NORTH CAROLINA REGISTER

VOLUME 26 • ISSUE 04 • Pages 241 - 362

August 15, 2011

PUBLISHED BY
The Office of Administrative Hearings
Rules Division
6714 Mail Service Center
Raleigh, NC 27699-6714
Telephone (919) 431-3000
Fax (919) 431-3104

Julian Mann, III, Director
Camille Winston, Deputy Director
Molly Masich, Codifier of Rules
Dana Vojtko, Publications Coordinator
Julie Edwards, Editorial Assistant
Tammara Chalmers, Editorial Assistant

Contact List for Rulemaking Questions or Concerns

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

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

Office of Administrative Hearings
Rules Division
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact:	Molly Masich, Codifier of Rules	molly.masich@oah.nc.gov	(919) 431-3071
	Dana Vojtko, Publications Coordinator	dana.vojtko@oah.nc.gov	(919) 431-3075
	Julie Edwards, Editorial Assistant	julie.edwards@oah.nc.gov	(919) 431-3073
	Tammara Chalmers, Editorial Assistant	tammara.chalmers@oah.nc.gov	(919) 431-3083

Rule Review and Legal Issues

Rules Review Commission
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact:	Joe DeLuca Jr., Commission Counsel	joe.deluca@oah.nc.gov	(919) 431-3081
	Bobby Bryan, Commission Counsel	bobby.bryan@oah.nc.gov	(919) 431-3079

Fiscal Notes & Economic Analysis and Governor's Review

Office of State Budget and Management
116 West Jones Street (919) 807-4700
Raleigh, North Carolina 27603-8005 (919) 733-0640 FAX
Contact: Anca Grozav, Economic Analyst osbmruleanalysis@osbm.nc.gov (919) 807-4740

NC Association of County Commissioners
215 North Dawson Street (919) 715-2893
Raleigh, North Carolina 27603
contact: Rebecca Troutman rebecca.troutman@ncacc.org

NC League of Municipalities (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603
contact: Erin L. Wynia ewynia@nclm.org

Legislative Process Concerning Rule-making

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

contact:	Karen Cochrane-Brown, Staff Attorney	Karen.cochrane-brown@ncleg.net
	Jeff Hudson, Staff Attorney	Jeffrey.hudson@ncleg.net

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

NORTH CAROLINA REGISTER

Publication Schedule for January 2011 – December 2011

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
25:13	01/03/11	12/08/10	01/18/11	03/04/11	03/21/11	05/01/11	05/2012	09/30/11
25:14	01/18/11	12/22/10	02/02/11	03/21/11	03/21/11	05/01/11	05/2012	10/15/11
25:15	02/01/11	01/10/11	02/16/11	04/04/11	04/20/11	06/01/11	05/2012	10/29/11
25:16	02/15/11	01/25/11	03/02/11	04/18/11	04/20/11	06/01/11	05/2012	11/12/11
25:17	03/01/11	02/08/11	03/16/11	05/02/11	05/20/11	07/01/11	05/2012	11/26/11
25:18	03/15/11	02/22/11	03/30/11	05/16/11	05/20/11	07/01/11	05/2012	12/10/11
25:19	04/01/11	03/11/11	04/16/11	05/31/11	06/20/11	08/01/11	05/2012	12/27/11
25:20	04/15/11	03/25/11	04/30/11	06/14/11	06/20/11	08/01/11	05/2012	01/10/12
25:21	05/02/11	04/08/11	05/17/11	07/01/11	07/20/11	09/01/11	05/2012	01/27/12
25:22	05/16/11	04/25/11	05/31/11	07/15/11	07/20/11	09/01/11	05/2012	02/10/12
25:23	06/01/11	05/10/11	06/16/11	08/01/11	08/22/11	10/01/11	05/2012	02/26/12
25:24	06/15/11	05/24/11	06/30/11	08/15/11	08/22/11	10/01/11	05/2012	03/11/12
26:01	07/01/11	06/10/11	07/16/11	08/30/11	09/20/11	11/01/11	05/2012	03/27/12
26:02	07/15/11	06/23/11	07/30/11	09/13/11	09/20/11	11/01/11	05/2012	04/10/12
26:03	08/01/11	07/11/11	08/16/11	09/30/11	10/20/11	12/01/11	05/2012	04/27/12
26:04	08/15/11	07/25/11	08/30/11	10/14/11	10/20/11	12/01/11	05/2012	05/11/12
26:05	09/01/11	08/11/11	09/16/11	10/31/11	11/21/11	01/01/12	05/2012	05/28/12
26:06	09/15/11	08/24/11	09/30/11	11/14/11	11/21/11	01/01/12	05/2012	06/11/12
26:07	10/03/11	09/12/11	10/18/11	12/02/11	12/20/11	02/01/12	05/2012	06/29/12
26:08	10/17/11	09/26/11	11/01/11	12/16/11	12/20/11	02/01/12	05/2012	07/13/12
26:09	11/01/11	10/11/11	11/16/11	01/03/12	01/20/12	03/01/12	05/2012	07/28/12
26:10	11/15/11	10/24/11	11/30/11	01/17/12	01/20/12	03/01/12	05/2012	08/11/12
26:11	12/01/11	11/07/11	12/16/11	01/30/12	02/20/12	04/01/12	05/2012	08/27/12
26:12	12/15/11	11/22/11	12/30/11	02/13/12	02/20/12	04/01/12	05/2012	09/10/12

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

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.

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

STATE BOARD OF ELECTIONS

6400 Mail Service Center • Raleigh, North Carolina 27699-6400

GARY O. BARTLETT
Executive Director

MAILING ADDRESS:
P.O. BOX 27255
RALEIGH, NC 27611-7255

July 15, 2011

Mr. John O. Moore
c/o Mr. Josh Boberg
3493-A South Evans Street
Greenville, North Carolina 27835

Re: Request for Advisory Opinion

Dear Mr. Moore:

Thank you for your recent request that the office of the Executive Director provide an advisory opinion pursuant to N.C. Gen. Stat. § 163-278.23 regarding compliance with Article 22A of Subchapter VIII of the North Carolina General Statutes.

By letter and emails to Kim Strach on May 11th, June 27th, July 6th and July 13, 2011, you and your attorney, Mr. Josh Boberg, have requested guidance as to whether your work on radio and television has campaign finance implications with respect to your candidacy for mayor of the Town of Greenville.

From a campaign finance perspective, the question raised by the facts you've provided is whether the circumstances of your radio or television work bring such activity within the meaning of "electioneering communications."

Such a determination is now significant to persons involved in local campaigns in North Carolina because of recently enacted legislation that extends the scope of "electioneering communications" provisions to apply to municipal elections.[1]

If an electioneering communication is coordinated with a candidate, the cost of that communication is considered an in-kind contribution to the candidate. If the source or sources paying for the communication are not eligible to contribute directly to candidates, or if the source is eligible to contribute but the cost of the communication causes the $4,000 contribution limitation to be exceeded, such contribution is rendered impermissible.

Relevant statutes for the purpose of this opinion include N.C.G.S. § 163-278.6(8j), which describes the type of communications that are deemed to be electioneering communications,[2] and

[1] Session law 2010-170, ratified July 10, 2010.

LOCATION: 506 NORTH HARRINGTON STREET • RALEIGH, NORTH CAROLINA 27603 • (919) 733-7173

N.C.G.S. §163-278.6(8k), which describes those communications that are not deemed to be electioneering communications. [3]

According to information you provided, you host two television programs and a radio music show, and also appear in radio and television commercials for Greenville Toyota.

Your attorney, Mr. Boberg, has confirmed with Kim Strach that the Greenville Toyota commercials do not mention any election, candidacy, political party, opposing candidate or voting by the general public, nor do the ads take a position on the candidate's character or qualifications or fitness for office, and further, the ads do propose a commercial transaction. Therefore, according to paragraph (e) of §163-278.6(8k), your commercials for Greenville Toyota do not constitute electioneering communications.

You also appear on the television shows, **Carolina Outdoor Journal** and **DownEast Today**.

---

[2] N.C.G.S. § 163-278.6(8j) "The term "electioneering communication" means any broadcast, cable, or satellite communication, or mass mailing, or telephone bank that has all the following characteristics:

a. Refers to a clearly identified candidate for elected office.

b. Is aired or transmitted within 60 days of the time set for absentee voting to begin pursuant to G.S. 163-227.2 in an election for that office.

c. May be received by either:

1. 50,000 or more individuals in the State in an election for a statewide office or 7,500 or more individuals in any other election if in the form of broadcast, cable, or satellite communication.

2. 20,000 or more households, cumulative per election, in a statewide election or 2,500 households, cumulative per election, in any other election if in the form of mass mailing or telephone bank.

[3] N.C.G.S. § 163-278.6(8k) "The term "electioneering communication" does not include any of the following:

a. A communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless those facilities are owned or controlled by any political party, political committee, or candidate.

b. A communication that constitutes an expenditure or independent expenditure under this Article.

c. A communication that constitutes a candidate debate or forum conducted pursuant to rules adopted by the Board or that solely promotes that debate or forum and is made by or on behalf of the person sponsoring the debate or forum.

d. A communication made while the General Assembly is in session which, incidental to advocacy for or against a specific piece of legislation pending before the General Assembly, urges the audience to communicate with a member or members of the General Assembly concerning that piece of legislation or a solicitation of others as defined in G.S. 120C-100(a)(13) properly reported under Chapter 120C of the General Statutes.

e. A communication that meets all of the following criteria:

1. Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public.

2. Does not take a position on the candidate's character or qualifications and fitness for office.

3. Proposes a commercial transaction.

f. A public opinion poll conducted by a news medium, as defined in G.S. 8-53f.11(a)(3), conducted by an organization whose primary purpose is to conduct or publish opinion polls, or contracted for by a person to be conducted by an organization whose primary purpose is to conduct or publish public opinion polls. This sub-subdivision shall not apply to a push poll. For the purpose of this sub-subdivision, "push poll" shall mean the political campaign technique in which an individual or organization attempts to influence or alter the view of respondents under the guise of conducting a public opinion poll.

g. A communication made by a news medium, as defined in G.S. 8-53.11(a)(3), if the communication is in print.

According to descriptions provided by your attorney, Josh Boberg, by email to Kim Strach on July 6, 2011, **Carolina Outdoor Journal** is a show (which I am a viewer) about fishing in North Carolina that airs on UNC TV, you are paid for your participation by Joe Albea Productions, Inc., and each season of the show is taped in advance. According to the same email, **DownEast Today** airs daily on WITN TV 7.2. Your services are not compensated, but are contracted through an agreement between ADNET Tutt Productions and Moore Marketing and Advertising. The hour-long talk show is pre-recorded at least a week in advance, and addresses themes of local interest such as civic clubs and community events.

Finally, you host a radio music show called **Sock Hop on WNCT FM,** which is a program that encourages listeners to phone in music requests. This show airs live on 107.9 WNCT FM on Friday nights from 6:00 pm until 11:00 pm. By letter dated July 13, 2011, you advise that you produce and sell advertising for the show, and that you control all content that is aired by taping the phoned requests to determine suitability for broadcast.

Based on this information and the provisions of N.C.G.S. § 163-278.6(8k)(a), it is my opinion that your work on the programs **Carolina Outdoor Journal, DownEast Today** and the **Sock Hop on WNCT FM** does not constitute electioneering communication. The content of the shows are properly described as "communication appearing in a news story, commentary or editorial distributed through the facilities of [a] broadcasting station," and such facilities are not "owned or controlled by any political party, political committee or candidate."

This opinion is based upon the information provided by you and your attorney. If any information should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

If you have any further questions, please contact me or Kim Strach, Deputy Director-Campaign Finance.

Sincerely,

Gary O. Bartlett

Gary O. Bartlett
Executive Director

cc: Julian Mann, Codifier of Rules
Josh Boberg
Susan Nichols
Don Wright

STATE BOARD OF ELECTIONS

6400 Mail Service Center ● Raleigh, North Carolina 27699-6400

GARY O. BARTLETT
Executive Director

MAILING ADDRESS:
P.O. Box 27255
Raleigh, NC 27611-7255

July 12, 2011

Mr. Phillip H. Brady, Treasurer
Harold J. Brubaker Campaign Committee
312 West Salisbury Street
Asheboro, NC 27203-4583

RE: Requested Advisory Opinion N.C.G.S. § 163-16B(a)(1)and (2)

Dear Mr. Brady:

Pursuant to N.C.G.S. § 163-278.23, your letter of July 5, 2011, requested an advisory opinion regarding the deductible difference in mileage expenses.

Historically, the reimbursement rate differential between the General Assembly allowance and the IRS deductible has been allowed to be expensed from campaign funds. This allowance is governed by N.C.G.S. 163-278.16B(a)(1) and (2), which reads:

(a) A candidate or candidate campaign committee may use contributions only for the following purposes:
  (1) Expenditures resulting from the campaign for public office by the candidate or candidate's campaign committee.
  (2) Expenditures resulting from holding public office.

Incurred mileage resulting from activities related to campaigning for and subsequently holding public office is a covered expenditure under this Statute. Therefore, Rep. Brubaker may receive reimbursement for the allowance differential for mileage accrued while attending to the duties of holding public office and the participating in the activities necessary while campaigning for election to office.

You may wish to consult IRS regulatory code for potential tax implications of this differential mileage reimbursement.

LOCATION: 506 North Harrington Street ● Raleigh, NC 27603 ● 919.733.7173 ● FAX: 919.715.0135

Advisory Opinion N.C.G.S. § 163-278.16B(a)(1) and (2)
Harold Brubaker Campaign Committee
July 12, 2011

This opinion is based upon the information provided in your letter of July 7, 2011. If the information should change, you should evaluate whether this opinion is still applicable and binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

Should I be of further assistance, please let me know.

Sincerely,

Gary O. Bartlett

Gary O. Bartlett
Executive Director

cc: Julian Mann, III, Codifier of Rules
Susan K. Nichols, Special Deputy Attorney General
Donald M. Wright, NCSBE General Counsel
Kim W. Strach, Deputy Director, Campaign Finance

PHILLIP H. BRADY
Certified Public Accountant
312 West Salisbury Street
Asheboro, North Carolina 27203-4582

Telephone: 336-625-1155
Fax: 336-625-6671
email: phbcpa@asheboro.com

July 5, 2011

Mr. Gary Bartlett
Executive Secretary-Director
State Board of Elections
PO Box 27255
Raleigh, NC 27611-7255

Dear Mr. Bartlett:

The purpose of this letter is to request an advisory opinion pursuant to G.S. 163-278.23 regarding the deductible difference for mileage. The General Assembly has reimbursed members at a rate below the standard deductible as set by the Internal Revenue Service.

Therefore, the question arises as to the legitimate reimbursement for a member to receive the difference between the rate paid and the rate set by the Internal Revenue Service as a legitimate campaign expense for performing the duties of the office.

I look forward to your reply so that we may be assured we are handling our accounting as is required by law.

Sincerely,

HAROLD J. BRUBAKER CAMPAIGN COMMITTEE

Phillip H. Brady

Phillip H. Brady, Treasurer

MEMBER:
AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
NORTH CAROLINA ASSOCIATION OF CERTIFIED PUBLIC ACCOUNTANTS

U.S. Department of Justice

Civil Rights Division

TCH:RSB:JR:LJM:cv
DJ 166-012-3
2011-2017

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 8, 2011

FILED
2011 JUL 15 PM 3:28
OFFICE OF
ADMIN HEARINGS

Adam S. Mitchell, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, North Carolina 27602

Dear Mr. Mitchell:

This refers to the 2011 redistricting plan for the City of Reidsville in Rockingham County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on May 24, 2011; additional information was received on May 25, 2011.

The Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41 and 51.43.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

TCH:RSB:RPL:SMC:tst
DJ 166-012-3
2011-1866

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

June 22, 2011

Karen M. McDonald, Esq.
City Attorney
P.O. Box 1513
Fayetteville, North Carolina 28302-1513

Dear Ms. McDonald:

This refers to eighteen annexations (adopted between May 26, 2009, and December 13, 2010) and their designation to districts of the City of Fayetteville in Cumberland County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on May 16, 2011.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41 and 51.43.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

U.S. Department of Justice
Civil Rights Division

TCH:RSB:JR:TAL:tst
DJ 166-012-3
2011-2025

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 11, 2011

Deborah R. Stagner, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, North Carolina 27602

Dear Ms. Stagner:

This refers to the 2011 redistricting plan and the change in annexation procedures for the City of Jacksonville in Onslow County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on May 25, 2011.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

TCH:RSB:MSR:AJM:par
DJ 166-012-3
2011-2202

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 14, 2011

David A. Holec, Esq.
City Attorney
P.O. Box 7207
Greenville, North Carolina 27835-7207

Dear Mr. Holec:

This refers to the 2011 redistricting plan for the City of Greenville in Pitt County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on June 10, 2011; additional information was received through June 27, 2011.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41 and 51.43.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

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 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 14 – BOARD OF COSMETIC ART EXAMINERS

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Board of Cosmetic Art Examiners intends to adopt the rules cited as 21 NCAC 14T .0101, .0201-.0205, .0301-.0305, .0401-.0404, .0501-.0502, .0601-.0617, .0701-.0706, .0801-.0803. .0901.*

Link to agency website pursuant to G.S. 150B.19.1(c): http://www.nccosmeticarts.com/uploads/Board/ProposedRules.pdf

Proposed Effective Date: *January 1, 2012*

Public Hearing:
Date: *August 30, 2011*
Time: *8:00 a.m.*
Location: *1201 Front Street, Suite 110, Raleigh, NC 27609*

Reason for Proposed Action: *This collection of rules clearly defines the Board related operations of cosmetic art schools in North Carolina to ensure that instruction and sufficient equipment is provided and student records are documented in all cosmetic art disciplines.*

Procedure by which a person can object to the agency on a proposed rule: *Anyone wishing to object to these rules, please send a letter to 1201 Front Street, Suite 110, Raleigh, NC 27609*

Comments may be submitted to: *Stefanie Kuzdrall, 1201 Front Street, Suite 110, Raleigh, NC 27609*

Comment period ends: *October 14, 2011*

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 funds affected**
☐ **Environmental permitting of DOT affected**
Analysis submitted to Board of Transportation
☐ **Local funds affected**
Date submitted to OSBM:
☐ **Substantial economic impact (≥$500,000)**
☐ **Approved by OSBM**
☒ **Approval by OSBM not required**

SUBCHAPTER 14T – COSMETIC ART SCHOOLS

SECTION .0100 – SCHOOL APPLICATIONS

21 NCAC 14T .0101 NEW SCHOOL APPLICATIONS

(a) Persons desiring to operate a cosmetic art school in the state of North Carolina must make application for licensure and a letter of approval by submitting to the Board the Board's School Application. School applications must be submitted complete with:

(1) Proof of bond as required by G.S. 88B-17;
(2) Diagram with detailed location of equipment placement and clearly marking square footage of all areas including classrooms, dispensary, water supplies, stations, locker room/dressing room, office areas, reception areas and restroom facilities;
(3) Course curriculum for each cosmetic art discipline to be taught in the school;
(4) Plans for record keeping of student hours, minimum course requirement qualifications, and student performances;
(5) Evaluation plans for the fair assignment of performance services, the qualifications for passing a performance requirement and techniques for grading of performances;
(6) Complete handbook for students containing student policies on attendance, performance assignment, and a plan to assist students to achieve the required minimum hours and performances; and
(7) A unique, raised seal identifying the school and physical location to be used on all Board forms, reports, and other official papers.

(b) The Board shall not approve an application for a license until all plans, furniture, supplies and equipment as prescribed by the rules in this Subchapter have been installed.

(c) The Board shall issue a license to any cosmetic art school that meets the requirements of this subchapter.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0200 – PHYSICAL REQUIREMENTS FOR COSMETIC ART SCHOOLS

21 NCAC 14T .0201 ALL COSMETIC ART SCHOOLS

(a) Cosmetic Art schools must have the following physical departments:

(1) Beginner Department – a minimum of 200 square feet with a table/stand to accommodate at least 10 students and have at least 40 inches between each mannequin. This area shall have at least one mirror of a minimum of two square feet. This area shall be dedicated to the instruction of beginner students.

(2) Advanced Department – the clinic floor for performance of all cosmetic art services. Within the clinic area each school shall maintain no less than 48 inches of space from the center to the center of each styling chair, esthetics table or manicuring table and shall have at least 30 inches of space from the back of each styling chair, esthetics table or manicuring table to the wall of the school.

(3) Dispensary – a room or area to organize and maintain supplies, equipment for disinfection of all implements and a sink with hot and cold running water. All cosmetic art schools must have the required equipment to carry out disinfection procedures.

(4) Theory classroom – classroom with a minimum of 300 square feet to accommodate a maximum of 25 students. Cosmetic art schools must provide an additional eight square feet in the theory classroom for each student over the maximum of 25.

(5) Office – administrative office for the secure/locked facilitation of student records and files. This office must be outfitted with a minimum of one desk and one chair.

(6) Reception area – a reception area for clients to wait prior to receiving services.

(7) Break room for student use.

(8) Restrooms for student/public use.

(9) Locker/dressing room – a locker or room for students to secure/lock personal belongings throughout the day.

(10) All stations must be numbered numerically.

(b) Each cosmetic art school must display a sign in a conspicuous place in the reception area. The sign cannot be smaller than 12 inches by 18 inches, and must read as follows and in no other way: "Cosmetic Art School-Work Done Exclusively by Students."

(c) Each of the requirements listed within this Rule must be located within the same building with the exception of the theory classroom which may be located in an adjacent building or another building within 500 feet of the main cosmetic art building.

(d) All Cosmetic Art schools must post hours of operation per cosmetic art discipline and submit this information to the Board. Any changes to the hours of operation must be posted and submitted to the Board. A school will be considered open by the Board when cosmetic art instruction, services and performances are provided.

(e) Students may not practice unless there is sufficient space and equipment with which to practice.

(f) All cosmetic art schools must adhere to any federal, state and local government regulation or ordinance regarding fire safety codes, plumbing and electrical work.

(g) All cosmetic art schools must maintain a ventilation system in good working order with temperature control. During school operating hours the temperature must be maintained between 60 and 85 degrees Fahrenheit.

(h) All equipment in cosmetic art schools shall be in working order and kept in safe, good repair.

(i) All cosmetic art school buildings shall be maintained.

(j) All cosmetic art schools must maintain a bulletin board in plain sight of the clinic floor. The bulletin board shall be used to display at all times the Board sanitation rules, the sanitation grade card issued to the school.

(k) All cosmetic art schools must post together the school letter of approval, the school license and all cosmetic art licenses issued to the teachers on staff.

(l) Each room in a cosmetic art school must be clearly labeled according to its assigned purpose.

(m) Each theory classroom shall be equipped with desks or chairs suitable for classroom work, chair(s) suitable for demonstrating cosmetic art practices.

