NORTH CAROLINA REGISTER

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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

Joint Legislative Administrative Procedure Oversight Committee
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300 North Salisbury Street — (919) 733-2578
Raleigh, North Carolina 27611 — (919) 715-5460 FAX

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NORTH CAROLINA REGISTER
Publication Schedule for January 2010 – December 2010

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:	270th day from publication in the Register
24:13	01/04/10	12/09/09	01/19/10	03/05/10	03/22/10	05/01/10	05/12/10	10/01/10
24:14	01/15/10	12/22/09	01/30/10	03/16/10	03/22/10	05/01/10	05/12/10	10/12/10
24:15	02/01/10	01/08/10	02/16/10	04/05/10	04/20/10	06/01/10	01/26/11	10/29/10
24:16	02/15/10	01/25/10	03/02/10	04/16/10	04/20/10	06/01/10	01/26/11	11/12/10
24:17	03/01/10	02/08/10	03/16/10	04/30/10	05/20/10	07/01/10	01/26/11	11/26109
24:18	03/15/10	02/22/10	03/30/10	05/14/10	05/20/10	07/01/10	01/26/11	12/10/10
24:19	04/01/10	03/11/10	04/16/10	06/01/10	06/21/10	08/01/10	01/26/11	12/27/10
24:20	04/15/10	03/24/10	04/30/10	06/14/10	06/21/10	08/01/10	01/26/11	01/10/11
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24:22	05/17/10	04/26/10	06/01/10	07/16/10	07/20/10	09/01/10	01/26/11	02/11/11
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25:04	08/16/10	07/26/10	08/31/10	10/15/10	10/20/10	12/01/10	01/26/11	05/13/11
25:05	09/01/10	08/11/10	09/16/10	11/01/10	11/22/10	01/01/11	01/26/11	05/29/11
25:06	09/15/10	08/24/10	09/30/10	11/15/10	11/22/10	01/01/11	01/26/11	06/12/11
25:07	10/01/10	09/10/10	10/16/10	11/30/10	12/20/10	02/01/11	05/2012	06/28/11
25:08	10/15/10	09/24/10	10/30/10	12/14/10	12/20/10	02/01/11	05/2012	07/12/11
25:09	11/01/10	10/11/10	11/16/10	01/03/11	01/20/11	03/01/11	05/2012	07/29/11
25:10	11/15/10	10/22/10	11/30/10	01/14/11	01/20/11	03/01/11	05/2012	08/12/11
25:11	12/01/10	11/05/10	12/16/10	01/31/11	02/21/11	04/01/11	05/2012	08/28/11
25:12	12/15/10	11/22/10	12/30/10	02/14/11	02/21/11	04/01/11	05/2012	09/11/11

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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.

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State of North Carolina

BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 64

CREATION OF THE GOVERNOR'S eLEARNING COMMISSION

WHEREAS, "eLearning" refers to the delivery of instruction and the management of the teacher-student relationship through electronic means; and

WHEREAS, eLearning, if properly developed and managed, can provide efficient, high quality, convenient and fair access to a free public education for students of all ages throughout the State; and

WHEREAS, in 2005 the State Board of Education Chair and the Business Education Training Alliance Chair informally established an eLearning Commission; and

WHEREAS, that informal commission has made significant progress in implementing eLearning for North Carolina's citizens; and

WHEREAS, it is now time to formally create the eLearning Commission and to define its goals and responsibilities in light of the experience of the original, informal commission.

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

Section 1. Establishment

The North Carolina eLearning Commission (hereinafter the "Commission") is hereby established.

Section 2. Membership

The Commission shall be composed of up to 30 members appointed by the Governor to serve at her pleasure for terms of two years. Commission members may be reappointed for successive terms. The persons appointed to the Commission may include representatives from educational organizations and institutions, information technology providers, nonprofits, business entities, and state and local government agencies. The Governor shall appoint a Chair and two Vice-Chairs of the Commission from the membership of the Commission.

Section 3. Duties of the Commission

The Commission shall have the following duties:

a. Make recommendations to the Governor regarding (1) the development of a unified data information system for all North Carolina students and learners to provide a basis for improving their educational, economic and other opportunities; (2) the improvement of network services and learning options for all citizens through the eLearning portal and other virtual opportunities; (3) the identification of improvements in technology and access to technology that may allow eLearning to be provided to citizens more efficiently at reduced costs; and (4) the revision of existing state policies, rules, or regulations that may inhibit North Carolina from maximizing eLearning's potential for students and learners of all ages (PK-20) as outlined in the Governor's Career and College-*Ready, Set, Go!* Initiative.

b. Develop state, national and global partnerships and collaborations in order to enhance eLearning opportunities for North Carolina's citizens.

c. Provide advice to the Governor regarding other issues requested by the Governor.

Section 4. Meetings

The Commission shall meet quarterly and as often as called by the Chair to carry out its work. A simple majority of the Commission shall constitute a quorum for the purpose of transacting the business of the Commission.

Section 5. Administration

The Office of the Governor may provide staff for the Commission as necessary and as determined by the Governor, upon the request of the Commission.

Section 6. Budget

The Office of the Governor may use up to $350,000 as designated in Section 7.9 (b) of Senate Bill 897, Session Law 2010-31, to support the work of the Commission. The Commission is encouraged to seek and receive additional public and private funding to support its work.

Section 7. Effect and Duration

This Executive Order is effective immediately. It supersedes and replaces all other Executive Orders on this subject. It shall remain in effect until September 23, 2014, pursuant to N.C. Gen. Stat. § 147-16.2, or 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 24th day of September in the year of our Lord two thousand and ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

Beverly Eaves Perdue
Governor

ATTEST:

Elaine F. Marshall
Secretary of State By and through Rodney S. Maddox Chief Deputy Secretary

North Carolina Department of Health and Human Services
Division of Health Service Regulation
Office of the Director
2701 Mail Service Center • Raleigh, North Carolina 27699-2701
http://www.ncdhhs.gov/dhsr/

Beverly Eaves Perdue, Governor
Lanier M. Cansler, Secretary

Drexdal Pratt, Director
Phone: 919-855-3750
Fax: 919-733-2757

September 15, 2010

Decision of the Department of Health and Human Services Regarding Its Review of the Biennial COPA Report of Mission Health System, Inc.

Pursuant to G.S. § 131E-192.9, Mission Health System, Inc. ("Mission") is required to submit a biennial report regarding the Certificate of Public Advantage ("COPA") under which it operates. Also under that statute, the Department of Health and Human Services ("DHHS") and the Department of Justice ("DOJ") review the biennial report, any public comments and any information provided in response to a request by either agency. Unless DOJ objects, DHHS may continue the existing COPA or amend it.

Mission submitted a biennial report encompassing its fiscal year ending September 30, 2009, and received by the Division of Health Service Regulation on March 9, 2010. Public notice was provided in the North Carolina Register, comments were received, and information has been received in response to requests by DHHS and DOJ. In the course of receiving public comments, DHHS and DOJ met at length with one commenter, Fletcher Hospital, Inc., d/b/a Park Ridge Health ("Park Ridge"), and received several rounds of documentary materials from Park Ridge and Mission.

DHHS concludes that, with certain amendments, the advantages of the COPA continue to outweigh its disadvantages, and that there are issues raised by both Mission and public comments about which DHHS and DOJ desire expert assistance to assure sound decision making.

Issues Raised by Mission

Mission seeks to amend the COPA's limits on employment of physicians in Buncombe and Madison Counties from 20 percent to 40 percent. Mission states that employment of physicians is necessary to assure the continued presence of needed physicians. Park Ridge seeks to restrict Mission's employment of physicians not only in Buncombe and Madison Counties, but also in other Western North Carolina counties. Park Ridge states that employment of physicians is a means of generating hospital referrals, and that Mission should be restricted in this form of competition.

DHHS declines to adopt either proposal. However, it will amend the COPA to require Mission to pay the costs and expenses for engaging one or more experts to assist in assessing the effects of hospital employment of physicians in Western North Carolina, and in analyzing such other issues DHHS and/or DOJ direct to be reviewed.

Location: 701 Barbour Drive ■ Dorothea Dix Hospital Campus ■ Raleigh, N.C. 27603
An Equal Opportunity / Affirmative Action Employer

Issues Raised by Public Comments

The principal commenter has been Park Ridge, which is located south of Mission in Henderson County near the Buncombe County line. Overall, Park Ridge accuses Mission of "predation," and seeks various amendments to the COPA to prevent or constrain that "predation." DHHS finds that Park Ridge has not shown that Mission has engaged in predatory conduct as that term is used in competition law, and therefore the rationale for many of Park Ridge's proposals is weak or lacking.

1. One amendment Park Ridge requests is a two-year moratorium precluding Mission from joint venturing with or developing new facilities in Henderson or Transylvania Counties or within 5 miles of either county line. Park Ridge's concern focuses on a possible joint venture between Mission and Pardee Hospital (located in Henderson County) to build and operate a medical services facility that would physically straddle the Buncombe/Henderson County line. At this point that possible joint venture has not been defined or agreed upon by Mission and Pardee.

DHHS declines to adopt this amendment. Many of the possible facilities and services in the possible joint venture are subject to prior Certificate of Need review and approval. DHHS finds that it is inappropriate to supplant the CON process, particularly if there is a shown need for the possible medical facilities or services, and further that an increase in Mission's ability to provide medical services in the vicinity of Park Ridge is not in itself anti-competitive. Indeed, it would appear to be pro-competitive by increasing competition.

2. Park Ridge requests an amendment to the COPA to require Mission to pay the agencies' costs and expenses for engaging an expert to assist them in assessing Mission's compliance with the COPA.

DHHS concurs with that request as noted above.

3. Park Ridge requests an amendment requiring Mission to annually provide all written strategic plans to DHHS and DOJ. DHHS declines this request because it is anticompetitive – G.S. § 131E-192.9 provides that such materials would be public records and therefore available to Mission's competitors.

4. Park Ridge seeks an amendment to the COPA that would preclude Mission from entering into any managed care contracts unless those terms are offered by payors to all hospitals in Mission's service area. Park Ridge offers this proposal on the premise that it is needed "[i]f Mission is allowed to continue its predatory behavior through hospital affiliations." However, Park Ridge has not shown that Mission's affiliation with other hospitals is predatory, otherwise anticompetitive, or harmful to the public interest.

This proposal also raises many difficult issues. Mission cannot control what managed care payors offer to other hospitals. To the extent it seeks to or does so, it could become subject to liability for antitrust violations or for tortious interference with the other hospitals' contracts with managed care payors. This proposal also has the potential to blunt Mission's ability to compete for managed care payors' business.

5. Park Ridge requests to extend the COPA's current prohibition on employing or entering into exclusive contracts with more than 20 percent of physicians in Buncombe and Madison Counties, to also cover Henderson, Haywood, McDowell, Rutherford, Transylvania and Yancey Counties.

DHHS and DOJ do not have sufficient information to determine if there is a competition problem in those counties relating to hospital employment of physicians, and Park Ridge has not

demonstrated one. However, as noted above, DHHS is amending the COPA to require Mission to pay the costs and expenses for engaging an expert to assist in assessing this issue, among others.

6. Park Ridge seeks an amendment further restricting the COPA's limits on Mission's ability to enter into exclusive contracts with physicians. Park Ridge indicates that each such contract "locks up" physician referrals to Mission. Park Ridge also suggests that exclusive contracts between Mission and physicians have been approved "in some process outside the COPA." That suggestion lacks a factual basis.

DHHS declines to adopt Park Ridge's proposal because it misapprehends the nature of Mission's exclusive contracts with physicians: those contracts are exclusive only in one direction, awarding the physicians certain rights at Mission, but not precluding them from practicing at, or referring to, other hospitals.

7. Park Ridge requests an amendment requiring that Mission's health plan, providing health care coverage as a benefit to its employees, have a payment and co-pay structure that are the same for all "other hospitals."

Mission's health plan for its employees offers coverage with a 10 percent co-pay for services provided at Mission or any hospital controlled by it; a 30 percent co-pay at "in-network" hospitals with which Mission has negotiated a discount; and a 50 percent co-pay at "out-of-network" hospitals.

Park Ridge has not demonstrated that this type of coverage framework, that is frequently if not universally used, is anticompetitive or in any way harmful to those consumers of health care services.

8. Park Ridge's last request is for an amendment that would require Mission to include in its periodic reports county-specific data on outpatient origin, utilization and market share percentages for certain outpatient services in a 17-county area in western North Carolina.

DHHS does not believe that this request is feasible. To assemble this data, Mission would have to gather patient origin and utilization information from all relevant outpatient service providers in the 17-county area. The other providers would be under no compulsion to provide their data, and they would appear to have an interest in not providing their customer information to Mission. In the absence of complete data, market shares could not be accurately calculated for any provider. DHHS notes that it and DOJ have requested Mission to provide data regarding the proportion of its revenues from in-patient and out-patient services, and they plan to monitor this metric.

With the amendments and actions outlined in this decision, and in the absence of an objection from DOJ, DHHS determines that the COPA should continue in full force and effect.

This the 15th day of September, 2010.

Department of Health and Human Services

Drexdal Pratt, Director
Division of Health Service Regulation

DEPARTMENT OF ENVIRONMENTAL AND NATURAL RESOURCES

DIVISION OF WASTE MANAGEMENT

NOTICE OF EXTENDED COMMENT PERIOD

Notice is hereby given that the end of the comment period for the proposed rules 15A NCAC 13B .0101, .0563, .1604, .1626, .1632-.1635, .1637 originally published in the N.C. Register on August 16, 2010 in Volume 25 Issue 4 Page 465 will be extended until November 1, 2010.

Procedure by which a person can object to the agency on a proposed rule: *Persons may submit written objections to the proposed rule by contacting: Ellen Lorscheider, DENR Division of Waste Management, Solid Waste Section, 1646 Mail Service Center, Raleigh, NC 27699-1646, fax (919)733-4810; or email ellen.lorscheider@ncdenr.gov.*

Comments may be submitted to: *Ellen Lorscheider, Planning and Programs Branch Head, 1646 Mail Service Center, Raleigh, NC 27699-1646, phone (919)508-8400, fax (919)733-4810, email ellen.lorscheider@ncdenr.gov*

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 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Care Commission intends to adopt the rules cited as 10A NCAC 13P.0217-.0220.*

Proposed Effective Date: *April 1, 2011*

Public Hearing:
Date: *December 7, 2010*
Time: *10:00 a.m.*
Location: *NC Division of Health Service Regulation, Dorothea Dix Campus, Council Building, Room 201, 701 Barbour Drive, Raleigh, NC 27603*

Reason for Proposed Action: *The current EMS rules do not allow for the permitting of medical ambulance/evacuation bus vehicles nor pediatric specialty care transport ambulances. The creation of these vehicle classifications are necessary to accommodate a need expressed by NC EMS providers to better manage the transportation of patients specific to these new vehicle types. In addition, the Medical Care Commission is establishing the staffing levels appropriate for both vehicle types through their statutory authority defined in General Statute 131E-158. Both the creation of the vehicle classifications as well as the staffing requirements specific to these vehicles is an essential tool for the Department in order to continue meeting the regulatory needs of a well designed state-wide EMS system.*

Procedure by which a person can object to the agency on a proposed rule: *An individual may object to the agency on the proposed rules by submitting written comments on the proposed rules. An individual may also object by attending the public hearing and personally voicing their objections during that time.*

Comments may be submitted to: *Erin Glendening, Division of Health Service Regulation, 2701 Mail Service Center, Raleigh, NC 27699-2701; fax (919) 715-4413; email DHSR.RulesCoordinator@dhhs.nc.gov*

Comment period ends: *December 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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: A copy of the fiscal note can be obtained from the agency.
☒ **State**
☒ **Local**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☐ **None**

Fiscal Note posted at
http://www.osbm.state.nc.us/files/pdf_files/DHHS09232010.pdf

CHAPTER 13 - NC MEDICAL CARE COMMISSION

SUBCHAPTER 13P - EMERGENCY MEDICAL SERVICES AND TRAUMA RULES

SECTION .0200 - EMS SYSTEMS

10A NCAC 13P .0217 MEDICAL AMBULANCE/EVACUATION BUS: VEHICLE AND EQUIPMENT REQUIREMENTS

(a) A Medical Ambulance/Evacuation bus is a multiple passenger vehicle configured and medically equipped for emergency and non-emergency transport of at least three stretcher bound patients with traumatic or medical conditions.
(b) To be permitted as a Medical Ambulance/Evacuation Bus, a vehicle shall have:
(1) a non-light penetrating sliding curtain installed behind the driver from floor-to-ceiling and from side-to-side to keep all light from reaching the driver's area during vehicle operation at night;
(2) patient care equipment and supplies as defined in the "North Carolina College of Emergency Physicians: Standards for Medical Oversight and Data Collection," which is incorporated by reference, including subsequent amendments and editions. This document is available from the OEMS, 2707 Mail Service Center, Raleigh, North Carolina 27699-2707, at no cost. The equipment and supplies shall be clean, in working order, and secured in the vehicle;

(3) five pound fire extinguishers mounted in a quick release bracket located inside the patient compartment at the front and rear of the vehicle that are either a dry chemical or all-purpose type and has a pressure gauge; and
(4) monitor alarms installed inside the patient compartment at the front and rear of the vehicle to warn of unsafe buildup of carbon monoxide;
(5) the name of the EMS Provider permanently displayed on each side of the vehicle;
(6) reflective tape affixed to the vehicle such that there is reflectivity on all sides of the vehicle;
(7) emergency warning lights and audible warning devices mounted on the vehicle as required by G.S. 20-125 in addition to those required by Federal Motor Vehicle Safety Standards. All warning devices shall function properly;
(8) no structural or functional defects that may adversely affect the patient, the EMS personnel, or the safe operation of the vehicle;
(9) an operational two-way radio that:
(A) is mounted to the ambulance and installed for safe operation and controlled by the ambulance driver;
(B) has sufficient range, radio frequencies, and capabilities to establish and maintain two-way voice radio communication from within the defined service area of the EMS System to the emergency communications center or PSAP designated to direct or dispatch the deployment of the ambulance;
(C) is capable of establishing two-way voice radio communication from within the defined service area to the emergency department of the hospital(s) where patients are routinely transported and to facilities that provide on-line medical direction to EMS personnel;
(D) is equipped with a radio control device mounted in the patient compartment capable of operation by the patient attendant to receive on-line medical direction; and
(E) is licensed or authorized by the FCC;
(10) permanently installed heating and air conditioning systems; and
(11) a copy of the EMS System patient care treatment protocols.

(c) A Medical Ambulance/Evacuation Bus shall not use a radiotelephone device such as a cellular telephone as the only source of two-way radio voice communication.

(d) Communication instruments or devices such as data radio, facsimile, computer, or telemetry radio shall be in addition to the mission dedicated dispatch radio and shall function independently from the mission dedicated radio.

(e) The EMS System medical director shall designate the combination of medical equipment as required in Subparagraph (b)(2) of this Rule that is carried on a mission based on anticipated patient care needs.

Authority G.S. 131E-157(a); 143-508(d)(8).

10A NCAC 13P .0218 PEDIATRIC SPECIALTY CARE GROUND AMBULANCE: VEHICLE AND EQUIPMENT REQUIREMENTS

(a) A Pediatric Specialty Care Ground Ambulance is an ambulance used solely to transport patients 18 years old or younger with traumatic or medical conditions or for whom the need for specialty care or emergency or non-emergency medical care is anticipated during an inter-facility or discharged patient transport.

(b) To be permitted as a Pediatric Specialty Care Ground Ambulance, a vehicle shall have:
(1) a patient compartment that meets the following interior dimensions:
(A) the length, measured on the floor from the back of the driver's compartment, driver's seat or partition to the inside edge of the rear loading doors, is at least 102 inches; and
(B) the height is at least 48 inches over the patient area, measured from the approximate center of the floor, exclusive of cabinets or equipment.
(2) patient care equipment and supplies as defined in the "North Carolina College of Emergency Physicians: Standards for Medical Oversight and Data Collection," which is incorporated by reference, including subsequent amendments and editions. This document is available from the OEMS, 2707 Mail Service Center, Raleigh, North Carolina 27699-2707, at no cost. The equipment and supplies shall be clean, in working order, and secured in the vehicle;
(3) one fire extinguisher mounted in a quick release bracket that is either a dry chemical or all-purpose type and has a pressure gauge;
(4) the name of the EMS Provider permanently displayed on each side of the vehicle;
(5) reflective tape affixed to the vehicle such that there is reflectivity on all sides of the vehicle;
(6) emergency warning lights and audible warning devices mounted on the vehicle as required by G.S. 20-125 in addition to those required by Federal Motor Vehicle Safety Standards. All warning devices shall function properly;
(7) no structural or functional defects that may adversely affect the patient, the EMS personnel, or the safe operation of the vehicle;
(8) an operational two-way radio that:
(A) is mounted to the ambulance and installed for safe operation and controlled by the ambulance driver;

(B) has sufficient range, radio frequencies, and capabilities to establish and maintain two-way voice radio communication from within the defined service area of the EMS System to the emergency communications center or PSAP designated to direct or dispatch the deployment of the ambulance;

(C) is capable of establishing two-way voice radio communication from within the defined service area to the emergency department of the hospital(s) where patients are routinely transported and to facilities that provide on-line medical direction to EMS personnel;

(D) is equipped with a radio control device mounted in the patient compartment capable of operation by the patient attendant to receive on-line medical direction; and

(E) is licensed or authorized by the FCC;

(9) permanently installed heating and air conditioning systems; and

(10) a copy of the EMS System patient care treatment protocols.

(c) Pediatric Specialty Care Ground ambulances shall not use a radiotelephone device such as a cellular telephone as the only source of two-way radio voice communication.

(d) Communication instruments or devices such as data radio, facsimile, computer, or telemetry radio shall be in addition to the mission dedicated dispatch radio and shall function independently from the mission dedicated radio.

(e) The Specialty Care Transport Program medical director shall designate the combination of medical equipment as required in Subparagraph (b)(2) of this Rule that is carried on a mission based on anticipated patient care needs.

Authority G.S. 131E-157(a); 143-508(d)(8).

10A NCAC 13P .0219 STAFFING FOR MEDICAL AMBULANCE/EVACUATION BUS VEHICLES

Medical Ambulance/Evacuation Bus Vehicles are exempt from the requirements of G.S. 131E-158(a). The EMS System Medical Director shall determine the combination and number of EMT, EMT-Intermediate, or EMT-Paramedic personnel that are sufficient to manage the anticipated number and severity of injury or illness of the patients transported in the Medical Ambulance/Evacuation Bus vehicle.

Authority G.S. 131E-158(b).

10A NCAC 13P .0220 STAFFING FOR PEDIATRIC SPECIALTY CARE GROUND AMBULANCES

Pediatric Specialty Care Ground Ambulances operated within the approved Specialty Care Transport Program dedicated for inter-facility transport of non-emergent, emergent, and critically ill or injured or discharged Neonatal and Pediatric patients are exempt from the requirements of G.S. 131E-158(a). The Specialty Care Program Medical Director shall determine the staffing that is sufficient to manage the severity of illness or injury of the patients transported in the Pediatric Specialty Care Ground Ambulance.

Authority G.S. 131E-158(b).

TITLE 11 – DEPARTMENT OF INSURANCE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Home Inspector Licensure Board intends to amend the rules cited as 11 NCAC 08 .1302, .1319, .1332, .1336.*

Proposed Effective Date: *February 1, 2011*

Public Hearing:
Date: *November 19, 2010*
Time: *9:00 a.m.*
Location: *Dare County Administrative Annex, 954 Marshall C Collins Drive, Rm 168, Manteo, NC*

Reason for Proposed Action:
***11 NCAC 08 .1302** – This change increases continuing education (CE) requirements from 12 to 16 hours for all licensees in response to SL 2009-509 requirements for all existing licensees and provides for an additional 4 hours CE needed for individuals newly licensed on or after 10/1/2011 that have not attended the 48 hour comprehensive CE program by requiring a Board-approved mandatory course.*
***11 NCAC 08 .1319, .1332, .1336** – Support e-commerce initiatives to all payments via electronic funds in addition to check and money order for sponsor and licensee convenience.*

Procedure by which a person can object to the agency on a proposed rule: *The Home Inspectors Licensure Board will accept written objections to these rules until the expiration of the comment period on December 14, 2010.*

Comments may be submitted to: *Karen E. Waddell, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919)733-4529, fax (919)733-6495, email karen.waddell@ncdoi.gov*

Comment period ends: *December 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

CHAPTER 08 - ENGINEERING AND BUILDING CODES DIVISION

SECTION .1300 - HOME INSPECTOR CONTINUING EDUCATION

11 NCAC 08 .1302 CONTINUING EDUCATION REQUIRED FOR RENEWAL OF ACTIVE LICENSE

(a) In order to renew an active home inspector or associate home inspector license for license renewal periods beginning on or after ~~October 1, 1999,~~October 1, 2011, the licensee shall have completed, during the ~~previous~~ license renewal period, ~~12 credit hours.~~16 credit hours, except as described in Paragraph (b) of this Rule.

