/02/09	02/09/09	03/17/09	05/01/09	05/20/09	07/01/09	05/2010	11/27/09
23:18	03/16/09	02/23/09	03/31/09	05/15/09	05/20/09	07/01/09	05/2010	12/11/09
23:19	04/01/09	03/11/09	04/16/09	06/01/09	06/22/09	08/01/09	05/2010	12/27/09
23:20	04/15/09	03/24/09	04/30/09	06/15/09	06/22/09	08/01/09	05/2010	01/10/10
23:21	05/01/09	04/09/09	05/16/09	06/30/09	07/20/09	09/01/09	05/2010	01/26/10
23:22	05/15/09	04/24/09	05/30/09	07/14/09	07/20/09	09/01/09	05/2010	02/09/10
23:23	06/01/09	05/08/09	06/16/09	07/31/09	08/20/09	10/01/09	05/2010	02/26/10
23:24	06/15/09	05/22/09	06/30/09	08/14/09	08/20/09	10/01/09	05/2010	03/12/10
24:01	07/01/09	06/10/09	07/16/09	08/31/09	09/21/09	11/01/09	05/2010	03/28/10
24:02	07/15/09	06/23/09	07/30/09	09/14/09	09/21/09	11/01/09	05/2010	04/11/10
24:03	08/03/09	07/13/09	08/18/09	10/02/09	10/20/09	12/01/09	05/2010	04/30/10
24:04	08/17/09	07/27/09	09/01/09	10/16/09	10/20/09	12/01/09	05/2010	05/14/10
24:05	09/01/09	08/11/09	09/16/09	11/02/09	11/20/09	01/01/10	05/2010	05/29/10
24:06	09/15/09	08/24/09	09/30/09	11/16/09	11/20/09	01/01/10	05/2010	06/12/10
24:07	10/01/09	09/10/09	10/16/09	11/30/09	12/21/09	02/01/10	05/2010	06/28/10
24:08	10/15/09	09/24/09	10/30/09	12/14/09	12/21/09	02/01/10	05/2010	07/12/10
24:09	11/02/09	10/12/09	11/17/09	01/02/10	01/20/10	03/01/10	05/2010	07/30/10
24:10	11/16/09	10/23/09	12/01/09	01/15/10	01/20/10	03/01/10	05/2010	08/13/10
24:11	12/01/09	11/05/09	12/16/09	02/01/10	02/22/10	04/01/10	05/2010	08/28/10
24:12	12/15/09	11/20/09	12/30/09	02/15/10	02/22/10	04/01/10	05/2010	09/11/10

## **EXPLANATION OF THE PUBLICATION SCHEDULE**

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

### **GENERAL**

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

**COMPUTING TIME:** In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

### **FILING DEADLINES**

**ISSUE DATE:** The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

**LAST DAY FOR FILING:** The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

### **NOTICE OF TEXT**

**EARLIEST DATE FOR PUBLIC HEARING:** The hearing date shall be at least 15 days after the date a notice of the hearing is published.

**END OF REQUIRED COMMENT PERIOD**  
An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

**DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION:** The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

**FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY:** This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

# State of North Carolina



BEVERLY EAVES PERDUE  
GOVERNOR

## EXECUTIVE ORDER NUMBER 1

### GOVERNOR'S TASK FORCE FOR THE DEVELOPMENT OF AN ENDOWMENT FOR POSITIVE GUBERNATORIAL CAMPAIGNS

**WHEREAS**, the current campaign finance system in North Carolina undermines voter confidence in our political system; and

**WHEREAS**, negative campaigns distort the policy ideas and vision of candidates for public office; and

**WHEREAS**, the current campaign finance system contributes to the electorate's perception of impropriety and mistrust in government;

**NOW, THEREFORE**, pursuant to the authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

#### Section 1. Establishment

- (a) The Governor's Task Force for the Development of an Endowment for Positive Gubernatorial Campaigns is hereby established. It will be composed of members appointed by the Governor including, but not limited to, citizens from the private sector, business, industry, and other professions of the State.
- (b) Thomas W. Lambeth of Winston-Salem shall serve as Chair of the Task Force.

#### Section 2. Duties

- (a) The Task Force shall meet upon the call of the Chair as directed by the Governor.
- (b) The Task Force shall have the following duties:
  - 1. To determine the steps necessary for the establishment of an endowment for positive gubernatorial campaigns. The Task Force is authorized to secure pledges

from philanthropists, businesses, philanthropic, and civic organizations to fund such an endowment, but the Task Force itself will receive no financial contributions from such pledges.

2. To identify and recommend an appropriate legal structure and/or organization through which pledges may be received.
3. Such other duties as may be assigned by the Governor.

Section 3. Administration

- (a) Heads of the State departments and agencies shall, to the extent permitted by law, provide to the Task Force such information as may be required by the Task Force in carrying out the purposes of this Order.
- (b) The Office of the Governor shall provide necessary professional, administrative, and staff support services to the Task Force.
- (c) No per diem allowance shall be paid to members of the Task Force. Members of the Task Force and staff may receive necessary travel and subsistence expenses in accordance with state law.

Section 4. Recommendations

Upon request, the Task Force shall provide recommendations to the Governor. The Task Force shall seek and encourage public comment to aid it in the development of the Endowment for Positive Gubernatorial Campaigns.

Section 5. Implementation and Duration

This Executive Order shall be effective immediately and shall remain in effect until rescinded.

**IN WITNESS WHEREOF**, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twelfth day of January in the year of our Lord two thousand and nine, and of the Independence of the United States of America the two hundred and thirty-third.



Beverly Eaves Perdue  
Governor

**ATTEST:**

Elaine F. Marshall  
Secretary of State



BEVERLY EAVES PERDUE  
GOVERNOR

EXECUTIVE ORDER NO 2

REFORMING DEPARTMENT OF TRANSPORTATION

**WHEREAS**, the State, through the Office of the Governor, has an obligation to assure that highway construction plans are developed and that projects are awarded based on professional standards designed to meet the needs of citizens and communities across the State fairly, efficiently and effectively; and

**WHEREAS**, the present process for developing plans and approving projects needs to be reformed in order to assure that plans are developed and projects are awarded based on professional standards and not other considerations.

**NOW, THEREFORE**, pursuant to the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED**,

Section 1. Board of Transportation Reform

The State Board of Transportation shall exercise the authority conferred on it by G.S. § 143B-350(g) to delegate to the Secretary the authority to approve highway construction projects and construction plans and to award highway construction contracts. The Board shall retain those duties prescribed to it under G.S. § 143B-350 and carry them out in accordance with a professional approval process to be established by the Secretary pursuant to Section 2 of this Order.

Section 2. Department of Transportation.

- (a) The Secretary of the Department of Transportation shall implement throughout the Department a professional approval process for all highway construction programs, highway construction contracts, highway construction projects, and plans for the construction of projects.
- (b) The Secretary will implement this professional approval process within 60 days of the signing of this Order.

Section 3. Strengthen Board of Transportation Ethics Policy

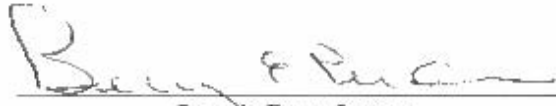
- (a) In addition to the disclosure requirements of G.S. § 143B-350 and the ethics provisions of G.S. § 143B-350, board members shall sign sworn statements that they will abide by the disclosure and ethics standards as set forth by law. Board members shall swear as part of these statements that they will follow the standards set forth by the State Government Ethics Act and attend any ethics education programs developed for the Board as set forth in G.S. § 143B-350(m).
- (b) Following the convening of each State Board of Transportation meeting and prior to the conduct of business, each board member shall sign a sworn statement that he or she has no financial, professional, or other interest in any project being considered on the meeting agenda. To the extent any board member has such an interest, the Chair and member shall take all appropriate steps to ensure the interest is properly evaluated and addressed under the law and that no member is permitted to act on any matter in which he or she has a disqualifying conflict of interest.
- (c) Failure of any member of the State Board of Transportation to comply with the standards of conduct established by G.S. § 143B-350, by other laws of this State, or by the terms of this Executive Order will constitute grounds for removal from office.

Section 4. Implementation and Duration

This Executive Order shall be effective immediately and shall remain in effect until rescinded.

**IN WITNESS WHEREOF**, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twelfth day of January in the year of our Lord two thousand and nine, and of the Independence of the United States of America the two hundred and thirty-third.



  
Beverly Eaves Perdue  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State

# State of North Carolina



BEVERLY EAVES PERDUE  
GOVERNOR

## EXECUTIVE ORDER NO. 3

### ON-SITE AND STATE-STAT PERFORMANCE MANAGEMENT AND ACCOUNTABILITY

**WHEREAS**, the citizens of North Carolina deserve excellent results from government programs and services; and

**WHEREAS**, the State should maximize efficiency and effectiveness when spending taxpayer dollars; and

**WHEREAS**, improving program and management performance requires commonly understood goals, clear measurement of the goals, and transparent reporting of progress; and

**WHEREAS**, G.S. §143B-10(h) requires departments to submit a plan of work that will serve as a base for development of budgets; and

**WHEREAS**, G.S. §143C requires the executive branch and grantees to report on program efficiency and effectiveness;

**NOW, THEREFORE**, pursuant to the authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**,

The State of North Carolina shall establish a comprehensive performance and budget system that incorporates performance management and accountability techniques that include strategic planning, improvement of management functions, and a formal program review and accountability program. This system shall be developed following a review of best practices in other states and may include, but not be limited to, the following:

#### Section 1. Strategic Planning

Each department shall develop a strategic planning process and continually update a strategic plan in compliance with guidance from the Office of State Budget and Management (OSBM) and the Governor's Policy Office. Departments shall submit their plans annually to OSBM and

the Governor's Policy Office. The plans shall include clear, concise, and focused statements of at least the following:

- (a) The mission of the department.
- (b) The goals of the department.
- (c) The strategies for achieving department goals.
- (d) Measures that demonstrate how well the goals are being achieved.
- (e) A description of the department strategic planning process.

Section 2. Performance Tracking of Management Functions

Departments shall improve the performance of their core management functions, including, but not limited to, the following:

- (a) Financial Management
- (b) Procurement
- (c) Information Technology Management
- (d) Capital Planning
- (e) Human Resources
- (f) Customer Service
- (g) Strategic Planning, Performance Management and Budgeting

OSBM, in consultation with the Governor's Policy Office, shall set measurable goals for these functions.

Section 3. Program Performance

For each division, program, or service area administered in whole or in part by the department, the department shall:

- 1. Establish annual and long-term goals that support the department's goals and are clear, concise, focused and defined by objectively measurable outcomes,
- 2. Measure progress toward achievement of their priorities,
- 3. Efficiently use resources in making that progress,
- 4. Specify action items for achieving goals and assign a responsible party for each item, including local partners, and
- 5. Assist the Governor, through OSBM, in making budget recommendations to the General Assembly that are supported by objective performance information.

Section 4. On-site Accountability and Site Visits

- (a) In addition to the other requirements of this Order, selected agency programs and services may be subject to more frequent reporting and review of their goals and measures. A process for measuring, evaluating, and publicizing the progress of selected agency programs and services may be established to:



1. Facilitate and accelerate the achievement of program goals,
  2. Improve coordination and progress towards cross-cutting state goals, and
  3. Identify and remedy management problems or inefficiencies.
- (b) These reviews will take place in accordance with guidelines established by OSBM. Reviews may occur both during unannounced inspections of state facilities and through regular performance reviews with agency heads.
- (c) Reviews of departments and programs will include unannounced on-site inspections conducted by the Governor and by staff of OSBM and/or the Governor's Policy Office. At such inspections, agencies should be prepared to brief the Governor and staff on their implementation of and compliance with this Order and their progress toward their measurable goals and priorities.

Section 5. Scope of Executive Order


The Board of Governors of the University of North Carolina System, the State Board of Community Colleges, State Board of Education, the Administrative Office of the Courts, and each of the heads of the Council of State agencies are encouraged and invited to participate in this Executive Order.

Section 6. Effect, Implementation and Duration

This Order supersedes any previously issued order on the subject matter contained herein, is effective immediately, and remains in effect until rescinded.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twelfth day of January in the year of our Lord two thousand and nine, and of the Independence of the United States of America the two hundred and thirty-third.



  
Beverly Eaves Perdue  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State

# State of North Carolina



BEVERLY EAVES PERDUE  
GOVERNOR

## EXECUTIVE ORDER NO. 4

### OPENBOOK GOVERNMENT FOR NORTH CAROLINA

**WHEREAS**, the public has the right to know how its tax dollars are being spent; and

**WHEREAS**, citizens should have the ability to access information about and account for State spending; and

**WHEREAS**, in the 21<sup>st</sup> Century, citizens should have ready access to information about government spending via the Internet;

**NOW, THEREFORE**, by authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

#### Section 1. Establishment of NC OpenBook

- (a) The Office of State Budget and Management (OSBM), with the support of Information Technology Services (ITS), is hereby directed to build and maintain a website to be called **NC OpenBook**; a single, searchable website on State spending for grants and contracts.
- (b) Cabinet secretaries shall immediately conduct a review of all State contracts and grants that are administered by their agencies.
- (c) All State institutions, departments, bureaus, agencies or commissions subject to the authority of the Governor that maintain a website shall be required to include an access link to the **NC OpenBook** website on the homepage of the agency website. Each agency shall also prominently display a search engine on the agency website homepage to allow for ease of searching for information, including contracts and grants, on the agency's website.

**Section 2. Contents of NC OpenBook**

- (a) The Office of State Controller (OSC), the Department of Administration (DOA), and ITS shall provide OSBM with the statewide information on state contracts necessary for the development and maintenance of the **NC OpenBook** website. They shall further ensure that this information is updated at least every 30 days.
- (b) OSBM shall work with the Office of the State Auditor and the Grant Information Center to incorporate data on grants into the **NC OpenBook** website. All State institutions, departments, bureaus, agencies or commissions subject to the authority of the Governor shall make necessary changes to existing reporting processes to OSBM, OSC, DOA, ITS, and other agencies for grants and contracts to ensure the goals of this Order are met.
- (c) All State contracts and grants awarded in amounts in excess of ten thousand dollars (\$10,000.00) shall be included in the **NC OpenBook** website and the following information shall be provided for each:
- The name of the entity receiving the award;
  - The amount of the award or estimated award;
  - Information on the award, including transaction type, funding agency, duration of contract or grant award;
  - The location of the entity receiving the award;
  - Background information on the entity receiving the award;
  - Timelines for anticipated completion of the work required;
  - Expected outcomes of the contract or grant and specific deliverables required; and
  - Contact information for the responsible state government officer or administrator of the contract or grant.

**Section 3. Implementation and Duration**

- (a) This Executive Order shall be effective immediately and shall remain in effect until rescinded.
- (b) The Order will first be implemented in the Department of Administration. Other agencies will be added to **NC OpenBook** thereafter. The website and data contained on it shall be continually updated.
- (c) All State institutions, departments, bureaus, agencies or commissions subject to the authority of the Governor are further directed to designate a staff person who will be the primary liaison tasked with ensuring that information on the **NC OpenBook** website is updated at least every 30 days.
- (d) The Board of Governors of the University of North Carolina System, the State Board of Community Colleges, State Board of Education, the Administrative Office of the Courts, and the heads of each of the Council of State agencies are encouraged and invited to participate in this Executive Order.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twelfth day of January in the year of our Lord two thousand and nine, and of the Independence of the United States of America the two hundred and thirty-third.



  
Beverly Faves Perdue  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State



BEVERLY EAVES PERDUE  
GOVERNOR

**EXECUTIVE ORDER NO. 5**

**ESTABLISHING THE NORTH CAROLINA BUDGET REFORM AND  
ACCOUNTABILITY COMMISSION (BRAC)**

**WHEREAS**, the citizens of the State of North Carolina deserve excellent results from government programs vital to the well-being of our people, our cities, and towns, and our economy; and

**WHEREAS**, such excellent results in delivering these programs and services are the State's obligation, regardless of the economic, environmental, or other broad external conditions; and

**WHEREAS**, we must transform the way North Carolina government delivers its services to remain healthy, growing, and vital.

**NOW, THEREFORE**, pursuant to the authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Establishment

- (a) The North Carolina Budget Reform and Advisory Commission is hereby established to help ensure that the services and programs provided by State government are meeting established public goals in the most effective, efficient and measured way; that the operations of State government are streamlined and improved to achieve cost savings without sacrificing core missions and services; and that policies and laws support these goals to keep North Carolina competitive economically, educationally, environmentally, culturally, and socially.
- (b) The Commission shall be composed of members appointed by the Governor, including, but not limited to, citizens from the private sector, local government, and academic sectors.
- (c) The State Budget Director and the Governor's Policy Director shall serve as non-voting ex officio members.

- (d) To the extent possible, the Commission shall include persons with expertise in one or more of the following areas: tax policy, education (both vocational and university), private business (both major corporation and small business), local government, health policy, economic development, and the environment.

Section 2. Officers

- (a) The Governor shall select the Chair and Vice Chair of the Commission.
- (b) The Chair shall preside at all meetings of the Commission; appoint any committee chairs; assist all committee chairs in the planning of any committee activities; supervise all committee chairs as to the management of committee plans; and serve as an ex officio member of all committees.
- (c) The Vice Chair shall assist the Chair and, in the absence of the Chair, perform those duties enumerated above. The Vice Chair shall accept special assignments from the Chair.

Section 3. Duties

The Commission shall advise the Governor on statewide goals and indicators, tax policy, measures that improve efficiencies, cost savings, and effectiveness of program functions and delivery of services, and other matters related to government performance and efficiency as determined by the Governor.

Section 4. Standing Committees

To assist the Commission in carrying out its duties and responsibilities, standing committees may be established. Committee chairs and members shall be appointed by the Commission Chair. Standing Committees may include, for example, committees on tax policy, program evaluation, and innovation and planning.

Section 5. Meetings

The Commission shall meet upon the call of the Chair as directed by the Governor.

Section 6. Commission Administration and Expenses

The Governor's Office of State Budget and Management and the Governor's Policy Office shall provide the necessary professional, administrative, and staff support services to the Commission. The Commission is authorized to accept funds and in-kind services from other state and federal entities to the extent allowed by the North Carolina State Budget Act. No per diem allowance shall be paid to members of the Commission. Members of the Commission and staff may receive necessary travel and subsistence expenses in accordance with State law.

Section 7. Implementation and Duration

This Executive Order shall be effective immediately and shall remain in effect until rescinded.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twelfth day of January in the year of our Lord two thousand and nine, and of the Independence of the United States of America the two hundred and thirty-third.



  
Beverly Hayes Perdue  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING  
NORTH CAROLINA BUILDING CODE COUNCIL

**Notice of Rule-making Proceedings** is hereby given by NC Building Code Council in accordance with G.S. 150B-21.5(d).

**Citation to Existing Rule Affected by this Rule-Making:** North Carolina Building, Electrical and Plumbing Codes.

**Authority for Rule-making:** G.S. 143-136; 143-138.

**Reason for Proposed Action:** To incorporate changes in the NC State Building Codes as a result of rulemaking petitions filed with the NC Building Code Council and to incorporate changes proposed by the Council.

**Public Hearing:** March 9, 2009, 1:00PM, NC Department of Insurance, First Floor Classroom, 322 Chapanoke Road, Raleigh, NC 27603

**Comment Procedures:** Written comments may be sent to Chris Noles, Secretary, NC Building Code Council, NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comment period expires on April 17, 2009.

**Statement of Subject Matter:**

**1. Request by Danny Hair, City of Raleigh, to amend the 2008 NC Electrical Code. The proposed amendment is as follows:**  
(Add an exception to section 338.10(A)(4)(a) of the 2008 NC Electrical Code)

**(4) Installation Methods for Branch Circuits and Feeders.**

(a) Interior Installations. In addition to the provisions of this article, Type SE service-entrance cable used for interior wiring shall comply with the installation requirements of Part II of Article 334.

Exception: Type SE service-entrance cable not installed within framing member with thermal insulation or areas that may be insulated in the future, shall not be required to comply with the 60 degree C ampacity limitation in section 334.80.

**2. Request by New Hanover County Code Enforcement, to amend the 2008 NC Electrical Code. The proposed amendment is as follows:**

**338.10 (B)(4)(a)**

Interior installations. In addition to the provisions of this article, Type SE service-entrance cable used for interior wiring shall comply with the installation requirements of Part II of Article 334, excluding 334.80.

**3. Request by Dan Tingen, Chair, to amend the 2008 NC Electrical Code. The proposed amendment is as follows:**

**210.12 Arc-Fault Circuit-Interrupter Protection. (AFCI)**

**(B) Dwelling Units:** All 125-volt, single phase, 15- and 20-ampere branch circuits supplying outlets installed in dwelling unit ~~family rooms, dining rooms, living rooms, parlors, libraries, dens, bedrooms, sunrooms, recreation rooms, closets, hallways, or similar rooms or areas~~ shall be protected by a listed arc-fault circuit interrupter, combination-type installed to provide protection of the branch circuit.

**4. Request by Al Bass, on behalf of the Plumbing Ad-Hoc Committee, to amend the 2009 NC Plumbing Code. The proposed amendment is as follows:**

**901.2.1 Venting required.** Every trap and trapped fixture shall be vented in accordance with one of the venting methods specified in this chapter. All fixtures discharging downstream from a water closet shall be individually vented except as provided in Section 911.

**5. Request by Al Bass, on behalf of the Plumbing Ad-Hoc Committee, to amend the 2009 NC Plumbing Code. The proposed amendment is as follows:**

**DELETE: SECTION C103**

**SUBSURFACE LANDSCAPE IRRIGATION SYSTEMS**

**DELETE: FIGURE 1**

**GRAY WATER RECYCLING SYSTEM FOR SUBSURFACE LANDSCAPE IRRIGATION**



**Note from the Codifier:** The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.

Statutory reference: G.S. 150B-21.2.

**TITLE 12 – DEPARTMENT OF JUSTICE**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Alarm Systems Licensing Board intends to amend the rule cited as 12 NCAC 11 .0206.*

**Proposed Effective Date:** July 1, 2009

**Public Hearing:**

**Date:** March 15, 2009

**Time:** 1:00 p.m.

**Location:** Bailey & Dixon, Conference Room, Suite 2500, 434 Fayetteville Street, Raleigh, NC 27601

**Reason for Proposed Action:** *The Board currently requires by rule that all licensees maintain a copy of the current quarterly Employment Security Commission reports. The Board is proposing that it be granted the authority to access electronically the Employment Security Commission reports via the internet.*

**Procedure by which a person can object to the agency on a proposed rule:** *Comments or objections should be submitted on or before the end of the comment period and in writing to the N.C. Alarm Systems Licensing Board, c/o Director Terry Wright, 1631 Midtown Place, Suite 104, Raleigh, NC 27609.*

**Comments may be submitted to:** Terry Wright, 1631 Midtown Place, Suite 104, Raleigh, NC 27609

**Comment period ends:** May 10, 2009

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal Impact:**

☐ State

☐ Local  
☐ Substantive (≥\$3,000,000)  
☒ None

**CHAPTER 11 - NORTH CAROLINA ALARM SYSTEMS  
LICENSING BOARD**

**SECTION .0200 - PROVISIONS FOR LICENSEES**

**12 NCAC 11 .0206 RECORDS INSPECTION**

(a) Records of a licensee maintained to satisfy the requirements of G.S. Chapter 74D or 12 NCAC Chapter 11 shall be subject to inspection by the ~~administrator~~ Director or his staff upon demand between 8:00 a.m. and 5:00 p.m. Monday through Friday.

(b) All licensees having registered employees shall submit a copy of their current quarterly Employment Security Commission NCUI 101-625 to the ~~administrator's~~ Director's office at the same time the form is submitted to the Employment Security Commission; and an additional list of non-Employment Security Commission employees currently employed by the licensee with the dates of employment. In lieu of submitting copies of the quarterly reports, the Board may request, and the licensee shall provide within 10 days of the request, the businesses' Employment Security Commission account number along with the personal identification number (PIN) so that the Board may access the data electronically. Those licensees who do not submit an Employment Security Commission NCUI 101-625 shall submit the names of their employees on a form provided by the Board. The licensee of a firm, association, or corporation that license a department or division shall also submit additional documentation as required by Paragraph (c) of this Rule.

(c) If a department or division of a firm, association, or corporation is licensed, then the licensee must submit a list of all employees who work with the department or division to the Board prior to the issuance of the license. This list must specifically indicate the employees that work with the department or division and are listed on the report required in Paragraph (b) of this Rule. If the department or division hires a new employee, the licensee must report the hiring within 5 days of employment.

(d) All records required to be kept by either Chapter 74D of the General Statutes of North Carolina or by 12 NCAC 11 shall be retained for at least three years. If the licensee is unable to produce records as required by this Subpart, the licensee shall give the Board it's Employment Security Commission account number along with the personal identification number (PIN) so that the Board may access the data electronically.

Authority G.S. 74D-5.

☐ Substantive (≥\$3,000,000)  
☒ None

**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND  
NATURAL RESOURCES**

**CHAPTER 07 - COASTAL MANAGEMENT**

**SUBCHAPTER 07B – CAMA LAND USE PLANNING**

**SECTION .0900 – CAMA LAND USE PLAN  
AMENDMENTS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to amend the rules cited as 15A NCAC 07B .0901; 07H .0309.*

**Proposed Effective Date:** July 1, 2009

**Public Hearing:**

**Date:** April 29, 2009

**Time:** 5:00 p.m.

**Location:** Sea Trail Golf Resort and Convention Center, 211 Clubhouse Road, Sunset Beach, NC 28468

**Reason for Proposed Action:**

**15A NCAC 07B .0901** – The Coastal Resources Commission (CRC) is proceeding with rule making in order to clarify its administrative rule governing CAMA Land Use Plan Amendments.

**15A NCAC 07H .0309** – The CRC is proceeding with rule making in order to make changes to its administrative rules governing development exceptions in the ocean hazard areas under its jurisdiction.

**Procedure by which a person can object to the agency on a proposed rule:** Objections may be filed in writing and addressed to the Director, NC Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557.

**Comments may be submitted to:** Jim Gregson, 400 Commerce Avenue, Morehead City, NC 28557, phone (252) 808-2808, fax (252) 247-3330

**Comment period ends:** May 15, 2009

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal Impact:**

☐ State  
☐ Local

**15A NCAC 07B .0901 CAMA LAND USE PLAN  
AMENDMENTS**

(a) Normal Amendment Process:

(1) The CAMA Land Use Plan may be amended and only the amended portions submitted for ~~CRC~~ CRC certification. If the local government amends half or more of the policies of the CAMA Land Use Plan, a new locally adopted plan shall be submitted to the CRC.

(A) Local public hearing and notice requirements shall be in the same manner as provided in 15A NCAC 07B .0801(a).

(B) Except for Land Use Plans that were certified prior to August 1, 2002, amendments and changes to the Local Land Use Plan shall be consistent with other required elements for the local land use plan per the requirements of Rule .0702 of this Subchapter.

(2) The local government proposing an amendment to its CAMA Land Use Plan shall provide to the Executive Secretary of the CRC or her/his designee written notice of the public hearing, a copy of the proposed amendment (including text and maps as applicable), and the reasons for the amendment no less than ~~30~~ five business days prior to publication of the public hearing notice. After the public hearing, the local government shall provide the Executive Secretary or her/his designee with a copy of the locally adopted amendment no earlier than 45 days and no later than 30 days prior to the next CRC meeting for CRC certification. If the local government fails to submit the requested documents as specified above and the resolution provided in Subparagraph (5) of this Paragraph, to the Executive Secretary within the specified timeframe, the local government shall be able to resubmit the documents within the specified timeframe for consideration at the following CRC meeting.

(3) For joint plans, originally adopted by each participating jurisdiction, each government shall retain its sole and independent authority

to make amendments to the plan as it affects their jurisdiction.

- (4) CRC review and action on CAMA Land Use Plan amendments shall be in the same manner as provided in 15A NCAC 07B .0802 (b), (c), (d) and (e), except amendments to Land Use Plans which were certified prior to August 1, 2002 are exempt from subsection .0802(c)(3)(D).

- (5) The local resolution of adoption shall include findings which demonstrate that amendments to policy statements or to the Future Land Use Plan Map (FLUP) have been evaluated for their consistency with other existing policies.

(b) Delegation of CRC Certification of Amendments to the Executive Secretary:

- (1) A local government that desires to have the Executive Secretary instead of the CRC certify a CAMA Land Use Plan amendment shall first meet the requirements in Subparagraphs (a)(1) through ~~(3)~~ (5) of this Rule and the following criteria defined in Parts (b)(1)(A) through (D) of this Rule. The local government may then request the Executive Secretary to certify the amendment. The Executive Secretary shall make a determination that all criteria have been met, and mail notification to the local government and CRC members, no later than two weeks after receipt of the request for certification. The CRC's delegation to the Executive Secretary of the authority to certify proposed amendments is limited to amendments that meet the following criteria:

- (A) Minor changes in policy statements or objectives for the purpose of clarification of intent; or
- (B) Modification of any map that does not impose new land use categories in areas least suitable for development as shown on the Land Suitability Map; or
- (C) New data compilations and associated statistical adjustments that do not suggest policy revisions; or
- (D) More detailed identification of existing land uses or additional maps of existing or natural conditions that do not affect any policies in the CAMA Land Use Plan.

- (2) If the Executive Secretary certifies the amendment, the amendment shall become final upon certification of the Executive Secretary, and is not subject to further CRC review described in 15A NCAC 07B .0802 (Presentation to CRC for Certification).

- (3) If the Executive Secretary denies certification of the amendment, the local government shall submit its amendment for review by the CRC in accordance with the regular plan

certification process in 15A NCAC 07B .0802 (Presentation to CRC for Certification).

- (c) Any amendments to the text or maps of the CAMA Land Use Plan shall be incorporated in context in all available copies of the plan and shall be dated to indicate the dates of local adoption and CRC certification. The amended ~~P~~-CAMA Land Use Plan shall be maintained as required by G.S. 113A-110(g).

- (d) Within 90 days after certification of a CAMA Land Use Plan amendment, the local government shall provide one copy of the amendment to each jurisdiction with which it shares a common border, and to the regional planning entity.

- (e) A local government that receives Sustainable Community funding from the Department pursuant to 15A NCAC 07L shall formulate and submit to the CRC for certification a CAMA Land Use Plan Addendum during its first year as a Sustainable Community, and if new planning rules have been adopted by the CRC, shall update the CAMA Land Use Plan within six years of adoption of these new planning rules.

*Authority G.S. 113A-107(a); 113A-110; 113A-124.*

## **SUBCHAPTER 07H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN**

### **SECTION .0300 - OCEAN HAZARD AREAS**

#### **15A NCAC 07H .0309 USE STANDARDS FOR OCEAN HAZARD AREAS: EXCEPTIONS**

(a) The following types of development shall be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of the Subchapter if all other provisions of this Subchapter and other state and local regulations are met:

- (1) campsites;
- (2) driveways and parking areas with clay, packed sand or gravel;
- (3) elevated decks not exceeding a footprint of 500 square feet;
- (4) beach accessways consistent with Rule .0308(c) of this Subchapter;
- (5) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;
- (6) uninhabitable, single-story storage sheds with a foundation or floor consisting of wood, clay, packed sand or gravel, and a footprint of 200 square feet or less;
- (7) temporary amusement stands;
- (8) sand fences; and
- (9) swimming pools.

In all cases, this development shall be permitted only if it is landward of the vegetation ~~line~~; line or static vegetation line, whichever is applicable; involves no alteration or removal of primary or frontal dunes which would compromise the integrity of the dune as a protective landform or the dune vegetation; has overwalks to protect any existing dunes; is not essential to the continued existence or use of an associated principal development; is not required to satisfy minimum requirements of local zoning, subdivision or health regulations; and meets all other non-setback requirements of this Subchapter.

(b) Where application of the oceanfront setback requirements of Rule .0306(a) of this Subchapter would preclude placement of permanent substantial structures on lots existing as of June 1, 1979, ~~single family residential structures—buildings~~ shall be permitted seaward of the applicable setback line in ocean erodible areas, but not inlet hazard areas or unvegetated beach areas, if each of the following conditions are met:

- (1) The development is set back from the ocean the maximum feasible distance possible on the existing lot and the development is designed to minimize encroachment into the setback area;
- (2) The development is at least 60 feet landward of the ~~vegetation line~~ line or static vegetation line, whichever is applicable;
- (3) The development is not located on or in front of a frontal dune, but is entirely behind the landward toe of the frontal dune;
- (4) The development incorporates each of the following design standards, which are in addition to those required by Rule .0308(d) of this Subchapter.

(A) All pilings shall have a tip penetration that extends to at least four feet below mean sea level;

(B) The footprint of the structure shall be no more than 1,000 square ~~feet or 40 percent of the lot size, whichever is greater,—feet, and the total floor area of the structure shall be no more than 2,000 square feet.~~ For the purpose of this Section, roof-covered decks and porches that are structurally attached shall be included in the calculation of footprint;

(C) Driveways and parking areas shall be constructed of clay, packed sand or gravel except in those cases where the development does not abut the ocean and is located landward of a paved public street or highway currently in use. In those cases concrete, asphalt or turfstone may also be used.

(D) No portion of a building's total floor area, including elevated portions that are cantilevered, knee braced or otherwise extended beyond the support of pilings or footings, may extend oceanward of the total floor area of the landward-most adjacent building. When the geometry or orientation of a lot precludes the placement of a building in line with the landward most adjacent structure of similar use, an average line of construction shall be determined by the Division of Coastal Management on a case-by-case basis in order to determine an ocean hazard setback that is landward of the vegetation

line, static vegetation line or measurement line, whichever is applicable, a distance no less than 30 times the shoreline erosion rate or 60 feet, whichever is greater; and

(E) Development setbacks shall be calculated from the shoreline erosion rate in place at the time of permit issuance.

(5) All other provisions of this Subchapter and other state and local regulations are met. If the development is to be serviced by an on-site waste disposal system, a copy of a valid permit for such a system shall be submitted as part of the CAMA permit application.

(c) Reconfiguration of lots and projects that have a grandfather status under Paragraph (b) of this Rule shall be allowed provided that the following conditions are met:

- (1) Development is setback from the first line of stable natural vegetation a distance no less than that required by the applicable exception;
- (2) Reconfiguration shall not result in an increase in the number of buildable lots within the Ocean Hazard AEC or have other adverse environmental consequences; and
- (3) Development on lots qualifying for the exception in Paragraph (b) of this Rule shall meet the requirements of Paragraphs (1) through (5) of that Paragraph.

For the purposes of this Rule, an existing lot is a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership. The footprint is defined as the greatest exterior dimensions of the structure, including covered decks, porches, and stairways, when extended to ground level.

(d) The following types of water dependent development shall be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of this Section if all other provisions of this Subchapter and other state and local regulations are met:

- (1) ~~piers providing public access (excluding any pier house, office, or other enclosed areas); and access; and~~
- (2) maintenance and replacement of existing state-owned bridges and causeways and accessways to such bridges.

~~(e) Where application of the oceanfront setback requirements of Rule .0306(a) of this Section would preclude replacement of a pier house associated with an existing ocean pier, replacement of the Replacement or construction of a pier house associated with an ocean pier shall be permitted if each of the following conditions are is met:~~

- (1) ~~The associated—ocean pier provides public access for fishing or—and other recreational purposes whether on a commercial, public, or nonprofit basis;~~
- (2) ~~The pier house is set back from the ocean the maximum feasible distance while maintaining existing parking and sewage treatment~~

~~facilities and is designed to reduce encroachment into the setback area; Commercial, non-water dependent uses of the ocean pier and associated pier house shall be limited to restaurants and retail services. Residential uses, lodging, and parking areas shall be prohibited;~~

- (3) The pier house shall ~~not be enlarged beyond its original dimensions as of January 1, 1996; be limited to a maximum of two stories;~~
- (4) A new pier house shall not exceed a footprint of 5,000 square feet and shall be located landward of mean high water;
- (5) A replacement pier house may be rebuilt not to exceed its most recent footprint or a footprint of 5,000 square feet, whichever is larger;
- ~~(4)(6)~~ The pier house shall be rebuilt to comply with all other provisions of this Subchapter; and
- ~~(5)(7)~~ If the ~~associated~~ pier has been destroyed or rendered unusable, replacement or expansion of the associated pier house shall be permitted only if the pier is ~~also~~ being replaced and returned to its original function.

(f) In addition to the development authorized under Paragraph (d) of this Rule, small scale, non-essential development that does not induce further growth in the Ocean Hazard Area, such as the construction of single family piers and small scale erosion control measures that do not interfere with natural ~~ocean front~~ oceanfront processes, shall be permitted on those non-oceanfront portions of shoreline that exhibit features characteristic of an Estuarine Shoreline. Such features include the presence of wetland vegetation, and lower wave energy and ~~lower~~ erosion rates than in the adjoining Ocean Erodible Area. Such development shall be permitted under the standards set out in Rule .0208 of this Subchapter. For the purpose of this Rule, small scale is defined as those projects which are eligible for authorization under 15A NCAC 07H .1100, .1200 and 07K .0203.

*Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(6)a; 113A-113(b)(6)b; 113A-113(b)(6)d; 113A-124.*

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to amend the rule cited as 15A NCAC 07H .0205 with changes from the proposed text noticed in the Register, Volume 23, Issue 03, pages 201-202.*

**Proposed Effective Date:** July 1, 2009

**Public Hearing:**

**Date:** April 29, 2009

**Time:** 5:00 p.m.

**Location:** Sea Trail Golf Resort and Convention Center, 211 Clubhouse Road, Sunset Beach, NC 28468

**Reason for Proposed Action:** *The CRC is continuing with rule making in order to amend its administrative rule that governs coastal wetlands. The CRC previously published proposed changes to this rule in the 23:03 issue of the NC Register which*

*included notice of a public hearing which was held on September 24, 2008 as well as a comment period and received a number of comments from interested parties. The CRC is proposing additional changes based on those comments.*

**Procedure by which a person can object to the agency on a proposed rule:** *Objections may be filed in writing and addressed to the Director, NC Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557.*

**Written comments may be submitted to:** *Jim Gregson, 400 Commerce Avenue, Morehead City, NC 28557, phone (252) 808-2808, fax (252) 247-3330*

**Comment period ends:** May 15, 2009

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal Impact:**

- ☐ State
- ☐ Local
- ☐ Substantive ( $\geq \$3,000,000$ )
- ☒ None

**CHAPTER 07 - COASTAL MANAGEMENT**

**SUBCHAPTER 07H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN**

**SECTION .0200 – THE ESTUARINE AND OCEAN SYSTEMS**

**15A NCAC 07H .0205 COASTAL WETLANDS**

(a) Description. Coastal wetlands are defined as any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tide waters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Coastal wetlands contain ~~some, but not necessarily all, any~~ of the following marsh plant species:

- (1) Cord Grass (*Spartina alterniflora*),
- (2) Black Needlerush (*Juncus roemerianus*),
- (3) Glasswort (*Salicornia* spp.),
- (4) Salt Grass (*Distichlis spicata*),
- (5) Sea Lavender (*Limonium* spp.),

- (6) Bulrush (*Scirpus* spp.),
- (7) Saw Grass (*Cladium jamaicense*),
- (8) Cat-tail (*Typha* spp.),
- (9) Salt Meadow Grass (*Spartina patens*),
- (10) Salt Reed Grass (*Spartina cynosuroides*).

The coastal wetlands AEC includes any contiguous lands designated by the Secretary of ~~ENR-DENR~~ pursuant to G.S. 113-230 (a).

(b) Significance. The unique productivity of the estuarine and ocean system is supported by detritus (decayed plant material) and nutrients that are exported from the coastal marshlands. The amount of exportation and degree of importance appears to be variable from marsh to marsh, depending primarily upon its frequency of inundation and inherent characteristics of the various plant species. Without the marsh, the high productivity levels and complex food chains typically found in the estuaries could not be maintained.

Man harvests various aspects of this productivity when he fishes, hunts, and gathers shellfish from the estuary. Estuarine dependent species of fish and shellfish such as menhaden, shrimp, flounder, oysters, and crabs currently make up over 90 percent of the total value of North Carolina's commercial catch. The marshlands, therefore, support an enormous amount of commercial and recreational businesses along the seacoast.

The roots, rhizomes, stems, and seeds of coastal wetlands act as good quality waterfowl and wildlife feeding and nesting materials. In addition, coastal wetlands serve as the first line of defense in retarding estuarine shoreline erosion. The plant stems and leaves tend to dissipate wave action, while the vast network of roots and rhizomes resists soil erosion. In this way, the coastal wetlands serve as barriers against flood damage and control erosion between the estuary and the uplands.

Marshlands also act as nutrient and sediment traps by slowing the water which flows over them and causing suspended organic and inorganic particles to settle out. In this manner, the nutrient storehouse is maintained, and sediment harmful to marine organisms is removed. Also, pollutants and excessive nutrients are absorbed by the marsh plants, thus providing an inexpensive water treatment service.

(c) Management Objective. To conserve and manage coastal wetlands so as to safeguard and perpetuate their biological, social, economic and aesthetic values; to coordinate and establish a management system capable of conserving and utilizing coastal wetlands as a natural resource essential to the functioning of the entire estuarine system.

(d) Use Standards. Suitable land uses ~~shall be~~ are those consistent with the management objective in this Rule. Highest priority of use ~~shall be~~ is allocated to the conservation of existing coastal wetlands. Second priority of coastal wetland use ~~shall be~~ is given to those types of development activities that require water access and cannot function elsewhere.

~~Unacceptable Examples of unacceptable land uses may include, but would not be limited to, the following examples: restaurants and businesses; residences, apartments, motels, hotels, and trailer parks; parking lots and private roads and highways; and factories.~~ include: restaurants, businesses, residences, apartments, motels, hotels, trailer parks, parking lots, private roads, highways and factories. Examples of acceptable land uses ~~may~~ include utility easements, fishing piers, docks, wildlife

habitat management activities, and agricultural uses, such as farming and forestry drainage, drainage as permitted under North Carolina's Dredge and Fill Act-Law or other applicable laws.

In every instance, the particular location, use, and design characteristics shall be in accord with the general use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

(e) Alteration of Coastal Wetlands. Alteration of coastal wetlands includes mowing or cutting of coastal wetlands vegetation whether by mechanized equipment or manual means. Alteration of coastal wetlands by federal or state resource management agencies as a part of planned resource management activities is exempt from the requirements of this Subsection. Mowing or cutting of coastal wetlands by academic institutions associated with research efforts shall be allowed subject to approval from the Division of Coastal Management. Alteration of coastal wetlands is governed according to the following provisions:

- (1) Alteration of coastal wetlands is exempt from the permit requirements of the Coastal Area Management Act (CAMA) when conducted in accordance with the following criteria:
  - (A) Coastal wetlands may be mowed or cut to a height of no less than two feet, as measured from the coastal wetland substrate, at any time and at any frequency throughout the year;
  - (B) Coastal wetlands may be mowed or cut to a height of no less than six inches, as measured from the coastal wetland substrate, once between each December 1 and March 31;
  - (C) Alteration of the substrate is not allowed;
  - (D) All cuttings/clippings shall remain in place as they fall;
  - (E) Coastal wetlands may be mowed or cut to a height of no less than six inches, as measured from the coastal wetland substrate, to create an access path four feet wide or less on waterfront lots without a pier access; and
  - (F) Coastal wetlands may be mowed or cut by utility companies as necessary to maintain utility easements.
- (2) Coastal wetland alteration not meeting the exemption criteria of this Rule shall require a CAMA permit. CAMA permit applications for coastal wetland alterations shall be subject to review by the North Carolina Wildlife Commission, North Carolina Division of Marine Fisheries, U.S. Fish and Wildlife Service, and National Marine Fisheries Service in order to determine whether or not the proposed activity will have an adverse impact on the habitat or fisheries resources.

*Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(1); 113A-124.*

## TITLE 25 – OFFICE OF STATE PERSONNEL

*Notice is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to amend the rule cited as 25 NCAC 01E .1006.*

**Proposed Effective Date:** August 1, 2009

**Public Hearing:**

**Date:** April 22, 2009

**Time:** 10:00 a.m.

**Location:** Office of State Personnel, Administration Building, 3<sup>rd</sup> floor, 121 West Jones Street, Raleigh, NC 27603

**Reason for Proposed Action:** *We are proposing to change the name of this rule from Compensatory Leave to Compensatory Time to accommodate the language used in the BEACON System. In addition, it is recommended that the amount of compensatory time awarded be changed from "on an hour for hour" bases to "at a rate not to exceed the individual's straight time equivalent rate." This will allow agencies to grant compensatory time at a rate less than hour for hour if appropriate.*

**Procedure by which a person can object to the agency on a proposed rule:** *A person may object to these proposed rules by one of the following methods: 1. A written letter to Peggy Oliver, HR Policy Administrator, Office of State Personnel, 1331 Mail Service Center, Raleigh, NC 27699-1331. 2. An email to peggy.oliver@osp.nc.gov. 3. A telephone call to Peggy Oliver at (919)807-4832.*

**Comments may be submitted to:** *Peggy Oliver, 1331 Mail Service Center, Raleigh, NC 27699-1331, phone (919)807-4832, fax (919)715-9750, email peggy.oliver@osp.nc.gov*

**Comment period ends:** April 22, 2009

**Procedure for Subjecting a Proposed Rule to Legislative Review:** *If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in*

G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal Impact:**

- ☐ State
- ☐ Local
- ☐ Substantive (≥\$3,000,000)
- ☒ None

## CHAPTER 01 - OFFICE OF STATE PERSONNEL

### SUBCHAPTER 01E - EMPLOYEE BENEFITS

#### SECTION .1000 - MISCELLANEOUS LEAVE

#### **25 NCAC 01E .1006 COMPENSATORY TIME**

Under the state's overtime compensation policy certain employees are designated as administrative, executive or professional. Employees in these categories are exempt from the provision for overtime pay. To grant these employees compensating time is a decision that must be made by the agency head. When compensatory ~~leave-time~~ is granted to administrative, executive or professional employees, the following applies:

- (1) Amount. Compensatory time is ~~granted on an hour for hour basis awarded at a rate not to exceed the individual's straight time equivalent rate.~~
- (2) Non-cumulative. Compensatory ~~leave-time~~ is not cumulative beyond a 12-month period. For this reason, an employee must be required to take compensatory ~~leave-time~~ as soon as possible after it is credited.
- (3) Non-transferable. Compensatory ~~leave-time~~ may not be transferred to any other type of leave or to another agency.
- (4) Separation. Compensatory ~~leave-time~~ is lost when an employee is separated from state service. The employee's separation date may not be moved forward in order to pay for compensatory time.

*Authority G.S. 126-4.*

**Note from the Codifier:** The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270<sup>th</sup> day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270<sup>th</sup> day.

This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

## **TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Rule-making Agency:** *Division of Health Service Regulation*

**Rule Citation:** 10A NCAC 14C .1403, 1902-.1905, .2002, .2103, .2701

**Effective Date:** *February 1, 2009*

**Date Approved by the Rules Review Commission:** *January 22, 2009*

**Reason for Action:** *Each year, changes to existing Certificate of Need rules are required to compliment or to ensure consistency with the State Medical Facilities Plan. The effective date of the 2009 SMFP is January 1, 2009.*

### **CHAPTER 14 – DIRECTOR, DIVISION OF HEALTH SERVICE REGULATION**

#### **SUBCHAPTER 14C – CERTIFICATE OF NEED REGULATIONS**

#### **SECTION .1400 – CRITERIA AND STANDARDS FOR NEONATAL SERVICES**

##### **10A NCAC 14C .1403 PERFORMANCE STANDARDS**

(a) An applicant shall demonstrate that the proposed project is capable of meeting the following standards:

- ~~(1) — an applicant proposing a new Level I or Level II services, or additional Level II beds shall demonstrate that the occupancy of the applicant's total number of neonatal beds is projected to be at least 50% during the first year of operation and at least 65% during the third year of operation following completion of the proposed project;~~
- ~~(2)~~(1) if an applicant proposes an increase in the number of the facility's existing Level II, Level III or Level IV beds, the overall average annual occupancy of the total number of existing Level II, Level III and Level IV beds in the facility is at least ~~75%~~, 75 percent, over the 12 months immediately preceding the submittal of the proposal; and
- ~~(3)~~(2) if an applicant is proposing to develop new or additional Level II, Level III or Level IV beds, the projected occupancy of the total number of Level II, Level III and Level IV beds proposed to be operated during the third year of

operation of the proposed project shall be at least ~~75%~~, 75 percent.

~~(4)~~(3) The applicant shall document the assumptions and provide data supporting the methodology used for each projection in this rule.

(b) If an applicant proposes to develop a new Level III or Level IV service, the applicant shall document that an unmet need exists in the applicant's defined neonatal service ~~area~~, area, unless the State Medical Facilities Plan includes a need determination for neonatal beds in the service area. The need for Level III and Level IV beds shall be computed for the applicant's neonatal service area by:

- (1) identifying the annual number of live births occurring at all hospitals within the proposed neonatal service area, using the latest available data compiled by the State Center for Health Statistics;
- (2) identifying the low birth weight rate (percent of live births below 2,500 grams) for the births identified in (1) of this Paragraph, using the latest available data compiled by the State Center for Health Statistics;
- (3) dividing the low birth weight rate identified in (2) of this Paragraph by .08 and subsequently multiplying the resulting quotient by four; and
- (4) determining the need for Level III and Level IV beds in the proposed neonatal service area as the product of:
  - (A) the product derived in (3) of this Paragraph, and
  - (B) the quotient resulting from the division of the number of live births in the initial year of the determination identified in (1) of this Paragraph by the number 1000.

*History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*

*Eff. January 4, 1994;*

*Temporary Amendment Eff. March 15, 2002;*

*Amended Eff. April 1, 2003;*

*Temporary Amendment Eff. February 1, 2009.*

#### **SECTION .1900 – CRITERIA AND STANDARDS FOR RADIATION THERAPY EQUIPMENT**



**10A NCAC 14C .1902 INFORMATION REQUIRED OF APPLICANT**

(a) An applicant proposing to acquire radiation therapy equipment shall use the Acute Care Facility/Medical Equipment application form.

(b) An applicant proposing to acquire radiation therapy equipment shall also provide the following additional information:

- (1) a list of all the radiation therapy equipment to be acquired and documentation of the capabilities and capacities of each item of equipment;
- (2) documentation of the purchase price and fair market value of each piece of radiation therapy equipment, each simulator, and any other related equipment proposed to be acquired;
- (3) the projected number of patient treatments by county and by simple, intermediate and complex treatments to be performed on each piece of radiation therapy equipment for each of the first three years of operation following the completion of the proposed project and documentation of all assumptions by which utilization is projected;
- (4) documentation that the proposed radiation therapy equipment shall be operational at least seven hours per day, five days a week;
- (5) documentation that no more than one simulator is available for every two linear accelerators in the applicant's facility, except that an applicant that has only one linear accelerator may have one simulator;
- (6) documentation that the services shall be offered in a physical environment that conforms to the requirements of federal, state, and local regulatory bodies; and
- (7) the projected number of patients that will be treated by county in each of the first three years of operation following completion of the proposed project.

(c) An applicant proposing to acquire a linear accelerator for development of a multidisciplinary prostate health center pursuant to a need determination for a demonstration project in the State Medical Facilities Plan shall provide the following additional information:

- (1) description of all services to be provided by the proposed multidisciplinary prostate health center, including a description of each of the following services:
  - (A) urology services,
  - (B) medical oncology services,
  - (C) biofeedback therapy,
  - (D) chemotherapy,
  - (E) brachytherapy, and
  - (F) living skills counseling and therapy;
- (2) documentation that urology services, medical and radiation oncology services, biofeedback therapy, brachytherapy and post-treatment

living skills counseling and therapy will be provided in the same building;

- (3) description of any services that will be provided by other facilities or in different buildings;
- (4) demographics of the population in the county in which the proposed multidisciplinary prostate health center will be located, including:
  - (A) percentage of the population in the county that is African American,
  - (B) the percentage of the population in the county that is male,
  - (C) the percentage of the population in the county that is African American male,
  - (D) the incidence of prostate cancer for the African American male population in the county, and
  - (E) the mortality rate from prostate cancer for the African American male population in the county;
- (5) documentation that the proposed center is located within walking distance of an established bus route and within five miles of a minority community;
- (6) documentation that the multiple medical disciplines in the center will collaborate to create and maintain a single or common medical record for each patient and conduct multidisciplinary conferences regarding each patient's treatment and follow-up care;
- (7) documentation that the center will establish its own prostate/urological cancer tumor board for review of cases;
- (8) copy of the center's written policies that prohibit the exclusion of services to any patient on the basis of age, race, religion, disability or the patient's ability to pay;
- (9) copy of written strategies and activities the center will follow to assure its services will be accessible by patients without regard to their ability to pay;
- (10) description of the center's outreach activities and the manner in which they complement existing outreach initiatives;
- (11) documentation of number and type of clinics to be conducted to screen patients at risk for prostate cancer;
- (12) written description of patient selection criteria, including referral arrangements for high-risk patients;
- (13) commitment to prepare an annual report at the end of each of the first three operating years, to be submitted to the Medical Facilities Planning Section and the Certificate of Need Section, that shall include:
  - (A) the total number of patients treated;

- (B) the number of African American persons treated;
- (C) the number of persons in other minority populations treated; and
- (D) the number of insured, underinsured and uninsured patients served by type of payment category;
- (14) documentation of arrangements made with a third party researcher to evaluate, during the fourth operating year of the center, the efficacy of the clinical and outreach initiatives on prostate and urological cancer treatment, and develop recommendations regarding the advantages and disadvantages of replicating the project in other areas of the State. The results of the evaluation and recommendations shall be submitted in a report to the Medical Facilities Planning Section and Certificate of Need Section in the first quarter of the fifth operating year of the demonstration project; and
- (15) if the third party researcher is not a historically black university, document the reasons for using a different researcher for the project.

*History Note: Authority G.S. 131E-177(1); 131E-183. Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Amended Eff. November 1, 1996; Temporary Amendment Eff. January 1, 1999; Temporary Amendment Eff. January 1, 1999 Expired on October 12, 1999; Temporary Amendment Eff. January 1, 2000; Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000; Amended Eff. April 1, 2001; Temporary Amendment Eff. January 1, 2005; Amended Eff. November 1, 2005; Temporary Amendment Eff. February 1, 2009.*

#### **10A NCAC 14C .1903 PERFORMANCE STANDARDS**

- (a) An applicant proposing to acquire a linear accelerator shall demonstrate that each of the following standards will be met:
  - (1) an applicant's existing linear accelerators located in the proposed radiation therapy service area performed at least 6,750 ESTV treatments per machine or served at least 250 patients per machine in the twelve months prior to the date the application was submitted;
  - (2) each proposed new linear accelerator will be utilized at an annual rate of 250 patients or 6,750 ESTV treatments during the third year of operation of the new equipment; and
  - (3) an applicant's existing linear accelerators located in the proposed radiation therapy service area are projected to be utilized at an

annual rate of 6,750 ESTV treatments or 250 patients per machine during the third year of operation of the new equipment.

(b) A linear accelerator shall not be held to the standards in Paragraph (a) of this Rule if the applicant provides documentation that the linear accelerator has been or will be used exclusively for clinical research and teaching.

(c) An applicant proposing to acquire radiation therapy equipment other than a linear accelerator shall provide the following information:

- (1) the number of patients that are projected to receive treatment from the proposed radiation therapy equipment, classified by type of equipment, diagnosis, treatment procedure, and county of residence; and
- (2) the maximum number and type of procedures that the proposed equipment is capable of performing.

(d) The applicant shall document all assumptions and provide data supporting the methodology used to determine projected utilization as required in this Rule.

*History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Amended Eff. November 1, 1996; Temporary Amendment Eff. January 1, 1999; Temporary Amendment effective January 1, 1999 expired October 12, 1999; Temporary Amended Eff. January 1, 2000; Temporary Amendment Eff. February 1, 2006; Amended Eff. November 1, 2006. Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000; Amended Eff. April 1, 2001; Temporary Amendment Eff. March 15, 2002; January 1, 2002; Amended Eff. April 1, 2003; Temporary Amendment Eff. February 1, 2008; Amended Eff. November 1, 2008; Temporary Amendment Eff. February 1, 2009.*

#### **10A NCAC 14C .1904 SUPPORT SERVICES**

(a) An applicant proposing to acquire radiation therapy equipment shall document that the following items shall be available; and if any item shall not be available, the applicant shall provide substantive information obviating the need for that item:

- (1) an organized program of radiation therapy continuing education for radiation therapists, technologists and medical staff;
- (2) a program for the collection of utilization data relative to the applicant's provision of radiation therapy services;
- (3) medical laboratory services;
- (4) pathology services; and
- (5) pharmaceutical support services.

(b) An applicant proposing to acquire a linear accelerator for development of a multidisciplinary prostate health center pursuant to a need determination for a demonstration project in the State Medical Facilities Plan shall provide a written description of the center's plans and strategies to establish:

- (1) an African American Prostate Cancer Education/Outreach Program that will partner with and complement existing support groups, such as the N.C. Minority Prostate Cancer Awareness Action Team; and
- (2) an Advisory Board composed of representatives of prostate cancer advocacy groups, prostate cancer patients and survivors that will meet regularly to provide feedback to the center regarding outreach practices which are effective or which need to be changed.

*History Note: Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*

*Authority G.S. 131E-177(1); 131E-183(b);*

*Eff. January 4, 1994;*

*Temporary Amendment Eff. February 1, 2009.*

#### **10A NCAC 14C .1905 STAFFING AND STAFF TRAINING**

(a) An applicant proposing to acquire radiation therapy equipment shall document the number and availability of staff or provide evidence that obviates the need for staff in the following areas:

- (1) Radiation Oncologist;
- (2) Radiation Physicist;
- (3) Dosimetrist or Physics Assistant;
- (4) Radiation Therapist;
- (5) Radiation-Oncology Administrator;
- (6) Registered Nurse or LPN;
- (7) Physical Therapist;
- (8) Dietician;
- (9) Pharmacist;
- (10) Social Worker; and
- (11) Maintenance Engineer.

(b) An applicant proposing to acquire a linear accelerator for development of a multidisciplinary prostate health center pursuant to a need determination for a demonstration project in the State Medical Facilities Plan shall document that the center will have:

- (1) a medical director who is either a urologist certified by the American Board of Urology, a medical oncologist certified by the American Board of Internal Medicine, or a radiation oncologist certified by the American Board of Radiology; and
- (2) a multidisciplinary team consisting of medical oncologists, radiation oncologists, urologists, urologic pharmacologists, pathologists and therapy specialists.

*History Note: Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*

*Authority G.S. 131E-177(1); 131E-183;*

*Eff. January 4, 1994;*

*Amended Eff. November 1, 1996;*

*Temporary Amendment Eff. February 1, 2009.*

#### **SECTION .2000 – CRITERIA AND STANDARDS FOR HOME HEALTH SERVICES**

##### **10A NCAC 14C .2002 INFORMATION REQUIRED OF APPLICANT**

(a) An applicant shall identify:

- (1) the counties that are proposed to be served by the new office;
- (2) the proposed types of services to be provided, including a description of each discipline;
- (3) the projected total unduplicated patient count of the new office for each of the first two years of operation;
- (4) the projected number of patients to be served per service discipline for each of the first two years of operation;
- (5) the projected number of visits by service discipline for each of the first two years of operation;
- (6) within each service discipline, the average number of patient visits per day that are anticipated to be performed by each staff person;
- (7) the projected average annual cost per visit for each service discipline;
- (8) the projected charge by payor source for each service discipline;
- (9) the names of the anticipated sources of referrals; and
- (10) documentation of attempts made to establish working relationships with the sources of referrals.

All assumptions, including the specific methodology by which patient utilization and costs are projected, shall be clearly stated.

(b) An applicant shall specify the proposed site on which the office is proposed to be located. If the proposed site is not owned by or under the control of the applicant, the applicant shall specify an alternate site. The applicant shall provide documentation from the owner of the sites or a realtor that the proposed and alternate site(s) are available for acquisition.

(c) An applicant proposing to establish a new home health agency pursuant to a need determination in the State Medical Facilities Plan to meet the special needs of the non-English speaking, non-Hispanic population shall provide the following additional information:

- (1) for each staff person in the proposed home health agency, identify the foreign language in which the person is fluent to document the home health agency will have employees fluent in multiple foreign languages other than Spanish, including Russian;

- (2) description of the manner in which the proposed home health agency will actively market and provide its services to non-English speaking, non-Hispanic persons; and
- (3) documentation that the proposed home health agency will accept referrals of non-English speaking, non-Hispanic persons from other home health agencies and entities, within Medicare Conditions of Participation and North Carolina licensure rules.

*History Note: Authority G.S. 131E-177(1); 131E-183;  
Eff. March 1, 1996;  
Temporary Amendment Eff. February 1, 2009.*

## **SECTION .2100 – CRITERIA AND STANDARDS FOR SURGICAL SERVICES AND OPERATING ROOMS**

### **10A NCAC 14C .2103 PERFORMANCE STANDARDS**

(a) In projecting utilization, the operating rooms shall be considered to be available for use five days per week and 52 weeks a year.

(b) A proposal to establish a new ambulatory surgical facility, to increase the number of operating rooms (excluding dedicated C-section operating rooms), to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall not be approved unless:

- (1) the applicant reasonably demonstrates the need for the number of proposed operating rooms in the facility, which is the subject of this review, in the third operating year of the project based on the following formula: {[ (Number of facility's projected inpatient cases, excluding trauma cases reported by Level ~~I, II, or III~~ I or II trauma centers, cases reported by designated burn intensive care units and cases performed in dedicated open heart and C-section rooms, times 3.0 hours) plus (Number of facility's projected outpatient cases times 1.5 hours)] divided by 1872 hours} minus the facility's total number of ~~existing, existing and approved and proposed~~ existing, existing and approved and proposed operating rooms, rooms and operating rooms proposed in another pending application, excluding one operating room for Level ~~I, II or III~~ I or II trauma centers, one operating room for facilities with designated burn intensive care units, and all dedicated open heart and C-section operating rooms. The number of rooms needed is ~~the positive difference rounded to the next highest number for fractions of 0.50 or greater; or determined as follows:~~

- (A) in a service area which has more than 10 operating rooms and the positive difference is 0.5 or greater, the need is the next highest whole number for fractions of 0.5 or greater and the next lowest whole number for

fractions less than 0.5; except if the difference is a negative number or a positive number less than 0.5, the need is zero;

- (B) in a service area which has six to 10 operating rooms and the positive difference is 0.3 or greater, the need is the next highest whole number for fractions of 0.3 or greater and the next lowest whole number for fractions less than 0.3, except if the difference is a negative number or a positive number less than 0.3, the need is zero;

- (C) in a service area which has five or fewer operating rooms and the positive difference is 0.2 or greater, the need is the next highest whole number for fractions of 0.2 or greater and the next lowest whole number for fractions less than 0.2; except if the difference is a negative number or a positive number less than 0.2, the need is zero;

or

- (2) the applicant demonstrates conformance of the proposed project to Policy AC-3 in the State Medical Facilities Plan titled "Exemption From Plan Provisions for Certain Academic Medical Center Teaching Hospital Projects."

(c) A proposal to establish a new ambulatory surgical facility, to increase the number of operating rooms (excluding dedicated C-section operating rooms) except relocations of existing operating rooms ~~between existing licensed facilities~~ within the same service area, to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall not be approved unless the applicant reasonably demonstrates the need for the number of proposed operating rooms in addition to the rooms in ~~its all of the~~ licensed facilities identified in response to 10A NCAC 14C .2102(b)(2) in the third operating year of the proposed project based on the following formula: {[ (Number of projected inpatient cases for all ~~its~~ the applicant's or related entities' facilities, excluding trauma cases reported by Level ~~I, II, or III~~ I or II trauma centers, cases reported by designated burn intensive care units and cases performed in dedicated open heart and C-section rooms, times 3.0 hours) plus (Number of projected outpatient cases for all ~~its~~ the applicant's or related entities' facilities times 1.5 hours)] divided by 1872 hours} minus the total number of ~~existing, existing and approved and proposed~~ existing, existing and approved and proposed operating rooms, rooms and operating rooms proposed in another pending application, excluding one operating room for Level ~~I, II or III~~ I or II trauma centers, one operating room for facilities with designated burn intensive care units, and all dedicated open heart and C-Section operating rooms in all of ~~its~~ the applicant's or related entities' licensed facilities in the service area. ~~A need is demonstrated if the difference is a positive number greater than or equal to 0.50. The number of rooms needed is determined as follows:~~

- (1) in a service area which has more than 10 operating rooms and the positive difference is 0.5 or greater, the need is the next highest whole number for fractions of 0.5 or greater and the next lowest whole number for fractions less than 0.5; except if the difference is a negative number or a positive number less than 0.5, the need is zero;
- (2) in a service area which has six to 10 operating rooms and the positive difference is 0.3 or greater, the need is the next highest whole number for fractions of 0.3 or greater and the next lowest whole number for fractions less than 0.3, except if the difference is a negative number or a positive number less than 0.3, the need is zero;
- (3) in a service area which has five or fewer operating rooms and the positive difference is 0.2 or greater, the need is the next highest whole number for fractions of 0.2 or greater and the next lowest whole number for fractions less than 0.2; except if the difference is a negative number or a positive number less than 0.2, the need is zero;

(d) An applicant that has one or more existing or approved dedicated C-section operating rooms and is proposing to develop an additional dedicated C-section operating room in the same facility shall demonstrate that an average of at least 365 C-sections per room were performed in the facility's existing dedicated C-section operating rooms in the previous 12 months and are projected to be performed in the facility's existing, approved and proposed dedicated C-section rooms during the third year of operation following completion of the project.

(e) An applicant proposing to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall provide documentation to show that each existing ambulatory surgery program in the service area that performs ambulatory surgery in the same specialty area as proposed in the application is currently utilized an average of at least 1,872 hours per operating room per year, excluding dedicated open heart and C-Section operating rooms. The hours utilized per operating room shall be calculated as follows: [(Number of projected inpatient cases, excluding open heart and C-sections performed in dedicated rooms, times 3.0 hours) plus (Number of projected outpatient cases times 1.5 hours)] divided by the number of operating rooms, excluding dedicated open heart and C-Section operating rooms.

(f) An applicant proposing to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall reasonably demonstrate the need for the conversion in the third operating year of the project based on the following formula: [(Total number of projected outpatient cases for all ambulatory surgery programs in the service area times 1.5 hours) divided by 1872 hours] minus the total number of existing, approved and proposed outpatient or ambulatory surgical operating rooms and shared operating rooms in the service area. The need for the conversion is demonstrated if the

difference is a positive number greater than or equal to one, after the number is rounded to the next highest number for fractions of 0.50 or greater.

(g) The applicant shall document the assumptions and provide data supporting the methodology used for each projection in this Rule.

*History Note: Authority G.S. 131E-177; 131E-183(b); Eff. November 1, 1990; Amended Eff. March 1, 1993; Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. January 4, 1994; Temporary Amendment Eff. January 1, 2002; July 1, 2001; Amended Eff. August 1, 2002; Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002; Amended Eff. April 1, 2003; Temporary Amendment Eff. January 1, 2005; Amended Eff. November 1, 2005; Temporary Rule Eff. February 1, 2006; Amended Eff. November 1, 2006; Temporary Amendment Eff. February 1, 2008; Amended Eff. November 1, 2008; Temporary Amendment Eff. February 1, 2009.*

## **SECTION .2700 - CRITERIA AND STANDARDS FOR MAGNETIC RESONANCE IMAGING SCANNER**

### **10A NCAC 14C .2701 DEFINITIONS**

The following definitions apply to all rules in this Section:

- (1) "Approved MRI scanner" means an MRI scanner which was not operational prior to the beginning of the review period but which had been issued a certificate of need.
- (2) "Capacity of fixed MRI scanner" means 100 percent of the procedure volume that the MRI scanner is capable of completing in a year, given perfect scheduling, no machine or room downtime, no cancellations, no patient transportation problems, no staffing or physician delays and no MRI procedures outside the norm. Annual capacity of a fixed MRI scanner is 6,864 weighted MRI procedures, which assumes two weighted MRI procedures are performed per hour and the scanner is operated 66 hours per week, 52 weeks per year.
- (3) "Capacity of mobile MRI scanner" means 100 percent of the procedure volume that the MRI scanner is capable of completing in a year, given perfect scheduling, no machine or room downtime, no cancellations, no patient transportation problems, no staffing or physician delays and no MRI procedures outside the norm. Annual capacity of a mobile MRI scanner is 4,160 weighted MRI procedures, which assumes two weighted MRI

- procedures are performed per hour and the scanner is operated 40 hours per week, 52 weeks per year.
- (4) "Dedicated breast MRI scanner" means an MRI scanner that is configured to perform only breast MRI procedures and is not capable of performing other types of non-breast MRI procedures.
  - (5) "Existing MRI scanner" means an MRI scanner in operation prior to the beginning of the review period.
  - (6) "Extremity MRI scanner" means an MRI scanner that is utilized for the imaging of extremities and is of open design with a field of view no greater than 25 centimeters.
  - (7) "Fixed MRI scanner" means an MRI scanner that is not a mobile MRI scanner.
  - (8) "Magnetic Resonance Imaging" (MRI) means a non-invasive diagnostic modality in which electronic equipment is used to create tomographic images of body structure. The MRI scanner exposes the target area to nonionizing magnetic energy and radio frequency fields, focusing on the nuclei of atoms such as hydrogen in the body tissue. Response of selected nuclei to this stimulus is translated into images for evaluation by the physician.
  - (9) "Magnetic resonance imaging scanner" (MRI Scanner) is defined in G.S. 131E-176(14e).
  - (10) "Mobile MRI region" means either the eastern part of the State which includes the counties in Health Service Areas IV, V and VI (Eastern Mobile MRI Region), or the western part of the State which includes the counties in Health Service Areas I, II, and III (Western Mobile MRI Region). The counties in each Health Service Area are identified in Appendix A of the State Medical Facilities Plan.
  - (11) "Mobile MRI scanner" means an MRI scanner and transporting equipment which is moved at least weekly to provide services at two or more ~~host facilities, campuses or locations.~~
  - (12) "MRI procedure" means a single discrete MRI study of one patient.
  - (13) "MRI service area" means the Magnetic Resonance Imaging Planning Areas, as defined in the applicable State Medical Facilities Plan, except for proposed new mobile MRI scanners for which the service area is a mobile MRI region.
  - (14) "MRI study" means one or more scans relative to a single diagnosis or symptom.
  - (15) "Multi-position MRI scanner" means an MRI scanner as defined in the State Medical Facilities Plan, pursuant to a special need determination for a demonstration project.
  - (16) "Related entity" means the parent company of the applicant, a subsidiary company of the applicant (i.e., the applicant owns 50 percent or more of another company), a joint venture in which the applicant is a member, or a company that shares common ownership with the applicant (i.e., the applicant and another company are owned by some of the same persons).
  - (17) "Temporary MRI scanner" means an MRI scanner that the Certificate of Need Section has approved to be temporarily located in North Carolina at a facility that holds a certificate of need for a new fixed MRI scanner, but which is not operational because the project is not yet complete.
  - (18) "Weighted MRI procedures" means MRI procedures which are adjusted to account for the length of time to complete the procedure, based on the following weights: one outpatient MRI procedure without contrast or sedation is valued at 1.0 weighted MRI procedure, one outpatient MRI procedure with contrast or sedation is valued at 1.4 weighted MRI procedures, one inpatient MRI procedure without contrast or sedation is valued at 1.4 weighted MRI procedures; and one inpatient MRI procedure with contrast or sedation is valued at 1.8 weighted MRI procedures.
  - (19) "Weighted breast MRI procedures" means MRI procedures which are performed on a dedicated breast MRI scanner and are adjusted to account for the length of time to complete the procedure, based on the following weights: one diagnostic breast MRI procedure is valued at 1.0 weighted MRI procedure (based on an average of 60 minutes per procedure), one MRI-guided breast needle localization MRI procedure is valued at 1.1 weighted MRI procedure (based on an average of 66 minutes per procedure), and one MRI-guided breast biopsy procedure is valued at 1.6 weighted MRI procedures (based on an average of 96 minutes per procedure).

*History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. February 1, 1994; Temporary Amendment Eff. January 1, 1999; Temporary Amendment Eff. January 1, 1999 Expired on October 12, 1999; Temporary Amendment Eff. January 1, 2000; Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000; Temporary Amendment Eff. January 1, 2001; Temporary Amendment effective January 1, 2001 amends and replaces a permanent rulemaking originally proposed to be effective April 1, 2001;*

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**TEMPORARY RULES**

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*Temporary Amendment Eff. January 1, 2002;  
Amended Eff. August 1, 2002;  
Temporary Amendment effective January 1, 2002 amends and  
replaces the permanent rule effective August 1, 2002;  
Temporary Amendment Eff. January 1, 2003;  
Amended Eff. August 1, 2004; April 1, 2003;  
Temporary Amendment Eff. January 1, 2005;*

*Amended Eff. November 1, 2005;  
Temporary Amendment Eff. February 1, 2006;  
Amended Eff. November 1, 2006;  
Temporary Amendment Eff. February 1, 2008;  
Amended Eff. November 1, 2008;  
Temporary Amendment Eff. February 1, 2009.*

*This Section contains information for the meeting of the Rules Review Commission on Thursday, January 22, 2009 9:00 a.m. at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3100. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2<sup>nd</sup> business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.*

**RULES REVIEW COMMISSION MEMBERS****Appointed by Senate**

Jim R. Funderburke - 1st Vice Chair  
David Twiddy - 2nd Vice Chair  
Keith O. Gregory  
Jerry R. Crisp  
Jeffrey P. Gray

**Appointed by House**

Jennie J. Hayman - Chairman  
John B. Lewis  
Clarence E. Horton, Jr.  
Daniel F. McLawhorn  
Curtis Venable

**COMMISSION COUNSEL**

Joe Deluca (919)431-3081  
Bobby Bryan (919)431-3079

**RULES REVIEW COMMISSION MEETING DATES**

February 19, 2009      March 19, 2008  
April 16, 2009      May 21, 2009

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**RULES REVIEW COMMISSION****January 22, 2009****MINUTES**

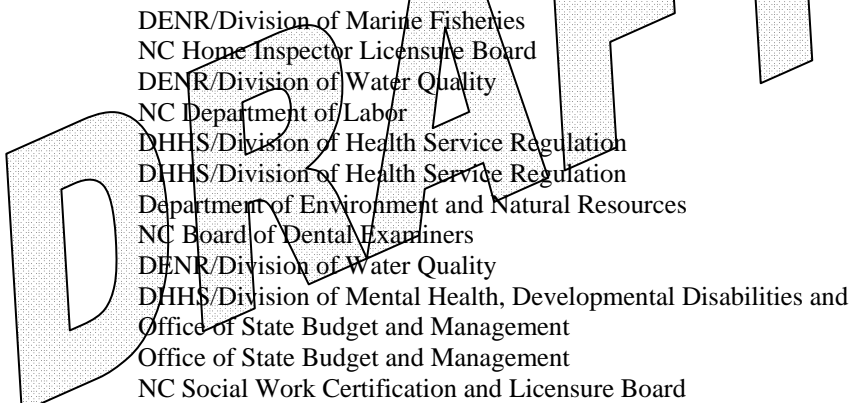
The Rules Review Commission (RRC) met on Thursday, January 22, 2009, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Keith Gregory, Clarence Horton, John Lewis, David Twiddy and Curtis Venable.

Staff members present were: Joseph DeLuca and Bobby Bryan, Commission Counsel, and Tammara Chalmers, RRC Administrative Assistant.

The following people were among those attending the meeting:

Catherine Blum  
Donald C. Warner  
Danny Smith  
Erin Gould  
Nadine Pfeiffer  
Drexdal Pratt  
Nancy Pate  
Carolyn Bakewell  
Adriene Weaver  
Andrea Borden  
Will Crumbly  
Ed McLenaghan  
Micki Lilly  
Stephen Dirksen  
Andy Ellen  
Julia Lohman  
Jeff Manning  
Wayne Woodard  
David McLeod

DENR/Division of Marine Fisheries  
NC Home Inspector Licensure Board  
DENR/Division of Water Quality  
NC Department of Labor  
DHHS/Division of Health Service Regulation  
DHHS/Division of Health Service Regulation  
Department of Environment and Natural Resources  
NC Board of Dental Examiners  
DENR/Division of Water Quality  
DHHS/Division of Mental Health, Developmental Disabilities and Substance Abuse Services  
Office of State Budget and Management  
Office of State Budget and Management  
NC Social Work Certification and Licensure Board  
NC Board of Funeral Service  
NC Retail Merchants Association  
DOJ/Sheriffs' Training and Standards  
DENR/Division of Water Quality  
DOJ/Criminal Justice Training and Standards  
NC Department of Agriculture and Consumer Services





Lee Hoffman	Department of Health and Human Services
Amanda Reeder	DHHS/Division of Mental Health, Developmental Disabilities and Substance Abuse Services
Bonnie Bendell	DENR/Division of Coastal Management
Mike Abraczinskas	DENR/Division of Air Quality
Frank Sheffield	Ward and Smith, P.A.

## **APPROVAL OF MINUTES**

The meeting was called to order at 9:05 a.m. with Mr. Funderburk presiding. He reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e). Vice Chairman Funderburk asked for any discussion, comments, or corrections concerning the minutes of the December 18, 2008 meeting. There were none and the minutes were approved as distributed.

## **FOLLOW-UP MATTERS**

10A NCAC 13P .0102, .0202, .0205, .0510 – Medical Care Commission. The Commission approved the rewritten rules submitted by the agency. The Commission has received at least 10 letters of objection to Rule .0102 so this rule is subject to legislative review.

12 NCAC 10B .0103 – Sheriff's Education and Training Standards Commission. The Commission approved the rule submitted by the agency. Commissioner Venable voted against the motion to approve the rule.

12 NCAC 10B .0202 – Sheriff's Education and Training Standards Commission. No action was taken by the Commission at the agency's request. Review of this rule is delayed until the next meeting.

12 NCAC 10B .0703, .0911, .0912, .0919, .0920 – Sheriff's Education and Training Standards Commission. The Commission approved the rewritten rules submitted by the agency.

13 NCAC 13 .0413, .0420 – Department of Labor. The Commission approved the rewritten rules submitted by the agency.

15A NCAC 02B .0602, .0604, .0606, .0607, .0608, .0609 – Environmental Management Commission. The Commission approved the rewritten rules submitted by the agency.

15A NCAC 02D .1110 – Environmental Management Commission. This rule was approved at the December 18, 2008 meeting. The Commission rescinded last month's approval of this rule. An identical rule and amendment was approved at the May RRC meeting and was already in the North Carolina Administrative Code (NCAC). The rule approved in December was unchanged from the rule approved in May and currently in the NCAC. The most recent version will be returned to the agency.

15A NCAC 02D .1205, .1212 – Environmental Management Commission. The Commission heard from Frank Sheffield who represented WASTEC and Mike Abraczinskas who spoke for the Division of Air Quality. No action was taken.

15A NCAC 18A .2606 – Commission for Public Health. This rule was withdrawn by the agency.

15A NCAC 18A .3606 – Commission for Public Health. The agency decided not to change the rule to satisfy the Commission's objection and asked that the rule be returned. The rule will remain in the NCAC as it currently is since the objection applied to the amendment and not to existing language. The rule will be returned to the agency.

21 NCAC 14H .0105 – Board of Cosmetic Art Examiners. The Commission objected to the rewritten rule based on lack of authority or ambiguity. It is unclear in (e) that only willful violations of the board's rules, including its sanitation rules, can be used to revoke or suspend a letter of approval or permit. The rule is a violation of G.S. 88B-24(8). There is no authority for the board to attempt to revoke or suspend a license for less than a willful violation.

21 NCAC 34A .0124, .0126 – Board of Funeral Service. The Commission approved the rewritten rules submitted by the agency.

21 NCAC 34B .0211, .0213, .0310 – Board of Funeral Service. The Commission approved the rewritten rules submitted by the agency.

21 NCAC 34C .0305 – Board of Funeral Service. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 34D .0201, .0303 – Board of Funeral Service. The Commission approved the rewritten rules submitted by the agency.

21 NCAC 34D .0203 – Board of Funeral Service. This rule was withdrawn by the agency.

21 NCAC 63 .0302 – Social Work Certification and Licensure Board. The Commission approved the rewritten rule submitted by the agency.

## **LOG OF FILINGS**

Vice Chairman Funderburk presided over the review of the log of permanent rules.

All permanent rules were approved unanimously with the following exceptions:

02 NCAC 38 .0203, .0701: Board of Agriculture – The Commission objected to this rule based on ambiguity. It is unclear what the meaning of "significantly" is in (1)(f)(iii) on page 2 line 11. It is unclear what the standards are that will be used to determine whether the changes in potential exposures are significant.

10A NCAC 27A .0401, .0402, .0403, .0404: HHS-Mental Health – These rules were withdrawn by the agency.

10A NCAC 27G .0504: HHS-Mental Health, Developmental Disabilities, and Substance Abuse Services – The Commission objected to this rule based on lack of authority. There is no authority cited for the provision in (a), (d) and anywhere else in this rule requiring private providers to establish a "Client Rights Assurance Committee."

Commissioner Venable made the motion to object to the above rule and in answer to a question from Commissioner Gray added to the motion to approve the remainder of the Mental Health rules. Commissioners Crisp, Gray, Gregory, Lewis, Twiddy, and Venable voted in favor of the motion. Commissioner Horton voted against the motion.

Prior to the review of the permanent rules from the Private Protective Services Board, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because he is under contract with the Private Protective Services Board to teach.

12 NCAC 07D .0402: Private Protective Services Board – The Commission objected to this rule based on lack of statutory authority and ambiguity. It is not clear what standards the Board will use in approving a school specializing in counterintelligence. While the Board has authority to approve schools, it must adopt the standards by rule. This objection applies to existing language in the rule.

12 NCAC 07D .0501: Private Protective Services Board – The Commission objected to this rule based on lack of statutory authority and ambiguity. In (a)(2), it is not clear what standards the Board will use in approving a polygraph school, and there is no authority cited to set the standards outside rulemaking. This objection applies to existing language in the rule.

12 NCAC 09B .0301: Criminal Justice Education and Training Standards Commission – This rule was withdrawn by the agency and re-filed for the next month's meeting.

12 NCAC 09H .0101, .0102, .0103, .0104, .0105: Criminal Justice Education and Training Standards Commission – These rules were withdrawn by the agency and re-filed for the next month's meeting.

15A NCAC 03H .0102, .0103: Marine Fisheries Commission – These rules were withdrawn by the agency.

15A NCAC 03I .0101: Marine Fisheries Commission – The Commission objected to this rule based on lack of statutory authority and ambiguity. In (5)(i), it is not clear what standards the Division will use in approving paper forms or electronic data files. It is also not clear what other information is required by the Division. There is no authority cited to set requirements other than by rulemaking.

15A NCAC 03I .0104: Marine Fisheries Commission – The Commission objected to this rule based on ambiguity. In (b)(1), it is not clear what diseases are "diseases of concern." In the last sentence in (b), it is not clear what standards will be used to determine if an applicant must have additional analyses performed. In (c), it is not clear what standards the Fisheries Director will use in determining whether to require the listed conditions for a permit.

15A NCAC 03J .502: Marine Fisheries Commission – The Commission objected to this rule based on ambiguity. In (e)(6), it is not clear what standards the Fisheries Director will use to determine if a proposed pound net set is in the public interest.

15A NCAC 07J .0701: Coastal Resource Commission – The Commission objected to this rule based on lack of authority. In (a) this rule sets out certain legal positions that are outside the agency's rulemaking authority or are unnecessary:

1. The first sentence states that a person denied a permit may seek a variance from the normal permit conditions. This is acceptable for the agency to specify.
2. However at the end of that first sentence and further in this paragraph and in (c)(6) the agency sets out the proviso that if the applicant wishes to do that, he cannot either then or later file a contested case proceeding over the initial agency decision. Any dispute over the agency's initial decision must be settled prior to seeking a variance appears to be the agency's position. This may or may not be a correct statement of the consequences of the APA and other NC law, but it is not within the agency's authority to attempt to write that law. To the extent that it is a correct statement of the law, then this portion of the rule is unnecessary.

While the agency is entitled to set certain conditions in seeking a variance, the agency may not require an applicant to give up an avenue of due process that might be granted by the APA in order to seek some other relief that might be available and to which the applicant is entitled. The last sentence of (a) sets certain conditions that must be met prior to seeking a variance and these conditions are within the agency's authority.

15A NCAC 07J .0703: Coastal Resources Commission – The Commission approved this rule contingent on receiving a requested technical change. The technical change has not yet been made. The agency wants their Commission to review the change first. The rule will be reviewed again at the February RRC meeting.

### **TEMPORARY RULES**

Vice Chairman Funderburk presided over the review of the log of temporary rules.

All temporary rules were unanimously approved by the Commission.

### **COMMISSION PROCEDURES AND OTHER BUSINESS**

The meeting adjourned at 11:00 a.m.

The next scheduled meeting of the Commission is Thursday, February 19, 2009 at 9:00 a.m.