(n) When a school and a shop are under the same ownership or otherwise associated, separate operation of the shop and school shall be maintained.

(1) if the school and shop are located in the same building, separate entrances and visitor reception areas shall be maintained; and

(2) the school and shop shall have separate public information releases, advertisements, names and advertising signs.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0202 COSMETOLOGY SCHOOLS

Cosmetology Schools must have the following physical departments: Advanced Department - a minimum clinic floor of 1200 square feet which shall accommodate a maximum of 40 enrolled advanced students. All cosmetology schools must provide an additional 10 square feet on the clinic floor for each enrolled advanced student over the maximum of 40. Each side approach shampoo bowl must be at least 40 inches apart center of bowl to center of bowl, free standing shampoo bowls must be at least 31 inches apart center of bowl to center of bowl.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0203 ESTHETICS SCHOOLS

Esthetics Schools must have the following physical departments: Advanced Department - a minimum clinic floor of 900 square feet which shall accommodate a maximum of 20 enrolled advanced students. Schools must provide an additional 7.5 square feet on the clinic floor for each enrolled advanced student over the maximum of 20.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0204 MANICURING SCHOOLS

Manicuring Schools must have the following physical departments: Advanced Department- a minimum clinic floor of 600 square feet which shall accommodate a maximum of 20 enrolled advanced students. Schools must provide an additional five square feet on the clinic floor for each enrolled advanced student over the maximum of 20.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0205 NATURAL HAIR CARE SCHOOLS

Natural Hair Care Styling Schools must have the following physical departments

Advanced Department - a minimum clinic floor of 900 square feet which shall accommodate a maximum of 20 enrolled advanced students. Schools must provide an additional 7.5 square feet on the clinic floor for each enrolled advanced student over the maximum of 20.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0300 – SCHOOL EQUIPMENT AND SUPPLIES

21 NCAC 14T .0301 EQUIPMENT FOR ALL COSMETIC ART SCHOOLS

All cosmetic art schools shall maintain, for student use, in a dispensary, supplies for all cosmetic art services offered in the school.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0302 EQUIPMENT FOR COSMETOLOGY SCHOOLS

(a) The beginner department must be equipped with the following minimum equipment:

(1) One manicure table and stool;
(2) Two shampoo bowls and chairs, Each side approach shampoo bowl must be at least 40 inches apart center of bowl to center of bowl, free standing shampoo bowls must be at least 31 inches apart center of bowl to center of bowl;
(3) Thermal styling equipment for the purpose of curling and straightening the hair;
(4) Visual aids;
(5) One mannequin practice table/stand to accommodate each student enrolled in the beginner department;
(6) Five dozen cold wave rods for each student in the department;

(b) The advanced department must be equipped with the following minimum equipment for up to 40 students in the department:

(1) Twenty stations, a station shall include at least one mirror and one hydraulic chair;
(2) Six hooded floor type dryers and chairs;
(3) Four shampoo bowls and chairs. Each side approach shampoo bowl must be at least 40 inches apart center of bowl to center of bowl, free standing shampoo bowls must be at least 31 inches apart center of bowl to center of bowl, all other types of shampoo bowls must be at least 31 inches apart center of bowl to center of bowl;
(4) Two manicure tables and stools;
(5) One pedicure station, a pedicure station shall include a chair, a foot bath and a stool; and
(6) One facial treatment table or chair and a stool.

(c) The advanced department must be equipped with the following minimum equipment if there are more than 40 enrolled advanced students:

(1) One station for every two students;
(2) One hooded floor type dryer for every 10 students;
(3) One shampoo bowl for every 10 students;
(4) One manicure table and stool for every 10 students;
(5) One pedicure station for every 20 students; and
(6) One facial lounge or chair for every 40 students.

(d) Cosmetology schools that also offer the disciplines of esthetics, manicuring and natural hair care must be equipped with one additional station (as defined in this section per discipline) per five students and the equipment requirements specific to the discipline.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0303 EQUIPMENT FOR ESTHETICS SCHOOLS

(a) The beginner department must be equipped with the following minimum equipment:

(1) One mannequin practice table/stand to accommodate each student enrolled in the beginner department;
(2) One sink with hot and cold running water;

(b) The advanced department shall be equipped with the following equipment for 1-40 students:

(1) Ten facial treatment chairs, or treatment tables;
(2) Ten esthetician's stools; covered waste container at each station;
(3) One facial vaporizer;

(4) One galvanic current apparatus;
(5) One infra-red lamp;
(6) One woods lamp;
(7) One magnifying lamp;
(8) One hair removal wax system;
(9) One thermal wax system;
(10) One suction machine;
(11) One exfoliation machine with brushes; and
(12) One hand washing sink with hot and cold running water, separate from restrooms.

(c) The advanced department must be equipped with the following minimum equipment if there are more than 40 enrolled advanced students:

(1) One station for every two students a station shall include at least one facial treatment table or chair and one stool
(2) Two hand washing sinks with hot and cold running water, separate from restrooms

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0304 EQUIPMENT FOR MANICURING SCHOOLS

(a) The beginner department must be equipped with the following minimum equipment:

(1) One mannequin practice table/stand to accommodate each student enrolled in the beginner department; and
(2) One hand washing sink with hot and cold running water, separate from restrooms.

(b) The advanced department must be equipped with the following minimum equipment:

(1) Two hand washing sinks with hot and cold running water, separate from restrooms, located in or adjacent to the clinic area;
(2) Ten work tables with two chairs per table;
(3) Ten pedicure chairs and basins;
(4) A covered waste container at each station; and
(5) A covered container for soiled or disposable towels located in the clinic area.

(c) The advanced department must be equipped with the following minimum equipment if there are more than 40 enrolled advanced students:

(1) One station for every two students a station shall include at least one work table and two chairs; and
(2) Two hand washing sinks with hot and cold running water, separate from restrooms.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0305 EQUIPMENT FOR NATURAL HAIR CARE STYLING SCHOOLS

(a) The beginner department must be equipped with the following minimum equipment:

(1) One shampoo bowl and chair, Each side approach shampoo bowl must be at least 40 inches apart center of bowl to center of bowl, free standing shampoo bowls must be at least 31 inches apart center of bowl to center of bowl;
(2) Styling equipment for the purpose of natural hair care;
(3) Visual aids;
(4) One mannequin practice table/stand to accommodate each student;

(b) The advanced department must be equipped with the following minimum equipment:

(1) Two shampoo bowls and chairs, Each side approach shampoo bowl must be at least 40 inches apart center of bowl to center of bowl, free standing shampoo bowls must be at least 31 inches apart center of bowl to center of bowl;
(2) Ten stations, a station shall include at least one mirror and one hydraulic chair;
(3) Two hooded floor type dryers; and
(4) Styling equipment for the purpose of natural hair care;

(c) The advanced department must be equipped with the following minimum equipment if there are more than 40 enrolled advanced students:

(1) One station for every two students a station shall include at least one mirror and one hydraulic chair;
(2) One hooded dryer for every 10 students; and
(3) One shampoo bowl for every 10 students.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0400 – STUDENT EQUIPMENT

21 NCAC 14T .0401 COSMETOLOGY AND APPRENTICE STUDENT EQUIPMENT

Each cosmetology and apprentice cosmetology student shall be supplied with following minimum equipment:

(1) Implements for a complete manicure;
(2) Twelve combs;
(3) Two capes;
(4) Six brushes;
(5) Thirty-six assorted clips;
(6) Assorted smooth rollers;
(7) Hard rubber or nonflammable comb for heat protection used in thermal styling;
(8) One electric marcel iron;
(9) One razor; one clipper;
(10) One thinning shears;
(11) One shaping shears;
(12) One eyebrow tweezer;
(13) One tint brush;
(14) One mannequin with hair;
(15) One blow dryer; and
(16) One copy of "An Act to Regulate the Practice of Cosmetic Art," syllabus and student handbook.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0402 ESTHETICS STUDENT EQUIPMENT

Each esthetician student shall be supplied with the following minimum equipment:

(1) Draping;
(2) Spatulas;
(3) Tweezers;
(4) Make up supplies;
(5) One mannequin; and
(6) One copy of "An Act to Regulate the Practice of Cosmetic Art, syllabus and student handbook.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0403 MANICURING STUDENT EQUIPMENT

Each manicurist student shall be supplied with the following minimum equipment:

(1) A manicurist bowl;
(2) Nail brushes;
(3) A tray for manicuring supplies;
(4) One mannequin hand;
(5) A manicuring kit containing proper implements for manicuring and pedicuring;
(6) Implements for artificial nails, nail wraps and tipping; and
(7) One copy of "An Act to Regulate the Practice of Cosmetic Art," syllabus and student handbook.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14 T .0404 NATURAL HAIR CARE STYLING STUDENT EQUIPMENT

Each natural hair care student shall have the following minimum equipment:

(1) Six combs;
(2) Six brushes;
(3) Ten clips;
(4) Mannequin with hair;
(5) One blowdryer;
(6) Two capes; and
(7) One copy of "An Act to Regulate the Practice of Cosmetic Art," syllabus and student handbook.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0500 – RECORD KEEPING

21 NCAC 14T .0501 SUBMISSION OF RECORDS

All cosmetic art schools must submit to the Board the appropriate, completed, original Board form for each student including enrollment, withdrawal and graduation. Cosmetic art student forms shall be submitted to the Board within the required time frame established in Table 1.

15 Days	30 Days
Esthetics, Manicuring, Natural Hair Care and Teacher trainee forms including: enrollments, withdrawals, and transfers	Cosmetology forms including: enrollments, withdrawals, transfers and graduations
	Esthetics, Manicuring, Natural Hair care and Teacher trainee graduation forms

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0502 PERMANENT RECORDS, FORMS AND DOCUMENTATION

(a) Cosmetic art schools must maintain a secure/locked permanent file of matriculations for all enrolled students and students that have withdrawn or graduated within the last six months together in one room within the approved square footage of the cosmetic art school. Withdrawal and graduation forms reviewed by the Board or an agent of the Board can be removed from this room. The permanent file shall include a copy of:

(1) Board Enrollment Form;
(2) Documentation of student receipt of school policies, school/student contract and the Board felony policy;
(3) All applicable Board Withdrawal Form;
(4) Social security card for any individual that has a social security number or tax ID card or student visa information;
(5) Government issued ID and proof of date of birth;
(6) Grades for all examinations and documentation for pass/fail performances;
(7) Documentation for any leave of absence over 30 days;
(8) Transfer of hours form documenting hours earned in other schools and hours accepted by current school; and
(9) Graduation Form.

(b) Record of hours earned daily, including field trip hours and documentation of field trip hours (updated and subtotaled weekly with a running grand total):

(1) A daily record shall be kept of the performances on the performance form for each student, showing the actual date of the performance and the teacher that approved.
(2) A daily record shall be kept of the actual number of hours of attendance.
(3) Performance Record (updated and subtotaled weekly).

(c) When a student enrolled in a cosmetic art school withdraws from such school, or if a school withdraws a student for any reason other than graduation, the cosmetic art school shall report the withdrawal to the Board within 30 working days of the administrative decision to withdraw the student.

(d) If a student withdraws from a cosmetic art program within the first five days, hours earned during the time period prior to

withdrawal the school need not submit the enrollment to the Board.

(e) The graduation form documentation must be signed by on site school staff or on site school administrators and must have the seal of the school affixed. The original graduation form documentation must be prepared on the Board form. The cosmetic art school shall mail, within 30 days after the student's graduation date, with the school seal affixed, the graduation form documentation to the Board at the Board's address,

(f) All forms submitted to the Board must be originals and a copy maintained in the school file. All forms submitted to the Board must be completed, except for student signatures as necessary, by on site school staff or on site school administrators. Board forms shall be used for the sole purpose of documenting to the Board student records and shall not be used to notify students of enrollment, transfer of hours, withdrawal or graduation.

(g) Changes or corrections to any Board form must be submitted to the Board with supporting documentation.

(h) All cosmetic art schools must maintain an original, daily record of enrolled students hours and performances on file at the school. This record must be kept in a secured location under lock and key but made available for review by the Board or its agent at any time.

(i) All records kept by a cosmetic art school on a student must be kept in the school's locked files for future reference until the date the student is accepted for the state board examination or five years after the date the student first enrolled in the school, whichever occurs earlier. Forms reviewed by the Board or an agent of the Board can be removed from this room.

(j) The record of all hours and performances must be verifiable though alternate documentation such as time cards or performance grading. Credit issued to students that cannot be verified may be eliminated from the student record by an agent of the Board.

(k) Access to student records must be limited to agents of the Board, teachers and administrators of the school. Records must be kept in a secure location under lock and key and cannot be altered offsite.

(l) All individuals in a cosmetic art school receiving cosmetic art education, earning hours, performing or practicing cosmetic art services must be enrolled in the school.

(m) Only teachers reported to the Board as employees of a cosmetic art school may grade practical student examinations and evaluate pass/fail of performances. Only on site teachers, on site school administrators or on site school staff shall record student hours and performances, grade examinations and determine completion and record credit of live model/mannequin performances.

(n) Passing grades for examinations and the successful completion of live model/mannequin performances as determined through the school's evaluation plan that is approved by the Board at the time of application shall be disclosed to students at the time of enrollment. Passing grades and performances cannot be credited to students without meeting the requirements of the evaluation plan.

(o) Cosmetic art schools must provide to each student a copy of school policies, the Board felony policies and retain for the permanent file a copy of the student's acknowledgement of receipt.

(p) Students with unsatisfied academic obligations shall not be submitted to the Board as graduates.

(q) Cosmetic art schools shall not report to the Board the unsatisfied financial obligations of any cosmetic art student. Cosmetic art schools cannot prevent the graduation of students that have met the Board minimum requirements and passed all school academic requirements.

(r) Records of hours must be rounded to no more than the nearest quarter hour. Cosmetic art schools cannot give or deduct hours or performances as a reward or penalty.

(s) An applicant may receive credit for instruction taken in another state if the conditions set forth in this Rule are met.

(1) The applicant's record shall be certified by the state agency or department that issues licenses to practice in the cosmetic arts. If this agency or department does not maintain any student records or if the state does not give license to practice in the cosmetic arts, then the records may be certified by any state department or state agency that does maintain such records and is willing to certify their accuracy. If no state department or board will certify the accuracy of the student's records, then the Board shall review the student's records on a case-by-case basis. Hours transferred between open North Carolina schools must be obtained by the submission of the Board transfer form submitted directly from the school in which the hours are earned with the school seal affixed. With grades for examinations and performance. Such original documentation shall be submitted to the Board with enrollment.

(2) In order that hours may be transferred from one cosmetic art school to another, a student must pass an entrance examination given by the school to which the student is transferring.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0600 – CURRICULUM

21 NCAC 14T .0601 COSMETIC ART CURRICULUM

(a) Cosmetic art schools must develop and submit to the Board a curriculum of each discipline to be taught at the school. The curriculum, once approved by the board, must be adhered to and lessons developed from the approved curriculum.

(b) Before a student can move from the beginner department to the advanced, the minimum requirements shall be met.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0602 COSMETOLOGY CURRICULUM

(a) The following live model/mannequin performance completions shall be done by each student before the student is eligible to take the cosmetologist's examination. Sharing of performance completions is not allowed. Credit for a performance shall be given to only one student.

Requirement Description	**Hours**	**Services**	
Beginners: Professional image, sanitation, bacteriology, disinfection, first aid, anatomy, electricity, chemistry, salon business, draping, shampooing, roller sets, pin curls, ridge curls with C shaping, fingerwaves, braids, artificial hair, up-styles, blowdrying brush control, blowdrying with curling iron, pressing, hair cutting, partings, perm wraps, relaxer sectioning, color application sectioning, scalp treatments, manicures, pedicures, and artificial nails	300		
Styles and techniques of cosmetology services including arranging, dressing, curling, waving, cleansing cutting, singeing, bleaching, or coloring hair, esthetics and manicuring, business management, professional ethics	1200		
Performance Requirements		**Mannequin**	**Live Model**
Scalp and hair treatments			10
Fullhead fingerwave and style		5 or	5
Fullhead pincurl and style		5 or	5
Hair styling – sets, blowdrying, thermal press/flat iron, artificial hair		70	100
Haircuts		10	75
Chemical reformation or permanent waving and relaxers		25	10
Temporary color			2
Color application – semi, demi, permanent color and hair lightening		10	30
Multidimensional color – low/high lighting, cap, bleach		10	15
Lash and brow color			2
Nail care – manicures and pedicures			15
Artificial nails		5 or	5
Facials with surface manipulation/makeup			10
Hair removal			5

(b) A minimum of 300 hours of technical and practical instruction in application areas are required prior to conducting performances on the public.
(c) Certification of live model or mannequin performance completions is required along with the graduation form and application for the examination.
(d) A live model may be substituted for a mannequin for any mannequin service.
(e) All mannequin services may be performed using a simulated product.
(f) Simulated product is not allowed for credit for live model performance.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0603 APPRENTICE COSMETOLOGY CURRICULUM

(a) The following live model/mannequin performance completions shall be done by each student before the student is eligible to take the cosmetologist's examination. Sharing of
performance completions is not allowed. Credit for a performance shall be given to only one student.

Requirement Description	Hours	Services	
Beginners: Professional image, sanitation, bacteriology, disinfection, first aid, anatomy, electricity, chemistry, salon business, draping, shampooing, roller sets, pin curls, ridge curls with C shaping, fingerwaves, braids, artificial hair, up-styles, blowdrying brush control, blowdrying with curling iron, pressing, hair cutting, partings, perm wraps, relaxer sectioning, color application sectioning, scalp treatments, manicures, pedicures, and artificial nails	300		
Styles and techniques of cosmetology services including arranging, dressing, curling, waving, cleansing cutting, singeing, bleaching, or coloring hair, esthetics and manicuring, business management, professional ethics	900		
Performance Requirements		**Mannequin**	**Live Model**
Scalp and hair treatments			8
Fullhead fingerwave and style		3 or	3
Fullhead pincurl and style		3 or	3
Hair styling – sets, blowdrying, thermal press/flat iron, artificial hair		56	80
Haircuts		8	60
Chemical reformation or permanent waving and relaxers		19	8
Temporary color			1
Color application – semi, demi, permanent color and hair lightening		8	11
Multidimensional color – low/high lighting, cap, bleach		8	3
Lash and brow color			1
Nail care – manicures and pedicures			12
Artificial nails		4 or	4
Facials with surface manipulation/makeup			7
Hair removal			3

(b) A minimum of 300 hours of technical and practical instruction in application areas are required prior to conducting performances on the public.
(c) Certification of live model or mannequin performance completions is required along with the graduation form and application for the examination.
(d) A live model may be substituted for a mannequin for any mannequin service.
(e) All mannequin services may be performed using a simulated product.
(f) Simulated product is not allowed for credit for live model performance.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0604 ESTHETICS CURRICULUM
(a) The following live model/mannequin performance completions shall be done by each student before the student is eligible to take the cosmetologist's examination. Sharing of performance completions is not allowed. Credit for a performance shall be given to only one student.

Requirement Description	Hours	Services
Beginners: anatomy/physiology, hygiene, disinfection, first aid, chemistry, draping, facial/body treatment (cleansing, manipulations, masks), hair removal, basic dermatology, machines, electricity, apparatus, aromatherapy, nutrition, make-up/color theory,	75	

Styles and techniques of esthetics services including facials, makeup application, performing skin care, hair removal, eyelash extensions, and applying brow and lash color, business management, professional ethics	525		
Performance Requirements		**Mannequin**	**Live Model**
Facials Manual (skin analysis, cleansing, scientific manipulations, packs and masks)		10	30
Facials Electronic (the use of electrical modalitus, including dermal lights, and electrical apparatus for facials and skin care including galvanic and faradic)			30
Eyebrow arching		5	15
Hair removal (hard wax, soft wax, depilitories		10	20
Makeup application (skin analysis, complete and corrective makeup)		10	20
Eyelash extensions		5	5
Brow and lash color		5	5

(b) A minimum of 75 hours of technical and practical instruction in application areas are required prior to conducting performances on the public.
(c) Certification of live model or mannequin performance completions is required along with the graduation form and application for the examination.
(d) A live model may be substituted for a mannequin for any mannequin service.
(e) All mannequin services may be performed using a simulated product.
(f) Simulated product is not allowed for credit for live model performance.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0605 MANICURING CURRICULUM

(a) The following live model/mannequin performance completions shall be done by each student in the before the student is eligible to take the cosmetologist's examination. Sharing of performance completions is not allowed. Credit for a performance shall be given to only one student.

Requirement Description	**Hours**	**Services**	
Beginners: Manicuring theory, disinfection, first aid, trimming, filing, shaping decorating, arm and hand manipulation, sculptured and artificial nails, pedicuring,	60		
Styles and techniques for the care, treatment and decoration of fingernails, toenails, cuticles, nail extensions and artificial nails, business management and professional ethics, electric file	240		
Performance Requirements		**Mannequin**	**Live Model**
Manicures (trimming, filing shaping, decorating and arm and hand manipulations)		5	10
Applications or repair of sculptured or artificial nails (sets – a set is one hand including all five fingers)		5	15
Pedicures			10

(b) A minimum of 60 hours of technical and practical instruction in application areas are required prior to conducting performances on the public.
(c) Certification of live model or mannequin performance completions is required along with the graduation form and application for the examination.
(d) A live model may be substituted for a mannequin for any mannequin service.
(e) All mannequin services may be performed using a simulated product.
(f) Simulated product is not allowed for credit for live model performance.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0606 NATURAL HAIR CARE STYLING CURRICULUM

(a) All natural hair care students shall complete the following minimum number of live model performances during the natural hair care course under the supervision of a licensed cosmetologist or natural hair care teacher before taking the natural hair care examination:

Requirement Description	**Hours**	**Services**	
Beginners: Sanitation, bacteriology, disinfection, first aid, shampooing, draping, anatomy, disorders of the hair and scalp	60		
Styles and techniques of natural hair styling including twisting, wrapping, extending, locking, blowdry and hot iron, business management and professional ethics	240		
Performance Requirements		**Mannequin**	**Live Model**
Braids		5	5
Twists		5	5
Knots		3	2
Corn rows		3	2
Hairlocking		5	5
Artificial hair and decorations		5	5
Blow dry and flat iron		5	5
Braid Removal		5	5

(b) A minimum of 60 hours of technical and practical instruction in application areas are required prior to conducting performances on the public.

(c) Certification of live model or mannequin performance completions is required along with the graduation form and application for the examination.

(d) A live model may be substituted for a mannequin for any mannequin service.

(e) All mannequin services may be performed using a simulated product.