(b) In order to renew an active home inspector license for license renewal periods beginning on or after October 1, 2011, home inspectors who are newly licensed on or after October 1, 2011, who have not completed the pre-licensing education program established pursuant to G.S. 143-151.51(1)(5)(a), or its equivalent pursuant to 11 NCAC 08 .1004(c), must complete 20 hours of continuing education per year for the first three years of licensure that include the following:

(1) Four hours of a Board approved mandatory course;
(2) Four hours of the update course component described in 11 NCAC 08 .1309; and
(3) 12 hours of Board approved elective courses.

~~(b)~~(c) A licensee who is ~~initially~~newly licensed on or after June 1 is exempt from this Section for the ~~following license~~initial license period.

Authority G.S. 143-151.49; 143-151.51; 143-151.55; 143-151.64.

11 NCAC 08 .1319 APPLICATION FOR ORIGINAL APPROVAL OF AN ELECTIVE COURSE

A person seeking original approval of a proposed elective course shall make application on a form prescribed by the Board. The course shall be submitted to the Board for approval no less than 45 days before the course presentation date. The Board shall not accept an application for original approval between July 1 and September 30. This restriction shall not apply when an applicant is seeking approval to conduct a course for which another sponsor has obtained approval. The applicant shall submit a nonrefundable fee of one hundred fifty dollars ($150.00) per course ~~which may be in the form of a check or money order payable~~paid to the Home Inspector Licensure Board. The application shall be accompanied by a copy of the course plan or instructor's guide for the course and a copy of materials that will be provided to students. An applicant that is not a resident of North Carolina shall also file with the application a consent to service of process and pleadings.

Authority G.S. 143-151.49(13); 143-151.64.

11 NCAC 08 .1332 PER STUDENT FEE

Following completion of any approved continuing education update or elective course, the course sponsor shall submit to the Board, along with the roster and the items required to be submitted by Rule .1331 of this Section, a fee in the amount of five dollars ($5.00) per credit hour for each licensee who completes the course according to the criteria in Rule .1305 of this Section. Fees ~~paid by check or money order~~ shall be ~~made payable~~paid to the Home Inspector Licensure Board. The sponsor shall make a separate fee payment for each separate class session.

Authority G.S. 143-151.49(13); 143-151.64.

11 NCAC 08 .1336 RENEWAL OF COURSE AND SPONSOR APPROVAL

(a) Board approval of all continuing education elective courses and of update course sponsors expires on the next September 30 following the date of issuance. In order to assure continuous approval, renewal applications shall be accompanied by the prescribed renewal fee and filed on a form prescribed by the Board on or before July 31 of each year. Any incomplete renewal application received on or before July 30 that is not completed within 10 days after notice of the deficiency, as well as any renewal application received after July 31, shall not be accepted; and the sponsor shall file an application for original approval on or after October 1 in order to be reapproved. Applicants for renewal of approval shall satisfy the criteria for original approval. When the Board issues original course or sponsor approval with an effective date between July 1 and September 10, the deadline for submittal of renewal applications shall be September 10 of the year in which the original approval is issued.

(b) The fee for renewal of Board approval shall be seventy-five dollars ($75.00) for each elective course. Fees ~~paid by check or money order~~ shall be ~~made payable~~paid to the Home Inspector Licensure Board and are nonrefundable.

Authority G.S. 143-151.49(13); 143-151.64.

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Home Inspector Licensure Board intends to amend the rule cited as 11 NCAC 08 .1318.*

Proposed Effective Date: *October 1, 2011*

Public Hearing:
Date: *November 19, 2010*
Time: *9:00 a.m. – Manteo, NC*
Location: *Dare County Administrative Annex, 954 Marshall C Collins Drive, Rm 168, Manteo, NC*

Reason for Proposed Action: *To increase Elective Course hours in response to SL 2009-509.*

Procedure by which a person can object to the agency on a proposed rule: *The Home Inspectors Licensure Board will accept written objections to this rule until the expiration of the comment period on December 14, 2010.*

Comments may be submitted to: *Karen E. Waddell, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919)733-4529, fax (919)733-6495, email karen.waddell@ncdoi.gov*

Comment period ends: *December 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

CHAPTER 08 - ENGINEERING AND BUILDING CODES DIVISION

SECTION .1300 - HOME INSPECTOR CONTINUING EDUCATION

11 NCAC 08 .1318 ELECTIVE COURSE COMPONENT

(a) ~~Except as provided in Rule .1304 of this Section, to~~To renew a license on active status, a licensee shall complete ~~eight~~12 classroom hours of instruction in ~~two~~three or more Board-approved elective courses within one year preceding license expiration ~~and~~ in addition to satisfying the continuing education mandatory update course requirement described in Rule .1309 of this Section.

(b) Approval of an elective course requires approval of the sponsor and instructor(s) as well as the course itself. Such approval authorizes the sponsor to conduct the approved course using the instructor(s) who have been found by the Board to satisfy the instructor requirements set forth in Rule .1322 of this Section. The sponsor may conduct the course at any location as frequently as is desired during the approval period. However, the sponsor may not conduct any session of an approved course for home inspector continuing education purposes between September 10 and September 30, inclusive, of any approval period.

Authority G.S. 143-151.49(13); 143-151.64.

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commissioner of Insurance intends to adopt the rules cited as 11 NCAC 12 .1030.*

Proposed Effective Date: *February 1, 2011*

Public Hearing:
Date: *November 5, 2010*
Time: *10:00 a.m.*
Location: *430 N. Salisbury Street, Raleigh, NC 27603; 3rd floor Jim Long Conference Room*

Reason for Proposed Action: *To adopt rules establishing the Long Term Care Partnership Standards as set forth in Session Law 2010-68.*

Procedure by which a person can object to the agency on a proposed rule: *The Department of Insurance will accept written objections to this rule until the expiration of the comment period on December 14, 2010.*

Comments may be submitted to: *Karen E. Waddell, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919)733-4529, fax (919)733-6495, email karen.waddell@ncdoi.gov*

Comment period ends: *December 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

11 NCAC 12 .1030 LONG-TERM CARE PARTNERSHIP STANDARDS

(a) As used in this Rule:

(1) "Consumer Price Index" means the measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services as determined by the Bureau of Labor Statistics of the U. S. Department of Labor.

(2) "Qualified Policy" has the same meaning as in G.S. 58-55-55(6) and includes a certificate issued under a group policy as specified in G.S. 58-55-60.

(b) Inflation protections:

(1) A qualified policy that is sold to an individual who has not attained the age of 61 as of the date of purchase shall provide compound annual inflation benefit increase equal to:

(A) the greater of three percent; and

(B) the changes in the Consumer Price Index.

(2) A qualified policy that is sold to an individual who has attained the age of 61 but has not attained the age of 76 as of the date of purchase shall provide a level of inflation protection that:

(A) shall be disclosed to the applicant or enrollee at the time of application or enrollment; and

(B) meets the requirements of G.S. 58-55-60(5)(b).

(c) At the time of application or enrollment, the insurer shall seek to obtain and record the contact information of at least one person to receive notification from the insurance company of a change in policy status from qualified to non-qualified if a change to the qualified policy is proposed by the insured.

(d) The notification required in Paragraph (c) of this Rule shall be provided by the insurer to the insured or applicant and to the designated person within 30 calendar days of the day the insurer receives notification of the requested change from the insured that results in the status of a qualified policy changing to unqualified policy status.

Authority G.S. 58-2-40; 58-51-5; 58-51-95; 58-55-30; 58-55-55; 58-55-60; 58-55-65; 58-55-70.

TITLE 12 – DEPARTMENT OF JUSTICE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the N.C. Private Protective Services Board intends to amend the rules cited as 12 NCAC 07D .0201 and .0701; and repeal the rule cited as 12 NCAC 07D .1201.*

Proposed Effective Date: *February 1, 2011*

Public Hearing:
Date: *November 1, 2011*
Time: *2:00 p.m.*
Location: *1631 Midtown Place, Suite 104, Raleigh, NC 27609*

Reason for Proposed Action:
12 NCAC 07D .0201 – *The amendment to this rule is to ensure that applicants for licensure meet the qualifications for licensure and understand the provisions of G.S. 74C and the administrative rules.*
12 NCAC 07D .0701 – *The amendment to this rule is to clarify that statements must be submitted to the Director and to ensure that applicants complete the required training prior to application.*
12 NCAC 07D .1201 – *The repeal of this rule is to rescind experience requirements for a courier license.*

Procedure by which a person can object to the agency on a proposed rule: *Objections to the proposed rule change shall be submitted before the end of the comment period in writing to Terry Wright, Director, Private Protective Services Board, 1631 Midtown Place, Suite 104, Raleigh, NC 27609.*

Comments may be submitted to: *Terry Wright, Director, Private Protective Services Board, 1631 Midtown Place, Suite 104, Raleigh, NC 27609*

Comment period ends: *December 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

CHAPTER 07 - PRIVATE PROTECTIVE SERVICES

SUBCHAPTER 07D - PRIVATE PROTECTIVE SERVICES BOARD

SECTION .0200 - LICENSES: TRAINEE PERMITS

12 NCAC 07D .0201 APPLICATION FOR LICENSES AND TRAINEE PERMITS

(a) Each applicant for a license or trainee permit shall submit an original and one copy of the application to the Board. The application shall be accompanied by:

(1) two sets of classifiable fingerprints on an applicant fingerprint card;

(2) one recent head and shoulders photograph(s) of the applicant of acceptable quality for identification, one inch by one inch in size;

(3) certified statement of the result of a criminal history records search by the appropriate governmental authority housing criminal record information or clerk of superior court in each county where the applicant has resided within the immediate preceding 60 months;

(4) the applicant's non-refundable application fee; and

(5) actual cost charged to the Private Protective Services Board by the State Bureau of Investigation to cover the cost of criminal record checks performed by the State Bureau of Investigation, collected by the Private Protective Services Board.

(b) Applications for trainee permits shall be accompanied by a notarized statement on a form provided by the Board and signed by the applicant and his prospective supervisor, stating that the trainee applicant shall at all times work with and under the direct supervision of that supervisor.

(c) Private investigator trainees applying for a license must make available for inspection a log of experience on a form provided by the Board.

(d) Each applicant must provide evidence of high school graduation either by diploma, G.E.D. certificate, or other acceptable proof.

(e) Each applicant for a license shall meet personally with either a Board investigator, the Screening Committee; the Director, or a Board representative designated by the Director prior to being issued a license. The applicant shall discuss the provisions of G.S. 74C and the administrative rules during the personal meeting. The applicant shall sign a form provided by the Board indicating that they have reviewed the information with the Board's representative and that they have an understanding of G.S. 74C and the administrative rules.

Authority G.S. 74C-2; 74C-5; 74C-8.

SECTION .0700 - SECURITY GUARD REGISTRATION (UNARMED)

12 NCAC 07D .0701 APPLICATION FOR UNARMED SECURITY GUARD REGISTRATION

(a) Each employer or his designee shall submit and sign an application form for the registration of each employee to the Board. This form shall be accompanied by:

(1) two sets of classifiable fingerprints on an applicant fingerprint card;

(2) two recent head and shoulders color photographs of the applicant of acceptable quality for identification, one inch by one inch in size;

(3) certified statement of the result of a criminal records search from the appropriate governmental authority housing criminal record information or clerk of superior court in each area where the applicant has resided within the immediate preceding 48 months;

(4) the applicant's non-refundable registration fee; and

(5) actual cost charged to the Private Protective Services Board by the State Bureau of Investigation to cover the cost of criminal record checks performed by the State Bureau of Investigation, collected by the Private Protective Services Board.

(b) The employer of each applicant for registration shall give the applicant a copy of the application and shall retain a copy of the application in the individual's personnel file in the employers' office.

(c) The applicant's copy of the application shall serve as a temporary registration card which shall be carried by the applicant when he is within the scope of his employment and which shall be exhibited upon the request of any law enforcement officer or other authorized representative of the Board.

(d) A statement signed by a certified trainer that the applicant has successfully completed the training requirements of 12 NCAC 07D .0707 shall be submitted to the ~~Administrator not later than 80 days from the hiring of an unarmed security guard.~~ Director with the application.

(e) A copy of the statement specified in Paragraph (d) of this Rule shall be retained by the licensee in the individual applicant's personnel file in the employer's office.

Authority G.S. 74C-5; 74C-11; 74C-13.

SECTION .1200 - COURIER

12 NCAC 07D .1201 EXPERIENCE REQUIREMENTS FOR COURIER LICENSE

~~In addition to the requirements of 12 NCAC 07D .0200, applicants for a courier service license shall:~~

~~(1) establish to the Board's satisfaction two years experience as a manager, supervisor, administrator, or courier with a contract security or courier company or proprietary security organization performing courier functions; or~~

~~(2) establish to the Board's satisfaction two years experience as a manager, supervisor, administrator, or courier with any federal, U.S. Armed Forces, state, county, or municipal agency performing courier functions.~~

Authority G.S. 74C-3(a)(4); 74C-5; 74C-13.

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 09B .0203, .0205, .0304-.0305; 09E .0102, .0105.*

Proposed Effective Date: *February 1, 2011*

Public Hearing:
Date: *November 9, 2010*
Time: *1:00 p.m.*
Location: *NC Department of Correction, Office of Staff Development and Training, 2211 Schieffelin Road, Apex, NC 27502*

Reason for Proposed Action:
12 NCAC 09B .0203 – *In order to comply with G.S. 93B-9, the Commission amended this rule effective July 1, 2010 to allow 18 and 19 year olds entry into the Basic Law Enforcement Training (BLET) program. The Commission sought legislation to be granted an exception to G.S. 93B-9. The exception was granted in House Bill 1717 and signed into law. The Commission now wishes to amend the rule to restrict entry to BLET programs to persons 20 years or older.*
12 NCAC 09B .0205 – *A two hour block of instruction entitled Human Trafficking has added to BLET, increasing the total hours of BLET from 618 to 620.*
12 NCAC 09B .0304 – *One of the requirements to be certified as a specialized instructor for the Department of Juvenile Justice and Delinquency Prevention Medical Emergencies has been changed. Previously, instructors were required to be certified in CPR and First Aid through the American Red Cross. This has been amended to require instructors to be certified in CPR and First Aid through an organization whose curriculum meets the national standards set forth by the International Guidelines Conference on Cardiopulmonary Resuscitation and Emergency Cardiovascular Care. This new requirement is consistent with other specialized instructor types that require CPR certification.*
12 NCAC 09E .0102, .0105 – *The Commission has changed the required topics for annual In-Service training for law enforcement officers. The following topics have been removed: Career Survival: Positive Ways to be Successful (4 hours) and Juvenile Minority Sensitivity Training: Race Matters (2 hours). The following topics have been added: Career Survival: Leadership and Mentoring (4 hours); Juvenile Minority Sensitivity Training: Interactions, Communications, and Understanding (2 hours); Domestic Violence: Lesbian, Gay, Bi-Sexual and Transgender (LGBT) Relationships (2 hours). The Department Topics of Choice hours have changed from 10 to 8.*

Procedure by which a person can object to the agency on a proposed rule: *The objection, reasons for the objection, and the clearly identified portion of the rule to which the objection pertains, must be submitted in writing to Teresa Marrella, Department of Justice, Criminal Justice Standards Division, 114 West Edenton Street, Raleigh, NC 27602.*

Comments may be submitted to: *Teresa Marrella, Department of Justice, Criminal Justice Standards Division, 114 West Edenton Street, Raleigh, NC 27602; phone (919) 716-6470; fax (919) 716-6752; email tmarrella@ncdoj.gov*

Comment period ends: *December 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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: A copy of the fiscal note can be obtained from the agency.
☒ **State** *12 NCAC 09B .0205; 09E .0102, .0105*
☒ **Local** *12 NCAC 09B .0205; 09E .0102, .0105*
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None** *12 NCAC 09B .0203, .0304*

Fiscal Note posted at
http://www.osbm.state.nc.us/files/pdf_files/DOJ09172010.pdf

CHAPTER 09 - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09B - STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT: EDUCATION: AND TRAINING

SECTION .0200 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOLS AND CRIMINAL JUSTICE TRAINING PROGRAMS OR COURSES OF INSTRUCTION

12 NCAC 09B .0203 ADMISSION OF TRAINEES
(a) The school director shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who is not a citizen of the United States.
(b) The school shall not admit any individual younger than ~~18~~ 20 years of age as a trainee in any non-academic basic criminal justice training course. Individuals under 20 years of age may be granted authorization for early enrollment as trainees in a presentation of the Basic Law Enforcement Training Course with prior written approval from the Director of the Standards Division. The Director shall approve early enrollment as long as the individual turns 20 years of age prior to the date of the State Comprehensive Examination for the course.

(c) The school shall give priority admission in certified criminal justice training courses to individuals holding full-time employment with criminal justice agencies.

(d) The school shall not admit any individual as a trainee in a presentation of the "Criminal Justice Instructor Training Course" who does not meet the education and experience requirements for instructor certification under Rule .0302(1) of this Subchapter within 60 days of successful completion of the Instructor Training State Comprehensive Examination.

(e) The school shall not admit an individual, including partial or limited enrollees, as a trainee in a presentation of the Basic Law Enforcement Training Course unless the individual has taken the reading component of a nationally standardized test within one year prior to admission to Basic Law Enforcement Training and has scored at or above the tenth grade level, or the equivalent. A nationally standardized test is a test that:

(1) reports scores as national percentiles, stanines or grade equivalents; and

(2) compares student test results to a national norm.

(f) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual has provided to the School Director a medical examination report, completed by a physician licensed to practice medicine in North Carolina, a physician's assistant, or a nurse practitioner, to determine the individual's fitness to perform the essential job functions of a criminal justice officer. The Director of the Standards Division shall grant an exception to this standard for a period of time not to exceed the commencement of the physical fitness topical area when failure to timely receive the medical examination report is not due to neglect on the part of the trainee.

(g) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual is a high school graduate or has passed the General Educational Development Test indicating high school equivalency. High school diplomas earned through correspondence enrollment are not recognized toward the educational requirements.

(h) The school shall not admit any individual trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual has provided the certified School Director a certified criminal record check for local and state records for the time period since the trainee has become an adult and from all locations where the trainee has resided since becoming an adult. An Administrative Office of the Courts criminal record check or a comparable out-of-state criminal record check will satisfy this requirement.

(i) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who has been convicted of the following:

(1) a felony;

(2) a crime for which the punishment could have been imprisonment for more than two years;

(3) a crime or unlawful act defined as a "Class B Misdemeanor" within the five year period prior to the date of application for employment unless the individual intends to seek certification through the North Carolina Sheriffs' Education and Training Standards Commission;

(4) four or more crimes or unlawful acts as defined as "Class B Misdemeanors" regardless of the date of conviction;

(5) four or more crimes or unlawful acts defined as "Class A Misdemeanors" except the trainee may be enrolled if the last conviction occurred more than two years prior to the date of enrollment;

(6) a combination of four or more "Class A Misdemeanors" or "Class B Misdemeanors" regardless of the date of conviction unless the individual intends to seek certification through the North Carolina Criminal Justice Education and Training Standards Commission.

(j) Individuals charged with crimes as specified in Paragraph (i) of this Rule, and such offenses were dismissed or the person was found not guilty, may be admitted into the Basic Law Enforcement Training Course but completion of the Basic Law Enforcement Training Course does not ensure that certification as a law enforcement officer or justice officer through the North Carolina Criminal Justice Education and Training Standards Commission will be issued. Every individual who is admitted as a trainee in a presentation of the Basic Law Enforcement Training Course shall notify the School Director of all criminal offenses which the trainee is arrested for or charged with, pleads no contest to, pleads guilty to or is found guilty of, and notify the School Director of all Domestic Violence Orders (G.S. 50B) which are issued by a judicial official that provide an opportunity for both parties to be present. This includes all criminal offenses except minor traffic offenses and specifically includes any offense of Driving Under the Influence (DUI) or Driving While Impaired (DWI). A minor traffic offense is defined, for the purposes of this Paragraph, as an offense where the maximum punishment allowable by law is 60 days or less. Other offenses under G.S. 20 (Motor Vehicles) or other similar laws of other jurisdictions which shall be reported to the School Director include G.S. 20-139 (persons under influence of drugs), G.S. 20-28 (driving while license permanently revoked or permanently suspended), G.S. 20-30(5) (fictitious name or address in application for license or learner's permit), G.S. 20-37.8 (fraudulent use of a fictitious name for a special identification card), G.S. 20-102.1 (false report of theft or conversion of a motor vehicle), G.S. 20-111(5) (fictitious name or address in application for registration), G.S. 20-130.1 (unlawful use of red or blue lights), G.S. 20-137.2 (operation of vehicles resembling law enforcement vehicles), G.S. 20-141.3 (unlawful racing on streets and highways), G.S. 20-141.5 (speeding to elude arrest), and G.S. 20-166 (duty to stop in event of accident). The notifications required under this Paragraph must be in writing, must specify the nature of the offense, the court in which the case was handled, the date of the arrest or criminal charge, the date of issuance of the Domestic Violence Order (G.S. 50B), the final disposition, and the date thereof. The notifications required under this Paragraph must be received by the School Director within 30 days of the date the case was disposed of in court. The requirements of this Paragraph are applicable at all times during which the trainee is enrolled in a

Basic Law Enforcement Training Course. The requirements of this Paragraph are in addition to the notifications required under 12 NCAC 10B .0301 and 12 NCAC 09B .0101(8).

Authority G.S. 17C-6; 17C-10.

12 NCAC 09B .0205 BASIC LAW ENFORCEMENT TRAINING

(a) The basic training course for law enforcement officers consists of instruction designed to provide the trainee with the skills and knowledge to perform those tasks essential to function in law enforcement.

(b) The course entitled "Basic Law Enforcement Training" shall consist of a minimum of 618 hours of instruction and shall include the following identified topical areas and minimum instructional hours for each:

(1) LEGAL UNIT
- (A) Motor Vehicle Laws 20 Hours
- (B) Preparing for Court and Testifying in Court 12 Hours
- (C) Elements of Criminal Law 24 Hours
- (D) Juvenile Laws and Procedures 10 Hours
- (E) Arrest, Search and Seizure/Constitutional Law 28 Hours
- (F) ABC Laws and Procedures 4 Hours

UNIT TOTAL 98 Hours

(2) PATROL DUTIES UNIT
- (A) Techniques of Traffic Law Enforcement 24 Hours
- (B) Explosives and Hazardous Materials Emergencies 12 Hours
- (C) Traffic Crash Investigation 20 Hours
- (D) In-Custody Transportation 8 Hours
- (E) Crowd Management 12 Hours
- (F) Patrol Techniques 26 Hours
- (G) Law Enforcement Communication and Information Systems 8 Hours
- (H) Anti-Terrorism 4 Hours
- (I) Rapid Deployment 8 Hours

UNIT TOTAL 122 Hours

(3) LAW ENFORCEMENT COMMUNICATION UNIT
- (A) Dealing with Victims and the Public 10 Hours
- (B) Domestic Violence Response 12 Hours
- (C) Ethics for Professional Law Enforcement 4 Hours
- (D) Individuals with Mental Illness and Mental Retardation 8 Hours
- (E) Crime Prevention Techniques 6 Hours
- (F) Communication Skills for Law Enforcement Officers 8 Hours

UNIT TOTAL 48 Hours

(4) INVESTIGATION UNIT
- (A) Fingerprinting and Photographing Arrestee 6 Hours
- (B) Field Note-taking and Report Writing 12 Hours
- (C) Criminal Investigation 34 Hours
- (D) Interviews: Field and In-Custody 16 Hours
- (E) Controlled Substances 12 Hours
- (F) Human Trafficking 2 Hours

UNIT TOTAL ~~80~~ 82 Hours

(5) PRACTICAL APPLICATION UNIT
- (A) First Responder 32 Hours
- (B) Firearms 48 Hours
- (C) Law Enforcement Driver Training 40 Hours
- (D) Physical Fitness (classroom instruction) 8 Hours
- (E) Fitness Assessment and Testing 12 Hours
- (F) Physical Exercise 1 hour daily, 3 days a week 34 Hours
- (G) Subject Control Arrest Techniques 40 Hours

UNIT TOTAL 214 Hours

(6) SHERIFF-SPECIFIC UNIT
- (A) Civil Process 24 Hours
- (B) Sheriffs' Responsibilities: Detention Duties 4 Hours
- (C) Sheriffs' Responsibilities: Court Duties 6 Hours

UNIT TOTAL 34 Hours

(7) COURSE ORIENTATION 2 Hours

(8) TESTING 20 Hours

TOTAL COURSE HOURS ~~618~~ 620 Hours

(c) The "Basic Law Enforcement Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for this basic training course for law enforcement officers as administered by the Commission. Copies of this publication may be inspected at the office of the agency:

Criminal Justice Standards Division
North Carolina Department of Justice
114 West Edenton Street
Old Education Building
Post Office Drawer 149
Raleigh, North Carolina 27602

and may be obtained from the Academy at the following address:

North Carolina Justice Academy
Post Office Drawer 99
Salemburg, North Carolina 28385

(d) The "Basic Law Enforcement Training Course Management Guide" as published by the North Carolina Justice Academy shall be used by School Directors in planning, implementing and delivering basic training courses. Each School Director shall be issued a copy of the guide at the time of certification at no cost to the certified school. The public may obtain copies of this guide from the Justice Academy.