Respectfully Submitted,  
Tammara Chalmers

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### **LIST OF APPROVED PERMANENT RULES January 22, 2009 Meeting**

#### **AGRICULTURE, BOARD OF**

<u>Type Approval of Weighing and Measuring Devices</u>	02	NCAC	38	.0203
<u>Retail Motor Fuel Dispensers/Half-Pricing</u>	02	NCAC	38	.0601
<u>Noxious Weeds</u>	02	NCAC	48A	.1702
<u>Regulated Areas</u>	02	NCAC	48A	.1703

#### **MEDICAL CARE COMMISSION**

<u>Definitions</u>	10A	NCAC	13P	.0102
<u>Model EMS Systems</u>	10A	NCAC	13P	.0202
<u>EMS Provider License Conditions</u>	10A	NCAC	13P	.0205
<u>Renewal of Credentials for Level I and Level II EMS Instr...</u>	10A	NCAC	13P	.0510

#### **MENTAL HEALTH, COMMISSION FOR**

<u>Staff Definitions</u>	10A	NCAC	27G	.0104
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**HHS - MENTAL HEALTH**

Operations During Licensed Period 10A NCAC 27G .0404

**HOME INSPECTOR LICENSURE BOARD**

Purpose and Scope 11 NCAC 08 .1103

**PRIVATE PROTECTIVE SERVICES BOARD**

Experience Requirements/Security Guard and Patrol License 12 NCAC 07D .0301

Experience Requirements for Guard Dog Service License 12 NCAC 07D .0302

Experience Requirements for Private Investigator License 12 NCAC 07D .0401

Experience Requirements for Courier License 12 NCAC 07D .1201

**SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION**

Definitions 12 NCAC 10B .0103

Administration of Detention Officer Certification Course 12 NCAC 10B .0703

Suspension: Revocation: Denial of Detention Officer Instr... 12 NCAC 10B .0911

Period/Suspension: Revocation: or Denial of Detention Off... 12 NCAC 10B .0912

Suspension: Revocation: Denial of Telecommunicator Instru... 12 NCAC 10B .0919

Period/Suspension: Revocation: or Denial of Telecommunica... 12 NCAC 10B .0920

**LABOR, DEPARTMENT OF**

Clearance 13 NCAC 13 .0413

Fire Mechanism Controls 13 NCAC 13 .0420

**ENVIRONMENTAL MANAGEMENT COMMISSION**

Site Specific Water Quality Management Plan for the Goose... 15A NCAC 02B .0602

Site Specific Water Quality Management Plan for the Goose... 15A NCAC 02B .0604

Site Specific Water Quality Management Plan for the Goose... 15A NCAC 02B .0606

Site Specific Water Quality Management Plan for the Goose... 15A NCAC 02B .0607

Site Specific Water Quality Management Plan for the Goose... 15A NCAC 02B .0608

Site Specific Water Quality Management Plan for the Goose... 15A NCAC 02B .0609

**MARINE FISHERIES COMMISSION**

Gill Nets, Seines, Identification, Restrictions 15A NCAC 03J .0103

Trawl Nets 15A NCAC 03J .0104

Pound Net Sets 15A NCAC 03J .0107

Hook-and-Line 15A NCAC 03J .0306

Definitions and Standards for Pound Nets and Pound Net Sets 15A NCAC 03J .0501

Pound Net Set Permit Renewal 15A NCAC 03J .0503

Pound Net Set Permit Transfer 15A NCAC 03J .0504

Pound Net Set Permit Conditions 15A NCAC 03J .0505

Prohibited Nets, Mesh Sizes and Areas 15A NCAC 03L .0103

Unlawful to Use or Take 15A NCAC 03L .0104

Recreational Shrimp Limits 15A NCAC 03L .0105

<u>American Lobster (Northern Lobster)</u>	15A	NCAC	03L	.0301
<u>Red Drum</u>	15A	NCAC	03M	.0501
<u>Authorized Gear</u>	15A	NCAC	03O	.0302
<u>Procedures and Requirements to Obtain Permits</u>	15A	NCAC	03O	.0501
<u>Permit Conditions, General</u>	15A	NCAC	03O	.0502
<u>Permit Conditions; Specific</u>	15A	NCAC	03O	.0503
<u>Descriptive Boundaries for Coastal-Joint-Inland Waters</u>	15A	NCAC	03Q	.0202
<u>Attended Gill Net Areas</u>	15A	NCAC	03R	.0112
<u>Pound Net Set Prohibited Areas</u>	15A	NCAC	03R	.0113

**COASTAL RESOURCES COMMISSION**

<u>Purpose</u>	15A	NCAC	07H	.1401
<u>Approval Procedures</u>	15A	NCAC	07H	.1402
<u>General Conditions</u>	15A	NCAC	07H	.1404
<u>Specific Conditions</u>	15A	NCAC	07H	.1405
<u>Purpose</u>	15A	NCAC	07H	.2101
<u>Approval Procedures</u>	15A	NCAC	07H	.2102
<u>General Conditions</u>	15A	NCAC	07H	.2104
<u>Specific Conditions</u>	15A	NCAC	07H	.2105
<u>Purpose</u>	15A	NCAC	07H	.2401
<u>Approval Procedures</u>	15A	NCAC	07H	.2402
<u>General Conditions</u>	15A	NCAC	07H	.2404
<u>Specific Conditions</u>	15A	NCAC	07H	.2405
<u>Declaration of General Policy</u>	15A	NCAC	07M	.0301
<u>Definitions</u>	15A	NCAC	07M	.0302
<u>Standards for Public Access</u>	15A	NCAC	07M	.0303
<u>Local Government and State Involvement in Access</u>	15A	NCAC	07M	.0306
<u>Eligibility, Selection Criteria and Matching Requirements</u>	15A	NCAC	07M	.0307

**CHIROPRACTIC EXAMINERS, BOARD OF**

<u>Examination</u>	21	NCAC	10	.0203
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**DENTAL EXAMINERS, BOARD OF**

<u>Procedure for Evaluation or Inspection</u>	21	NCAC	16Q	.0204
<u>Temporary Approval Prior to Site Inspection</u>	21	NCAC	16Q	.0303
<u>Temporary Approval Prior to Site Inspection</u>	21	NCAC	16Q	.0403

**FUNERAL SERVICE, BOARD OF**

<u>Solicitation</u>	21	NCAC	34A	.0124
<u>Complaints: Preliminary Determination</u>	21	NCAC	34A	.0126
<u>National Board Certificate</u>	21	NCAC	34B	.0211
<u>Expiration of Text Scores</u>	21	NCAC	34B	.0213
<u>Practice of Funeral Service or Funeral Directing Not as a...</u>	21	NCAC	34B	.0310
<u>Monthly Reports</u>	21	NCAC	34C	.0305
<u>Preneed Funeral Establishment License</u>	21	NCAC	34D	.0201

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**RULES REVIEW COMMISSION**

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<u>Certificate of Performance</u>	21	NCAC	34D	.0303
<b>SOCIAL WORK CERTIFICATION AND LICENSURE BOARD</b>				
<u>Reporting of Scores</u>	21	NCAC	63	.0302

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**LIST OF APPROVED TEMPORARY RULES**  
**January 22, 2009 Meeting**

**HEALTH SERVICE REGULATION, DIVISION OF**

<u>Performance Standards</u>	10A NCAC 14C .1403
<u>Information Required of Applicant</u>	10A NCAC 14C .1902
<u>Performance Standards</u>	10A NCAC 14C .1903
<u>Support Services</u>	10A NCAC 14C .1904
<u>Staffing and Staff Training</u>	10A NCAC 14C .1905
<u>Information Required of Applicant</u>	10A NCAC 14C .2002
<u>Performance Standards</u>	10A NCAC 14C .2103
<u>Definitions</u>	10A NCAC 14C .2701

*This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 431-3000. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.*

**OFFICE OF ADMINISTRATIVE HEARINGS**

**Chief Administrative Law Judge**  
**JULIAN MANN, III**

**Senior Administrative Law Judge**  
**FRED G. MORRISON JR.**

**ADMINISTRATIVE LAW JUDGES**

Beecher R. Gray	Randall May
Selina Brooks	A. B. Elkins II
Melissa Owens Lassiter	Joe Webster
Don Overby	

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOL BEVERAGE CONTROL COMMISSION</u></b>				
Partnership T/A C Js Lounge v. ABC Commission	07 ABC 0201	Overby	03/11/08	
Michael Daniel Clair v. T/A Par 3 Bistro v. ABC Commission	07 ABC 1289	Lassiter	10/07/08	
ABC Commission v. Rainbow Enterprises, Inc T/A Club N Motion	07 ABC 1532	Gray	06/20/08	23:05 NCR 489
Benita, Inc., T/A Pantana Bob's v. ABC Commission	07 ABC 1584	Overby	04/21/08	23:01 NCR 141
Original Grad, Inc/ T/A Graduate Food and Pub	07 ABC 1648	Joseph	02/25/08	
N.C. Alcoholic Beverage Control Commission v. Feest Inc.	07 ABC 2135	Gray	09/12/08	
T/A Spankys Sports Bar and Grill				
Don Mariachi Ventures, T/A EL Mariachi Gordo	07 ABC 2155	Webster	11/05/08	
N.C. Alcoholic Beverage Control Commission v. Jenny S. Chanthalacksa	08 ABC 0097	May	09/03/08	
T/A JB Food Mart				
N.C. Alcoholic Beverage Control Commission v. Jenny S. Chanthalacksa	08 ABC 0351	May	09/03/08	
T/A JB Food Mart				
AM Enterprises of Fayetteville, Inc., T/A Izzy's Sports Bar v. ABC Commission	08 ABC 0371	Lassiter	06/13/08	
Bhaves Corporation, T/A K&B Foomart v. ABC Commission	08 ABC 0508	Overby	05/19/08	
Downtown Event Center, Inc. T/A Downtown Event Center v. ABC Commission	08 ABC 0937	May	09/16/08	
<b><u>CRIME VICTIMS COMPENSATION</u></b>				
Patricia Ginyard v. Crime Victim Compensation Commission	06 CPS 1720	Gray	05/27/08	
Carrie R. McDougal v. Victims Compensation Services Division	07 CPS 1970	Elkins	05/23/08	
Hillary Holt v. Crime Victims Compensation Commission	07 CPS 2292	Brooks	09/18/08	
Taureka S Johnson v. NC Crime Victims Compensation Commission	08 CPS 0402	Morrison	08/08/08	
Rich's Towing and Service Inc. v. NC Department of Crime Control	08 CPS 0698	May	08/13/08	
And Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section				
Steel Supply and Erection Co., Department of Crime Control and Public Safety, Division of State Highway Patrol and Department of Revenue	08 CPS 0777	Overby	05/29/08	
ATS Specialized, Inc, v. Dept. of Crime Control and Public Safety, Div. Of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 0864	May	09/11/08	
Willie Trucking, Inc d/b/a Allstate Transport Co v. Dept. of Crime Control	08 CPS 0897	May	09/11/08	
& Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section				
Randy S. Griffin v. NC Crime Victims Compensation Commission	08 CPS 0995	May	09/11/08	
Kenneth Lee Moore v. Dept. of Crime Control and Public Safety	08 CPS 1093	Webster	10/27/08	
Interstate Crushing Inc. v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1086	Overby	09/29/08	

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## CONTESTED CASE DECISIONS

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Sterett Equipment Company LLC v. N.C. Dept. of Crime Control And Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1206	Overby	09/29/08
Bertrand E. Dupuis d/b/a New England Heavy Hauling v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1207	Overby	09/29/08
Bulldog Erectors, Inc v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1208	Overby	09/29/08
Continental Machinery Movers Inc. v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1209	Overby	09/29/08
Michael Alan Moore v. Crime Victims Compensation Commission	08 CPS 1478	Lassiter	09/08/08
TNT of York County, Inc., Tony McMillan v. State Highway Patrol Motor Carrier Enforcement	08 CPS 1508	Joseph	12/11/08
SOOF Trucking, Ray Charles Solomon v. Secretary of Crime Control And Public Safety	08 CPS 1526	Overby	09/09/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1800	Brooks	12/15/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1801	Brooks	12/15/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1802	Brooks	12/15/08
Kayonna Goodwin Pollard c/o Chad Lopez Pollard v. Crime Control & Victim Compensation Services	08 CPS 1850	Gray	10/24/08
John D. Lane v. Diversified Drilling Corp v. Office of Admin Svc, Sec. of Crime Control and Public Safety	08 CPS 2049	Joseph	11/06/08
Richard Pratt v. Dept. of Crime Control and Public Safety	08 CPS 2417	Lassiter	01/15/08
Robert D. Reinhold v. Dept. of Transportation, Division of Motor Vehicles	08 CPS 2501	Gray	12/10/08

A list of Child Support Decisions may be obtained by accessing the OAH Website: <http://www.ncoah.com/hearings/decisions/>

### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Gloria McNair Jean's Jewels v. Div. of Child Development, DHHS	06 DHR 0633	Lassiter	07/11/08
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Character Builders, Inc., Clavon Leonard v. DMA, Developmental Disabilities and Substance Abuse Services	07 DHR 0124	Elkins	08/07/08
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Arthur Burch and Margaret and Burch v. Department of Health and Human Services	07 DHR 0242	Brooks	04/30/08
The "M" Company LLC, v. DHHS, DMA, Program Integrity	07 DHR 0429	Webster	05/29/08
Brenda F. Ervin v. DHHS, DFS, Health Care Personnel Registry	07 DHR 0493	Gray	12/08/08
Judy E. Pettus v. Office of Chief Medical Examiner, Thomas B. Clark, Iii, Md, Pathologist	07 DHR 0535	Webster	05/05/08
Clorie Bivens Owen on Behalf of Williams Baxter Bivens – Estate of Leroy A. Bivens v. DHHS	07 DHR 0701	Elkins	12/08/08
Alterra Clare Bridge of Asheville v. DHHS, DFS, Adult Care Licensure Section	07 DHR 0914	Gray	06/06/08
Shirley Brooks Dial v. Health Care Personnel Registry	07 DHR 0931	Webster	02/27/08
Midtown Food Mart #2, Kerab Giebrehiwot, Mehreteab Wooldegehibel and Fesseha Zeru	07 DHR 1044	Webster	04/25/08
Midtown Food Mart III, Chenet Hailelassi and Fesseha Zeru v. DHHS	07 DHR 1045	Webster	04/28/08
Kelly Schofield MD, Clinical Director, Youth Quest, Inc. v. DHHS, DFS Mental Health Licensure and Certification	07 DHR 1064	Joseph	10/17/08
Carolyn E. Reed v. DHHS, Division of Social Services Program Integrity AFDC/Work First	07 DHR 1214	Webster	07/21/08
Mrs. Elizabeth Futrell v. Value Options	07 DHR 1331	Lassiter	06/09/08
Cornell Jones v. DHHS, Division of Health Services Regulation	07 DHR 1399	Joseph	04/22/08
Dianetta Foye v. Division of Child Development, DHHS, Services	07 DHR 1440	Joseph	05/07/08
Rufus Patrick Devers v. DHHS, Division of Health Service Regulation Health Care Personnel Registry	07 DHR 1442	Joseph	05/29/08
Ray Dukes, Bright Future Learning Center v. DHHS, Division of Public Health, Child and Adult Care Food Program	07 DHR 1473	Joseph	04/08/08
William Manning c/o Thyllis Smith, A Touch From the Heart Staff v. NC Department of Health and Human Services, Division of Medical Assistance	07 DHR 1060	Webster	10/14/08



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Janice Addison v. Value Options	07 DHR 1618	Webster	05/16/08	
Donna Hicks Crocker v. DHHS/DMA	07 DHR 1629	Joseph	08/01/08	
Rebecca Dehart v. DHHS, Division of Health Service Regulation Health Care Personnel Registry Section	07 DHR 1650	Elkins	05/21/08	
Ellen Brown v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	07 DHR 1651	Elkins	05/21/08	
Life Solutions of Lumberton, NC, LLC d/b/a Timberwood and Bridgecrest	07 DHR 1758	Joseph	12/04/08	
Life Solutions of Lumberton, NC, LLC d/b/a Timberwood and Bridgecrest	07 DHR 1759	Joseph	12/04/08	
Joann Lennon v. Value Options Medicaid	07 DHR 1770	Webster	05/16/08	
Angeline Currie v. DHHS	07 DHR 1986	Elkins	06/04/08	
Tameala Jones v. OAH	07 DHR 1993	Webster	05/16/08	
Dianetta Foye v. Division of Child Development, DHHS, Services	07 DHR 2020	Joseph	05/07/08	
Lashauna Reid v. CCMHC (PFCS-Service Provider)	07 DHR 2039	Elkins	08/05/08	
Presbyterian Diagnostic Center at Cabarrus LLC v. N.C. Department of Health and Human Services, Division of Health Service Regulation and Southern Piedmont Imaging, LLC	07 DHR 2043	Lassiter	08/18/08	23:16 NCR 1600
Southern Piedmont Imaging, LLC v. N.C. Department of Health and Human Services, Division of Health Service Regulation and Presbyterian Diagnostic Center at Cabarrus, LLC	07 DHR 2045	Lassiter	08/18/08	23:16 NCR 1600
Family & Youth Services, Inc. Angela Ford, President v. DHHS, Division of Medical Assistance Provider Services	07 DHR 2057	Webster	05/16/08	
Yolanda Jones v. DHHS, Adult Licensure Section	07 DHR 2081	Webster	05/16/08	
Tianna Troy Legal guardian Mother Traci Lookadoo v. Value Option	07 DHR 2087	Elkins	05/23/08	
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Roger Houston v. DHHS, Div. of Health Service Regulation	07 DHR 2176	Gray	07/08/08	
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Kevin McMillian/Linda M McLaughlin v. DHHS	07 DHR 2239	Elkins	06/04/08	
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Gladys Cherry v. NC Department of Health and Human Services	07 DHR 2288	Webster	10/10/08	
Anna Fields v. Value Options	07 DHR 2326	Joseph	06/02/08	
Larry Hopper v. DHHS	07 DHR 2356	May	06/20/08	
Shelby Davis v. DHHS	08 DHR 0014	Lassiter	05/09/08	
Hellon P. Johnson v. DHHS	08 DHR 0020	May	07/03/08	
Lenora King v. DHHS	08 DHR 0034	Joseph	05/01/08	
Forest Mewborn v. Health Care Personnel Registry	08 DHR 0043	Elkins	05/23/08	
Wilma Jackson v. Value Options	08 DHR 0082	Joseph	06/02/08	
Carmelita Wiggins v. Value Options	08 DHR 0198	Webster	05/16/08	
Blue Ridge Healthcare Surgery Center, Morganton LLC and Grace Hospital, Inc. v. DHHS, DHSR, CON Section v. Dr. Mushtaq Bukhari, Dr. Edwin Holler, Dr. Suneel Mohammed, Carolina Digestive Care, PLLC, and Gastroenterology Specialists	08 DHR 0204	Brooks	09/18/08	
Murphy's Outreach Community Developmental Services, Inc, d/b/a Outreach Home Health	08 DHR 0220	Joseph	07/22/08	
Lisa Helms v. DHHS	08 DHR 0255	Overby	06/17/08	
Pearlene Johnson Ivery v. DMA, Third Party Recovery (Medicaid)	08 DHR 0286	Brooks	07/07/08	
Darryl A. Edwards v. DHHS	08 DHR 0320	Gray	11/05/08	
Mamaue Aytch v. DHHS	08 DHR 0325	Elkins	05/23/08	
Brenda McGilvary v. DHHS, Division of Social Services	08 DHR 0384	Webster	08/05/08	
Fannie M. Wilson v. OAH	08 DHR 0393	Webster	06/17/08	
Angela D Seabrooks/The Jabez House LLC v. DHHS/Division of Mental Health, Developmental and Substance Abuse Services, The Guilford	08 DHR 0403	Joseph	06/09/08	
Angela D. Seabrooks/The Jabez House LLC v. NC Department of Health and Human Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services and The Guilford Center Center	08 DHR 0403	Joseph	09/03/08	
William McCray Pretty v. DHHS, Division of Facility Services	08 DHR 0411	Webster	06/12/08	
Focus Health Services, Inc. via Annette Johnson, Owner Operator v. North Carolina Department of Health and Human Services and Albemarle Mental Health Center for Developmental Disabilities and Substance Abuse Services	08 DHR 0442	Gray	06/12/08	
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Frances Milligan v. DHHS	08 DHR 0566	May	06/19/08	
Betty Williams v. DHHS	08 DHR 0570	Joseph	06/02/08	
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Brenda M. Finney v. Medicaid	08 DHR 0586	Joseph	06/09/08	
Allred & Allred Day Care Center, Inc. v. N.C. Department of Health and Human Services, Division of Public Health, Child And Adult Care Food Program	08 DHR 0617	May	06/04/08	
Lakeva Robinson v. DMA/Value Options	08 DHR 0625	May	05/28/08	
Ronald Lee Young v. N.C. Department of Health and Human Services	08 DHR 0631	Joseph	07/21/08	
Steven Chestnut v. DHHS, Health Care Personnel Registry	08 DHR 0652	May	11/19/08	
Tina Miller v. OAH, DHHS	08 DHR 0661	Lassiter	06/10/08	
Doris Harris v. Division of Child Development	08 DHR 0710	May	07/02/08	
Michelle D. Mills v. DHHS, Division of Health Service Regulation	08 DHR 0712	Joseph	06/09/08	
Trena Ellis v. DHHS	08 DHR 0730	Lassiter	07/03/08	
Faith Davis v. Pride in North Carolina Value Options	08 DHR 0746	Overby	05/28/08	
Evonne Neal v. Medicaid	08 DHR 0748	May	06/20/08	
Maria Dejesus Ruiz La Vaca Ramona v. N.C. Department of Health and Human Services	08 DHR 0760	Overby	07/24/08	
Ray C. Price v. DHHS, Office of the Controller	08 DHR 0767	Brooks	07/07/08	
Miland Hanna, Lamia Hanna and Charlotte Fast Mart, v. DHHS Div. of Public Health	08 DHR 0778	Brooks	08/28/08	
Cheryl I Rice v. DHHS	08 DHR 0793	Overby	07/10/08	
Destiny A Taylor v. Division of Child Development	08 DHR 0794	Gray	07/21/08	
Shawanda Rayner v. Cherry Hospital	08 DHR 0797	Webster	10/10/08	
Mary Ada Mills, Mary M. Mills MSA FCH v. Adult Care Licensure	08 DHR 0808	May	08/26/08	
Total Renal Care of North Carolina, LLC d/b/a TRC-Lelan v. DHHS Div. of Health Service Center Regulation, CON Section and Bio-Medical Applications of NC, Inc. d/b/a Fresenius Medical Care Of Brunswick County	08 DHR 0818	Webster	12/23/08	23:16 NCR 1670
Lula Bowden v. OAH	08 DHR 0852	May	06/20/08	
Donovan Harris v. Value Options	08 DHR 0894	May	06/19/08	
Gabrielle Lloyd v. DHHS, Division of Health Service Regulation	08 DHR 0905	May	09/22/08	
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Frankie Nicole Carter v. DHHS, Division of Health Service Regulation	08 DHR 0929	Brooks	06/19/08	
Christine Maria Plyer v. Medicaid Reimbursement	08 DHR 0949	Mann	06/18/08	
Margaret Mubanga v. NC Department of Health and Human Services	08 DHR 0961	Gray	08/25/08	
Evangelina Ingram v. Value Options	08 DHR 0997	Gray	06/10/08	
Marcia Veronica Harris v. Department of Health and Human Services, Division of Health Service Regulation	08 DHR 0169	Lassiter	08/11/08	
Maureen Jordan parent of Destinne Jordan v. Value Options	08 DHR 1005	Gray	06/19/08	
Triangle Alternative Inc. Dorothy George v. Office of Administrative Hearings	08 DHR 1012	May	07/21/08	
Terrie P Hill dba Positive Care MHL 041-595 2203 Wanda Drive v. N.C. Department of Health and Human Services, Division of Health Service Regulation, Mental Health Licensure and Certification Section	08 DHR 1015	Lassiter	09/12/08	
Terrie P Hill dba Positive Care II MHL 041-633 3406 Fern Place v. NC Department of Health and Human Services, Division of Health Service Regulation, Mental Health Licensure and Certification Section	08 DHR 1016	Lassiter	09/12/08	
Terrie P Hill dba Positive Care II MHL 041-765 3406 Fern Place v. NC Department of Health and Human Services, Division of Health Service Regulation, Mental Health Licensure and Certification Section	08 DHR 1017	Lassiter	09/12/08	
Mario Jackson v. DHHS	08 DHR 1024	Overby	06/19/08	
Adam L Powell v. NC Department of Health and Human Services	08 DHR 1030	Lassiter	09/05/08	
Edwin F Clavijo, El Exito v. NC Department of Health and Human Services, Division of Public Health, Nutrition Services Branch	08 DHR 1034	Lassiter	09/15/08	
Linda F. Ellison v. NC Department of Health and Human Services and or EDS	08 DHR 1035	Joseph	07/09/08	
Doris Smith v. Health Care Personnel Registry	08 DHR 1238	Brooks	08/08/08	
Latrish T. Perry v. Department of Health and Human Services	08 DHR 1023	Webster	08/29/08	
Martha Washington Harper v. DSS	08 DHR 1041	Brooks	06/23/08	
Martha McDonald v. DHHS, Div. of Health Service Regulation, Health Care Personnel Registry	08 DHR 1052	May	12/04/08	
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Gwendolyn F. Gulley v. NC Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section	08 DHR 1062	Overby	09/09/08	
Rhonda Jones v. Value Options	08 DHR 1064	Webster	07/18/08	
One Love Developmental Services v. Division of Health Service Regulation, Department of Health and Human Services	08 DHR 1068	Lassiter	07/25/08	
Jona Turner v. Office of Administrative Hearings	08 DHR 1092	Webster	07/18/08	
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Mary M. Branch v. North Carolina Dept of Health and Human Services, Value Options	08 DHR 1174	Elkins	08/11/08
Haywood Miller, Bobby Jean Graves Miller v. DHHS, Mental Health Licensure Certification Section	08 DHR 1181	Overby	07/01/08
Donna Armstrong v. DHHS	08 DHR 1185	Brooks	12/02/08
Jan Williams v. Value Options, DHHS	08 DHR 1231	Overby	07/09/08
Heather Peete v. OAH	08 DHR 1281	Lassiter	07/02/08
Ann Moody v. DHHS	08 DHR 1299	Webster	07/18/08
Khahada Kirby v. Value Options	08 DHR 1310	Webster	07/18/08
Amir Abusamak v. N.C. Department of Health and Human Services	08 DHR 1325	Gray	07/16/08
Big Z Supermarket, Abdul Hamdan v. Cory Menees, NC Dept. of Health and Human Services	08 DHR 1343	Overby	08/27/08
Alesia Alwahishi dba Brotherhood Market	08 DHR 1356	Gray	07/22/08
Nigel Brown v. Value Options	08 DHR 1358	Gray	08/29/08
Beverly Darlene Christian v. DHHS Hearing Office	08 DHR 1422	Elkins	11/24/08
Forever Young Group Care LLC T/A FY Inc v. DHHS, Div. of Health Service Regulation, Mental Health Licensure and Certification Section	08 DHR 1455	Lassiter	01/16/09
Supported Living Youth Service, Kirk Hillian v. Div. of Health Service Regulation	08 DHR 1456	Joseph	10/22/08
Michael Grondahl v. DHHS	08 DHR 1491	Gray	08/01/08
Tyechia Jones v. Value Options/DHHS	08 DHR 1492	Mann	09/18/08
Kelly A Schofield MD – Clinical Director Youth Quest Inc. v. N.C. Department of Health Service Regulation, Mental Health Licensure and Certification Section	08 DHR 1505	Lassiter	09/08/08
Holly Martin Ph.D, Div. of Medical Assistance of DHHS	08 DHR 1534	Webster	01/06/09
Edward Kenneth Smith v. NC Department of Health and Human Services, Division of Health Service Regulation	08 DHR 1537	Lassiter	09/16/08
Brian C. Hargrove v. DHHS	08 DHR 1556	Webster	01/07/09
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Margaret Brack for Elgin Brack v. Value Options Emery Milliken DHHS	08 DHR 1576	Lassiter	08/27/08
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Brittany Brown v. Value Options	08 DHR 1599	Webster	10/10/08
Evangeline Ingram v. Value Options	08 DHR 1618	Joseph	12/05/08
Tyvonnie Sheri Glenn v. Value Options	08 DHR 1628	May	09/19/08
Robert Anthony Glenn, Sr., v. EDS, SMA, DHHS, Medicaid	08 DHR 1630	Brooks	10/20/08
Levi Rutty/Linda McLaughlin v. DHHS	08 DHR 1651	Elkins	01/14/09
Longview Childrens Day School v. Div. of Child Development	08 DHR 1676	Webster	01/06/09
Judy Grissett v. OAH, DHHS	08 DHR 1678	Webster	11/19/08
Tyrese Rogers/Linda McLaughlin v. DHHS	08 DHR 1685	Elkins	01/14/09
Shavon Maynor/Linda McLaughlin v. DHHS	08 DHR 1688	Elkins	01/14/09
William Scott Davis, Jr v. DHHS, Child Protective Services	08 DHR 1691	Webster	12/15/08
Donna Locklear v. Value Options	08 DHR 1695	Webster	11/19/08
Amanda Hennes v. N.C. Department of Health and Human Services	08 DHR 1696	Gray	09/22/08
Alexis Faulk v. DMA/Value Options	08 DHR 1701	Elkins	11/14/08
Bobbie L Cribb v. Office of Administrative Hearings	08 DHR 1714	Gray	09/08/08
Irene McLendon/Mikala McLendon v. Value Options	08 DHR 1722	Webster	10/01/08
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Janelle Gatewood v. Value Options	08 DHR 1763	Webster	10/10/08
Mr. and Mrs. Gregory and Martha Glenn v. HHS	08 DHR 1787	Brooks	10/27/08
Roxanne Haughton v. Value Options/DMA	08 DHR 1799	Elkins	10/14/08
Rainbow Academy, Dorothy Johnson v. Div. of Child Development DHHS	08 DHR 1838	Brooks	11/03/08
Joshua Dmae Thompson (Consumer) Sebreana Yvett Thompson (Mother) v. Department of Mental Health	08 DHR 1844	Webster	10/01/08
Christie Moriea Turner v. CMC Carolines Medical Center Mental Health	08 DHR 1848	Gray	10/27/08
Sativa Shalunda Brown v. DHHS, Div. of Health Service Regulation	08 DHR 1869	Gray	12/31/08
JE Cameron DDS & Associates v. DHHS, DMA	08 DHR 1885	Gray	10/27/08
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Penny A. Golden v. Medicaid	08 DHR 1890	May	11/05/08
Keystone Charlotte, LLC d/b/a The Keys of Carolina (Administrative Penalty) v. DHHS, Div. of Health Service Regulation, Mental Health Licensure and Certification Section	08 DHR 1913	Joseph	11/17/08
Forever Young Group Care LLC T/A FY Inc v. DHHS, Div. of Health Service Regulation, Mental Health Licensure and Certification Section	08 DHR 2159	Lassiter	01/16/09

### **DEPARTMENT OF JUSTICE**

Jamu Kimyakkki Sanders v. N.C. Criminal Justice Education And Training Standards Commission	06 DOJ 1741	May	08/29/08
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Dallas Ray Joyner v. Criminal Justice Education and Training Standards Commission	07 DOJ 0719	Overby	04/15/08
Richard Junior Hopper v. Private Protective Services Board	07 DOJ 1071	Webster	02/21/08
Sheldon Avery McCoy v. Criminal Justice Education and Training Standards Commission	07 DOJ 1162	Mann	04/07/08
David Steven Norris v. Private Protective Services Board	07 DOJ 1256	Elkins	04/16/08
Scott McLean Harrison v. North Carolina Criminal Justice Education And Training Standards Commission	07 DOJ 1330	Webster	06/24/08
Brian Campbell v. Department of Justice, Company Police Program	07 DOJ 1344	Webster	02/25/08
John Mark Goodin v. Alarm Systems Licensing Board	07 DOJ 1405	Lassiter	04/04/08
James Lee Rodenberg v. Depart. of Justice, Company Police Program	07 DOJ 1434	Webster	02/25/08
Michael L. Scriven v. Private Protective Services Board	07 DOJ 1483	Elkins	03/25/08
Lamuel Tommy Anderson v. North Carolina Department of Justice Campus Police Program	07 DOJ 1500	Joseph	06/03/08
Roger Wayne Mungo, Jr., Sheriffs' Education and Training Standards Commission	07 DOJ 1510	Overby	05/19/08
Steven L. Haire v. North Carolina Department of Justice, Campus Police Program	07 DOJ 1558	Joseph	05/22/08
Timothy Daniel McFalls v. N.C. Criminal Justice Education and Training Standards Commission	07 DOJ 1712	May	09/03/08
Iris Nina Bumpass v. Criminal Justice Education and Training Standards Commission	07 DOJ 2071	Webster	05/16/08
Michael Gerald Copeland v. Private Protective Services Board	07 DOJ 2286	Gray	07/17/08
Leigh Ann Branch v. N.C. Sheriffs' Education and Training Standards Commission	08 DOJ 0177	Gray	06/23/08
Jimmy Dean Poston v. N.C. Sheriffs' Education and Training Standards Commission	08 DOJ 0179	Webster	08/28/08
Katheryn Renee Johnson v. North Carolina Sheriffs' Education And Training Standards Commission	08 DOJ 0180	Brooks	06/18/08
Gerald Boyce Bond, Jr. v. N.C. Sheriffs' Education and Training Standards Commission	08 DOJ 0181	Gray	07/14/08
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John Edward Isaacks, Jr. v. North Carolina Sheriffs' Education And Training Standards Commission	08 DOJ 0184	May	06/18/08
Anthony Ray Haynie v. N.C. Sheriffs' Education and Training Standards Commission	08 DOJ 0207	Brooks	08/06/08
Joseph Shane Johnston v. N.C. Sheriffs' Education and Training Standards Commission	08 DOJ 0209	Lassiter	10/07/08
Anthony Ray Haynie v. N.C. Sheriffs' Education and Training Standards Commission	08 DOJ 0532	Brooks	08/06/08
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Stephen Joseph Ciliberti v. N.C. Private Protective Services Board	08 DOJ 0858	Gray	07/15/08
Deborah Moore Anderson v. North Carolina Sheriffs' Education And Training Standards Commission	08 DOJ 1038	Brooks	05/28/08
Dustin Elvin Campbell v. Criminal Justice Education and Training Standards Commission	08 DOJ 1078	Lassiter	07/14/08
Cynthia Kay Saintsing v. Criminal Justice Education and Training Standards Commission	08 DOJ 1079	Lassiter	07/14/08
Timothy C. Darrh v. DHHS/Value Options	07 DOJ 1239	Overby	07/07/08
David Alan Moore v. North Carolina Private Protective Services Board	08 DOJ 1264	Morrison	07/21/08
Gregory Alan Hooks v. NC Alarm Systems Licensing Board	08 DOJ 1265	Morrison	07/10/08
Jesse Adam Salmon v. N.C. Sheriffs' Education and Training Standards Commission	08 DOJ 1270	Overby	09/15/08
Tina Ann Ward v. N.C. Sheriffs' Education and Training Standards Commission	08 DOJ 1273	Gray	08/29/08
P.J. Shelton v. NC Sheriffs' Education and Training Standards Commission	08 DOJ 1274	Brooks	10/10/08

**DEPARTMENT OF LABOR**

Sandra Leroux, Leroux Entertainment Corporation d/b/a Spectacular Events! V. DOL	08 DOL 0754	May	07/08/08
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**DEPARTMENT OF TRANSPORTATION**

Kevin Douglas v. Dept. of Justice Criminal Justice Standards, DMV License and Theft, Holly Springs Police Department	07 DOT 2221	Webster	05/12/08
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**DEPARTMENT OF STATE TREASURER**

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Robert A. Gabriel Sr. v. DST	05 DST 0586	Gray	12/31/08	23:16 NCR 1695
Trevor Allan Hampton v. N.C. State Retirement Systems	07 DST 1493	Overby	09/08/08	
Patricia V. Leonard v. State Treasurer/Retirement Systems Division	07 DST 1928	Lassiter	03/12/08	
William S. Greene v. DST, Retirement Systems Division	08 DST 0235	Gray	07/16/08	23:05 NCR 524
Jerry Alan Reese v. DST, State and Local Finance Division and the Local Government Commission	08 DST 0256	Morrison	07/25/08	

**EDUCATION, STATE BOARD OF**

Bradford Dale Gulley v. Depart. of Education Attorney Generals Office	07 EDC 1486	Webster	05/16/08	
Lucretia Burrus v. State Board of Education	07 EDC 2210	Webster	05/16/08	
Gregory Bates v. DPI, Licensure Section	07 EDC 2238	Gray	04/30/08	
Heather S. Brame v. State Board of Education	07 EDC 2287	Joseph	05/07/08	
Nancy L. Ashburn v. NC Department of Public Instruction	07 EDC 2357	Brooks	08/19/08	
Sandra Chesser v. State Board of Education	08 EDC 0022	May	04/30/08	
Terry L Moore v. N.C. Department of Public Instruction	08 EDC 0386	Morrison	07/22/08	
Len Stevenson Smith v. North Carolina Department of Public Instruction	08 EDC 0215	May	08/26/08	
Hubert Thomas Byrum v. Office of State Superintendent	08 EDC 0619	Gray	06/04/08	
Gary Alan Cooper v. N.C. State Board of Education	08 EDC 0920	Gray	08/01/08	
Selena Blad v. NC Board of Education	08 EDC 1316	Brooks	09/17/08	

**DEPT. OF ENVIRONMENT AND NATURAL RESOURCES**

Anderson Sand & Grave; LLC, Gerald L. Anderson LLC, and Gerald Anderson	05 EHR 1787	Gray	10/29/08	23:16 NCR 1701
Henry S. Cowell, III and Carolyn Dressler v. DENR, Div. of Coastal Management	06 EHR 1185	Brooks	05/30/08	23:05 NCR 501
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**CONTESTED CASE DECISIONS**

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STATE OF NORTH CAROLINA  
CABARRUS COUNTY

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

PRESBYTERIAN DIAGNOSTIC CENTER  
AT CABARRUS, LLC,

Petitioner;

v.

N.C. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, DIVISION OF  
HEALTH SERVICE REGULATION,  
CERTIFICATE OF NEED SECTION,

Respondent,

and

SOUTHERN PIEDMONT IMAGING, LLC,

Respondent-Intervenor.

07 DHR 2043

OFFICE OF  
ADMINISTRATIVE HEARINGS

2008 AUG 18 PM 3:06

FILED

SOUTHERN PIEDMONT IMAGING, LLC,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,  
DIVISION OF HEALTH SERVICE  
REGULATION, CERTIFICATE OF NEED  
SECTION,

Respondent,

and

PRESBYTERIAN DIAGNOSTIC CENTER  
AT CABARRUS, LLC,

Respondent-Intervenor.

07 DHR 2045



**RECOMMENDED DECISION**

This matter came for hearing before the undersigned Administrative Law Judge on May 20, May 28-30, June 3-5, and July 15, 2008, in Raleigh, North Carolina. By Order dated January 14, 2008, Chief Administrative Law Judge Julian Mann, III consolidated these contested cases. On August 1, 2008, the parties filed their respective proposed Decisions with the Office of Administrative Hearings.

**APPEARANCES**

For Presbyterian Diagnostic Center at Cabarrus, LLC ("PDCC"):

Denise Gunter  
Candace S. Friel  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
GlenLake One, Suite 200  
4140 Parklake Avenue  
Raleigh, NC 27622-0519

For Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("the CON Section" or "Respondent"):

Susan K. Hackney  
June S. Ferrell  
Assistant Attorneys General  
N.C. Department of Justice  
114 West Edenton Street  
Raleigh, NC 27602-0629

For Southern Piedmont Imaging, LLC ("SPI"):

Maureen Demarest Murray  
Terrill Johnson Harris  
SMITH MOORE LLP  
300 North Greene Street  
Suite 1400 (27401)  
P.O. Box 21927  
Greensboro, NC 27420

**APPLICABLE LAW**

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act ("APA"), N.C. Gen. Stat. § 150B-1, *et seq.*
2. The substantive statutory law applicable to this contested case hearing is the North Carolina Certificate of Need ("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.1800 *et seq.*, 14C.2300 *et seq.*, 14C.2700 *et seq.*, and the Office of Administrative Hearings Regulations, 26 N.C.A.C. 3.0001, *et seq.*

**ISSUES**

1. Whether Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law, in finding PDCC's CON application conditionally approved with respect to the applicable Statutory Review Criteria contained in N.C. Gen. Stat. §§ 131E-183(a)(4), (5), (12), (18a), and 183(b), and with 10A N.C.A.C. 14C.2702(c)(1) and (c)(4), and in conditioning PDCC to not acquire an MRI unit?<sup>1</sup>
2. Whether Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law by finding SPI's application conforming with N.C. Gen. Stat. §131E-183(3), (5), (8), 10A N.C.A.C. 14C.2702(c)(6), and approving SPI's acquisition and development of an MRI to be placed in its previously-approved diagnostic center in Cabarrus County?

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<sup>1</sup> Respondent conditionally approved PDCC with the Statutory Review Criteria in N.C. Gen. Stat. §§ 131E-183(a)(3) and (6), and 10A N.C.A.C. 14C.1804(2) with respect to the proposed digital mammography unit, in addition to the review criteria listed above. Respondent conditioned PDCC not to acquire a digital mammography unit as a part of its approved diagnostic center. However, the Court determined as a matter of law in its ruling on PDCC's motion for summary judgment, that Respondent did not err in applying the 10A N.C.A.C. 14C.1804(c) performance standard, Criterion (3), or Criterion (6) to the proposed digital mammography unit and in conditioning PDCC to not acquire the proposed digital mammography unit.

3. Whether Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law in approving PDCC's application to develop a diagnostic center with one computed tomography ("CT") scanner, one digital x-ray unit, and one digital ultrasound unit?

### **PARTIES**

1. Petitioner/Respondent-Intervenor ("PDCC") is a North Carolina limited liability company. It seeks to establish a freestanding diagnostic center in Concord, Cabarrus County, with an MRI scanner, a computed tomography ("CT") scanner, and mammography, x-ray, and ultrasound equipment.

2. Petitioner/Respondent-Intervenor ("SPI") is a North Carolina limited liability company. It previously received a CON to develop a diagnostic center in Kannapolis, Cabarrus County, with a CT scanner and x-ray, ultrasound, mammography, and bone density equipment. It seeks to acquire an MRI scanner for its previously approved freestanding diagnostic center in Kannapolis.

3. Respondent ("CON Section or Respondent") is the State agency that administers the Certificate of Need Act ("CON Act"), N.C. Gen. Stat. Chapter 131E, Article 9.

### **WITNESSES AT CONTESTED CASE HEARING**

#### **For PDCC Diagnostic Center at Cabarrus, LLC**

1. Tanya Rupp is employed as a project analyst by the CON Section who reviewed the PDCC and SPI applications. (Rupp, T. Vol. 1, p. 154) She testified as an adverse witness in PDCC's case in chief.

2. Lee Hoffman was the Chief of the Certificate of Need Section at the time the findings and decision were issued on the PDCC and SPI applications. (Hoffman, T. Vol. 2, p. 184) She testified as an adverse witness in PDCC's case in chief.

3. Nancy Bres Martin is a health planning consultant with NBM Health Planning Associates who assisted with the preparation of PDCC's application. At

hearing, she was qualified as an expert witness in CON preparation and analysis in health planning. (Bres Martin, T. Vol. 2, pp. 64, 74; PDCC Ex. 6)

4. Barbara Freedy is Director of Certificate of Need for Novant Health who was primarily responsible for the PDCC application. At hearing, she was qualified as an expert witness in CON preparation and analysis in health planning. (Freedy, T. Vol. 4, pp. 77, 87-88; PDCC Ex. 27)

5. Robert Glenn Johnson, Jr. prepared the pro forma financial statements for PDCC's certificate of need application. At hearing, he was qualified as an expert in the field of CON financial analysis and preparation. (Johnson, T. Vol. 3, pp. 192-193; PDCC Ex. 24)

6. Ashley Profitt is a Planning Specialist at CMC-NorthEast, and assisted with preparing certain aspects of the SPI application, including physician letters. (Profitt, T. Vol. 4, p. 54) At hearing, she was called as an adverse witness in PDCC's case in chief.

7. Elizabeth Kirkman is Director of Planning at CMC-NorthEast with responsibilities for service line planning, capacity planning, and certificate of need applications. She was responsible for supervising the preparation of the SPI MRI application. (Kirkman, T. Vol. 4, p. 45) At hearing, she was called as an adverse witness in PDCC's case in chief.

**For Southern Piedmont Imaging, LLC**

1. Ms. Kirkman also testified as a witness in SPI's case in chief. She was qualified as an expert in certificate of need preparation and analysis and health planning. (Kirkman, Vol. 5, pp. 133-134; SPI Ex. 43)

2. Beverly Flynn is employed as Director of Financial Development for CMC-NorthEast, and has responsibility for Medicare/Medicaid cost reports, financial pro formas for certificate of need applications and new services, rate modeling, budgeting, and the cost accounting system. She prepared the pro formas for SPI's MRI application. She was qualified as an expert witness in Medicare and Medicaid

reimbursement and financial analysis and projections for inpatient and outpatient services. (Flynn, T. Vol. 6, pp. 138-144; SPI Ex. 53).

**For the Certificate of Need Section**

Respondent did not call any witnesses in its case in chief.