(f) Simulated product is not allowed for credit for live model performance.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0607 COSMETOLOGY TEACHER TRAINEE CURRICULUM

(a) To meet the approval of the Board, a cosmetologist teacher training course must consist of at least 800 hours of instruction in theory and practical application, divided as follows:

Requirement Description	**Hours**
Beginners: observation theory, motivation, business management, student relations, teaching techniques, preparing lesson plans, shop internship, preparing class lectures and presentations, preparing examinations, grading and GS 88B and the rules of the Board	150
Conducting theory classes from prepared lessons, preparing and giving examinations and giving practical demonstrations	650

(b) A minimum of 150 hours of technical and practical instruction in practice areas are required prior to trainees permitted to instruct in a cosmetic art classroom.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0608 ESTHETIC TEACHER TRAINEE CURRICULUM

(a) To meet the approval of the Board, a cosmetologist teacher training course must consist of at least 650 hours of instruction in theory and practical application, divided as follows:

Requirement Description	**Hours**
Beginners: observation theory, motivation, business management, student relations, teaching techniques, preparing lesson plans, preparing class lectures and presentations, preparing examinations, grading and GS 88B and the rules of the Board	120
Conducting theory classes from prepared lessons, preparing and giving examinations and giving practical demonstrations	530

(b) A minimum of 120 hours of technical and practical instruction in practice areas are required prior to trainees permitted to instruct in a cosmetic art classroom.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0609 MANICURIST TEACHER TRAINEE CURRICULUM

(a) To meet the approval of the Board, a cosmetologist teacher training course must consist of at least 320 hours of instruction in theory and practical application, divided as follows:

Requirement Description	Hours
Beginners: observation theory, motivation, business management, student relations, teaching techniques, preparing lesson plans, grading, preparing class lectures and presentations, preparing examinations and G.S. 88B and the rules of the Board	115
Conducting theory classes from prepared lessons, preparing and giving examinations and giving practical demonstrations	205

(b) A minimum of 115 hours of technical and practical instruction in practice areas are required prior to trainees permitted to instruct in a cosmetic art classroom.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0610 NATURAL HAIR CARE TEACHER CURRICULUM

(a) To meet the approval of the Board, a cosmetologist teacher training course must consist of at least 320 hours of instruction in theory and practical application, divided as follows:

Requirement Description	Hours
Beginners: observation theory, motivation, business management, student relations, teaching techniques, preparing lesson plans, grading, preparing class lectures and presentations, preparing examinations and GS 88B and the rules of the Board	115
Conducting theory classes from prepared lessons, preparing and giving examinations and giving practical demonstrations	205

(b) A minimum of 115 hours of technical and practical instruction in practice areas are required prior to trainees permitted to instruct in a cosmetic art classroom.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0611 ONLINE INSTRUCTION

Online instruction and course hours are not accepted by the Board for any cosmetic art discipline. Online resources, course supplements and internet research can be used during the course of study with the supervision of a cosmetic art teacher within a cosmetic art school.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21NCAC 14T .0612 INSTRUCTION GUIDELINES

(a) The hours earned in the advanced department must be devoted to study and performance completions.

(b) Work in the advanced department may be done on the public. Students with less than 300 hours credit must not work in this department and are not allowed to work on the public except shampoo and scalp manipulations.

(c) All work done by students on the public must be checked by the cosmetic art teacher as the work is being performed and after the service has been completed so that the teacher may point out errors to the student in order that they may be corrected.

(d) Cosmetic art students shall receive training and passing scores on examinations on the theory prior to performing services.

(e) Cosmetic art students shall receive training in:

(1) The procedures and methods of disinfection, sanitation, including the study of the Federal Environmental Protection Agency's disinfectant guidelines;

(2) Recommendations on the Material Safety Data Sheets prepared by the manufactures on all products used by the school's students in performances;

(3) The study of bacteriology including communicable diseases and the requirements of The Pure Food and Drug Law for creams and lotions.

(f) Classroom work shall include lectures on the subject as well as demonstrations, questions and answers on textbooks, written examinations, and in-class practice of procedures and methods.

(g) Cosmetic art teacher trainees must be enrolled in school to earn hours.

(h) Cosmetic art schools must supply each student with a copy of An Act to Regulate Cosmetic Art, Board rules, and the student handbook.

(i) All of the work outlined in the Beginners' Department and the Advanced Department shall be given to the students through practical demonstrations and lectures, questions and answers on textbooks, and written exam.

(j) A minimum of 10 percent of scheduled attendance time per week shall be dedicated to theory instruction, questions and answers on textbooks, and written exam shall be given to full-time students per week.

(k) All papers written shall be graded and returned to the students in order that the students may see their errors.

(l) Cosmetic art students may only receive training and practice in the discipline in which they are enrolled.

(m) All live model performances must be done on the clinic floor. Mannequin performances may be performed on the clinic floor or in an advanced department classroom.

(n) Textbooks used for instruction shall not exceed five years after original publishing date.

(o) Schools must make text books and supplementary educational materials and equipment available to students.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0613 UNIFORMS

Each cosmetic arts school must define what constitutes a uniform for students and acceptable attire for teachers. Students and teachers shall wear the uniform or acceptable attire as defined by the school so that Board members or agents of the Board can identify by sight students and teachers. Each school's definition of acceptable attire cannot change more than once per year. Students must wear a clean uniform and a name tag identifying student name, cosmetic art discipline and academic status.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0614 INTERNSHIPS

Schools and cosmetic art shops desiring to implement an internship program shall follow these requirements:

(1) Schools wishing to participate in an internship program must notify the Board of intent to implement a program before credit for an internship may be granted. Cosmetic art shops and student selection criteria must be submitted along with the notification.

(2) Schools shall report to the Board all cosmetic art shops contracted and students selected to participate in the program.

(3) Internships may be arranged in various time frames but shall never exceed five percent of a student's training period.

(4) Credit for an internship shall be granted upon submission of student hours verification based on a daily attendance record. Hours must be recorded on a form approved by the school.

(5) Students may be assigned a variety of duties, but client services are restricted. Cosmetology and natural hair care students may only provide shampoo services, manicurist students may only remove nail polish and esthetician students may only drape and prep clients. Cosmetic art shop violation of restrictions or school requirements may result in the termination of the internship contract and the loss of student training hours.

(6) Students must follow all cosmetic art shop employee rules and regulations. Violations of cosmetic art shop rules or any misconduct may result in dismissal of the intern or loss of training hours.

(7) A licensed teacher need not be in attendance during this internship.

(8) Students participating in the program shall not receive compensation for duties performed in the cosmetic art shop.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0615 FIELD TRIPS

(a) Cosmetic art schools must record field trip hours of each student not to exceed 40 hours of education. Cosmetic Art Educational Field Trips include the following activities:

(1) Cosmetic art shops;

(2) Cosmetic art Conventions;

(3) Competition Training;

(4) Other Schools;

(5) State Board Office and Archives Museum;

(6) Supply Houses;

(7) College or Career Day at School;

(8) Fashion Shows;

(9) Rest Homes/Nursing Homes;

(10) Hospitals; and

(11) Funeral Homes.

(b) An instructor must be present during these educational field trips, for credit to be given to student, with a ratio of one instructor per 25 students present.

(c) The maximum number of hours a student may earn for field trips is 40 credit hours for cosmetology students, 20 credit hours for esthetician students and 10 credit hours for manicurist or natural hair care students.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0616 ADDITIONAL HOURS

(a) Students returning to complete additional hours to fulfill three time examination failure requirements shall be evaluated and provided remedial assistance and training in the areas of deficiency.

(b) Notwithstanding any other provision of the rules in this Subchapter, pursuant to G.S. 88B-18(d) a cosmetologist, esthetician, manicurist, natural hair care specialist or teacher candidate who has failed either section of the examination three times, shall complete the following amounts of study at an approved cosmetic art school before reapplication for examination shall be accepted by the Board:

(1) Cosmetologist 200 hours;

(2) Esthetician 80 hours;

(3) Manicurist 40 hours;

(4) Natural Hair Care Specialist 40 hours; and

(5) Teacher:

(A) Cosmetology 100 hours;

(B) Esthetician 80 hours; and

(C) Manicurist 40 hours.

(c) Teacher candidates with no prior cosmetic art teacher training program experience shall provide a written affidavit documenting a minimum of required work experience as outlined in 21 NCAC 14N .0115 or complete a minimum of the hours required for the teacher curriculum in the discipline in which they hold a license. The required minimums for teacher curriculums are 800 hours of a cosmetology teacher curriculum, 650 hours of an esthetician teacher curriculum, 320 hours of a natural hair care teacher curriculum or 320 hours of a manicurist teacher curriculum.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0617 TEACHER TRAINEES

(a) A cosmetic art teacher trainee may not perform clinical services on a patron at the cosmetic art school.

(b) A cosmetic art teacher trainee shall be supervised by a cosmetic art teacher at all times when the trainee is at a cosmetic art school except as set out in Paragraph (c) of this Rule.

(c) A manicurist, natural hair care or esthetician teacher may not supervise a cosmetologist teacher trainee with regard to any cosmetic art other than manicuring or esthetics, as appropriate.
(d) A cosmetic art teacher trainee program may be a full-time program or a part-time program. A cosmetic art teacher trainee, however, may not receive credit for more than eight hours per day.
(e) Teacher trainees may present lessons they have prepared under the direct supervision of a licensed cosmetic art teacher as long as the supervising teacher is present in the classroom.
(f) Persons receiving teacher training in a cosmetic art school shall be furnished a teacher's manual and shall spend all of their training time under the direct supervision of a licensed cosmetic art teacher and shall not be left in charge of students or the school at any time.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0700 – SCHOOL LICENSURE, OPERATIONS, CLOSING AND RELOCATING SCHOOLS

21 NCAC 14T .0701 SCHOOL OPERATIONS/LICENSURE MAINTENANCE
(a) No individual shall be given credit for any hours earned in a cosmetic art school before the date the school is granted a license, before the student is enrolled or after graduation or withdrawal without a new enrollment.
(b) All Cosmetic Art schools must submit hours of operation per cosmetic art discipline to the Board. Any changes to the hours of operation must be submitted to the Board. A school will be considered open by the Board when cosmetic art instruction, services and performances are provided.
(c) Students can be required to clean and disinfect work areas, reception areas, implements and the dispensary. Students cannot be required to perform regular maintenance.
(d) All cosmetic art schools must adhere to all Board sanitation regulations.
(e) Cosmetic art schools may permit students to visit on campus libraries and other educational resource rooms such as computer labs for research and study under the supervision of a cosmetic art instructor.
(f) Cosmetic art schools must use the following grading scale as a minimum for passing grades:

Grade A	100-90
Grade B	80-89
Grade C	70-79
Grade F (Fail)	0-69

(g) Cosmetic art schools shall not graduate any student that has not met the minimum school and Board requirements for graduation.
(h) Examinations shall be administered in all subjects of the cosmetic art curriculum. Students must pass examinations in all curriculum subjects.
(i) Students present at school must be supervised by a cosmetic art teacher at all times. If a guest lecturer is leading a class, at least one cosmetic art teacher must be present in the lecture.
(j) All cosmetic art schools shall provide one teacher for every 25 enrolled students.
(k) In theory or demonstration classes the student teacher ratio may exceed 1:25.
(l) During student practical work on live models, on the clinic floor, there must be a ratio of one teacher for every 20 students. These ratios shall be adhered to when schools are in operation. Any cosmetic art teacher may be responsible for 25 teacher trainees or up to 25 cosmetic art students and five teacher trainees.
(m) The Board must be notified of changes in teaching staff by written correspondence prior to instruction by the new teacher. A change in teaching staff includes any substitution for the regularly scheduled teacher and any change, scheduled or otherwise, in the list of teachers last given to the Board's school administrator. All courses in a cosmetic art school must be taught by a licensed cosmetology teacher, except that manicuring courses may be taught by either a licensed cosmetology teacher or a licensed manicurist teacher, natural hair care courses may be taught by either a licensed cosmetology teacher or a licensed natural hair care teacher, and esthetics courses may be taught by either a licensed cosmetology teacher or a licensed esthetician teacher. A licensed cosmetologist not licensed to teach cosmetic art may substitute for a cosmetology, esthetician, natural hair care or manicurist teacher; a licensed manicurist not licensed as a manicurist teacher may substitute for a manicurist teacher; a licensed natural hair care specialist not licensed as a natural hair care teacher may substitute for a natural hair care teacher; and a licensed esthetician not licensed as an esthetic teacher may substitute for an esthetician teacher. In no event may any cosmetic art licensee substitution last for more than 15 consecutive working days per year per teacher. If any teacher substitution is 16 consecutive days or longer, the school must provide a new cosmetic art teacher.
(n) Enrolled students may earn a maximum of eight hours per day per discipline of cosmetic art and a maximum of 48 hours per week per discipline. A student enrolled in more than one cosmetic art discipline may not earn hours or performances concurrently.
(o) A cosmetic art student must complete at least 1/3 of the minimum required hours in the cosmetic art school certifying his or her application for the state board examination.
(p) Upon written petition by the student and the school, the Board shall make an exception to the requirements set forth in Paragraph (o) of this Rule if the student shows that circumstances beyond the student's control prohibited him or her from completing a minimum of 1/3 hours at the school that certifies his or her application.
(q) The Board shall certify student hours for any North Carolina cosmetic art school that is closed. The Board shall not certify student hours between any North Carolina open cosmetic art schools. The Board shall certify student hours earned at open North Carolina cosmetic art schools to other state board and schools open outside of the North Carolina.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0702 TRANSFER OF CREDIT

(a) A student who transfers from one cosmetic art discipline to another cosmetic art discipline will not receive credit for hours received in the initial curriculum.

(b) Up to 25 percent of all credit earned in an approved esthetician, manicurist or natural hair care teacher training program may be transferred to a cosmetology teacher training program. A maximum of 160 hours earned in either an esthetician, natural hair care or manicurist teacher training program may be transferred between programs.

(c) Licensed estheticians, manicurists and natural hair care stylists may apply up to 25 percent of required hours earned toward the cosmetology curriculum.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0703 EXPIRATION OF STUDENT CREDIT

Students and graduates that fail to file application for the examination within five years of the initial enrollment shall not be credited any hours or performances previously earned.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0704 FELONY APPLICANTS

Any applicant convicted of a felony may disclose such information upon their enrollment in cosmetic art school and may apply for Board approval upon enrollment in a cosmetic art school.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0705 SCHOOL PERFORMANCE REQUIREMENTS

(a) The school shall meet or exceed the following outcomes during a running five year period: A cosmetic art program completion rate of at least 50 percent;

(b) The school shall meet or exceed the following outcomes during a running three year period: A pass rate on cosmetic art state licensing examination of at least 70 percent

(c) The school shall allow the teachers to have the opportunity to prepare for class, evaluate students' progress in the course, counsel students individually, and participate in activities of continuing education.

(d) Cosmetic art schools must provide to substitutes copies of lesson plans and the performance evaluation plan for the successful grading of clinical performances.

(e) School attendance policies shall give appropriate performances attendance credit for all hours attended;

(f) If a graduate meets all the financial, hour, academic, and performance requirements the school must provide the student with the examination application.

(g) Cosmetic Art schools shall maintain current bond according to G.S. 88B and shall submit certification of renewal or new bond prior to expiration of the bond approved by the Board.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0706 SCHOOL CLOSING

(a) If the location of a cosmetic art school changes, or if there is a transfer of majority ownership of a cosmetic art school, whether by sale, lease or otherwise a new approval application is required.

(b) License and letters of approval issued to cosmetic art schools are not transferrable, and are valid only for the location, square footage and enrollment capacity for which issued, and to the owner to whom issued. The letter of approval shall contain the school name, school owner name, school location, date of approval, the signature of the Board members, the amount of approved square footage and the maximum number of enrollments for which the school has been approved.

(c) Schools intending to close must notify the Board not less than 30 days in advance.

(d) Schools must make provisions for the long term storage of school documents, and facilitate the retrieval of any school documents upon the request of a student or the Board. Schools shall notify the Board of the contact information for retrieval of any school information.

(e) Schools must facilitate and cooperate in the final inspection and processing of student final hours.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0800 – SCHOOL INSPECTIONS

21 NCAC 14T .0801 INSPECTION REPORTS

Schools shall sign and receive a copy of all inspection reports.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0802 SCHOOL SANITATION GRADES

Schools shall follow all Board sanitation regulations. Schools shall be issued a grade at each inspection on a grade card provided by the Board.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0803 SCHOOL INSPECTIONS

(a) Schools must facilitate and cooperate during all school inspections.

(b) Schools are subject to reevaluation and re-inspection at any time.

(c) Failure to comply with the laws and rules of the Board is cause to revoke or suspend the school's license/letter of approval.

(d) In addition to such other reports as may be required by the Board, cosmetic art schools shall report to the Board or its authorized agent, upon inspection of the cosmetic art school and at other times upon specific request, the names of all students currently enrolled and the hours and performances completed by each.

(e) The owner or manager of the cosmetic art school shall read each inspection report made of the school by an authorized agent of the Board to determine that the information on the inspection report is correct and shall sign the report. If any part of the information on the report is incorrect, it shall be corrected by the

authorized agent of the Board or an exception to the report signed by the owner or manager shall be attached to the report.
(f) All present student equipment shall be made available to inspectors during school inspection.
(g) Cosmetic art schools must maintain copies of lesson plans and make such copies available to an agent of the Board upon request.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0900 – DISCIPLINARY ACTIONS

21 NCAC 14T .0901 SCHOOL PROBATION
(a) After notice and opportunity for a hearing, the board shall put the school on probation if the board finds that the program fails to comply with General Statute or these Rules. The decision shall identify all deficiencies required to be corrected for the program to come into compliance.
(b) No later than one calendar year after notification, the school shall either:
(1) Correct the deficiencies identified above and come into compliance with board requirements; or
(2) Request an extension of time at which it shall:
(A) Explain the basis for its failure to correct the deficiencies within the allotted time;
(B) Provide a summary of the program's good faith efforts to come into compliance within the allotted time; and
(C) Present a plan of action to come into compliance within the extension.
(c) The board shall extend the one year time frame by a single six-month period if:
(1) The explanation provided above is complete and contains all material facts;
(2) The efforts made to come into compliance demonstrate good faith; and
(3) The plan of action to come into compliance is realistic and complete.
(d) The board shall make site visits, or require the school to submit progress reports, syllabi, evaluative tools and student records when necessary to verify the accuracy of the report.
(e) When a program previously placed on probation fails to demonstrate compliance with General Statute or these Rules as set forth in the board's order, the board shall order the school's official and the director to appear at a hearing at which time the school shall present evidence why the school license and letter of approval shall not be withdrawn.
(f) Violation of this Rule is just cause to revoke the Board's approval of the cosmetic art school's teacher trainee program for a period of one year.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

This Section contains information for the meeting of the Rules Review Commission on Thursday July 21, 2011 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 919-431-3000. 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	**Appointed by House**
Addison Bell	Ralph A. Walker
Margaret Currin	Curtis Venable
Pete Osborne	George Lucier
Bob Rippy	Garth K. Dunklin
Faylene Whitaker	Stephanie Simpson

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

September 15, 2011 October 20, 2011
November 17, 2011 December 15, 2011

RULES REVIEW COMMISSION
July 21, 2011
MINUTES

The Rules Review Commission met on Thursday, July 21, 2011, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Margaret Currin, Addison Bell, Garth K. Dunklin, George Lucier, Pete Osborne, Bob Rippy, Stephanie Simpson, Ralph Walker and Faylene Whitaker.

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

The following people were among those attending the meeting:

Barry Bloch	Department of Justice
Julia George	Board of Nursing
Linda Burhans	Board of Nursing
Jean Stanley	Board of Nursing
Julie Woodson	NC Association of Realtors
Bob Hamilton	ABC Commission
Reneé Batts	Community Colleges
David Tuttle	Board of Engineers and Surveyors
Jane Gilchrist	Department of Labor
Natalie Caviness	Department of Labor
Erin Gould	Department of Labor
Jack Nichols	Allen, Pinnix & Nichols
Julia Lohman	Sheriffs' Education and Standards Commission
Wilson Hayman	Health Network Solutions
Vance Kinlaw	NC Chiropractic Board
Barbara Geiger	Irrigation Contractors Licensing Board
Bob Hensley	DHHS/Division of Social Services
Charles Wilkins	Board of Marriage and Family Therapy Licensure Board
Dedra Alston	DHHS/Division of Child Development
Anca Grozav	Office of State Budget and Management
Michael Byrne	Moore & Van Allen

Felicia Gore Hoover	Occupational Safety and Health Review Commission
Carlotta Dixon	Division of Social Services

Prior to the scheduled meeting on July 21, 2011, Judge Ralph A. Walker was sworn in by Administrative Law Judge Augustus B. Elkins II.

The meeting was called to order at 1:32 p.m. Judge Walker, as senior member present presided over the meeting. He reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

Chairman Walker recognized former Commissioner Dan McLawhorn.
New Commissioners Addison Bell, Margaret Currin, Garth K. Dunklin, Pete Osborne, Bob Rippy, Stephanie Simpson and Faylene Whitaker were welcomed and introduced by Chairman Walker. He then administered the oath of office to the new Commissioners.

Chairman Walker read into the record the following statements of economic interest for:

Addison Bell, which stated there was no actual conflict of interest;

Margaret Currin, which stated there was no actual conflict of interest;

Garth K. Dunklin, which stated there was no actual conflict of interest. However, there is the potential for a conflict of interest because Mr. Dunklin is an attorney with the law firm of Wishart, Norris, Henninger and Pittman, P.A. Should any employees or partners of the firm, or any of the firm's current or former clients, come before the Commission for official action, Mr. Dunklin should exercise appropriate caution in the performance of his public duties. This would include recusing himself to the extent that those interests would influence or could reasonably appear to influence his actions;

Pete Osborne, which stated there was no actual conflict of interest. However, there is the potential for a conflict of interest because Mr. Osborne owns Osborne Company, Inc., a general contracting company. He should exercise appropriate caution in the performance of his public duties should any issues impacting Osborne Company, Inc., come before the Commission for official action. This would include recusing himself to the extent that those interests would influence or could reasonably appear to influence his actions;

Bob Rippy, which stated there was no actual conflict of interest. However, there is the potential for a conflict of interest because Mr. Rippy owns Wrightsville Farms Management, Inc., a waterpark, amusement, concessions and rides business and is also a member of the Amusement Device Advisory Board. He should exercise appropriate caution in the performance of his public duties should any issues impacting Wrightsville Farms Management, Inc., including the Department of Labor/Amusement Device Advisory Board, come before the Commission for official action. This would include recusing himself to the extent that those interests would influence or could reasonably appear to influence his actions;

Stephanie Simpson, which stated there was no actual conflict of interest. However, there is the potential for a conflict of interest because Ms. Simpson's spouse is an attorney with the law firm of Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, LLP. Should any employees or partners of the firm, or any of the firm's current or former clients, come before the Commission for official action, she must exercise appropriate caution in the performance of her public duties. This would include recusing herself to the extent that those interests would influence or could reasonably appear to influence her actions;

Faylene Whitaker, which stated there was no actual conflict of interest. However, there is the potential for a conflict of interest because Ms. Whitaker owns Whitaker Farms, a farming business including tobacco, field tomatoes, strawberries, pumpkins as well as trees, shrubs, flowering plants, mulch and stone. Ms. Whitaker should exercise appropriate caution in the performance of her public duties should issues impacting Whitaker Farms come before the Commission for official action. This would include recusing herself to the extent that those interests would influence or could reasonably appear to influence her actions.