Authority G.S. 17C-6; 17C-10.

SECTION .0300 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE INSTRUCTORS

12 NCAC 09B .0304 SPECIALIZED INSTRUCTOR CERTIFICATION

(a) The Commission may issue a Specialized Instructor Certification to an applicant who has developed specific motor-skills and abilities by virtue of special training and demonstrated experience in one or more of the following topical areas:

(1) Subject Control Arrest Techniques
(2) First Responder
(3) Firearms
(4) Law Enforcement Driver Training
(5) Physical Fitness
(6) Restraint, Control and Defense Techniques (DJJDP)
(7) Medical Emergencies (DJJDP)
(8) Explosive and Hazardous Materials Emergencies

(b) To qualify for and maintain any Specialized Instructor Certification, an applicant must possess a valid CPR Certification that included cognitive and skills testing, through an organization whose curriculum meets the national standards set forth by the International Guidelines Conference on Cardiopulmonary Resuscitation and Emergency Cardiovascular Care.

(c) To qualify for Specialized Instructor Certification in the Subject Control Arrest Techniques topical area, an applicant must meet the following requirements:

(1) hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
(2) successfully complete the pertinent Commission-approved specialized instructor training course; and
(3) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

(d) To qualify for Specialized Instructor Certification in the First Responder topical area, an applicant must satisfy one of the following two options:

(1) The first option is:
  (A) hold CPR instructor certification through an organization whose curriculum meets the national standard;
  (B) hold, or have held, basic Emergency Medical Technician certification;
  (C) have successfully completed the Department of Transportation's 40 hour EMT Instructor Course or equivalent within the last three years or hold a North Carolina teaching certificate; and
  (D) obtain the recommendation of a Commission-certified school director or in-service training coordinator.
(2) The second option is:
  (A) hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
  (B) hold CPR instructor certification through an organization whose curriculum meets the national standard;
  (C) hold, or have held, basic EMT certification; and
  (D) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

(e) To qualify for Specialized Instructor Certification in the Firearms topical area, an applicant must meet the following requirements:

(1) hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
(2) successfully complete the pertinent Commission-approved specialized instructor training course; and
(3) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

(f) To qualify for Specialized Instructor Certification in the Law Enforcement Driver Training topical area, an applicant must meet the following requirements:

(1) hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
(2) successfully complete the pertinent Commission-approved specialized instructor training course; and
(3) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

(g) To qualify for Specialized Instructor Certification in the Physical Fitness topical area, an applicant shall become certified through one of the following two methods:

(1) The first method is:
  (A) hold General Instructor Certification, either probationary status or full

general instructor status, as specified in Rule .0303 of this Section;

(B) successfully complete the pertinent Commission-approved specialized instructor training course; and

(C) obtain the recommendation of a Commission-certified School Director.

(2) The second method is:

(A) successfully complete the pertinent Commission-approved specialized instructor training course;

(B) obtain the recommendation of a Commission-certified School director or in-service training coordinator; and

(C) meet one of the following qualifications:

(i) hold a valid North Carolina Teacher's Certificate and hold a minimum of a baccalaureate degree in physical education and be presently teaching in physical education topics; or

(ii) be presently instructing physical education topics in a community college, college or university and hold a minimum of a baccalaureate degree in physical education.

(h) To qualify for Specialized Instructor Certification in the Department of Juvenile Justice and Delinquency Prevention Restraint, Control and Defense Techniques topical area, an applicant must meet the following requirements:

(1) hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;

(2) successfully complete the pertinent Commission-approved specialized instructor training course; and

(3) obtain the recommendation of a Commission-certified school director.

(i) To qualify for Specialized Instructor Certification in the Department of Juvenile Justice and Delinquency Prevention Medical Emergencies topical area, an applicant must meet the following requirements:

(1) have successfully completed a Commission-certified basic instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise, within the 12 month period preceding application;

(2) hold instructor certification in CPR and First Aid ~~by fulfillment of the American Red Cross Instructor requirements;~~ through an organization whose curriculum meets the national standards set forth by the International Guidelines Conference on Cardiopulmonary Resuscitation and Emergency Cardiovascular Care; and

(3) obtain the recommendation of a Commission-certified school director.

(j) To qualify for Specialized Instructor Certification in the Explosive and Hazardous Materials Emergencies topical area, an applicant must satisfy one of the following two options:

(1) The first option is:

(A) hold instructor certification as a First Responder Awareness Level Hazardous Materials instructor;

(B) have successfully completed the Fire Service Instructor Methodology Course or the equivalent utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise; and

(C) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

(2) The second option is:

(A) hold General Instructor Certification, either probationary status or full general instructor status, as specified in 12 NCAC 09B .0303 of this Section;

(B) have successfully completed the Awareness/Operations Level Hazardous Materials Course developed by the North Carolina Department of Insurance, Office of the State Fire Marshal; and

(C) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

Authority G.S. 17C-6.

SUBCHAPTER 09E – IN-SERVICE TRAINING PROGRAMS

SECTION .0100 - LAW ENFORCEMENT OFFICER'S IN-SERVICE TRAINING PROGRAM

12 NCAC 09E .0102 REQUIRED ANNUAL IN-SERVICE TRAINING TOPICS

The following topical areas are hereby established as minimum topics and hours to be included in the law enforcement officers' annual in-service training program:

(1) Firearms Training and Qualification (4);

(2) Legal Update (4);

(3) Career Survival: ~~Positive Ways to be Successful~~ Leadership and Mentoring (4);

(4) Juvenile Minority Sensitivity Training: ~~Race Matters~~ Interactions, Communications and Understanding (2); ~~and~~

(5) Domestic Violence: Lesbian, Gay, Bi-Sexual and Transgender (LGBT) Relationships (2); and

~~(5)~~(6) Department Topics of Choice ~~(10).~~ (8).

Authority G.S. 17C-6; 17C-10.

12 NCAC 09E .0105 MINIMUM TRAINING SPECIFICATIONS: ANNUAL IN-SERVICE TRAINING

The following specifications shall be incorporated in each law enforcement agency's annual in-service training courses:

(1) Firearms:

(a) Use of Force: review the authority to use deadly force [G.S. 15A-401(d)(2)] including the relevant case law and materials;

(b) Safety:

(i) range rules and regulations;

(ii) handling of a firearm; and

(iii) malfunctions;

(c) Review of Basic Marksmanship Fundamentals:

(i) grip, stance, breath control and trigger squeeze;

(ii) sight and alignment/sight picture; and

(iii) nomenclature; and

(d) The "Specialized Firearms Instructor Training Manual" as published by the North Carolina Justice Academy shall be applied as a guide for conducting the annual in-service firearms training program. Copies of this publication may be inspected at the office of the agency:

Criminal Justice Standards Division
North Carolina Department of Justice
114 West Edenton Street
Old Education Building
Post Office Drawer 149
Raleigh, North Carolina 27602;

(2) Legal Update (4);

(3) Career Survival: ~~Positive Ways to be Successful~~ Leadership and Mentoring (4);

(4) Juvenile Minority Sensitivity Training: ~~Race Matters~~ Interactions, Communications and Understanding (2); ~~and~~

(5) Domestic Violence: Lesbian, Gay, Bi-Sexual and Transgender (LGBT) Relationships (2); and

~~(5)~~(6) Department Topics of Choice ~~(10).~~ (8).

The In-Service Lesson Plans as published by the North Carolina Justice Academy shall be applied as a minimum curriculum for conducting the annual in-service training program. Copies of this publication may be inspected at the office of the agency:

Criminal Justice Standards Division
North Carolina Department of Justice
114 West Edenton Street
Old Education Building
Post Office Drawer 149
Raleigh, North Carolina 27602

and may be obtained at cost from the Academy at the following address:

North Carolina Justice Academy
Post Office Drawer 99
Salemburg, North Carolina 28385

Authority G.S. 17C-6; 17C-10.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 42 - BOARD OF EXAMINERS IN OPTOMETRY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Examiners in Optometry intends to amend the rules cited as 21 NCAC 42B .0101, .0107 and .0302 and adopt the rule cited as 21 NCAC 42B .0305.*

Proposed Effective Date: *February 11, 2011*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *A public hearing may be demanded by contacting: John D. Robinson, O.D., Executive Director, NC State Board of Examiners in Optometry, 109 North Graham Street, Wallace, NC 28466; phone (910) 285-3160 or (800) 426-4457; email exdir@ncoptometry.org.*

Reason for Proposed Action:

21 NCAC 42B .0101 – *The purpose of this amendment is to update addresses of schools of Optometry to maintain compatibility with the National Board of Examiners in Optometry's examination structure and sequence.*

21 NCAC 42B .0107 – *The purpose of this amendment is to accommodate changes in the National Board examinations given by the National Board of Examiners in Optometry.*

21 NCAC 42B .0302 – *The purpose of this amendment is to accommodate changes to continuing education that are necessary due to scientific advances and the demands of the profession.*

21 NCAC 42B .0305 – *The purpose of this addition is to comply with the provisions of Session Law 2009-125.*

Procedure by which a person can object to the agency on a proposed rule: *Persons may object to the proposed rule changes by contacting: John D. Robinson, O.D., Executive Director, NC State Board of Examiners in Optometry, 109 North Graham Street, Wallace, NC 28466; phone (910) 285-3160 or (800) 426-4457; email exdir@ncoptometry.org.*

Comments may be submitted to: *John D. Robinson, O.D., Executive Director, NC State Board of Examiners in Optometry,*

109 North Graham Street, Wallace, NC 28466; phone (910) 285-3160 or (800) 426-4457; email exdir@ncoptometry.org

Comment period ends: *December 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

SUBCHAPTER 42B - LICENSE TO PRACTICE OPTOMETRY

SECTION .0100 - LICENSE BY EXAMINATION

21 NCAC 42B .0101 GRADUATE OF APPROVED SCHOOL

(a) The Board may grant recognition and approval to a school or college of optometry, deny or rescind recognition and approval, or make any recognition and approval granted by the Board conditional or probational, based on the Board's determination of the quality of the educational programs and offerings of the school or college of optometry. Their optometric educational programs having been ~~duly~~ accredited by the Accreditation Council ~~of~~ on Optometric Education ~~of the American Optometric Association~~ and recommended to the Board by the ~~International~~ Association of Regulatory Boards ~~of Examiners~~ in Optometry as worthy of approval, the following accredited schools and colleges of optometry are hereby recognized and approved:

(1) University of Alabama ~~in~~ at Birmingham
School of Optometry
1716 University ~~Station~~ Boulevard
Birmingham, AL ~~35294~~ 35294-0010

(2) University of California, Berkeley
School of Optometry
350 Minor Hall MC 2020
Berkeley, CA ~~94720~~ 94720-2020

(3) Southern California College of Optometry
2575 Yorba Linda Blvd.
Fullerton, CA 92631

(4) Ferris State ~~College~~ University
Michigan College of Optometry
1310 Cramer Circle
Big Rapids, MI ~~49307~~ 49307-2738

(5) University of Houston
College of Optometry
505 J. Davis Armistead Bldg.
Houston, TX ~~77004-6052~~ 77004-2020

(6) Illinois College of Optometry
3241 South Michigan Avenue
Chicago, IL 60616

(7) Indiana University
School of Optometry
800 East Atwater
Bloomington, IN ~~47405~~ 47405-3680

(8) New England College of Optometry
424 Beacon Street
Boston, MA 02115

(9) State University of New York
State College of Optometry
~~100 East 24th Street~~
33 West 42nd Street
New York, NY ~~10010~~ 10036-8003

(10) The Ohio State University
College of Optometry
338 West Tenth Avenue
Columbus, OH ~~43210~~ 43210-1280

(11) Pacific University
College of Optometry
2043 College Way
Forest Grove, OR 97116

(12) Pennsylvania College of Optometry
at Salus University
Elkins Park Campus
~~1200 West Godfrey~~
~~Philadelphia, PA 19141~~
8360 Old York Road
Elkins Park, PA 19027

(13) Southern College of Optometry
1245 Madison Avenue
Memphis, TN 38104

(14) University of Waterloo
School of Optometry
~~Faculty of Science~~
200 University Avenue West
~~Waterloo~~ Waterloo, ~~Ontario~~ ON ~~Canada~~ N2L 3G1 CANADA

(15) Inter American University of Puerto Rico
School of Optometry
~~G.P.O. Box 3255~~
~~San Juan, PR 00936~~
500 Carretera Dr John Will Harris
Bayamon, PR 00957

(16) University of ~~Missouri-St. Louis~~ Missouri, St. Louis
~~School~~ College of Optometry
~~8001 Natural Bridge Road~~
One University Blvd.
331 Marillac Hall

St. Louis, MO ~~63121~~ 63121-4400

(17) University of Montreal
Ecolo ~~d'optometrie~~ d'Optometrie
~~3750~~ 3744 ~~Jean-Brillant~~ Jean-Brillant, Suite 260-7
~~Case Postale 6128, Succursale "A"~~
Montreal, ~~P.Q. Canada H3C 3J7~~ QC H3T 1P1
CANADA

(18) Northeastern State University
Oklahoma College of Optometry
1001 N. Grand Avenue
Tahlequah, OK 74464

(19) Nova Southeastern University ~~of the Health Sciences~~
College of Optometry
~~1750 N.E. 168th St.~~
~~North Miami Beach, FL 33162~~
3200 S. University Drive
Ft. Lauderdale, FL 33328

(20) Midwestern University
Arizona College of Optometry
19555 N 59th Ave
Glendale, AZ 85308

(21) University of the Incarnate Word
School of Optometry
4301 Broadway, Box 373
San Antonio, TX 78209-6397

(22) Western University of Health Sciences
College of Optometry
309 E Second St.
Pomona, CA 91766-1854

(b) The Board may request a copy of the Council of Optometric Education's accreditation report on each school or college recognized and approved by the Board and for each school or college which has requested recognition and approval or for which the Board is considering recognition and approval.

Authority G.S. 90-117.5; 90-118(a),(b).

21 NCAC 42B .0107 WRITTEN EXAMINATION

(a) Each applicant for examination must submit evidence of having reached the recommended levels of acceptable performance on the National Board examinations given by the National Board of Examiners in Optometry on or after the April, 1978 administration in one of the following formats and under the following conditions prior to Board approval of his application to take the clinical practicum examination administered by the Board and shall authorize the release of his official score report by the National Board to the Board prior to the approval by the Board of his application to take the clinical practicum ~~examination.~~ examination:

(1) April, 1978 through August, 1986 administrations: passing scores on Parts I, IIA, and IIB, with scores of not less than 75 in Section 7 (Pathology) and Section 9 (Pharmacology) on the Part IIB examination, and a score of not less than 75 on the National Board's Treatment and Management of Ocular Disease ("TMOD") examination.

(2) April, 1987 through August, 1992 administrations: passing scores on the Part I Basic Science (BS) examination and Part II Clinical Science (CS) examination of the National Board, with scores of not less than 75 on the Ocular Disease/Trauma and Clinical Pharmacology sections of the PART II Clinical Science (CS) examination, and a score of not less than 75 on the National Board's ~~TMOD~~ Treatment and Management of Ocular Disease (TMOD) examination.

(3) April, 1993 through December, 2008: passing score on the Part I Basic Science Examination of the National Board. ~~and thereafter: passing scores on Basic Science and Clinical Science Examinations of the National Board, with a score of not less than 75 on the Ocular Disease/Trauma component within the Clinical Science examination, and a score of not less than 75 on either the TMOD component within the Clinical Science examination, or on the equivalent stand alone TMOD examination~~.

(4) April, 1993 through April, 2009: passing score on the Part II Clinical Science Examination of the National Board, with a score of not less than 75 on the Ocular Disease/Trauma component within the Clinical Science examination, or on the equivalent stand-alone TMOD examination.

(5) March, 2009 and thereafter: passing score on Part I Applied Basic Science (ABS) examination of the National Board.

(6) December, 2009 and thereafter: passing score on Part II Patient Assessment and Management (PAM) examination of the National Board, with a score of not less than 75 on the Disease/Trauma component within the Patient Assessment and Management (PAM) examination, and a score of not less than 75 on the TMOD component within the Patient Assessment and Management (PAM).

(7) March, 2010 and thereafter: passing score on the Part III Clinical Skills Examination (CSE) of the National Board.

(b) For ~~candidates~~ applicants with passing scores on at least one National Board examination part under different formats and time periods described in ~~(a)(1) and (a)(2)~~ (a)(1), (a)(2), (a)(3), (a)(4), and (a)(5) of this Rule, the following equivalences shall apply:

(1) Parts I and IIA are the equivalent of Basic ~~Science.~~ Science;

(2) Part IIB is the equivalent of Clinical Science without the inclusion of ~~TMOD.~~ TMOD;

(3) Part I Applied Basic Science (ABS) is the equivalent of Part I Basic Science; and

(4) Part II Patient Assessment and Management (PAM) is the equivalent of Part II Clinical Science.

(c) For those candidates taking the National Board examination under any of the examination formats dating back to April 1978 and prior to March 2009, old Part III (Patient Care) is not required.

Authority G.S. 90-117.5; 90-118.

SECTION .0300 - ANNUAL LICENSE RENEWAL

21 NCAC 42B .0302 CONTINUING EDUCATION

(a) Each optometrist holding a certificate of registration shall take annual courses of study approved by the Board as related to and essential to the practice of optometry as defined in G.S. 90-114. ~~It is the intent of the Board that this~~ This requirement shall be met by the taking of courses whose content and quality of presentation are reasonably assured to the end that the licensee's abilities to meet the public demand of acceptable standards of care are enhanced and that currency of knowledge is insured.

(b) ~~It is the responsibility of each~~ Each licensee ~~to~~ shall determine if a course has been approved by the Board prior to the taking of the course and submitting it for credit.

(c) No course or course offering ~~will~~ shall be considered for approval unless the vendor or sponsor has submitted to the Board no later than 30 days prior to the offering of the course information deemed sufficient by the Board as to the course title, course format, course content and learning purpose, lecturers including curriculum vitae, dates courses are offered, city and state where offered, and the name, address, and telephone number of the vendor or sponsor and the contact person(s) to whom inquiries can be made.

(d) Those courses that are approved, including the type and number of hours of credit, ~~will~~ shall be entered by the Board's staff into the Board's central data base and the vendor or sponsor notified. Information concerning those courses that have been approved ~~will~~ shall be made available to any licensee making inquiry concerning course approval.

(e) The Board ~~will~~ shall maintain continuing education data on-line in its central data base for a minimum period of five years preceding the next annual license renewal date. A yearly listing of credits shall be furnished each licensee at the time of license renewal. Additional reports ~~will~~ shall be available on request and ~~the~~ with payment of a transcript fee ~~not to exceed~~ of five dollars ($5.00). Telephone inquiries as to current status of continuing education hours may be made during normal business hours.

(f) Notification of the number of hours required by the Board for license renewal shall be given to each licensee at the time the licensee receives notice of annual license renewal. Such notice shall state the number of hours of approved continuing education ~~that will be~~ required in the following year in order to renew a license for the second following year. The number of required continuing education hours is ~~20.~~ 25 hours.

(g) In any calendar year no less than ~~nine~~ 12 hours of the continuing education requirement must be in courses ~~within the areas of~~ focused on current practices and advancements in the fields of ocular ~~or~~ and general pharmacology, diagnosis and therapeutics, or advanced clinical ~~procedures~~ procedures, said hours to be deemed "certified" credit hours by the Board. ~~It is expected that courses~~ Courses certified to meet this special requirement ~~will~~ shall be of sufficient length and depth to ~~sufficiently~~ address the subject matter in the course ~~descriptions~~ description(s) and ~~will be~~ taught by individuals who are ~~appropriately~~ qualified by training and experience and known to have ~~an acknowledged~~ expertise in the area taught.

(h) Courses of self-study meeting the standards set by the Council on Optometric Postgraduate Education (COPE) or the Council on Continuing Medical Education (CCME) offered by approved vendors or sponsors, said course(s) meant to be taken by individuals through journal articles or over the internet where organized material is presented and written evaluations are ~~later~~ made prior to or after completing the course(s) are eligible for approval provided the vendor or sponsor has submitted the course or courses for approval as described in this Rule prior to its being offered to the licensee. However, no licensee shall receive credit for more than ~~four~~ six hours of educational credit by this means in any calendar year.

(i) Courses that are classified as practice administration ~~may~~ shall be accepted by the Board for credit provided that no more than ~~three~~ four hours of the total number of continuing education hours required ~~will~~ shall be accepted within one calendar year for the ~~purposes~~ purpose of ~~credit.~~ credit for any licensee.

(j) All courses accepted for credit must be taken within the calendar year for which the credit is applied; provided, however, that any course dependent upon an examination for successful completion may be certified to the Board following examination even if the examination or the results thereof are not available until the next calendar year.

(k) Attendance at any course or courses approved by the Board ~~must~~ shall be for the requisite period. ~~It is the responsibility of the~~ The vendor or sponsor of the course ~~to~~ shall assure compliance with this requirement and ~~to~~ shall so certify to the Board ~~at the appropriate time.~~ no later than 30 days following the courses being offered. Documentation of attendance may be transmitted:

(1) By the vendor or sponsor of the education provided the documentation is in a form acceptable to the Board and contains the following information:
   (A) Course title and classification verification;
   (B) Vendor or sponsor identification;
   (C) Name of and license number of North Carolina licensee; and
   (D) Vendor or sponsor's attestation or verification of attendance.

(2) By any licensee directly to the Board provided that the attendance ~~verification form utilized by the vendor has been approved by the Board has been completed properly~~ is fully documented by the vendor or sponsor of the ~~education and by the licensee, and has been properly validated or certified,~~ education, on a form given the licensee attending the course(s) attesting to their attendance, and the original form, ~~and~~ not a photocopy or facsimile, is submitted.

(l) Electronic transfer of attendance records in a data base format compatible to the Board's data management system is

acceptable; provided, however, the Board may at any time within three years of the date of transfer call for a hard copy verification if in its opinion such verification is necessary.
~~(m) The continuing education requirement shall be waived only in cases of certified illness, or upon evidence satisfactory to the Board that the applicant for renewal was unable to meet the requirement because of undue hardship.~~

Authority G.S. 12-3.1; 90-117.5; 90-123.1.

21 NCAC 42B .0305 SUSPENSION OF AUTHORITY TO EXPEND FUNDS
In the event the Board's authority to expend funds is suspended pursuant to S.L. 2009-125, the Board shall continue to issue and renew licenses and all fees tendered shall be placed in an escrow account maintained by the Board for this purpose. Once the Board's authority is restored, the funds shall be moved from the escrow account into the general operating account.

Authority G.S. 93B-2(b).

TITLE 23 – COMMUNITY COLLEGES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the State Board of Community Colleges intends to adopt the rule cited as 23 NCAC 02C .0213.*

Proposed Effective Date: *April 1, 2011*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *To demand a public hearing please send the written demand to Q. Shanté Martin, NC Community College System, 200 West Jones Street, MSC 5001, Raleigh, NC 27699-5001 or by emailing martins@nccommunitycolleges.edu. Demands must be received within 15 days of the publication of the proposed rule in the North Carolina Register.*

Reason for Proposed Action: *G.S. 115D-5(u) requires that the State Board of Community Colleges direct community colleges to adopt policies addressing religious exemptions beginning with the 2010-2011 academic year.*

Procedure by which a person can object to the agency on a proposed rule: *Written objections shall be addressed to President, NC Community College System Office, 5001 MSC, Raleigh, NC 27699-5001 within the comment period and must be post marked by 11:59 p.m. on the last day of the comment period.*

Comments may be submitted to: *Q. Shanté Martin, 200 W. Jones Street, MSC 5001, Raleigh, NC 27699-5001, phone (919)807-6961, fax (919)807-7171, email publiccomments@nccommunitycolleges.edu*

Comment period ends: *December 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

CHAPTER 02 - COMMUNITY COLLEGES

SUBCHAPTER 02C - COLLEGES: ORGANIZATION AND OPERATIONS

SECTION .0200 - PERSONNEL

23 NCAC 02C .0213 SCHOOL ABSENCE FOR RELIGIOUS OBSERVANCES
Each community college shall adopt a policy that authorizes a minimum of two excused absences each academic year for religious observances required by the faith of a student. The policy may require that the student provide written notice of the request for an excused absence a reasonable time prior to the religious observance. The policy shall also provide that the student shall be given the opportunity to make up any tests or other work missed due to an excused absence for a religious observance.