**EXHIBITS ADMITTED INTO EVIDENCE**

**For PDCC:** Exhibits 1 (PDCC's application), 2 (SPI's application), 3 (Respondent file), 4 - 22, 24, 26, 27 - 29, 31, 34 - 36. Exhibit 30 was used in an Offer Of Proof.

PDCC's request to take official notice of PDCC Exhibit 32 is Granted. PDCC's request to take judicial notice of Exhibits 23 and 33 is Denied. Exhibit 25 (Mr. Robert Johnson's deposition transcript) is not admitted.

**For SPI:** Exhibits 43, 53, 55, and 61.

**For Respondent:** None introduced.

**STIPULATED FACTS**

1. Respondent is part of the State agency that administers the Certificate of Need Law, N.C. Gen. Stat. Chapter 131E, Article 9.
2. On or about May 15, 2007, PDCC filed a CON application with Respondent to acquire one fixed MRI scanner, one CT scanner, mammography unit, ultrasound unit and an x-ray unit, and to establish a new diagnostic center to be located on Highway 73 in Cabarrus County, North Carolina, identified as Project I.D. No. F-7864-07.
3. By letter dated October 26, 2007, Respondent issued its decision conditionally and partially approving the PDCC Application, and denying PDCC's request for a new mammography unit and an MRI scanner.

4. On or about May 15, 2007, SPI filed a CON application with Respondent to acquire one fixed MRI scanner, and install it in a previously-approved diagnostic center at the North Carolina Research Campus in Kannapolis, Cabarrus County, North Carolina, identified as Project I.D. No. F-7859-07.

5. By letter dated October 26, 2007, Respondent issued its decision conditionally approving the SPI Application.

6. On November 21, 2007, PDCC filed a petition for a contested case hearing with the Office of Administrative Hearings ("OAH") appealing Respondent's conditional and partial approval of the PDCC Application and the conditional approval of the SPI Application. PDCC timely filed its petition for contested case hearing in accordance with N.C. Gen. Stat. § 150B-23. (07 DHR 2043)

7. On November 26, 2007, SPI filed a petition for a contested case hearing in OAH appealing Respondent's conditional and partial approval of the PDCC Application. SPI timely filed its petition for a contested case hearing in accordance with N.C. Gen. Stat. § 150B-23. (07 DHR 2045)

8. On December 14, 2007, PDCC filed a motion to intervene in SPI's contested case (07 DHR 2045). The undersigned granted such motion on January 3, 2008.

9. On December 14, 2007, SPI filed a motion to intervene in PDCC's contested case (07 DHR 2043). The undersigned granted such Motion on January 3, 2008.

10. On January 2, 2008, PDCC and SPI filed a petition to consolidate the two above-referenced contested cases. Chief Administrative Law Judge Julian Mann, III consolidated these cases on January 14, 2008.

#### **SUMMARY JUDGMENT ORDER**

1. Before the contested case hearing commenced on May 20, 2008, PDCC filed a motion for summary judgment on two issues:

(a) Whether Respondent erred in conditioning PDCC not to acquire mammography equipment, and

(b) Whether SPI improperly amended its CON application when its parent company, Cabarrus Memorial Hospital d/b/a NorthEast Medical Center, merged with The Charlotte Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System during the review at issue in this contested case. Briefs were submitted, and oral arguments were held on May 20, 2008.

2. On May 27, 2008, the undersigned issued an Order denying PDCC's motion, and entering Summary Judgment in favor of Respondent and SPI on both issues raised in the motion. A copy of this Order is attached to this Recommended Decision and incorporated herein.

### **FINDINGS OF FACT**

On the remaining issues, having heard all the evidence in the case, considered the arguments of counsel, examined all the exhibits, and reviewed the relevant law, the undersigned makes the following Findings of Fact by a preponderance of the evidence, Conclusions of Law thereon, and the following Recommended Decision:

#### **I. APPLICATION REVIEW PROCESS**

##### **A. Agency Custom and Practice**

1. Respondent has issued thousands of sets of Agency findings over the years. (Rupp, T. Vol. 1, p. 223)
2. As Chief of the CON Section, Ms. Hoffman has issued more than 100 MRI decisions and more than 1,000 decisions in general. She has conducted at least 500 comparative analyses. (Hoffman, T. Vol. 3, p. 160)
3. Agency findings are public record. (Rupp, T. Vol. 2, p. 11) An applicant or any other person can request copies of findings from Respondent. (Rupp, T. Vol. 1, p. 223; Vol. 2, p. 11)
4. Respondent encourages pre-application conferences with applicants, during which possible comparative factors may be discussed. (Rupp, T. Vol. 1, p. 221)
5. In a competitive review, Respondent is required to review each application individually against each review criterion. After the individual review, Respondent is

required to conduct a comparative review. (Rupp, T. Vol. 2, p. 62; Hoffman, T. Vol. 3, pp. 9-10)

6. In individually reviewing an application against the review criteria, Respondent does not assess the degree to which the applicant is conforming with the criteria. (Hoffman, T. Vol. 2, p. 196)

7. The project analysts review the applications, written comments, public hearing comments, and public hearing presentations prior to preparing draft findings. (Rupp, T. Vol. 2, p. 6)

8. As Chief of the CON Section, Ms. Hoffman reviews and edits findings that are prepared by project analysts to ensure they are consistent with previous decisions. Ms. Hoffman also provides guidance and direction to the analysts. (Hoffman, T. Vol. 2, pp. 184-185)

9. Respondent's findings do not reference, quote from, or address every comment or portion of the applications in the discussion under the various criteria. Only information that responds to the statutory criteria is included in Respondent's findings. (Rupp, T. Vol. 2, pp. 6-7; Hoffman, T. Vol. 2, p. 227)

10. Respondent considers every comment that it receives. (Hoffman, T. Vol. 2, p. 227)

11. Respondent is not expected to make a finding for every letter submitted or every comment made at a public hearing. (Freedy, T. Vol. 5, pp. 97-98)

12. It is within Respondent's discretion to determine whether to condition an applicant. (Hoffman, T. Vol. 3, p. 145)

13. If Respondent obtains information that an applicant is not providing a service in material compliance with the representations in its application, Respondent will investigate. Under the CON Act, Respondent has the power to seek judicial relief to enforce compliance with the representations in the application. (Hoffman, T. Vol. 3, pp. 97-98)



**B. Review of PDCC and SPI Applications**

14. Respondent considered all letters and all information submitted during the review at issue. (Rupp, T. Vol. 2, p. 60)

15. Ms. Hoffman reviewed and edited the findings prepared by Tanya Rupp, Project Analyst, on the SPI and PDCC applications. (Hoffman, T. Vol. 2, p. 185)

16. Ms. Rupp did not prepare any draft findings in this review that approved PDCC for the MRI scanner. (Rupp, T. Vol. 2, p. 7)

17. Respondent's decision in this review was dated October 26, 2007. Respondent issued its findings on November 2, 2007. (PDCC Ex. 3, p. 872)

**II. STATUTORY AND REGULATORY CRITERIA**

**A. SPI's Application**

**1. Criterion 1**

18. N.C. Gen. Stat. § 131E-183(a)(1) ("Criterion 1") requires the applicant to demonstrate that its proposal is consistent with the applicable policies and need determination in the State Medical Facilities Plan.

19. The 2007 State Medical Facilities Plan contained a need determination for one MRI scanner in Cabarrus County. (PDCC Ex. 3, p. 872; PDCC Ex. 32, pp. 122, 131)

20. The MRI need determination for Cabarrus County was based on the number of procedures performed in Cabarrus County. The number of procedures performed in Cabarrus County also included scans performed on patients from surrounding counties. (Hoffman, T. Vol. 3, pp. 50-51)

21. SPI proposed to acquire one 1.5 Tesla MRI scanner. (Kirkman, T. Vol. 5, p. 138; PDCC Ex. 2, pp. 257-305; PDCC Ex. 3, p. 873)

22. Respondent found SPI's application conforming with Criterion 1. (PDCC Ex. 3, p. 872)

23. PDCC did not present any evidence to contest Respondent's finding that SPI's application was conforming with Criterion 1.

2. Criterion 3

24. N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3") requires an applicant to demonstrate the population to be served by the proposed project and the need of the population for the services proposed.

25. Respondent found SPI's application conforming with Criterion 3. (PDCC Ex. 3, p. 873)

26. CMC-NorthEast owns four MRI scanners, two of which are located on the main hospital campus, and two of which are located in Copperfield Outpatient Imaging Center, approximately 1.2 miles from the main campus. All four MRI scanners are hospital-based and operated under the license of the hospital. (Kirkman, T. Vol. 5, pp. 139-140; PDCC Ex. 2, p. 17)

27. CMC-NorthEast's existing scanners have the capability to perform breast and cardiac MRI scans. (Kirkman, T. Vol. 6, p. 19; PDCC Ex. 3, pp. 186, 190-191)

28. The SPI MRI scanner is proposed to be located in a freestanding outpatient imaging center in Kannapolis. As such, SPI will have lower overhead costs than the hospital-based facilities, and will not be operated under the hospital license. (Kirkman, T. Vol. 5, p. 140)

29. SPI proposed to locate its MRI scanner and its approved diagnostic center in the North Carolina Research Campus in Kannapolis, because (1) there was not an MRI scanner in the Kannapolis area, (2) Kannapolis is the second largest municipality in Cabarrus County, and (3) the growth in the North Carolina Research Campus area is projected to be significant over the next 25 years. In addition, the Kannapolis area has a higher percentage of residents aged 65 and older, and that age cohort is growing faster than other age cohorts. The location in the North Carolina Research Campus will make access easier for the older population, as well as the Kannapolis population in general. (Kirkman, T. Vol. 5, pp. 144-145; PDCC Ex. 2, pp. 12, 51-67; PDCC Ex. 3, p. 875)

30. The North Carolina Research Campus is expected to generate more than 5,000 jobs with an economic impact that will help create thousands more jobs across

the state. It will have a significant positive impact on the community after the 2003 closing of Pillowtex left nearly 43,000 people suddenly without jobs or health insurance. (Kirkman, T. Vol. 5, pp. 146-147; PDCC Ex. 2, pp. 13-16, 56-57)

31. The 65 and over population in Kannapolis is projected to grow faster than other age groups, and will be a larger percent of the total population in Kannapolis than in Cabarrus County or North Carolina. (Kirkman, T. Vol. 5, p. 50; PDCC Ex. 2, pp. 60-62)

32. The city limits of Kannapolis include zip codes in both Rowan and Cabarrus counties. (Kirkman, T. Vol. 5, p. 140)

33. Historically, 24% of CMC-NorthEast's outpatient MRI scans are for patients who are residents of the three Kannapolis zip codes. This 24% patient origin from the Kannapolis zip codes was derived using Fiscal Year 2006 Patient Origin Data for MRI Services at CMC-NorthEast by zip code. The actual total for the three zip codes in Kannapolis was 24.01%. (Kirkman, T. Vol. 5, pp. 141-143; PDCC Ex. 2, p. 64)

34. SPI based its projections for the proposed MRI scanner on historical outpatient data only. (Kirkman, T. Vol. 5, p. 151)

35. CMC-NorthEast's existing MRI scanners operate until 12:30 a.m. Monday through Friday to try to keep up with the demand for MRI services. (Kirkman, T. Vol. 5, p. 156; PDCC Ex. 3, p. 85)

36. The proposed SPI MRI scanner in Kannapolis is expected to alleviate the capacity constraints for the existing MRI scanners operated by CMC-NorthEast, which are operating above their practical capacity, and causing a scheduling backlog where patients can wait several days to receive an MRI scan. (Kirkman, T. Vol. 5, pp. 153-154; PDCC Ex. 2, p. 17; PDCC Ex. 3, p. 878)

37. SPI proposed to operate its MRI scanner 72 hours per week from 8:00 a.m. to 8:00 p.m. Monday through Saturday. (Kirkman, T. Vol. 5, pp. 160-161; PDCC Ex. 2, p. 29; PDCC Ex. 3, p. 42)

38. The SPI MRI scanner will be digitally integrated with CMC-NorthEast's main campus, which means that the physicians can have immediate access to results of

the scan through the PACS system without having to wait to see the actual film. (Kirkman, T. Vol. 5, p. 156; PDCC Ex. 2, p. 18; PDCC Ex. 3, p. 85)

39. PDCC did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found SPI's application conforming with Criterion 3.

3. Criterion 4

40. N.C. Gen. Stat. § 131E-183(a)(4) ("Criterion 4") requires an applicant to demonstrate that it has proposed the least costly or most effective alternative for meeting the needs of the proposed project.

41. Respondent found SPI's application conforming with Criterion 4. (PDCC Ex. 3, p. 894)

42. PDCC did not present any evidence to contest Respondent's finding that SPI's application was conforming with Criterion 4.

4. Criterion 5

43. N.C. Gen. Stat. § 131E-183(a)(5) ("Criterion 5") requires that an applicant's financial and operational projections demonstrate the availability of funds for capital and operating needs, and the immediate and long-term financial feasibility of the proposal based on reasonable projections of costs and charges.

44. Respondent found SPI's application conforming with Criterion 5. (PDCC Ex. 3, p. 895)

45. Mr. Johnson opined that the SPI application might be nonconforming with "the criteria," because SPI excluded essential expenses, including imputed interest and certain operating expenses, in its application. However, Johnson he did not opine that the SPI application should have been found nonconforming with Criterion 5 or any other specific criterion. Instead, he acknowledged that Ms. Flynn explained, during her deposition, that the operating expenses he claimed were omitted from SPI's application, were included in SPI's pro formas. (Johnson, T. Vol. 4, pp. 262-263)

46. The pro forma Balance Sheet in the SPI application represents the entire facility with diagnostic imaging and MRI services. It mirrors the audited financial statements for CMC-NorthEast. (Flynn, T. Vol. 6, pp. 148-150; PDCC Ex. 2, pp. 140, 539-569)

47. The supplies and other category in the Statement of Operations and Changes in Net Assets for the entire facility refers to anything that is not itemized, and may include purchased services, professional fees, leases, and travel expenses. (Flynn, T. Vol. 6, p. 150; PDCC Ex. 2, p. 141)

48. SPI did not need to include interest in the Statement of Operations and Changes in Net Assets, because SPI was not borrowing money for its project. (Flynn, T. Vol. 6, p. 150; PDCC Ex. 2, p. 141)

49. The pro forma Statement of Operations and Changes in Net Assets for SPI was accurate, because it eliminated duplicate salaries between the first and second SPI applications. It was not proper to add salaries from the diagnostic center application to the salaries in the MRI application to obtain the total. The SPI MRI application specifically stated that some of the salary expenses are duplicated. The MRI application correctly reflected the total in salary expense for the entire diagnostic center including the MRI scanner. (Flynn, T. Vol. 7, pp. 42-46; PDCC Ex. 2, pp. 106-107, 141, 143; PDCC Ex. 7)

50. The MRI pro forma income and expense statement contained projections for the MRI scanner only for the years 2009-2011. (Flynn, T. Vol. 6, p. 51; PDCC Ex. 2, p. 143)

51. The gross patient revenue is derived by multiplying an average charge per scan by the number of procedures. (Rupp, T. Vol. 2, p. 25; Flynn, T. Vol. 6, p. 152; PDCC Ex. 2, pp. 143-144)

52. Because SPI is a freestanding imaging center, it will be reimbursed under the Medicare physician fee schedule technical component. The average charge per scan was based on the physician fee schedule. That schedule is published in the Federal Register. (Flynn, T. Vol. 6, pp. 153-156)

53. The 2004 Copperfield outpatient MRI application was for a hospital-based MRI scanner, not a freestanding MRI scanner. Hospital-based services are considered departments of the hospital, and are reimbursed under the hospital reimbursement system. Whereas, freestanding facilities are not considered departments of the hospital, and have a lower charge and cost structure. (Flynn, T. Vol. 6, pp. 178-178)

54. It would not have been reasonable to use the charges from the 2004 Copperfield outpatient MRI application to develop the charges for the SPI MRI application, because the Copperfield location is hospital-based and SPI is a freestanding facility. There is a completely different charge structure for a freestanding facility. (Flynn, T. Vol. 6, pp. 179-180; PDCC Ex. 3, pp. 108-109)

55. Four percent is a normal inflation factor, and is a reasonable inflation factor for pro forma financial statements. (Flynn, T. Vol. 6, p. 157; PDCC Ex. 2, p. 145)

56. In its pro forma income and expense statement, SPI's projected expenses were derived by using the financial statements for the relevant cost centers in the hospital, and determining a per unit of service cost for existing MRI services. This method of estimating expenses is reasonable. (Flynn, T. Vol. 6, p. 158; PDCC Ex. 2, pp. 143-144)

57. The cost of the initial physics report is considered a capital cost, and is reported on the capital cost form in the SPI application, not on the pro forma financial statements. (Flynn, T. Vol. 6, p. 159; PDCC Ex. 2, p. 114)

58. The second physics report that is provided when the MRI scanner comes online is not included in SPI's pro forma income and expense statement as a professional fee. Rather, it is reported as part of the management fee, because the management company is responsible for retaining the physics consultant and for accreditation. (Flynn, T. Vol. 6, p. 159; PDCC Ex. 2, p. 143)

59. Equipment maintenance is included in the "other" category in the pro forma income and expense statement for SPI. The amount in the first year is \$24,472.00. There is an additional \$130,000.00 for equipment maintenance in the second and third years. (Flynn, T. Vol. 6, p. 162; PDCC Ex. 2, pp. 143-145)

60. The "other" category also includes the lease expense of approximately \$24,000.00 per year. (Flynn, T. Vol. 6, p. 162; PDCC Ex. 2, pp. 143-145)

61. The lease expense is typically determined by calculating the market rate per square foot by the number of square feet to be leased. The SPI MRI application shows that 863 square feet would be used for the MRI scanner, and 14,352 square feet is the total square footage for the entire diagnostic center facility. A per square foot charge of \$28.25 per square foot can be derived from the first SPI application for the diagnostic center. Multiplying \$28.25 per square foot by the number of square feet for the MRI scanner yields \$24,380.00. This is consistent with numbers in the "other" category in the SPI MRI pro forma income and expense statement. (Flynn, T. Vol. 6, pp. 162-166; PDCC Ex. 2, pp. 143-145; PDCC Ex. 7, p. 181)

62. The CON Section application form for medical equipment does not contain a separate line item for lease expense on Form B-1. (Flynn, T. Vol. 7, pp. 47-48; PDCC Ex. 18)

63. The SPI pro forma income and expense statement contains a category called administrative allocation. This allocation was developed by using 3.4% of gross patient revenue, and includes expenses such as utilities, information services, telecommunications, etc. It includes plant operations and maintenance functions as well as other functions. It could also be called general and administrative expense. The 3.4% estimate is based on actual experience for the MRI department at CMC-NorthEast. (Flynn, T. Vol. 6, pp. 167-169; PDCC Ex. 2, pp. 143-145)

64. It was reasonable for SPI not to use a separate line item for plant operations and maintenance, because it does not identify those expenses at the cost center level, and includes those expenses in the administrative allocation category. (Flynn, T. Vol. 6, pp. 170-171)

65. The cost and expense information is based on actual cost and the revenue is based on the physician fee schedule, so all of the assumptions and adjustments have a basis in fact. (Flynn, T. Vol. 6, p. 174)

66. There is no CON rule mandating whether applicants should expense start-up expenses when incurred, or amortize them over time. (Johnson, T. Vol. 3, pp. 261-262)

67. SPI expensed its start-up expenses, while PDCC amortized its start-up expenses. PDCC's expert admitted that SPI's treatment of start-up expenses was appropriate. (Johnson, T. Vol. 3, pp. 261-262)

68. SPI properly treated its start-up expenses as an expense during the period in which they are incurred, based on Statement of Policy 98-5 by the American Institute of Certified Public Accountants. (Flynn, T. Vol. 6, pp. 171-172; SPI Ex. 55)

69. There is no CON rule requiring applicants to show imputed interest. (Johnson, T. Vol. 3, p. 271)

70. Mr. Johnson has never had any discussions with Respondent concerning imputed interest. (Johnson, T. Vol. 3, p. 198)

71. None of the CON Section's application forms have a line item for imputed interest. (Johnson, T. Vol. 3, p. 271)

72. Respondent has not made findings regarding imputed interest in any prior decisions. (Johnson, T. Vol. 3, p. 272)

73. Novant's audited financial statements do not have a line item for imputed interest. (Johnson, T. Vol. 3, p. 272)

74. Actual interest is different from imputed interest, because actual interest is actually incurred, while imputed interest is futuristic. (Johnson, T. Vol. 3, p. 273)

75. Imputed interest is not required for the pro forma financial statements in CON applications, because it is not required under Generally Accepted Accounting Principles. (Flynn, T. Vol. 6, p. 189)

76. The SPI pro forma income and expense statement shows that CMC-NorthEast's historical experience for bad debt is 4% of gross revenue, and for charity care is 1.6% of gross revenue. (Flynn, T. Vol. 6, p. 169; PDCC Ex. 2, p. 145)

77. SPI's financial statements for the MRI application are conservative and accurately reflect the financial forecast of the project. (Flynn, T. Vol. 6, p. 174)



78. PDCC did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found SPI's application conforming with Criterion 5.

**5. Criterion 6**

79. N.C. Gen. Stat. § 131E-183(a)(6) ("Criterion 6") requires an applicant to demonstrate that the proposed project will not result in the unnecessary duplication of existing services or facilities.

80. Respondent found SPI's application conforming with Criterion 6. (PDCC Ex. 3, p. 899)

81. PDCC did not present any evidence to contest Respondent's finding that SPI's application was conforming with Criterion 6.

**6. Criterion 7**

82. N.C. Gen. Stat. § 131E-183(a)(7) ("Criterion 7") requires an applicant to show evidence of the availability of resources, including personnel, for the services proposed.

83. Respondent found SPI's application conforming with Criterion 7. (PDCC Ex. 3, p. 900)

84. SPI projected to have three MRI technologists and one lead technologist for the MRI scanner. (Kirkman, T. Vol. 5, p. 160; PDCC Ex. 2, p. 107; PDCC Ex. 3, p. 900)

85. SPI proposed to provide benefits in the amount of 23% of salaries for staff. (Hoffman, T. Vol. 3, p. 153; PDCC Ex. 2, p. 145)

86. PDCC did not present any evidence to contest Respondent's finding that SPI's application was conforming with Criterion 7.

**7. Criterion 8**

87. N.C. Gen. Stat. § 131E-183(a)(8) ("Criterion 8") requires the applicant to demonstrate that it will have the necessary ancillary and support services available for the proposed project.

88. Respondent found SPI's application conforming with Criterion 8. (PDCC Ex. 3, p. 902)

89. PDCC did not present any evidence to contest Respondent's finding that SPI's application was conforming with Criterion 8.

**8. Criterion 13**

90. N.C. Gen. Stat. § 131E-183(a)(13) ("Criterion 13") requires an applicant to demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and medically underserved.

91. Respondent found SPI's application conforming with Criterion 13. (PDCC Ex. 3, pp. 904-908)

92. SPI has a policy to provide all services to all patients regardless of income, racial or ethnic origin, gender, physical or mental conditions, age, ability to pay, or any other factor that would classify a patient as underserved. Diagnostic imaging services at SPI will be available to and accessible by any patient having a need for these services. (Kirkman, T. Vol. 4, pp. 52-53; PDCC Ex. 2, p. 98)

93. PDCC admitted that CMC-NorthEast provides, and SPI proposes, to provide a significant amount of care to Medicare, Medicaid, and other underserved groups. (Bres Martin, T. Vol. 2, p. 122)

94. PDCC did not present any evidence to contest Respondent's finding that SPI's application was conforming with Criterion 13.

**9. Criterion 14**

95. N.C. Gen. Stat. § 131E-183(a)(14) ("Criterion 14") requires an applicant to demonstrate that the project will accommodate the clinical needs of the health professional training programs in the area.

96. Respondent found SPI's application conforming with Criterion 14. (PDCC Ex. 3, p. 908)

97. PDCC admitted that SPI would provide an alternative venue for training opportunities for clinical education. (Freedy, T. Vol. 5, p. 111)

98. PDCC did not present any evidence to contest Respondent's finding that SPI's application was conforming with Criterion 14.

10. Criterion 18a

99. N.C. Gen. Stat. § 131E-183(a)(18a) ("Criterion 18a") requires the applicant to demonstrate the expected effects of the proposed services on competition, including how any enhanced competition will have a positive impact on cost effectiveness, quality, and access to the proposed services.

100. Criterion 18a was applicable to the MRI applications in this case. (Rupp, T. Vol. 1, p. 197)

101. Respondent found SPI's application conforming with Criterion 18a. (Rupp, T. Vol. 1, p. 197; PDCC Ex. 3, p. 909)

102. Respondent must determine each application's conformity with Criterion 18a by looking at cost effectiveness, quality, and access offered by each application. It does not conduct a comparative analysis under Criterion 18a or compare the degree of conformity under Criterion 18a. (Bres Martin, T. Vol. 2, pp. 161-162; Hoffman, T. Vol. 2, p. 196)

103. At the time the applications were submitted by PDCC and SPI, there were already three distinct separate MRI providers in Cabarrus County, as well as an additional 16 providers outside the county that Cabarrus County residents used for MRI services. (Bres Martin, T. Vol. 2, p. 160; Kirkman, T. Vol. 6, p. 26; PDCC Ex. 1, p. 98; PDCC Ex. 36)

104. Of the 19 providers of MRI services for Cabarrus County residents during the review, eight of the providers are affiliated or associated with Novant and PDCC. (Hoffman, T. Vol. 3, pp. 171-172; Kirkman, T. Vol. 6, p. 28)

105. Competition is desirable if it will have positive consequences. But, competition can be accomplished by the existing providers improving their services, improving their quality, or improving their cost effectiveness. Competition is not necessarily limited to the introduction of a new provider. (Hoffman, T. Vol. 3, pp. 35-36)

106. A potential benefit to increasing competition is decreasing costs. (Bres Martin, T. Vol. 2, p. 163)

107. SPI's application will enhance competition in the local MRI service area by adding a new provider and a new fixed MRI scanner in an outpatient freestanding center. (Kirkman, T. Vol. 6, pp. 24-25; PDCC Ex. 3, p. 34)

108. SPI's application demonstrates that its project will have a positive impact on quality, because it demonstrated its conformity with Criterion 3. (Rupp, T. Vol. 1, p. 201; PDCC Ex. 2, pp. 24-25, 69-70)

109. SPI's application demonstrates that its project will have a positive impact on access, because it projected to serve a significant percentage of Medicare patients. (Rupp, T. Vol. 1, p. 201)

110. SPI's application also demonstrates that its project will have a positive impact on access, because it will be located in Kannapolis, a place which does not already have an MRI scanner, and which has higher population of elderly residents than other areas of Cabarrus County. (Kirkman, T. Vol. 5, pp. 144-145; PDCC Ex. 2, pp. 12, 17-18, 22-25)

111. SPI's application also stated that its proposal would help alleviate capacity constraints in the other MRI scanners operated by CMC-NorthEast, and give more timely access to MRI services on the main campus. (Hoffman, T. Vol. 3, pp. 170-171; PDCC Ex. 2, pp. 17-18)

112. Approval of SPI's MRI scanner will lead to lower health care costs, because the proposal represented the lowest gross and net revenue per unweighted MRI procedure. (Rupp, T. Vol. 1, p. 199)

113. SPI's application demonstrates that its project will have a positive impact on cost effectiveness, because SPI's application represented that it would operate as a freestanding facility, and would not be licensed under the hospital's license. As a result, SPI's its operations would be less costly, and have lower overhead and different reimbursement. (Hoffman, T. Vol. 3, p. 146; PDCC Ex. 2, pp. 17-18, 69; PDCC Ex. 3, p. 34)

114. Respondent understood that SPI's charges and revenue calculations were consistent with being a freestanding, as opposed to a hospital-based imaging center. (Hoffman, T. Vol. 3, p: 147)

115. Respondent's finding that SPI's application was conforming with Criterion 18a was reasonable and proper, because SPI's application adequately demonstrated that SPI would have a positive impact on cost effectiveness, quality, and access to the services proposed.

116. PDCC did not present any evidence to contest Respondent's finding that SPI's application was conforming with Criterion 18a.

11. 10A N.C.A.C. 14C.2702(c)(6)

117. 10A N.C.A.C. 14C.2702(c)(6) states that the applicant proposing to acquire a magnetic resonance imaging scanner:

shall provide the following information . . . letters from physicians indicating their intent to refer patients to the proposed magnetic resonance imaging scanner and their estimate of the number of patients proposed to be referred per year, which is based on the physician's historical number of referrals.

(Rupp, T. Vol. 1, pp. 160-161)

118. The purpose of this rule is to give Respondent an idea of the historical referral base that has existed, the potential for future referrals to the proposed MRI scanner, and to determine whether an applicant's projections are reasonable. (Rupp, T. Vol. 1, p. 165)

119. 10A N.C.A.C. .2702(c)(6) does not require a certain number of letters from physicians, and does not require the number of projected referrals in the letters to correlate on a one-to-one basis with the number of procedures projected by the applicant in its need methodology. (Rupp, T. Vol. 2, p. 10; Freedy, T. Vol. 4, p. 189; T. Vol. 5, p. 81)

120. SPI provided letters of support from referring physicians that documented the number of referrals to the proposed scanner. (Rupp, T. Vol. 1, p. 162)

121. SPI submitted between 55 and 60 physician letters. (Freedy, T. Vol. 5, p. 81)

122. Ms. Profitt prepared the physician referral letters by tailoring a template letter provided by Keystone Planning Group for each individual physician and practice. (Profitt, T. Vol. 4, pp. 55-56)

123. Ms. Profitt calculated the number of patients proposed to be referred to the proposed SPI MRI scanner using the historical patient origin percentage for CMC-NorthEast for the zip code areas proposed by SPI. (Profitt, T. Vol. 4, p. 57)

124. The patient origin percentage for the Kannapolis area used in the letters was 24%, based on the fact that 24% of CMC-NorthEast's MRI patients are from the three zip codes in the Kannapolis area. (Profitt, T. Vol. 4, p. 58; PDCC Ex. 2, p. 64)

125. The physicians who wrote letters indicating their intent to refer patients for scans to the proposed scanner were given historical referral numbers for 2006 for their practice. (Kirkman, T. Vol. 5, p. 173)

126. The referral numbers in the physician letters are on a group practice basis, rather than an individual physician basis. (Profitt, T. Vol. 4, p. 59)

127. Historical referral volumes used in preparing the letters were for outpatient MRI scans only. (Profitt, T. Vol. 4, pp. 60, 66)

128. The number of referrals in each letter reflects historical referral volumes, but does not represent a projection forward into the future. (Profitt, T. Vol. 4, p. 69)

129. Twenty-four percent is a conservative estimate for the number of referrals. (Profitt, T. Vol. 4, p. 60)

130. All of the physician letters contained an SPI application from physicians with offices in the Concord and Kannapolis area. (Profitt, T. Vol. 4, p. 68; Kirkman, T. Vol. 5, p. 172; PDCC Ex. 2, pp. 325-397)

131. PDCC did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found SPI's application conforming with 10A N.C.A.C. 14C.2702(c)(6).

**B. PDCC's Application**

132. Mr. Johnson and Ms. Freedy routinely review certificate of need applications for competitors and obtain copies of the CON Section's findings. (Johnson, T. Vol. 3, p. 267; Freedy, T. Vol. 5, pp. 55-56)

**1. Criterion 3**

133. Respondent found PDCC's application conditionally conforming with Criterion 3 on the condition that it not acquire the proposed mammography unit. (PDCC Ex. 3, pp. 889-891, 894)

134. Respondent properly found PDCC's application conditionally conforming with Criterion 3 based on the grounds set forth in the attached Order granting summary judgment in favor of Respondent and SPI.

135. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conditionally conforming with Criterion 3.

**2. Criterion 4**

136. Respondent found PDCC's application conforming with Criterion 4 only on the condition that it not acquire the proposed mammography unit or MRI scanner. (PDCC Ex. 3, pp. 894-895)

137. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conditionally conforming with Criterion 4.

**3. Criterion 5**

138. Respondent found PDCC's application conditionally conforming with Criterion 5 on the condition that it not acquire the proposed mammography unit or MRI scanner. (PDCC Ex. 3, pp. 895, 897-899)

139. PDCC anticipated that the MRI review would be competitive. Yet, when Mr. Johnson prepared the PDCC application, he did not separate the projected

operating costs for the MRI scanner from the projected operating costs for the other imaging modalities. The projected operating costs for the entire facility appear in the application, and there is no way to compare the operating costs for the PDCC MRI scanner to the SPI MRI scanner based on the PDCC application. (Johnson, T. Vol. 4, pp. 5-6; Freedy, T. Vol. 5, p. 57)

140. PDCC used the CON Section application form of pro formas as a guide, but made changes to the forms in preparing its pro formas. (Johnson, T. Vol. 4, p. 26; PDCC Ex. 1, pp. 212-225; PDCC Ex. 18)

141. The pro formas in PDCC's application include administrative services provided by Novant in the line item entitled "General and Administrative Expenses." This category in PDCC's pro formas includes billing, collections, payroll, and other related functions. They are the same types of services listed in the Management Agreement used by SPI. (Johnson, T. Vol. 3, pp. 280-282; PDCC Ex. 1, p. 180)

142. PDCC's application reported the initial physics report on its capital cost form. (PDCC Ex. 1, p. 186; Flynn, T. Vol. 6, pp. 159-162)

143. PDCC's Form B-1 is not an exact match of the CON Section's Form B-1. (Johnson, T. Vol. 4, pp. 24-26; Flynn, T. Vol. 7, p. 48; PDCC Ex. 18; PDCC Ex. 1, p. 214)

144. If PDCC had not included imputed interest in its pro formas, the profit for its first operating year would have been \$440,000.00 higher than stated in the application. (Johnson, T. Vol. 4, p. 10; PDCC Ex. 1, p. 214)

145. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conditionally conforming with Criterion 5.

#### **4. Criterion 6**

146. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conditionally conforming with Criterion 6.



**5. Criterion 7**

147. PDCC proposed to have two MRI technologists. (Kirkman, T. Vol. 5, p. 160; PDCC Ex. 3, p. 901; PDCC Ex. 1, p. 1014)

148. Respondent noted in its findings that PDCC's proposed MRI scanner has the capability to perform breast scans. (PDCC Ex. 3, p. 902)

149. PDCC proposed to provide 23% of salaries for benefits for staff. (Hoffman, T. Vol. 3, p. 153; PDCC Ex. 1, p. 223)

150. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conforming with Criterion 7.

**6. Criterion 12**

151. Respondent found PDCC's application conditionally conforming with N.C. Gen. Stat. § 131E-183(a)(12) ("Criterion 12") on the condition that it not acquire the proposed mammography unit or the MRI scanner. (PDCC Ex. 3, p. 904)

152. PDCC's application showed that its proposed MRI scanner will cost \$2,054,338.00, excluding the cost associated with installing the MRI scanner in the building. (Johnson, T. Vol. 3, p. 277; PDCC Ex. 1, p. 475)

153. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conditionally conforming with Criterion 12.

**7. Criterion 18a**

154. Respondent found PDCC's application conditionally conforming with Criterion 18a on the condition that it not acquire the proposed mammography unit or the MRI scanner. (PDCC Ex. 3, pp. 909-910)

155. Novant has a statewide, as well as a nationwide, presence through its MedQuest acquisition. (Freedy, T. Vol. 5, p. 50)

156. The southern Piedmont region for Novant includes Mecklenburg, Union, Cabarrus, Rowan, Gaston, and Lincoln Counties in North Carolina and certain border counties in South Carolina. (Freedy, T. Vol. 5, p. 51)

157. At the time the PDCC application was submitted, Novant owned and operated the following imaging centers in and around Charlotte: Presbyterian Imaging Center Mint Museum, which has an MRI scanner; Presbyterian Imaging Center at Midtown, which has an MRI scanner; Presbyterian Imaging Center University; Presbyterian Imaging Center Ballantyne; and the Breast Center at Presbyterian Medical Tower Downtown. Presbyterian owned and operated a mobile imaging center with CT and MRI capabilities. It also owned and operated a mobile MRI scanner for a host site in Union County, and a host site in Mecklenburg County. Novant also owned and operated imaging centers in the Triad region, including Winston-Salem, Kernersville, and Thomasville. (Freedy T. Vol. 4, pp. 110-112)

158. Some of the Novant sites in Mecklenburg County were providing MRI services to Cabarrus County residents at the time PDCC's application was submitted. (Hoffman, T. Vol. 3, pp. 171-172; Kirkman, T. Vol. 6, p. 28; PDCC Ex. 1, p. 98; PDCC Ex. 36)

159. At the time PDCC's application was submitted, Cabarrus Diagnostic Imaging was providing MRI services to Cabarrus County residents. Cabarrus Diagnostic Imaging was later acquired by Novant through its acquisition of MedQuest. (Freedy, T. Vol. 5, pp. 111-114; PDCC Ex. 3, p. 98; PDCC Ex. 31; PDCC Ex. 36)

160. During the Cabarrus County MRI review, Novant announced that it would acquire Rowan Regional Medical Center, the only hospital in Rowan County in August 2007. Rowan County is located north of Cabarrus County, while Mecklenburg County is located to the southwest. (Freedy, T. Vol. 5, pp. 53-54, 124; PDCC Ex. 34)

161. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conditionally conforming with Criterion 18a.

**8. 10A N.C.A.C. 14C.2702(c)(1)**

162. 10A N.C.A.C. 14C.2702(c)(1) requires an applicant to demonstrate that its proposed MRI scanner will be available and staffed for use at least 66 hours per week.

163. Prior to submitting the PDCC application, Novant representatives prepared an application for Salem MRI, a subsidiary of Novant, for an MRI scanner in Forsyth County. Salem MRI was conditioned to provide additional information to confirm that its MRI scanner would be staffed 66 hours per week during the first year of the project. (Bres Martin, T. Vol. 2, pp. 135, 173; Hoffman, T. Vol. 2, p. 187; PDCC Ex. 11, p. 41)

164. Respondent found that PDCC provided inconsistent information in its application regarding the hours of operation for the proposed MRI scanner, and found it conditionally conforming with this rule on the condition that PDCC could not acquire the MRI scanner. (Rupp, T. Vol. 2, pp. 8-9; PDCC Ex. 3, p. 912)

165. The PDCC application contained inconsistent answers as to the number of hours the MRI scanner would be staffed and operational per week. Ms. Burkart, Director of Imaging Services, stated in her letter that the MRI scanner would be available for use and staffed at least 66 hours per week. However, Sections II and VII of the application stated that the MRI scanner would be operated only 42.5 hours per week. (Bres Martin, T. Vol. 2, p. 129; Freedy, T. Vol. 5, p. 104; Kirkman, T. Vol. 5, pp. 160-161; PDCC Ex. 1, pp. 39, 40, 71, 181, 1014-1015; PDCC Ex. 3, p. 42)

166. PDCC stated on Pages 71 and 1014-1015 of its application that the proposed fixed MRI scanner would be available and staffed for use at least 66 hours per week. (Rupp, T. Vol. 2, pp. 40-41; PDCC Ex. 1, pp. 71, 1014-1015)

167. PDCC stated on Pages 39, 40, and 181 that the scanner would be operated only 42.5 hours per week. (Rupp, T. Vol. 2, pp. 8-9; PDCC Ex. 1, pp. 39, 40, 181)

168. PDCC was not conforming with the rule at 10A N.C.A.C. 14C.2702(c)(1), because its application contained inconsistent information about how many hours per week the MRI scanner would be available and staffed for use. (Rupp, T. Vol. 2, p. 8)

169. If Respondent had not conditioned PDCC not to acquire the MRI scanner, it would have found PDCC's application nonconforming with 10A N.C.A.C. 14C.2702(c)(1). (Rupp, T. Vol. 2, p. 9)

170. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conditionally conforming with 10A N.C.A.C. 14C.2702(c)(1) subject to the condition that it not acquire the proposed MRI scanner.

**9. 10A N.C.A.C. 14C.2702(c)(4)**

171. 10A N.C.A.C. 14C.2702(c)(4) requires an applicant to list the average charge to the patient for the twenty most frequent MRI procedures to be performed for each of the first three years of operation.

172. PDCC listed only its average charge for fifteen MRI procedures, not twenty procedures as required by 10A N.C.A.C. 14C.2702(c)(4). (Kirkman, T. Vol. 5, p. 170; PDCC Ex. 1, pp. 196, 322; PDCC Ex. 3, p. 913)

173. In PDCC's application, the top procedure codes are listed in Tables 13 and 14. The list of CPT codes it plans to utilize does not include any cardiac procedure codes. The list only includes three breast procedure codes. Only 8.8% of the total number of procedures projected are breast procedures. (Johnson, T. Vol. 4, pp. 18-22; Freedy, T. Vol. 5, pp. 109-110; Kirkman, T. Vol. 6, p. 23; PDCC Ex. 1, pp. 196, 322)

174. Respondent properly found PDCC's application conditionally conforming with 10A N.C.A.C. 14C.2702(c)(4), because it did not provide the average charge for the top twenty procedures as required, but rather only provided the average charge for fifteen procedures to be performed. (Rupp, T. Vol. 2, p. 10)

175. SPI did not present sufficient evidence to meet its burden of proving Agency error, and Respondent properly found PDCC's application conditionally conforming with 10A N.C.A.C. 14C.2702(c)(4) subject to the condition that it not acquire the proposed MRI scanner.