APPROVAL OF MINUTES
Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the June 16, 2011 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS
13 NCAC 13 .0211 – Department of Labor. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 10 .0211 – Board of Chiropractic Examiners. The Commission approved the rewritten rule submitted by the agency. Wilson Hayman appeared and spoke. He raised no objections to the rewritten rule.

21 NCAC 23 .0102, .0401, .0401, .0404, .0406 – Irrigation Contractor's Licensing Board. The Commission approved the rewritten rules submitted by the agency. Commissioners Bell, Currin, Lucier, Osborne, Rippy, Simpson and Whitaker voted for the motion to approve the rule. Commissioner Dunklin voted against the motion.

21 NCAC 31 .0201, .0501, .0801 – Marriage and Family Therapy Licensure Board. No rewritten rule was submitted by the agency and no action was taken.

21 NCAC 64 .0307 – Board of Examiners for Speech and Language Pathologists and Audiologists. No rewritten rule was submitted by the agency and no action was taken.

LOG OF FILINGS
Chairman Walker presided over the review of the log of permanent rules.

Alcoholic Beverage Control Commission
All rules were approved unanimously.

Child Care Commission
All rules were approved unanimously.

Social Services Commission
All rules were approved unanimously with the following exceptions:

10A NCAC 70G .0403 – The Commission objected to this rule based on lack of statutory authority. Subparagraph (e)(1) is not consistent with G.S. 131D-10.3(h)(2) as written. The rule is a complete prohibition on certain applicants being licensed while the statute only prohibits licensure for a certain time period. Since the General Assembly has set the standard, there is no authority cited for the agency to change it. Similarly, Subparagraph (e)(2) is not consistent with G.S. 131D-10.3(h)(1) by making an absolute prohibition beyond 60 months. There is the same issue in Subparagraph (e)(4).

10A NCAC 70G .0503 – This rule was withdrawn by the agency.

10A NCAC 70H .0114 – The Commission objected to this rule based on lack of statutory authority. Subparagraph (e)(1) is not consistent with G.S. 131D-10.3(h)(2) as written. The rule is a complete prohibition on certain applicants being licensed while the statute only prohibits licensure for a certain time period. Since the General Assembly has set the standard, there is no authority cited for the agency to change it. Similarly, Subparagraph (e)(2) is not consistent with G.S. 131D-10.3(h)(1) by making an absolute prohibition beyond 60 months. There is the same issue in Subparagraph (e)(4). Similarly, Subparagraph (e)(2) is not consistent with G.S. 131D-10.3(h)(1) by making an absolute prohibition beyond 60 months. There is the same issue in (e)(4).

10A NCAC 70J .0106 – The Commission objected to this rule based on lack of ambiguity. In (a)(1)(B) and (C), it is not clear how much space is required between the sides of beds. Part (B) seems to say that the sides of beds must be three feet apart while Part (C) only requires that they be 30 inches apart. It is not clear which is the requirement. This objection applies to existing language in the rule.

Sheriffs Education and Training Standards Commission
All rules were approved unanimously.

Board of Massage and Bodywork Therapy
21 NCAC 30 .0624 –
Charles Wilkins Representing the Board addressed the Commission.

The Commission voted in favor of Commissioner Bell's motion to extend the period of review for this rule. It extended the period of review to allow Mr. Wilkins and Commission Counsel Deluca to consult and see if there could be some agreement either as to the authority for the rule or to develop satisfactory language for this rule.

Commissioner Osborne was not present during this vote.

Board of Nursing

All rules were approved unanimously.

Commissioner Dunklin was not present during this vote.

Board of Examiners for Engineers and Surveyors
All rules were approved unanimously with the following exceptions:

David Tuttle representing the Board addressed the Commission.

21 NCAC 56 .0701 – The Commission objected to this Rule based on ambiguity. In (e)(5) page 3 line 8 and (e)(6) line 10 it is not clear what is included in the term "licensee's organization." It is not clear whether this is restricted to the business entity under which the licensee is engaging in the practice of engineering or surveying or whether it expands to include professional societies, boards or memberships.

21 NCAC 56 .1602 – The Commission voted to extend the period of review for this rule. The Commission did this to give Mr. Tuttle an opportunity to explore with his surveyor board members acceptable language which could define in (a) line 4 what is meant or required by the necessity for a licensee "to make adequate investigation" or "to determine." This was prompted by Mr. DeLuca's earlier technical change request to delete or define "adequate." It would seem that an "investigation to determine if there are encroachments, gaps, lappages, or other irregularities along each line surveyed" is the definition of "adequate" and makes that word unnecessary. It is unclear what that word adds to the requirements and appears to make the rule ambiguous. The same issue applies in line 6 in regards to what constitutes a "nearby" closed or verified traverse. By requiring that the points be from a "nearby" closed or verified traverse, there is an implication that some point may be too far away to be used. If that is the case then there needs to be a definition of "nearby" or a listing of the standards that are to be used to make that determination.

TEMPORARY RULES
There were no temporary rules filed for review.

COMMISSION PROCEDURES AND OTHER BUSINESS
The Commissioners discussed changing the start time of next month's meeting to 10:00 a.m. The out of town commissioners seemed to agree that they would be travelling to the meeting the morning of the meeting and would prefer the later start time. Ms Simpson agreed that she too would prefer the later start time. The Commissioners seemed to agree that they would likely make the change permanent.

The Commissioners discussed voting to elect new officers at next month's meeting.

The meeting adjourned at 3:55 p.m.

The next scheduled meeting of the Commission is Thursday, August 18 at 10:00 a.m.

Respectfully Submitted,

_____
Julie Edwards
Editorial Assistant

LIST OF APPROVED PERMANENT RULES
July 21, 2011 Meeting

ALCOHOLIC BEVERAGE CONTROL COMMISSION

Local Board Members and Employees	04 NCAC 02R .2001
Local Board Training Courses	04 NCAC 02R .2002
Participation Standards and Attendance Requirements	04 NCAC 02R .2003

CHILD CARE COMMISSION

Application for a License for a Child Care Center	10A NCAC 09 .0302

Application for a License for a Family Child Care Home	10A	NCAC 09	.1702
Centers Operating under G.S. 110-106	10A	NCAC 09	.2101

SOCIAL SERVICES COMMISSION

New Licenses	10A	NCAC 70E	.0703
Relicensure and Renewal	10A	NCAC 70E	.0704
Method of Mutual Home Assessment	10A	NCAC 70E	.0802
Responsible Individual List	10A	NCAC 70E	.1115
Licensure	10A	NCAC 70F	.0102
Staff	10A	NCAC 70F	.0207
Preplacement Assessment	10A	NCAC 70H	.0405
Licensing Actions	10A	NCAC 70I	.0101
Personnel Qualifications	10A	NCAC 70I	.0404
Licensing Actions	10A	NCAC 70K	.0103
Personnel	10A	NCAC 70K	.0201

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

Basic Law Enforcement Training Course for Deputies	12	NCAC 10B	.0502
Detention Officer Certification Course	12	NCAC 10B	.0601
Evaluation for Training Waiver	12	NCAC 10B	.0603
Comp Written Exam - Detention Officer Certification Course	12	NCAC 10B	.0606
Trainee Attendance	12	NCAC 10B	.1305

LABOR, DEPARTMENT OF

Certificate Inspections	13	NCAC 13	.0211

CHIROPRACTIC EXAMINERS, BOARD OF

Agreements to Provide Financing or Management Services	21	NCAC 10	.0211

IRRIGATION CONTRACTORS' LICENSING BOARD

Surety Bonds and Legal Status	21	NCAC 23	.0102
System Design Objectives and Requirements	21	NCAC 23	.0401
Water Pressure	21	NCAC 23	.0404
Components and Zone Designs	21	NCAC 23	.0406

NURSING, BOARD OF

Existing Nursing Program	21	NCAC 36	.0303
Faculty	21	NCAC 36	.0318

ENGINEERS AND SURVEYORS, BOARD OF EXAMINERS FOR

Records of Board Proceedings	21	NCAC 56	.0401
Requirements for Licensing	21	NCAC 56	.0501
Expirations and Renewals of Certificates	21	NCAC 56	.0505
Waiver for Licensees Serving on Active Duty in the Armed ...	21	NCAC 56	.0506
Expirations and Renewals of Certificates	21	NCAC 56	.0606

Waiver for Licensees Serving on Active Duty in the Armed ...	21	NCAC 56	.0607
Annual Renewal	21	NCAC 56	.0804
Standard Certification Requirements	21	NCAC 56	.1103
Improper Practice by a Licensee	21	NCAC 56	.1301
Unlawful Practice by and Unlicensed Person	21	NCAC 56	.1302
Classification of Vertical Control Survey	21	NCAC 56	.1605
Specifications for Topographic and Planimetric Mapping, I...	21	NCAC 56	.1606
Global Positioning Systems Surveys	21	NCAC 56	.1607
Classification/Land Information System/Geographic Informa...	21	NCAC 56	.1608
Requirements	21	NCAC 56	.1703
Determination of Credit	21	NCAC 56	.1705
Exemptions	21	NCAC 56	.1707
Sponsors	21	NCAC 56	.1713

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	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
ABC Commission v. Universal Entertainment, LLC T/A Zoo City Saloon	11 ABC 2294	07/05/11	
DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY			
Dianne Moody Costello v. Victim and Justice Services	11 CPS 05780	06/20/11	
DEPARTMENT OF HEALTH AND HUMAN SERVICES			
Scott M. Jensen, DMD v. DHHS, Division of Medical Assistance	09 DHR 3252	06/21/11	
Patricia Anne Edwards v. DHHS, Division of Child Development	10 DHR 0292	06/06/11	
Marchell Gunter, The Home of Marchell F Gunter v. DHHS	10 DHR 0557	06/03/11	
Theracare Home Health and Staffing, LLC v. DHHS, Division of Medical Assistance Program Integrity	10 DHR 1455	06/01/11	
Alternative Life Programs, Inc. Marchell F Gunter v. DHHS	10 DHR 3583	06/03/11	
Carolyn Rucker v. DHHS, Division of Medical Assistance	10 DHR 3717	05/19/11	
WakeMed v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc, d/b/a Rex Healthcare, Holly Springs Surgery Center, LLC and Novant Health, Inc	10 DHR 5274	05/17/11	26:04 NCR 275
Rex Hospital Inc d/b/a Rex Healthcare v. DHHS, Division of Health Service Regulation, CON Section And WakeMed, Springs Surgery Center, LLC and Novant Health, Inc	10 DHR 5275	05/17/11	26:04 NCR 275
Angela Mackey v. DHHS, Division of Health Service Regulation	10 DHR 5499	06/01/11	
Cynthia Dawn Sloope v. DHHS	10 DHR 5500	06/07/11	
Alternative Life Programs, Inc. Marchell F Gunter	10 DHR 6204	06/03/11	
Cherie L Russell v. DHHS, Division of Health Services Regulation	10 DHR 6240	05/17/11	
Grover L. Hunt v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	10 DHR 6710	05/25/11	
Raymond Taylor Mabe Jr. v. OAH, Debbie Odette/Glana Surles	10 DHR 8094	05/26/11	
Shanta M. Collins v. DHHS, Division of Health Service Regulation	10 DHR 8444	06/22/11	
Yolanda M. Brown v. Health Care Registry Personnel	10 DHR 09708	07/14/11	
James L. Graham v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	11 DHR 0303	06/28/11	
Angela Clark v. DHHS	11 DHR 1565	06/03/11	
April G. Cooper v. Edgecombe County, Dept. of Social Services (DHHS) Food Stamps	11 DHR 2146	06/15/11	
Patricia Anne Edwards v. DHHS, Division of Child Development	11 DHR 2149	06/06/11	
Demetrius L. Brooks v. DHHS, Division of Health Service Regulation	11 DHR 2441	06/30/11	
Cyonna Hallums v. DHHS, Healthcare Registry	11 DHR 2858	06/30/11	
Angela L. Jordan v. DHHS, Division of Health Service Regulation	11 DHR 2920	06/30/11	
Creative Hands Occupational Therapy v. Susan Olmschenk v. Office of Administrative Hearings	11 DHR 2924	06/10/11	
Singleton Developmental Center Inc, dba In The Beginning Child Care #3 v. Division of Child Development, DHHS	11 DHR 2990	05/27/11	
Singleton Developmental Center Inc, dba In The Beginning Child Care #3 v. Division of Child Development, DHHS	11 DHR 2993	05/27/11	

Singleton Developmental Center Inc, dba In The Beginning Child Care #3 v. Division of Child Development, DHHS	11 DHR 2994	05/27/11
Singleton Developmental Center Inc, dba In The Beginning Child Care #3 v. Division of Child Development, DHHS	11 DHR 2995	05/27/11
Nellie v. Mitchell, Little Lamb's Daycare v. DHHS, Division of Child Development	11 DHR 3391	06/13/11
Yolanda McKinnon v. DHHS, Division of Child Development	11 DHR 4117	06/09/11
Angelicia Linney v. Alexander County DSS	11 DHR 4965	06/21/11
Robin Whistsett-Crite/RJ Whitsett Residential Services v. DHHS	11 DHR 5146	07/12/11
Joyce Muhammad v. DHHS	11 DHR 00198	07/11/11
Support Staff v. DHHS, Division of Medical Assistance	11 DHR 01449	07/11/11
Maithily H Patel v. Nutrition Service Branch, DHHS	11 DHR 02144	06/30/11
Kishja Marlin v. DHHS	11 DHR 03313	07/07/11
Wonne Mills v. Department of Social Services/Fraud Department, Office of Administrative Hearings	11 DHR 03389	06/27/11
Beau A. Davis v. DHHS	11 DHR 03691	06/20/11
Bertha's Place Inc, Wayne Louis Garris v. Mecklenburg County LME	11 DHR 04186	06/17/11
Nicole McGee v. Health Care Personnel Registry	11 DHR 04475	06/17/11
Dondra R. Sugg v. Carteret County Social Services Food Stamp	11 DHR 04958	07/15/11

DEPARTMENT OF CORRECTION

John Channon Engle v. Department of Correction	11 DOC 07333	07/11/11

DEPARTMENT OF JUSTICE

Aaron R Taylor v. Company Police Program	10 DOJ 5356	05/27/11
Dustin Clark v. Department of Justice, Company Police Program	10 DOJ 5877	05/24/11
Travis Mark Caskey v. Sheriffs' Education and Training Standards Commission	10 DOJ 6966	06/02/11
Robert Scott MacFayden v. Sheriffs' Education and Training Standards Commission	10 DOJ 7773	06/01/11
Darius Antuan McLean v. Sheriffs' Education and Training Standards Commission	11 DOJ 04824	07/11/11

DEPARTMENT OF LABOR

Hilliard Glass Company, Inc v. Department of Labor, Wage and Hour Bureau	11 DOL 07329	07/15/11

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Farmington Square LLC, Jawahar Muniyandi v. City of Raleigh Stormwater Management	10 EHR 01613	07/14/11
Jeff Snavely/Triad Siteworks Inc v. NCDENR	11 EHR 2475	06/06/11

OFFICE OF STATE PERSONNEL

Sandra J. Barile v. Dare County Department of Social Services	10 OSP 0469	07/11/11
Robert Lindsey v. Department of Correction	10 OSP 5362	07/05/11
Christopher Sanders v. DHHS	10 OSP 5943	06/23/11
Melissa A McLean v. Ms. Gerri Robinson, MSW Social Services Director, Durham County, Dept. of Social Services	11 OSP 1379	06/03/11
Vickie D. Randleman v. NCSU	11 OSP 3838	06/09/11
Mary K. Severt v. Iredell Dept. of Social Services	11 OSP 4757	06/27/11
Henry Dennis Tysor III v. Dept. of Corrections, Fountain Corrections	11 OSP 02643	07/12/11
Jessie M Chambers v. Brown Creek Correctional Institution	11 OSP 03747	06/23/11

OFFICE OF SECRETARY OF STATE

Husayn Ali Bey v. Department of Secretary of State	10 SOS 09195	06/28/11
Christopher R. Eakin v. Department of Secretary of State	11 SOS 0139	06/08/11

STATE OF NORTH CAROLINA COUNTY OF WAKE	Filed 2011 MAY 17 PM 3:09 Office of Administrative Hearings	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
WakeMed Petitioner vs. N. C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section Respondent and Rex Hospital, Inc. d/b/a Rex Healthcare, Holly Springs Surgery Center, LLC and Novant Health, Inc. Respondent Intervenors.	)	**10 DHR 5274**
Rex Hospital Inc d/b/a Rex Healthcare Petitioner vs. N. C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section Respondent and WakeMed, Holly Springs Surgery Center, LLC and Novant Health, Inc. Respondent Intervenor	)	**10 DHR 5275**

RECOMMENDED DECISION

This matter came for hearing before Donald W. Overby, Administrative Law Judge ("ALJ"), beginning February 21, 2011 – March 4, 2011 and continuing on March 14, 2011, in Raleigh, 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 his Conclusions of Law thereon, and makes the following recommended decision.

APPEARANCES

For Petitioner WakeMed:

Maureen Demarest Murray
Allyson Jones Labban
Smith Moore Leatherwood LLP
P.O. Box 21927
Greensboro, NC 27420

For Petitioner Rex Hospital, Inc. d/b/a Rex Healthcare ("Rex"):

Gary S. Qualls
Colleen M. Crowley
Susan K. Hackney
K&L Gates LLP
430 Davis Drive, Suite 400
Morrisville, NC 27560

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

Angel Gray
Stephanie Brennan
Assistant Attorneys General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

For Respondent-Intervenor Holly Springs Surgery Center, LLC and Novant Health, Inc. (collectively "Novant" or "HSSC"):

Marcus C. Hewitt
Elizabeth Sims Hedrick
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601

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, 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 Administrative Regulations, 10A N.C.A.C. 14C.0101 *et. seq.*, 10A N.C.A.C. 14C.2100 *et. seq.*, and the Office of Administrative Hearings Regulations, 26 N.C.A.C. 3.0101 *et. seq.*

ISSUES

Issues as articulated by each party are as follows:

WakeMed's Contested Issues

WakeMed identified the following issues for the Contested Case Hearing in this cause:

1. Did the CON Section exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law, resulting in substantial prejudice to WakeMed's rights, in denying WakeMed's application to add three shared surgical operating rooms at WakeMed Cary Hospital, Project I.D. No. J-8463-10 ("the WakeMed Application")?

2. Did the CON Section exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law, resulting in substantial prejudice to WakeMed's rights, in approving Holly Springs Surgery Center, LLC's application to develop a free standing ambulatory surgery center in Holly Springs with three ambulatory surgical operating rooms and one minor procedure room, Project I.D. No. J-8471-10 ("the HSSC Application")?

Rex's Contested Issues

Rex identified the following issues for the Contested Case Hearing in this cause:

1. Whether the Agency's decision violated the provisions set forth in N. C. Gen. Stat. § 150B-23(a)(1) through (5), including whether or not the Agency has deprived Rex of property or has otherwise substantially prejudiced Rex's rights in reaching its decision to deny Rex's two Applications, to find WakeMed's application conforming with all applicable review criteria, to find the Holly Springs Surgery Center ("HSSC") application conforming with all applicable review criteria, and to approve the HSSC application, and whether the Agency has:

   (1) Exceeded its authority and jurisdiction;

   (2) Acted erroneously;

   (3) Failed to use proper procedure;

   (4) Acted arbitrarily or capriciously; and

(5) Failed to act as required by law or rule.

2. Whether the Agency improperly found the HSSC application conforming or conditionally conforming with N.C.G.S. § 131E-183(a) subsections 1, 3, 4, 5, 6, 7, 8, 13, and 18a as well as N.C. Gen. Stat. § 131E-183(b) and Regulatory Criteria 10A N.C.A.C. 14C.2102, 10A N.C.A.C. 14C.2103, and 10A N.C.A.C. 14C.2105.

3. Whether the Agency improperly found the WakeMed application conforming or conditionally conforming with N.C.G.S. § 131E-183(a) subsections 1, 3, 4, 5, 6, 7, 8, 13, and 18a as well as N.C. Gen. Stat. § 131E-183(b) and Regulatory Criteria 10A N.C.A.C. 14C.2102, 10A N.C.A.C. 14C.2103, and 10A N.C.A.C. 14C.2105.

4. Whether the Agency violated the review standards in N.C.G.S. § 150B-23(a) and the terms of the CON statute by failing to determine that Rex's application was comparatively the most effective application of all competitive applications.

5. Whether the Agency correctly applied proper comparative factors in its comparative analysis.

6. Whether HSSC improperly amended its application in violation of CON Statutes and regulations, as well as case law interpretations thereof.

7. Whether WakeMed improperly amended its application in violation of CON Statutes and regulations, as well as case law interpretations thereof.

Agency's Contested Issues

The CON Section identified the following issues for the Contested Case Hearing in this cause:

1. Whether the Agency substantially prejudiced WakeMed's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying WakeMed's certificate of need application.

2. Whether the Agency substantially prejudiced WakeMed's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in approving Novant's certificate of need application.

3. Whether the Agency substantially prejudiced Rex's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying Rex's certificate of need application.

4. Whether the Agency substantially prejudiced Rex's rights and exceeded its

authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in approving Novant's certificate of need application.

Novant's Contested Issues

Novant identified the following issues for the Contested Case Hearing in this cause:

1. Whether the Respondent substantially prejudiced Rex Hospital, Inc.'s and/or WakeMed's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the CON application of Holly Springs Surgery Center, LLC, Project I.D. J-8471-10, conforming with all applicable statutory criteria and regulatory standards, and by approving such CON application.

2. Whether the Respondent substantially prejudiced WakeMed's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving the CON application of WakeMed, Project I.D. J-8463-10.

3. Whether the Respondent substantially prejudiced Rex Hospital's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving the CON applications of Rex Hospital, Inc. d/b/a Rex Healthcare, Project I.D. J-8468-10 and Project I.D. J-8469-10.