Authority G.S. 115D-5; S.L. 2010-112, s. 2.

This Section contains information for the meeting of the Rules Review Commission on Thursday, September 16, 2010 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 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate
Jim R. Funderburk - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Ralph A. Walker
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
October 21, 2010 November 18, 2010
December 16, 2010 January 20, 2011

RULES REVIEW COMMISSION
September 16, 2010
MINUTES

The Rules Review Commission met on Thursday, September 16, 2010, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Jennie Hayman, Clarence Horton, Dan McLawhorn, David Twiddy and Ralph Walker.

Staff members present were: Joe DeLuca and Bobby Bryan, Commission Counsel; Tammara Chalmers, Julie Edwards and Dana Vojtko.

The following people were among those attending the meeting:

Nadine Pfeiffer	DHHS/Division of Health Service Regulation
Donald Chaney	DHHS/Division of Public Health
Karen Waddell	Department of Insurance
Donnie Sides	Office of Emergency Medical Services
Kimberly Sides	Office of Emergency Medical Services
Pat Wylie	DHHS/Division of Public Health
Bob Martin	DHHS/Division of Public Health
Erin Glendening	DHHS/Division of Health Service Regulation
Etta Maynard	Department of Insurance
Rebecca Shigley	Department of Insurance
Stephen Dirksen	Board of Funeral Service
Chris Hoke	DHHS/Division of Public Health
Terry Bryant	NC Aquariums
Nancy Pate	Department of Environment and Natural Resources
Ted Triebel	Home Inspector Licensure Board

The meeting was called to order at 9:03 a.m. with Ms. Hayman presiding. She 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).

RULES REVIEW COMMISSION PUBLIC HEARING

Chairman Hayman opened the public hearing for Rule 26 NCAC 05 .0113 (Withdrawal of Objection Letters). Chairman Hayman called on anyone present who wished to comment on or object to the adoption of this rule as it was noticed in the NC Register. There were no verbal comments. The Rules Review Commission received one written comment on this rule. This comment will become part of the rulemaking record. The period to receive comments will expire at 5:00 p.m., October 1, 2010. The Commission may vote on the adoption of 26 NCAC 05 .0113 at its regularly scheduled meeting in October.

APPROVAL OF MINUTES

Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the August 19, 2010 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

02 NCAC 34 .0331, .1103 – Structural Pest Control Commission. No rewritten rules have been submitted and no action was taken.

10A NCAC 27E .0301, .0302, .0303, .0304. These rules were returned to the agency at the agency's request.

Prior to the review of the rules from the Board of Funeral Service, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because Charles McDarris, an attorney in his office represents the board.

21 NCAC 34B .0311 – Board of Funeral Service. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 34D .0203 – Board of Funeral Service. The Commission approved the rule as submitted with the requested technical changes.

LOG OF FILINGS

Chairman Hayman presided over the review of the log of permanent rules.

Medical Care Commission
All permanent rules were approved unanimously.

HHS – Division of Health Service Regulation
10A NCAC 14A .0103 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (d), it is not clear what relevance Subparagraphs (1) and (2) have to a determination of whether a rule is valid or as to the applicability to a given state of facts of a statute, rule or order. If the factors are not relevant there is no authority cited to base a decision on them.

Commission for Public Health
All permanent rules were approved unanimously with the following exceptions:

10A NCAC 41C .0904 - The Commission objected to this rule based on ambiguity. In (e)(4), it is not clear what is required to be submitted. There is nothing in Paragraph (f) about qualifications of instructors.

Department of Insurance – Chapter 4 and 6 rules
Prior to the review of the rules from the Department of Insurance, Commissioner Twiddy recused himself and did not participate in any discussion or vote concerning these rules because he is a chairman of a bank owned insurance agency.

All permanent rules were approved unanimously with the following exceptions:

11 NCAC 04 .0423 – The Commission objected to this rule based on ambiguity. In (a), it is not clear what is meant by "when in contact with the public." Specifically, it is not clear what circumstances require an agent, etc., to identify himself as required in (1) or conduct himself in a particular manner as required in (3). In (a)(3), it is not clear what is meant by "honorable dealings."

11 NCAC 06A .0812 – The Commission objected to this rule based on ambiguity. In (b)(1), it is not clear what is meant by "pattern of irregularities."

The Commission granted the Board's Request for Waiver of Rule 26 NCAC 05 .0108(a) and approved re-written rules 11 NCAC 04 .0423 and 11 NCAC 06A .0812.

Home Inspector Licensure Board

All permanent rules were approved unanimously.

Department of Insurance – Chapter 13 rules
Prior to the review of the rules from the Department of Insurance, Commissioner Twiddy recused himself and did not participate in any discussion or vote concerning these rules because he is a chairman of a bank owned Insurance Agency.

All permanent rules were approved unanimously with the following exceptions:

11 NCAC 13 .0527 was returned to the agency at the agency's request.

11 NCAC 13 .0528 – The Commission objected to this rule based on lack of statutory authority and ambiguity. There is no authority cited for the provision in (b)(9) to require the Commissioner to summarily suspend or terminate a provider's certification. If that is not the intent of the rule, then the rule is not clear.

Private Protective Services Board
Prior to the review of the rules from the Private Protective Services Board, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because Charles McDarris, an attorney in his office represents the board.

All permanent rules were approved unanimously.

Department of Environment and Natural Resources
15A NCAC 28 .0502 – The Commission objected to this rule based on ambiguity. In the rule as originally submitted it is not clear what type of insurance is required. In a proposed revision of the rule it is not clear what the insurance requirements are.

Terry Bryant from the agency addressed questions from the Commission.

Board of Pharmacy
21 NCAC 46 .1204 was approved unanimously.

Department of Labor
13 NCAC 07F .0901 was approved unanimously contingent on receiving a technical change. The change was subsequently received.

Office of Administrative Hearings
Commissioner Gray served as staff for review of the rules from the Office of Administrative Hearings; therefore he did not participate in any discussion or vote concerning these rules.

All permanent rules were approved with the exceptions as set out below:

The first motion for these rules, which was to object to Rule .0103 on the basis of lack of statutory authority and to approve the remaining rules, failed. Commissioners Crisp, Funderburk, and Twiddy voted in favor of the motion. Commissioners Hayman, Horton, McLawhorn, and Walker voted against the motion.

The second motion for these rules, which was to approve all, passed. Commissioners Hayman, Horton, McLawhorn, and Walker voted in favor of the motion. Commissioners Crisp, Funderburk and Twiddy voted against the motion.

TEMPORARY RULES

No temporary rules were filed for review.

COMMISSION PROCEDURES AND OTHER BUSINESS

The meeting adjourned at 10:14 a.m.

The next scheduled meeting of the Commission is Thursday, October 21 at 9:00 a.m.

Respectfully Submitted,

_____
Dana Vojtko

Publications Coordinator

LIST OF APPROVED PERMANENT RULES
September 16, 2010 Meeting

MEDICAL CARE COMMISSION

Licensure Surveys	10A NCAC 13B .3106
Chemical Addiction or Abuse Treatment Program Requirements	10A NCAC 13P .1401
Provisions for Participation in the Chemical Addiction of...	10A NCAC 13P .1402
Conditions for Restricted Practice with Limited Privileges	10A NCAC 13P .1403
Reinstatement of an Unencumbered EMS Credential	10A NCAC 13P .1404
Failure to Complete the Chemical Addiction or Abuse Treat...	10A NCAC 13P .1405

PUBLIC HEALTH, COMMISSION FOR

General	10A NCAC 41C .0901
Certification of Individuals	10A NCAC 41C .0902
Certification of Renovation Firms	10A NCAC 41C .0903
Accreditation of Training Providers	10A NCAC 41C .0905
Standards for Conducting Lead-Based Paint Renovation Acti...	10A NCAC 41C .0906
Standards for Records Retention, Information Distribution...	10A NCAC 41C .0907

INSURANCE, DEPARTMENT OF

Ethical Standards	11 NCAC 04 .0423
General Information	11 NCAC 06A .0201
Licenses	11 NCAC 06A .0212
Resident Surplus Lines License Renewal	11 NCAC 06A .0234
Rental Car Company License Application	11 NCAC 06A .0238
Administration of Examination	11 NCAC 06A .0305
Licensing of Resident Agent, LTD Representative and Adjuster	11 NCAC 06A .0402
Licensing of Business Entities	11 NCAC 06A .0413
Fingerprints Required for Criminal Record Checks	11 NCAC 06A .0418
Renewal of Agent Appts: Licenses/Limited Reps: Company Ad...	11 NCAC 06A .0501
Failure to Renew License	11 NCAC 06A .0504
Termination of Appointments for Limited Reps and Company ...	11 NCAC 06A .0505
Cancellation of Licenses Issued to Individuals	11 NCAC 06A .0506
Licensee Requirements	11 NCAC 06A .0802
Sanctions for Noncompliance	11 NCAC 06A .0811
Special Cases	11 NCAC 06A .0812
Definitions	11 NCAC 06A .0901
Transactions with Insureds	11 NCAC 06A .0902
Relationships with Third Parties	11 NCAC 06A .0903
Regulatory Matters	11 NCAC 06A .0904
Catastrophic Disasters	11 NCAC 06A .0905
Fingerprints Required for Criminal Record Checks	11 NCAC 06A .0906

HOME INSPECTOR LICENSURE BOARD

Fee Schedule	11	NCAC 08	.1011
General Limitations	11	NCAC 08	.1104
Code of Ethics	11	NCAC 08	.1116
Per Student Fee	11	NCAC 08	.1332

INSURANCE, DEPARTMENT OF

Definitions	11	NCAC 13	.0101
Purpose of Division	11	NCAC 13	.0102
Deputy Commissioner	11	NCAC 13	.0103
Division Personnel	11	NCAC 13	.0104
Field Investigations: Examinations	11	NCAC 13	.0105
Renewal of Insurance Premium Finance License	11	NCAC 13	.0304
Quarterly Report	11	NCAC 13	.0309
Surety Bond	11	NCAC 13	.0405
Collateral Security Required by Bondsmen	11	NCAC 13	.0512
Alteration of Affidavit of Surety	11	NCAC 13	.0513
Surety Bondsmen Licensing Procedures	11	NCAC 13	.0516
Fingerprints Required for Criminal Record Checks	11	NCAC 13	.0519
Prelicensing Education: Definitions for Bail Bond Prelice...	11	NCAC 13	.0520
Bail Bond Monthly Report	11	NCAC 13	.0521
Continuing Education Requirements	11	NCAC 13	.0522
Qualification for BCEC	11	NCAC 13	.0523
BCEC Extension of Time: Hardship	11	NCAC 13	.0524
Approval of BCEC Courses	11	NCAC 13	.0526
Issuance of and Continuation BCEC of Provider Approval	11	NCAC 13	.0530
Examinations: Special Accommodations (Americans with Disa...	11	NCAC 13	.0532
Schedule of Examinations	11	NCAC 13	.0533
Certificate of Course Completion	11	NCAC 13	.0534
Examination Authorization Letter	11	NCAC 13	.0535
Responsibility of Applicant at Examination Site	11	NCAC 13	.0536
Administration of Examination	11	NCAC 13	.0537
Bail Bond Prelicensing Education Provider	11	NCAC 13	.0539
Bail Bond Prelicensing Education Courses	11	NCAC 13	.0541
Bail Bond Prelicensing Instructions	11	NCAC 13	.0542

PRIVATE PROTECTIVE SERVICES BOARD

Renewal or Reissue of Licenses and Trainee Permits	12	NCAC 07D	.0203
Reports	12	NCAC 07D	.0404
Renewal or Reissue of Unarmed Security Guard Registration	12	NCAC 07D	.0706
Renewal of Armed Security Guard Firearm Registration Permit	12	NCAC 07D	.0806
Training Requirements for Armed Security Guards	12	NCAC 07D	.0807
Renewal of Firearms Trainer Certificate	12	NCAC 07D	.0904
Renewal of an Unarmed Guard Trainer Certificate	12	NCAC 07D	.0911

FUNERAL SERVICE, BOARD OF

Special Procedures for Licensing of Active Military Perso...	21	NCAC 34B	.0311
Surety Bonds	21	NCAC 34D	.0203

PHARMACY, BOARD OF

Office of the Board	21	NCAC 46	.1204

ADMINISTRATIVE HEARINGS, OFFICE OF

General	26	NCAC 03	.0101
Commencement of Contested Case: Notice and Filing Fee	26	NCAC 03	.0103
Duties of the Administrative Law Judge	26	NCAC 03	.0105

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

AGENCY	CASE NUMBER	ALJ	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION				
ABC Commission v. Quickstops of Guilford County, Inc., T/A Road Runner Express (Regional Road)	09 ABC 5421	Brooks	04/19/10	
ABC Commission v. Ghulam Khan v. T/A West Green Market	09 ABC 4303	Brooks	04/19/10	
ABC Commission v. Sarabjit Kaur v. T/A G&S Food Market	09 ABC 5257	Brooks	04/19/10	
ABC Commission v. Quickstops of Guildford County, Inc., T/A Road Runner Express (Lee Street)	09 ABC 5422	May	06/09/10	
ABC Commission v. Boulos 2, Inc., T/A Akron Texaco	10 ABC 0027	May	04/21/10	
ABC Commission v. Startown Lounge, Inc. T/A 5 O'clock Somewhere	10 ABC 0153	Gray	06/25/10	
ABC Commission v. Diversified Investments and Growth, LLC, T/A Petro Mart 6	10 ABC 0576	Webster	07/09/10	
ABC Commission v. Scooby's Bar & Restaurant, Sherri Lynn Bridgeman	10 ABC 2512	Gray	08/02/10	
ABC Commission v. Alpha 3 Enterprises LLC, T/A Liquid Room	10 ABC 2659	Lassiter	07/14/10	
ABC Commission v. Taqueria Guadalajara II, Inc, Jaime Fuentes Vice President	10 ABC 3107	Brooks	07/15/10	
ABC Commission v. El Corona Mexican Resturant Inc., T/A Corona II	10 ABC 4122	May	09/24/10	
BOARD OF SOCIAL WORK CERTIFICATION AND LICENSURE				
Miriam Deborah Kahn Sichel v. Social Work Certification and Licensure Board	10 BSW 2454	Overby	06/25/10	
DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY				
Tammy S. Barbone v. Crime Victims Compensation Comm.	08 CPS 2667	Brooks	07/16/10	
Christine G. Mroskey v. Crime Victims Compensation	09 CPS 0451	Gray	06/24/10	
Ace Wrecker Service Inc, Secretary of Crime Control and Public Safety	09 CPS 2292	Overby	03/31/10	
William Pickard Trucking, Inc., William Pickard v. Dept. of Crime Control and Public Safety, State Highway Patrol	09 CPS 4692	Brooks	06/09/10	
California Overland Ltd., NC State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 5225	Overby	05/12/10	
Earl Stanley Peters III v. Victims Compensation Service Division	09 CPS 5444	Elkins	08/30/10	
Alice Conrad v. Crime Victims Compensation Commission	09 CPS 6168	Brooks	04/01/10	
Marius A. Christian v. State Highway Patrol	09 CPS 6368	Overby	08/13/10	
Jose H. Geronimo Ramirez v. Victims and Justice Services	09 CPS 6454	May	06/23/10	
David Leon Darby v. Division of Crime Control and Public Safety	09 CPS 6703	Overby	08/17/10	
Selective Clearing and Grading, Inc., Danny Creech, Lynn Creech v. Crime Control and Public Safety	09 CPS 6726	Gray	07/29/10	
Harry L. Foy Jr., Department of Crime Control and Public Safety, Div. of State Highway Patrol Motor Carrier Enforcement Section	09 CPS 6728	Overby	08/17/10	
James M. Abdella v. Department of Crime Control and Public Safety v. Motor Carrier Enforcement Div	09 CPS 6740	Overby	08/18/10	
AD Gustafson Inc., Andrew Gustafson v. State Highway Patrol	10 CPS 0071	Lassiter	07/30/10	
Benjamin C. Simmons III, Precision Custom Farming, LLC v. DMV	10 CPS 0419	Elkins	06/29/10	25:04 NCR 515
Keon J. Jones v. Victims Compensation Commission	10 CPS 0848	Webster	07/26/10	
X&M Trucking, Xavier Artis v. Dept State Highway Patrol, DMV	10 CPS 0855	Lassiter	07/20/10	
Preferred Materials Inc v. Department of Crime Control & Public Safety, DMV	10 CPS 0931	Elkins	08/30/10	

AD Gustafson, Inc., Andrew Gustafson v. Secretary of Crime Control	10 CPS 2072	Gray	06/15/10	
Michael A. Rossi Sr., v. Dept. of Crime Control and Public Safety, Div. of Victims Compensation Services	10 CPS 2478	Lassiter	08/30/10	
McLain, LLC, Phillip McLain v. NC State Highway Patrol	10 CPS 2515	Brooks	07/02/10	
Vincent John Hall v. Crime Victims Compensation Commission, Maxton Police Department, Officer Duron Burney	10 CPS 2811	Gray	10/04/10	
Anne F. Palmer v. Victim and Justice Services	10 CPS 3604	Lassiter	09/08/10	

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

C&W Alternative Family Living Facility, Inc., v. CenterPoint Human Services and DHHS	09 DHR 3377	Brooks	06/16/10	
Ward Drug Co. of Nashville Gary Glisson v. DHHS	09 DHR 3830	Webster	04/29/10	
Mekre Francis v. DHHS, Div. of Health Service Regulation	09 DHR 3935	Gray	05/27/10	
Mattie Lowe/Angela Lowe, Lowe Family Care Home #3 v. DHHS, Division of Health Service Regulation	09 DHR 4148	Gray	08/27/10	
Kid Ventures Inc., d/b/a Health Park Child Development Center v. Div. of Child Development DHHS	09 DHR 4887	Overby	06/22/10	
Kimberly N. Carter (Davis) v. DHHS, Div. of Health Service Regulation	09 DHR 5133	Webster	08/03/10	
A+ Child Development Center LLC, v. DHHS, Division of Child Development	09 DHR 5443	May	04/27/10	
Gail N. Highsmith v. DHHS	09 DHR 5513	Brooks	05/13/10	
Sarah J. Bridges v. DHHS	09 DHR 5583	Brooks	05/27/10	
Onslow MRI, LLC v. DHHS, Div. of Health Service Regulation, Certificate of Need Section and Jacksonville Diagnostic Imaging, LLC d/b/a Coastal Diagnostic Imaging	09 DHR 5617	Overby	06/24/10	
Jacksonville Diagnostic Imaging, LLC d/b/a Coastal Diagnostic Imaging v. DHHS, Division of Health Service Regulation, CON Section and Onslow MRI, LLC	09 DHR 5638	Overby	06/24/10	
Rex Hospital, Inc, d/b/a Rex Hospital and UNC and Wake Radiology Oncology Services v. DHHS, Division of Health Service Regulation, Certificate of Need Section and Parkway Urology, P.A.	09 DHR 5769	Gray	07/20/10	
University of North Carolina Hospitals at Chapel Hill, and Rex Hospital, Inc. d/b/a Rex Healthcare and Wake Radiology Oncology Services, PLLC v. DHHS	09 DHR 5770	Gray	07/20/10	
Wake Radiology Oncology Services, PLLC and University of North Carolina Hospitals at Chapel Hill and Rex Hospital, Inc. d/b/a Rex Healthcare v. DHHS, Division of Health Service Regulation, CON Section and Parkway Urology, P.A. d/b/a Cary Urology, P.A.	09 DHR 5785	Gray	07/20/10	
The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Rehabilitation-Mount Holly and d/b/a Carolinas Health Care System v. DHHS, Div of Health Service Regulation CON Section and Caromont Health, Inc. and Gaston Memorial Hospital, Inc	09 DHR 6116	Brooks	07/26/10	25:08 NCR 1010
June Rae Crittenden v. Health Care Registry Section, DHHS	09 DHR 6166	Overby	03/29/10	
Kelvin Donelle Lewis v. Health Care Personnel Registry , Nurse Aide Registry	09 DHR 6196	Webster	04/05/10	
Elizabeth Ann Holt v. DHHS, Division of Health Service Regulation	09 DHR 6347	Brooks	03/31/10	
Gloria Manley v. DHHS-DCD	09 DHR 6816	Overby	06/24/10	
Estate of Nora L. Edwards, Wanda Harrington v. DHHS, Div. of Medical Assistance	09 DHR 6836	Overby	03/16/10	
Teresa Dargan Williams v. DHHS, Division of Health Service Regulation	10 DHR 0246	Gray	05/21/10	
Samuel and Nita Gaskin v. DHHS	10 DHR 0420	Overby	06/09/10	
TLC Adult Group Home, Sonja Hazelwood v. DHHS, Div. of Health Service Regulation	10 DHR 0485	Lassiter	06/11/10	
Tamekia Cain v. DHHS, Division of Health Service	10 DHR 0488	Gray	05/20/10	
Elizabeth Locke v. DHHS, Div. of Health Service Regulation, Health Care Personnel Registry	10 DHR 0678	Webster	06/17/10	
Cassandra Johnson v. Div. of Child Development, DHHS	10 DHR 0683	Brooks	06/29/10	
Karen Stutts v. DHHS	10 DHR 0719	May	08/18/10	
Candy Bynum-Anderson v. DHHS, Division of Facility Services, Health Care Personnel Registry	10 DHR 0793	Gray	07/29/10	
John J. Hannan v. Wake County Finance Dept	10 DHR 0831	Webster	08/27/10	
Ryan Bonscot Shearin v. Walter B. Jones Alcohol & Drug Treatment Center	10 DHR 0957	Gray	08/02/10	
Group Homes of Forsyth, Inc., Independence Group Home MHL #034-151 v. DHHS, Div. of Health Service Regulation	10 DHR 1165	May	07/16/10	
Timothy S. Wilson v. DHHS	10 DHR 1252	Brooks	06/18/10	
Felicia J. Stewart v. DHHS, Div. of Health Service Regulation	10 DHR 1348	Lassiter	06/21/10	
Phillip D. Hollifield, Administrator of the Estate of Phillip W. Hollifield v. DHHS	10 DHR 1448	Brooks	06/16/10	
Wee Wiggles Child Care Center a/k/a P&L Services LLC, Patricia York, and Ramona Jones	10 DHR 1514	May	07/20/10	
Triad ENT Debbie Beck v. DHHS, Division of Medical Assistance	10 DHR 1668	May	08/04/10	
Elizabeth House Blackwell v. DHHS, Div. of Health Service Regulation	10 DHR 1670	Overby	07/15/10	
Sandbox Academy Child Care Center, Cynthia Martin v. OAH, DHHS	10 DHR 1837	Mann	08/27/10	
Patrice Michelee Harris-Powell v. DHHS, Div. of Health Service Regulation	10 DHR 2067	Elkins	07/26/10	
Lenora Wesley v. Division of Child Development, DHHS	10 DHR 2069	Gray	08/17/10	
Happy Feet Learning Center, Tamika Herron v. Division of Child Development, DHHS	10 DHR 2658	Mann	08/20/10	
Community Helps Network, LLC v. Alamance-Caswell Local Management Enity f/k/a Alamance-Caswell MH/DD/SA	10 DHR 2660	Brooks	07/02/10	
Michael Parks c/o Fresh Start Residential Services Inc v. Div. of Medical Assistance Program Integrity/BHRS	10 DHR 2661	Overby	07/21/10	
Laytoya Daniels v. DHHS, Div. of Health Service Regulation, Health Care Personnel Registry	10 DHR 2913	Webster	08/27/10	
The Circle of Courage Faith House (formerly Birges House) LaRonda Woods-Freeman v. DHHS Ms. Emery E. Milliken General Counsel	10 DHR 2937	Overby	08/13/10	
Baker's Counseling and Mentoring Center, Inc., v. The Division of Mental Health, Developmental Disabilities and Substance Abuse Services	10 DHR 2989	Brooks	08/24/10	
Ultimate Care LLC, Fostoria Pierson v. DHHS-NC State Atty Gen Office	10 DHR 3052	Brooks	08/23/10	