10. 10A N.C.A.C. 14C.2702(c)(6)

176. PDCC provided letters of support from referring physicians that documented the number of referrals to the proposed scanner. (Rupp, T. Vol. 1, p. 162)

177. Representatives of PDCC gathered the historical referral information for physicians who signed letters indicating their intent to refer patients for MRI scans at the proposed PDCC MRI scanner. (Freedy, T. Vol. 5, p. 72)

178. The physician referral letters in the PDCC application do not contain the historical number of referrals in the body of the letters. (Freedy, T. Vol. 5, p. 77; PDCC Ex. 1, pp. 622-683)

179. The physician referral surveys in PDCC's application are not signed by the physicians. (Freedy, T. Vol. 5, p. 83; PDCC Ex. 1, pp. 1063-1124)

180. PDCC submitted between 55 and 60 physician letters. (Freedy, T. Vol. 5, p. 81)

181. More than half of the physician referral letters and all of the radiologists' letters in the PDCC application were from physicians who were not located in Cabarrus County. Of the 21 physician practices that PDCC lists as supportive of its project, only ten are based in Cabarrus County. (Kirkman, T. Vol. 5, p. 177; PDCC Ex. 3, p. 41)

182. Novant Medical Group currently owns physician practices in Cabarrus County and did so at the time of the review. (Freedy, T. Vol. 5, p. 75)

183. Respondent properly found PDCC's application conforming with the rule requiring physician referral letters. (Rupp, T. Vol. 1, p. 166)

C. Comparative Analysis

1. Selection and Consideration of Comparative Factors

184. The project analyst reviewed multiple sets of findings from prior MRI reviews. These prior findings appear in Respondent's file for the review of the PDCC and SPI applications. These prior findings in Respondent's file all used geographic distribution, access by underserved groups, revenues, and operating costs as

comparative factors in competitive MRI reviews. (Rupp, T. Vol. 2, pp. 12-16; PDCC Ex. 3, pp. 201-398, 451-503)

185. A comparative analysis considers a number of factors, not just one. (Rupp, T. Vol. 2, p. 51; Hoffman, T. Vol. 2, p. 207)

186. The comparative factors used to analyze competing CON applications can vary from one review to another and from one service to another based on the facts in each review. (Rupp, T. Vol. 1, p. 220; Bres Martin, T. Vol. 2, p. 119)

187. Respondent compares the same factors from review to review to the extent possible, but takes into account that there are different facts and circumstances in each review. (Freedy, T. Vol. 4, p. 118; Hoffman, T. Vol. 2, p. 189)

188. Respondent gives different weight to comparative factors depending on the circumstances of each review. (Bres Martin, T. Vol. 2, p. 160)

189. Respondent has the discretion and responsibility to select and weigh the factors in the comparative analysis in a competitive review. It does not have discretion in how to apply the law and the rules. (Bres Martin, T. Vol. 2, p. 161; Hoffman, T. Vol. 2, p. 224; Freedy, T. Vol. 5, p. 115)

190. The comparative analysis in competitive reviews must be fair, based on relevant information, and reasonable. (Hoffman, T. Vol. 3, p. 6)

191. Respondent does not look at one particular comparative factor to the exclusion of all others. Rather, Respondent looks at all the factors in combination. (Hoffman, T. Vol. 2, p. 207; Vol. 3, p. 60)

192. Any difference can become significant in a close review. (Rupp, T. Vol. 2, p. 54)

193. Respondent does not compare total capital costs standing alone, but rather compares the impact of the capital costs on the cost of services by comparing the operating costs and revenues. (Hoffman, T. Vol. 2, pp. 239, 241-242)

194. Respondent does not compare the technical capabilities of the MRI scanners. (Hoffman, T. Vol. 3, pp. 24-25)

195. If the cost of the breast and cardiac coils is less than \$2 million, SPI would be able to, without a CON, add a breast coil or cardiac coil to an existing MRI scanner one year after operations begin. (Hoffman, T. Vol. 3, p. 174)

196. Respondent did not and could not review the services proposed in SPI's diagnostic center application during the 2007 MRI review, because those services were previously reviewed and approved. (Hoffman, T. Vol. 2, p. 228)

197. Respondent did not and could not combine the capital costs from SPI's diagnostic center application submitted in 2006 with the MRI application submitted in 2007 during the MRI review, because the diagnostic center capital costs had already been reviewed and approved, and because the diagnostic center services are not the same as the MRI services. (Hoffman, T. Vol. 3, pp. 11-12)

198. Referencing facts from a prior application is an acceptable practice, but it is different from combining costs from the previously approved application with one under review, because the combination of the two costs would result in changing the facts under review. (Kirkman, T. Vol. 5, p. 137)

199. It would not have been appropriate to compare the SPI and PDCC applications on the comparative factor of "demonstration of need," because both applicants were conforming with Criterion 3. Respondent only uses demonstration of need as a factor when an applicant is not conforming with Criterion 3, such as in the 2005 Columbus County MRI findings and the 2007 Scotland County MRI findings. In both of those reviews, the CON Section also used the same four comparative factors as in the 2007 Cabarrus County MRI review. (Hoffman, T. Vol. 2, pp. 194-195; PDCC Ex. 3, pp. 317-359, 451-503)

200. In the 2005 Richmond County MRI review, physical access to the MRI scanner was used as a comparative factor in addition to the four comparative factors used in the 2007 Cabarrus County MRI review. One of the applicants in the Richmond County review proposed to build a structure around a mobile MRI scanner, while the other applicant proposed to put an MRI scanner into a building. The enclosed mobile MRI scanner had steps that would be difficult for some patients to climb. The applicant with the better physical access was not ultimately the approved applicant. Such a

comparison was not needed on the basis of the facts in the 2007 Cabarrus County MRI review. (Hoffman, T. Vol. 3, pp. 27-28; PDCC Ex. 3, pp. 201-246)

201. In the 2004 Planning Area 16 MRI Review, Respondent considered the level of physician support in addition to the four comparative factors used in the 2007 Cabarrus County MRI review. One applicant represented that it would serve patients from three different counties, but only had evidence of physician support from one county, and it was not apparent to Respondent how the applicant would obtain referrals from the other two counties without evidence of physician support. This factor was not relevant in the 2007 Cabarrus County MRI review. (Hoffman, T. Vol. 3, pp. 32-33; PDCC Ex. 17, p. 314)

202. As a matter of policy, Respondent does not count physician letters in reviews. Doing so would generate many, many letters, but would not generate a useful basis for comparing the applications. (Hoffman, T. Vol. 3, p. 33)

203. If an applicant does not provide letters from referring physicians indicating their intent to refer for an MRI application, the applicant would be found nonconforming with 10A N.C.A.C. 14C.2702(c)(6), and Respondent would use a comparative factor related to physician referrals. However, if both applicants are conforming with the rule and with Criterion 3, then they would not be compared on the basis of the letters. (Hoffman, T. Vol. 3, p. 74)

204. In the 2004 Planning Area 11 MRI Review, two scanners were determined to be needed and were awarded to Cabarrus Radiologists and NorthEast Medical Center. Neither Cabarrus Radiologists nor NorthEast Medical Center had the lowest gross or net revenue per procedure, but the other three applicants were nonconforming with one or more review criteria. The approved applicants were the only two applicants conforming with all criteria. In the comparative analysis, Respondent analyzed the same four comparative factors as in the 2007 Cabarrus County MRI review. (Hoffman, T. Vol. 3, pp. 60-65; PDCC Ex. 13)

205. The factors of access by underserved groups, operating costs, revenues, and geographic distribution were also used in the February 20, 2006 Forsyth County MRI decision, and involved Salem MRI, a subsidiary of Novant. As a result, PDCC had



notice that these factors would be used in evaluating its MRI scanner application. (Hoffman, T. Vol. 3, pp. 165-167; PDCC Ex. 11)

206. In addition, Salem MRI had the lowest gross and net revenue per unweighted procedure, excluding professional fees, of the applicants in that review. (Hoffman, T. Vol. 3, p. 167; PDCC Ex. 11)

207. These same factors were used in the MRI decision dated February 25, 2004, involving Piedmont Imaging, Novant and Foundation Health Systems, and the North Carolina Baptist Hospital. The approved applicants had the lowest average gross revenue per procedure and the lowest average net revenue per procedure in the comparative analysis. (Hoffman, T. Vol. 3, p. 169; PDCC Ex. 16)

208. In the 2005 New Hanover County operating room review, Respondent used the same four factors as in the 2007 Cabarrus County MRI review, as well as four additional factors, one of which was development of an alternative provider of ambulatory surgical services. Development of an alternative provider factor was used, because all of the existing operating rooms in the service area were owned by one provider. Respondent determined that the approved applicant was comparatively superior, because its approval would result in the development of an alternative, full-time provider of ambulatory surgical services. (Hoffman, T. Vol. 2, pp. 202-203; PDCC Ex. 4)

209. In reviews where an existing provider has a monopoly over the service at issue, Respondent does look at whether an applicant would result in the introduction of a new provider into the service area. This is weighed on a case-by-case basis according to facts in the review. (Hoffman, T. Vol. 3, pp. 35-36)

210. Competition is often an issue in competitive reviews, but the addition of another provider does not always result in competition. If there are multiple providers, there is already competition in a particular service area. Competition can be enhanced by the existing providers improving their services, improving their quality, or improving their cost effectiveness. (Hoffman, T. Vol. 2, p. 205; Vol. 3, pp. 35-36)

211. PDCC is not an alternative provider of MRI services to those providers already in Cabarrus County, because it is a subsidiary of Novant, who has another

subsidiary that owns and operates an MRI scanner in Cabarrus County. (Hoffman, T. Vol. 3, pp. 37-38)

212. SPI also is not an alternative provider of MRI services in Cabarrus County, because it is controlled by an existing provider in the same county. (Hoffman, T. Vol. 3, p. 38)

213. In the summary of the comparative findings, Respondent does not list all the positive findings on behalf of each applicant, but rather summarizes the reasons it made the decision in the particular review. (Hoffman, T. Vol. 3, pp. 182-183)

214. Unlike PDCC's application, SPI's application was conforming with and was not conditioned on either of the rules at 10A N.C.A.C. .2702(c)(1) or (c)(4). (Freedy, T. Vol. 5, p. 102; PDCC Ex. 3, pp. 912-913)

215. Based on their experience in preparing and reviewing certificate of need applications and Agency findings, Ms. Kirkman and Ms. Freedy were both aware that Respondent typically uses the comparative factors of geographic distribution, operating costs, gross and net revenue, and access to underserved groups in competitive MRI reviews. (Freedy, T. Vol. 5, pp. 56-57; Kirkman, T. Vol. 5, pp. 134-136)

## **2. Geographic Distribution**

216. The CON Act, N.C. Gen. Stat. § 131E-175(3), requires Respondent to avoid the geographic maldistribution of facilities. This requirement relates to several comparative factors, including geographic distribution and cost of health care services. (Hoffman, T. Vol. 3, pp. 161-162)

217. Prior to submitting its application, PDCC was aware that Respondent typically looks at geographic distribution in competitive MRI reviews. (Freedy, T. Vol. 4, p. 119)

218. SPI proposed to locate its MRI scanner in a previously approved diagnostic center on the North Carolina Research Campus in Kannapolis. (Rupp, T. Vol. 1, p. 156)

219. SPI's proposed location is in one of the zip code areas that PDCC's application proposed to serve. (Freedy, T. Vol. 5, p. 61)

220. The North Carolina Research Campus is located in Kannapolis and is part of the reason that the Kannapolis area is expected to grow. (Freedy, T. Vol. 5, p. 65)

221. PDCC's application lists some of the features of the North Carolina Research Campus, including a state of the art core laboratory, a work force support and training facility, and a high school for girls to focus on science and math. (Freedy, T. Vol. 5, pp. 65-66; PDCC Ex. 1, pp. 28, 91, 92)

222. Kannapolis is the only population center in Cabarrus County that does not have an MRI scanner. (Rupp, T. Vol. 2, p. 28; PDCC Ex. 3, pp. 37-39)

223. Kannapolis is an underserved market with a very large population base, limited economic resources, and limited services. (Bres Martin, T. Vol. 2, p. 103; PDCC Ex. 3, pp. 37-39)

224. The population of the zip codes in the Kannapolis area is an older population which has more Medicare patients. (Bres Martin, T. Vol. 2, p. 122)

225. PDCC proposed to locate its MRI scanner in zip code 28027. There is already an MRI scanner located in zip code 28027 operated by Access Imaging. (Freedy, T. Vol. 5, p. 68; Kirkman, T. Vol. 6, p. 10; PDCC Ex. 9)

226. CMC-NorthEast does not own or operate Access Imaging. Access Imaging is operated by Cabarrus Radiologists. CMC-NorthEast does not own Cabarrus Radiologists. (Kirkman, T. Vol. 6, pp. 9-10)

227. PDCC's location is not in the North Carolina Research Campus. It is approximately five miles away from any entrance to the North Carolina Research Campus. (Kirkman, T. Vol. 6, p. 8)

228. The chart on Page 945 of Respondent's Findings is incorrect, in that it lists Kannapolis as the location for Cabarrus Diagnostic Imaging when the location should say Concord, zip code 28025. The PDCC location is also incorrectly listed as Kannapolis. PDCC's application correctly listed PDCC's location as a Concord address, zip code 28027. (Rupp, T. Vol. 2, pp. 27-28; Kirkman, T. Vol. 6, p. 7; PDCC Ex. 1, p. 1; PDCC Ex. 3, p. 945)

229. At the time the PDCC application was filed, Cabarrus Diagnostic Imaging was owned by MedQuest. During the review, MedQuest and Novant entered into a

transaction pursuant to which Novant agreed to acquire MedQuest. (Freedy, T. Vol. 4, pp. 129-131)

230. Respondent received notice, by letter dated August 30, 2007, regarding the Novant and MedQuest transaction. Respondent responded that the transaction was exempt from review in a letter dated September 26, 2007. Both letters were prepared during the review in this case. (Freedy, T. Vol. 5, pp. 26-28, 111; PDCC Ex. 31)

231. The August 30, 2007 letter stated that the parties hope to close the transaction by September 30, 2007. (Freedy, T. Vol. 5, p. 29; PDCC Ex. 31)

232. The Novant/MedQuest transaction closed on November 9, 2007. (Freedy, T. Vol. 5, p. 31)

233. Cabarrus Diagnostic Imaging is one of the entities owned by MedQuest and involved in the transaction with Novant. (Freedy, T. Vol. 5, p. 112)

234. The Novant acquisition of MedQuest, which owned Cabarrus Diagnostic Imaging, was important to note in the comparative findings, because it changed the distribution of the equipment between the providers in the service area. It was not necessary to mention the NorthEast Medical Center/Carolinas Health Care Systems merger in the findings, because it did not change the distribution of equipment between providers. (Hoffman, T. Vol. 3, pp. 126-128; Ex. 3, p. 945)

235. Respondent found that the two applicants' proposed locations are comparable in terms of geographic distribution of MRI services in Cabarrus County. (Rupp, T. Vol. 1, p. 202)

### **3. Operating Costs**

236. The comparative factor related to operating costs is derived from statutory Criterion 5. (Rupp, T. Vol. 2, p. 17)

237. Because PDCC did not separately provide projected operating costs for the MRI scanner, Respondent was unable to compare operating costs among the two applicants for the MRI scanner. (Rupp, T. Vol. 1, p. 224)

238. It would have been reasonable and appropriate for PDCC to provide its operating costs for the MRI services separately from the costs for the other services in

its proposed diagnostic center, to enable Respondent to compare the costs for the MRI services of each applicant as the operating costs for the MRI scanner were the only competitive aspects of the applications. (Kirkman, T. Vol. 6, p. 12)

**4. Net and Gross Revenue**

239. The comparative factor related to revenues is derived from statutory Criterion 5. (Rupp, T. Vol. 2, p. 17)

240. The net and gross revenue are determined from the applicant's financial information in the application, including pro formas B-1 and B-1a. The average charge is multiplied by the number of procedures to obtain the gross revenue. (Rupp, T. Vol. 2, p. 25)

241. Net revenue is determined by subtracting from gross revenue all contractual adjustments, charity care, and bad debt. (Rupp, T. Vol. 2, p. 26)

242. The projected net revenue for SPI in its third operating year of \$567.00 is less than the projected net revenue per procedure for PDCC in its first operating year of \$582.00. (Rupp, T. Vol. 2, pp. 24-25)

243. It would be reasonable to expect differences between the projected charges in a hospital-based MRI scanner application and a freestanding MRI scanner application. One would expect the projected charges to be lower in the freestanding MRI scanner application. (Johnson, T. Vol. 4, p. 11)

244. PDCC used its internal chargemaster for freestanding imaging centers to develop its proposed charges for the MRI scanner. The chargemaster for the freestanding imaging centers is slightly lower than the chargemaster for the hospital. (Johnson, T. Vol. 4, p. 11)

245. PDCC's charges are more reflective of a hospital-based facility than a freestanding facility, and do not give the benefit of the lower cost and charge structure that a freestanding center should have. SPI does give this benefit to the community. (Flynn, T. Vol. 6, pp. 180-185; PDCC Ex. 3, pp. 34-37, 104-105; SPI Ex. 61)

246. SPI's projected net revenue per unweighted MRI procedure in Fiscal Year 2011 was \$567.00. (PDCC Ex. 3, p. 946)

247. PDCC's projected net revenue per unweighted MRI procedure in Fiscal Year 2011 was \$585.00. (PDCC Ex. 3, p. 947)

248. SPI's net revenue per unweighted procedure in 2011 is \$18.00 lower than PDCC's net revenue per unweighted procedure in 2011.

249. Respondent determined that the \$18.00 difference in net revenue per unweighted procedure in Fiscal Year 2011 between SPI and PDCC was a significant difference. (Rupp, T. Vol. 1, pp. 227-228; Hoffman, T. Vol. 3, pp. 75-76)

250. In a CON review, any difference could be significant, and the determination of a significant difference depends on the applications in the review. Only one MRI scanner could be approved, so even a smaller difference than \$18.00 could have been an appropriate difference upon which to make a determination between the applications. (Rupp, T. Vol. 1, pp. 228-229; Hoffman, T. Vol. 3, p. 76)

251. Respondent has previously approved applicants in competitive reviews with the lowest gross revenue and net revenue per unweighted procedure, including the 2005 Forsyth County MRI review. (Bres Martin, T. Vol. 2, pp. 171-172; PDCC Ex. 11)

252. There is no requirement in the law that the applicant with the lowest net revenue per procedure be approved, but the CON program is a cost containment program, and Respondent is required to make sure that the consumers get the most benefit from the services approved. (Hoffman, T. Vol. 3, pp. 74-75)

253. In the January 2005 Richmond County MRI review, the applicant with the lowest net revenue per procedure was not approved, because it was nonconforming with Criterion 3 and could not have been approved. (Hoffman, T. Vol. 3, p. 96; PDCC Ex. 17)

254. In a competitive review, it would not be appropriate to compare the total dollar amount of gross revenue projected from Medicare and Medicaid patients, because charge structures can be very different. If the volumes are the same or similar, then the provider with the highest charges will always have the highest gross revenue from Medicare and Medicaid. (Flynn, T. Vol. 6, pp. 187-188)

255. SPI's application is more cost effective than PDCC's application, because SPI's application has a lower charge structure based on the physician fee schedule, and has higher salaries. (Flynn, T. Vol. 6, pp. 186-187; PDCC Ex. 3, pp. 35, 44)

256. The difference between an applicant's net revenue and its expenses is profit. The applications show that PDCC's profit is higher than SPI's profit. (Johnson, T. Vol. 4, pp. 8-9)

#### **5. Access to the Underserved**

257. The comparative finding of access to the underserved is related to and derived from statutory Criterion 13. (Rupp, T. Vol. 2, p. 17)

258. The objectives in the CON Act, N.C. Gen. Stat. § 131E-175(3), also relate to the comparative factor of access by underserved groups, because the services need to be equally accessible to all population groups. (Hoffman, T. Vol. 3, p. 163)

259. Underserved groups are identified in Criterion 3 and in Criterion 13. These criteria require Respondent to look at access to the services for Medicare and Medicaid recipients, which are two groups of underserved persons. (Hoffman, T. Vol. 3, pp. 163-164)

260. Respondent looks at Medicare and Medicaid percentages separately to avoid a circumstance in which an applicant proposes a very high percent access in one category and a significantly lower or zero percent access in the other category. (Hoffman, T. Vol. 3, p. 102)

261. Applicants may define charity care and bad debt in different ways, so that one applicant would have more money attributed to charity care, and one applicant would have more money attributed to bad debt. (Hoffman, T. Vol. 3, p. 112)

262. Bad debt, as distinguished from charity care, typically means charges for which a patient does not make payment, either because the patient has no insurance or no funds with which to pay. After collection efforts are unsuccessful, the amount is written off as bad debt. (Flynn, T. Vol. 6, pp. 166-167)

263. If Respondent had analyzed the combined percentages of Medicare and Medicaid for the two applicants, the analysis would have shown that SPI proposed a

higher combined Medicare/Medicaid/self-pay/ indigent/charity care percentage than PDCC. The total combined projected percentage of Medicare, Medicaid, and self-pay/indigent/charity care as a percent of total utilization for SPI was 49.00%. The same total for PDCC was 44.27%. (Rupp, T. Vol. 2, pp. 20-21; PDCC Ex. 1, p. 173; PDCC Ex. 2, p. 104; PDCC Ex. 3, p. 39)

264. On a combined basis, SPI's application proposed a higher percentage of revenue and patient days from Medicare and Medicaid than PDCC's application. (Bres Martin, T. Vol. 2, p. 170)

265. SPI's application demonstrated that NorthEast Medical Center has historically provided 1.6% of gross revenue in charity care and 3.9% of gross revenue in bad debt. The total combined percentage is 5.5%. (Rupp, T. Vol. 2, p. 22; PDCC Ex. 2, p. 100)

266. PDCC's application demonstrated that Presbyterian Imaging Centers historically provided 1.4% of gross revenue as charity care and 1.66% of gross revenue as bad debt. The total historical percentage of charity care and bad debt for Presbyterian Imaging Centers was 3.06%. (Rupp, T. Vol. 2, pp. 22-23; PDCC Ex. 1, p. 166)

267. SPI's application demonstrated that NorthEast Medical Center historically provided a greater percentage of gross revenue for bad debt and charity care than the Presbyterian Imaging Centers historically provided, according to PDCC's application. (Rupp, T. Vol. 2, pp. 22-23; PDCC Ex. 1, pp. 166-167; PDCC Ex. 2, p. 104)

268. SPI proposed in its application to provide 1.6% of its gross patient revenue as charity care. It projected to provide 4.0% of its gross revenue as bad debt. The total proposed bad debt and charity care percentage is 5.6%. (Rupp, T. Vol. 2, p. 23; PDCC Ex. 2, pp. 100-101)

269. PDCC also proposed to provide 1.6% of gross revenue for charity care, but only 1.7% of gross revenue for bad debt, the total of which is 3.3%. (Rupp, T. Vol. 2, p. 24; PDCC Ex. 1, pp. 166-167)



270. SPI proposed to provide a greater percentage of its gross revenue for charity care and bad debt than PDCC. (Rupp, T. Vol. 2, p. 24; Flynn, T. Vol. 6, pp. 175-176; PDCC Ex. 1, pp. 166-167; PDCC Ex. 2, pp. 98-100)

271. Respondent considered that both Novant Health and NorthEast Medical Center spend millions and millions of dollars every year providing care to people who cannot afford to pay for their own care. (Rupp, T. Vol. 2, p. 52)

272. Because the population in Kannapolis is an older population and the older part of the population is growing at a more rapid rate than other groups, the SPI application offers greater access to MRI services for the elderly population than the PDCC application. (Kirkman, T. Vol. 6, p. 14)

273. SPI's expert witness opined that SPI is comparatively superior to PDCC with regard to access to the medically underserved, because its total percentage of Medicare and Medicaid patients is higher. (Kirkman, T. Vol. 6, pp. 15-18; PDCC Ex. 1, p. 173; PDCC Ex. 2, p. 104; PDCC Ex. 3, pp. 39, 947)

#### **6. Other Advantages of SPI's Application**

274. The SPI location in Kannapolis on the North Carolina Research Campus is superior in that it provides access to a service area that currently is not served by a fixed MRI scanner. (Kirkman, T. Vol. 6, p. 9; PDCC Ex. 3, pp. 34-35, 37-39)

275. SPI proposed more MRI technologists than PDCC for a similar number of procedures. (Kirkman, T. Vol. 5, p. 163; PDCC Ex. 1, pp. 174, 323; PDCC Ex. 2, pp. 80-85, 107)

276. SPI's proposed MRI technologist salaries are higher than the salaries for MRI technologists proposed in the PDCC application. (Kirkman, T. Vol. 5, p. 164; PDCC Ex. 1, p. 179; PDCC Ex. 2, p. 107; PDCC Ex. 3, p. 44)

277. SPI's staff benefits would be proportionately higher than PDCC's staff benefits because the same benefit percentage was used in the two applications, but SPI's salaries were higher. (Hoffman, T. Vol. 3, p. 153; PDCC Ex. 1, pp. 179, 223; PDCC Ex. 2, pp. 107, 145)

278. Staff benefits and salaries can be a factor in recruiting staff. (Hoffman, T. Vol. 3, pp. 152-153)

279. The approximate number of square feet in the PDCC application dedicated to PDCC's proposed MRI scanner was the same or comparable to the number of square feet proposed in SPI's application. (Hoffman, T. Vol. 3, p. 156; PDCC Ex. 1, p. 1004; PDCC Ex. 2, pp. 134-135)

280. The total proposed capital cost for SPI's entire project is \$1,939,683.00. The total number of square feet to be upfit for the proposed MRI scanner is 863 square feet. (Hoffman, T. Vol. 3, p. 158; Kirkman, T. Vol. 5, p. 157; PDCC Ex. 2, p. 114; PDCC Ex. 3, p. 895)

281. The MRI scanner quote in PDCC's application showed that its net selling price was \$2,054,339.00. This quote does not include the cost of the space to house the MRI scanner. (Hoffman, T. Vol. 3, p. 159; PDCC Ex. 1, pp. 491, 507)

282. The total capital expenditure for the proposed SPI MRI scanner is less than the net selling price of the proposed PDCC MRI scanner. It is not possible to determine the total capital expenditure for PDCC's MRI scanner because PDCC did not separate the capital costs for the MRI scanner from the capital costs for the diagnostic center project. (Kirkman, T. Vol. 5, p. 159)

283. SPI's proposed charges are significantly lower than PDCC's proposed charges. (PDCC Ex. 3, p. 35)

284. SPI's application was conforming with all criteria and standards, unlike PDCC's application. (Kirkman, T. Vol. 6, pp. 33-34)

285. Respondent properly found SPI's application comparatively superior to PDCC's application because it proposed greater access to Medicare patients. In addition, its net and gross revenues per unweighted MRI procedure were lower than PDCC's net and gross revenues per unweighted MRI procedure, thereby making it a more effective alternative for the community.

**CONCLUSIONS OF LAW**

1. As a petitioner challenging the MRI decision, PDCC has the burden of proof on the issues presented in this contested case hearing relating to Respondent's decision to award the MRI scanner to SPI.

2. As a petitioner challenging Respondent's approval of PDCC's diagnostic center, SPI has the burden of proof relating to Respondent's decision to award a CON to PDCC to establish a diagnostic center to include a CT Scanner, ultrasound unit and x-ray unit.

3. The rule at 10A N.C.A.C. 14C.0202(f) defines when applications are competitive. The SPI and PDCC applications were only competitive as to MRI services.

4. To be approved, an applicant must be conforming or conditionally conforming with all relevant statutory and regulatory criteria.

5. Respondent has the authority and discretion to condition an applicant but is not required to condition an applicant.

6. An Agency's interpretation of its own regulation must be given substantial deference by the Courts unless its interpretation is plainly erroneous or inconsistent with the regulation. See *Morrell v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994) ("It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.'") (citations omitted).

7. 10A N.C.A.C. .2702(c)(6) does not require a certain number of letters from physicians, does not require the number of projected referrals in the letters to match the number of procedures projected by the applicant in its need methodology, and does not require Respondent to count and compare the total number of estimated referrals by the applicants.

8. The estimated number of referrals in physician letters submitted as required by 10A N.C.A.C. 14C.2702(c)(6) must be based on the physicians' historical referral volume, but the historical referral volume does not have to be stated in the physician letters.

9. Respondent gave adequate consideration to the information in PDCC's and SPI's applications, the competitive comments, the responses to comments, and the public hearing comments.

10. There is no requirement in law or regulation that CON applicants include imputed interest in the pro forma financial statements.

11. Respondent properly determined that SPI included all reasonable operating costs in its pro forma financial statements in its application.

12. Respondent properly determined that SPI's proposed charges were reasonable and appropriate.

13. Respondent properly determined that SPI's project was financially feasible.

14. Respondent properly determined that SPI's application conformed with all applicable review criteria and rules.

15. Respondent properly determined that PDCC's application conformed or conditionally conformed with all applicable review criteria and rules.

16. Respondent gave public notice of the factors that it uses in competitive MRI reviews, both PDCC and SPI had adequate notice of the factors that could be used, and Respondent was not arbitrary and capricious in its choice of factors to be compared or its comparative analysis of those factors.

17. Respondent did not selectively compare PDCC's and SPI's applications and made its decision based on an appropriate comparative analysis.

18. In its comparative analysis of geographic distribution, it was proper for Respondent to consider Novant's acquisition of MedQuest, including Cabarrus Diagnostic Imaging, in determining the ownership of the existing MRI scanners in Cabarrus County.

19. It was proper for Respondent not to note in its findings the merger between NorthEast Medical Center and The Charlotte Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System because the merger did not change the ownership of the existing MRI scanners in Cabarrus County.

20. Pursuant to the holding in Britthaven, Inc., v. N.C. Department of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455, disc. rev. denied, 451 N.C. 418, 461 S.E.2d 754 (1995), Respondent cannot do a comparative analysis under Criterion 18a, but rather must evaluate each application independently.

21. Respondent gave due consideration to the impact each project would have on competition and properly conducted its review under N.C. Gen. Stat. § 131E-183(a)(18a).

22. In Total Renal Care v. Dep't of Health and Human Services, 171 N.C. App. 734, 615 S.E.2d 81 (2005), the Court of Appeals affirmed the final Agency decision, which used as key factors enhanced competition and consumer choice. In determining that increased competition and consumer choice gave one applicant an advantage over the other, Respondent looked at surrounding counties and facilities in operation, not just the county in which the new facility would be located.

23. Respondent's decision is consistent with Total Renal Care v. Dep't of Health and Human Services, 171 N.C. App. 734, 615 S.E.2d 81 (2005), because there is already competition for MRI services in Cabarrus County, approval of SPI's application will enhance competition and consumer choice in Cabarrus County, and approval of PDCC's application would not provide any benefit to the public in terms of lower costs and charges.

24. It would have been erroneous for Respondent to compare the total capital cost for the PDCC application with the combined capital costs for the two SPI applications, because the review was only competitive as to the MRI scanner.

25. The Britthaven decision and 10A N.C.A.C. 14C.0202(f) also precludes Respondent from comparing an application under review with an application previously approved.

26. It was not appropriate to compare gross revenue projections by the applicants, because the applicant with the highest charge will have the highest gross revenue, assuming the proposed procedure volume is the same or similar. Making such a comparison would encourage the wrong behavior with respect to charges and be inconsistent with the purposes of the CON Act.

27. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(1).

28. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(3).

29. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(4).

30. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(5).

31. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(6).

32. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(7).

33. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(8).

34. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law

and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(13).

35. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(14).

36. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with N.C. Gen. Stat. § 131E-183(a)(18a).

37. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding SPI's application conforming with the Criteria and Standards for Magnetic Resonance Imaging Scanners, 10A N.C.A.C. 14C.2700 et seq., including 10A N.C.A.C. 14C.2702(c)(6).

38. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(1).

39. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(3) for the proposed diagnostic equipment with the exception of the proposed mammography unit.

40. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(4) subject to the conditions that it not acquire a MRI scanner or a mammography unit.

41. Respondent acted within its authority and jurisdiction, acted correctly,

used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(5) subject to the conditions that it not acquire a MRI scanner or a mammography unit and that the approved capital expenditure shall be \$6,800,838.

42. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(6) subject to the conditions in the comparative analysis in the Required State Agency Findings.

43. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(7).

44. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(8).

45. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(12) subject to the condition that it not construct or develop space in the diagnostic center for an MRI scanner or a mammography unit.

46. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(13).

47. Respondent acted within its authority and jurisdiction, acted correctly,



used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(14).

48. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conforming with N. C. Gen. Stat. § 131E-183(a)(18a) subject to the conditions in the comparative analysis.

49. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conditionally conforming with 10A N.C.A.C. 14C .2702(c)(1) subject to the condition that PDCC not acquire the proposed MRI scanner.

50. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application for its proposed diagnostic center conditionally conforming with 10A N.C.A.C. 14C .2702(c)(4) subject to the condition that PDCC not acquire the proposed MRI scanner.

51. 37. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in finding PDCC's application conforming with the Criteria and Standards for Diagnostic Centers, 10A N.C.A.C. 14C.1800 *et seq.*

52. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in finding that SPI's application was comparatively superior to PDCC's application with regard to the MRI scanner.

53. Respondent properly determined that SPI was the most effective alternative with regard to the MRI scanner.

54. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in approving SPI's application.

55. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice SPI's rights in approving PDCC's diagnostic center subject to the conditions in the comparative analysis including the conditions that it not acquire a MRI scanner or a mammography unit.

56. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in disapproving PDCC's application for the MRI scanner.

57. Respondent acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily and capriciously, acted as required by law and rule and did not substantially prejudice PDCC's rights in conditioning PDCC not to acquire mammography equipment or an MRI scanner.

58. PDCC failed to prove that Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law and rule in approving SPI's application for the MRI scanner and disapproving PDCC's application for the MRI scanner.

59. SPI failed to prove that Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law or rule in approving PDCC's application for the diagnostic center subject to the conditions in the comparative analysis including the conditions that it not acquire a MRI scanner or a mammography unit.

60. SPI and PDCC were not denied due process in this review.

**RECOMMENDED DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby recommends that Respondent's decision approving SPI's application for an MRI scanner be **AFFIRMED**, and that a certificate of need should be awarded to SPI to acquire one fixed MRI scanner in Cabarrus County.

The undersigned further recommends that Respondent's decision to approve PDCC's application to establish a new diagnostic center be **AFFIRMED**, subject to the conditions that it not acquire a MRI scanner or a mammography unit, and that a certificate of need be awarded to PDCC to establish a diagnostic center to include a CT Scanner, ultrasound unit and x-ray unit, subject to the conditions that it not acquire a MRI scanner or a mammography unit.

**ORDER**

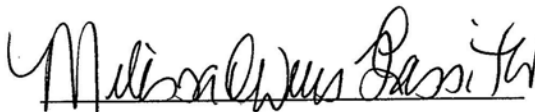
The undersigned hereby orders Respondent serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b).

**NOTICE**

Before Respondent makes the Final Decision, it is required by N.C. Gen. Stat. § 150B-36(a) to give each party an opportunity to file exceptions to this Recommended Decision, and to present written arguments to those in Respondent's agency who will make the final decision in these cases.

Respondent is required to serve a copy of the Final Decision on all parties and to furnish a copy to the parties' attorneys of record.

This the 18th day of August, 2008.



MELISSA OWENS LASSITER  
ADMINISTRATIVE LAW JUDGE

**CERTIFICATE OF SERVICE**

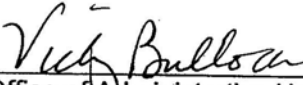
The undersigned hereby certifies that a true copy of the foregoing **RECOMMENDED DECISION** was served on the persons indicated below by electronic mail and by placing a copy thereof in the United States Mail, first class, postage prepaid, addressed as follows:

Maureen Demarest Murray, Esquire  
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*Attorneys for Presbyterian Diagnostic Center at Cabarrus, LLC*

Susan K. Hackney  
June S. Ferrell  
Assistant Attorneys General  
N.C. Department of Justice  
114 West Edenton Street  
Raleigh, NC 27602-0629  
*Attorneys for Respondent*

This the 18<sup>th</sup> day of August, 2008.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 733-2698  
Fax: (919) 733-3407

**CERTIFICATE OF SERVICE**

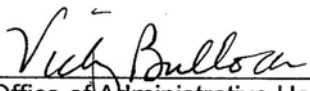
The undersigned hereby certifies that a true copy of the foregoing **RECOMMENDED DECISION** was served on the persons indicated below by electronic mail and by placing a copy thereof in the United States Mail, first class, postage prepaid, addressed as follows:

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N.C. Department of Justice  
114 West Edenton Street  
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*Attorneys for Respondent*

This the 18<sup>th</sup> day of August, 2008.

  
\_\_\_\_\_  
Office of Administrative Hearings  
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

Filed

2008 OCT -1 AM 11:25

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
07 DHR 2275

Manu Gaur  
Petitioner

vs.

North Carolina Department of Health and  
Human Services  
Respondent

Office of  
Administrative Hearings

DECISION

On June 11, 2008, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. Pursuant to the undersigned's request, the Respondent filed its proposed Decision on July 30, 2008, and Petitioner filed its proposed Decision on August 19, 2008.

**APPEARANCES**

For Petitioner: Philip S. Adkins  
Adkins Law Group  
PO Box 52393  
Durham, NC 27717

For Respondent: Ellen A. Newby  
Associate Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

**ISSUE**

Whether Respondent properly reduced the number of Home and Community Support hours requested for Petitioner, and supplemented these hours with Personal Care Services, while approving the requested number of Day Support hours?

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner:

- 1 Videotaped deposition of Kenneth M. Carnes, MD
- 2 CAP-MR/DD Manual

- 4 10/16/06 letter
- 5 Manu's bathing system
- 6 Deposition of Mary Elizabeth Van Bourgondien, PhD

For Respondent:

- 1 Notice of Decision
- 2 Introduction Excerpt of 2005 CAP-MR/DD Manual
- 3 North Carolina's Section 1915(c) Waiver Format
- 4 CAP-MR/DD Manual - Home and Community Supports
- 5 CAP-MR/DD Waiver - Habilitative Services
- 6 CAP-MR/DD Manual- Day Supports
- 7 CAP-MR/DD Manual - Personal Care Services
- 8 Excerpt of CAP-MR/DD Waiver - Personal Care Services
- 9 CAP-MR/DD Manual - Utilization Review Guidelines
- 10 Dr. Stephen Lucente's Curriculum Vitae
- 11 Recipient's CAP Targeted Case Management  
Authorization Request Form for services starting 6/1/07
- 12 Recipient's Plan of Care for services starting 6/1/07
- 13 Recipient's Plan of Care for services starting 6/1/07
- 14 Recipient's North Carolina Support Needs Assessment  
Profile
- 15 Recipient's Mental Retardation Services Form
- 16 Letters and medical information Petitioner submitted for  
informal hearing

Judicial Notice is taken of: CAP-MR/DD Waiver, and 10A NCAC 22O .0301

#### **FINDINGS OF FACT**

After considering the testimony of witnesses, exhibits introduced into evidence, and the parties' arguments, the undersigned finds as follows:

##### **Background Facts**

1. The Community Alternative Program for Persons with Mental Retardation/Development Disabilities ("CAP-MR/DD") is a Medicaid waiver program permitted under 42 U.S.C. §1396n(c) (also known as Section 1915(c) of the Social Security Act) which provides home- and community-based services. Under the waiver program, the United States Secretary of Health and Human Services may grant a waiver to a state under which approved costs of home- and community-based services are reimbursed for eligible individuals who otherwise would require institutionalization in an Intermediate Care Facility for the Mentally Retarded (ICF-MR). See 42 U.S.C. §1396n(c)(1). Home and Community supports ("HCS") are waiver services, and are defined in 42 CFR 440.180.

2. Pursuant to Section 1915(c) of the Social Security Act, the State of North Carolina implemented a Medicaid the home- and community-based services Section 1915(c) Waiver ("the Waiver"). Under the Waiver, HCS are intended to "meet the habilitation and support needs of individuals living in their own home or their family's home." (CAP Manual § 4.6.6) Section 4 of the CAP Manual defines "Home and Community Supports" as a service intended to "provide instruction and assistance to enable the individual to acquire and maintain skills that will allow him/her to function with greater independence in the community."

3. Respondent's Division of Mental Health/Developmental Disabilities/and Substance Abuse Services ("DMH/DD/SAS") and the Division of Medical Assistance ("DMA") manage the Waiver statewide, exercise administrative discretion in the administration and supervision of the waiver, and issue policies, rules and regulations related to the waiver.

4. Value Options, Inc. ("Value Options") is the group of independent Medicaid consultants responsible for reviewing requests for mental health services on Respondent's behalf.

5. CAP-MR/DD services are generally approved for one-year periods, and require annual renewals. Individuals receiving services under the CAP-MR/DD program must annually submit a Plan of Care outlining the requested services, and explaining how the services will be used.

6. The recipient's case manager is responsible for managing the recipient's case, conducting a continuing needs review, and submitting a Plan of Care that supports the request for approval of requested services. The case manager may submit other documentation supporting the request, but the Plan of Care is the central document used.

Request for Services At Issue

7. Petitioner is a twenty-eight year old Medicaid recipient who resides at home with his parents. Petitioner has a diagnosis of Autism, Moderate Mental Retardation, and Seizure Disorder. Petitioner's medications include Clonidine, Camitor, Neurontin, Depakote, and Ambien.

8. Petitioner is presently a client of Wake Enterprises, the Autism Society of North Carolina, and Residential Support Services of Wake County, all providers of CAP-MR/DD services.

9. Until 2007, Respondent had previously approved Medicaid payment for Petitioner to receive the CAP-MR/DD services of HCS for 35 hours per week, 30 hours per week of Direct Service-Individual Care (Day Supports), 200 hours per week of Respite Services, and 13.88 units per month for Individual Caregiver Training and Education.



10. In May 2007, Wake Enterprises submitted a CAP/Targeted Case Management Request for Authorization ("CTCM") and a Plan of Care ("POC") to Value Options for approval of 35 hours a week of HCS for Petitioner for the authorization period beginning June 1, 2007. Wake Enterprises indicated that Petitioner should continue receiving 35 hours per week of HCS, because he remained symptomatic, had not achieved treatment goals, and continued to need support to increase independence. (Resp Exh 11)

11. On August 7, 2007, Value Options denied Petitioner's request for Medicaid coverage for 35 hours per week of HCS. Instead, Value Options reduced Petitioner's HCS to 18 hours a week for the authorization period, and added 14 hours a week of Personal Care Services. It did not change the level of Day Support, Respite Care, and Individual Caregiver Training and Education.

12. On October 3, 2007, Respondent conducted a Reconsideration Review. Petitioner submitted letters to Respondent from Heidi Cromity, Laurie Nederveen who helped design Petitioner's program at TEACCH, Ginger Yarbrough at the Autism Society, Dr. Carnes and Dr. Paul Kartheiser at TEACHH, and a 1991 Yale University Evaluation Report. Petitioner's father explained that Petitioner has progressed since the 1991 Yale Evaluation. (Resp Exh 16) These letters noted in pertinent part:

a. Ms. Cromity advised that Petitioner progressed on his some of his goals while receiving training. Nevertheless, it was crucial that Petitioner receive the requested habilitative services to maintain his current level of health, safety, and well-being.

b. Ms. Nederveen opined that Petitioner's progression may falter without adequate time to teach appropriate goals that address the core features of Petitioner's impairment. She noted that replacing the HCS hours with personal care hours would at best, be a method of "treading water" as opposed to facilitating progress in his development. Similarly, Ms. Yarbrough explained that staff actively teaches Petitioner how to perform tasks by himself. These skills are seen as HCS, not personal care services, and are "essential" for Petitioner to be independent.

c. Dr. Carnes explained that Petitioner's medical conditions cause Petitioner to experience behavioral issues, anxiety, unpredictable sleep patterns and seizures. He opined that, "It is imperative to keep his [Petitioner's] current care intact as changing his routine would be detrimental to his well-being."

13. On October 23, 2007, Respondent upheld Value Options' decision to reduce Medicaid payment for HCS for Petitioner. (Resp Exh 1)

Evidence Presented at Hearing

14. Dr. Kenneth M. Carnes is a PhD, and board certified in adult neurology. He has treated Petitioner since June of 1999, and sees him four to six times a year. Most of Dr.

Carnes' treatment of Petitioner involves medication management. He considers Petitioner's autism and mental retardation to be severe. Petitioner has profound impairment in both social and communication skills. He displays agitated behavior, inability to follow commands, and a tendency towards violent and aggressive behavior.

15. Dr. Carnes believes it is critically important that Petitioner learn skills that help him become more independent. This learning helps Petitioner's overall behavioral status, and his overall health status, thereby, contributing to his ability to stay at home with his parents. Without the ongoing teaching, Petitioner's behavior would regress severely, and he would likely be institutionalized. (Carnes Dep., p. 10)

16. Dr. Carnes opined, to a reasonable degree of medical certainty, that the proposed reduction of HCS to 18 hours a week, and the substitution of 14 hours of Personal Care Services per week, would be profoundly detrimental to Petitioner. (Carnes Dep., pp. 12, 13, 25) Dr. Carnes feared that Petitioner's behavioral issues, particularly his obsessive-compulsive behaviors and his tendency towards agitation and violence, would spiral out of control if HCS were reduced; thereby, making it impossible for Petitioner to stay at home with his parents, and resulting in Petitioner being institutionalized. (Carnes Dep., p. 13, 19)

17. Dr. Carnes explained that the HCS Petitioner received in the past have stabilized his situation, and allowed him to remain at home. A reduction of HCS would also lead to regression and impairment, specifically in Petitioner's abilities to perform his daily living activities. Reduced HCS would make Petitioner less cooperative, and participate less in daily activities such as dressing, eating, grooming or toileting tasks. (Carnes Dep., p. 18) Even if there was little or no progress in teaching daily living skills to Petitioner, the HCS' goals would provide behavioral management of Petitioner's aggressive, agitated and violent behavior. The behavior management helps Petitioner's parents deal with Petitioner. (Carnes Depo., p 25)

18. Dr. Carnes admitted that he has never seen the CAP-MR/DD manual, and has not read the definition of either Personal Care Services or HCS. Carnes has never seen Petitioner's POC, and was unaware that Petitioner received Day Supports.