WITNESSES

Witnesses for Petitioner WakeMed

Craig R. Smith, Section Chief, CON Section
Michael J. McKillip, Project Analyst, CON Section
Clarence "Robbie" Roberts, Planning and Regulatory Consultant, WakeMed
W. Stanley Taylor, Vice President, Corporate Planning, WakeMed
Daniel J. Sullivan, President, Sullivan Consulting Group

Witnesses for Petitioner Rex

Craig R. Smith, Section Chief, CON Section
Michael J. McKillip, Project Analyst, CON Section
Jody G. Morris, VP and Chief Operating Officer, Triangle Market, Novant Health, Inc.
Daniel Carter, Managing Consultant, Health Planning Source
Dawn Carter, President, Health Planning Source

Witnesses for Respondent-Intervenors HSSC and Novant

Nancy Bres Martin, Owner, NBM Health Planning Associates
Robert G. Johnson, Manager of Financial Planning and Analysis, Novant Health, Inc.
Barbara Freedy, Director, Certificate of Need/Financial Planning & Analysis, Novant Health, Inc.

EXHIBITS

Joint Exhibits

1. Agency File
2. Holly Springs Surgery Center, LLC's Application
3. Rex Hospital, Inc. d/b/a Rex Healthcare's Holly Springs Application
4. Rex Hospital, Inc. d/b/a Rex Healthcare's Application
5. WakeMed Cary Application
9. Bob Johnson Deposition Transcript
18. Criteria and Standards for Surgical Services and Operating Rooms
23. Woody Hubbard Deposition Transcript Excerpts

WakeMed Exhibits

107. Résumé of Clarence A. Roberts, Jr.
108. Expert Opinions Regarding 2010 Wake County Operating Room CON Review, Clarence A. Roberts, Jr.
109. Chart: Utilization of Wake County Surgical Operating Rooms by Type, as Percent of Capacity
110. WakeMed Cary Application, page 86
111. WakeMed Cary Application, page 87
112. WakeMed Cary Application, page 69
113. Rex Hospital application, page 70

114. Chart: Rex Outpatient Surgical Utilization, FFY 2009

116. Chart: .2013(c) Performance Standard Analysis from Agency Findings

117. Chart: WakeMed Cary Application, Table II.35, with Addition of Blue Ridge Surgery Center Data

118. Why WakeMed Used Thomson Reuters Data Rather than License Renewal Application Data

120. Résumé of W. Stan Taylor

121. 1/19/10 Presentation: Health System Partnership Opportunities (Confidential)

122. 1/21/10 Minutes of Finance Committee of Board of Directors approving filing of CON application (Confidential)

124. 10/5/09 proposed Letter of Understanding between SCA and WakeMed (Confidential)

125. 4/1/10 Secretary's Certificate (Confidential)

126. 4/1/10 Contribution Agreement (SCA) (Confidential)

127. 4/1/10 Contribution Agreement (WakeMed) (Confidential)

128. 4/1/10 Partnership Interest Purchase Agreement (Confidential)

130. 4/1/10 Operating Agreement of Blue Ridge GP, LLC (Confidential)

131. 4/1/10 Management Agreement, WakeMed Cary Hospital Surgery Department (Confidential)

132. 2/11/10 e-mail, Walker to DeVaughn (Confidential)

133. 3/6/10 e-mail from Murray re Blue Ridge Limited Partners (Confidential)

136. 3/15/10 e-mail, Walker to Taylor (Confidential)

137. 3/29/10 e-mail string re closing Documents (Confidential)

138. 3/31/10 e-mail string re revised Management Agreement (Confidential)

140. WakeMed Cost Savings Analysis for Ambulatory Surgery (Confidential)

141. WakeMed Cost Savings Breakdown (Confidential)

142. Chart: No Material Change in WakeMed Cary Surgery Department from SCA

Management Agreement

143. Résumé of Daniel J. Sullivan

144. Chart: Wake County Surgical Providers 2009 Operating Room Utilization Rate

146. Chart: Access Provided by Shared Operating Rooms

147. Chart: Wake County Operating Room CON Applications Comparison of Proposed Project Costs Per Operating Room

148. Chart: Novant Ambulatory Surgery Centers Relied on by Bob Johnson for HSSC Financial Projections

149. Map: Existing Surgery Centers in Holly Springs Surgery Center Service Area

151. Map: Holly Springs Surgery Center Primary Service Area and Existing Providers

152. Chart: Travel Distance and Times Between Holly Springs Surgery Center and Existing Surgical Providers

153. Chart: Holly Springs Surgery Center Projected Market Share: CY 2012 - CY 2015

154. Chart: Top Five Ambulatory Surgery Providers for Huntersville (Zip Code 28078) FY 2004 to 2009 Cases and Market Shares Listed

155. Charts: Holly Springs Surgery Center Total Ambulatory Surgery Volume, Projected Market Share, Projected HSSC Surgical Volume from HSSC Service Area, and Projected Ambulatory Surgery Volume CY 2012 - CY 2015

156. Charts: HSSC Projected Ambulatory Surgical Volume from CON Application and with Revised Market Shares, CY 2012 - CY 2015

157. Chart: Why the Agency Should Not Have Accepted Novant's Market Shares

158. Map: Holly Springs Surgery Center Projected Surgical Volume CY 2015

159. Chart: Projected Rex-Holly Springs Surgical Cases by Year

160. Chart: Rex-Holly Springs Projected Shift in Cases CY 2014

161. 2/24 Map: Projected Rex Holly Springs Surgical Cases CY14 by Zip Code

163A. 08/31/10 Comments filed by SouthPark Surgery Center on Randolph Surgery Center Project to Open Single Specialty Surgery Center, as amended

168. Website: Cecil G. Sheps Center, "NC Hospital Inpatient Discharge and Ambulatory Surgery Center Data,"

http://www.shepscenter.unc.edu/research_programs/hosp.discharge

169. Map, WakeMed Cary to HSSC

170. Map, Existing, Approved and Proposed Southern Wake County Surgery Providers

624. Chart: Distances from Offices of Physicians Listed as Supporting the HSSC Project to 190 Rosewood Centre Drive, Holly Springs, NC 27540

628. Chart: FY 2008 Wake County Residents - Surgery Cases at All Facilities by Age Group and by Percent Inpatient vs. Percent Outpatient

629. Chart: 2009 Surgical Hours Per Operating Room, Wake County

630. Chart: Hours Per OR Per Year

631. Chart: Shared and Outpatient Only Operating Rooms in Wake County, Percent of Utilization Against Need Threshold, 2007-2009

632. Chart: Top Five Ambulatory Surgery Providers for Huntersville (Zip Code 28078), FYs 2004-2009, Cases and Market Shares Listed

634. Daniel Sullivan's Calculation of Aggregate Use Rate in Holly Springs Hospital Review and Holly springs Surgery Center Review

635. CAGR calculations reflected by use rates in WakeMed application in comparison with historical use rate, prepared by Mr. Roberts

Rex Exhibits

208. Agency findings – 2005 Wake County Hospice Review

209. Excerpt from 2010 SMFP (p. 73)

217. Confidential: Agenda – Kickoff Meeting for Three-OR New Ambulatory Surgery Center

308. Application Excerpts from Community Hospice, Inc. filed October 15, 2003

311. Resume of Daniel Carter

315. Agency findings – 2006 CMHA-Union Waxhaw Healthplex dated February 27, 2007

316. Agency findings – 2009 Onslow County MRI Review dated September 22, 2009

317. Agency findings – 2003 MRI Service Area 8 Review dated February 27, 2004

318. Agency findings – 2006 Central Carolina ASC, LLC establish an Am Surg Center dated May 26, 2006

319. Agency findings – 2007 Johnston County MRI Review dated November 27, 2007

320. 2009 Payor Mix data from 2010 License Renewal Applications

321. Agency findings – 2008 Multi-Position MRI Scanner Review (Eastern Portion of State) dated September 25, 2008

322. Agency findings – 2008 Multi-Position MRI Scanner Review (Western Portion of State) dated September 26, 2008

324. Agency findings – 2006 Rowan County Operating Room Review dated June 30, 2006

326. Agency findings – Scotland Memorial Hospital to develop urgent care outpatient imaging center and acquire new CT Scanner and X-ray dated April 27, 2007

327. Agency findings – Carolina Neurosurgery & Spine Associates – acquire a mobile MRI Scanner dated April 11, 2003

328. Agency findings – HSA V Linac Review dated November 26, 2008

337. Agency findings – 2003 Pamlico County Home Health Review

338. Agency findings – 2004 MRI Planning Area 11 Review

339. Agency findings – 2009 Harnett Health System, Inc. MRI Review

341. Agency findings – 2007 Rowan Regional Medical Center relocate 50 acute care beds to establish a new hospital in Kannapolis

342. Agency findings – 2003 OR review for Moore/Lee County

343. Agency findings – 2006 Harnett County Hospice Inpatient Bed Review

345. Excerpts from Gaston County ED Application

346. Agency findings – 2002 OR Review for Moore County

347. Agency findings – 1996 Hamlet Hospital replacement of existing hospital

348. Agency findings – 2003 Good Hope – replacement of existing hospital

349. Agency findings – 2005 Harnett County Hospital Review

350. Agency findings – 2008 Lincoln County MRI Review

352. Agency findings- 2009 Gaston County Freestanding ED Review

353. Agency findings – 2009 Cherokee County Hospice Home Care Review

354. Agency findings – 2008 Wilkes County MRI Review

355. Agency findings – 2007 WakeMed South Healthplex – develop hospital outpatient department

356. Map showing Huntersville, NC

357. Map showing Wake County Census Tracts

358. Map showing Wake County Zip Codes

359. Map showing zip code areas with census tracts overlaid

362. Charts regarding ASC payor mix

363. Agency findings - 2006 Onslow County Linear Accelerator Review

364. Agency findings – 2006 FMC-Kernersville establish new hospital

365. Agency findings - 2007 Clemmons/Davie County Replacement Hospital Review

375. Novant's Competitive Comments opposing Davie County Hospital Project ID G-8164-08 dated July 15, 2008

376. Novant's Competitive Comments opposing Davie County Emergency Health Corporation Project G-7984-07 dated October 31, 2007

383. Dawn Carter's Resume

387. Charts prepared by Dawn Carter

388a. Daniel Carter's Analysis of WakeMed's Regression Methodology

388b. Daniel Carter's Physician Commitment Chart

HSSC and Novant Exhibits

404. Curriculum Vitae, Barbara Lynn Freedy

405. Analysis of Rex support letters

407. Curriculum vitae, Nancy Bres Martin

408. Top Procedures by ICD-10 (Confidential)

411. Curriculum vitae, Robert G. Johnson, Jr.

412. Novant facility data and CON application excerpts (Confidential)

413. 2009 and 2010 licensure renewal application excerpts for Wake County providers Confidential

420. Costs-Savings Analysis of SCA Deal, 12/11/09 (Confidential)

422. 4/1/10 Partnership Interest Purchase Agreement (Confidential)

423. 10/5/09 proposed Letter of Understanding between SCA and WakeMed (Confidential)

424. 4/1/10 Contribution Agreement (SCA) (Confidential)

425. Memorandum to Finance Committee/Board of Directors, 1/15/10 (Confidential)

426. Board action approving SCA Deal (Confidential)

427. 4/1/10 Management Agreement, WakeMed Cary Hospital Surgery Department (Confidential)

428. 4/1/10 Contribution Agreement (WakeMed) (Confidential)

430. 4/1/10 Operating Agreement of Blue Ridge GP, LLC (Confidential)

432. Rule 30(b)(6) deposition notice to Rex Hospital, Inc.

433. Rex Hospital, Inc. 30(b)(6) deposition transcript excerpts, as amended

434. Excerpt from Daniel Carter Deposition Transcript, page 27

436. Rex responses and objections to second discovery requests from HSSC (attachments Confidential)

440. HSSC CON Application: Operating Room CON Application Form, 7/1/08, Section III, Questions III.3 - III.9

441. Relevant Dates of Transaction Between WakeMed and Surgical Care Affiliates ("SCA") (Confidential)

442. Barb Freedy Rebuttal - Rex Findings

443. Excerpts from 2010 licensure renewal applications: Rex, Duke Raleigh, BRSC,

WakeMed

444. Excerpts from deposition of Judy Orser (pp. 9 and 10 Confidential)

445. Agency Findings, Franklin County OR, 12/09

EXHIBITS SUBMITTED AS OFFERS OF PROOF

WakeMed Exhibits

163. Chart: Comparison of Market Share Assumptions (Three Reviews)

Rex Exhibits

325. Affidavit of Charles H. Wilson

208. Agency Findings – 2006 Wake County Hospice Review

BURDEN OF PROOF

1. Petitioners bear the burden of showing by the preponderance of the evidence that the Agency acted outside of its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule in approving the HSSC certificate of need ("CON") application. N.C. Gen. Stat. § 150B-23(a); Britthaven, Inc. v. N.C. Dept. of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995).

2. The General Assembly intended the CON statute to confer standing to an "affected person" in N.C. Gen. Stat. § 131E-188, sufficient to permit a petitioner's right to a full contested case hearing, without an additional showing of substantial prejudice.

3. Rex and WakeMed are "affected persons" within the meaning of N.C. Gen. Stat. § 131E-188. Rex and WakeMed are "affected persons" because they are applicants in this competitive review.

WITNESSES

Witnesses for Petitioner WakeMed:

Craig Smith
Mike McKillip
Clarence A. "Robbie" Roberts
W. Stan Taylor
Daniel Sullivan
Robert G. Johnson (by deposition)
Joseph Woodward Hubbard (by deposition)

Witnesses for Petitioner Rex:

Craig Smith
Mike McKillip
Daniel Carter
Dawn Carter
Robert G. Johnson (by deposition)
Joseph Woodward Hubbard (by deposition)

Witnesses for Respondent Agency:

Craig Smith
Mike McKillip

Witnesses for Respondent-Intervenor Novant:

Barbara Lynn Freedy
Nancy Bres Martin
Robert G. Johnson

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 the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

I. BACKGROUND

1. All parties are properly before the Office of Administrative Hearings, and that the Office of Administrative Hearings has jurisdiction of the parties and of the subject matter.

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

A. PARTIES

1. Certificate of Need Section

3. The Certificate of Need Section ("CON Section" or "Agency") is the agency within the North Carolina Department of Health and Human Services (the "Department"),

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 Certificate of Need ("CON") Law, codified at N.C. Gen. Stat. Chapter 131E, Article 9.

2. Rex

4. Rex Hospital, Inc. ("Rex") operates an acute care hospital with its principal place of business in Raleigh, Wake County. Rex also operates facilities in Cary and Wakefield, among other health care facilities within Wake County.

3. Novant

5. Novant Health, Inc. ("Novant") is a North Carolina corporation which owns and operates health care facilities throughout North Carolina. Holly Springs Surgery Center, LLC ("HSSC") is a North Carolina limited liability company, and is a subsidiary of Novant Health, Inc.

4. WakeMed

6. WakeMed is a North Carolina corporation that owns and operates an acute care hospital with several campuses in Wake County, including WakeMed Cary.

B. PROCEDURAL BACKGROUND

7. The CON Act establishes a regulatory framework under which proposals to develop new health care facilities or services or purchase certain regulated equipment must be reviewed and approved by the Agency prior to development. As articulated by the General Assembly, the fundamental purpose of this regulatory framework is to limit the development of health services and facilities to those that are needed by the people of North Carolina and to avoid the proliferation of unnecessary and duplicative health service and facilities and the resulting economic burden on the public. *See* N.C. Gen. Stat. § 131E-175.

8. On an annual basis, the North Carolina State Health Coordinating Council publishes the State Medical Facilities Plan ("SMFP"). The SMFP contains an inventory of regulated facilities, services, and equipment, as well as determinations of need for the regulated facilities, services, and equipment. N.C. Gen. Stat. §§ 131E-175, 176-(17), 177(4); *see also* Joint Ex. 22.

9. The 2010 SMFP contained a need determination for three operating rooms in Wake County. (Joint Ex. 22 p. 81; Smith, T. Vol. 5 pp. 1109-11.)

10. The need for three operating rooms in Wake County resulted from the application of a multi-step need determination methodology based on the number of total surgical hours reported by existing Wake County surgical providers on their 2009 Licensure Renewal Applications. This historical utilization data is included in "Table 6A: Operating Room Inventory" of the SMFP. (Joint Ex. 22 pp. 65-66.)

11. Need is triggered when utilization of existing operating rooms in an operating room service area—in this case, Wake County—reaches a certain threshold. (*Id.* pp. 60-63.) For the purposes of determining a need for additional operating rooms, the SMFP methodology considers an operating room to be at practical capacity at 1,872 surgical hours per year (80% of absolute capacity of 2,340 hours per operating room per year). (*Id.* p. 62.)

12. On or about February 15, 2010, Rex timely filed an application for a Certificate of Need ("CON") to develop two ambulatory surgical operating rooms at Rex Healthcare of Holly Springs, Wake County, identified as Project I.D. No. J-8468-10 (Rex's Holly Springs Project" or "Rex Holly Springs Application").

13. On or about February 15, 2010, Rex timely filed a separate application for a CON to add one shared operating room at Rex Hospital in Wake County, identified as Project I.D. No. J-8469-10 ("Rex Raleigh Project" or "Rex Raleigh Application").

14. On or about February 15, 2010, Novant timely filed an application for a CON to construct an ambulatory surgery center, Holly Springs Surgery Center, LLC ("HSSC") with three ambulatory surgical operating rooms and one minor procedure room in Holly Springs, Wake County, identified as Project I.D. No. J-8471-10 ("Novant's Project" or "Novant's Application").

15. On or about February 15, 2010 WakeMed timely filed a CON Application to add three shared surgical operating rooms at WakeMed Cary Hospital, identified as Project I.D. No. J-8463-10 ("WakeMed's Project" or WakeMed's Application")

16. Duke University Health System d/b/a Duke Raleigh Hospital timely filed a CON Application to add two shared surgical operating rooms at Duke Raleigh Hospital, identified as Project I.D. No. J-8467-10 ("Duke Raleigh's Project" or "Duke Raleigh's Application").

17. The hospital applicants in this review, WakeMed, Duke Raleigh, and Rex, all included shared operating rooms in their respective applications. (Joint Ex. 1 p. 1581.)

18. The Agency cannot approve an application unless the applicant demonstrates it is conforming or conditionally conforming with all of the review criteria. See N.C. Gen. Stat. § 131E-183. Each applicant has the burden of demonstrating conformity with the applicable 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).

19. A CON 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.

20. Once a CON application is filed with the Agency, an applicant may not amend its application absent a specific request for additional information from the Agency. 10A N.C.A.C. 14C.0204.

21. The Agency subsequently determined that Rex's Applications, HSSC's Application, WakeMed's Application and Duke's Application were complete for review and the applications were included in the next scheduled review cycle, which began March 1, 2010.

projected the highest percentage of total services to be provided to Medicaid recipients; (3) HSSC projected the third highest percentage of total services to be provided to Medicare recipients; (4) HSSC projected the lowest gross revenue and lowest net revenue per surgical case of the two proposed outpatient surgery facilities in the third full fiscal year of operation; (5) HSSC projected the lowest operating expense per surgical case of the two proposed outpatient surgical facilities in the third full fiscal year of operation (Jt. Ex. 1, pp. 1707-1708)

34. The Agency found that the Rex Holly Springs Application was a less effective alternative than HSSC's proposal because: (1) Rex projected the lowest percentage of total services to be provided to Medicaid recipients; (2) Rex projected the lowest percentage of total services to be provided to Medicare recipients; (3) Rex projected the highest gross and net revenue per surgical case in the third full year of operation of the two applications proposing to develop outpatient surgical facilities (Jt. Ex. 1, p. 1708)

35. The Agency found that the Rex Raleigh Application was a less effective alternative than HSSC's proposal because: (1) Rex proposed a less effective alternative with regard to improving geographic access; and (2) Rex projected the lowest percentage of total services to be provided to Medicaid recipients. (Jt. Ex. 1, p. 1708)

36. The Agency found that the WakeMed Application was a less effective alternative than HSSC's proposal because: (1) WakeMed proposed a less effective alternative with regard to improving geographic access; and (2) WakeMed projected the lowest percentage of total services to be provided to Medicare recipients. (Jt. Ex. 1, p. 1708)

37. Rex, WakeMed and Duke Raleigh all filed Petitions for Contested Case Hearing on August 27, 2010. On October 6, 2010 the parties, including HSSC, filed a Joint Consent Motion to Intervene and an Order granting invention was issued on October 18, 2010.

38. On October 25, 2010, Rex's Contested Case, Duke Raleigh's Contested Case and WakeMed's Contested Case were consolidated for discovery, hearing and all ancillary matters.

39. On January 1, 2011, Duke Raleigh filed a Notice of Voluntary Dismissal of its Petition for Contested Case Hearing and withdrew as a Respondent-Intervenor in the other contested cases.

40. While WakeMed and Rex appealed the denial of their applications and the Agency's findings of conformity with regard to the other's application and the approval of the HSSC application, HSSC did not appeal any portion of the Agency Decision, but instead intervened to support the Agency's decision. (10/16/10 Joint Consent Motion to Intervene, ¶¶ 2-3, 17.)

41. At the contested case hearing, HSSC sought to challenge the Agency's decision that the WakeMed application was complete and had not been amended. HSSC also sought to challenge the Agency's determination that WakeMed's and Rex's applications were conforming to the applicable statutory and regulatory criteria.

II. THE HSSC APPLICATION

42. The Agency found the HSSC Application conforming to all applicable Statutory Review Criteria and Regulatory Review Criteria and found the HSSC Application comparatively superior to the competing applications. (Jt. Ex. 1 at 1581-1710; McKillip T. Vol. 5 at 1048-49).

43. Specifically, the Agency found that HSSC's application was conforming to Criteria 1, 3, 4, 5, 6, 7, 8, 12, 13c, 13d, 14, and 18a, and with the regulatory criteria at .2101(a), (b)(2), (b)(4), (b)(5), (b)(6), (b)(8), (b)(9); .2103(a), (b)(1), (g); .2104(a), (b); .2105(a), (b), (c); .2106(b), (c), and (d). The Agency found all other statutory and regulatory criteria not applicable to the HSSC application. (Joint Ex. 1 pp. 1581-1703.)

A. CRITERION 1:

44. Criterion 1 requires that a "proposed project . . . be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating room, or home health offices that may be approved." N.C. Gen. Stat. § 131E-183(a)(1).