Community Support Specialists, Annie Della Kenion v. Dept. of Mental Health, Substance Abuse and Development Disabilities, DHHS	10 DHR 3060	Overby	08/04/10	
Positive Connection Community Services, Inc., DHHS	10 DHR 3128	Gray	07/30/10	
Peggy's Home Health Care, Inc., DHHS	10 DHR 3309	Gray	07/30/10	
Straight Walk Family Services., Inc., DHHS	10 DHR 3411	Gray	07/30/10	
Pamela Terry-President/Administrator People Achieving Living Skills Inc. (PALS) v. DHHS, Div Of Health Service Regulation Mental Health Licensure & Certification	10 DHR 3883	Lassiter	08/18/10	

DEPARTMENT OF JUSTICE

Jay Eduard Krueger v. Criminal Justice Education and Training Standards Commission	06 DOJ 0578	Webster	06/29/10	
Scott Ray Berkley v. Criminal Justice Education and Training Standards Commission	09 DOJ 3750	Gray	06/25/10	
Tony Blaine Drake v. Criminal Justice Education and Training Standards Commission	09 DOJ 4151	Lassiter	04/14/10	
Daniel Brannon Gray v. Sheriff's Education and Training Standards Commission	09 DOJ 4364	May	03/15/10	
Phyllis Ann Johnson v. DOJ, Company Police Program	09 DOJ 5295	Elkins	05/03/10	25:01 NCR 111
Joseph Thomas DePrisco v. Criminal Justice Education and Training Standards Commission	09 DOJ 5354	Lassiter	06/01/10	
Michael Gray Solomon, Jr v. Sheriffs' Education and Training Standards Commission	09 DOJ 5648	Gray	06/30/10	
Lang Lemorris Harrison v. Sheriffs' Education and Training Standards Commission	09 DOJ 5649	May	07/30/10	
Kenneth Maidene, Jr v. Sheriff's Education and Training Standards Commission	09 DOJ 5650	Overby	04/19/10	
Dustin RY Hussey v. Sheriffs' Education and Training Standards Commission	09 DOJ 5857	Brooks	07/27/10	
Jeffrey Gray Royall v. Sheriffs' Education and Training Standards Commission	09 DOJ 5859	May	07/28/10	
Mitchell Ray Satterthwaite v. Criminal Justice Education and Training Standards Commission	09 DOJ 6326	Lassiter	07/16/10	
Dustin Matthew James v. Sheriffs' Education and Training Standards Commission	09 DOJ 6254	Gray	05/07/10	
Phillip Daniel Griffin v. Sheriffs' Education and Training Standards Commission	10 DOJ 0156	Gray	07/21/10	
Robert Clay Thompson v. Sheriffs' Education and Training Standards Commission	10 DOJ 0064	Webster	07/26/10	
Frankie Durwood Hill v. Sheriffs' Education and Training Standards Commission	10 DOJ 0065	Overby	07/24/10	
Charles Lovelace Williams v. Sheriffs' Education and Training Standards Commission	10 DOJ 0066	Gray	05/26/10	
Richard Anthony Simpson v. Sheriffs' Education and Training Standards Commission	10 DOJ 0155	Lassiter	07/21/10	
Anthony Paul Britt v. Sheriffs' Education and Training Standards Commission	10 DOJ 0157	Gray	06/02/10	
Wayne Keith Timmons v. Sheriffs' Education and Training Standards Commission	10 DOJ 0158	Gray	05/26/10	
Jeffrey Edward Byrd v. Sheriffs' Education and Training Standards Commission	10 DOJ 0389	May	05/26/10	
William Lee Walter v. Private Protective Services Board	10 DOJ 0528	Webster	04/22/10	
Mark Mauldin v. Criminal Justice Education and Training Standards Commission	10 DOJ 0583	Gray	07/29/10	
Thomas Bernard Clark v. Private Protective Services Board	10 DOJ 1009	Lassiter	07/23/10	
Michael H. Robinson v. DOJ, Company Police Program	10 DOJ 1093	Brooks	07/29/10	
Michael Luther Cole v. Private Protective Service Board	10 DOJ 1102	Lassiter	07/26/10	
Frederick Charles Newingham v. Private Protective Services Board	10 DOJ 1103	Lassiter	07/23/10	
Steven Daniel Blue v. Private Protective Service Board	10 DOJ 1250	Webster	08/03/10	
Brian Scott Bradshaw v. Alarm Systems Licensing Board	10 DOJ 1738	Webster	08/03/10	
Geoffrey Paul Doucette v. Sheriffs' Education and Training Standards Commission	10 DOJ 2378	Overby	08/20/10	

DEPARTMENT OF TRANSPORTATION

Andrew Scott Treadway v. Commissioner of Division of Motor Vehicles, Mr. Robertson	10 DOT 3746	May	08/19/10	

DEPARTMENT OF STATE TREASURER

Michael L. Bost Sr., v. Retirement System	09 DST 3781	May	04/15/10	
Jane C. Brocious v. State Treasurer Retirement System Division	09 DST 4066	Gray	03/25/10	25:03 NCR 350
Russell Ray Rouse v. DOT, Retirement Systems Division	10 DST 0068	Overby	07/21/10	

STATE BOARD OF EDUCATION

Benjamin Franklin Wyche Jr. v. State Board of Education	10 EDC 2449	Overby	07/20/10	
Dionne B. Stafford Pursley v. State Board of Education	10 EDC 2685	Overby	07/21/10	

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Quality Built Homes Inc. v. DENR, Division of Water Quality	09 EHR 2650	May	07/22/10	
Windy Woods, LLC v. DENR, Division of Water Quality	09 EHR 4621	Gray	06/04/10	25:05 NCR 674
Rufus E. Murray v. DENR, Division of Marine Fisheries	09 EHR 5042	Gray	07/23/10	
Little Miracles Child Care, Margaret Mosley v. Moore County Health Department, DENR	10 EHR 0624	Gray	08/11/10	
Bradford M. Kimzey v. DENR, Division of Environmental Health	10 EHR 0876	Overby	06/23/10	
Bill M. Klimvakis, Bill's Plumbing v. DENR, Division of Waste Management	10 EHR 3286	Overby	08/23/10	

DEPARTMENT OF INSURANCE

Tammy A. Lee v. Blue Cross Blue Shield of NC	09 INS 6817	Overby	05/03/10	
Benton E. Miles, Jr., State Health Plan	10 INS 0720	Brooks	06/08/10	

OFFICE OF STATE PERSONNEL

Linda Cheryl Strider v. Vance County Board of Social Services	08 OSP 0904	Lassiter	06/25/10	
Gwendolyn E. White v. DHHS, Department of Information Resource Management (DIRM) Privacy and Security Office	08 OSP 0991	Webster	06/14/10	25:04 NCR 519
Jewel C. Mosley v. Wilson County Health Department, Felix Meyer, Director	08 OSP 2140	Gray	07/20/10	
Spencer Batchelor v. NCSU Campus Police	09 OSP 0059	Lassiter	03/29/10	25:03 NCR 358
Nedra T. Rollins v. NC State University	09 OSP 1536	Overby	06/07/10	
Bobby L. Murray v. NCCU	09 OSP 2149	Gray	06/18/10	25:07 NCR 933
Mekre Francis v. DHHS, Division of Mental Health, Developmental Disabilities and Substance	09 OSP 2813	Gray	05/27/10	

Abuse Services, Murdoch Developmental Center				
Willie Hubbs v. Broughton Hospital	09 OSP 3326	Brooks	04/19/10	25:03 NCR 372
Pamela D. Shoffner v. Agricultural and Technical State University, Mr. Linc Butler, Assistant Vice Chancellor for Human Resources	09 OSP 4432	Brooks	05/19/10	
Charolettee Hope v. Cumberland County Department of Social Services	09 OSP 4436	Gray	04/15/10	
O'Tonious T. Raynor v. DHHE, Emery Milliken	09 OSP 4648	Webster	07/26/10	25:07 NCR 948
Michael Karr v. DHHS, Division of Vocational Rehabilitation Services	09 OSP 5157	Elkins	07/19/10	25:07 NCR 960
Robert L. Hamm v. Department of Correction	09 OSP 5320	May	04/15/10	
Horace Blakeney v. UNC Charlotte	09 OSP 5352	Brooks	07/14/10	
Quintino Brooks v. NCCU	09 OSP 5567	Webster	04/28/10	25:03 NCR 379
Dwight Steven Murphy v. DHHS, Div. of Services for the Blind	09 OSP 5924	Webster	05/13/10	
LaCinda L. McKenzie v. O'Berry Center	09 OSP 6785	Lassiter	06/21/10	
Glenn Hodge v. DOT	10 OSP 0229	Lassiter	06/14/10	
Janice F. Stokes v. DOC, Division of Community Corrections	10 OSP 2316	Gray	08/20/10	
Alvin L. Bess v. The County of Cumberland	10 OSP 2517	Overby	06/25/10	
Cynthia Lloyd v. Vance County	10 OSP 2577	Overby	08/30/10	
John Anthony McDonald, II v. DHHS, Division of Information Resource Management	10 OSP 2786	Gray	06/24/10	
Tammy R. Northern v. County of Durham Criminal Justice Resources Center	10 OSP 2904	Gray	08/20/10	
Cornelia G. Snow v. Wendy Godwin/Longleaf Neuro-Medical Treatment Center	10 OSP 2909	Lassiter	06/29/10	
Angela R. Harris v. DOC	10 OSP 3007	Lassiter	08/31/10	
Vance L. Yates v. DJJDP Dept. of Juvenile Justice & Deliquency Prevention	10 OSP 3155	Overby	08/20/10	
Maureen Marie Schepis v. DHHS, J. Iverson Riddle Developmental Center, Emery Milliken, DHHS General Counsel	10 OSP 3346	Gray	08/30/10	

OFFICE OF SECRETARY OF STATE

Jenny S. Thompson v. Department of SOS	09 SOS 2342	Lassiter	03/17/10	
James D. Harrison v. Notary Public Commission	10 SOS 1515	May	06/15/10	

FILED
2010 JUL 26 AM 9:31
OFFICE OF ADMIN HEARINGS

STATE OF NORTH CAROLINA

COUNTY OF GASTON

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
09 DHR 6116

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, d/b/a CAROLINAS REHABILITATION-MOUNT HOLLY and d/b/a CAROLINAS HEALTHCARE SYSTEM,

Petitioner,

v.

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

Respondent,

and

CAROMONT HEALTH, INC. and GASTON MEMORIAL HOSPITAL, INC.,

Respondent-Intervenors.

RECOMMENDED DECISION

This matter came for hearing before Selina M. Brooks, Administrative Law Judge ("ALJ"), on April 12-16, 20-23, 2010, May 3-5, 2010, and June 14, 2010 in Charlotte, North Carolina, and on June 30, 2010 in High Point, North Carolina. Having heard all of the evidence in the case, and having considered the exhibits, arguments, and relevant law, the undersigned makes the Findings of Fact, by a preponderance of the evidence, enters her Conclusions of Law thereon, and makes the following recommended decision.

APPEARANCES

For Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Rehabilitation-Mount Holly and d/b/a Carolinas Healthcare System (collectively "CMHA"):

Gary S. Qualls
K&L Gates LLP
430 Davis Drive, Suite 400
Morrisville, NC 27560

For Respondent-Intervenor CaroMont Health, Inc. and Gaston Memorial Hospital, Inc. (collectively "CaroMont"):

Noah H. Huffstetler, III
Wallace C. Hollowell, III
Elizabeth B. Frock
Nelson Mullins Riley & Scarborough LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612

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

June S. Ferrell
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

APPLICABLE LAW

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act (the "APA"), N.C. Gen. Stat. § 150B-1 *et seq.*

2. The substantive statutory law applicable to this contested case hearing is the APA and the North Carolina Certificate of Need Law (the "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.0101 *et seq.*, the Criteria and Standards for Computed Tomography Equipment promulgated in 10A NCAC 14C .2300 *et seq.*, and the Office of Administrative Hearings Regulations, 26 N.C.A.C. 3.0101 *et seq.*

ISSUES

1. Whether the Agency: exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law, in finding the CMHA Application non-conforming with N.C. Gen. Stat. §§ 131E-183(a)(3), (4), (5), (6), (18a), (b) and 10A N.C.A.C. 14C.2303(1), and disapproving the CMHA Application.

2. Whether the Agency: exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law by finding the CaroMont Application conforming or conditionally conforming with all statutory review criteria in N.C. Gen. Stat. § 131E-183(a), and approving the CaroMont Application.

3. Whether the Agency's decision to approve the CaroMont Application violated the provisions set forth in N.C. Gen. Stat. § 150B, including whether the Agency substantially prejudiced CMHA's rights by approving the CaroMont Application.

BURDEN OF PROOF

CMHA bears the burden of showing by the greater weight of the evidence that the Agency substantially prejudiced its rights, and that the Agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule:

1. In finding its application to develop a freestanding emergency department in Belmont/Mt. Holly, Gaston County, nonconforming with N.C. Gen. Stat. §§ 131E-183(a)(3), (4), (5), (6) and (18a) and 10A N.C.A.C. 14C.2303(1), and in disapproving the CMHA Application.

2. In finding CaroMont's competing application to develop a freestanding emergency department in Mt. Holly, Gaston County, conforming or conditionally conforming with all applicable statutory review criteria in N.C. Gen. Stat. § 131E-183(a).

N.C. Gen. Stat. § 150B-23(a); *Britthaven, Inc. v. N.C. Dept. of Human Resources, et al.*, 118 N.C. App. 379, 455 S.E.2d 455, 459, *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). *Also see generally*, Jt. Ex. 1 at 950-1023.

WITNESSES

Witnesses for CMHA:

1. Frank Delmar Murphy, Jr. Mr. Murphy is the Vice President of Planning of CMHA, a position which he has held since April 1996. Mr. Murphy was qualified as an expert witness in: 1) health planning; and 2) CON preparation and analysis. (Tr. Vol. 1 at 109-10, 139-140)

2. James Clinton Hunter, M.D. Dr. Hunter is the Chief Medical Officer of the Carolinas HealthCare System Metro Group and has been employed with CMHA since 2008. Dr. Hunter was qualified as an expert in emergency medicine and healthcare administration from his clinical experience. (Tr. Vol. 2 at 16-17, 27)

3. Carol Leslie Hutchison. Ms. Hutchison is employed as a Project Analyst by the Agency. She is the Project Analyst who reviewed the CMHA Application and the CaroMont Application. She was called as an adverse witness in CMHA's case-in-chief. (Tr. Vol. 2 at 85-86)

4. Martha Frisone. Ms. Frisone is currently employed as the Assistant Chief by the Agency, a position she has held since March 1, 2010. During the review of the CMHA Application and the CaroMont Application, she held the position of Team Leader. She was called as an adverse witness in CMHA's case-in-chief. (Tr. Vol. 3 at 33, 99-100)

5. Dawn Carter. Ms. Carter is a CON consultant, and is the President and Principal Consultant with Health Planning Source, Inc. Ms. Carter was qualified as an expert in the areas of health planning, CON preparation and analysis in the capacity as a consultant. Ms. Carter was primarily responsible for overseeing the development of the CMHA Application, and for reviewing and editing drafts of the CMHA Application. Ms. Carter participated in the drafting of the comments against the CaroMont Application. Ms. Carter also participated in the drafting of CMHA's response to CaroMont's comments in opposition to the CMHA Application. (Tr. Vol. 4 at 78, 100-02; Tr. Vol. 6 at 79-80)

Witness for the Agency:

1. Ms. Frisone was called as a witness in the Agency's case-in-chief.

Witnesses for CaroMont:

1. Jayne Marie Kendall, M.D. Dr. Kendall is employed by Emergency Medicine Physicians which contracts with CaroMont and has worked at CaroMont since 2006. Dr. Kendall is the chair and medical director of the Emergency Department at CaroMont. Dr. Kendall participated in the preparation of the CaroMont Application by rendering opinions regarding the facility design and staffing of the proposed freestanding ED. (Tr. Vol. 8 at 29, 31-33)

2. Macklyn Rett ("Bo") Sellers, Jr. Mr. Sellers is the Director for Facilities Planning of CMHA, a position which he has held for fourteen years. (Tr. Vol. 8 at 72-73)

3. David Stephen Legarth. Mr. Legarth is a CON consultant and is the President and Senior Consultant with DanEs Planning, Inc. Mr. Legarth was qualified as an expert in the areas of health planning, CON preparation and analysis. Mr. Legarth prepared the CaroMont Application. Mr. Legarth prepared CaroMont's comments in opposition to the CMHA Application. (Tr. Vol. 8 at 135, 149, 154; Tr. Vol. 9 at 8, 135)

4. J. David Huber, M.D. Dr. Huber is the Executive Vice President of Clinical Integration at CaroMont. Dr. Huber's role in the preparation of the CaroMont Application was to review the emergency department operations and to develop opportunities for improving the overall provision of emergency services in Gaston County. (Tr. Vol. 7 at 4, 7)

5. Greg Gombar. Mr. Gombar is the Executive Vice President and Chief Financial Officer at Carolinas HealthCare System. Mr. Gombar prepared the funding letter which appears in the CMHA Application. (Jt. Exh. 2, pp. 517-518; Tr. Vol. 6 at 5, 7)

6. Kathleen Besson. Ms. Besson is the Assistant Vice President of Ambulatory Services at CaroMont. Ms. Besson's role in the preparation of the CaroMont Application was the clinical resources for the application and helping to develop the patient care delivery model for the proposed freestanding ED. (Tr. Vol. 10 at 178-79)

EXHIBITS ADMITTED INTO EVIDENCE

Joint Exhibits:

1. Agency File
2. CON Application of CMHA, Project I.D. No. F-8339-09
3. CON Application of CaroMont, Project I.D. No. F-8340-09

CMHA Exhibits:

4. Dawn Carter's Resume
5. Agency findings – 2009 Union County OR Review dated August 26, 2009
6. Agency findings – 2007 Rex Hospital – Panther Creek Diagnostic Center dated April 28, 2008
7. Agency findings – 2006 CMC-Union Healthplex in Waxhaw dated February 27, 2007
8. Pie Chart Showing CaroMont's Proposed Patient Shifts
11. Agency findings – 2007 Rowan Regional Medical Center – new hospital in Kannapolis dated March 28, 2008
12. Agency findings – 2007 Advanced Radiology of Shelby, LLC – establish a diagnostic center in Shelby, Cleveland County dated June 23, 2008
13. Agency findings - 2007 Presbyterian Diagnostic Center at Steele Creek – establish a diagnostic center in Steele Creek area of Mecklenburg County dated July 26, 2007
15. Agency findings – 2005 Mercy Hospital – relocate 11 beds from CMC-Mercy to CMC-Pineville dated December 28, 2005
16. Agency findings – 2002 Lake Norman Regional Medical Center – renovation of emergency department, dated December 18, 2002
19. Agency findings - 2007 Rex Hospital Inc. – develop outpatient cancer center, dated April 28, 2008

20A. Gaston Memorial Statement of Revenue and Expenses REVISED

23. Agency findings – 2008 Davie County Emergency Health Corporation – relocate existing hospital dated August 28, 2008
24. Agency findings – 2008 Forsyth Memorial Hospital – develop 50-bed satellite campus in Clemmons, dated December 23, 2008
25. Agency findings – 2009 Hoke County/Cumberland County Hospital and Diagnostic Center Review dated November 25, 2009 (Offer of Proof)
26. Agency findings - 2009 University of North Carolina Hospitals at Chapel Hill -develop second acute care medical campus in Hillsborough, dated September 25, 2009
27. Agency findings - 2006 Brunswick Community Hospital & Novant Health – construct Replacement Hospital dated April 27, 2007
28. Agency findings - 1997 Angel Medical Center – construction of an addition to the surgery suite to include one additional operating room, dated December 29,1997
29. Agency findings – 1996 Hamlet HMA – replacement of existing hospital, dated July 9, 1996
30. Agency findings – 2002 Rowan Regional Medical Center – construct three story patient tower dated February 27, 2003

31. Agency findings – 2007 High Point Health Care Ventures – relocate existing diagnostic imaging center dated March 28, 2008
32. Agency findings - 2007 KND Development 50, LLC – develop a new 60-bed freestanding long term care hospital dated March 28, 2008
33. Agency findings – 2007 S.M.G. Leasing Associates (Lessor) and Piedmont HealthCare (Lessee) – establish a new ambulatory surgical facility dated March 28, 2008
34. Agency findings – 2008 Forsyth County Acute Care Bed Review dated March 28, 2008
37. Deposition Transcript of Lee Hoffman in Novant Case – Contested Case No. 07 DHR 0688, dated January 10, 2008
38. Gaston Memorial Hospital, Inc. Freestanding Emergency Department – Statement of Revenue and Expenses, REVISED (Depo. Ex. 107)
38A. Gaston Memorial Hospital, Inc. Freestanding Emergency Department – Statement of Revenue and Expenses, REVISED
39. List of 8 Issues in three colors
40A. CHS Service Area Map
40B. CHS Service Area Map
41. Identification of Service Areas Comparison
43. Bar Graph re 87% vs. 99%
44A. Chart re % of GMH ED not served by MedPlex (25.9%)
44B. Chart re GMH Treatment Rooms Needed (8.9 vs. 4.3)
44C. Chart re Acuity Projection Comparison Sheet
44D. Chart Comparing Waxhaw, NorthCross, and Mt. Holly
45. CR-Mount Holly Freestanding ER Review – Comparative Factors Revised
46. CR-Mount Holly Healthplex Reviews – Facility Comparison (Depo. Ex. 109)
47. Gaston Memorial Hospital Freestanding ED Application- Revised ED visits Worksheet
49. Kathleen Besson's Deposition Transcript
51A. Market Share Downsizing Comparison Sheet
51B. GMH "capacity" chart
51C. Bar Graph Comparing GMH's: Visits; Tx Rooms; RME Bays; Square Feet; Capital Costs; and Revenues
52A. Map Showing Lack of "overlap issue" with Northcross and Steele Creek
52B. Chart Showing Lincoln Patients
52C. Chart Showing GMH's Excess X-Ray and Ultrasound Capacity
52D. Comparison of Alleged CHS Duplication with Actual GMH Duplication
53. Ancillary Utilization Comparison Sheet
54. Letter dated May 22, 2008 to Lee Hoffman and Susan Hackney regarding Contested Case No. 08 DHR 776 – Settlement in Waxhaw ED Negotiations Pursuant to Evidence Rule 408 – Revisions to April 30, 2008 settlement letter
55. CR-Mount Holly Map with In-migration comparisons
58. Application Excerpts from Mercy Hospital, Inc. d/b/a CMC-Pineville to develop a Healthplex in Steele Creek with a freestanding ED
59. Application Excerpts from CMHA d/b/a CMC-University to develop a hospital-based emergency department in Northcross Medical Park in Huntersville
60. Application Excerpts from Lincoln Health System d/b/a CMC-Lincoln to replace existing hospital
62. Chart created by Dawn Carter regarding capacity of ancillary equipment

64. Application Excerpts from Medical Park Hospital Clemmons dated September 17, 2007
65. Application Excerpts from WaveCo, LLC and CHS to relocate existing ambulatory surgical center (Edgehill Surgery Center)
67. CHS – Board Resolution [CONFIDENTIAL] (Offer of Proof)
68. Map showing distances to area hospitals
69. Chart Created by Dawn Carter regarding adjustment acuity
70. Chart by Dawn Carter
71. Photo of signage from Steele Creek
72. Agency findings – 2001 Mooresville Hospital Management Associates, Inc. d/b/a Lake Norman Regional Medical Center – dedicate existing angiography equipment as shared fixed cardiac catheterization equipment dated July 31, 2001
73. F. Del Murphy, Jr. Biography
94. Documents Produced by Agency: Agency findings - 2006 Moses Cone Hospital – develop freestanding ED in High Point
96. Documents Produced by Agency: Agency findings - 2006 Johnston Memorial Hospital – develop outpatient facility with freestanding ED, ORs and other diagnostic services
98. Documents Produced by Agency: Agency findings - 2007 CMC-Northeast – develop freestanding ED facility in Kannapolis
99. Documents Produced by Agency: Agency findings - 2007 WakeMed Brier Creek Healthplex

CaroMont's Exhibits:

5. Additional Expert Witness Opinions of Dawn Carter
7. CMC-Mt. Holly, CON Production Schedule, Health Care Pavilion (CMHA 16)
36. C. V. of David Legarth
38. C. V. of Jayne Marie Kendall, MD, FACEP
66. Documents Produced by CMHA (1339; 2460-2469)
102. Revised Pro Forms (prepared by David Legarth)
103. Expert Opinion of David Legarth
111. Emails dated 5/14/09 between Senior Staff, Carol Lovin and Joseph Piemont regarding Mt. Holly Healthcare Pavilion CON filed today
138. Deposition Transcript of Timothy Spence dated 4/2/10
147. Mark-up of Petitioners' Exhibit 44b
148. Chart prepared by David Legarth
150. Chart prepared by Ms. Besson regarding updated volumes at main hospital ED (Offer of Proof)

Agency's Exhibits:

4. Pages from WakeMed's Website

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 the credibility, including but not limited to, the demeanor of the witnesses, any interests, bias, or prejudice each witness may have, the opportunity of each witness to see, hear, know, or remember the facts or occurrences about which each witness testified, whether the testimony of each witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

Parties:

CMHA

1. Petitioner, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Rehabilitation-Mount Holly and d/b/a Carolinas HealthCare System (collectively "CMHA"), is a not-for-profit, multi-hospital system with its principal place of business in Mecklenburg County, North Carolina. CMHA provides health care services which includes emergency services. (Jt. Ex. 2 at 1, 8, 11-14)

2. CMHA is a North Carolina hospital authority which operates, among other facilities, Carolinas Rehabilitation-Mount Holly ("CR-Mount Holly"). (Jt. Ex. 2 at 8, 212)

3. In the years immediately prior to filing the CON Application at issue in this contested case, CMHA has filed CON Applications for freestanding emergency department healthplexes and is in the process of developing healthplexes in: Waxhaw, Union County (referred to as the "Waxhaw Healthplex"); Huntersville, Mecklenburg County (referred to as the "Northcross Healthplex"); the Steele Creek area of Mecklenburg County (referred to as the "Steele Creek Healthplex"); and Kannapolis in Cabarrus County (referred to as the "Kannapolis Healthplex"). (Jt. Ex. 2 at 11-12)

4. The Northcross Healthplex, Steele Creek Healthplex and Kannapolis Healthplex CON applications were all approved. The Waxhaw Healthplex CON application was initially denied and then approved by the Respondent through settlement.