19. He believes that Personal Care Services could potentially benefit Petitioner. Maintaining skills, as described in the CAP-MR/DD manual under Personal Care Services, would be desirable for Petitioner. He acknowledged that Petitioner would not be able to differentiate between HCS and Personal Care Services.

20. Dr. Carnes believes Petitioner could handle four to eight hours per day of active learning. Dr. Carnes opined that Petitioner has little, if any, ability to manage his own activities of daily living. He would be surprised if there was any actual improvement in Petitioner's situation. He did not think Petitioner had made any improvement in daily living skills since Carnes had been treating Petitioner.

21. Residential Support Services of Wake County provides case management for

clients with developmental disabilities, and provides different levels of support for individuals in their own apartments.

22. Heidi Cromity, of Residential Support Services of Wake County, has worked with developmentally disabled individuals since receiving her BA in 1995. Ms. Cromity is a case manager who coordinates services for individuals with disabilities, and ensures these persons receive the services they require either to live at home or to maintain their own individual residence. She has been a case manager for two years.

23. Ms. Cromity sees Petitioner once a month, and is one of the people responsible for developing the plan that would include Day Supports, HCS, and Personal Care Services. Wake Enterprises, Coordinated Health, and the Autism Society also participated in developing Petitioner's plan. For at least two years, Petitioner has had the same POC, and has received the same level of care.

24. Ms. Cromity explained that Day Supports provide vocational training for Petitioner, while Petitioner attends a vocational workshop and works on different skills and tasks. HCS allow Petitioner to work on different skills that will assist him in the community. Ms. Cromity opined that Petitioner has made some progress with his goals, but progress has been quite slow. Petitioner needs to keep the skills he has learned as well as acquire new skills. She believes that a reduction in Petitioner's HCS would be detrimental to Petitioner.

25. Ms. Cromity was partly responsible for developing the 2007 POC. She submitted Petitioner's 2007 POC to Value Options. She acknowledged that Petitioner's 2007 POC did not describe the progress Petitioner had made during the last year. Neither did she submit any other documentation to Value Options to show Petitioner's progress.

26. Ms. Cromity opined that prompting Petitioner to act, as listed in both the 2006 and 2007 POC, would be more of a Personal Care Service than HCS. Personal Care Services would help Petitioner practice skills he has already learned.

27. Rasheeda Jordan-Oliver from Wake Enterprises, Inc. is a vocational training center for adults with developmental disabilities. She has worked with Wake Enterprises for almost ten years, and worked as a Qualified Professional ("QP") there since May of 2007. As a QP, she manages a caseload of individuals who receive CAP funding or C-Waiver funding, supervises direct care staff, and implements plans of care that come in from case managers. Ms. Jordan-Oliver began supervising Petitioner's case in August of 2007.

28. Ms. Jordan-Oliver believes that reducing Petitioner's HCS would affect Petitioner's behavior at work. But, since she does not actually see the care Petitioner receives at home, she could not specifically say how changing Petitioner's HCS and Personal Care Services would affect his behavior. Petitioner has been able to do some things with verbal prompting.

29. Melissa Carden of the Autism Society of North Carolina has worked in the autism community for about 9 years. As a community skills coordinator with the Autism Society, Carden manages a caseload of approximately nineteen individuals, supervises staff, helps develop plans of care, and helps implement those goals.

30. In Ms. Carden's opinion, Petitioner needs one-on-one instruction, and constantly needs a structured environment. On a typical day, the HCS worker arrives at Petitioner's home at five p.m. The worker and Petitioner begin Petitioner's chores in the home, such as laundry, vacuuming, or dusting. During the course of these chores, the staff constantly instructs or prompts Petitioner in order to assist Petitioner perform different activities or tasks. Each task is broken into many parts or steps.

31. Staff always communicates with Petitioner through sign language, body language, and gestures.

32. Based on Carden's experience, Personal Care Services is a maintenance service for skills an individual has already learned. In her opinion, Personal Care Services would not work for Petitioner. For example, Petitioner can do his laundry, but usually does so, one step at a time with verbal prompts.

33. Wake Enterprises provides Day Supports for Petitioner. Johnnie Rhodes is a paraprofessional for Wake Enterprises who provides one-on-one services for individuals with developmental disabilities. He has a high school diploma, and attended two years of pre-nursing at a Community College. He has provided one-on-one care for individuals for the past eight years. He has provided HCS to clients, but never Personal Care Services.

34. For the past five or six years, Mr. Rhodes has provided Day Supports to Petitioner. Mr. Rhodes works with Petitioner Monday through Friday for about six hours a day. Every day for the past five or six years, Rhodes has to repeat the model of Petitioner's task. Petitioner gets tired sometimes, and refuses to work. They take a break for approximately thirty minutes, and then resume the task.

35. Santosh Gaur, Petitioner's father, holds Bachelor, Master, and PhD degrees in electrical and computer engineering. When Petitioner was a little more than a year old, he was diagnosed with severe learning disability. Petitioner has been completely nonverbal since the age of two and a half years. Petitioner has attended special schools from an early age.

36. Mr. Gaur explained that Petitioner is autistic, mentally retarded, and experiences occasional seizures. Petitioner is nonverbal, and has obsessive-compulsive behaviors. Petitioner cannot be left unsupervised, because he will place foreign objects in his mouth, and sniffs items that are potentially dangerous. Petitioner may drink anything if left unattended. Petitioner gets agitated if pushed hard to do something he does not want to do. Petitioner also becomes agitated unless his day is structured, and he is being actively taught.

37. Petitioner has been receiving Day Supports from nine a.m. to three p.m., and HCS from five p.m. to ten p.m. Monday through Friday. Petitioner receives HCS from one p.m. to six p.m. Saturday and Sunday.

38. Mr. Gaur believes that as long as Petitioner is awake, he is learning and needs active training. Petitioner has never received Personal Care Services. Mr. Gaur believes that Personal Care services will not be useful for Petitioner. While Petitioner has some free time, he must always be supervised. Mr. Guar estimated that Petitioner knows twenty to fifty signs, but does not always use them correctly.

39. Chris Best from the Autism Society of North Carolina has provided one-on-one services for Petitioner since September of 2005. Petitioner is less aggressive since Best began working with Petitioner. Petitioner will forget any skill he has learned unless he constantly practices his skills. Petitioner's schedule must be flexible as Petitioner's attitude affects what Petitioner's daily performance.

40. Mr. Best explained that Petitioner has learned quite a few skills, such as going to the bathroom by himself, making his own snacks and lunch, and packing his own lunch. He has observed Petitioner forget signs that he does not frequently use. As a result, they often practice signs and skills so Petitioner will not forget them.

41. Dr. Mary Elizabeth Van Bourgondien has a PhD in clinical psychology, is the director of the TEACCH program in Raleigh, and is a licensed clinical psychologist.

42. The TEACCH program is a program for children and adults with autism and is affiliated with UNC-Chapel Hill. She explained that autism is a development disability that children are born with. It affects thinking and learning processes, and there are different levels of severity. Often, people with autism are also diagnosed with mental retardation.

43. For those with autism, learning is a slower process, and is a lifelong process. Individuals with autism and mental retardation, like Petitioner, have uneven patterns of learning. It is extremely important to teach new skills to autistic individuals, or they will likely lose their skills. People with autism have more behavioral problems during unstructured free time, because they lack the ability to organize themselves. It is important that Petitioner be flexible, and generalize his skills across people, places, and materials. The leading reason that autistic persons are institutionalized is because their families can no longer manage their physically aggressive behavior.

44. Since 2002, Petitioner has been a patient at the TEACCH program. Dr. Van Bourgondien has never actually seen Petitioner. Her knowledge of his care is based solely on information related to his TEACCH participation, and from speaking with his parents. Petitioner has profound impairment in both social and communication skills. He displays agitated behavior, inability to follow commands, and a tendency towards violent and aggressive behavior.

45. Dr. Van Bourgondien is familiar with the CAP-MR/DD Manual from briefly reading it. A part of the teaching aspect of HCS is the assessment of Petitioner's interests or abilities, and then adjusting the teaching techniques to fit Petitioner's problems. Based on the "Home and Community Supports" definition, Dr. Van Bourgondien believes that reducing HCS would not benefit Petitioner.

a. She opined that the reduction in such services would most likely result in Petitioner learning at a slower rate, and getting into negative nonfunctional routines. It would be more difficult to teach Petitioner, and Petitioner would likely increase his aggressive behavior and violence. A reduction in HCS, and substitution of personal care services, would also adversely affect Petitioner's communication skills, and increase Petitioner's aggressive behavior. A reduction in HCS hours would also make it more difficult for Petitioner's parents to manage Petitioner's behavior, and for Petitioner to stay at home.

46. Dr. Van Bourgondien conceded that she has never seen Personal Care Services or HCS implemented, and has no experience with them in practice. If the name of services provided to Petitioner changed, but the nature of the services provided to Petitioner remain unchanged, the change would not affect Petitioner. She is unfamiliar with Day Supports other than having read the definition.

47. Patricia Kirk works in Respondent's Behavioral Health Clinical Policy section and oversees the CAP waiver. Ms. Kirk participated in creating the CAP-MR/DD waiver ("Waiver") and CAP-MR/DD Manual for North Carolina. At hearing, Kirk explained that Day Supports and HCS are habilitative treatments. To habilitate an individual is to teach that person to learn a skill that he/she have never learned before. Habilitative services work on skills to help a person function at the highest level he/she is able to maintain in his/her environment. Part of learning is retention.

48. Medicaid does not pay for habilitation services. Outside of the CAP-MR/DD waiver, Medicaid only pays for rehabilitation or relearning a lost skill.

49. Kirk explained that Personal Care services engage participation in a variety of activities in the home or community setting. Personal Care Services were intended for the subject population who need supervision, engagement, and participation in a task or a goal that he/she has already learned. HCS and Personal Care Services should work together as a whole. Personal Care Services must be tailored to the individual, and each worker must have client specific training.

50. POCs are important documents that are the basis for authorizing Community Support Services. The plan of care needs to be as complete and accurate a reflection of that individual as the team can provide on a yearly basis, and contain the reasons the requested services are medically necessary for the authorization period. POCs can be updated at any time, but at a minimum of once a year. The POC should be updated to reflect any progress that has been made since its last update. If the goals have not



changed, the case manager should explain why the goals have not been met. The case manager may indicate that the standards are set too high, as the recipient could not achieve the goals listed.

51. CAP-MR/DD Manual, Appendix M Utilization Review Guidelines lists guidelines for CAP-MR/DD recipients residing at home. Respondent's Division of Mental Health, Substance Abuse, and Developmental Disabilities develops these guidelines by performing a statewide analysis of all individuals served by the 2004 Waiver. The SNAP scores are listed from one to five, with five being the highest level of help required. The higher the level of dysfunction, the higher the SNAP score, and the more Personal Care Services the individual usually needs with his daily living skills.

52. These guidelines reflect the range of services individuals received under the 2004 Waiver. About ninety-five percent of the individuals receiving services from the 2004 Waiver received services within a certain range. Kirk admitted that there would be individuals that need fewer services than the guidelines recommend, and individuals that need more services than the guidelines recommend.

53. The Guidelines recommend that an individual with a Level 4 SNAP score would be entitled to 576 hours of Respite services per year, 180 hours a month of Personal Care Personal Care services, and 120 hours a month of HCS, Day Supports, or Supported Employment in any combination. (Resp Exh 9)

54. In Kirk's opinion, some of the services Mr. Best provided Petitioner are actually Personal Care Services. She explained that the personal care and the teaching elements blend together. Under the State's definition of "habilitation," the habilitation occurs when a new skill is being taught. In contrast, reinforcement of a skill is considered Personal Care Services.

55. Dr. Stephen Lucente, accepted as an expert in the field of psychology, is a peer advisor for Value Options who reviews requests for treatment. Dr. Lucente has a PhD in psychology, and is a license clinical psychologist. Dr. Lucente is very familiar with both the CAP-MR/DD Manual and Waiver. Dr. Lucente has a general knowledge of autism, but little specialized knowledge of autism. He had no experience with autism in his practice.

56. Value Options uses the CTCM, POC, N.C. SNAP Score, and the MR-2 to review requests for services. These documents are standard forms provided by the State. CAP-MR/DD policy requires case manager use these forms in submitted requests for services to Value Options.

57. When looking at a request for services, Value Options examines the goals submitted in the POC, and other documents, and compares them to acceptable community standards shown by evidence-based treatments and acceptable standards of research. Value Options cannot approve services that are not supported by the generally accepted North Carolina community practice standards for that diagnosis.

58. Dr. Lucente explained that the goals in these documents should be written so the goals are measurable, objective, and achievable. Dr. Lucente would never expect the goals to be identical from one year to the next. Instead, he would expect that a goal would either be changed or dropped if a person is not achieving that goal over time. If the person is a slower learner, then the goals should reflect that.

59. Value Options looks for progress to show that the habilitative or teaching services are in fact teaching some skills. Without documentation of progress by the case manager, Value Options has no knowledge of any progress made by the Medicaid recipient.

60. Value Options used the CTCM, the POC, the NC SNAP Score, and the MR-2 to deny Petitioner's request for continued HCS. They also considered letters Petitioner submitted at the informal appeal.

61. Dr. Lucente's review of Petitioner's 2006 POC and 2007 POC revealed that the 2006 POC is significantly similar to Petitioner's 2007 POC. Specifically, the case manager failed to show in Petitioner's 2007 POC that Petitioner made any progress during the subject year. The 2007 POC failed to provide justifications for the new POC, and thus, the 2007 POC is not approvable as written.

62. Petitioner has a SNAP score at Level 4, based on his score in the daily living area. SNAP defines the area of daily living as: "Assistance needed: Partial hands-on to complete assistance needed in most areas of self-help, daily living, and decision-making. Cannot complete complex skills."

63. In Dr. Lucente's opinion, Petitioner's level of functioning indicates that Petitioner needs both Personal Care Services and habilitative services. He explained that balancing both HCS and Personal Care Services is important. Personal Care Services can build on HCS, and provide maintenance of skills learned in HCS.

64. Dr. Lucente further explained that Value Options was recommending that Petitioner's overall level of Home and Community Support services be reduced by approximately thirty minutes a day.

65. Based on how HCS are provided to Petitioner, Dr. Lucente believed staff is already providing Personal Care Services to Petitioner at some level, even though such services are called "HCS." For example, for over one year, one of Petitioner's goals is to tie his shoes. Lucente explained that if Petitioner cannot tie his own shoes by now, he either is allowed to leave the home with untied shoes, or someone ties his shoes for him. Dr. Lucente doubted Petitioner's worker allowed Petitioner to leave home with untied shoes; therefore, Lucente thought someone else must have done this for Petitioner. Tying Petitioner's shoes for him is an example of Personal Care Services, even though staff called it "HCS." In Lucente's opinion, it would not be detrimental to Petitioner to change the name of the provided service for billing and recording



purposes.

66. Dr. Lucente believed that Petitioner's 2007 POC and other documentation failed to provide justification why the requested services are medically necessary, and that Medicaid should cover 35 hours per week of HCS for Petitioner. The recommended alternative services would be more appropriate and effective than the requested services.

67. Petitioner presented evidence that the cost of an Intermediate Care Facility (ICF-MR) placement for Petitioner is \$125,000 per year. The annual cost of services Petitioner had been receiving was \$85,750.00. Ms. Kirk opined that it is difficult to determine the actual cost of an ICF-MR placement for Petitioner, because different placements cost different amounts, and ultimately, the State will pay for any services identified as medically necessary from the POC, regardless of the cost.

#### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to N.C. Gen. Stat. § 150B-23 *et seq.* All necessary parties have been joined. The parties received proper Notice of the Hearing for this matter. To the extent that Findings of Fact contain Conclusions of Law, or that Conclusions of Law are Findings of Fact, they should be so considered without due regard to the given labels.

2. The CAP-MR/DD program is a Medicaid-funded program which provides home and community-based care to persons with mental retardation/developmental disabilities, who but for the Waiver's provision of services, would require care in an intermediate care facility (ICF/MR).

3. Respondent is the State agency charged with administering the Medicaid program, including the Community Support Services program in North Carolina. Value Options Inc. is the group of independent Medicaid consultants for mental health services.

4. Petitioner is eligible to participate in the CAP-MR/DD program.

5. Petitioner has the burden of proof. See *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 699, 635 S.E.2d 442, 444-45 (2006), *disc. rev. denied*, 361 N.C. 220, 642 S.E.2d 445 (2007). In meeting her burden of proof, Petitioner is aided by the "presumption in favor" of opinions of treating physicians regarding medical necessity. See, e.g., *Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989) ("The Medicaid statute and regulatory scheme create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.")

6. 10A N.C.A.C. 220.0301 requires that all medical services performed must be medically necessary, and may not be experimental in nature. "Medical necessity is determined by generally accepted North Carolina community practice standards as verified by independent Medicaid consultants." 10A N.C.A.C. 220.0301
7. Pursuant to the CAP-MR/DD Waiver, Section 13, qualified individuals will develop a plan of care for each individual under this Waiver. The plan of care will describe the medical and other services (regardless of funding source) to be furnished, their frequency, and the type of provider who will furnish each service. All services will be furnished pursuant to a written plan of care. The plan of care will be subject to the approval of the Medicaid agency.
8. Case managers shall be responsible for ongoing monitoring of the provision of services included in the individual's plan of care. Case managers shall initiate and oversee the process of assessment and reassessment of the individual's level of care. CAP-MR/DD Waiver; Appendix B-1 (a)
9. The CAP-MR/DD program requires a person-centered approach to deliver mental health and developmental disability services to eligible individuals. (Resp Exh 2, CAP-MR/DD Manual, Sect. 1.4) The expressed goal of the CAP-MR/DD program is to keep an eligible individual in their home and avoid placing them in an ICF/MR facility. (Resp Exh 2, CAP-MR/DD Manual, Sect. 1.1 et seq)
10. Petitioner's evidence showed that the CAP-MR/DD Manual was designed more for the mentally retarded than individuals with autism. While Ms. Kirk is an expert in administration of the CAP-MR/DD program, she had no expertise in autism. Dr. Lucente is a clinical psychologist for Value Options who has some general knowledge of autism, but no practical experience with autism, and little specialized knowledge of autism.
11. Petitioner's evidence from treating physicians demonstrated the medical necessity of the requested services, and is entitled to a presumption in favor of Petitioner. See, e.g., *Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989) ("The Medicaid statute and regulatory scheme create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.")
12. Drs. Van Bourgondien and Carnes are experts in the field of diagnosing and treating autism, and as such, their opinions hold great weight with the undersigned. Drs. Van Bourgondien and Carnes opined that the reduction of HCS to 18 hours a week, even with adding Personal Care Services, would have an extremely detrimental effect on Petitioner's behavior. They explained that it is more likely than not that Petitioner would regress and lose, among other things, his critical ability to communicate, thereby leading to more aggressive and violent behaviors. Petitioner's likely regression in behavior would more likely than not result in Petitioner being placed in an ICF-MR facility.

13. Through these doctors' opinion testimony at trial, and the opinions stated in their letters to Respondent, Petitioner demonstrated the medical necessity for Petitioner to continue receiving 35 hours a week of HCS.

14. The total expenditure for services provided to a CAP-MR/DD participant must not exceed the amount that Medicaid would have incurred for that individual in an ICF/MR facility. (Resp Exh 2, CAP-MR/DD Manual, Sect. 1.4 (5))

15. In this case, Petitioner proved that the total expenditure for the level of care Petitioner had been receiving was significantly less than the cost of placing him in an ICF-MR facility. Respondent presented no evidence to rebut that information.

16. Based on the foregoing evidence presented at hearing and evidence presented to Respondent at the Reconsideration Review, Petitioner met his burden of proving he is qualified and entitled to receive Medicaid payment for 35 hours a week of HCS. Respondent relied primarily on the deficiencies of the Plan of Care submitted, and failed to rebut the evidence of medical necessity presented by Petitioner.

#### **DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Respondent's decision to deny the request for HCS for Petitioner should be **REVERSED**, and should approve Petitioner's HCS services to continue at 35 hours a week.

#### **NOTICE AND ORDER**

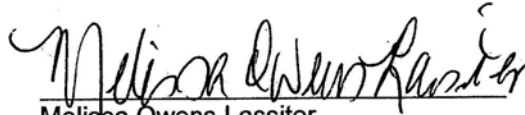
North Carolina Department of Health and Human Services will make Final Decision in this contested case. That agency shall adopt the Decision of the Administrative Law Judge, unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency is required to give each party an opportunity to file exceptions to this Decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. §150B-36(a).

In accordance with N.C. Gen. Stat. §150B-36, the agency shall adopt each Finding of Fact contained in the Administrative Law Judge's decision, unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each Finding of Fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the Finding of Fact and the evidence in the record relied upon by the agency. Every Finding of Fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial

review. For each new Finding of Fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new Finding of Fact is supported by a preponderance of the evidence in the official record.

That agency is required by N.C. Gen. Stat. §150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

This the 1<sup>st</sup> day of October, 2008.

  
Melissa Owens Lassiter  
Administrative Law Judge


**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

Philip S Adkins  
Adkins Law Group  
PO Box 52393  
Durham, NC 27717  
ATTORNEY FOR PETITIONER

Ellen A. Newby  
Associate Attorney General  
N.C. Dept. of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 1<sup>st</sup> day of October, 2008.

  
\_\_\_\_\_  
Office of Administrative Hearings  
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STATE OF NORTH CAROLINA  
COUNTY OF BRUNSWICK

Filed  
2008 OCT 23 PM 1:05  
IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
08-DHR-0818

Office of  
Administrative Law Judge

TOTAL RENAL CARE OF NORTH  
CAROLINA, LLC d/b/a TRC-LELAND

Petitioner,

v.

NORTH CAROLINA DEPARTMENT  
OF HEALTH AND HUMAN  
SERVICES, DIVISION OF HEALTH  
SERVICE REGULATION,  
CERTIFICATE OF NEED SECTION,

Respondent,

and

BIO-MEDICAL APPLICATIONS OF  
NORTH CAROLINA, INC. d/b/a  
FRESENTIUS MEDICAL CARE OF  
BRUNSWICK COUNTY,  
Respondent-Intervenor.

DECISION

Pursuant to N.C. Gen. Stat. § 131E-188(a) and N.C. Gen. Stat. § 150B-22 et seq., this contested case was heard on October 14-16 and 20, 2008 in Raleigh, North Carolina before Administrative Law Judge Joe L. Webster.

The parties to this contested case are Petitioner Total Renal Care of North Carolina, LLC d/b/a TRC-Leland ("TRC"); Respondent North Carolina Department of Health and Human Resources, Division of Health Service Regulation, Certificate of Need Section (the "Agency" or the "CON Section"); and Respondent-Intervenor Bio-Medical Applications of North Carolina, Inc. d/b/a Fresenius Medical Care of Brunswick County ("BMA"). TRC has challenged the Agency's decision to approve BMA's application for a certificate of need ("CON") to develop and operate a new ten (10) station dialysis facility in Brunswick County (the "BMA application" or "BMA's application"), as well as the Agency's decision to deny TRC's application for a certificate of need to develop and operate a new ten (10) station dialysis facility in Brunswick County (the "TRC application" or "TRC's application"). BMA has intervened as the prevailing applicant.

**APPEARANCES**

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Raleigh, North Carolina

For Petitioner TRC

Scott T. Stroud  
Assistant Attorney General  
North Carolina Department of Justice  
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For Respondent CON Section

Lee M. Whitman  
Sarah M. Johnson  
Wyrick Robbins Yates & Ponton LLP  
Raleigh, North Carolina

For Respondent-Intervenor BMA

**APPLICABLE LAW**

The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 et seq.

The substantive statutory law applicable to this contested case hearing is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175 et seq.

The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Regulations, 10A N.C. Admin. Code 14C.0100-.0209, .0400-.0403 and .2001-.2005, and the Office of Administrative Hearings Regulations, 26 N.C. Admin. Code 3.0100-.0131.

**BURDEN OF PROOF**

As Petitioners, TRC has the burden of proof by the preponderance of the evidence. See N.C. Gen. Stat. § 150B-23(a); N.C. Gen. Stat. § 150B-29(a); Town of Wallace v. N.C. Dep't of Env't & Natural Res., 160 N.C. App. 49, 56, 584 S.E.2d 809, 814-15 (2003).

**ISSUES**

The parties set forth the following issues for resolution in this contested case in the Pre-Hearing Order:

**Petitioner TRC'S List of Issues**

TRC contends that the issues for resolution in this contested case are as follows:

1. Whether the CON Section deprived TRC of property or otherwise substantially prejudiced TRC's rights when the CON Section conditionally approved the BMA Application and denied the TRC Application.

2. Whether the CON Section 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 determining that the BMA Application conformed, or could be found conforming with conditions, with the review criteria codified at N.C. Gen. Stat. § § 131E-183(a)(3), (4), (5), (6) and (18a), and 10A NCAC 14C.2203(a) and (c).

3. Whether the CON Section 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 determining that the TRC Application did not conform, or should not be found conforming with conditions, with the review criteria codified at N.C. Gen. Stat. § § 131E-183(3), (a), (4), (5), (6) and (18a), and 10A NCAC 14C.2203(a) and (c).

**Respondent CON Section's List of Issues**

1. The issue to be resolved is whether Respondent substantially prejudiced Petitioner'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 when Respondent conditionally approved the CON application filed by BMA, Project I.D. No. O-7965-07 and denied the CON application of TRC, Project I.D. No. O-7973-07.

**Respondent-Intervenor BMA's List of Issues**

1. Whether the CON Section properly found BMA's application to develop a new ten (10) station dialysis facility in Supply, Brunswick County conditionally conforming to all statutory and regulatory criteria.

2. Whether the CON Section properly found TRC's application to develop a new ten (10) station dialysis facility in Leland, Brunswick County nonconforming to all statutory and regulatory criteria.

**RECORD OF THE CASE**

At the hearing, the following testimony was received:

<b><u>Volume Number</u></b>	<b><u>Witness</u></b>	<b><u>Affiliation</u></b>	<b><u>Pages</u></b>
Volume I – October 14	Bartle Canny	TRC	58-96
	Eileen Peacock	TRC	97-143
	Tanya Rupp	CON Section	145-227
	William Lawrence Hyland	TRC	228-259
Volume II – October 15	William Lawrence Hyland	TRC	265-400



	James William Swann, Jr.	BMA	400-483
Volume III – October 16	Tanya S. Rupp	CON Section	490-606
	Craig Richard Smith	CON Section	601-660

In addition, the following exhibits were admitted into evidence:

**Joint Exhibits**

1. CON Application of Bio-Medical Applications of North Carolina d/b/a FMC Brunswick County, Project ID No. O-7965-07
2. CON Application of Total Renal Care of North Carolina, LLC, d/b/a Leland Dialysis Center, Project ID No. O-7973-07
3. Agency File for the competitive review of Project ID Nos. O-7965-07 and O-7973-07

**TRC Exhibits**

1. Patient List for Support of TRC-Leland Application – **Subject to HIPAA Protective Order**
2. N.C. Department of Transportation State Highway Map
6. Excerpts of CDC MMWR: Recommendations for Preventing Transmission of Infections Among Chronic Hemodialysis Patients (Deposition Exhibit 17) (offer of proof)
8. CDC MMWR: Outbreaks of Hepatitis B Virus Infection Among Hemodialysis Patients (Deposition Exhibit 19) (offer of proof)
11. Agency Findings for BMA and TRC Anson County Dialysis Review (Deposition Exhibit 24)
12. Handwritten Calculations Pages of Bill Hyland (Deposition Exhibit 28)
16. SEKC-Based Chart of Zip Code Data (Illustrative Exhibit)
20. Letter from Swann to Rupp re: Acceptance of Conditions for BMA Supply – 03/12/018 (Deposition Exhibit 43)
28. Public Hearing Transcript: TRC-Leland, BMA-Brunswick, TRC-Shallotte Review
33. Transcript of Deposition of Douglas Hamerski, MD

**BMA Exhibits**

1. Qualifications of Expert Witness Jim Swann
2. Excerpts from the Deposition of Dr. Douglas Hamerski: pp. 8-9, 16, 46-47
3. Excerpts from the Deposition of Dr. Derrick Robinson: pp. 12-13, 70
4. Final Agency Decision issued in Total Renal Care of North Carolina, LLC v. N.C. Department of Health and Human Services, 03 DHR 0499 (Greene County)
6. Certificate of Need Application for Total Renal Care of North Carolina, LLC d/b/a Southport Dialysis Center (Deposition Exhibit 25)
8. Davie County CON Application

**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 the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, 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. Wherefore, the undersigned makes the following Findings of Fact, Conclusions of Law and Recommended Decision, which is tendered to the North Carolina Department of Human Resources for a final decision.

**FINDINGS OF FACT**

**Parties, Procedural Points and Other Undisputed Information**

1. All the parties are properly before the Office of Administrative Hearings ("OAH"), and OAH has jurisdiction of the parties and of the subject matter.
2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.
3. Petitioner TRC is a Delaware limited liability company and is authorized to do business in the state of North Carolina. (Joint Ex. 2 at 71.) TRC is in the business of providing dialysis services. (*Id.* at 9.)
4. Respondent CON Section is the agency within the Department of Health and Human Services that carries out the Department's responsibility to review and monitor new institutional health services under the Certificate of Need Law, codified at N.C. Gen. Stat. §

131E-175 et seq.

5. Respondent-Intervenor BMA is a Delaware corporation and is authorized to do business in the state of North Carolina (Joint Ex. 1 at 72.) BMA is in the business of providing dialysis services. (Id. at 6.)

*Certificate of Need Regulation of Dialysis Facilities*

6. Under North Carolina's certificate of need law, a kidney disease treatment center, also known as a dialysis clinic, is a "health service facility." N.C. Gen. Stat. § 131E-176(9b).

7. The construction, development, or other establishment of a new health service facility is a "new institutional health service." N.C. Gen. Stat. § 131E-176(16)(a).

8. A new institutional health service may not be offered or developed without first obtaining a certificate of need. N.C. Gen. Stat. § 131E-178(a).

9. Therefore, a dialysis clinic cannot be offered or developed without first obtaining a certificate of need.

10. When an applicant applies for a certificate of need, the CON Section must review each application using the criteria outlined in N.C. Gen. Stat. § 131E-183. N.C. Gen. Stat. § 131E-183.

11. A certificate of need cannot be issued to an applicant unless the application is conforming to all statutory and regulatory criteria. 10A N.C. Admin. Code 14C.0207.

12. In a competitive review, the CON Section must first evaluate each application on its own merits and then perform a comparative review to determine which applicant is the superior applicant and should receive the certificate of need. Britthaven, Inc. v. N.C. Dep't of Human Res., 118 N.C. App. 379, 385, 455 S.E.2d 455, 464 (1995).

*Standard of Review*

13. When challenging the CON Section's decision to issue a certificate of need, a petitioner must establish, by a preponderance of the evidence, that the CON Section:

- (1) Exceeded its authority or jurisdiction;
- (2) Deprived the petitioner of property; or
- (3) Substantially prejudiced the petitioner's rights.

The petitioner must also establish by a preponderance of the evidence that the CON Section

- (1) Acted erroneously;
- (2) Failed to use proper procedure;
- (3) Acted arbitrarily or capriciously; or

Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-23(a).

14. A petitioner is not entitled to a *de novo* review in the Office of Administrative Hearings. Britthaven, 118 N.C. App. at 381-83, 455 S.E.2d at 458-59. Rather, the CON Section's decision is reviewed for error based on a hearing limited to the evidence presented or available to the CON Section during the review period. Id. at 382-83, 455 S.E.2d at 459.

15. It is improper for a Court to substitute its judgment for the CON Section's decision when substantial evidence in the record supports the CON Section's findings. Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs., 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006).

16. The CON Section's interpretation of the certificate of need statutes is customarily afforded deference. Christenbury Surgery Ctr. v. N.C. Dep't of Health and Human Servs., 138 N.C. App. 309, 312, 531 S.E.2d 219, 221 (2000). Deference to agency interpretation is a "long-standing tradition." County of Durham v. N.C. Dep't of Env't & Natural Res., 131 N.C. App. 395, 397, 507 S.E.2d 310, 311 (1998).

17. A Court should also "take into account the specialized expertise of the staff of an administrative agency." High Rock Lake Ass'n Inc. v. N.C. Env't Mgmt. Comm'n, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981).

18. The CON Section's interpretations and findings must be upheld if they are "reasonable." Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs., \_\_\_ N.C. App. \_\_\_, \_\_\_, 659 S.E.2d 456, 471-472, *aff'd*, 362 N.C. 504, 666 S.E.2d 749 (2008). Further, deference must be given to the CON Section when it has made a choice between two reasonable alternatives. Craven, 176 N.C. App. at 397, 625 S.E.2d at 845.

#### Background of this Contested Case

19. The North Carolina Department of Health and Human Services (the "Department") publishes a Semiannual Dialysis Report ("SDR"). The SDR is an official document that projects the need for additional dialysis stations as prescribed by North Carolina CON law.

20. The July 2007 SDR identified a need for thirteen (13) new dialysis stations in Brunswick County, North Carolina.

21. In response to the need identified in the July 2007 SDR, TRC submitted two (2) applications: (a) an application to add three (3) dialysis stations to its existing Shallotte, Brunswick County dialysis clinic; and (b) the TRC application, which proposed to develop a new ten (10) station dialysis clinic in Leland, Brunswick County. (Joint Ex. 3 at 633-635.)

22. Also in response to the need identified in the July 2007 SDR, BMA submitted a

single application, the BMA application, which proposed to develop a new ten (10) station dialysis clinic in Supply, Brunswick County. (Id. at 633-34.)

23. Because the TRC application and the BMA application were submitted in the same review period and could not both be approved pursuant to the July 2007 SDR-identified need for dialysis stations in Brunswick County, the review of the two applications was competitive. (Tr. at 152:10-13; 10A N.C. Admin. Code 14C.0202(f).)

24. The CON Section assigned CON project analyst Tanya Rupp ("Ms. Rupp") the task of reviewing the TRC application, the BMA application, and the application for three (3) additional stations in Shallotte. (Tr. at 153:6-9; Joint Ex. 3 at 633.)

25. At the time of the hearing, Ms. Rupp had worked for the CON Section for approximately three (3) years. (Tr. at 490:21-23.) In her three (3) year tenure at the CON Section, Ms. Rupp has performed approximately 100 to 150 reviews of CON applications. (Id. at 491: 13-16.) As a CON project analyst, Ms. Rupp is responsible reviewing the CON applications from an eight (8) county service area, writing the Required State Agency Findings (the "Agency Findings") for those applications, and monitoring her service area. (Id. at 491:1-8.)

26. Ms. Rupp's educational background includes a B.A. degree in political science and a J.D. degree. (Id. at 491:9-12.)

27. Assistant Chief of the CON Section, Craig Smith ("Mr. Smith"), is charged with supervising the CON Section's project analysts. (Id. at 602:2-13.) He supervised and assisted Ms. Rupp in her review of the applications at issue in this case. (Id. at 496:5-7, 614:7-10.) Mr. Smith has a B.A. degree in political science and a master's degree in urban and regional planning. (Id. at 602:20-22.)

28. The CON Section issued its decision in this case on February 27, 2008 and issued the Agency Findings on March 5, 2008. (Joint Ex. 3 at 633.)

29. The CON Section determined that TRC's application was nonconforming to Criteria 3, 4, 6, 12, 14, 18a and 10A N.C. Admin. Code 14C.2202(b)(2). (Joint Ex. 3 at 633-680.)

30. The CON Section also determined that BMA's application was conforming or conditionally conforming to all statutory and regulatory review criteria. (Id.)

31. After performing a comparative review of the applications, the CON Section determined that BMA's application was superior and thus conditionally approved BMA's application for a CON to develop a new ten (10) station dialysis center in Brunswick County. (Id. at 672-80.)

32. The CON Section also found TRC's application to add three (3) dialysis stations to its Shallotte facility was conforming or conditionally conforming to all statutory and regulatory review criteria, and thus conditionally approved the application. (Id. at 672.)

33. TRC filed a Petition for Contested Case Hearing challenging the CON Section's conditional approval of BMA's application and disapproval of TRC's application on March 28, 2008.

34. BMA filed a Motion to Intervene on April 17, 2008. BMA's Motion was granted on May 1, 2008.

*The Isolation Room Issue Has No Impact on the Outcome of this Case*

35. Both the TRC application and the BMA application proposed to include isolation station capabilities in their proposed new facilities. (See, e.g., Joint Ex. 1 at 58; Joint Ex. 2 at 65.) Both the TRC Application and the BMA Application made identical proposals regarding isolation station capabilities.

36. The CON Section treated TRC and BMA exactly the same with regard to their proposals for isolation stations. (Tr. at 510:24-511:2.)

37. The CON Section determined that neither TRC nor BMA identified a need under statutory review Criterion 3 for isolation capabilities, since they did not identify any infectious dialysis patients or project an increase in infectious patients. (Joint Ex. 3 at 639, 646.)

38. At the time the CON Section published its decision in this case, March 5, 2008, neither state nor federal regulations required any dialysis facility to have isolation capabilities. (Tr. at 134:23-135:5; cite to regulation.)

39. On April 15, 2008, after the CON Section issued the Agency Findings, it was announced that as of February 9, 2009, new dialysis facilities would be required by the Centers for Medicare and Medicaid Services ("CMS"), as a condition of participation, to include isolation capabilities. (Tr. at 136:1-25; Medicare and Medicaid Programs, 73 Fed. Reg. 20476 (Apr. 15, 2008).) CMS also provided a means by which a provider could seek a waiver from this requirement. (73 Fed. Reg. 20460-61.)

40. At the time the CON Section issued its decision in this case, there was no way for the CON Section to know that the CMS regulations would be revised such that isolation capabilities were to be required in new dialysis facilities as of February 9, 2009.

41. Subsequent to the April 15, 2008 CMS announcement, the CON Section adopted a policy that an applicant was not required to identify a specific need for isolation capabilities before an isolation station would be approved. (Tr. at 617:21-618:4.)

42. While the inclusion of an isolation room in a dialysis facility may be best practice, the law at the time the applications were submitted and at the time the CON Section issued its decision did not mandate the inclusion of an isolation room in a new dialysis facility. The undersigned does find as a fact that the inclusion of an isolation room in both applications showed forward thinking and sensitivity to the health of its patients. Therefore, the CON Section

should not have found the inclusion problematic at all and should have been welcomed.

43. Nevertheless, the isolation room issue has no material impact or bearing on the outcome of this case.

**While The CON Section Properly Convened A Public Hearing, The CON Section Did Not Properly Consider Due Process Considerations.**

44. Under N.C. Gen. Stat. § 131E-185(a1)(2), the CON Section is required to ensure that a public hearing is conducted with the appropriate service area if the review to be conducted is competitive.

45. Because the review in this case was competitive, the CON Section held a public hearing in Brunswick County on November 19, 2007. (Joint Ex. 3 at 451.)

**The CON Section Decision Makers Erred by Failing to Attend, Listen to the Recorded Testimony or Read the transcript of the Public Hearing.**

46. In conducting the public hearing, the CON Section must comply with the following requirements:

- (1) Within fifteen (15) days from the beginning of the review of the applications, give notice of the time and place of the public hearing;
- (2) Conduct the hearing in the service area at issue;
- (3) Allow a Department representative to conduct the hearing;
- (4) Allow the proponent of an application to respond to any written comments about the application;
- (5) Allow any person to comment on the applications under review; and
- (6) Maintain a recording of the public hearing and all written submissions received at the public hearing.

N.C. Gen. Stat. § 131E-185.

47. The CON Section gave notice of the time and place of the public hearing in this case. (Joint Ex. 3 at 5, 451.)

48. The CON Section conducted the public hearing in Brunswick County, the service area at issue. (*Id.* at 451.)

49. A Department representative, CON Section senior project analyst Ron Loftin, conducted the public hearing. (Tr. at 493:6-7.)

50. The CON Section allowed the proponents of each application to respond to any written comments about their respective applications. (See TRC Ex. 28.)

51. The CON Section allowed any person who wished to comment on the

applications under review to make such comments. (*Id.*; see also Tr. at 493:19-494:2; Joint Ex. 3 at 453-54.)

52. The CON Section maintained a recording of the public hearing and all written submissions received at the public hearing. (Tr. at 494:24-495:1.) While the Program Analyst, Ms. Rupp may have spoken with Mr. Loftin about the public hearing, reviewed the public hearing sign-in sheet, and read all 386 pages of public comments that were submitted (Tr. at 147:21-24, 149:17-25; 493:8-494:23; Joint Ex. 3 at 64-450), Ms. Rupp did not review nor take into consideration any oral comments delivered at the public hearing prior to making her decision on these applications. (Vol. Iii, Rupp, pp. 527-28)

53. While there is no statutory or regulatory requirement that project analyst attend the public hearing, listen to the recording of the public hearing or read the transcript of the hearing, the undersigned finds as a fact that in order for the CON Section to make a fair and accurate decision concerning the competing applications, at least one of the decision makers must either attend the public hearing, listen to the tape or read the transcript of the public hearing. Not fully considering the evidence at the public hearing defeats the underlying purpose of the public hearing. Testimony by the Project Analyst that her decision would not have changed if she had listened to the tape or been present at the hearing does not completely erase the taint brought about by her failure to at least read the transcript of the public hearing prior to making her decision on the applications. The undersigned finds as a matter of fact and law that this was error and was not harmless error.

**Any Error that Resulted from the CON Section's Failure to Attend the Public Hearing, Listen to the Recording of the Public Hearing, or Read the Transcript of the Public Hearing Prior to CON Section's Decision is Not Harmless Error.**

54. When the CON Section acts contrary to CON law, the error is harmless if there is evidence to support the CON Section's determination and that the same result would have been reached if the CON Section had acted in accordance with CON law. *Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461.

55. Ms. Rupp gave her opinion that BMA had the comparatively superior application did not change after she read the transcript of the public hearing. (Tr. at 495:12-18.)

56. Mr. Smith testified that despite the fact that Ms. Rupp did not listen to the recording of the public hearing or attend the public hearing and after hearing all the evidence introduced in this contested case, he still believes that BMA had the comparatively superior application. (Tr. at 611:24-612:3.)

57. I find as a fact and as a matter of law that the CON Section's (those responsible for making the decision) failure to listen to the tape of the hearing or at a minimum, read the transcript of the hearing constitutes reversible error, requiring the applications to be reviewed again by members of the CON Section who were not part of the first review process. The error committed by the CON Section in this regard is not harmless as it substantially taints the fairness of the process.



58. The undersigned finds that notwithstanding the testimony of Ms. Rupp and Mr. Smith, their failure to listen to the tape of the public hearing or read the transcript of the hearing may have caused them to reach a different result concerning whether BMA met the requirements of Criterion 3 on the population to be served, including the patient origins. Ms. Rupp's and Mr. Smith's after the fact testimony is self serving and is not credible in light of the other evidence in the record.