45. The 2010 State Medical Facilities Plan ("SMFP") identified a need determination for three operating rooms in Wake County. Under Criterion 1, the Agency determines whether the applicant's proposal exceeds the need determination in the SMFP. (Jt. Ex. 1, p. 1582; Carter, T. Vol. 7, pp. 1396-1397)

46. In addition, under Criterion 1 the Agency addresses whether the applicant has adequately responded to applicable policies in the SMFP, in this case Policy Gen-3. (Jt. Ex. 1, p. 1582; Carter, T. Vol. 7, pp. 1396-1397)

47. Policy Gen-3 requires applicants to demonstrate their conformity with the three basic principles of the SMFP and to explain and document how their proposed project would meet those principles. (Jt. Ex. 1, pp. 1582; Carter, T. Vol. 7, pp. 1396-1397)

48. Section III.4 of the CON application asks the applicant to "[d]escribe how the project is consistent with each applicable policy in the [SMFP], including Policy Gen-3, the Basic Principles." However, HSSC omitted Section III.4 from its application. When it filed its Response to Competitive Comments, HSSC admitted that it had inadvertently omitted these pages from its application and included the pages, as Attachment D, to its Responsive Comments. (Jt. Ex. 1, pp. 642, 885; Carter, T. Vol. 7, pp. 1396-1397; Freedy, T. Vol. 9, pp. 2198-2199)

49. The Agency routinely looks at all parts of an application and its exhibits to find information responsive to review criteria, and Petitioners' witnesses admitted that the Agency is permitted to review the entire application for information responsive to the applicable criteria. (Sullivan T. Vol. 4 at 796-97; McKillip T. Vol. 5 at 1045-46; Daniel Carter T. Vol. 7 at 1505). The answers to the missing questions in Sections III.3 through III.9 were found by the agency in other parts of the application by reviewing the entire application.

50. The Agency found that HSSC's application conformed to Criterion 1 based upon its finding that HSSC proposed to develop an ambulatory surgery center with three ambulatory surgical operating rooms in Holly Springs, Wake County. The Agency also found HSSC's application conforming to Criterion 1 based on its finding that HSSC complied with Policy GEN-3 from the 2010 SMFP, which requires the project to be consistent with the three basic principles governing the SMFP: to promote cost effective approaches, expand health care services to the medically underserved, and encourage quality health care services. (Jt. Ex. 1, pp. 1586-1587).

51. In as much as HSSC is found to not be in conformity with Criterion 3 as set forth below, then it is not in conformity with Criterion 1.

B. CRITERION 3:

52. Criterion 3 requires that 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.
>
> N.C. Gen. Stat. § 131E-183(a)(3).

53. The Agency found HSSC conforming to Criterion 3, finding that HSSC adequately identified the population to be served and demonstrated the need that population had for the proposed project. (Joint Ex. 1 pp. 1643-56.) The Agency Findings under Criterion 3 contain little analysis but instead consist primarily of text copied from the application. (*Id.*)

54. WakeMed contends in part that the Agency failed to analyze or acknowledge the need the population of Wake County as a whole, and in particular low income persons, the elderly, and other underserved groups, had for shared ambulatory operating rooms and the greater access provided by shared operating rooms. WakeMed further contends that the Agency did not analyze or acknowledge the access constraints that may be caused by existing shared operating rooms operating at or near capacity, or whether it was reasonable to add more ambulatory operating room capacity when existing ambulatory rooms are operating well below capacity and 16 more ambulatory rooms had been approved for development in an ambulatory setting and the actual utilization of such rooms was not known. (Joint Ex. 1 pp. 1643-56; Smith, T. Vol. 5, pp. 494-97; McKillip, T. Vol. 5, pp. 1110-17.)

55. Wake/Med further argues that the Agency failed to evaluate HSSC's market share projections, which underlie its utilization projections, and instead accepted those market share projections at face value, including the rapid ramp up in market share in the first three years that could not be justified. (Joint Ex. 1 pp. 1643-56.) Mr. Smith testified that this was due in part to the fact that HSSC was a new provider, and acknowledged that this "gave an edge" to HSSC. (Smith, T. Vol. 5, pp. 1052-54.)

56. In its six census tract service area, HSSC projected market shares in its very first year of operation of 48%, 28%, 28%, 28%, 28%, and 8%. (Joint Ex. 1 p. 1649.) By the third year of operation, HSSC projected market shares of 60%, 35%, 35%, 35%, 35%, and 10%. (*Id.*) In their written comments and at the hearing, WakeMed and Rex contended that the HSSC projections were unreasonable on their face, unreasonable when compared to the market share projections made in the 2008 HSSC Holly Springs Hospital application that was denied by the Agency, and unsupported by any actual or historical data. (Joint Ex. 1 pp. 127-29; 192-99; Sullivan, T. Vol. 4, pp. 707-725, 728-745; Carter, T. Vol. 6, pp. 1315-16, 1321, 1356-59.)

57. Expert witnesses for WakeMed and Rex noted that on their face, the HSSC's market share projections were unreasonably high, especially for a new entrant to the market. (Sullivan, T. Vol. 4, pp. 708-10; Carter, T. Vol. 6, pp. 1322-23, 1346-48; Roberts, T. Vol. 1, pp. 167-68; *see also* Joint Ex. 1 pp. 127-28.) It was noted that in a market such as Wake County, where there are a number of well-established providers of surgery services, it is difficult for any provider to gain a large market share, much less a new provider with no history of offering services in the market. (Sullivan, T. Vol. 4, pp. 708-10; *see also* Joint Ex. 1 p. 127.)

58. Evidence was also presented that showed HSSC's projected market shares in its first to third year of operation were materially higher than market shares currently held by providers that had an established presence and a long history of serving Wake County. (Joint Ex. 1 pp. 192-201.) In fact, as noted by WakeMed in its comments, the market shares projected by HSSC would make it the third highest utilized provider in all of Wake County. (Joint Ex. 1 p. 129.)

59. Mr. McKillip agreed that the assumption was that existing providers would lose market share as a result of HSSC entering the market. (McKillip, T. Vol. 5, pp. 971-72.) He conceded, however, that he did not evaluate the impact on existing providers, and that HSSC provided no information regarding the potential impact on existing providers. (*Id.*)

60. Compounding the issue was the fact that HSSC does not have any acute care hospital in the area from which HSSC could receive referrals. (Joint Ex. 1 p. 127.) While HSSC does have a physician network with physicians in Durham and Wake Counties, the majority of the surgeon support letters obtained by HSSC were from physicians in Durham and Orange Counties. (Joint Ex. 1 pp. 128, 152-53, 193; Joint Ex. 2 pp. 251-59) Mr. Roberts noted that both physician and patient referral patterns would have to change significantly in a very short period of time for HSSC to be able to achieve the market shares projected in its application for the first through third years of operation. (Roberts, T. Vol. 1, p. 167.)

61. Although there is no rule requiring a specific number of physician support letters, the Agency has used a lack of physician support letters to find an applicant nonconforming with Criterion 3. Each applicant must demonstrate that its projections are reasonable. With documentation from only two surgical specialties, orthopedics and general surgery, it is unreasonable to expect that a physician from every surgical specialty will perform cases at HSSC. (Smith, T. Vol. 6, pp. 1132-1133, 1168; Carter, T. Vol. 3, pp. 481-483, T. Vol. 6, p. 1346)

62. In its written comments and at the hearing, WakeMed presented an analysis of the market shares for Presbyterian Huntersville, a facility for which HSSC had projected similarly

high market share gains. (Joint Ex. 1 pp. 128-29; Roberts, T. Vol. 1, pp. 167-68; Sullivan, T. Vol. 4, pp. 728-32.) Presbyterian Huntersville, which opened in 2004, is located in Mecklenburg County, where HSSC has a very strong presence and referral network. Mr. Sullivan noted that Presbyterian Huntersville was developed by an established provider in the market, was located at a greater distance from other surgical providers than HSSC would be, and had the benefit of being a hospital, which draws patients to an extent that an ambulatory surgical facility cannot. (Sullivan, T. Vol. 4, pp. 728-32.) Despite these positive factors, however, Presbyterian Huntersville has not attained market shares higher than 26.7%, lower than the 32% market share HSSC projected for Presbyterian Huntersville's very first year of operation. (Joint Ex. 1 p. 128; Sullivan, T. Vol. 4, p. 731.)

63. Dan Sullivan did an analysis wherein he calculated the need demonstrated by HSSC should it achieve just half of the market share projected. Mr. Sullivan testified that such market share would be a "highly favorable scenario for a new provider;" the resulting calculation showed that there would be volume to support no more than 1.3 operating rooms at the proposed facility. (WakeMed Ex. 155; Sullivan, T. Vol. 4, pp. 732-34.)

64. Mr. McKillip conceded at the hearing that he did not know and the application did not describe the basis for the specific market share percentages projected by HSSC. (McKillip, T. Vol. 5 p. 961.) Ms. Bres Martin, who prepared HSSC's projections, acknowledged that there were few quantitative bases for the market share assumptions and the assumptions were instead the product of a "qualitative" analysis. (Bres Martin, T. Vol. 12, pp. 2561-63.)

65. Expert witnesses for WakeMed and Rex also noted that the HSSC market share projections were unreasonable when compared to the market share projections made by HSSC in the 2008 Holly Springs Hospital application. (Sullivan, T. Vol. 4, pp. 712-21; Carter, T. Vol. 6, pp. 1360-62.) In that review, the Agency found Holly Springs Hospital's market share projections to be unreasonably high, due in part to the fact that Holly Springs Hospital failed to provide sufficient documentation in the form of physician support letters to demonstrate that its market share assumptions were reasonable. (Joint Ex. 1 pp. 1247-49.)

66. Similarly, in this current review HSSC did not provide any letters of support from ENT or urology physicians. HSSC provided physician support letters from Cary Orthopaedic, which is located in Cary and Garner, Regional Surgical Associates, which is located in Durham and Chapel Hill, and Regional Neurosurgery (although they could not commit to performing surgeries at HSSC), which is located in Durham. Cary, Garner, Durham and Chapel Hill are all located outside of HSSC's primary service area and Durham and Chapel Hill are not located in HSSC's service area at all. Thus, HSSC failed to include any physician support letters from surgeons located in its Primary Service Area, the area from which 90% of its surgical cases are projected to originate. HSSC also included seven surgeon letters of support from surgeons in Durham County out of 14 surgeon letters of support in the application. (Jt. Ex. 2, pp. 41, 78, 251-260; McKillip, T. Vol. 5, pp. 965-970; Carter, T. Vol. 6, pp. 1360-1362, 1364-1367)

67. In HSSC's Competitive Comments in Opposition to Duke Raleigh's application, HSSC criticized the Duke Raleigh application, arguing that there were an insufficient number of surgeon support letters to support Duke Raleigh's projected volume. (Jt. Ex. 1, p. 365)

68. It is certainly not consistent for HSSC to criticize Duke Raleigh for its lack of surgical specialties and its failure to provide a sufficient number of surgeon support letters to support its projected volume without adhering to the same standard in its own application. Such argument loses credibility.

69. Ms. Freedy repeatedly referred to the Competitive Comments as an "advocacy document" in an apparent effort to downplay the inconsistency in HSSC's arguments. It is reasonable to believe that HSSC's "advocacy document" presented HSSC's beliefs regarding what types of physician support is inadequate to support a certain level of surgery volume. If it was not an accurate statement of HSSC's position concerning the support letters, then it must have been intended to deceive. (Freedy, T. Vol. 10, pp. 2207, 2215, 2217-2219, 2229-2230, 2231-2232)

70. Mr. McKillip testified that in reviewing the HSSC application, he did not attempt to compare the market share projected in the Holly Springs Hospital application with the market share projected in the HSSC application, even though the findings concerning the Holly Springs Hospital application were considered by the Agency in this review and included in the Agency File. (McKillip, T. Vol. 5, pp. 970-71; Joint Ex. 1 pp. 1175-1381.)

71. During the hearing, Mr. Sullivan performed a calculation which revealed that, while on the surface it appears that the Holly Springs Hospital market share projections from 2008 were higher than the HSSC projections, in fact the HSSC application projects a higher aggregate market share than proposed in the Holly Springs Hospital application. (WakeMed Ex. 634; Sullivan, T. Vol. 4, pp. 714-18.) Holly Springs Hospital projected an aggregate market share of 34.2%, while HSSC projected a 40.5% market share. (*Id.*) Mr. Sullivan also noted that the bulleted list of factors offered by HSSC in support of the HSSC market share projections was almost identical to the factors provided in the Holly Springs Hospital application. (Sullivan, T. Vol. 4, pp. 721-23.)

72. Upon reviewing Mr. Sullivan's calculations, Mr. Smith testified that although he and the Agency had the information, he did not realize at the time of the review that HSSC had actually projected a higher aggregate market share than had been projected by Holly Springs Hospital, which the Agency had found to be unreasonable. (Smith, T. Vol. 6, p. 1172.) He stated that had he realized that HSSC was projecting an aggregate market share of 40.5%, it might have caused him to question HSSC's market share projections. (Smith, T. Vol. 6, pp. 1201-02.)

73. Mr. Carter also testified that HSSC should have been found non-conforming to Criterion 3 due to HSSC's use of an incorrect use rate methodology and overstatement of that use rate when projecting surgical procedures to be performed at the facility. (Carter, T. Vol. 6, pp. 1315-16, 1319-23; *see also* Joint Ex. 1 p. 195.)

74. Mr. Carter testified to the lack of physician support for the project and stated that there was no basis for HSSC to assume that all specialist types would practice at its facility. (Carter, T. Vol. 6, pp. 1320-24.) HSSC presented letters of support from only orthopedic surgeons, general surgeons, and neurosurgeons, many of whom practiced outside of Wake County. (Joint Ex. 2, pp. 251-59) Nevertheless, HSSC developed a use rate methodology that was based on all surgical types performed in Wake County, excluding only those procedures

performed in single-specialty operating rooms. (Joint Ex. 2 p. 73; Bres Martin, T. Vol. 8, p. 1754; Vol. 12, p. 2536.)

75. On page 63 of its application, HSSC stated: "in its application HSSC does not propose to provide these specialties (women's, ophthalmology, plastic surgery)" that are performed in single-specialty operating rooms. (Joint Ex. 2 p. 63.) HSSC argued at trial that the sentence was meant to apply only to the construction of its need methodology, and that it did not intend to preclude the provision of women's, ophthalmology, and plastic surgery cases at the proposed facility. (Bres Martin, T. Vol. 8, pp. 1752-54.)

76. The plain meaning of the statement is that HSSC will not offer those three services. (*See, e.g.* Carter, T. Vol. 6, pp. 1354-55.) HSSC did not provide any letters of support or other documentation to support a finding that such specialties would be offered at the facility. (Joint Ex. 2 pp. 251-60.) HSSC also provided a chart on page 34 of its application in response to the request that HSSC list the number of physicians expected to practice at the facility; no women's, ophthalmology, or plastic surgery physicians were listed. (Joint Ex. 2 p. 34.)

77. HSSC's use rate methodology also incorporated all outpatient surgical procedures performed in Wake County, even those outpatient procedures performed on hospital patients. (Joint Ex. 2 pp. 73-74.) There are many patients for whom an ambulatory surgical facility is not an appropriate option, given the patient's co-morbidities, health status, payment source and whether their condition is emergent or urgent. *See* Findings of Fact 75-83.

78. Mr. Carter noted that the number of cases represented by the three specialty types for which HSSC did obtain physician support letters – orthopedic surgery, general surgery, and neurosurgery – is insufficient to result in a 60% market share by project year three in the Holly Springs census tract, as projected by HSSC. (Carter, T. Vol. 6, pp. 1321-22.)

79. Mr. Carter referenced a chart on page 195 of the Agency File that was submitted in Rex's written comments. The chart used Thomson data to calculate the percent of ambulatory surgery cases in the three surgical specialties for which HSSC did obtain physician support letters that were provided by Wake County providers in fiscal year 2009. (Joint Ex. 1 pp. 195.) According to the chart, general surgery, neurosurgery, and orthopedic surgery accounted for 51.9% of the total ambulatory surgical cases provided by Wake County providers in fiscal year 2009. (*Id.*) Mr. Carter testified that because the three specialties only made up 51.9% of the county volume, it was inappropriate for HSSC to rely on a use rate based on the entire county volume. (Carter, T. Vol. 6, pp. 1321-22.)

80. As stated above, in its written comments filed against the Duke Raleigh Hospital application, HSSC criticized Duke Raleigh's utilization projections on the basis that Duke Raleigh failed to include sufficient physician letters of support with its application. (Joint Ex. 1 p. 365.) HSSC argued that Duke Raleigh only included ten surgeon letters of support, and that the letters were insufficient because: (1) support from ten surgeons is insufficient to support and justify the projected increase in surgical cases; and (2) while Duke Raleigh stated it planned to grow four surgical specialties (neurosurgery, oncologic, vascular, and urologic), it did not include any letters of support from urologists, vascular surgeons, or oncologic surgeons. (*Id.*)

81. In its application, HSSC itself provided letters of support from only four general surgeons in Durham County, three neurosurgeons in Durham County, and seven orthopedic surgeons in Wake County. (Joint Ex. 2 pp. 251-59) HSSC did not submit letters of support from any other surgical specialties. (*Id.*) Nevertheless, HSSC asserted that it would offer all types of surgical specialties and projected volumes based on offering all types of surgical specialties. (Joint Ex. 2 pp. 21, 73; Bres Martin, T. Vol. 8, pp. 1752-54.)

82. Mr. Smith acknowledged at the hearing that HSSC would have to gain the support of additional physicians in order to reach its market share projections, and agreed that the Agency had to take a "leap of faith" that HSSC would attract additional physicians. (Smith, T. Vol. 6, p. 1199; Vol. 3, pp. 602, 603-04.) Mr. McKillip agreed, testifying that a market shift can occur only if a certain number of surgeons shift their cases from one facility to another, and that such a shift must also be accompanied by referrals by primary care physicians to those surgeons. (McKillip, T. Vol. 5, p. 1096.) The Agency witnesses did not point to any documentation that would justify assuming such shift would occur.

83. Mr. McKillip also acknowledged that the reasonableness of an applicant's utilization projections is a critical factor under both Criteria 3 and 4. (McKillip, T. Vol. 5, p. 1017.) He also acknowledged that utilization projections generally rely on market share assumptions, so if market share assumptions are found to be unreasonable, the utilization projections will be as well. (McKillip, T. Vol. 5, pp. 974-76, 1017.)

84. HSSC repeatedly contended that its market share projections were appropriate because it was projecting to accommodate only 5% of the total Wake County surgical volume. (*See, e.g.* Joint Ex. 2 p. 68.) Mr. Sullivan testified that the 5% figure was not particularly meaningful, noting that "you could divide it by the population of the United States and it would probably be .001 percent of the total surgical volume in the United States. But that doesn't really tell us anything about the reasonableness of the individual assumptions." (Sullivan, T. Vol. 4, pp. 851, l. 20-24.) The fact that the percentages projected represent a small portion of the total county surgical volume does not negate errors in those projections or mean the projections are reasonable. HSSC's market share projections form a cornerstone of its utilization projections, upon which the reasonableness, need, and financial viability of the project are evaluated. Erroneous, insupportable, and unreasonable market share projections result in erroneous, insupportable, and unreasonable utilization projections.

85. Evidence was also presented regarding the lack of support or documentation for the market share projections. Mr. Sullivan noted that the application did not explain how the HSSC market share projections were derived. (Sullivan, T. Vol. 4, pp. 709-10.) Nancy Bres Martin, the individual who prepared portions of the HSSC application, testified in her deposition that she did not base the market share projections on documentation of physician support, that she did not look at data from any existing HSSC ambulatory surgical facilities to evaluate their market share percentages, nor did she evaluate whether any ambulatory surgical facility project has been able to achieve market shares as high as those projected by HSSC for its first three years of operation. (Bres Martin, T. Vol. 12, pp. 2585-87)

86. While Mr. Sullivan agreed that there is an objective component and a subjective component to developing market share projections in that a provider must project into the future, there must be actual, objective facts underlying those projections. (Sullivan, T. Vol. 4, pp. 815-

16.) The Agency should rely on objective facts in evaluating the reasonableness of an applicant's projections. There was no objective basis for HSSC's projections.

87. Mr. Smith confirmed that it is the responsibility of the Agency to evaluate the reasonableness of an applicant's projections when determining whether need has been shown. (Smith, T. Vol. 5, p. 1065.) The Agency must determine whether the applicant can reasonably accomplish the projections contained in the application. Even when a need for a particular facility or service is identified in the SMFP, the Agency must still evaluate the reasonableness of the applicant's market share projections. (Smith, T. Vol. 3, p. 484.)

88. Mr. Smith conceded that HSSC did not provide any documentation that any other ambulatory surgical facility had achieved such high market share percentages in its first three years of operation, and that the Agency did not have any such information before it at the time of the review. (Smith, T. Vol. 3, p. 530.)

89. Mr. Smith also confirmed that in the past the Agency has found an applicant non-conforming to Criterion 3 upon its determination that the applicant's market share projections were too aggressive. (Smith, T. Vol. 3, pp. 483-84.)

90. Mr. Smith acknowledged that in his deposition he had characterized the HSSC market share projections as "ambitious" and that he would stand by that characterization. (Smith, T. Vol. 3, p. 647.)

91. The Agency considered downsizing the HSSC project (i.e., approving the project for fewer operating rooms than requested). According to Mr. McKillip, the Agency was concerned regarding HSSC's market share projections, and in particular the 60% projection in the Holly Springs census tract. (McKillip, T. Vol. 4, p. 876.) Despite the fact that it is the job of the Agency to evaluate the reasonableness and appropriateness of an applicant's assumptions and projections, Mr. Smith testified that the Agency ultimately did not downsize the project because "we would have had to substitute our judgment for theirs with regards to the assumptions." (Smith, T. Vol. 6, p. 1129, l. 14-15.) The Agency determined it did not have sufficient information, therefore, to accomplish downsizing and accepted HSSC's projections despite its concerns.

92. Mr. Sullivan also noted that the HSSC service area in which it projected such large market shares was not logical or reasonable, but instead appeared to have been drawn in order to come very close to existing providers without actually overlapping. (Sullivan, T. Vol. 4, pp. 702-06; *see* WM Exhibit 151.) Mr. Sullivan pointed out that HSSC proposed to locate its ambulatory surgical facility in the upper northwest corner of its service area, a configuration that places the bulk of the population proposed to be served at a significant distance from the facility. (Sullivan T. Vol. 4, pp. 700-01; *see* WakeMed Ex. 149.) HSSC's application did not describe why the service area was drawn in this manner.

93. HSSC argued that its project would provide geographic access to surgical services for residents of southern Wake County. At the hearing and in its comments and application, HSSC spoke at length regarding the lack of surgical services in the service area, and the need these residents of southern Wake County have for closer access to surgical services. (Joint Ex. 1 pp. 640-42; Joint Ex. 2 pp. 48-49; Bres Martin, T. Vol. 8, p. 1737.)