5. These CMHA Healthplex CON Applications were similar proposals in that they all proposed emergency departments operating 24 hours a day/7 days a week/365 days a year and would be staffed by board certified emergency room physicians with between 8-11 treatment rooms and offer the same scope of services.

6. CMHA also operates two freestanding emergency departments in Charleston, South Carolina which are not physically attached to acute care hospitals. The two Charleston facilities are located approximately 12-19 miles away, respectively, from the nearest acute care hospital. (Jt. Ex. 2 at 32)

7. CMHA currently provides services to residents of Gaston County at its existing Mecklenburg County facilities, including those facilities' emergency departments ("EDs").

8. Since 2006, CMHA has internally discussed placing a Healthplex in the Mount Holly/Belmont area because patients travel from that area to be treated at CMHA facilities.

9. CMHA's Mount Holly project would be a natural extension of the services CMHA currently provides to Gaston County residents as well as an opportunity for those patients to seek emergency care closer to home.

10. In 2009, CMHA filed a CON Application, proposing to develop a freestanding emergency department (Mount Holly Healthplex or Healthplex) in the Belmont/Mount Holly area of Gaston County. The Mount Holly Healthplex would provide emergency department services and outpatient imaging and laboratory services. The Healthplex would be located on CR-Mount Holly's campus, with the following services to be included:

- eight exam/treatment rooms, one of which will be a resuscitation room;
- two observation beds;
- one new 64-slice CT scanner;
- one multipurpose ultrasound unit and one portable ultrasound unit;
- one X-ray machine;
- laboratory; and
- an automated pharmaceutical dispensing machine.

(Jt. Ex. 1 at 951; Jt. Ex. 2 at 20-26)

11 CMHA's proposed project would be licensed under CR-Mount Holly and certified by Medicare as a second provider-based location for Carolinas Rehabilitation. (Jt. Ex. 1 at 951; Jt. Ex. 2 at 6)

12. CMHA's Mount Holly Healthplex would not be physically attached to a hospital with acute care beds.

CaroMont

13. Respondent-Intervenor, CaroMont Health, Inc. and Gaston Memorial Hospital, Inc. (collectively, "CaroMont"), is a not-for-profit, hospital system with its principal place of business in Gaston County, North Carolina. CaroMont provides health care services, which includes emergency services. (Jt. Ex. 3 at 6, 14-15)

14. CaroMont Health, Inc. is the parent of Gaston Memorial Hospital, Inc. ("GMH") which operates an acute care hospital in Gaston County. (Jt. Ex. 1 at 979)

15. In 2008, CaroMont filed a CON application ("2008 Application") to develop a freestanding emergency department in Mount Holly, Gaston County to be operated as an outpatient department of GMH. The 2008 Application made patient volume projections using the same need methodology and assumptions, based upon the subjective judgment of hospital administrators, as the Moses Cone Health System ("Moses Cone") in a similar CON project approved by the Agency in 2006. (Tr. Vol. 8 at 208-12; CMHA Ex 94) This Application was

denied by the Agency on the ground that its patient volume projections were not supportable. (Jt. Ex. 1 at 836-873)

16. In 2009, CaroMont filed a new Application ("2009 Application") that was substantially the same as the 2008 Application in that it proposed the same project based upon the same need methodology and assumptions. The difference between the Applications is that in 2009, CaroMont commissioned a telephone survey to address the Agency's concerns that the subjective opinion of CaroMont did not support their projections in the 2008 Application.

17. The 2009 Application, the subject matter of this proceeding, proposed to develop a satellite emergency department (MedPlex) in Mount Holly in Gaston County. The MedPlex would be operated as an outpatient department of GMH. The MedPlex would provide emergency department services and outpatient imaging and laboratory services, including:

- six rapid medical evaluation ("RME") bays;
- twelve treatment rooms;
- one trauma room;
- one resuscitation room;
- one replaced and relocated 128-slice CT scanner;
- one ultrasound unit;
- one fixed general radiology unit;
- one mobile general radiology unit;
- laboratory; and
- an automated pharmaceutical dispensing machine.

(Jt. Ex. 1 at 979-980; Jt. Ex. 3 at 16)

18. CaroMont's proposed project would not be physically attached to a hospital with acute care beds. (Jt. Ex. 3 at 16)

The CON Section

19. Respondent, the Certificate of Need Section ("CON Section" or the "Agency"), is the agency within the N.C. Department of Health and Human Services (the "Department"), the Division of Health Service Regulation (the "Division"), that carries out the Department's responsibility to review and approve the development of new institutional health services under the CON Law.

20. CaroMont's Application and CMHA's Application were assigned to the same Project Analyst who also reviewed CaroMont's 2008 Application.

21. Prior to this review, the Project Analyst was involved in the review of freestanding ED applications for CMC-Kannapolis, CMC-Waxhaw and CMC-Northeast. This review was her first competitive freestanding ED review. (Tr. Vol. 2 at 87-89)

22. The team leader reviewed the Agency findings prepared by the Project Analyst. Prior to this review she was involved in only one other freestanding ED review, involving Moses Cone Health System. (Tr. Vol. 2 at 101, 105)

Procedural Background:

23. On or about May 15, 2009, CMHA submitted a CON application to develop a freestanding emergency department and outpatient imaging services in Belmont/Mount Holly, Gaston County, North Carolina ("Mt. Holly Healthplex"). (Jt. Ex. 2)

24. On or about May 15, 2009, CaroMont submitted a CON application to develop a freestanding emergency department and outpatient imaging services in Mount Holly, Gaston County, North Carolina ("MedPlex"). (Jt. Ex. 3)

25. The Agency determined that the CMHA Application and the CaroMont Application were competitive. (Jt. Exh. 1 at 3, 85)

26. During the review by the Agency, CMHA filed written comments asserting that the CaroMont Application should be disapproved. CaroMont also filed written comments, asserting that the CMHA Application should be disapproved. (Jt. Ex. 1 at 93-121) The public hearing was held on July 21, 2009. Representatives of CMHA and CaroMont presented information at the public hearing regarding their respective applications as well as the competing application. (Jt. Ex. 1 at 122-286)

27. By decision letter dated October 9, 2009, the Agency informed CMHA that its application had been disapproved. (Jt. Ex. 1 at 78-80) The Agency's findings denying the CMHA Application are also dated October 9, 2009. (Jt. Ex. 1 at 950-1023)

28. By decision letter dated October 9, 2009, the Agency informed CaroMont that its application had been conditionally approved. (Jt. Ex. 1 at 87-90) The Agency's findings conditionally approving the CaroMont Application are also dated October 9, 2009. (Jt. Ex. 1 at 950-1023)

29. On November 6, 2009, CMHA filed a Petition For Contested Case Hearing with the Office of Administrative Hearings ("OAH") in which it appealed the disapproval of its Application and asserting additional grounds, beyond those cited by the Agency, for the disapproval of the CaroMont Application.

30. On November 19, 2009, CaroMont filed a consent motion to intervene which motion was granted by the Undersigned on December 2, 2009.

31. The hearing of this contested case was held on April 12-16, 20-23, May 3-5, June 14 and 30, 2010.

CON Review Process:

32. In testimony, the Agency explained that it reviews an application for conformity with applicable statutory and regulatory criteria by analyzing whether the applicant's methodology and assumptions are "reasonable and supportable". The Agency does not mandate what methodology or assumptions an applicant uses. The fact that a methodology may have been accepted and an application based upon it may have been approved in the past does not mean that the methodology will be found acceptable in a similar application. The Agency evaluates an Applicant's assumptions to determine whether the assumptions are reasonable and supportable based upon the Applicant's documentation submitted with the Application. The Agency may use its experience and knowledge based upon other CON reviews to assist with its analysis. (Tr. Vol. 12 at 23, 159-61, 179-86, 484-85; Tr. Vol. 13 at 103-04, 182)

33. Pursuant to N.C. Gen. Stat. § 131E-176(16)(b), a certificate of need is required for the projects proposed in both the CMHA Application and the CaroMont Application, because both projects proposed to develop or expand a health service or health service facility that would require a capital expenditure in excess of $2 million. There is no methodology in the State Medical Facilities Plan for establishing the need for additional emergency department services.

34. To receive a CON for a proposed project, an applicant's proposal must satisfy all applicable statutory review criteria specified in N.C. Gen. Stat. § 131E-183(a) as well as all applicable regulatory review criteria established pursuant to N.C. Gen. Stat. § 131E-183(b). N.C. Gen. Stat. § 131E-183; *Bio-Medical Applications of N.C., Inc.*, 136 N.C. App. 103, 523 S.E.2d 677 (1999); *Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996).

35. The applicant has the burden of demonstrating conformity with the review criteria. *Presbyterian-Orthopaedic Hosp. v. N.C. Dep't of Human Res.*, 122 N.C. App. 529, 534, 470 S.E.2d 831, 834 (1996). The applicant must include everything that it needs to demonstrate conformity with the review criteria in the CON application itself. *See* 10A N.C.A.C. 14C.0204.

36. The Agency has the authority to approve, conditionally approve or disapprove an application. N.C.G.S. § 131E-186; 10A N.C.A.C. 14C.2307(a).

37. The Agency does not condition an applicant to provide information necessary to demonstrate need. The conditions that the Agency imposes are strictly for documentation, not information that must be analyzed after the end of the review to determine whether the applicant has demonstrated need. (Tr. Vol. 5 at 9)

38. "Applications are competitive if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application reviewed in the same review period." 10A N.C.A.C. 14C.0202(f).

39. The Agency treated the two applications as competitive. (Jt. Ex. 1 at 102)

40. In a competitive review, each Application is to be reviewed independently for conformity to statutory and regulatory criteria, and then, after each Application is reviewed on its merits, the Agency compares the Applications to determine which should be approved. *See Britthaven, Inc. v N. C. Dept. of Human Resources, et al.,* 118 N.C. App. 379, 384-85 (1995). This Recommended Decision separately discusses the Agency's independent reviews of the Applications under each applicable statutory and regulatory criteria in the sections below and the comparative review is discussed in a separate section toward the end of the findings of fact.

41. In addition to information presented in CON applications, competitive written comments and public hearing presentations, the Agency considers and relies upon publicly available data in its review and analysis of CON applications. The publicly available data which the Agency may access and consider includes, but is not limited to, census or demographic data, population data, data reported on providers' licensure renewal applications, and data maintained by the North Carolina Cancer Registry. The Agency may access resources which are publicly available through the Internet. (Jt. Ex. 1 at 93-949; Tr. Vol. 3 at 57-58, 61-62, 64-65; Tr. Vol. 11 at 42, 49, 68; Tr. Vol. 12 at 117, 119-120)

42. An applicant may not amend its application absent a specific request for additional information from the Agency. 10A N.C.A.C. 14C.0204.

The CON Section's Review of the Applications:

43. The Agency determined that Criteria 1, 3a, 9, 10, and 10A N.C.A.C. 14C.2302(b), 14C.2302(e), 14C.2302(g), 14C.2302(h), 14C.2303(2), 14C.2303(3), 14C.2304(b)(1), 14C.2304(b)(2), 14C.2305(c) were not applicable to CMHA's Application or CaroMont's Application. (Jt. Ex. 1 at 950-1023)

44. The Agency determined that CMHA was conforming to Criteria 7, 8, 12, 13, 14, and 20 and the rules at 10A N.C.A.C. 14C.2302(a), .2302(c), .2302(d), .2302(f), .2302(i), .2302(j), .2304(a), .2305(a), .2305(b). (Jt. Ex. 1 at 950-1023)

45. The Agency determined that CMHA was nonconforming with Criteria 3, 4, 5, 6, 18a and rule 10A N.C.A.C. 14C.2303(1). (Jt. Ex. 1 at 950-1023)

46. The Agency determined that CaroMont was conforming to Criteria 3, 4, 5, 6, 12, and 18a. As documented in the required Agency Findings, the Agency found that the CaroMont Application was conforming or conditionally conforming with all of the applicable statutory review criteria in N.C. Gen. Stat. § 131E-183(a). (Jt. Ex. 1 at 950-1023) There are no regulatory review criteria applicable to the CaroMont Application pursuant to N.C. Gen. Stat. § 131E-183(b).

Criterion 3 and Related Criteria:

47. N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3") requires the following:

> The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the

services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

48. Criterion 3 has two components: (1) the applicant must identify the population that it proposes to serve; and (2) the applicant must demonstrate the need that population has for the services it proposes.

Criterion 3 – Identification of Service Area:

Review of CMHA Application

49. CMHA's Application generally identified a five-mile service area and specified the population that was included in the service area by zip codes. (Jt. Ex. 2 at 69-76)

50. The service area map included in CMHA's Application is a representational map of the service area with a red circle as a graphical representation of the general five-mile radius. (Jt. Ex. 2 at 70)

51. In a similar application filed by CMHA for a freestanding emergency department, the Steele Creek Healthplex, CMHA configured its service area for specific zip codes because of the closeness of the proposed Steele Creek Healthplex to the existing CMC-Pineville hospital, under which the Healthplex was to be licensed. It was assumed that not all patients in the proposed service area would use the Steele Creek Healthplex due to the proximity of the hospital. A representational map of the service area with a circle drawn as a graphical representation of the service area was included. (CMHA Ex. 58 at 58) The Agency approved the Steele Creek Healthplex application. (Jt. Ex. 1 at 874)

52. The Agency determined that there was an inconsistency between the text of the CMHA Application and the representational map, because some zip codes identified in the text as the service area for CMHA were only partly within the five-mile radius red circle drawn on the map. The Agency testimony was that only the portion of the zip code within the red circle on the map could be within CMHA's service area. (Jt. 1 at 960-61; Tr. Vol. 4 at 111-13)

53. CMHA used Claritas population data that was specific to the zip codes identified as its service area and its market share percentage to calculate patient utilization projections. (Jt. Ex. 2 at 70-71)

54. The Agency used data from the North Carolina Office of Budget and Management ("OBM") to evaluate CMHA's projections. (Jt. Ex. 1 at 958) The OBM only provides population data by county. (Tr. Vol. 2 at 54-56)

55. The Agency determined that CMHA was nonconforming to Criterion 3 because it did not adequately identify the population it proposes to serve. (Jt. Ex. 1 at 952-53)

56. The Agency acted in error when it determined that CMHA did not adequately identify its service area and when it used the nonanalogous OBM data to verify CMHA's projections based on Claritas data.

Review of CaroMont Application

57. The CaroMont Application identified the service area for the proposed Mt. Holly MedPlex by specifying six zip codes in Gaston and Mecklenburg Counties. (Jt. Ex. 3 at 58, 71-81)

58. For the Town of Stanley zip code (28164), the CaroMont Application stated that population estimates and projections included only 60% of the zip code's total population, the estimated percentage of the town's population living in Gaston County. The remainder live in Lincoln County. (Jt. Ex. 3 at 40)

59. When CaroMont projected the volume of ED visits, it counted 100% of the Stanley zip code population, not just the 60% as CaroMont defined its service area. (Jt. Ex. 3 at 71)

60. CaroMont was inconsistent between how it described its service area and how it made utilization projections based on population data.

61. In competitive comments, CMHA stated that CaroMont overstated its projected utilization because it did not use only 60% of the population of the Stanley zip code in its methodology. (Jt. Ex. 1 at 93-121)

62. The Agency did not review this issue raised by CMHA in its competitive comments. (Tr. Vol. 2 at 141-42)

63. If the Agency had performed the recalculation regarding CaroMont's patient origin projections, the Agency would have found that CaroMont had overstated its population by 5032 and ED visits by 733. (Tr. Vol. 2 at 143; Tr. Vol. 4 at 122)

64. The Agency decision to conditionally approve the CaroMont Application would have been the same even if the Agency had reviewed this issue. (Tr. Vol. 2 at 144)

65. The Agency determined that CaroMont adequately identified the population proposed to be served. (Jt. Ex. 1 at 951, 997)

66. By comparison with another review, Agency findings for additional operating rooms in Union County ("Union County OR Review") show that the Agency determined that the subtotals for patients from certain zip codes did not correspond to the percentage of the primary service area population from that zip code and stated that there was a difference of four to six percentage points quoted throughout the application. (CMHA Ex. 5 at 7-8) The Agency concluded "that as a result of the inconsistencies described above, the applicant did not adequately describe the population to be served." (CMHA Ex. 5 at 10)

67. In the Union County OR review, the Agency cited a 6% point difference in patient origin calculations as a basis for finding the applicant nonconforming to Criterion 3.

68. In this review, CaroMont was approved and found conforming with Criterion 3 with a 40% point difference in its patient origin calculations.

69. In another set of findings, Rex Hospital proposed to develop an outpatient care center. In the Rex findings, the Agency stated: "However, the applicants listing the zip codes in the primary and secondary service areas are not consistent throughout the application.... Therefore, the applicant did not adequately identify the population proposed to be served." (CMHA Ex. 6 at 4)

70. The Agency determined that Rex Hospital's inconsistencies made the Rex application nonconforming with Criterion 3.

71. Another set of Agency findings denied CMHA's Application to develop a Healthplex in Waxhaw. According to the Agency, the applicant provided inconsistent information with regard to its primary and secondary service areas since one of the census tracts listed in the application was identified for York County when in fact it was actually in Lancaster County. (CMHA Ex. 7 at 17-18)

72. In the Waxhaw Healthplex review, the Agency found the applicant nonconforming with Criterion 3 because it did not know whether the primary service area included a particular county. This is similar to CaroMont's lack of clarity regarding Lincoln County residents of the Town of Stanley zip code being excluded from CaroMont's service area. (CMHA Ex. 7) However, unlike the Waxhaw Healthplex review, CaroMont's Application was found conforming with Criterion 3.

73. The Agency's findings that the CaroMont Application adequately defined its service area are inconsistent with other Agency findings.

74. The Agency acted in error when it did not review the CaroMont Application for overstated patient population projections and did not consider it in their review of the Application's conformity with statutory and regulatory criteria.

75. The Agency determined that CaroMont was conforming with criterion 3 even though their projections were overstated.

Agency's Independent Reviews of the Applications

76. The Agency was arbitrary and capricious when it found the CMHA Application nonconforming with criterion 3 based upon the Agency's evaluation using nonanalagous data and found the CaroMont Application conforming with criterion 3 based upon overstated projections.

77. The Agency disparately and arbitrarily treated CMHA and CaroMont concerning their relative compliance with Criterion 3 related to the issue of service area identification.

Criterion 3 – ED Projections – Acuity:

Review CMHA Application

78. CMHA's proposed Mount Holly ED will operate with the same characteristics of a traditional hospital based emergency department and will be staffed the same as a hospital ED, based on acuity levels, i.e., the severity of the condition resulting in the ED visit. CMHA's proposed Mount Holly ED will be open 24/7, and be staffed by board certified emergency physicians. (Jt. Ex. 2 at 21)

79. The CMHA Application provides this description:

> CMC-Mount Holly will not be a designated trauma center. All trauma victims being transported via Mecklenburg Emergency Medical Services or Gaston Emergency Medical Services will be transported to the nearest trauma center. As such, CMC-Mount Holly does not expect to receive trauma patients from EMS, but it is well aware that many trauma patients arrive as walk-ins. As with any emergency department (freestanding or community hospital-based) trauma patients—such as gunshot wounds, motor vehicle accident (MVA) victims, and other critical cases—must be stabilized and transferred to a higher level of inpatient care for ongoing treatment.

(Jt. Ex. 2 at p. 20)

80. Freestanding emergency departments can offer the same clinical capabilities as a community hospital, but with an outpatient focus that raises the level of efficiency and patient satisfaction. (Jt. Ex. 2 at 33)

81. In the CMHA methodology, ED visits are assigned a level of acuity from I through VI, with Level VI being the highest acuity level. Although CMHA will be capable of treating all ED visits, regardless of acuity, CMHA based its utilization projections on only Level I through V visits. (Jt. Ex. 2 at 75) The CMHA Application did not provide definitions for the acuity levels.

82. CMHA's Application provided historical data from its Charleston freestanding ED facilities about the patients who seek care at those facilities by level of care. (Jt. Ex. 2 at 75)

83. CMHA's methodology for projections entailed a three-step process: (1) CMHA started with total ED visits, inpatient and outpatient; (2) subtracted out the 1% of level VI patients; and (3) projected a market share percentage for patients that would go to the freestanding facility. (Jt. Ex. 2 at 75-77)

84. CMHA's assumptions regarding acuity were based on: (1) the 99% Level I through V patients that are seen at CMHA's Charleston freestanding EDs; and (2) the 99% of Level I

through V patients seen at CMHA's Mecklenburg County hospitals. CMHA subtracted the 1% of ED patients that are Level VI and would be less likely to present at the proposed Mount Holly ED. (Jt. Ex. 2 at 75-77)

85. The Agency findings stated that CMHA ED facilities had 30% market share in the five-mile service area radius. (Jt. Ex. 1 at 966)

86. CMHA's Application conservatively assumed that it would achieve a 25% market share capture rate by the third project year within the five-mile service area of the proposed Mount Holly ED. (Jt. Ex. 2 at 77, 80) This assumption is analogous to one of the main market share assumptions in CMHA's approved Steele Creek application. (CMHA Ex. 58)

87. The Agency made certain assumptions which it used to evaluate CMHA's Application as set forth below.

88. The Agency assumed that the percentage of ED visits that would result in an inpatient admission were inappropriate for a visit to a freestanding ED. (Jt. Ex. 1 at 9664-65) The Agency made this assumption because other CON applications in other reviews have used this assumption in the past.

89. The Agency examined the license renewal applications for CMHA facilities to determine that 87% of emergency department visits result in an inpatient admission to a hospital as a proxy for estimating the percentage of patients that would not be treated at a freestanding emergency department. (Jt. Ex. 1 at 964-65)

90. The Agency determined that CMHA's volume projections were over-stated because they included patients needing inpatient admissions in its volume projections for a freestanding facility. (Jt. Ex. 1 at 964-65)

91. Based upon the Agency's recalculations and assumptions, the Agency concluded that CMHA did not adequately demonstrate the reasonableness of CMHA's assumption that Level I through V patient visits were appropriate for treatment at a freestanding ED. (Jt. Ex. 1 at 965)

92. The Agency erred when it used the Agency's assumption to evaluate CMHA's projections rather than accepting as supportable documentation the historical data from the Charleston freestanding ED and the Mecklenburg County hospitals submitted by CMHA as a basis for its assumptions.