*The CON Section Improperly Found That BMA's Application Conditionally Conformed to Criterion 3*

59. Criterion 3 is the only statutory review criteria at issue with regard to BMA's application in this case.

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

61. Therefore, Criterion 3 requires an applicant to set forth its need methodology for determining patient origin.

62. There is no specific methodology that must be used in determining patient origin under CON law. Retirement Villages, Inc. v. N.C. Dep't of Human Resources, 124 N.C. App. 495, 500, 477 S.E.2d 697, 700 (1996). Rather, what is required is that all assumptions, including the methodology, must be stated. 10A N.C. Admin. Code 14C.2202(b)(6), .2203(c).

63. The CON Section reviews need methodology for "analytical, procedural, and mathematical correctness" in order to determine whether an application is conforming to the statutory and regulatory criteria. Britthaven, 118 N.C. App. at 388, 455 S.E.2d at 462.

64. The CON Section's determinations of whether an application conforms to statutory or regulatory criteria will be upheld if they are "reasonable." Good Hope, \_\_\_ N.C. App. at \_\_\_, 659 S.E.2d at 471-472. Further, when the CON Section makes a determination that is consistent with earlier rulings regarding similar issues, the CON Section has acted "reasonably." Good Hope, \_\_\_ N.C. App. at \_\_\_, 659 S.E.2d at 471.

65. Projections attempt to predict something that will occur in the future; therefore, the very nature of a projection cannot be established with absolute certainty. Craven, 176 N.C. App. at 52-53, 625 S.E.2d 837, 841. Projections of a patient census made in a CON application thus conform to Criterion 3 as long as the projections are "reasonable."

66. However, the CON Section's determination that BMA's application conformed to Criterion 3 by identifying the population to be served by its proposed project and demonstrating the need that the population had for the proposed services, with the condition that BMA not develop an isolation station, was not reasonable.

**BMA's Assumption that All Brunswick County Residents Will Want to Dialyze in Brunswick County and that Resident-Patients who are not Currently Dialyzing in Brunswick County Will Want to Transfer to BMA's Proposed Facility in Brunswick County Is Unreasonable**

67. The foundational assumption in BMA's need methodology under Criterion 3 is that dialysis patients residing in Brunswick County will want to dialyze at a facility within Brunswick County. BMA set forth three factors as support for its position for the reasonableness of this assumption. (Joint Ex. 1 at page 20).

68. First, the July 2007 SDR identified a need for thirteen (13) additional dialysis stations for the residents of Brunswick County, and not the surrounding counties: (See July 2007 SDR; TRC Ex. 16; Joint Ex. 3 at 634.)

69. Second, the traffic to and through Wilmington is very congested, such that a New Hanover dialysis facility is unattractive to dialysis patients since they need treatments at least three (3) times per week. (Tr. at 79:5-10; TRC Ex. 28 at 15-16, 18; Joint Ex. 3 at 357.)

70. Third, the available public transportation within Brunswick County only transports patients within the county and will not take patients across county lines. (Tr. at 62:16-18.) The undersigned takes notice that the record is devoid of testimony or other evidence as to what percentage of those patients residing in Brunswick County and receiving dialysis in another County would use public transportation in order to receive treatment in Brunswick County.

71. BMA also presented evidence that TRC's own affiliated physicians testified that they would refer patients to BMA's Supply facility in Brunswick County. (BMA Exhibits 2 and 3). The record is devoid of evidence as to how many patients these two physicians estimate or project they may be able to refer to the Supply facility.

72. BMA projected that its new facility would serve any patients residing in Brunswick County who were not already receiving or projected to receive dialysis services from another facility located in Brunswick County at some point in the future. (Joint Exhibit 1 at 20-25.) There is evidence in the record that BMA did not propose to serve a specified set of individual patients that have already indicated their intent, on the record, to transfer to another facility in a specific location. This may include residents who previously chose to dialyze in another county or even another state. While BMA did not specifically project that the 13 patients who were dialyzing at TRC's Wilmington facility in New Hanover County would actually transfer to BMA's new facility in Supply, it was not reasonable to project that any patients residing in Brunswick County who were not already receiving or projected to receive dialysis services from another facility located in Brunswick County would transfer to the new BMA facility in Supply. (Tr. at 456:18-457:13.)

73. Notwithstanding BMA's evidence that it did not propose to serve a specified set of individuals, there is also evidence in the record that thirteen of the pool of patients BMA relied upon to meet the need requirement under Criterion 3, lived in Leland in close proximity to the TRC dialysis center in Wilmington. The evidence showed that the distance from Leland to a dialysis facility in Wilmington would be a 14-minute (9 mile) commute while the commute and time from Leland to Supply would be 33-minute (24 mile) to a facility in Supply. (Vol. III, Rupp, pp. 535-40). The undersigned finds as a fact that there was not sufficient evidence to support BMA's foundational assumption as to need methodology under Criterion 3 that dialysis patients residing in Brunswick County would want to dialyze at a facility within Brunswick County. The evidence presented shows that if the new dialysis facility was located in Leland, travel time for Leland residents would be considerably less than if they had to travel to Wilmington because of the heavy congestion or if Leland residents had to travel to Supply. Moreover, the evidence shows that public transportation for Brunswick County residents would also be available for travel within Brunswick County. I find that public transportation would be available for in county residents whether the new dialysis facility is located in Supply or Leland since both towns are located in Brunswick County. There is also evidence that not all of the BMA patients in its North Myrtle Beach facility signed letters or otherwise indicated their intent to transfer their dialysis treatment to the proposed Supply facility. I also find that the Leland area residents constitute a sizable portion of the available pool of those in county residents in need of dialysis treatment. Therefore, the CON Section's acceptance of BMA's assumption that dialysis patients residing in Brunswick County and receiving treatment outside Brunswick County will want to dialyze at a facility within Brunswick County was not reasonable. Based upon the evidence before the Court, BMA did not conform to Criterion 3 and the Performance Standard Rule.

74. The undersigned also finds that patients residing in a particular service area may choose to change providers upon the opening of a new facility in their service area has been previously recognized as valid and reasonable by the Agency in a Final Agency Decision issued in 2004 in the TRC St. Pauls contested CON case. This fact was specifically referenced on Page 24 of BMA's application to further support the reasonableness of its patient projections under Criterion 3. (Joint Ex. 1 at 24, citing to Finding of Fact #72 in Final Agency Decision for TRC St. Pauls.) Further, the undersigned finds that TRC has previously acknowledged the possibility that patients will transfer to a new provider entering an area where only other providers offer dialysis services. In an application filed by TRC on September 15, 2008, in which TRC proposed to develop a new ten (10) station dialysis facility in Davie County, TRC projected that out of thirty-nine (39) Davie County patient-residents currently dialyzing out of county at one of four different facilities operated by providers other than TRC, thirty-five (35), or approximately ninety percent (90%) would transfer to TRC's new facility. (BMA Ex. 8, Tr. at 364:11-365:10.)

75. The undersigned also finds that the proposal set forth by BMA and discussed in the Anson County Dialysis Review findings from March 2007 (the "Anson County findings") are substantively and materially different than BMA's proposal in this case. In the Anson County findings, fourteen (14) patients living in Anson County were currently dialyzing at a TRC facility in Monroe, Union County. (TRC Ex. 11 at 6; Tr. at 643:13-644:13.) In an application filed approximately one (1) year prior to the date of the Anson County findings, TRC

specifically identified these fourteen (14) patients as having expressed a desire to transfer to a proposed facility in Marshville, Union County. (TRC Ex. 11 at 6; Tr. at 644:18-24.) When BMA filed an application to develop a new facility in Anson County, TRC claimed that BMA's need methodology improperly attempted to usurp those fourteen (14) patients that had already expressed an intention to transfer to the proposed Marshville, Union County facility. (TRC Ex. 11 at 5-6; Tr. at 572:6-13; 645:3-15.) The undersigned finds the facts of the CON cases set forth in paragraphs 73 and 74 herein to be distinguishable from this case, and while considered by the undersigned, are not determinative of the ultimate decision reached in this case.

76. Projections, by their very nature, cannot be established with absolute certainty. See Craven, 176 N.C. App. at 53, 625 S.E.2d at 837. While projections need only be "reasonable" to conform to Criterion 3 it was unreasonable for BMA to project to serve thirteen (13) Brunswick County patient-residents who are not currently receiving dialysis services in Brunswick County because these thirteen (13) patients could then dialyze in their home county.

77. TRC's application was accompanied by a significant number of letters of support. Patient letters of support are not as relevant in a county need review because the patients typically know only one of the providers. (Tr. at 646:9-15.) It would thus not be appropriate for the CON Section to have given great weight to these letters in determining whether BMA's need methodology was reasonable. (Tr. at 648:25-649:9.) If patient support was the only deciding factor, there would be no need for publication of county need in an SDR or review of CON applications. (Tr. at 646:9-15.)

78. While the CON Section has previously determined that it is reasonable to assume that some patients will transfer from their existing providers to new providers once they are offered that choice, (Joint Ex. 1 at 24; Tr. at 331:18-332:4.), no OAH or Appellate Court decisions were put forward by either party that stand for the proposition that it is reasonable to assume that all patients will transfer from their existing providers to new providers once they are offered choice.

79. Consistency among the CON Section's decisions supports a finding that those decisions are reasonable. Good Hope, \_\_\_ N.C. App. at \_\_\_, 659 S.E.2d at 471. It was unreasonable for the CON Section to find BMA's application conditionally conforming to Criterion 3 when the BMA application assumed that Brunswick County dialysis patients would choose to dialyze in Brunswick County.

**BMA's use of the Five Year Annual Change Rate was Reasonable**

80. BMA projected the dialysis patient population of Brunswick County by using the Five Year Annual Change Rate published within the July 2007 SDR. The Five Year Annual Change Rate represents the average annual growth rate over a five (5) year period so as to capture the dynamics of the population and account for all upswings and downturns in the population. (Tr. at 455:14-21.)

81. Even though there was a decrease in the Brunswick County patient population during the six (6) month period between December 2006 and July 2007, it was reasonable to use

the Five Year Annual Change Rate because it was based on a greater sample of patients over a longer period of time.

82. The North Carolina Court of Appeals has recognized, in an unpublished opinion, that it is reasonable to rely on the data that formed the basis of the SDR that originally identified the relevant need. Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health and Human Servs., 177 N.C. App. 286, 628 S.E.2d 258, 2006 WL 997667 at \*3-4 (2006) (unpublished opinion).

83. The Court further recognized that a six-month fluctuation in patient population is not reliable enough to indicate an actual overall change in patient population. Id. at \*4. Instead, "years' worth of data" is required to get a fair and accurate reading of patient population growth. Id.

84. Therefore, even though some data indicated a decrease in the Brunswick County patient population between December 2006 and July 2007, it was reasonable for the CON Section to find the BMA application conditionally conforming to Criterion 3 when the BMA Application relied on the Five Year Annual Change Rate as published by the July 2007 SDR.

**It was Unreasonable for the CON Section to Condition BMA's Conformity with Criterion 3 by Preventing BMA from Building an Isolation Station**

85. As stated previously, the isolation room issue has no material impact or bearing on the outcome of this case. The CON Section found BMA's application conforming to Criterion 3 with the condition that BMA not develop any isolation stations as a result of this project. (Joint Ex. 3 at 639, 679.) The BMA application proposed the development of one isolation station. (See, e.g., Joint Ex. 1 at 58.) The CON Section found that BMA did not demonstrate a need for an isolation station in its proposed facility. (Id. at 639.) At the time the CON Section issued its decision in this case, neither state nor federal regulations required any dialysis facility to have isolation capabilities. At the time the CON Section issued its decision in this case, while there was no way for the CON Section to know that the CMS regulations would be revised such that isolation capabilities were to be required in new dialysis facilities as of February 9, 2009, the inclusion of an isolation station in the applications of BMA and TRC demonstrated forward thinking and sensitivity to the safety of its patients as previously stated herein. It should not have been made a condition of the BMA approval or the finding of the TRC disapproval. Also, there was nothing in the regulations which would prohibit Isolation Stations in new facilities. Therefore, it was unreasonable for the CON Section to condition BMA's conformity with Criterion 3 on the grounds that BMA not develop an isolation station.

**The CON Section Improperly Determined that BMA's Application Conformed to the Performance Standard Rule.**

86. The Performance Standard Rule, 10A N.C. Admin. Code 14C.2203, is the only regulatory review criteria at issue with regard to BMA's application in this case. The Performance Standard Rule requires that an applicant proposing to establish a new dialysis treatment facility document the need for at least ten (10) stations based on utilization of 3.2

patients per station, per week as of the end of the first operating year of the facility. 10A N.C. Admin. Code 14C.2203(a). An applicant must also provide all assumptions, including the methodology, by which patient utilization is projected. *Id.* at (b).

87. The BMA application clearly set forth all of its assumptions. (Joint Ex. 1 at 20-21.)

88. The undersigned having found the CON Section erred in finding that the BMA application conformed to Criterion 3, I also find that Performance Standard Rule was not met. To calculate utilization under the Performance Standard Rule, the total number of patients is divided by the total number of stations. (See Joint Ex. 3 at 638.) The BMA application projected that it would serve 32.6 in-center patients by the end of the first operating year. (Joint Ex. 1 at 23.) The BMA application proposed to develop ten (10) dialysis stations. The division of 32.6 in-center patients by ten (10) dialysis stations equals a utilization rate of 3.26. While BMA's mathematical computation is correct with respect to the utilization rate of 3.26, the BMA application did not conform to the Performance Standard Rule because its methodology of showing need pursuant to Criterion 3 was nonconforming as hereinbefore set forth.

**Having Found the CON Section Erred with Respect to its Decision Concerning BMA, the Undersigned finds that the CON Section Correctly Determined that the TRC Application was Not Approvable**

89. An applicant may not obtain a CON unless the CON Section determines that the application is conforming, or conditionally conforming, to all statutory and regulatory criteria. N.C. Gen. Stat. § 131E-187; *Dialysis Care of North Carolina, LLC v. N.C. Department of Health and Human Servs.*, 137 N.C. App. 638, 649, 529 S.E.2d 257, 263 (2000).

90. Because the TRC application did not conform to all statutory and regulatory criteria, the CON Section properly disapproved the TRC application.

**The TRC Application did not Conform to Criterion 14**

91. Criterion 14 requires that an applicant demonstrate that its proposal accommodates the clinical needs of health professional training programs in the area. N.C. Gen. Stat. § 131E-183(a)(14).

92. Although the TRC application included a letter of support from Brunswick Community College, the TRC application did not demonstrate that its proposed Leland facility would be available as a health care training site. (Joint Ex. 2 at 219; Joint Ex. 3 at 678.) The fact that TRC's existing Shallotte dialysis facility is available as a clinical rotation site for Brunswick Community College is not sufficient evidence to establish that TRC would also make its brand new, modern facility in Leland available to students.

93. The burden of establishing that an application meets all CON criteria is placed on the applicant. *Good Hope*, \_\_\_ N.C. App. at \_\_\_, 659 S.E.2d at 466. It would be inappropriate to place this burden on the administrative agency and require that the CON Section go out and seek information to make the application conforming for the applicant.



94. The CON Section correctly determined that the TRC application was nonconforming to Criterion 14.

**The TRC Application did not Conform to 10A NC Admin. Code 14C.2202(b)(2)**

95. The regulatory criterion found at 10A N.C. Admin. Code 14C.2202(b)(2) mandates that an applicant provide a written agreement or a letter of intent to sign a written agreement with a kidney transplantation center describing the relationship and the specific services provided by the transplantation center. The TRC application did not include either a written agreement or a letter of intent to sign a written agreement with a kidney transplantation center. (Joint Ex. 3 at 666.) The fact that TRC's existing Shallotte dialysis facility has a written agreement with a kidney transplantation center is not sufficient evidence to establish that the same transplantation center would enter into an agreement with a new facility in Leland.

96. The CON Section correctly determined that the TRC application did not conform to 10A N.C. Admin. Code 14C.2202(b)(2).

**The TRC Application Contained Errors Which are Inconsequential in the Undersigned's Decision**

97. Regulatory review criterion 10A N.C. Admin. Code 14C.2202(b)(7) requires that an applicant for a new dialysis facility establish that at least eighty percent (80%) of the anticipated patient population resides within thirty (30) miles of the proposed facility. In the TRC application, TRC represented that no patients from its anticipated patient population would travel more than thirty (30) miles one way either to or from Leland for their treatments. (Joint Ex. 2 at 31.) However, TRC projected that four (4) of its patients live in Riegelwood and Chadbourn. (Joint Ex. 2 at 29.) It is a round trip of almost ninety (90) miles between Chadbourn and Leland. (Joint Ex. 3 at 305.) Therefore, TRC's statement that none of the patients from its anticipated patient population would travel more than thirty (30) miles one way for a treatment is false. (Tr. at 656:5-15.) However, the undersigned gives little weight to the errors as set forth in this paragraph and are inconsequential with respect to the undersigned's Recommended decision in this case.

98. The undersigned having found that neither TRC nor BMA's Applications met the criteria set forth in NCGS 131E-183 or other regulatory criteria, and after concluding that a new review by Agency employees not previously involved in this case is necessary, it is not necessary for the undersigned to determine which applicant had the superior Application. The undersigned finds as a matter of fact and law that the CON Section erred in not finding that the BMA and TRC applications did not comply with the Statutory and regulatory criteria. If the CON Section had properly found that neither applicant was conforming to all relevant statutory and regulatory criteria, the analysis as to which applicant was superior would not have been necessary and should have stopped once that conclusion was reached. Nevertheless, to the extent that it would be helpful to the Agency to receive findings of fact and conclusions of law on the superiority issue from the undersigned in order to make a final decision in this case, the undersigned makes the following findings of fact and conclusions of law as to superiority issue

relating to the applications of BMA and TRC.

**The CON Section Correctly Determined that the BMA Application was Comparatively Superior to the TRC Application**

99. In a competitive review, the Agency may conduct a comparison of the applications, but no particular points of comparison must be used. Craven, 176 N.C. App. at 58, 625 S.E.2d at 845. A comparison can provide the CON Section with the ability to make “additional findings and conclusions [that] give the [CON Section] the opportunity to explain why it finds one applicant preferable to another on a comparative basis.” Id. at 58, 625 S.E.2d at 845 (quoting Britthaven, 118 N.C. App. at 385, 455 S.E.2d at 459.) The comparative factors are considered equal in value and are not weighted.

100. In this review, the CON Section compared the BMA application and the TRC application on the following factors: SMFP Principles, facility location, service to Brunswick County patients; access to alternative providers; access by underserved groups, access to support services; operating costs; revenue; charges to insurers; and direct care staff salaries. (Joint Ex. 3 at 672-78.)

101. With regard to the CON Section’s selection of these particular factors, [t]he correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing.” 10A N.C. Admin. Code 14C.0402.

**The CON Section Correctly Determined that BMA and TRC were Equally Effective with Regard to SMFP Principles and Direct Care Staff Salaries**

102. The CON Section determined that the BMA application and the TRC application were equally effective alternatives with regard to SMFP principles and Direct Care Staff Salaries. (Joint Ex. 3 at 673, 678.) Neither party takes issue with this determination. Based on the evidence of record, the CON Section correctly determined that the BMA application and the TRC application were equally effective alternatives with regard to SMFP principles and direct care staff salaries.

**The CON Section Correctly Determined that TRC was the Comparatively Superior Applicant with Regard to Charges to Insurers**

103. The CON Section determined that the TRC application was comparatively superior to BMA’s application with regard to charges to insurers. (Joint Ex. 3 at 677-78.) Neither party takes issue with this determination. Based on the evidence of record, the CON Section correctly determined that the TRC application was comparatively superior with regard to charges to insurers

**The CON Section Correctly Determined that TRC was the Comparatively Superior Applicant with Regard to Service to Brunswick County Patients**

104. The CON Section determined that the TRC application was comparatively



superior to BMA's application with regard to service to Brunswick County patients. (Joint Ex. 3 at 675.) Neither party takes issue with this determination. Based on the evidence of record, the CON Section correctly determined that the TRC application was comparatively superior with regard to service to Brunswick County patients.

**The CON Section Correctly Determined that BMA was the Comparatively Superior Applicant with Regard to Operating Costs**

105. The CON Section determined that the BMA application was comparatively superior to TRC's application with regard to operating costs. (Joint Ex. 3 at 677.) Neither party takes issue with this determination. Based on the evidence of record, the CON Section correctly determined that the BMA application was comparatively superior with regard to operating costs.

**The CON Section Correctly Determined that BMA was the Comparatively Superior Applicant with Regard to Revenue**

106. Based on the evidence of record, the CON Section correctly determined that the BMA application was comparatively superior with regard to revenue.

**The CON Section Correctly Determined that BMA was the Comparatively Superior Applicant with Regard to Access to Alternative Providers**

107. The CON Section determined that the BMA application was comparatively superior to TRC's application with regard to access to alternative providers. (Joint Ex. 3 at 675.) Neither party takes issue with this determination. Based on the evidence of record, the CON Section correctly determined that the BMA application was comparatively superior with regard to access to alternative providers.

**The CON Section Correctly Determined that BMA was the Comparatively Superior Applicant with Regard to Access by Underserved Groups**

108. When determining whether and to what degree an applicant is superior with regard to access by underserved groups, the CON Section looks at the percentage of Medicare and Medicaid patients that the applicant proposes to serve. Tr. at 504:25-505:6. The CON Section determined that the BMA application was comparatively superior to TRC's application with regard to access to underserved groups. (Joint Ex. 3 at 676.) The CON Section based its determination on the fact that BMA projected serving a higher percentage of Medicare and Medicaid patients (95.17%) than TRC (90.0%). (Joint Ex. 3 at 675.) BMA based its projections in part on its historical experience in small rural counties, and in part on its experiences at its Loris, South Carolina facility. (Joint Ex. 1 at 34; Tr. at 433:2-15, 533:7-11.) The basis for BMA's projections was reasonable. Conversely, the TRC Application provided no explanation as to the source of its data or projections regarding payor mix (Joint Ex. 2 at 39-40.) Nor did TRC make any efforts to change, distinguish or adjust the payment projections in Section VI of the Applications for TRC-Shallotte, TRC-Southport and TRC-Leland. (Cf. Joint Ex. 2 at 39 with BMA Ex. 6.) Based on the evidence of record, the CON Section correctly determined that the BMA application was comparatively superior with regard to access by underserved groups.

**The CON Section Correctly Determined that BMA and TRC were Comparatively Equal with Regard to Facility Location**

109. The CON Section determined that the BMA application and the TRC application were comparatively equal with regard to facility location and improving geographic access to dialysis services in Brunswick County. (Joint Ex. 3 at 673-74.) TRC proposed to place its facility in Leland, Brunswick County, so that each of the three points of the triangular-shaped Brunswick County would have a dialysis facility. (Joint Ex. 3 at 674; Tr. at 310:15-19, 368:9-12.) Leland is near the intersection of U.S. 17 and U.S. 74/76. (Joint Ex. 3 at 674.)

110. BMA proposed to place its facility in Supply, Brunswick County, at the intersection of U.S. 17 and N.C. 211. (Joint Ex. 1 at 18, Joint Ex. 3 at 674.) Supply is essentially at the geographic center of Brunswick County. (Joint Ex. 1 at 18.) Brunswick County Commissioner David Sandifer has indicated that Supply is one of the fastest growing areas of Brunswick County. (*Id.*) BMA and TRC each proposed sites that were most effective for them. (Joint Ex. 3 at 675.)

111. Data from the Southeastern Kidney Council as of December 31, 2006, the same set of data upon which the July 2007 SDR was based, shows that seventeen (17) in-center dialysis patients reside within the zip code associated with Supply and Holden Beach. (Joint Ex. 3 at 674.) The same data shows that fifteen (15) in-center dialysis patients reside within the zip code associated with Belville, Leland and Navassa. TRC's proposed location in Leland would allow TRC to serve its patients in the northern point of the "triangle" that makes up Brunswick County, as well as patients residing in Columbus County. (*Id.* at 675.) BMA's proposed location in Supply would allow BMA to serve the local cluster of patients in Supply as well as patients from all over Brunswick County, due to its central location. (*Id.*) Based on the evidence of record, the CON Section correctly determined that BMA and TRC were comparatively equal with regard to facility location and improving geographic access to dialysis services in Brunswick County.

**The CON Section Correctly Determined that BMA and TRC were Comparatively Equal with Regard to Access to Support Services**

112. The TRC application proposed to receive diagnostic and evaluation, x-ray, blood bank, emergency care, vascular surgery and acute care support services from New Hanover Regional Medical Center. (Joint Ex. 2 at 34; Joint Ex. 3 at 676.) The TRC application also proposed to receive laboratory support services from Dialysis Laboratories. (Joint Ex. 2 at 34; Joint Ex. 3 at 676.) The BMA application proposed to receive diagnostic and evaluation, x-ray, blood bank and emergency care support services from Brunswick Community Hospital in Supply and Loris Community Hospital in Loris, South Carolina. (Joint Ex. 1 at 27; Joint Ex. 3 at 676.) The BMA application also explained that with regard to emergency care, all BMA staff members are trained to respond to an emergency, a fully stocked crash cart will be available at the proposed facility, and there will be ambulance service to both Brunswick Community Hospital and Loris Community Hospital. (Joint Ex. 1 at 27.) The BMA application proposed to receive vascular surgery and acute care support services from Loris Community Hospital. (*Id.*; Joint Ex. 3 at 676.) Finally, the BMA application proposed to receive laboratory services from

SPECTRA. (Joint Ex. 1 at 27; Joint Ex. 3 at 676.) Based on the evidence of record, the CON Section correctly determined that BMA and TRC were comparatively equal with regard to access to support services.

**The BMA Application was Comparatively Superior to the TRC Application on More Factors**

113. The CON Section correctly found the BMA application comparatively superior to the TRC application on four factors, whereas the CON Section found the TRC application comparatively superior to the BMA application on only two factors. (Joint Ex. 3 at 672-78.)

114. Furthermore, the TRC application was nonconforming to Criteria 3, 14, and 10A N.C. Admin. Code 14C.2202(b)(2), and also contained errors. (See Section H *supra*.)

115. Therefore, the CON Section correctly found the BMA application comparatively superior overall to the TRC application.

**The CON Section Properly Conditioned the BMA application instead of the TRC application**

116. BMA's application was found conditionally conforming to Criterion 3 and 10A N.C. Admin. Code 14C.2202(b)(2). (Joint Ex. 3 at 639, 666.) BMA was conditioned with regard to Criterion 3 because BMA had proposed an isolation station but had not established a need for an isolation station. (Joint Ex. 3 at 639.) BMA was conditioned with regard to 10A N.C. Admin. Code 14C.2202(b)(2) because the BMA application failed to include a letter of intent to sign or a signed transplant agreement with a kidney transplantation center describing the relationship and the specific services provided by the transplantation center. (Joint Ex. 3 at 666.) The TRC application was found nonconforming to Criterion 3 for the same reasons that BMA's application was found conditionally conforming to Criterion 3. (Joint Ex. 3 at 646.) The TRC application was found nonconforming to 10A N.C. Admin. Code 14C.2202(b)(2) for the same reasons that BMA's application was found conditionally conforming to 10A N.C. Admin. Code 14C.2202(b)(2). (Joint Ex. 3 at 666.) The CON Section properly conditioned BMA's application instead of TRC's application because the BMA application was comparatively superior to the TRC application. If TRC's application had been found comparatively superior to BMA's application, the CON Section would have conditionally approved TRC's application and disapproved BMA's application. (Tr. at 507:5-10.)

**CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact, the undersigned Administrative Law Judge enters 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.

2. BMA is an affected person and has an interest in this contested case, and is thereby entitled to intervene in this contested case hearing by authority of N.C. Gen. Stat. § 131E-188(c), N.C. Gen. Stat. § 150B-23(d) and N.C. Gen. Stat. § 1A-1, Rule 24(a).

3. TRC is an affected person entitled to this contested case hearing by authority of N.C. Gen. Stat. § 131E-188(a) and (c).

4. The failure of the CON Section decision makers to listen to the tape of the public hearing or read the transcript of the hearing constitutes reversible error. It is the undersigned's recommendation that the review process commence anew with reviewers not associated with the first review, and in the alternative, the undersigned finds as a matter of law the following:

5. The CON Section incorrectly determined that the BMA application conformed or conditionally conformed to all statutory and regulatory criteria.

6. The CON Section correctly determined that the TRC application was nonconforming with Criteria 3, 4, 6, 12, 14, 18a and 10 N.C. Admin. Code 14C.2202(b)(2).

7. The CON Section incorrectly determined that the BMA application was comparatively superior to the TRC application since it should have determined that neither application satisfied the criteria in NCGS 131 E-188 or other regulatory criteria.

8. The CON Section incorrectly approved the BMA application.

9. The CON Section correctly disapproved the TRC application.

10. BMA is not entitled to a certificate of need for a new ten (10) station dialysis facility in Supply, Brunswick County.

11. TRC is not entitled to a certificate of need for a new ten (10) station dialysis facility in Leland, Brunswick County.

### **DECISION**

It is hereby recommended that the Director of the Division of Facility Services, Department of Human Resources, grant BMA and TRC a new review of the applications utilizing reviewers not involved in the initial review, and in the alternative, reverse the CON Section's decision to grant BMA's application for a certificate of need and to affirm the CON Section's decision to deny TRC's applications for a certificate of need.

### **ORDER**

It is hereby ordered that the Agency serve a copy of the Final Decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, NC 27611-7447, in accordance with N.C. Gen. Stat. § 150B-36(b).

NOTICE

The Agency that will make the Final Decision in this contested case is the North Carolina Department of Human Resources.

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this Recommended Decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of its Final Decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

This the 23<sup>rd</sup> day of December, 2008.



Joe L. Webster  
Administrative Law Judge

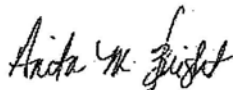
A copy of the foregoing was mailed to:

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ATTORNEY FOR RESPONDENT INTERVENOR

This the 23rd day of December, 2008.



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Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA

COUNTY OF DARE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
05 DST 0586

Robert A Gabriel Sr.,  
Petitioner,

vs.

North Carolina Department of State Treasurer,  
Respondent.

DECISION

This matter previously was heard by the undersigned administrative law judge on Respondent's Motion for Judgment on the Pleadings. Judgment on the Pleadings in favor of Respondent was entered on October 21, 2005. The Judgment on the Pleadings decision was considered, reversed, and remanded by the Board of Trustees of the Teachers' and State Employees' Retirement System at a regularly scheduled quarterly meeting on January 26, 2006. The Board of Trustees of the Teachers' and State Employees' Retirement System remanded this matter by Final Decision dated February 3, 2006. The parties attempted to resolve the case following the remand but were unsuccessful. The case was brought on for hearing on the order of remand on December 4, 2008 in Williamston, North Carolina, before the undersigned Administrative Law Judge after notice of hearing was issued and served on or about October 30, 2008.

Petitioner filed this contested case pro se. For the hearing on remand, Petitioner was present and represented by Branch W. Vincent, III, Attorney at Law. Respondent was represented by Robert M. Curran, Assistant Attorney General. Petitioner called only one witness, Petitioner Robert A. Gabriel, Sr. Respondent offered no evidence. The parties agreed at the outset of the remand hearing that the case would be submitted by stipulation of the facts as contained in Joint Exhibits 1-4 which were marked and admitted and which, together with Robert A. Gabriel, Sr.'s testimony at this hearing, constituted the sole body of evidence in this contested case. At the conclusion of all of the evidence and arguments of counsel, a decision in favor of Petitioner was announced from the bench and the record closed. On or about December 10, 2008, the parties filed draft proposals for the written decision.

On December 19, 2008, Respondent filed a motion to reopen the hearing to allow rebuttal evidence in the form of an affidavit from Judy Coletrain, an employee of the Dare County School System, obtained by Respondent at its own initiative following the hearing on December 4, 2008. From Joint Exhibits 1-4 and the testimony of Robert A. Gabriel, Sr., I make the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. The parties stipulated on the record that notice of hearing was proper.

2. The parties stipulated on the record that Joint Exhibits 1-4 were authentic and that those exhibits, plus the testimony of Robert A. Gabriel, Sr., constituted the entire body of evidence to be considered in determining the decision to be made on the order of remand.
3. The Final Decision of the Board of Trustees of the Teachers' and State Employees' Retirement System ordering this contested case to be considered on remand contained the following finding:

The Petitioner represented to the Board that neither he nor his wife had received any notification, either from the Respondent or from the member's employer, regarding the timing or the means of applying for long-term disability benefits, prior to Debra Gabriel's death. The Petitioner further represented that his wife's employer, the Dare County School System, normally provides such notification to its employees, but did not do so in this instance. Based upon the record in this matter, the Board is of the opinion that the pleadings disclose a validly stated contested case and that there are questions of fact which need to be heard and resolved before the Petitioner's claim can be finally determined.

4. Petitioner Robert A. Gabriel, Sr. is the surviving spouse and beneficiary of Debra Gabriel, deceased.
5. Debra Gabriel, a teacher employed by the Dare County School System, was diagnosed with Metastatic Breast Cancer, Stage 4 (pervasive).
6. Debra applied for short term disability on March 1, 2003. (See Exhibit 4).
7. In preparing the application for short term disability benefits, Debra was assisted by Judy Coletrain, Benefits Coordinator for Dare County Schools. Judy Coletrain came to Debra's home to assist in the preparation of the application.
8. Debra informed the Dare County School System on May 19, 2003 that she no longer would be able to continue teaching after 18 years of service because of breast cancer.
9. Debra's last day of work was June 13, 2003.
10. Debra's application for short term disability was approved on November 4, 2003.



11. In May, 2004, Debra's condition progressively worsened. Petitioner was her primary caregiver. Petitioner testified that Debra's mental condition noticeably was affected both by her physical condition and the numerous medications she had been prescribed.
12. Debra was admitted to Norfolk Sentara Hospital on August 10, 2004. Her medical records indicate that she was diagnosed with Stage IV breast cancer with progressive disease to the liver. Her medical records also indicate that there were mental status changes and disorientation.
13. The short term disability benefit expired on August 12, 2004.
14. Debra again was admitted Norfolk Sentara Hospital on August 16, 2004. Her medical records note that Debra markedly was confused.
15. Debra died on August 18, 2004. Her medical records indicate that the diagnosis at the time of death was widely metastatic breast cancer involving multiple organs including liver and bone with massive hepatic necrosis and hepatorenal syndrome.
16. During this time period, Petitioner was responsible for the household and Debra's daily care. Petitioner testified that Debra did not receive an application for long term disability from anyone. He further testified that beginning in May 2004 and until the time of her death, Debra was not mentally competent and would not have been able to prepare an application for long term disability benefits if one had been presented to her. Petitioner's testimony was not contradicted by any other evidence produced in this hearing.
17. After Debra's death, Petitioner attempted to contact Judy Coletrain, but she was not available because she had been injured in an automobile accident.
18. Petitioner contacted Respondent as early as September 20, 2004 making inquiry of the benefits which were due. He testified that he initially was informed by Respondent that he was entitled to additional benefits, including a death benefit.
19. Subsequently, Petitioner was told that the death benefit was not payable because Debra's death occurred more than 180 days from the date she last worked, June 13, 2003. Petitioner also was informed that Debra was not receiving benefits under the Disability Income Plan at the time of her death.

20. In an effort to maintain eligibility for the death benefit, Petitioner attempted to make application for long term disability benefits but was informed by Respondent that he could not file an application for long term disability benefits after Debra's death.
21. Dare County Schools prepared a form known as "Certification from Employer/Final Status Report" (Form 253) dated October 7, 2004. The form did not indicate that Debra was "In Service" or "Not In Service". The form affirmatively indicated that Debra was "in receipt of a benefit under the Disability Income Plan." The payroll section of the form affirmatively indicated that Debra last was on the payroll as of August 27, 2004. The form also indicated that at the time of her death on August 18, 2004, she was due an additional amount for vacation, overtime, etc. in the amount of \$3,478.00 and that an additional amount of \$208.68 was to be paid for retirement contribution. Petitioner testified that he received this additional payment after Debra's death.
22. The post-death payment of accrued vacation, sick leave, etc. indicates that Debra remained on the Dare County School payroll and had not been terminated by action of the school system. Therefore, her sick and annual leave had not expired.
23. At the time of her death, Debra was well within her 180 day time limit for filing for long term disability, had she been afforded the opportunity to do so. G.S. 135-106.

#### CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, as stipulated, I make the following conclusions of law:

1. This Court has jurisdiction over the parties and the subject matter.
2. Debra Gabriel, with the assistance of her husband and primary caregiver, Petitioner Robert A. Gabriel, Sr., would have been eligible for long term disability had she been provided an application for same and, upon her proper completion of that application she, consequently, would have been eligible for the death benefit for her surviving spouse had she been receiving benefits under the disability plan at the time of her death.
3. Petitioner Robert Gabriel, Sr., Debra Gabriel's surviving beneficiary spouse, is entitled, in the exercise of discretion on the part of the Board of Trustees of

the Teachers' and State Employees' Retirement System, to be awarded the death benefit provided by G.S. 135-5(l) following the death of Debra Gabriel.

DECISION

Based upon the body of evidence produced in this contested case hearing on remand from the Board, Petitioner Robert A. Gabriel, Sr. is entitled, in the discretion of the Board, to an award of the death benefit provided for in G.S. 135-5(l) following the death of Debra Gabriel, a career teacher and member of the Retirement System at the time of her death. Respondent's motion to reopen the hearing to admit an affidavit obtained by Respondent after the hearing concluded and a decision was announced from the bench is DENIED.

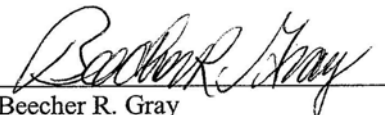
NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b3) to serve a copy of the final decision on all parties and to furnish a copy to the parties attorney of record and to the Office of Administrative Hearings.

The agency that will the final decision in this contested case is the Board of Trustees of the Teachers' and State Employees' Retirement System.

This the 31 day of December, 2008.

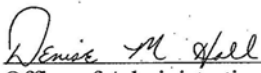
  
Beecher R. Gray  
Administrative Law Judge

A copy of the foregoing was mailed to:

Branch W. Vincent, III  
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ATTORNEY FOR PETITIONER

Robert M Curran  
Assistant Attorney General  
N. C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 31st day of December, 2008.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA, IN THE OFFICE OF  
COUNTY OF CRAVEN ADMINISTRATIVE HEARINGS  
05 EHR 1787

Anderson Sand & Gravel LLC,  
Gerald L. Anderson LLC,  
and Gerald Anderson,

Petitioner,

v.

N.C. Department of Environment and  
Natural Resources, Division of  
Water Quality,

**DECISION**

This matter was heard before Administrative Law Judge Beecher R. Gray on Monday, July 28, 2008 in New Bern, North Carolina. The case involved the appeal of a civil penalty assessment. Respondent assessed Petitioners in the amount of \$44,933.84 for violations of N.C. Gen. Stat. § 143-215.1, 15A N.C. Admin. Code 2B.0211(2), 15A N.C. Admin. Code 2B.0233(4), 15A N.C. Admin. Code 2B.0231(a)(1) and (b)(1), 15A N.C. Admin. Code 2H.0501, and 15A N.C. Admin. Code 2H.0501. Respondent submitted a proposed decision on October 03, 2008. Petitioner has not filed a response.

APPEARANCES

For Petitioner:

Petitioners appeared pro se  
in this matter

For Respondent:

Brenda E. Menard  
Associate Attorney General  
N. C. Department of Justice  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

ISSUES

1. Whether Petitioners meet their burden of proof in establishing that Respondent erred in determining that a stream existed on the Spruill Town Mine site ("Site") for purposes of the Neuse River Basin Riparian Buffer rule, 15A N.C. Admin. Code 2B.0233, and the applicable Water Quality Standards rule, 15A N.C. Admin. Code 2B.0211.
2. Whether Petitioners met their burden of proof in establishing that Respondent erred in assessing \$44,933.84 in civil penalties on October 28, 2005 against Petitioner for violations of N.C. Gen. Stat. § 143-215.1, 15A N.C. Admin. Code 2B.0211(2), 15A N.C. Admin.

Code 2B.0233(4), 15A N.C. Admin. Code 2B.0231(a)(1) and (b)(1), 15A N.C. Admin. Code 2H.0501, and 15A N.C. Admin. Code 2H.0501.