94. Evidence was presented that showed that the proposed location of the Holly Springs Surgery Center is only 6.7 miles from WakeMed Cary Hospital. (Roberts, T. Vol. 1, p. 155; Sullivan, T. Vol. 4, pp. 706-07; WakeMed Ex. 152.) Given its proposed location in the upper corner of the service area, the Holly Springs Surgery Center would be located much closer to WakeMed Cary Hospital than to the majority of its proposed service area. (WakeMed Ex. 149; Sullivan, T. Vol. 4, pp. 700-01.) The proposed location undermines to a degree HSSC's argument that the project will greatly increase access to surgical services by residents of southern Wake County.

95. Also undermining HSSC's argument to a degree is the fact that Rex Surgery Center of Cary ("Rex Cary"), is an ambulatory surgical facility located close to the proposed location of the Holly Springs Surgery Center, and has never attained more than 60% utilization since opening in 2003. (Joint Ex. 1 pp. 114, 125; Roberts, T. Vol. 1, p. 158; Sullivan, T. Vol. 4, pp. 738-39.) Data presented in Rex's application shows that patients from Holly Springs and the surrounding area drive past Rex Cary to receive surgery services at Rex Hospital. (Joint Ex. 1 p. 142; Joint Ex. 3 p. 119.)

96. Mr. Sullivan pointed out that distance is not a key factor when discussing ambulatory surgical facilities because they offer elective procedures scheduled in advance, rather than emergency services. (Sullivan, T. Vol. 4, pp. 706-07, 775-77.) Moreover, having surgery is a relatively infrequent event for most people; having to travel a few miles to reach an ambulatory surgical facility is not a hardship for most members of the public. (*Id.*)

97. HSSC also relied on census tracts, rather than zip codes, to construct its service area. (Joint Ex. 2 pp. 41, 49.) Because historical data is calculated based on zip codes (patient addresses contain zip codes, not census tract numbers) it is difficult to accurately evaluate historical utilization patterns or verify patterns and projections within census tracts. (Roberts, T. Vol. 2., p. 266; Sullivan, T. Vol. 4, pp. 702-03.) There was no information in the application about physicians who would practice at the facility and their referral patterns. (Sullivan, T. Vol. 4, pp. 703-04.)

98. Both HSSC and Rex cited population growth in the Holly Springs area in support of their respective projects. As noted by WakeMed in its written comments and at the hearing, however, while Holly Springs has seen rapid growth in terms of the percentage change in population, from a numerical standpoint—i.e., the actual number of people in the area—Holly Springs remains quite small. (Joint Ex. 1 p. 123.) In fact, Southern Wake County as a whole lags behind the other portions of the county in terms of numerical population growth. (*Id.*; Joint Ex. 1 p. 145; Roberts, T. Vol. 1, pp. 158-59.) Rex's Holly Springs application and WakeMed's written comments noted that the 2009 and projected 2014 population of Holly Springs was 25% to 50% less than the population of Cary and Central and Northern Wake County. (Joint Ex. 1 p 123; Joint Ex. 3 pp. 67-6.)

99. Similarly, HSSC proposed to develop a minor procedure room at the proposed ambulatory surgical facility, but provided no data or documentation to support the purported need for a minor procedure room at the facility. In its application, HSSC stated that it "estimated non-surgical minor procedure volume at the proposed [sic] to be equal to 20%, or a 1:5 ratio of non-surgical procedures to surgical procedures, based on the annual HSSC outpatient surgical cases for Project Years 1-3." (Joint Ex. 2 p. 79.)

100. Mr. McKillip testified that HSSC stated in the application only that it was relying on the "expertise" of an unnamed "Vice-President, Surgical Services, Ambulatory Division" in formulating the 1:5 ratio. (McKillip, T. Vol. 5, pp. 973-74.) Mr. McKillip also agreed that if the utilization projections for surgical procedures are flawed, the minor procedure room projections would likely have been found unreasonable as well. (McKillip, T. Vol. 5, pp. 974-75.) No data or documentation was provided to support this 1:5 ratio, and HSSC did not demonstrate a need for a minor procedure room at the facility. (Joint Ex. 1 pp. 201-02.)

101. HSSC's application did not conform to Criterion 3, and the Agency erroneously found HSSC's application conforming to this criterion.

C. CRITERION 4

102. N.C. Gen. Stat. § 131E-183(a)(4) ("Criterion 4") requires that [w]here 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."

103. As noted above, HSSC inadvertently omitted the responses to several questions in the HSSC Application that was filed with the Agency. (Freedy T. Vol. 9 at 2018-19; *see also* Jt. Ex. 1, at 767-74 (HSSC responses to comments)), including Question III.8, which asks the applicant to describe options it considered. (Jt. Ex. 1 at 1657).

104. In reviewing the applications, the Agency found the HSSC Application conforming to Criterion 4 based on its discussion elsewhere in the application of several alternative locations considered and the HSSC Application's conformity with all other criteria. (Jt. Ex. 1 at 1657). Mr. McKillip testified that the Agency routinely looks at all parts of an application and its exhibits to find information responsive to the criteria, and CON Section Chief Smith agreed that the Agency did not have to look outside the HSSC Application to find sufficient information responsive to Criterion 4. (McKillip T. Vol. 5 at 1045-46; Smith T. Vol. 6 at 1228). Mr. Smith further testified that, as a new provider, there were very few alternatives HSSC could have considered, and that it was unnecessary for a new provider in particular to discuss the alternative of maintaining the status quo. (Smith T. Vol. 3 at 539-40).

105. Petitioners' witnesses admitted that the Agency may review the entire application for information responsive to applicable criteria and that there is no set standard as to what alternatives an applicant must discuss under Criterion 4. (Sullivan T. Vol. 4 at 796-97; Daniel Carter T. Vol. 7 at 1505).

106. The pages in the application where the Agency found alternatives it believed HSSC considered did not discuss why the HSSC project as proposed was the "most effective alternative" of those it considered. (Carter, T. Vol. 7, pp. 1398-1401)

107. When an application is found nonconforming with Criterion 3, then the application is found nonconforming with Criterion 4 because the applicant's failure to demonstrate the need the proposed population has for the service indicates that the proposed

project is not the most effective alternative. (Smith, T. Vol. 3, p. 523; McKillip, T. Vol. 5, pp. 1016-1017)

108. HSSC was nonconforming under Criterion 3 and, thus, was nonconforming under Criterion 4. The Agency incorrectly determined that HSSC was conforming with Criterion 4.

D. CRITERION 5

109. Criterion 5 requires the Agency to determine that financial and operational projections for the project "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." N.C. Gen. Stat. § 131E-183(a)(5).

110. Therefore, an applicant must show that the funds are available to develop the project and also show that the project is financially feasible, based on reasonable projections of costs and charges, at the end of the first three years of the project. (Smith, T. Vol. 6, p. 1151; Carter, T. Vol. 7, p. 1401; Sullivan, T. Vol. 4, pp. 691-692)

111. The applicant must provide a pro forma budget of revenues and operating expenses and the assumptions that the projections are based upon. (Smith, T. Vol. 6, p. 1151)

112. Taking into account the overall utilization projections, the Agency reviews the applicant's assumptions, its projection of revenue based on payor source and its expenses to determine the reasonableness of the applicant's assumptions and projections. (Smith, T. Vol. 3, pp. 523, 540-541, T. Vol. 6, pp. 1152-1153)

113. The Agency found HSSC conforming to Criterion 5, based on the documentation of availability of funds and the financial projections and information regarding costs and charges provided by HSSC in its application. (Joint Ex. 1 pp. 1661-63.)

114. Mr. Sullivan explained that financial projections hinge largely on projected utilization. (Sullivan, T. Vol. 4, pp. 691-92; 744-46.) Mr. Smith testified that where an applicant's utilization projections are unreasonable that finding impacts conformity under Criterion 5. (Smith, T. Vol. 3, p. 523.)

115. In their written comments and at the hearing, WakeMed and Rex challenged the reasonableness of HSSC's proposed costs and charges. (Joint Ex. 1 pp. 130-31; Roberts, T. Vol. 1, p. 178-79, Vol. 2, pp. 212-13; Carter, T. Vol. 7, pp. 1401-05.) WakeMed and Rex presented evidence contending that the proposed costs and charges contained in HSSC's application were unreasonably low on their face and as well as when compared to the actual costs and charges of Wake County providers. (*Id.*)

116. In his hearing testimony, Mr. Sullivan noted that Criterion 5 requires that financial projections must be based on "reasonable projections of the costs and charges," and that therefore the Agency has a duty to evaluate the reasonableness of the applicant's cost and charge

projections. (Sullivan, T. Vol. 4, pp. 846-47.) Mr. Smith agreed that it is the job of the Agency to test the reasonableness of an applicant's representations. (Smith, T. Vol. 5, p. 1065.)

117. One method available to the Agency to evaluate the reasonableness of HSSC's costs and charges was to compare them to the costs and charges of existing Wake County providers. WakeMed noted in its written comments that the net revenues per case projected by WakeMed and Rex, based on historical costs and charges, ranged from $4,411 to $5,995. In contrast, HSSC projected a net revenue per case of only $1,418. (Joint Ex. 1 p. 130.)

118. Acknowledging that the types and intensity of procedures performed at a facility impacts both charges and revenues, and that ambulatory surgical facilities tend to have lower costs and charges than hospital-based facilities, Mr. Roberts compared the net revenue per case projected by HSSC, which submitted primarily orthopedic surgery letters of support, with that of the Orthopaedic Surgery Center of Raleigh ("OSCR"). (Roberts, T. Vol. 1, pp. 176-77.) Mr. Roberts noted that despite the fact that the OSCR application was approved over two years ago, HSSC's projected net revenue per case was still $135.00 lower than OSCR's projections. (*Id.*) Mr. Roberts stated this was not believable, given the passage of time and accounting for inflation.

119. The average cost and charge projections by the applicants proposing to offer operating rooms in the 2008 Wake County review, where the decision was issued January 28, 2009, were included by the Agency in its work papers. (Joint Ex. 1 p. 1079.) The Agency stated that it relied upon the projected net revenue per case and expense per case for the applicants in that review that proposed freestanding ambulatory operating rooms to conclude that HSSC's projected costs and charges were reasonable. (Smith, T. Vol. 3 pp. 541-43.) OSCR and Blue Ridge Surgery Center were the two applicants in the 2008 review that proposed freestanding ambulatory operating rooms.

120. OSCR proposed to offer only orthopedic surgery procedures. (Joint Ex. 1 pp. 1196-97.) Blue Ridge Surgery Center was a multi-specialty ambulatory surgery facility offering a range of surgery procedures. (Joint Ex. 1 p. 1200.) Because HSSC proposed to be multi-specialty offering a range of procedures, it was more accurate to compare HSSC's cost and charge projections to that of Blue Ridge Surgery Center.

121. Regardless of whether HSSC's projected costs and charges are compared to OSCR or Blue Ridge Surgery Center, their projections for calendar year 2013 were higher than HSSC's projections for its third full fiscal year (2015) and, therefore, are a basis for determining that HSSC's projected costs and charges were unreasonable rather than reasonable. HSSC projected net revenue per surgical case at $1,418 and operating expenses per surgical case at $1,178. (Joint Ex. 1 p. 1706.) For 2013, two years earlier, OSCR projected net revenue per case of $1,547 and operating expenses per surgical case of $1,420, while Blue Ridge Surgery Center projected net revenue per case of $2,136 and operating expenses per surgical case of $1,319. (Joint Ex. 1 p. 1079, 1376-77; *see also* Sullivan, T. Vol. 4, pp. 781-82.)

122. WakeMed also compiled and presented data in its written comments regarding the fiscal year 2009 average charge per outpatient surgery case of several of the Cary Orthopaedic surgeons who submitted letters of support for the HSSC project. (Joint Ex. 1 p. 131) The data

revealed that the average charge per case for the Cary Orthopaedic surgeons was $11,705, over four times higher than HSSC's projected Year 3 average charge per case of $2,814. (*Id.*)

123. During the review, the Agency did not have any information upon which to determine that HSSC's projected low costs and charges were reasonable.

124. Robert "Bob" Johnson, the Manager of Business Planning for Novant who was responsible for developing the financial projections in the application, was asked about his testimony in a prior case in which he testified that costs that are below the market average are unreasonable. He argued that in the prior case, Novant "knew that it would have been impossible for [the other applicant]" to use the charges listed in its application, but that in the case of Holly Springs he felt HSSC's below-market charges were reasonable. (Johnson, T. Vol. 9, pp. 1949-50.)

125. Mr. Johnson acknowledged that he did not compare the HSSC projected costs and charges to existing Wake County providers to evaluate the reasonableness of the HSSC numbers. (Johnson, T. Vol. 9, p. 1973.) Mr. Johnson testified that he saw no reason to do such a comparison because "I knew what our charges were." (Johnson, T. Vol. 9, p. 1975, l. 7-21.)

126. On page 165 of its application, HSSC made the statement that it relied on other ambulatory surgery centers, Wake County Surgery Center CONs, and a review of the payer mix from Wake County Licensure Renewal applications. (Joint Ex. 2 p. 165.) This statement is not credible. The application did not provide any information regarding the specific ambulatory surgical centers or Wake County Surgery Center CONs upon which HSSC relied in making its financial projections, and at his deposition Mr. Johnson testified that he could not recall which facilities or CONs he reviewed. (Joint Ex. 2 p. 165; Johnson, T. Vol. 9, p. 1944.) In fact, at several points Mr. Johnson explained his projections by stating they were based on his "expert opinion." (*See, e.g.* Johnson, T. Vol. 9, p. 1893; p. 1905.)

127. At his deposition on December 17, 2010 (admitted into evidence as Joint Exhibit 9), Mr. Johnson stated that he relied on the costs, charges and utilization at the HSSC ambulatory surgical facilities Same Day Surgery Center ("SDSC") Ballentyne, South Park Surgery Center, and SDSC Monroe in developing the financial projections for the HSSC application. (Johnson, T. Vol. 9, pp. 1930-32) In his testimony at the hearing, however, Mr. Johnson testified that he used data from only SDSC Ballentyne in making the financial projections. (Johnson, T. Vol. 9, p. 1898; p. 1899; p. 1911.)

128. Mr. Johnson was questioned about the discrepancy and showed the relevant portions of his deposition transcript. For example, at his deposition Mr. Johnson testified that he calculated the projected average charge for HSSC by taking "the three surgery centers that we have currently. I looked at their average charge per procedure. I took an average and I've inflated it." (Johnson, T. Vol. 9, p. 1931-32, l. 25-3.) Mr. Johnson insisted that by testifying at his deposition that he used data from SDSC Ballentyne, South Park Surgery Center, and SDSC Monroe, he meant that he "reviewed but did not use" data from South Park Surgery Center and SDSC Monroe. (Johnson, T. Vol. 9, pp. 1930-32.)

129. Mr. Johnson testified at the hearing that he used SDSC Ballentyne data because he believed it "would more reflect what [he] believe[s] Holly Springs will be." (Johnson, T. Vol.

9, p. 1900, ll. 22-25.) He acknowledged, however, that the Medicaid percentage at SDSC Ballentyne was 4.79% and the Medicare percentage was 16.93%, in contrast to the 9.12% and the 31.08% he projected for HSSC. (Johnson, T. Vol. 9, p. 1937.)

130. Mr. Johnson also acknowledged that he did not rely on any historical Wake County data or demographic data in developing his financial projections. (Johnson, T. Vol. 9, pp. 1940-41.) He agreed that demographic factors can impact the payer mix, including the relative percentages of Medicaid and Medicare patients. (Johnson, T. Vol. 9, pp. 1941-42, 1945.) He also testified, however, that while he knew Holly Springs to be one of the most affluent parts of Wake County, he believed that having the Novant charity care policy in place "would somewhat change the normal payer mix," even though the population as a whole was more affluent and therefore would not qualify for charity care. (Johnson, T. Vol. 9, pp. 1966-67, l. 18-10.)

131. Demographic information can impact payor mix. If the population is younger, commercial insurance will be higher and Medicare will be lower. When the income level of the population is higher, the amount of commercial insurance goes up and Medicare and Medicaid are lower. (Jt. Ex. 23, Hubbard, pp. 163-164; Johnson, T. Vol. 9, pp. 1942, 1951)

132. Because the Agency had concerns as to whether HSSC's projected payor mix was reasonable, Mr. Smith and Mr. McKillip reviewed demographic information for the HSSC service area. (Smith, T. Vol. 3, pp. 556-557; Carter, T. Vol. 6, p. 1407)

133. Mr. Smith determined that Holly Springs is located in one of the most affluent parts of Wake County. The town of Holly Springs has about half as many people with incomes under $25,000 as the Wake County average. (Johnson, T. Vol. 9, pp. 1966-1967; Smith, T. Vol. 3, pp. 657-658, T. Vol. 6, pp. 1158-1159)

134. After reviewing the information, Mr. Smith determined that the payor mix was reasonable because, although Holly Springs is very affluent, the town of Fuquay-Varina, which is also in HSSC's Primary Service Area, is not. However, Mr. Smith failed to consider HSSC's market share projections, which projected 60% market share in the Holly Springs census tract and only 35% in Census Tract 531.01, where Fuquay-Varina is located. (Smith, T. Vol. 3, pp. 657-658)

135. Mr. Johnson also acknowledged that the number of Medicaid patients that could be served by HSSC is limited by the number of patients in the area who are Medicaid beneficiaries, and stated that he had not done any sort of analysis to determine if the number of Medicaid patients projected in the HSSC application was even mathematically feasible. (Johnson, T. Vol. 9, p. 1955.)

136. Mr. Johnson acknowledged that variation in Medicaid percentages across facilities may also be due to the type of procedures offered. (Johnson, T. Vol. 9, p. 1945.) However, Mr. Johnson testified that he did not know what type of cases would be offered at HSSC, other than he believed it would be a multispecialty ambulatory surgical facility. (Johnson, T. Vol. 9, p. 1959-60.) Mr. Johnson also testified that the average reimbursement for the list of top 20 procedures projected to be performed at the facility was not developed until after he had completed the financial projections. (Johnson, T. Vol. 9, p. 1923.)

137. Mr. Johnson testified that the list of top 20 procedures, which was provided to him by Nancy Bres Martin or Barb Freedy, was based on the letters received from physicians. (Johnson, T. Vol. 9, p. 1947, 1959.) Mr. Johnson stated at his deposition that he personally did not evaluate physician referral patterns, but was "sure . . . the people that came up with this [top 20 list] did that." (Johnson, T. Vol. 9, p. 1947, l. 21-24.) In her testimony, however, Ms. Bres Martin testified that she calculated the list of top 20 procedures by looking at Thomson data to determine the most common procedures done across the state in large multispecialty ambulatory surgical facilities, rather than tying the top 20 procedures to the actual specialties proposed for the facility or the actual use rates of Wake County patients. (Bres Martin, T. Vol. 8, pp. 1797-98.)

138. In his deposition, Mr. Johnson testified that he took data for each of the three surgery centers (SDSC Ballentyne, South Park, and SDSC Monroe) and "if I saw anything they were doing that we were not going to be doing at the surgery center, I eliminated them." (Johnson, T. Vol. 9, p. 1932, l. 11-18.) At the hearing, however, Mr. Johnson first testified that in calculating the gross projected average charge for the proposed HSSC facility he did not eliminate any specialties or types of procedures. (Johnson, T. Vol. 9, p. 1928, 1930.) Mr. Johnson later testified that he could not recall if he excluded information related to plastic surgery, women's services, ophthalmology, ENT, or urology cases, specialties for which HSSC did not have any physician letters of support. (Johnson, T. Vol. 9, p. 1960.)

139. At the hearing, Mr. Johnson agreed that volume projections in a CON application underlie the financial projections, and the financial projections are in turn dependent upon the volume projections. (Johnson, T. Vol. 9, p. 1946.) Mr. Johnson testified that in creating the financial projections in the HSSC application, he relied on volume projections provided to him by Nancy Bres-Martin. (Johnson, T. Vol. 9, p. 1946.) He did not rely on physician letters of support in developing the financial projections, was not involved in developing the volume projections, and did not conduct any independent review or analysis of the volume projections. (Johnson, T. Vol. 9, p. 1946.)

140. Mr. Johnson relied on Novant's charity care policy in place as justification for his financial projections. Mr. Johnson contends in his deposition that because of the HSSC charity care policy, patients would come from across the State, from outside of North Carolina, and even internationally to utilize the proposed surgery center. (Johnson, T. Vol. 9, pp. 1952-54.) HSSC did not present any data or evidence to support this position.

141. Mr. Johnson also asserted that because of the publicity campaign waged by Novant during the review of the Holly Springs Hospital project in 2008-2009, the residents of Holly Springs had extensive knowledge about the Novant charity care policy and would flock to the proposed Holly Springs Surgery Center as a result. (Johnson, T. Vol. 9, pp. 1890-91.) Mr. Johnson went so far as to assert that the residents of Holly Springs had a greater knowledge of the Novant charity care policy than patients in Mecklenburg or Forsyth Counties, where Novant has had a significant presence for over a decade. (Johnson, T. Vol. 9, pp. 1981-82.)

142. Mr. Johnson acknowledged that the Novant charity care policy, which he cited in support of the high Medicaid percentages projected for Holly Springs Surgery Center, applied to all Novant facilities, including SDSC Ballentyne in Charlotte, but argued that the charity care policy had not been advertised to the Ballentyne population and would have a greater effect at

Holly Springs than at any other Novant facility. (Johnson, T. Vol. 9, pp. 1944-45, 1970-71, 1972, 1979-80.) Mr. Johnson also acknowledged that the charity care policy is posted prominently on the Novant web site. (Johnson, T. Vol. 9, p. 1973.)

143. Mr. Johnson's testimony regarding the Novant charity care policy was not reasonable or credible and was unsupported by any facts or evidence.

144. Furthermore, despite Mr. Johnson's insistence at the hearing that he relied solely on data from SDSC Ballentyne, Ms. Freedy repeatedly contradicted this testimony, stating at several points that the development of the payer mix and other financial projections involved consideration of multiple data sources, including Novant ambulatory surgical facility data, Wake County CONs, and licensure renewal data. (*See, e.g.* Freedy, T. Vol. 10, pp. 2181)

145. HSSC's financial projections are not credible, reliable or reasonable. Taking the HSSC application and the testimony of its witnesses together, at the very least the Agency could not have known what, if any, actual data was used in formulating the HSSC financial projections.