Review of CaroMont Application

93. The emergency department at GMH is highly utilized, over-crowded and operating at 97% capacity. (Jt. Ex. 2 at 61; Jt. Ex. 3 at 41-42; Jt. Ex. 1 at 494) CaroMont proposed to expand GMH's emergency department by developing the Mount Holly MedPlex as a freestanding ED, intended to increase capacity and alleviate overcrowding at GMH's main campus. (Jt. Ex. 3 at 2, 38)

94. As part of its demonstration of need, CaroMont proposed an "internal shift" of 72% of existing GMH patients who currently seek treatment at GMH to the new Mount Holly MedPlex. This internal shift amounted to 11,151 patients. (Jt. Ex. 3 at 74-75)

95. CaroMont also proposed an "external shift" of patients who are not currently GMH patients. The external shift was based on CaroMont's projection to gain market share from other providers. This external shift amounted to an additional 11,040 patients. (Jt. Ex. 3 at 72-79)

96. The Agency found that CaroMont's projected internal shift of 72% of its existing patients in the proposed service area to a new freestanding ED was reasonable, relying upon earlier Agency findings approving a CON application for a freestanding ED for Moses Cone Health Services ("Moses Cone") which projected a 75% internal shift based upon subjective judgment. (Jt. Ex. 1 at 989; Tr. Vol. 3 at 167-68; CMHA Ex. 94)

97. In previous CON applications for a freestanding ED, Steele Creek, Kannapolis and NorthCross, CMHA proposed internal shifts of existing patients to the new freestanding facilities ranging from 75-92 percent. (Jt. Ex 1 at 874-927, 926-949; CMHA Ex. 98)

98. CaroMont's Application stated that it assumed patients would go to emergency departments closest to their homes that were likely to be less crowded and have shorter wait times. CaroMont stated that "to validate" its assumptions about the external shift of patients, it relied on the results of a telephone survey. (Jt. Ex. 3 at 74, 76)

99. The telephone survey was commissioned because in 2008, when CaroMont filed its first application to develop a freestanding ED in Mount Holly, it made patient utilization projections based on the experience of its administrative team and the proximity of patients to the proposed facility, following the same need methodology and assumptions identified in the Agency findings for the Moses Cone application. (CMHA Ex. 94) The 2008 and 2009 Applications were substantially the same. The 2008 Application was found not supportable.

100. The Agency determined that it did not have sufficient information about the telephone survey to determine its scope or validity, and found the results of the survey to be unreliable. (Jt. Ex. 1 at 988-89)

101. The Agency found that CaroMont's projections for the external shift of patients to be unsupportable because of the unreliability of the telephone survey and that the Application overstates their projected ED utilization by approximately twice the amount. (Jt. Ex. 1 at 992)

102. The CaroMont need methodology did not include any acuity adjustments. (Jt. Ex. 3 at 69-89)

103. If the Agency had reviewed CaroMont's license renewal application, the Agency would have been able to determine that CaroMont's internal shift projections did not make any acuity adjustment.

104. The Agency did not find CaroMont's internal shift projections were overstated even though no acuity adjustment was made.

105. The Agency was inconsistent when it found the ED projections for the internal shift of patients in the 2008 Application not supportable and found the ED projections for the internal shift of patients based upon the same methodology and assumptions in the 2009 Application to be supportable.

Agency's Independent Reviews of Applications

106. Agency findings of other reviews have been inconsistent as to whether an acuity adjustment is required for projections of patient utilization of freestanding EDs.

107. In the Waxhaw application, the Agency determined the applicants overestimated the projected number of emergency department visits by not making an estimated acuity adjustment for patients who would need surgery at an inpatient facility and, thus, could not be appropriately treated in a remote freestanding emergency department without operating rooms. (CMHA Ex. 7)

108. The projections in CMHA's Steele Creek application entailed a two-step process: (1) CMHA started with total ED visits, inpatient and outpatient; and (2) projected a market share percentage of the patients that would go to the freestanding facility. (CMHA Ex. 58 at 76, 83-84) CMHA never made an acuity adjustment in CMHA's Steele Creek application.

109. In a previously filed CON Application by Moses Cone for a freestanding ED, Moses Cone assumed that within its primary service area, 75% of projected ED patients would be assumed to use the new freestanding emergency center, while the remaining 25% would be projected to go to one of Moses Cone's Greensboro campus EDs. (CMHA Ex. 94 at 15-16) Moses Cone based these utilization and market share "assumption[s] … mainly on the subjective judgment of Moses Cone." (CMHA Ex. 94 at 16)

110. The Agency incorrectly determined that CMHA license renewal applications contained data around inpatient and outpatient admissions from emergency departments that contradicted CMHA's acuity assumptions and, on that basis, found CMHA nonconforming with Criterion 3.

111. The Agency was inconsistent when it made the assumption that any ED visit that results in an inpatient admission would not be reasonable to project as an ED visit for a freestanding ED and only applied this assumption to the CMHA Application.

112. The Agency was inconsistent when it reviewed CMHA license renewal applications in an effort to determine if there was any data which contradicted CMHA's utilization projections and did not review any CaroMont license renewal applications in an effort to determine if there was any data which contradicted CaroMont's utilization projections.

113. The Agency was inconsistent when it found CMHA nonconforming because its projections based upon historical data from its Charleston facility were not reasonable and not

supportable, and found the CaroMont Application conforming even though the Agency determined that approximately one-half of their projected volumes were not supportable.

114. The Agency was inconsistent when it found the CMHA Application was nonconforming because the acuity adjustment made to their ED visit projections was too small and found the CaroMont Application conforming even though there was no acuity adjustment made to their ED visit projections.

115. The Agency disparately and arbitrarily treated CMHA and CaroMont concerning their relative compliance with Criterion 3 related to the issues of ED visit projections and acuity adjustments related thereto.

Criterion 3, 5 and 12 – Market Share/Downsizing:

Review of CMHA Application

116. CMHA's Application provided information supporting its market share projections such as the estimate of the market share that CMHA facilities already have of Level I through V visits within CMHA's proposed five-mile service area. (Jt. Ex. 2 at 77-80)

117. CMHA's Application relied upon the emergency department capture rates at other facilities in North Carolina, including community hospitals in Mecklenburg County. Depending on the primary zip-code service areas for those Mecklenburg County hospitals, between 37% and 76% of patients were choosing a community hospital for ED services. (Jt. Ex. 2 at 78) At the time CMHA's Application was filed, there was no operational freestanding ED in Mecklenburg County and, therefore, CMHA also relied upon the capture rate of 42.1% at WakeMed North's freestanding ED facility to determine its market share. (Jt. Ex. 2 at 80)

118. Based upon the above data, CMHA conservatively made the assumption that it would achieve a 25% market share by the third year of the Healthplex's operations. (Jt. Ex. 2 at 80)

119. The Agency found that CMHA had an existing market share of 29% in the eight zip code service area and it would have found the proposed 25% market share of all ED visits reasonable if CMHA had stated that its market share would be a shift of ED volume from existing CMHA facilities to the new proposed HealthPlex in Mount Holly. (Jt. Ex. 1 at 968; Tr. Vol. 2 at 212-13; Tr. Vol. 3 at 169; Tr. Vol. 11 at 90)

120. CMHA's NorthCross application (proposing a freestanding ED licensed under CMC-University) projected a 10.8% capture rate of the service area, and, like CMHA's Mount Holly proposal, never stated that CMHA would shift its volume from CMC-University. (CMHA Ex. 59) The Agency approved that application.

121. The materials submitted in settlement regarding the Waxhaw Healthplex application (to be licensed under CMC-Union), proposed to serve 24.9% of its market share in year three, and state that CMC-Union's hospital had only a capture rate of 17.6% in that service area. Neither the Waxhaw application nor settlement materials stated that the proposed Waxhaw freestanding

ED would shift volume from CMC-Union. The Waxhaw project was still expecting to capture a larger market share in the proposed service area than CMC-Union's main ED. (CMHA Ex. 54)

122. CMHA's Mount Holly Application had similar language regarding market share capture, and less aggressive assumptions regarding its proposed market share, than the two prior approved CMHA applications, Waxhaw and NorthCross.

123. The Agency was inconsistent when it determined that CMHA was nonconforming with Criterion 3 on the ground that its market share projections were not supportable because CMHA did not discuss the impact of the proposed shift of patients away from existing providers to the Healthplex. (Jt. Ex. 1 at 966-68)

Review of CaroMont Application

Market Share

124. In Step 5 of CaroMont's need methodology, CaroMont made the assumption that patients seeking emergency department care are less likely to bypass an emergency department to get to another one and are more likely to seek care at an emergency department known to have fewer patients and a shorter wait time. (Jt. Ex. 3 at 74; Jt. Ex. 1 at 987)

125. CaroMont's 2008 Application was disapproved by the Agency because it projected utilization based upon an assumption made on the experience of its administrative team and proximity of patients to the proposed facility as was done by Moses Cone in a similar application. (CMHA Ex. 94) In an attempt to validate its assumptions, in 2009 CaroMont hired an independent marketing firm which performed a telephone survey of the six zip code service area to determine the percentage of residents who might use the freestanding ED in Mount Holly. (Jt. Ex. 1 at 987)

126. CaroMont used the telephone survey to support the assumptions on which it based its utilization and market share projections.

127. The Agency determined that the survey results did not include sufficient information regarding the scope and validity of the survey, and that the survey could not validate CaroMont's assumptions.

128. The Agency found unreasonable CaroMont's assumption that it would capture approximately 50% of the ED visits from the MedPlex service area currently served by other providers ("external shift") and CaroMont provided no supporting data or explanation to support the assumption. (Jt. Ex. 1 at 991-92)

129. Step 5 of CaroMont's need methodology also projected an internal shift of patients for a total of 11,151 ED visits in year 3, which is approximately a 72% market share. The Agency accepted CaroMont's projection with regard to its "internal shift". (Jt. Ex. 1 at 988-989; Jt. Ex. 3 at 75)

130. The Agency then made its own analysis that consisted of looking at the numbers that CaroMont generated in its Application and finding that a 72% internal shift would be reasonable compared to other applications that they had reviewed. (Tr. Vol. 2 at 113-114; Tr. Vol. 3 at 167-168)

131. The Agency relied on past knowledge and experience from other applications by other applicants to conclude that CaroMont's internal shift of 72% was reasonable. (Tr. Vol. 12 at 180-183)

132. The Agency concluded that CaroMont's "projection of additional market share from other existing providers (11,040) is unsupported and overstates GMH-Mount Holly's total projected ED utilization in Project Year 3 (11,151 + 11,040 = 22,121 ED visits) by 11,040 ED visits." (Jt. Ex. 1 at 992, 994)

133. The Agency downsized the project, accepting as valid only CaroMont's projections that it would have an internal shift of patients for a total of 11,151 ED visits in year 3, which is approximately a 72% market share. (Jt. Ex. 1 at 988-989; Jt. Ex. 3 at 75)

134. The Agency was inconsistent with the Agency's denial of the 2008 CaroMont Medplex application because: (1) the Agency denied the 2008 Application because the utilization projections were not supportable; and (2) the difference between the 2008 Application and the 2009 Application is that the latter Application included the unverifiable telephone survey.

Downsizing, generally

135. The Agency has conditionally approved other CON applications by downsizing the proposed project.

136. The Agency downsized UNC Hospitals' recent project to develop a 68-bed new satellite hospital by conditioning it not to develop or acquire a vascular interventional radiography room and the ultrasound equipment associated with the room. (CMHA Ex. 26)

137. In Agency findings for a project proposed by Forsyth Memorial Hospital ("FMH") to develop a 50-bed satellite hospital in Clemmons, NC the Agency conditioned FMH not to acquire a CT Scanner, but to relocate or contract for mobile CT service, and not to develop a gastro-intestinal endoscopy room. (CMHA Ex. 24 at 56)

138. Brunswick Community Hospital's project to replace its existing hospital and add 92 acute care beds and an operating room was conditioned by the Agency to develop only 74 acute care beds, 4 shared operating rooms, and one of the two GI/Endoscopy rooms. (CMHA Ex. 27 at 28)

139. Angel Medical Center filed a CON Application to construct an addition to its surgery suite for two dedicated inpatient operating rooms and the Agency conditioned them, under Criterion 1, to only develop one inpatient operating room. The distinction in Angel's findings is that, even though the Agency downsized the number of operating rooms from two to one, it is

still an addition to the existing surgery suite and not reducing the project by half. (CMHA Ex. 28 at 6)

140. In 1996, Hamlet HMA filed an application to replace its existing hospital. The Agency downsized this project by conditioning it not to purchase nuclear medicine equipment and not to develop observation medicine. (CMHA Ex. 29 at 16-17)

141. CMC-Northeast proposed to develop a freestanding ED in Kannapolis and the Agency determined that it did not conform with Criterion 3a regarding the relocation of an existing CT Scanner. Therefore, the Agency conditioned CMC-Northeast not to relocate the CT Scanner. (CMHA Ex. 98)

142. The magnitude of downsizing a proposed project by approximately one-half is inconsistent with other Agency decisions to conditionally approve an application by downsizing the proposed project.

Treatment Rooms

143. There are no standards or regulations in CON law regarding the number of treatment rooms needed to serve a certain number of ED patients.

144. The American College of Emergency Physicians ("ACEP") is a professional society that governs the practice of emergency medicine. ACEP provides capacity guidelines for ED room use at a low range of 1250 and a high range of 1800 patient visits per room per year for a facility with 10,000 ED visits.

145. CaroMont's Application made the assumption that ED room capacity is 1800 visits per room and used this number for calculating capacity projections. (Jt. Ex. 3 at 38, 90)

146. CaroMont's Application did not base any capacity projections on the assumption that ED room capacity is 1250 visits per room. (Jt. Ex. 3 at 90)

147. The CMHA Application based its capacity projections on the assumption that ED room capacity is 1250 visits per room. (Jt. Ex. 2 at 82)

148. The Agency recalculated CaroMont's projections, using the CMHA assumption of ED room capacity of 1250 visits per room and CaroMont's projected internal shift projection of 11,151 visits to conclude that the CaroMont Application demonstrated a need for 9 treatment rooms. (Jt. Ex. 1 at 997)

149. CaroMont's Application was conditionally approved to develop 9 treatment rooms instead of the 14 proposed by CaroMont. (Jt. Ex. 1, at 997)

150. If the Agency had recalculated CaroMont's projections using CaroMont's assumption of 1800 visits per room and CaroMont's projected internal shift projection of 11,151 visits, then no more than 7 treatment rooms should have been approved.

151. The Agency did not offer any evidence of a situation where, in a competitive review, the Agency approved the winning applicant based upon utilization or capacity information which was contained in the losing application but not contained in the winning application. (Tr. Vol. 13 at 16-17)

152. The Agency was arbitrary and capricious in its evaluation of CaroMont's capacity when it used the CMHA assumption rather than the CaroMont assumption in order to determine the extent to which the Agency would conditionally approve the CaroMont Application.

Square Footage and Capital Costs

153. N.C. Gen. Stat. § 131E-183(a)(5) ("Criterion 5") requires the following:

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

154. N.C. Gen. Stat. § 131E-183(a)(12) ("Criterion 12") requires the following:

> Applications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

155. The floorplan in the CaroMont Application was based on the proposal for a 14 treatment room facility. The Agency approved nine treatment rooms, but did not downsize the square footage of the project and, therefore, the space for five treatments rooms is still approved for construction even though this space has no purpose.

156. The Agency's decision to conditionally approve a project by downsizing it in scope and not reducing square footage and capital costs is inconsistent with other Agency decisions.

157. In a previous review, the Agency conditioned both Davie County Hospital and North Carolina Baptist Hospital to develop only certain aspects of their joint project under Criterion 3. The Agency placed additional conditions upon that approval under Criterion 12, which required Davie County Hospital and North Carolina Baptist Hospital to decrease the size of their proposed replacement hospital by the number of square feet proposed in the application for two general acute care beds, ten licensed observation beds and four emergency department treatment beds. (CMHA Ex. 23 at 72-73)

158. In another prior review, Brunswick Community Hospital ("Brunswick") also filed a CON Application to replace its existing hospital. The Agency downsized the project and conditioned Brunswick under Criterion 12 to decrease the size of its new facility by the number of square feet proposed in the application for one GI endoscopy room, two procedure rooms and 18 acute care beds. (CMHA Ex. 27 at 37)

159. In another set of findings, the Agency conditionally approved Angel Medical Center ("Angel") to add one additional operating room, rather than the two operating rooms that Angel proposed in its application. Under Criterion 5, the Agency conditioned Angel and reduced the amount of approved capital expenditures to reflect the elimination of one of the operating rooms. (CMHA Ex. 28 at 8)

160. In another set of findings, Hamlet Hospital proposed to build a replacement hospital. The Agency conditionally approved Hamlet's application by removing some components of the project. The Agency also conditioned Hamlet Hospital under Criterion 12 to reduce the original capital expenditure proportional with the components conditioned to be removed from Hamlet's project. (CMHA Ex. 29 at 28)

161. Kindred Hospital filed a CON application to develop a new freestanding, long-term care hospital in Mecklenburg County. The Agency denied Kindred's application partly because Kindred failed to provide any evidence to support the need for 3,281 square feet of shelled space for which there was no dedicated use. Under Criteria 3 and 12, the Agency found that Kindred did not demonstrate that the design and construction costs represented the most reasonable alternative for the services proposed in the application. (CMHA Ex. 32 at 10, 20)

162. The Agency also conditioned Piedmont Healthcare's new ambulatory surgery center application under Criterion 12 to prevent construction of space for an exam room on the line drawing of the proposed facility because the application did not demonstrate the need or intent for that exam room. (CMHA Ex. 33 at 18)

163. High Point Healthcare Ventures was also conditioned under Criterion 3 and 12 regarding the use of shell space in its proposed diagnostic center. The Agency determined that High Point Healthcare Ventures did not adequately demonstrate that the cost and design of construction represented the most reasonable alternative for the services proposed in the application. (CMHA Ex. 31 at 7, 12-13)

164. The Agency found Rowan Regional Medical Center's CON Application nonconforming under Criterion 12 because the applicant failed to demonstrate a need for the proposed construction of 16,500 square feet of new undesignated space and Rowan did not adequately demonstrate that the cost and design of construction represented the most reasonable alternative for the services proposed in the application. (CMHA Ex. 30 at 24)

165. The Agency findings for Baptist and FMC, in which the Agency conditioned each applicant to only develop 13 acute care beds, rather than the 26 acute care beds each applied for, is distinguishable from the Agency's downsizing of CaroMont's proposed freestanding ED

166. In other findings, WakeMed filed a CON application to develop a healthplex in Brier Creek and the Agency found WakeMed nonconforming with Criterion 12 because the proposed design of the building included a room for bone densitometry services and a second mammography room, for which need was not demonstrated. The Agency found WakeMed nonconforming under Criterion 12 for this reason. (CMHA Ex. 99 at 18)

167. These numerous Agency findings demonstrate that the Agency has previously downsized other projects and limited the amount of capital costs expended and reduced the size of projects commensurate with the downsizing of beds or other reviewable assets.

168. Under Criteria 5 and 12, the Agency was inconsistent with other Agency findings by failing to condition CaroMont's approved square footage and capital expenditure amounts when the Agency conditioned CaroMont to develop only nine treatment rooms. (Jt. Ex. 1 at 1006)

RME bays (Criterion 3)

169. CaroMont proposed six rapid medical evaluation ("RME") bays which are an innovative design for triage space (Jt. Ex. 3 at 29-30) RME bays are intended to address the arrival patterns of patients, and ensure that the initial evaluation of patients takes place more quickly than in a traditional triage model in an emergency department.

170. There are no standards or regulations for emergency department services and there are no standards regarding any particular ratio of emergency treatment rooms to triage space.

171. The CaroMont Application did not contain any information about the capacity of RME bays.

172. In the Agency findings for CaroMont's 2008 MedPlex application, the Agency denied CaroMont, in part, because CaroMont proposed to use the RME bays as "fast track" treatment rooms. (Jt. Ex. 1 at 852) The 2009 Application omitted that descriptive phrase. (Jt. Ex. 3 at 29)

173. In testimony, it was the Agency's position that: the Agency did not consider the RME bays as "treatment rooms"; the Agency found that CaroMont demonstrated the need for RME bays; the Agency was not sure of the scope of what would occur in CaroMont's proposed RME bays; the Agency would not know if CaroMont started using its RME bays as treatment rooms; the CaroMont Application did not contain any utilization projections for its proposed RME bays; the CaroMont Application did not contain any definition of capacity for its proposed RME bays; the Agency did not discern CaroMont's RME bay capacity; the Agency did not assess how many RME bays CaroMont needed; and the Agency just accepted the number of RME bays CaroMont proposed. (Tr. Vol. 2 at 99-101; Tr. Vol. 13 at 57-59, 139-54)

174. CaroMont's witness testified that with fewer treatment rooms available based on the Agency's downsize of the facility, it would be even more important to be able to evaluate and triage patients quickly, so that more RME bays may be needed than proposed in the Application. (Tr. Vol. 8 at 41-42)

175. The Agency findings contained no analysis of how RME bays would have an impact on the number of treatment rooms CaroMont needed.

176. In the Agency findings regarding the Davie County replacement hospital, the Agency counted all types of rooms that Davie had listed in its application as treatment rooms, including areas defined as "fast track rooms, major resuscitation rooms, urgent/emergent rooms and behavioral health rooms, and determined that Davie's assumptions and methodology only supported the need for 16 treatment rooms and conditioned Davie to only develop a total of 16 treatment rooms rather than 20 treatment rooms. (CMHA Ex. 23 at 40)

177. The Agency was inconsistent in its evaluation of RME bays between the 2008 and 2009 CaroMont Application reviews and with the Davie County findings.

Financial Feasibility

178. Criterion 5 has two components: (1) the application must demonstrate the availability of capital and operating funds; and (2) the application must demonstrate that the immediate and long-term financial feasibility of the project is based on reasonable projections of the costs of charges.

179. The Agency determined that CaroMont's project as downsized would be financially feasible in the long-term based upon the Agency's recalculations of revenues and costs based upon the Agency's arbitrary assumptions:

1. Average gross revenue per ED visit is assumed to be 10% lower than that projected by the applicants.

2. Total costs as a percentage of gross revenue are assumed to be 10% higher than that projected by the applicants.

3. Net revenue as a percentage of gross revenue is assumed to remain the same as that projected by the applicants.

(Jt. Ex. 1 at 1002; Tr. Vol. 2 at 119; Tr. Vol. 3 at 180, 194)

180. The Agency expressly based its finding that CaroMont's project was financially feasible (and thus conforming with Criterion 5) on the conclusion that CaroMont's freestanding ED project would still show a positive net income of $172,432 in Project Year 3 based upon the Agency's recalculations of revenues and costs for CaroMont. (Jt. Ex. 1 at 1002)

181. The Agency made no findings about whether the CaroMont Application would be financially feasible if the Agency examined the net income of GMH's ED as a whole (existing ED and proposed freestanding ED).

182. CaroMont's witness could not say whether CaroMont would show a positive or negative net income in Year 3 of the project based on the downsizing. (Tr. Vol. 9 at 127)

Agency's Independent Reviews of the Applications

183. The Agency was inconsistent when it disapproved CMHA's Application because its market share capture projections were not supportable and when it approved CaroMont's Application after determining that CaroMont's market share capture projections also were not supportable.

184. The Agency was arbitrary and capricious when it used CMHA's ED room capacity assumption to evaluate CaroMont's capacity projections and to determine the extent to which the Agency would conditionally approve CaroMont's Application.

185. The Agency disparately and arbitrarily treated CMHA and CaroMont concerning their relative compliance with Criterion 3, 5 and 12 related to the issues of market share projections and downsizing.

Criterion 3 and 6 – Duplication:

186. N.C. Gen. Stat. § 131E-183(a)(6) ("Criterion 6") requires the following:

> The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities

Review of CMHA Application

187. The Agency findings state:

> "...the applicant does not discuss the impact of its proposal on CMC-NorthCross and CMC-Steele Creek, both of which are being developed as satellite ED facilities with service area overlap with CMC-Mount Holly's service area. In addition, the applicant does not address the impact of CMC-Mount Holly's ED on CMC-Lincoln which serves Gaston County residents..."

(Jt. Ex. 1 at 971)

188. The Agency had information readily available to the Agency from the prior CON Applications filed by CMC-NorthCross, CMC-Steele Creek and CMC-Lincoln to determine if there was such an overlap.

189. Analysis of the data in the CMC-Steele Creek, CMC-NorthCross and CMC-Mount Holly Applications shows a maximum total overlap of ED visits is a total of 179 visits. (Tr. Vol. 5 at 72, 122)

190. The Agency determined that CMHA's Mount Holly ED would have an impact on CMC-Lincoln. CMC-Lincoln's application, previously filed with the CON Section, indicated a

declining volume of emergency patients from Gaston County. (CMHA Ex. 60) Although the SHEPs Center data that the Agency received showed that almost 7000 Gaston County residents went to CMC-Lincoln in 2008, CMC-Lincoln's application projected that 3000 visits by Gaston County residents would not be served at CMC-Lincoln in the future. (CMHA Ex. 60)

191. The Agency was arbitrary when it did not review the prior CON Applications filed by CMC-NorthCross, CMC-Steele Creek and CMC-Lincoln to determine if there was such an overlap.