STATUTES AND RULES

N.C. Gen. Stat §§ 143-215.1

N.C. Admin. Code, Title 15A, Chapter 2B

N.C. Admin. Code, Title 15A, Chapter 2H

EXHIBITS RECEIVED INTO EVIDENCE

PETITIONER:

RESPONDENT:

- 1 Corporation Information for Anderson Sand & Gravel, LLC  
07-29-96 Annual Report showing date of organization 04-02-96  
06-12-03 Certificate of Dissolution
- 2 Corporation Information for Gerald L. Anderson, LLC  
02-04-98 Annual Report showing date of organization 03-25-94  
04-05-05 Certificate of Dissolution  
02-07-06 Application for Reinstatement
- 3 05-26-95 Certificate of Coverage under General Permit No: NCG020000
- 4 04-16-96 Site Plan - Spruill Town Mine
- 5 09-23-96 Letter from Division of Land Resources Approving Modification  
of Mining Permit per 04-16-96 Site Plan, with enclosed Permit  
for Operation of a Mining Activity
- 6 12-17-99 Reissue - NPDES Stormwater Permit, Gerald Anderson LLC  
Certificate of Coverage No: NCG020300
- 7b 03-23-00 Borrow Pit Overall Site Map with Markings Showing Addition
- 9 07-14-04 Letter from DWQ Informing Permittee of Requirement to  
Renew NPDES Stormwater Permit Coverage
- 10 01-21-05 Notice of Violations of Mining Permit  
To: Mr. Gerald Anderson/Anderson Sand & Gravel, LLC  
From: Division of Land Resources

- 12 United States Geologic Survey Quadrangle Topographic Map  
of Spruill Town Mine Site and Surrounding Area
- 13 02-10-05 PHOTOS:  
Clearing of Wetland area that plan indicates to remain as wooded  
Active discharge without NPDES Permit  
Expanded mine boundary into wetland of Bear Creek
- 14 02-17-05 Cease & Desist Letter to Gerald Anderson/Anderson Sand &  
Gravel, LLC from Army Corps of Engineers
- 15 03-10-05 PHOTOS:  
View at point "A" GPS pt. Crossing over stream feature  
View at point "B" GPS pt.  
No boards in riser. Pump discharge 20 ft from riser  
View at point "C" GPS pt. view of where stream should be located  
View at point "D"
- 16 03-16-05 Letter to Mr. Gerald Anderson from Department of the Army
- 17 04-25-05 Notice of Violation and Notice of Enforcement Recommendation  
To: James K. Spruill, Vanceboro, NC  
and Gerald Anderson, Bridgeton, NC  
From: Division of Water Quality
- 18 08-05-05 PHOTOS:  
Active excavation in wetlands  
Active mining without permits  
Expanded mine boundary into wetlands of Bear Creek  
Dewatering without an NPDES Permit. No boards in riser
- 19 09-30-05 Assessment of Civil Penalties  
Mr. James K. Spruill, Anderson Sand and Gravel, LLC  
Gerald L. Anderson, LLC, and Mr. Gerald Anderson  
Anderson Mine Site/Spruill Town Mine DV 2005-0023  
09-30-05 Assessment Factors Form
- 20 10-28-05 Rescission and Replacement of Assessment of Civil Penalties  
Mr. James K. Spruill, Anderson Sand and Gravel, LLC  
Gerald L. Anderson, LLC, and Mr. Gerald Anderson  
Anderson Mine Site/Spruill Town Mine DV 2005-0027  
10-28-05 Assessment Factors Form
- 21 07-03-07 Rescission of Civil Penalties DV 2005-0027 against James K.  
Sпруill, Billie C. Spruill, and Pierce Landing Subdivision

- 22            12-03-07 Permanent Injunction in 05 CVS 2047
- 23            Resume of Danny Smith
- 24            Resume of Kyle Barnes

Based upon careful consideration of the testimony and evidence received during the contested case hearing as well as the entire record of this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1.        The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2.        Petitioner Gerald Anderson is a citizen of the State of North Carolina and a resident of Craven County, North Carolina.
3.        Gerald Anderson was a member/manager of Petitioner Anderson Sand & Gravel, LLC in Craven County, North Carolina. (Respondent's Exhibit 1) Anderson Sand & Gravel, LLC administratively was dissolved under N.C. Gen. Stat. § 57C-6-03 on June 12, 2003. (Respondent's Exhibit 1) Mr. Anderson testified at the hearing on this matter that he was aware of the dissolution. (T pp 17-18)
4.        Gerald Anderson is a member/manager of Petitioner Gerald L. Anderson, LLC. (Respondent's Exhibit 2) Gerald L. Anderson, LLC administratively was dissolved under N.C. Gen. Stat. § 57C-6-03 on April 5, 2005. (Respondent's Exhibit 2) Gerald L. Anderson, LLC later was reinstated. (Respondent's Exhibit 2)
5.        Respondent Department of Environmental Resources ("DENR") is a State agency established under the provisions of N.C. Gen. Stat. § 143B-279.1 *et seq.* and vested with the authority to enforce the State's environmental pollution laws, including laws enacted to protect the water quality of the State. The Division of Water Quality ("DWQ") is a division within DENR and all actions taken by DWQ are actions of Respondent.
6.        In 1996, DENR's Division of Land Resources ("DLR") transferred a permit to Anderson Sand & Gravel, LLC, allowing it to conduct mining operations at the Spruill Town Mining Site (Site). (Respondent's Exhibit 5) In 2005, Anderson Sand & Gravel, LLC was leasing the Site and held the mining rights to that property. (T p 18) Those mining rights never were transferred. (T p 18) The mining permit issued by the Division of Land Resources also was not transferred before the date of the civil penalty assessment at issue. (T p 25)
7.        DWQ issued a certificate of coverage under a stormwater general permit allowing Gerald L. Anderson, LLC to discharge stormwater, process wastewater, and wastewater



associated with mine dewatering to an unnamed tributary of Swift Creek in the Neuse River Basin. (Respondent's Exhibit 3) On December 17, 1999, DWQ issued a renewed certificate of coverage to Gerald L. Anderson, LLC. (Respondent's Exhibit 6)

8. By letter dated July 14, 2004, DWQ notified Petitioner Gerald L. Anderson, LLC that its coverage under the stormwater general permit would expire on November 30, 2004. (Respondent's Exhibit 9) Petitioner did not renew the certificate of coverage. (T p 60)

9. The Site is located in the Neuse River Basin. (T p 96)

10. Kyle Barnes, an Environmental Senior Specialist with DENR's Washington Regional Office staff, conducted a stream determination in 2006. (T p 84) This stream determination was conducted in order to evaluate whether a stream existed for purposes of DENR's statutes and regulations upstream of the Site. (T p 84) Mr. Barnes verified the existence of a perennial stream upstream of the Site, ending at the point where a "ditch" is shown on Petitioner Anderson Sand & Gravel, LLC's mining map submitted in March 2000. (Respondent's Exhibit 7b; T p 84) Mr. Barnes testified at the hearing on this matter that if a perennial stream exists upstream, a perennial stream naturally would exist downstream as well. (T p 85)

11. A stream is shown running through the Site on the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey ("USGS"), in approximately the same location as the feature labeled "ditch" on the mining map provided by Anderson Sand & Gravel, LLC in March of 2000. (Respondent's Exhibit 7b; T pp 98-99)

12. In 1996, Petitioner Anderson Sand & Gravel, LLC submitted a mining map in its application for modification and transfer of the mining permit for the Site. (Respondent's Exhibit 5; T pp 20-21) This mining map showed a buffer surrounding the line labeled as a "ditch" running along the edge of the permitted mining area. (Respondent's Exhibit 5)

13. According to Mr. Barnes' estimation, approximately 1800 linear feet of stream had been excavated at the time of his site visits in 2005. (T p 95) Excavation of a stream destroys the natural aquatic habitat of that stream. (T p 96)

14. Mr. Barnes testified at the hearing on this matter that when he visited the Site in 2005, there was no vegetation in the fifty-foot area on both sides of the location where the stream would have been according to the USGS map. (T p 99)

15. During his inspections of the Site in 2005, Mr. Barnes witnessed discharges of mine pit water. (Respondent's Exhibits 13 and 18; T p 88-89, 108-109) No permit for such discharges was held by Petitioners at the time of those discharges. (T p 89, 109)

16. Anderson Sand & Gravel, LLC submitted a mining map entitled "Borrow Pit Overall Site" to the Division of Land Resources in March of 2000 showing wetlands surrounding the permitted mining area at the Site. (Respondent's Exhibit 7b; T pp 27-28)

17. The Army Corps of Engineers issued cease and desist letters to Petitioners on February 17, 2005 and March 16, 2005 indicating that wetlands existed at the Site. (Respondent's Exhibits 14 and 16)

18. Mr. Barnes witnessed fill of wetlands during his site visits in 2005 (Respondent's Exhibits 13 and 18; T pp 90, 108) Mr. Barnes testified at the hearing on this matter that the fill of wetlands would have required a 401 Water Quality Certification. (T p 90) No 401 Water Quality Certification was issued for this Site. (T p 90) Mr. Barnes also testified that this fill also constituted a wetland standards violation under 15A N.C. Admin. Code 2B.0231. (T p 108)

19. Tom Reeder, the former Deputy Director of DWQ, was delegated authority to assess the civil penalty at issue. (T p 116) Before assessing the civil penalty at issue, Mr. Reeder considered all the factors listed in N.C. Gen. Stat. § 143-282.1(b). (Respondent's Exhibit 20; T p 119)

20. In his position as Deputy Director of DWQ, Mr. Reeder assessed approximately one hundred fifty (150) to two hundred (200) non-point source cases, including wetlands violations, buffer violations, and violations for impacts to streams without 401 Certification. (T p 121-123) In Mr. Reeder's evaluation of the civil penalty at issue in this contested case, the underlying violations were among the most egregious violations for which he had assessed penalties during his time with DWQ, and the civil penalty assessed was consistent with other assessments made by Mr. Reeder during his time with DWQ. (T pp 121-122)

21. Under 15A N.C. Admin. Code 2B.0211, fresh surface waters in the State "shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard."

22. A vegetated buffer spanning 50 feet must be maintained adjacent to surface waters in the Neuse River Basin under 15A N.C. Admin. Code 2B.0233. For purposes of this buffer rule, a surface water is "present if the feature is approximately shown on either the most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture or the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey."

23. Under 15A N.C. Admin. Code 2B.0231(a), wetlands in the State shall be suitable for uses such as "[s]torm and flood water storage and retention and the moderation of extreme water level fluctuations." In order to ensure that wetlands in the State are suitable for such uses, "[l]iquids, fill or other solids or dissolved gases may not be present in amounts which may cause adverse impacts on existing wetland uses," under 15A N.C. Admin. Code 2B.0231(b).

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter.
2. All parties correctly have been designated, and there is no question as to misjoinder or nonjoinder of parties.
3. Petitioners are "persons" within the meaning of N.C. Gen. Stat. § 143-215.6A pursuant to N.C. Gen. Stat. § 143-212(4).
4. A permit is required to discharge waste or stormwater to waters of the State pursuant to N.C. Gen. Stat. § 143-215.1(a).
5. Waters of the State existed on the Site. Petitioners violated N.C. Gen. Stat. § 143-215.1 by discharging wastewater and stormwater to those waters without a permit in 2005.
6. Fresh surface waters existed at the Site. Petitioners violated 15A N.C. Admin. Code 2B.0211 by excavating 1850 linear feet of stream, thereby removing the use of those waters.
7. Surface waters existed at this site for the purposes of 15A N.C. Admin. Code 2B.0233, since the Site is located within the Neuse River Basin and a stream feature was shown at the Site on the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey.
8. Petitioners violated 15A N.C. Admin. Code 2B.0233 by removing the vegetated buffer beside the surface waters present on the Site.
9. Wetlands existed on the Site as shown on Petitioner Anderson Sand & Gravel's map entitled "Borrow Pit Overall Site," submitted in March of 2000. These wetlands constitute waters of the State pursuant to N.C. Gen. Stat. § 143-212(6).
10. Petitioners violated 15A NCAC 2B.0231 by causing "fills and other solids" to be present in amounts that would "cause adverse impacts on existing wetland uses."
11. A 401 Water Quality Certification is required to discharge dredged or fill material to wetlands in the State under 15A N.C. Admin. Code 2H.0501 and 2H.0502.
12. Petitioners violated 15A N.C. Admin. Code 2H.0501 and 2H.0502 by causing discharges of dredged or fill material to wetlands without first obtaining a 401 Water Quality Certification.
13. Respondent properly assessed Petitioners for \$44,933.84. The assessment was appropriate in amount because of the violations at the Site.

14. Under North Carolina law, dissolved corporations are prohibited from conducting any business other than that appropriate to winding up their affairs and liquidating their assets. N.C. Gen. Stat. § 55-14-05(a). In Guilford Builders Supply Co. v. Reynolds, 249 N.C. 612, 61, 107 S.E.2d 80, 83 (1959), the North Carolina Supreme Court stated:

Under certain circumstances, stockholders, officers and directors may be held liable as individuals or partners when such stockholders, officers and directors permit the charter of the corporation to expire, and continue to obtain credit for and on behalf of a purported but non-existent corporation.

In the similar context of a corporation with a suspended charter due to non-payment of taxes, the North Carolina Court of Appeals stated:

The general rule is that the shareholders of a corporation whose charter has been suspended "are not made individually liable for its debts incurred during the suspension" . . . . On the other hand, directors and officers are personally liable for corporate obligations incurred by them on behalf of the corporation, or by others with their acquiescence, if at that time they were aware that the corporate charter was suspended.

Charles A. Torrence Co. v. Clary, 121 N.C. App. 211, 213, 464 S.E.2d 502, 504 (N.C. Ct. App. 1995) (citations omitted).

15. Mr. Anderson continued to carry on business in the name of Anderson Sand & Gravel, LLC, by continuing to conduct mining operations at the Site under a mining permit issued by the Division of Land Resources and using mining rights held by Anderson Sand & Gravel, LLC. Mr. Anderson was aware of the dissolution of Anderson Sand & Gravel, LLC, but failed to wind up the affairs of the business. Instead, Mr. Anderson continued to benefit from activities undertaken on behalf of the dissolved corporation. Therefore, Mr. Anderson assumed personal responsibility for the liabilities incurred in the name of Anderson Sand & Gravel, LLC after its dissolution on June 12, 2003. Anderson Sand & Gravel, LLC also may be liable for violations that occurred before the date of its dissolution.

16. When a dissolved corporation is reinstated, the corporation continues its activities as if the dissolution never had occurred. N.C. Gen. Stat. § 55-14-22(c). The reinstatement "relates back to and takes effect as of the date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution never had occurred, subject to the rights of any person who reasonably relied to his prejudice upon the certificate of dissolution." *Id.* Therefore, any liabilities incurred by the corporation after the date of the administrative dissolution remain liabilities of the corporation once it has been reinstated.

17. Gerald L. Anderson, LLC administratively was dissolved, but later was reinstated. Under N.C. Gen. Stat. § 55-14-22, a reinstated corporation continues its activities as if it never were dissolved. Therefore, Gerald L. Anderson, LLC retains any liabilities that it incurred, regardless of the date on which they were incurred.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

PROPOSED DECISION

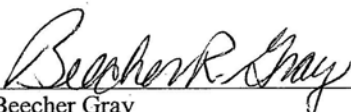
The Environmental Management Commission should uphold the decision to assess a civil penalty against Petitioners for violations of the State's water pollution laws in the amount of \$44,933.84.

NOTICE

The Environmental Management Commission, the agency making the final decision in this contested case, is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The Environmental Management Commission is required by N.C. Gen. Stat. § 150B-36(b3) to serve a copy of the final decision on all parties and to the Office of Administrative Hearings.

This the 29 day of October, 2008.

  
Beecher Gray  
Administrative Law Judge

A copy of the foregoing was mailed to:

Anderson Sand and Gravel LLC,  
Gerald L Anderson LLC and Gerald Anderson  
PO Box 568  
Bridgeton, NC 28519  
PETITIONER

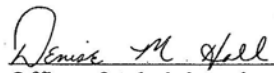
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ATTORNEYS FOR RESPONDENT

This the 29th day of October, 2008.

  
\_\_\_\_\_  
Office of Administrative Hearings  
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STATE OF NORTH CAROLINA  
COUNTY OF COLUMBUS

Filed  
2008 OCT 31 AM 9:27  
Office of  
Administrative Hearings

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
08 INS 0819

Esther A. Scott,

Petitioner,

v.

N.C. State Health Plan,

Respondent.

**DECISION**

This contested case came on to be heard before Beecher R. Gray, Administrative Law Judge, on September 9, 2008 in Bolivia, North Carolina. At the beginning of the hearing on the merits, the parties filed a final prehearing order containing written stipulations. The parties stipulated on the record that Respondent's actions regarding payment for Anesthesiology services in connection with Petitioner's surgery were proper and not in controversy in this hearing. The parties filed proposed decisions and written arguments on September 30, 2008.

**APPEARANCES**

For Petitioner: F. Murphy Averitt, III  
Marshall, Williams & Gorham, LLP  
14 South Fifth Street  
Wilmington, NC 28401

For Respondent: Robert Croom  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602-0629

**ISSUES**

1. Whether Respondent exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule of law when it processed and paid claims for hospital services provided to Petitioner at Memorial Sloan-Kettering Cancer Center (MSK) in August 2007.

2. Whether Respondent exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law when it processed and paid claims for professional services provided to the Petitioner in August 2007.

3. Whether Respondent is estopped from enforcing the applicable statutes and medical policies of the North Carolina Comprehensive Major Medical Plan based upon the representations made to Petitioner by employees, representatives, or agents of the North Carolina Comprehensive Major Medical Plan that Petitioner's hospitalization and physician care at MSK was covered and the Petitioner had nothing to worry about regarding payment for services following receipt of the admission approval letter.

**STATUTES AND MEDICAL POLICIES AT ISSUE**

N.C. Gen. Stat §§ 135-40.1, 135-40.6, 135-40.7;  
Respondent's 2007 Benefits Summary Plan Description Booklet

**EXHIBITS ADMITTED INTO EVIDENCE**

For the Petitioner: Exhibits 1,2,4,5,7,8,10,11,12,14,15,25,42,50,51, 53, 54, 55,56,60, 61,63, and 64 (Exhibits 50, 63 and 64 are submitted under seal)

For the Respondent: Exhibits 1-40, 43-51

**FINDINGS OF FACT**

1. The parties stipulated that all parties properly are before the Office of Administrative Hearings and that jurisdiction of the parties and of the subject matter is proper in this forum.

2. Respondent is an agency of the State of North Carolina that offers health care benefits to eligible active and retired employees ("members") and their dependents (members and their covered dependents jointly are referred to herein as "covered persons") in accordance with applicable N. C. General Statutes and the State Health Plan ("the plan") medical policies. N. C. Gen. Stat. § 135-40 et seq. By contract, North Carolina Blue Cross and Blue Shield of North Carolina ("BCBS") administers Respondent Plan's benefits.

3. Petitioner is a retired teacher and is a licensed professional counselor, having been a State employee from 1967 through 2002. She is a "covered person" entitled to benefits under Respondent's Health Plan.

4. On July 19, 2007, Petitioner had a bilateral lumpectomy performed in Whiteville, North Carolina by Dr. Andrew Hutchinson.

5. Biopsy results indicated that Petitioner suffered from bilateral breast cancer. The cancer in Petitioner's left breast was a sarcoma and the right breast had a lobular carcinoma and infiltrating ductal carcinoma.

6. In the seven years that Dr. Hutchinson had been practicing, he never had seen a diagnosis of sarcoma of the breast. He considered it very unusual and based upon the fact that three types of cancer were found in Petitioner's left and right breast, he thought it very important to begin treatment immediately. Memorial Sloan-Kettering Clinical Cancer Center ("MSK") is one of only two cancer centers in the United States to focus exclusively on the treatment of



cancer. Dr. Hutchinson did 9 to 12 months of residency at MSK in New York during his medical training which included cancer of the breast, liver, and stomach.

7. Based upon his training at MSK in New York, Dr. Hutchinson felt that MSK was the best place for Petitioner to seek treatment. Dr. Hutchinson contacted MSK and spoke to Mary Gimignani, one of his attending physicians, and was able to get Petitioner in for treatment and consultation by the first of August 2007. Although MSK was not the only medical facility to which Petitioner could have gone for oncology services, it was the center most familiar to Dr. Hutchinson and the one with which he had the greatest degree of confidence.

8. Petitioner presented to MSK at the beginning of August for an evaluation and additional diagnosis prior to treatment at the hospital.

9. Following her examination at the beginning of August, 2007, Petitioner received a letter from Respondent Plan dated August 6, 2007 captioned "Admission Approval" letter. The letter approved Petitioner's hospital admission to MSK for treatment. The "Admission Approval" letter contained the following language:

**Disclaimer:**

...

\*The member is always responsible for the plan year deductible, coinsurance amounts, inpatient admission co-payment and charges for non-covered service.

\*The State Comprehensive Major Medical Plan (SHP) has a contract with Private Healthcare Systems (PHCS) Healthy Directions Network to provide an out-of-state provider network for SHP members who receive medical services outside of North Carolina

\*Contracting hospitals and professional providers (doctors, therapists, etc.) in North Carolina and out-of-state hospitals and professional providers in the PHCS Healthy Directions Network agreed to accept the plan allowance. They will not hold the member responsible for the difference in cost if the charge is higher than the Plan's allowance.

\*If the member receives services in a non-contracting hospital or by a non-contracting professional provider in North Carolina, or in an OUT-OF-STATE hospital or by an out of state professional provider who is not in the PHCS Healthy Directions Network, and the charge is higher than the Plan's allowance, the hospital or professional provider may hold the member responsible for the difference in cost.

10. The August 06, 2007 letter also stated: "[t]o determine if your provider outside of North Carolina is participating or to obtain a list of participating providers in the PHCS Healthy Directions network, please contact PHCS toll free at 1-800-678-7427 or visit their website at [www.phcs.com](http://www.phcs.com). Be sure to specify the Health Directions network."

11. Upon receipt of the Admission Approval letter, Petitioner contacted the Plan. Petitioner spoke with a representative of the Plan and inquired with respect to the disclaimer contained in the Admission Approval letter regarding treatment at an out-of-state provider. Petitioner testified in this hearing that she was informed by a representative of the Plan that "if she had received the Admission Approval letter, Petitioner had "nothing to worry about" with respect to payment for services rendered at MSK. Petitioner spoke with employees of Respondent, Jennifer Thomas initially and later with LaShawnda Jones, on or about August 09, 2007. Upon inquiry from Petitioner, representative Thomas told Petitioner that she could not find MSK in the participating provider list but that Petitioner should call the number printed in the August 06, 2007 admission approval letter to confirm MSK's status. During her later conversation with representative Jones, Petitioner was informed that Respondent would process claims at 80% of the usual, customary, and reasonable (UCR) amounts and, upon meeting her deductible amount, Petitioner's claims would be processed at 100% of UCR.

12. It is found as a fact that Petitioner attempted to exercise due diligence in ascertaining whether her out of state treatment would be paid for by Respondent and was put on notice by the approval letter disclaimer and the conversations with the two Plan representatives that MSK did not appear on the participating provider list and that Petitioner should call the telephone number provided to make a definitive determination of MSK's status. Petitioner did not call the PHCS Health Directions network number listed on the August 06, 2007 admission approval letter to see if MSK or her professional providers were part of the PHCS Health Directions network.

13. After receiving the admission approval letter and having had discussions with the two representatives of the Plan, Petitioner proceeded with surgery and treatment at MSK. Petitioner underwent a double mastectomy and reconstructive surgery at MSK and remained hospitalized from August 13, 2007 through August 15, 2007.

14. Petitioner's treatment at MSK was necessary and appropriate.

15. Following treatment at MSK, Petitioner began to receive Explanation of Benefit ("EOB") forms from the Plan. An EOB is not a bill and is not a declination of coverage. Each EOB sent to Petitioner contained a section on appeal procedures which stated:

[i]f you have inquired about your claim and disagree with the response from Customer Services, you may appeal the decision. Appeals are required to be submitted within 60 days of the initial denial or benefits decision.

16. The following chart contains the approximately ten (10) EOB forms sent to Petitioner following her surgery:

Date	Provider	Date of Service	Charge	Amt Paid By Resp.	Amt Owed By Pet.
8/31/07	Mskcc Surg. Grp.	8/1/07	\$525.00	\$202.85	\$322.15
	Mskcc Surg. Grp.	8/1/07	See 11/9/07 EOB		

	Mskcc Rad. Grp.	8/1/07	\$205.00	\$67.45	\$137.55
	Mem. Cardio.	8/1/07	\$40.00	\$27.00	\$13.00
9/7/07	Mem. Path.	8/1/07	\$655.00	\$389.70	\$265.30
	Mskcc Rad.	8/1/07	see 11/2/07 EOB		
9/14/07	Mem. N. Med. Grp.	8/13/07	\$285.00	\$117.62	\$167.38
	Mem. Path.	8/13/07	\$1,395.00	\$981.00	\$414.00
	Mem. Cardio.	8/13/07	\$40.00	\$27.00	\$13.00
10/5/07	Mem. Hosp.	8/13/07 through 8/15/07	\$30,790.12	\$8,595.89	\$22,194.23
10/12/07	Mem. Hosp.	8/1/07 through 8/22/07	\$2,500.00	\$2,425.00	\$75.00
10/19/07	Mem. Hosp.	8/24/07	\$379.00	\$379.00	\$0.00
10/26/07	Mem. Hosp.	8/13/07 through 8/15/07	Charges previously processed		
11/2/07	Mskcc Surg. Grp.	8/13/07	\$28,985.00	\$5,110.68	\$23,874.32
	Mskcc Surg. Grp. (Rad) Same charge as 9/7/07 EOB	8/1/07	\$150.00	\$67.45	\$82.55
11/9/07	Mskcc Surg. Grp. Same charge as 8/31/07 EOB	8/1/07	\$290.00	\$107.30	\$182.70
12/7/07	Mem. Anesthesia.	8/13/07	\$3,120.00	\$2,052.75	\$1,067.25
12/14/07	Mskcc Surg. Grp.	8/13/07	Charges previously processed		

17. As to the EOB's dated August 31, 2007 and September 07, 2007, Petitioner did not call Respondent or make any inquiry about them within 60 days of the date of either of them.

18. On or after October 5, 2007, Petitioner received an EOB dated October 5, 2007 with respect to her treatment at MSK indicating that the Plan had received a bill from MSK in the amount of \$30,790.12 for hospitalization. The EOB indicated the Petitioner had an outstanding balance in the amount of \$22,294.23 based upon a bill from MSK.

19. On or about October 26, 2007, Petitioner received an additional EOB dated October 26, 2007 with respect to Petitioner's treatment at MSK indicating that there was an outstanding bill in the amount of \$30,790.12. Nothing was listed in the balance portion of the EOB and the explanation of her balance was stated: "\$30,790.12 charges previously processed."

20. On or after November 2, 2007, Petitioner received an additional EOB dated November 2, 2007 from MSK Surgery Group, including a radiology charge of \$82.55, indicating

that the plan had received a bill in the amount of \$28,985.00 and that Petitioner was responsible for \$23,956.87 as her portion of payment of that outstanding bill.

21. Upon her receipt of the EOB dated November 2, 2007, Petitioner contacted Blue Cross/Blue Shield of North Carolina on November 05, 2007 to inquire about the EOB's that she had received and to inquire as to her outstanding balance. During that conversation, a representative of Blue Cross/Blue Shield and Respondent informed Petitioner that "her hospital bills and her medical bills still were being processed and that she should be getting money back based upon payments in excess of her co-insurance that Petitioner already had made".

22. On or about December 13, 2007 Petitioner received a letter dated December 13, 2007, from the Plan on its letterhead which pertained to the processing of Petitioner's case. The letter stated as follows:

We are writing to inform you that your claim(s) for medical services is now being reviewed. If needed, we will communicate with the health care provider or health care facility to resolve the claim(s). We are sending you this notice because it is important to us to keep our customers informed of their claim(s) status. **NO ACTION ON YOUR PART IS NEEDED.** (Emphasis added).

The letter was signed by the claims processing contractor, BCBS. Based upon this letter, Petitioner was under the good faith belief that she did not need to take any action with respect to any pending claims that she might have for payment of her medical bills at MSK. Petitioner during this period of time was undergoing chemotherapy and was somewhat distracted in both mind and body from discerning and understanding the details of her medical expenses at MSK and the Plan's claims processing system.

23. Following receipt of the letter dated December 13, 2007, Petitioner received an EOB dated December 14, 2007. Petitioner contacted Carol Ann Bagnulo, her health coach. During that conversation, Ms. Bagnulo indicated that apparently some of MSK's claims for services rendered were being denied by the Plan and that Petitioner should file an appeal regarding the denial of any of the claims for services rendered at MSK.

24. Under authority granted in G.S. 135-39.7, Respondent has adopted and implemented internal claims grievance procedures now set out in its policy number AD0050 under the title of "Medical and Pharmacy Appeal and Grievances". Policy AD0050 states that an appeal must be made within 60 days after the initial notification of Respondent's decision, change, action, or EOB.

25. Petitioner submitted a Request for Appeal or Grievance Review dated January 17, 2008 with respect to her bills for services rendered at MSK. This appeal included all claims associated with treatment at MSK with respect to physicians or professional services and hospital charges.

26. By letter dated January 28, 2008, Respondent advised Petitioner of its decision to deny her appeal. Respondent denied Petitioner's internal grievance procedure appeal as it related to her claims except as to the December 07, 2007 EOB, related only to anesthesia, which Respondent found to have been timely filed. As to all other claims, Respondent found that they

were untimely as not made within 60 days of the dates of the other EOB's Petitioner had received. In so doing, Respondent's Appeals Department either failed to notice the import of the December 13, 2007 letter telling Petitioner that "[n]o action on your part is needed", was unaware of its existence, or ignored it.

27. Petitioner's grievance appeal filed on or about January 17, 2007 was within 60 days of the date of EOB's dated November 02, 2007, November 09, 2007, and December 07, 2007.

28. Petitioner filed a petition for contested case with the Office of Administrative Hearings on March 31, 2008. This petition was filed less than 60 days from the date of Respondent's grievance denial letter dated January 28, 2008.

#### MSK HOSPITAL CHARGES

29. On or about November 27, 2007, MSK Hospital submitted a letter to the Plan dated November 27, 2007 indicating that MSK Hospital was a DRG EXEMPT hospital and that Respondent erroneously had processed its claim for hospital services based on the Plan's DRG rates. MSK further asserted that it was a member of the Multi-Plan network and that Multi-Plan had purchased PHCS, through which Petitioner's hospital charges should be reprocessed. The Multi-Plan and/or PHCS Network are the out-of-state network provider of physicians and hospitals for the Plan and if care is received at a participating provider, the member is not held responsible for amounts billed in excess of the allowance for covered services. The original hospital charges billed totaled \$30,790.12 of which the Plan had paid \$8595.89. MSK notified the Plan in this letter that, as a DRG exempt hospital, it would reduce its charges to \$9434 which would leave a balance of only \$838.11 to satisfy the original \$30,790.12 in billed hospital charges. Respondent failed to provide Petitioner with notice of this letter and refused to make payment to MSK to satisfy the claim. Petitioner was not made aware of this letter until it was produced through the discovery process of this contested case. Subsequent to receipt of a copy of the letter dated November 27, 2007, Petitioner satisfied her hospital charges with MSK by direct negotiation and payment in the amount of \$838.11. In addition, Petitioner previously had paid \$1,008.50 out of pocket for hospital services, excluding her \$150.00 copay.

30. MSK Hospital asserted in its letter of November 11, 2007 that it was a Multi-Plan member and that Multi-Plan had bought PHCS and that Respondent could reprocess its claim accordingly. Respondent insists that MSK was not a participating member of the PCHS network. The Plan refused to recognize that MSK Hospital was a DRG exempt facility and refused to reprocess this claim. The Plan did not inform its member, Petitioner, that she could settle the \$30,790.12 original hospital charges by payment of an additional \$838.11.

#### PHYSICIAN CHARGES

31. Petitioner's current outstanding bill for physician services as of the date of this contested case hearing at MSK was \$22,634.17. For the year 2007, Petitioner has exhausted all co-insurance requirements and made all co-payments. Petitioner is contesting charges for Dr. Joseph Disa for plastic/reconstructive surgery and for Mary Gimignani, her breast surgeon. Accordingly, Petitioner's current outstanding balance owed per MSK's Physician Services is

\$21,566.92. In addition, Petitioner has paid \$3,055.03 out of pocket towards these physician services.

32. Respondent submitted an additional EOB to Petitioner dated July 25, 2008, subsequent to the filing of this contested case, which indicated that the MSK physicians had submitted a bill in the amount of \$14,700.00, that the Plan had paid the amount of \$850.00 and that Petitioner's balance was \$12,150.00. The computation on the EOB was confusing to Petitioner.

33. Respondent Plan did not accept Petitioner's grievance appeal concerning any EOB's except the EOB dated December 07, 2007. The charge amounts for physician services was part of the inquiry Petitioner made on November 05, 2007 when she called the Plan for assistance and explanation of the various EOB's and pending charges. Specifically, the EOB dated November 02, 2007, which contained physician charges to date, was a part of this inquiry.

34. Evidence regarding the correctness of Respondent's method of calculation of the amount to be paid to Petitioner's physician and allied providers was admitted during this hearing, upon the agreement of both parties for the sake of efficiency in reaching a final determination of the outstanding claims. Respondent produced evidence by and through its business analyst, Michelle Overby, that it processed Petitioner's physician claims, which are filed under discrete CPT codes, standard for medical claims across the United States, using its standard methodology of determining the usual, customary, and reasonable (UCR) charges for physicians who are not local to North Carolina and who are not in the PHCS network.

35. Michelle Overby was unable to state how the UCR allowances were calculated and specifically could not state how the discount percentage applied in some cases by BCBS, the claims processing contractor, were applied to the UCR allowances to arrive at a final figure for a particular claim. Michelle Overby stated that such determinations were "above her pay grade" and that she was unable to explain how the figure was determined. Accordingly, Ms. Overby was unable to specifically explain how the UCR allowable rates were calculated such that any payment could be verified.

36. Ms. Overby testified that Respondent should act in Petitioner's best interest. Respondent failed to acknowledge or inform Petitioner of MSK's letter dated November 27, 2007 regarding Petitioner's MSK hospital charges, the Respondent failed to provide information necessary for Petitioner to make an informed decision about her health care, and has failed to adequately explain the basis or method of calculation of the payments made and refused under the UCR billing system.

#### **CONCLUSIONS OF LAW**

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner's grievance appeal dated January 17, 2008 was ineffective as relates to EOB's prior to the November 02, 2007 EOB because Petitioner had notice that grievance appeals must be filed within 60 days of the date of EOB's and Petitioner did not initiate grievance appeals within the allowable 60 days.

3. Respondent's denial of Petitioner's grievance appeal dated January 17, 2008 as it relates to the EOB dated November 02, 2007 addressing physician services was erroneous. Although this grievance was made more than 60 days after the date of the EOB, Respondent's letter of December 13, 2007, which followed Petitioner's inquiry of November 05, 2007, effectively extended Petitioner's time for filing of a grievance concerning the November 02, 2007 EOB by stating that **NO ACTION IS NEEDED ON YOUR PART** (emphasis added).

4. Respondent's action in refusing to recognize MSK as a DRG exempt hospital is erroneous. Respondent may not have been under a duty to reprocess MSK's hospital claim in the manner requested by MSK in its letter of November 27, 2007, but it did have a duty to inform its covered person Petitioner that MSK had reduced its hospital charges from \$30,790.12 to \$9434 because it was a DRG exempt facility and that the entire claim could be resolved for an additional \$838.11.

5. Petitioner is entitled to have her grievance appeal of January 17, 2008 accepted and completely reviewed by Respondent. Petitioner also is entitled to a full and fair explanation of how Respondent arrives at the amounts it proposes to pay on her behalf concerning physician services. Although some evidence regarding how the Plan determines its allowable charges was produced at the hearing of this matter, such evidence was conclusory, incomplete, and confusing. No satisfactory explanation was given regarding a discount formula which BCBS may apply to some or all of these charges after or during the process of determining the usual, customary, and reasonable amounts to be paid on Petitioner's behalf.

#### **DECISION**

Respondent's decisions in applying and following its grievance appeal procedures with respect to charges for hospital services provided by MSK Hospital to Petitioner in August, 2007 are supported by the evidence and are **AFFIRMED**. Respondent's decisions in applying and following its grievance appeal procedures with respect to charges for professional services rendered to Petitioner beginning in August, 2007 in connection with her surgery at MSK Hospital in August, 2007, referencing only the charges stated on the November 02, 2007 EOB, are not supported by the evidence and are **REVERSED**.

Respondent's decisions and actions wherein it failed to notify Petitioner that MSK Hospital had issued a letter declaring itself to be a DRG exempt facility and willing to reduce its charges from \$30,790.12 to \$9434 resulting in an opportunity for Petitioner to resolve the outstanding balance for an additional \$838.11 represents a failure by Respondent to act in a fair and reasonable manner toward its insured and is arbitrary and capricious. In the interest of fair dealing with its members, Respondent should pay Petitioner the amount she expended in attorney's fees and costs associated with discovering the existence of this letter plus any overpayments made by petitioner toward professional services in this matter.

#### **ORDER**

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G. S. 150b-36(b) (b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision to the Administrative Law Judge and to present written arguments to those in the agency who make the final decision. N. C. Gen. Stat. §150B-36(a).

The agency that will make the final decision in this contested case is the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan.

This the 30 day of October, 2008.

By:

  
BEECHER R. GRAY  
Administrative Law Judge

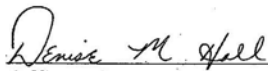


A copy of the foregoing was mailed to:

F Murphy Averitt III  
Marshall Williams & Gorham LLP  
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Wilmington, NC 28402-2088  
ATTORNEY FOR PETITIONER

Robert D. Croom  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 31st day of October, 2008.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100

FILED

STATE OF NORTH CAROLINA

COUNTY OF MACON

ELIZABETH FRAZIER,

Petitioner,

v.

WESTERN CAROLINA UNIVERSITY,

Respondent.

2008 DEC -9 AM 7:50

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
NO. 08 OSP 0246

OFFICE OF  
ADMINISTRATIVE HEARINGS

DECISION

The above-captioned case was heard before the Honorable Selina M. Brooks, Administrative Law Judge, on 2 September 2008, in Asheville, North Carolina.

APPEARANCES

**FOR RESPONDENT:** Katherine A. Murphy  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, N.C. 27602

**FOR PETITIONER:** Elizabeth Frazier, *pro se*  
19 Bees Hive Dr.  
Franklin, N.C. 28734

EXHIBITS

Admitted for Respondent:

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	4/16/07	Memorandum from Dr. Kyle Carter to Ms. Elizabeth Frazier
2	6/06/07	Memorandum from Dr. Kyle Carter to Ms. Elizabeth Frazier
3	N/A	University Policy #77

4	N/A	University Policy #78
5	5/22/07	Memorandum from Elizabeth Frazier to Dr. Kyle Carter

**Admitted for Petitioner:**

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	N/A	Diagram
2	12/19/07	Handwritten Note to Elizabeth from Gibbs
3	various	Assorted Documents
4	4/11/07	"Graduate School and Research"

**WITNESSES**

**Called by Respondent:**

Dr. Kyle Ray Carter  
 Dr. Angela Johnson Grube  
 Michelle Hargis  
 Wanda Ashe  
 Heyward Gibbs Knotts  
 Karen Nicholson  
 Kathy Wong

**Called by Petitioner:**

Kristie Coggins  
 Elizabeth Frazier

**ISSUES**

1. Whether the counseling memorandum, dated April 16, 2007, from Dr. Carter to Petitioner, was inaccurate or misleading.
2. Whether Respondent denied Petitioner her due process rights by failing to provide her with the procedures in Respondent's Policy No. 78 "Disciplinary Policy and Procedures for SPA Employees".
3. Whether Respondent denied Petitioner her due process rights by denying her grievance under Respondent's Policy No. 77 "Grievance Policy and Procedures for SPA Employees" at each stage of the proceeding without giving Petitioner a reason in

writing for why the counseling memorandum was written or presenting Petitioner with its evidence.

4. Whether Respondent has violated Petitioner's due process rights by not treating a counseling memorandum in the same manner as a warning letter for the purpose of removing it from her personnel file.

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**ON THE BASIS** of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

**FINDINGS OF FACT**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. Petitioner Elizabeth Frazier is a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina ("the State Personnel Act").
3. Respondent Western Carolina University ("WCU") is subject to Chapter 126 and is Petitioner's employer.
4. During the relevant time period, Petitioner worked as the Student Services Manager in the Graduate School at WCU.
5. In late 2006 or early 2007, the Provost of WCU, Dr. Carter, was made aware of some management problems with the dean of the Graduate School and requested an investigation.
6. As part of the investigation, employees in the Graduate School were interviewed. During these interviews, among other issues raised, employees complained that Ms. Frazier disrupted the workplace by often talking in a loud voice that interfered with coworkers' ability to work, spreading rumors and gossip, and behaving in an unprofessional manner.
7. The investigation findings, including the issues that had arisen concerning Ms. Frazier's conduct, were submitted to Dr. Carter.

8. On April 13, 2007, Dr. Carter held a meeting with Ms. Frazier and other employees to explain his expectations of how these employees should conduct themselves in the future. A written memorandum, dated April 16, 2007, was sent to Ms. Frazier and to each of the others.
9. The memorandum Ms. Frazier received from Dr. Carter ("counseling memorandum") stated in relevant part: "I expect the behavioral patterns of talking about co-workers, aligning co-workers against other co-workers, adding to negative conversations, and creating disruption in the workplace to stop immediately." Resp. Ex. 1
10. Petitioner filed a grievance in response to the counseling memorandum by sending a memorandum to Dr. Clark, dated May 22, 2007. Resp. Ex. 5
11. In her memorandum, Ms. Frazier describes in detail various events, providing dates, times and conversations she had with her coworkers.
12. As described by Ms. Frazier, her participation in these events are properly characterized as: gossiping about coworkers; spreading rumors; and encouraging divisiveness.
13. Pursuant to University Policy No. 77 "Grievance Policy and Procedures for SPA Employees", following inaction on her grievance by her supervisors, Ms. Frazier's grievance went to Step Two, which was before Dr. Carter, the supervisor who was next in the chain of command. Resp. Ex. 3
14. Regarding Step Two, Policy No. 77 provides in relevant part:

The supervisor may request documentation or other written explanation from the employee and the immediate supervisor. The supervisor may hold whatever discussions he/she deems desirable. The supervisor may schedule a private meeting with the employee to discuss the grievance. . . .

Following a review of all relevant information, the supervisor will issue a Step Two decision. The decision shall be in writing . . . .

Resp. Ex. 3, at p. 4 (emphasis added)
15. Dr. Carter reviewed Ms. Frazier's appeal and, by memorandum dated June 6, 2007, Dr. Carter informed Ms. Frazier of his decision not to remove the counseling memorandum from her personnel file. Resp. Ex. 2
16. Following Dr. Carter's decision, Ms. Frazier's grievance was considered by a Grievance Committee, which is Step Three of Policy No. 77. Resp. Ex. 3

17. Regarding Step Three, Policy No. 77 provides in relevant part as follows:

If the grievance does not arise from dismissal, suspension, or reduction in pay or position, the format below will be followed.

The proceedings shall concern whether the employee, as specified in the request for appeal, has established a factual and legal basis for the grievance.

Formal rules of evidence shall not apply; however, the committee has the authority to reject evidence, which is repetitive or has no relevance to the case. The employee or supervisor may not confront or cross-examine each other unless the committee requests that they do so. The employee and supervisor may not remain in the room throughout the proceedings unless the committee requires their presence. . . .

The employee presents, through documentation or oral testimony, the basis of the grievance. The supervisor may then present documentation or oral testimony in response. Rebuttal or additional evidence may be allowed or requested by the committee. . . .

Resp. Ex. 3, at p. 6

18. The Grievance Committee upheld the decision of Dr. Carter.
19. At each step of the grievance process, Respondent refused to remove the counseling memorandum from Ms. Frazier's personnel file because the counseling memorandum was determined not to be "inaccurate or misleading" and therefore not subject to Policy No. 77.
20. At each step of the grievance process, Respondent refused to remove the counseling memorandum from Ms. Frazier's personnel file because the counseling memorandum was not a warning letter and therefore not subject to Policy No. 78.
21. The counseling memorandum was not a "warning letter" as defined by Policy No. 78.
22. A warning letter expires after a period of time and is automatically removed from an employee's personnel file upon expiration of that period of time pursuant to Respondent's policy manual.
23. Respondent's policy manual does not define counseling memorandum, and is silent concerning an expiration period or removal from a personnel file.
24. A counseling memorandum remains in a personnel file indefinitely unless it contains

“inaccurate or misleading information” as stated in Policy No. 77. There is no policy or procedure available for the removal of a counseling memorandum that is not “inaccurate or misleading”.

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. With regard to the first issue, Petitioner failed to meet her burden to show that the counseling memorandum was inaccurate or misleading.
3. With regard to the second issue, because the counseling memorandum was not a disciplinary action pursuant to Respondent’s Policy No. 78; therefore, Respondent did not violate Petitioner’s due process rights by not following the procedures in its Policy No. 78.
4. With regard to the third issue, Respondent’s Policy No. 77 does not require that Respondent give Petitioner a reason in writing for the action being grieved; therefore, Respondent did not violate Petitioner’s due process rights by failing to give Petitioner a reason in writing for why the counseling memorandum was written.
5. With regard to the third issue, Respondent’s Policy No. 77 does not require that Respondent present Petitioner with evidence; therefore, Respondent did not violate Petitioner’s due process rights by failing to present evidence to her during the grievance process.
6. With regard to the fourth issue, Respondent has violated Petitioner’s due process rights by not treating a counseling memorandum in the same manner as a warning letter for the purpose of removing it from her personnel file.

**ON THE BASIS** of the above Conclusions of Law, the undersigned issues the following:

**DECISION**

It is hereby decided that Petitioner has not proved that the counseling memorandum dated April 16, 2007, from Dr. Carter to Petitioner, was inaccurate or misleading.

It is also hereby decided that Respondent denied Petitioner due process by not treating a counseling memorandum in the same manner as a warning letter for the purpose of removing it from her personnel file.

**ORDER**

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. § 150B-36(b).

**NOTICE**

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to Decision and to present written arguments to those in the agency who will consider this Decision. N.C.G.S. § 150B-36(a).

The agency is required by N.C.G.S. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 9th day of December, 2008.



Hon. Selina M. Brooks  
Administrative Law Judge

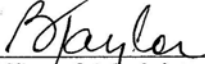


A copy of the foregoing was sent to:

Elizabeth Frazier  
19 Bees Hive Drive  
Franklin, NC 28734  
PETITIONER

Katherine A. Murphy  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602-0629  
ATTORNEY FOR RESPONDENT

This the 9<sup>th</sup> day of December, 2008.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, N.C. 27699-6714  
Phone: 919-431-3000  
Fax: 919-431-3100