Review of CaroMont Application

Imaging Equipment

192. The Agency did not assess whether the imaging equipment proposed in the CaroMont Application would be unnecessary duplication of existing services. By virtue of showing the need for a freestanding emergency department, the Agency found that CaroMont had shown a need for the proposed imaging equipment because such equipment is necessary for the proper functioning of an emergency department.

193. There are no performance standards, or utilization requirements for x-ray or ultrasound equipment and CaroMont was not required to relocate its existing equipment instead of purchasing new equipment for the MedPlex.

194. The Agency found that the development of the MedPlex in Mount Holly would not be an unnecessary duplication of existing services. Therefore, the CaroMont Application was found conforming with Criterion 6. (Jt. Ex. 1 at 1003)

RME Bays

195. CaroMont's Application proposed six (6) Rapid Medical Evaluation (RME) bays. (Jt. Ex. 3 at 16)

196. In the Agency findings regarding the 2008 Application, the Agency determined:

> "...the six RME bays are proposed to be used as both triage and fast track patient treatment areas. Specifically, on pg. 76 of the application, the applicants state
>
> *"RME bays provide a cost effective, efficient space for initial patient triage and evaluation...Patients arriving by private vehicle will be greeted by an emergency severity index-trained registered nurse...unstable patients will be placed in 12 monitored beds for physician evaluation and intervention...Stable, low acuity patients deemed to require further diagnostic workups will have appropriate imaging and lab testing ordered and initiated immediately in the RME bays...Develop a 'Fast Track' for treating minor-presenting complaints and use discharge lounge for patients awaiting discharge...The RME physician will discuss results and*

> *discharge plan with the patient and family in adjacent consultation room..."*
>
> Because the applicants intend to use the proposed six RME bays for treating minor complaints, the project analyst determined the applications propose to develop a total of 18 treatment rooms, which include 12 "monitored" rooms and 6 rapid medical evaluation (RME) bays..."

(Jt. Ex. 1 at 852)

197. The 2009 Application states:

> "RME bays provide a cost effective, efficient space for initial patient triage and evaluation...Patients arriving by private vehicle will be greeted by an emergency severity index-trained registered nurse...unstable patients will be placed in 12 treatment beds for physician evaluation and intervention...Stable, low acuity patients deemed to require further diagnostic workups will have appropriate imaging and lab testing ordered and initiated immediately in the RME bays...Expedite minor-presenting complaints using RME and treatment rooms...The RME physician will discuss results, treatments, and discharge plan with the patient and family in a treatment room..."

(Jt. Ex. 3 at 29)

198. In the 2009 Application, CaroMont removed the reference to "fast-track".

199. In both of the 2008 and 2009 Applications, CaroMont proposed fourteen (14) treatment rooms with six (6) triage/RME bays for a freestanding ED facility.

200. In the 2008 Application, the Agency determined that since the RME bays would be used for minor complaints, the RME bays had to be counted as treatment rooms. (Jt. Ex. 1 at 852)

201. In 2009, the Agency findings are silent as to whether RME bays should be counted as treatment rooms and contain no analysis of the six (6) RME bays utilization or capacity for reasonableness.

Agency's Independent Reviews of the Applications

202. The Agency erred when it did not review information readily available to it to evaluate what impact, if any, the CMHA proposed project would have on existing providers.

203. The Agency was inconsistent in its review of CaroMont's 2008 and 2009 Applications concerning their relative compliance with Criteria 3 and 6 related to the issues of unnecessary duplication.

Criterion 3 – Ancillary Utilization:

Review of CMHA Application

204. CMHA's application stated that CMC-University and CMC-Pineville were the best proxies for projected utilization at CMC-Mount Holly because each hospital was most similar to the proposed campus, e.g. community-based, historically non-tertiary hospitals, and which had received prior approval by the CON Section to construct a freestanding ED using the same methodology used in CMHA's current application. (Jt. Ex. 2 at 84)

205. The Agency concluded that CMC-University and CMC-Pineville were not reasonable to use as a basis for utilization projections for ancillary services, such as CT, ultrasound and x-ray services, because CMC-University's and CMC-Pineville's hospital emergency departments are located within the hospital. (Jt. Ex. 1 at 972)

206. CMHA was found nonconforming under Criterion 3 for relying upon the hospitals' experience to project ancillary services at the freestanding ED.

207. CMHA's three previous applications used the experience from a hospital ED to project ancillary services and used the same methodology in each:

1) The Waxhaw Healthplex used the experience of CMC-Union;
2) The NorthCross Healthplex used the experience of CMC-University; and
3) The Steele Creek Healthplex used the experience of CMC-Pineville.

(Jt. Ex. 1 at 874-949, CMHA Ex. 44d; Carter Tr. Vol. 6 at 22)

208. In another set of findings regarding the approval of Johnston Memorial Hospital Authority ("JMHA") to develop an outpatient facility that included a freestanding ED, JMHA relied upon the experience with the emergency department at the hospital to determine the projected number of observation beds and the laboratory volumes. The Agency approved that application. (CMHA Ex. 96 at 12, 15)

209. The Agency findings are inconsistent with other freestanding ED findings previously approved by the Agency.

Review of CaroMont Application

210. The Agency's findings do not discuss any analysis of whether CaroMont demonstrated the need for any of the ancillary services, other than its proposed CT scanner. (Jt. Ex. 1 at 996-997)

211. CaroMont used the hospital's 2008 Emergency Department and ancillary services statistics generated by the patients treated at GMH to project its ancillary service at the freestanding ED. (Jt. Ex. 3 at 84)

212. CaroMont was found conforming under Criterion 3.

Agency's Independent Reviews of the Applications

213. The Agency disparately and arbitrarily treated CMHA and CaroMont concerning their relative compliance with Criterion 3 related to the issue of ancillary utilization when it found CMHA nonconforming for relying upon hospital experience to project ancillary services at the freestanding ED and found CaroMont conforming even though its ancillary utilization projections also were based upon hospital experience.

Criterion 3 – In-migration:

Review of CMHA Application

214. In-migration is defined as the patients who reside outside of the defined geographic service area who chose to use the facility.

215. The CMHA Applicatioan based its projections on a five-mile radius service area. To determine the appropriate projection for in-migration, CMHA examined the level of in-migration at other CMHA facilities. For existing CMHA emergency departments, the percentage of patients who originate within a five-mile radius is 42% while 58% of the patients originate outside the five-mile radius. (Jt. Ex. 2 at 81)

216. CMHA's projections conservatively assumed that only 30% of the Mount Holly ED visits will originate from outside the five-mile radius which is roughly half the in-migration at other existing CMHA facilities. (Jt. Ex. 2 at 81)

217. The Agency compared six hospitals in which CMHA proposed to expand or renovate hospital emergency departments physically located in the hospital to determine the proposed hospital ED service area patient origin. (Jt. Ex. 1 at 969)

218. The Agency determined that CMHA's projected in-migration for ED services should be anywhere between 9% to 19.1%. (Jt. Ex. 1 at 969)

219. The other CMHA hospitals that the Agency used in the findings to compare CMHA's in-migration percentages had larger service areas of ten miles. Therefore, the larger service areas would naturally result in lower in-migration percentages at those hospitals. (Jt. Ex. 1 at 969)

220. Because CMHA's Mount Holly service area is a smaller five-mile radius, it is reasonable that the percentage of patients projected to originate from outside the defined five-mile service area would be higher.

Agency's Independent Review

221. The Agency erred when it reviewed CMHA's patient in-migration projections based on the Agency's comparison of nonanalogous data.

Other Review Criteria and Rules:

Criterion 4

222. N.C. Gen. Stat. § 131E-183(a)(4) ("Criterion 4") requires the following:

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

223. The Agency's discussion under Criterion 4 states that the CMHA Application is nonconforming with Criterion 4 because of its nonconformity with Criterion 3, 5, 6 and 18a and the rule at 10A N.C.A.C. 14C.2300. (Jt. Ex. 1 at 999)

224. There were no independent reasons cited by the Agency to find the CMHA Application nonconforming with Criterion 4. (Tr. Vol. 2 at 94)

225. Therefore, if the Agency had found CMHA conforming with Criteria 3, 5, 6 and 18a and 10A N.C.A.C. 14C.2300, the Agency would have found CMHA conforming with Criterion 4. (Tr. Vol. 2 at 94)

Criterion 5

226. N.C. Gen. Stat. § 131E-183(a)(5) ("Criterion 5") requires the following:

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

227. The Agency's discussion under Criterion 5 states that the CMHA Application is nonconforming with Criterion 5 because of its nonconformity with Criterion 3. (Jt. Ex. 1 at 1001)

228. The Agency found that CMHA demonstrated the availability of funds for capital and operating needs of the project.

229. The Agency found CMHA's projected utilization unsupported and unreliable. Therefore, the Agency also found that CMHA's projections of costs and revenues based on this level of projected utilization were unreliable. (Jt. Ex. 1 at 1000-01)

230. Therefore, if the Agency had found CMHA conforming with Criterion 3, the Agency would have found CMHA conforming with Criterion 5. (Tr. Vol. 2 at 96)

Criterion 6

231. N.C. Gen. Stat. § 131E-183(a)(6) ("Criterion 6") requires the following:

> The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.

232. The Agency's discussion under Criterion 6 states that the CMHA Application is nonconforming with Criterion 6 because of its nonconformity with Criterion 3. (Jt. Ex. 1 at 1001)

233. There were no independent cited by the Agency to find the CMHA Application nonconforming with Criterion 6. (Tr. Vol. 2 at 96-97)

234. Therefore, if the Agency had found CMHA conforming with Criterion 3, the Agency would have found CMHA conforming with Criterion 6. (Tr. Vol. 2 at 96-97)

Criterion 18a

335. N.C. Gen. Stat. § 131E-183(a)(18a) ("Criterion 18a") requires the following:

> The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact.

236. The Agency's discussion under Criterion 18a states that the CMHA Application is nonconforming with Criterion 18a because of its nonconformity with Criteria 3 and 5. (Jt. Ex. 1 at 1012)

237. There were no independent reasons that the Agency used or cited to find the CMHA Application nonconforming with Criterion 18a. (Tr. Vol. 2 at 97-98)

238. Therefore, if the Agency had found CMHA conforming with Criterion 3 and 5 then it would have found CMHA conforming with Criterion 18a. (Tr. Vol. 2 at 98)

Rule 10A N.C.A.C. 14C.2303(1)

239. The Agency found CMHA nonconforming with 10A N.C.A.C. 14C.2303(1) ("Rule 2303(1)") which requires an application "…proposing to acquire a CT Scanner shall demonstrate …each fixed CT Scanner…to be acquired shall be projected to perform 5,100 HECT units annually in the third year of operation of the proposed equipment" based on discussion under Criterion 3. (Jt. Ex. 1 at 1016)

240. CMHA provided two different utilization projections for the CT scanner of 6,309 and 7,602 for Project Year 3. Jt. Ex. 2 pp 45-46, and 96.

241. The Agency found CMHA nonconforming with this regulation even though the lower utilization projection exceeds the capacity limit stated in the performance standard regulation.

242. There was no independent reasons that the Agency used or cited to find the CMHA Application nonconforming with Rule 2303(1). (Tr. Vol. 2 at 98)

243. The Agency erred when it found CMHA nonconforming with 10A N.C.A.C. 14C.2303(1)

Comparative Analysis:

244. "Applications are competitive if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application reviewed in the same review period." 10A N.C.A.C. 14C.0202(f).

245. When competitive applications are reviewed by the Agency, the Agency conducts a comparative analysis. The CMHA Application and the CaroMont Application were determined to be competitive. (Jt. Ex. 1 at 3, 85)

246. If an application is non-conforming with the statutory review criteria or the regulatory review criteria, and the Agency has determined that it cannot be conditionally approved, the application will be denied.

247. In a competitive review, an application that is non-conforming and is not conditionally approvable cannot be comparatively superior to an application that is conforming with all of the statutory and regulatory review criteria.

248. The Agency disapproved the CMHA Application and conditionally approved the CaroMont Application, finding that the CaroMont Application was comparatively superior. (Jt. Ex. 1 at 1020-1023)

Agency Comparative Review

Geographic Distribution

249. The Agency determined that because both applicants were proposing to locate their freestanding emergency departments in eastern Gaston County, CMHA and CaroMont were comparable with regard to geographic distribution of proposed outpatient ED services and outpatient diagnostic services. (Jt. Ex. 1 at 1020)

Access by Medically Underserved

250. The Agency determined that because one applicant was proposing a higher percentage of Medicare and the other applicant was proposing a higher percentage of Medicaid, the applicants were comparable. (Jt. Ex. 1 at 1021)

Facility Design

251. The Agency determined that it could not compare the applications due to the difference in the two proposed projects. (Jt. Ex. 1 at 1021)

252. The Agency found that due to the differences in the way the square footage of the facilities was presented, it could not "make conclusive comparisons" of the applications. (Jt. Ex. 1 at 1021)

253. CaroMont's facility design was based upon the project as proposed and not as conditionally downsized by the Agency.

Demonstration of Need

254. The Agency determined that CaroMont's Application was the more effective alternative under "demonstration of need". (Jt. Ex. 1 at 1022)

255. As discussed above, the Agency was arbitrary in its review of the Applications under the comparative factor "demonstration of need".

Operating Costs

256. The Agency determined that CMHA was not the most effective alternative under the comparative factor "Operating Costs" because of its findings under Criterion 3 and 5. (Jt. Ex. 1 at 1022)

257. As discussed above, the Agency was arbitrary in its review of the Applications under the comparative factor "operating costs".

Revenues

258. Revenue is a comparative factor that is often used in competitive reviews. Since the CON Law is a cost containment system, the Agency usually finds that the applicant with lower projected revenues is comparatively superior. (Tr. Vol. 3 at 208; Tr. Vol. 11 at 225-26)

259. CMHA projected lower revenues than CaroMont, but the Agency found that CMHA's projected utilization was unsupported and unreasonable and, therefore, CMHA's projected revenues were also unsupported and unreliable. (Jt. Ex. 1 at 1022-23)

260. The Agency determined that CMHA was not the most effective alternative under the comparative factor "Revenues" because of its findings under Criteria 3 and 5. (Jt. Ex. 1 at 1022-1023)

261. After downsizing CaroMont's project, the Agency recalculated CaroMont's revenues and costs based upon the Agency's assumptions. (Jt. Ex. 1 at 1002)

262. As discussed above, the Agency was arbitrary in its review of the Applications under the comparative factor "revenue".

CaroMont's Issues Raised In Its Competitive Comments:

263. In addition to the Agency's findings that the CMHA application was non-conforming with N.C. Gen. Stat. § 131E-183(a)(3), (4), (5), (6) and (18a) and with regulatory review criterion 10A N.C.A.C. 14C.2303(1), CaroMont raised issues in competitive comments regarding the CMHA Application's non-conformity with Criteria 4, 5, and 13(c).

Alleged Missing Applicant

264. CaroMont's competitive comments alleged that CMHA failed to include Carolinas Rehabilitation and Carolinas Medical Center as applicants. (Jt. Ex. 1 at 134)

265. There is only one legal entity, The Charlotte Mecklenburg Hospital Authority ("CMHA"), so the application was appropriate in having CMHA as the sole legal applicant. (Jt. Ex. 1 at 475; Tr. Vol. 1 at 243) Carolinas Rehabilitation and Carolinas Medical Center are merely operating divisions of CMHA. (Jt. Ex. 1 at 475; Tr. Vol. 1 at 248; Tr. Vol. 6 at 81)

266. The Agency reviewed Carolinas Rehabilitation-Mount Holly's 2009 License Renewal Application and determined that the legal entity was The Charlotte-Mecklenburg Hospital Authority and confirmed this information on the Secretary of State's website. (Tr. Vol. 11 at 48-50)

267. CaroMont failed to provide any evidence that CMHA did not include the proper applicants in its CON application.

Allegation that CMHA's Project could not be developed because it was being licensed under a Rehabilitation Hospital

268. CaroMont's competitive comments allege that the project proposed by CMHA could not be developed because it was being proposed under the license of a rehabilitation hospital. (Jt. Ex. 1 at 123-133)

269. CMHA stated in its Responsive Comments that in fact this project was permissible under North Carolina licensure rules and that CR-Mount Holly had a hospital license. (Jt. Ex. 1 at 475-476, 517)

270. CMHA's license for CR-Mount Holly is to operate a hospital, and CR-Mount Holly is subject to the general Hospital Licensure Requirements in the regulations. Because CMHA's beds are all rehabilitation beds, there are additional requirements that the facility has to meet, but there is nothing in the licensure rules that prevents CR-Mount Holly from developing emergency department services. (Jt. Ex. 1 at 476, 517; Tr. Vol. 6 at 82-83; 96-97)

271. CaroMont failed to provide any evidence that CMHA would not be able to develop its project because it was licensed under a rehabilitation hospital.

Allegation that CMHA's Project is not permissible under CMS Regulations regarding Medicare Certification

272. CaroMont's competitive comments alleged that CMHA's project as proposed could not be certified as a provider-based location of Carolinas Rehabilitation and that it would not meet the Medicare conditions of participation regarding emergency services. (Jt. Ex. 1 at 123-133)

273. Pursuant to the Court of Appeals opinion in *Craven Reg'l Med. Auth. v. NC HHS*, 176 NC App. 46, 625 SE2d 837 (2006), the CON Section does not have the authority to independently consider whether a CON applicant is in compliance with other statutes or rules outside the CON law or regulations, in determining if an applicant is conforming with the CON review criteria. (Jt. Ex. 1 at 478)

274. The Office of Administrative Hearings has subject matter jurisdiction limited to reviewing whether the Agency was arbitrary, capricious, or acted in error of law or procedure when reviewing CON applications for compliance with statutory and regulatory review criteria This jurisdiction does not extend to determining whether an application is in compliance with other statutes or rules outside the CON law or regulations.

Allegation that CMHA is nonconforming to Criterion 5 because it failed to document the "Commitment of Funds"

275. Under Section VIII, Question 7, the CON application form asks that the applicant "submit documentation of the availability of accumulated reserves, such as a letter from the appropriate official who is fiscally responsible for the funds." (Jt. Ex. 2 at 156)

276. CMHA provided a letter demonstrating the availability of funds in excess of $17 million for CMHA's proposed project, from the existing accumulated cash reserves. (Jt. Ex. 2 at 517-518)

277. Although CaroMont included a CaroMont Board Resolution approving its project and allocating the capital funds, such board resolutions are not required to be included in a CON Application.

278. CaroMont failed to provide any evidence that CMHA is nonconforming under Criterion 5 regarding the availability of funding.

No Amendments:

279. 10A N.C.A.C. 14C.0204 states that an applicant cannot amend an application after the review has commenced.

280. Both applicants provided some information at the public hearing that was not contained in their applications and not considered by the Agency. Because this information was not considered, neither applicant amended their application.

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. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.

3. The Office of Administrative Hearings has jurisdiction over all of the parties and the subject matter of this action.

4. CMHA is an "affected person" entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes pursuant to N.C. Gen. Stat. § 131E-188(c).

5. The subject matter of this contested case is the Agency's decision to approve the CaroMont Application and disapprove the CMHA Application. N.C. Gen. Stat. § 131E-188(a); *Presbyterian Hospital v. N.C. Dept. of Health and Human Services*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006); *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995).

6. To obtain a CON for a proposed project, a CON application must satisfy all of the applicable review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an application fails to conform with any one of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law. *See Presbyterian-Orthopaedic Hospital v. N.C. Dept. of Human Res.*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996) (holding that "an application must comply with all review criteria" and that failure to comply with one review criteria supports entry of summary judgment against the applicant) (emphasis in original).

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

8. The Agency has clear and express statutory authority to conditionally approve an applicant to ensure that the project conforms with applicable review criteria. N.C. Gen. Stat. § 131E-186; 10A N.C.A.C. 14C.0207(a); *see also Dialysis Care of North Carolina, LLC v. N.C. Dept. of Health and Human Services*, 137 N.C. App. 638, 648-51, 529 S.E.2d 257, 263-64, *aff'd*

per curiam, 353 N.C. 258, 538 S.E.2d 566 (2000); *In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986).

9. "Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule." *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. at 382, 455 S.E.2d at 459.

10. Administrative agency decisions may be reversed as arbitrary and capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment.'" *ACT-UP Triangle v. Comm'n for Health Services for the State of North Carolina*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997).

11. In making this determination regarding whether an Agency decision is arbitrary or capricious, the ALJ must use the standard of review known as the "whole record" test. *High Rock Lake Ass'n Inc. v. North Carolina Environmental Management Commission*, 51 NC App. 275, 279, 276 S.E.2d. 472, 475 (1981). Under this standard of review, the ALJ is required to recommend approval of the Agency's decision if substantial evidence appears in the record to support the Agency's findings. (*Id.*)

12. There is no statute, rule or any other legal authority that imposes any limitations on the number of Emergency Department services or Emergency Department treatment rooms that can be approved by the Agency in Gaston County or any other location in the State of North Carolina.

13. The 2009 State Medical Facilities Plan ("SMFP") does not impose any limitations on the number of Emergency Department services or Emergency Department treatment rooms to be approved in a CON review.

14. The Agency did not: substantially prejudice petitioner's rights; or exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, by finding that the CaroMont Application was conforming to the following statutory criteria: Criteria 3a, 7, 8, 13, 14, and 20.

15. The Agency did not: exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, by finding that the following statutory criteria were not applicable to the CaroMont Application: Criteria 1, 9, and 10.

16. The Agency did not: exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, by finding that N.C. Gen. Stat. § 131E-183(b) was not applicable to the CaroMont Application.

17. The Agency did not: exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, by finding that the CMHA Application was conforming to the following statutory and regulatory criteria: Criteria 7, 8, 12, 13, 14, 20 and 10A N.C.A.C. 14C.2302(a), 14C.2302(c), 14C.2302(d), 14C.2302(f), 14C.2302(i), 14C.2302(j), 14C.2304(a), 14C.2305(a), and 14C.2305(b).

18. The Agency did not: exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, by finding that the following statutory and regulatory criteria were not applicable to the CMHA's or CaroMont's Application: Criteria 1, 3a, 9, 10 and 10A N.C.A.C. 14C.2302(b), 14C.2302(e), 14C.2302(g), 14C.2302(h), 14C.2303(2), 14C.2303(3), 14C.2304(b)(1), 14C.2304(b)(2), 14C.2305(c).

19. CMHA met its burden of proving by a preponderance of the evidence that the Agency did substantially prejudice petitioner's rights and did: exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, by finding that the CMHA Application was nonconforming to the following statutory and regulatory criteria: Criteria 3, 4, 5, 6, 18a and rule 10A N.C.A.C. 14C.2303(1).

20. CMHA met its burden of proving by a preponderance of the evidence that the Agency did substantially prejudice petitioner's rights and did: exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, by finding that the CaroMont Application was conforming or conditionally conforming to the following statutory criteria: Criteria 3, 4, 5, 6, and 18a.

21. CMHA met its burden of proving by a preponderance of the evidence that the Agency did substantially prejudice petitioner's rights and did: exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, in its independent reviews of the CMHA and CaroMont Applications as discussed above.

22. CMHA met its burden of proving by a preponderance of the evidence that the Agency did substantially prejudice petitioner's rights and did: exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23, in its comparative review of the CMHA and CaroMont Applications as discussed above.

23. CaroMont failed to prove by a preponderance of the evidence that the Agency should have disapproved the CMHA Application for the additional reasons raised in this contested case by CaroMont that were not included in the Agency's decision and findings.

24. The information provided by both CMHA and CaroMont at the public hearing which was not included within their respective CON Applications and was not considered by the Agency did not constitute an amendment to their respective CON Applications under 10A N.C.A.C. 14C.0204.

RECOMMENDED DECISION

It is apparent from the weight of the evidence as a whole that there is a need for additional emergency department services and treatment rooms in the Mount Holly/Belmont area of Gaston County. Based upon the foregoing findings of fact and conclusions of law, it is clear that the process for reviewing these competing CON Applications was flawed and inconsistent within each independent review and within the comparative review. The Agency should consider conducting new, fair reviews of these Applications with the same evaluation strategies used for analyzing the Applications, independently and comparatively. The Agency should also consider whether the needs of Gaston County residents would be better served by issuing a CON to both Applicants which would provide patients with a choice of providers.

ORDER

It is hereby ordered that the Agency shall 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 the Agency 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 the Agency who will make the final decision.

The 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. The Agency that will make the Final Decision in this case is the North Carolina Department of Health and Human Services.

IT IS SO ORDERED.

This the 26th day of July, 2010.

Selina M. Brooks

Selina M. Brooks
Administrative Law Judge

A copy of the forgoing was mailed to each of the following:

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This the 27th day of July, 2010.

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