146. Mr. Sullivan testified regarding WakeMed Exhibit 148, which was a chart analyzing the utilization, costs, and charges at the three Novant facilities. Mr. Sullivan stated that the data showed that these facilities were not a good template to use in evaluating the reasonableness of the HSSC projections. (Sullivan, T. Vol. 4, pp. 747-49.) He noted that SDSC Ballentyne had only been open for a few months, while SDSC Monroe was a one-room facility that had not yet opened. South Park Surgery Center is a large, high-volume facility, but unlike the proposed Holly Springs Surgery Center it is partially owned by the physician group that performs surgeries there, and only offers otolaryngology, or ear, nose and throat ("ENT") procedures and ophthalmology procedures. (*Id.*) Additionally, while HSSC represented in its application that it would provide neurosurgery procedures, SDSC Ballentyne and SDSC Monroe do not offer neurosurgery. (*Id.*)

147. Mr. Carter noted that, based on the deposition testimony of the Novant Vice-President for Ambulatory Services, Joseph "Woody" Hubbard, which was admitted at trial, neurosurgery cases are among the most highly reimbursed cases offered in ambulatory surgical facilities. (Carter, T. Vol. 6, pp. 1368-69, Vol. 6, pp. 1406-08.) Mr. Carter pointed out that it did not appear that Mr. Johnson included costs and charges for neurosurgery procedures, and had he done so, the average cost and charge reported by HSSC would have increased. (Carter, T. Vol. 7, pp. 1406-08.)

148. Mr. Carter and Ms. Carter testified that, in general, the financial projections created by Mr. Johnson appeared to be unconnected to any projections or data regarding the actual type of procedures proposed to be performed at HSSC. (Carter, T. Vol. 7, pp. 1401-03, 1406-09, 1512-13; D. Carter, T. Vol. 12, pp. 2618-21.) The list of top twenty procedures to be performed at HSSC, for example, appears to have little to no relation to the projected costs and charges, despite the fact that costs and charges vary depending on the type of procedure performed. (Carter, T. Vol. 6, pp. 1326-27.)

149. Mr. Sullivan and Mr. Carter also noted that Mr. Johnson could not tie any of his assumptions regarding costs and charges back to any particular source of data or cite to the specific documents underlying those assumptions. (Carter, T. Vol. 7, pp. 1401-05, 1602-03; D.

Carter, T. Vol. 12, pp. 2618-19.) Instead, the numbers presented in the HSSC application appear to have been developed by Mr. Johnson without any documentation or support. (*Id.*; *see also* Findings of Fact 404-419.)

150. The inconsistency between Mr. Johnson's deposition testimony and his hearing testimony undermines his credibility. Mr. Johnson's testimony regarding the basis for HSSC's costs and charges is unreliable.

151. HSSC's financial projections were not supported or reasonable. The information in HSSC's application, including its written comments and its working papers, which were otherwise available to the Agency, showed HSSC's financial projections were not supported or reasonable.

152. Further, when an application is found nonconforming with Criterion 3, then the application is found nonconforming with Criterion 5 because the financial projections are based on unreasonable volume projections. (Smith, T. Vol. 3, p. 523; Carter, T. Vol. 7, pp. 1401-1402; Sullivan, T. Vol. 4, pp. 691-692)

153. The Agency erroneously found the HSSC application conforming to Criterion 5.

E. CRITERION 6

154. Criterion 6 requires the Agency to determine that the applicant demonstrated "that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C. Gen. Stat. § 131E-183(a)(6).

155. The Agency found HSSC conforming to Criterion 6, citing as the basis for its determination HSSC's proposal to add no more than the three operating rooms for which a need exists in the SMFP, and its finding that under Criterion 3, "Holly Springs Surgery Center reasonably demonstrated the need for three operating rooms." (Joint Ex. 1 p. 1664.)

156. As discussed above, HSSC's market share projections, utilization projections, and financial projections were not reasonable; therefore, HSSC should not have been found conforming to Criterion 3.

157. Even if HSSC was conforming to Criterion 3, Mr. Smith acknowledged that Criterion 6 is an independent criterion with which the applicant must demonstrate compliance; an applicant cannot be found conforming to Criterion 6 solely on the basis of a finding of conformity with another criterion. (Smith, T. Vol. 3, p. 487.)

158. Mr. Sullivan testified on behalf of WakeMed that he believed HSSC's project constituted unnecessary duplication because HSSC proposed ambulatory surgery services and Rex's existing ambulatory surgery center in Cary had been historically underutilized. (Sullivan T. Vol. 4 at 750-51).

159. WakeMed did not identify any rule, policy, or prior decision requiring the Agency to find that an application for ambulatory operating rooms filed pursuant to a need determination

in the SMFP was non-conforming to Criterion 6 because another ambulatory provider in the service area was below capacity. (Sullivan T. Vol. 4 at 829).

160. Mr. Carter testified on behalf of Rex that he believed HSSC's project constituted unnecessary duplication because HSSC did not demonstrate that existing providers could not adequately meet the needs of the population it proposed to serve. (Daniel Carter T. Vol. 7 at 1421-22; *see also* Jt. Ex. 1 at 205).

161. CON Section Chief Smith testified that he was not aware of any review in which the Agency found an applicant for operating rooms pursuant to an SMPF need determination to be non-conforming to Criterion 6 when the applicant was found conforming to Criteria 1 and 3. (Smith T. Vol. 3 at 486-87).

162. In this Review, the SMFP had taken existing capacity into account in determining that there was a need for three operating rooms in Wake County. Thus, in the Agency's view, if each applicant conformed to Criteria 1 and Criteria 3, any duplication that would result from the applicant's project was not unnecessary. (Smith T. Vol. 3 at 486-87).

163. In as much as HSSC should have been found by the Agency to be non-conforming to Criterion 3, then HSSC should have been found non-conforming to Criterion 6.

F. CRITERION 7

164. Criterion 7 requires the Agency to determine that the applicant presented "evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided." N.C. Gen. Stat. § 131E-183(a)(7).

165. The Agency found HSSC conforming to Criterion 7 on the basis that HSSC provided proposed staffing tables for administrative, clinical, and support personnel for its facility; stated that it would staff the proposed facility with 20.0 FTEs by the second year of operation; described the recruitment and retention processes followed by Novant; and identified the Chief Medical Officer. (Joint Ex. 1, p. 1666.)

166. WakeMed and Rex contend that HSSC did not demonstrate that the resources needed to operate an ambulatory surgical facility were available. (Joint Ex. 1, p. 132, 206-07; Carter, Vol. 7, pp. 1422-23.)

167. In his testimony, Daniel Carter stated that the requirement for availability of health manpower includes demonstrating that sufficient physicians are willing and able to perform cases at the facility. (Carter, T. Vol. 7, pp. 1422-23.) Mr. Carter noted that while HSSC asserted that it would provide certain surgical specialties at the facility, such as urology and ENT, it provided no documentation that any urologists or otolaryngologists had agreed to perform surgeries at the proposed facility. (Carter, T. Vol. 7, p. 1393.)

168. Unlike nurses, surgical technicians, and administrative staff, there was no evidence that any surgeons would be employed by HSSC. Mr. Carter testified that he was unaware of any prior Agency review where the Agency found an applicant non-conforming to Criterion 7 on the basis of surgeon or physician support letters and that he was not relying on any Agency policy or guidance in forming his opinion. (Daniel Carter T. Vol. 7 at 1549). To the contrary, Ms. Bres Martin testified that HSSC's treatment under Criterion 7 was consistent with agency practice. (Bres Martin T. Vol. 8 at 1777)

169. In its written comments, WakeMed questioned whether HSSC demonstrated the availability of certain essential service providers, and contends that the Agency did not analyze or address the availability of physicians, anesthesiologists, laboratory services, or pathology services at the proposed HSSC facility in its Agency Findings. (Joint Ex. 1, p. 132.)

170. In summary, Petitioners raised issues upon which they disagree with the Agency's conclusion that the HSSC Application conformed to Criterion 7; however, there is substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 7.

G. CRITERION 8

171. Criterion 8 requires the Agency to determine that the applicant demonstrated that the provider of the proposed services "will make available, or otherwise make arrangements for, the provision of the necessary ancillary and support services" and that "the proposed service will be coordinated with the existing health care system." N.C. Gen. Stat. § 131E-183(a)(8).

172. The Agency found HSSC conforming to Criterion 8 on the basis that the applicant described the manner in which radiology, laboratory, pathology, and sterile processing would be provided; provided a list of facilities with which other HSSC facilities have transfer agreements and copies of requests for transfer agreements sent to Wake County hospitals; and provided physician letters of support. (Joint Ex. 1, p. 1667.)

173. WakeMed challenged the finding that HSSC demonstrated that pathology, laboratory, and anesthesiology services would be reasonably available at the proposed facility, given the fact that HSSC proposed to use ancillary and support providers located in Forsyth County, Mecklenburg County, and Bennettsville, South Carolina.

174. With regard to physician letters of support, both WakeMed and Rex challenged the sufficiency of the HSSC physician letters of support in their written comments and at the hearing. (Joint Ex. 1 pp. 128, 200-01, 207-09; Roberts, Vol. 1, pp. 169-71; Sullivan, T. Vol. 4, pp. 724-25, 737-38; Carter, T. Vol. 6, pp. 1323-25, 1346-48, 1360-62.)

175. There was extensive testimony regarding the Agency's treatment of physician support letters during the 2008 Holly Springs Hospital review as compared to the HSSC review. It was noted that in the 2008 review, the Agency found a lack of documentation of physician support and cited to the dearth of surgeon support letters from Wake County providers for Holly Springs Hospital. (Joint Ex. 1 p. 1248.) In the Holly Springs Hospital review, the Agency also took into consideration the distance between the proposed facility and the practice locations of

the physicians providing letters of support as well as the specialties of the physicians providing letters of support. (*Id.*)

176. Mr. Smith testified that the different results from the two reviews was due to the Agency's decision that it would be "arbitrary" to find the applicant with the lowest number of letters non-conforming, given the wider range of letters presented by the applicants in this review when compared to the 2008 review. (Smith, T. Vol. 5, pp. 1086-88.)

177. HSSC witnesses made the point at the hearing that operating room applications do not require physician letters of support, unlike the case of applications to acquire MRI scanners. (*See, e.g.* Freedy, T. Vol. 9, pp. 2053-54.)

178. Mr. Roberts testified that while there may not be an explicit requirement, there is a statutory requirement under Criterion 8 that the applicant show coordination with the existing health care system, which is demonstrated through physician support letters. (Roberts, T. Vol. 1, p. 171.)

179. Mr. Smith agreed, testifying that while there is no CON rule specifically requiring physician letters of support for an operating room application, an applicant who fails to provide sufficient quality and quantity of surgeon letters of support would not be approved because physician support letters back up and lend plausibility to an applicant's utilization projections. (Smith, T. Vol. 3, pp. 609-10, 611; Vol. 6, p. 1169.)

180. Although Petitioners raised issues upon which they disagree with the Agency's conclusion that the HSSC Application conformed to Criterion 8, and the issue of support letters has been discussed above, the record contains sufficient and substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 8.

H. CRITERION 12

181. Criterion 12 requires the Agency to determine for projects involving construction that the applicant demonstrated "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" and that the project incorporates "applicable energy saving features." N.C. Gen. Stat. § 131E-183(a)(12).

182. The total cost of the HSSC project was $8,204,090, which equates to $2,734,697 per operating room. In contrast, WakeMed projected costs of $1,955,951 per operating room while Rex projected costs of $2,910,056 per operating room. (Joint Ex. 1, pp. 1657-63.)

183. The Agency evaluated the applicants' compliance with Criterion 12 in terms of whether the "cost, design, and means of construction proposed" represented the most reasonable alternative for the individual applicant. (Joint Ex. 1, p. 1669.)

184. The record contains sufficient and substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 12.

I. CRITERION 13c

185. Criterion 13c requires the Agency, in order to determine the extent to which the proposed service will be accessible, to find that the applicant demonstrated "that the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services." N.C. Gen. Stat. § 131E-183(a)(13)c.

186. In its financial assumptions, HSSC stated that its payor mix was based on data from other HSSC Ambulatory Surgery Centers, ASC CON applications, and Wake County Licensure Renewal Applications. From the HSSC application, the Agency was unable to determine which facilities HSSC's payor mix was based upon. Thus, the Agency was unable to analyze the demographics of the location of the facilities or the types of surgical specialties provided at the facilities upon which HSSC based its payor mix. (Jt. Ex. 2, p. 165, Jt. Ex. 1, p. 1675; McKillip, T. Vol. 5, pp. 975-976)

187. Mr. McKillip acknowledged that while HSSC stated that its payer mix was based on "data from other Novant ambulatory surgery centers, Wake County CONs, and Licensure Renewal Data," HSSC did not identify the specific ambulatory surgical facilities or Wake County projects on which it relied. (McKillip, T. Vol. 5, pp. 1068-70.) Therefore, it was not possible to evaluate whether the HSSC projections comported with actual, historical data because the source of such data, if any, was unknown.

188. Demographic information can impact payor mix. If the population is younger, commercial insurance will be higher and Medicare would be lower. When the income level of the population is higher, the amount of commercial insurance is expected to be higher and Medicare and Medicaid are lower. (Jt. Ex. 23, pp. 163-164; Johnson, T. Vol. 9, pp. 1942, 1951; McKillip, T. Vol. p. 977)

189. An ASC's case mix will affect its payor mix. (McKillip, T. Vol. p. 977)

190. Because of HSSC's aggressive Medicaid projections, Mr. Smith and Mr. McKillip reviewed demographic information regarding the Holly Springs area, which revealed that less than 10% of the Holly Springs population has income below $25,000. However, in all of Wake County 18.3% of the population has income below $25,000, and in North Carolina overall, 30.7% of the population has income below $25,000. (Jt. Ex. 1, p. 1050; McKillip, T. Vol. 4, pp. 909-911; Smith, T. Vol. 3, pp. 556-557, 657-658. T. Vol. 6, pp. 1158-1159; Carter, T. Vol. 6, p. 1407; Johnson, T. Vol. 9, pp. 1966-1967)

191. Generally, the fewer the people with income below $25,000, the fewer the Medicaid recipients in that particular area. (McKillip, T. Vol. 4, pp. 911)

192. HSSC's Medicaid projections were almost double the Wake County Medicaid rate for outpatient surgery. HSSC proposed that it would provide 9.17% of its cases for Medicaid patients in its third year of operation. However, Wake County's outpatient Medicaid average is only 5.08%. (Jt. Ex. 1, p. 1675; McKillip, T. Vol. 4, pp. 912)

193. Thus, HSSC proposed to serve almost twice the Wake County average of Medicaid patients even though its facility would be located in an area that was one of the most affluent areas of Wake County. (Jt. Ex. 1, p. 1675; McKillip, T. Vol. 4, pp. 912-913)

194. The Agency also compared HSSC's payor mix projections to Novant Health's outpatient surgical case payor mix. However, Novant Health's payor mix projections include its hospital outpatient cases while its proposed facility is an ambulatory surgery center. Further, none of Novant's existing facilities are located in Wake County.

195. After reviewing the demographic information, Mr. Smith determined that the payor mix was reasonable. Although Holly Springs is very affluent, the town of Fuquay-Varina, which is also in HSSC's primary service area, is not. However, Mr. Smith failed to consider HSSC's market share projections, which projected 60% market share in the Holly Springs census tract and only 35% in Census Tract 531.01, where Fuquay-Varina is located. (Smith, T. Vol. 3, pp. 657-658)

196. Mr. Johnson did not base HSSC's payor mix on any Wake County historical data. At the hearing, Mr. Johnson testified that, although he reviewed other information, he relied on Novant's freestanding ambulatory surgery centers, the Holly Springs Hospital payor mix projections and the Franklin County Same Day Surgery application. (Johnson, T. Vol. 9, p. 1941; HSSC Ex. 412)

197. At his deposition, Mr. Johnson had inconsistently testified that he reviewed only the data from Novant's three freestanding ASCs. (Johnson, T. Vol. 9, pp. 1942-1943)

198. Payor mix should be based on the types of cases that are likely to be performed at an ASC, as well as the demographics of the population to be served. (Carter, T. Vol. 7, pp. 1412-1413) In developing the payor mix for HSSC, Mr. Johnson did not base any of his projections on any historical Wake County data or look at any of the demographic information, such as family income, for the Holly Springs area. (Johnson, T. Vol. 9, pp. 1940 -1941; Jt. Ex. 23, p. 163)

199. Accordingly, HSSC's payor mix is not based on the actual population that HSSC is proposing to serve, the six census tracts in Southern Wake County. Further, the payor mix for Novant facilities in Mecklenburg County is irrelevant for Wake County because the demographics and the surgical specialties for those facilities are different than for HSSC. (Carter, T. Vol. 7, p. 1410)

200. The HSSC Application did not consider the projected surgical case mix at HSSC when determining its projected payor mix. There is no nexus between the projected population to be served and the physicians, particularly who are likely going to be performing those cases at HSSC. (Carter, T. Vol. 7, p. 1415; Johnson, T. Vol. 9, p. 1946)

201. Medicaid is one of the components of an applicant's payor mix. (Jt. Ex. 2, pp. 114-115)

202. Mr. Johnson testified that: (1) he increased the Medicaid percentage at HSSC because people without insurance will be attracted to the facility due to its charity care policy; (2) many of the people that present as charity care cases can then be qualified for Medicaid; and (3) people in the Holly Springs area are more familiar with Novant's charity care policy than people in other areas of the State because it was touted to several hundred people at the Holly Springs Hospital Public Hearing (not the Public Hearing in this review). (Johnson, T. Vol. 9, pp. 1889-1890)

203. Mr. Johnson's testimony is not credible because it is unreasonable to believe that the Medicaid percentage projected for HSSC would be higher than in Novant's existing, established markets where Novant has operated for decades simply because of HSSC's representations at the Holly Springs Hospital Public Hearing where only several hundred people attended. (Johnson, T. Vol. 9, pp. 1890-1891, 1977, 1977-1982) Moreover, none of Mr. Johnson's rationales were stated as assumptions for Medicaid projections in the HSSC Application.

204. HSSC was nonconforming with Criterion 13(c) because its projections of payor mix were not based on reasonable assumptions. Thus, HSSC failed to demonstrate that medically underserved groups would be adequately served by its proposed facility.

205. The Agency erred by determining HSSC conforming with Criterion 13(c).

J. CRITERION 13d

206. Criterion 13d requires the Agency, in order to determine the extent to which the proposed service will be accessible, to find that the applicant demonstrated "that the applicant offers a range of means by which a person will have access to its services. Examples of a range of means are outpatient services, admission by house staff, and admission by personal physicians." N.C. Gen. Stat. § 131E-183(a)(13)d.

207. The Agency made a single finding of conformity applicable to all parties: "In Section VI.9 of the application, all applicants state that patients will have access to the services offered by a range of means, including physician referral." (Joint Ex. 1, p. 1675.)

208. The record contains sufficient and substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 13d.

K. CRITERION 18a

209. Criterion 18a requires the Agency to determine that the applicant demonstrated "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." N.C. Gen. Stat. § 131E-183(a)(18a).

210. The Agency found HSSC conforming to Criterion 18a based on Sections II.8, VI.2, and V.7 of the application. (Joint Ex. 1 p. 1677)

211. WakeMed contends that, given the excess ambulatory operating room capacity that already exists or is under development in Wake County, the development of additional ambulatory operating rooms would not enhance competition. WakeMed also contends that HSSC's project would not offer any material improvement in geographic access.

212. WakeMed contends that the Agency failed to analyze how HSSC's application impacted competition, that there were a sufficient number of ambulatory operating room providers in Wake County to provide ample competition, and that existing providers of shared operating rooms are limited in their ability to compete due to utilization being at or above practical capacity, and conducted a deficient analysis under Criterion 18a.

213. The record contains sufficient and substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 18a.

L. REGULATORY RULES CRITERIA.

214. Subsection (b) of N.C. Gen. Stat. § 131E-183 provides that the Agency may "adopt rules for the review of particular types of applications that will be used in addition to those criteria outlined in subsection (a) of this section."

215. The rules at 10A N.C.A.C. 14C.2100, "Criteria and Standards for Surgical Services and Operating Rooms" are applicable to certificate of need applications proposing the development of operating rooms.

216. The Agency applied the rules at 10A N.C.A.C. 14C.2100 to the HSSC application, and found HSSC conforming to all applicable rules. (Joint Ex. 1, p. 1679.)

217. As stated above, HSSC is found to be non-conforming to various review criteria as set forth in N.C. Gen. Stat. § 131E-183(a), and to the degree that those review criteria apply to the rules at10A N.C.A.C. 14C.2100, *et. seq.*, and the rules would be derivative of the substantive review criteria, then HSSC would likewise be non-conforming without restating the rationale previously stated. Otherwise, there is sufficient evidence of record to support the Agency's decision as it relates to the rules.

M. TIMELINESS OF HSSC APPEAL

218. The CON Act provides that "[a] petition for a contested case shall be filed within 30 days after the Department makes its decision" to issue, deny, or withdraw a certificate of need. N.C. Gen. Stat. § 131E-188(a).

219. The Agency rendered its decision July 28, 2010. WakeMed, Duke and Rex filed timely appeals. As the prevailing party, HSSC did not file a petition for a contested case hearing to challenge the Agency's decision

220. HSSC was allowed to intervene in the contested cases filed by WakeMed and Rex, and by Order dated October 15, 2010 each party was allowed to intervene "with all rights of parties" in all of the cases.

221. WakeMed contends that HSSC is now time barred from contesting issues raised by the Agency's decision because it did not file a petition. Although Rule 24 of the Rules of Civil Procedure is silent as to the extent an intervenor may participate, our courts have found that anything less than full participation would be unduly restrictive and defeat the intent of the rule. An intervenor is as much a party to the action as the original parties and has rights equally broad. *Harrington v. Overcash*, 61 N.C. App. 742, 301 S.E. 2d 528 (1983); *Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 311 S.E.2d 1 (1984).

N. DID HSSC IMPROPERLY AMEND ITS APPLICATION:

222. Novant timely filed its application for HSSC on the filing deadline of February 15, 2010 and the Agency deemed it complete on February 16, 2010. The Agency's application filing deadline ensures that competitive applications can be reviewed at the same time and that all applicants are treated fairly and equally. (Jt. Ex. 1, p. 96; Jt. Ex. 2, p. 1; Smith, T. Vol. 3, p. 569)

223. An applicant may not amend an application after it has been filed. 10A NCAC 14C .2014; *Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources*, 122 N.C. App. 529, 537, 470 S.E.2d 831, 836 (1996).

224. Generally, when the Agency receives additional information after an application has been filed, the Agency stamps the information "not considered." (Smith, T. Vol. 3, pp. 574-575; Carter, T. Vol. 6, p. 1317)

225. If the Agency receives information from an applicant after the filing date, in its Findings, the Agency generally "cites the fact that an applicant provided additional information that would have amended the application and that application is not being considered." (Smith, T. Vol. 3, p. 571)

226. In his testimony, Mr. Smith stated that the late-filed documents submitted by HSSC should not have been considered, citing the 2003 Agency memo by then-CON Chief Lee Hoffman that specifically prohibits submission of support letters and other documentation after the filing deadline, and should have been stamped "Not Considered." (Smith, T. Vol. 3, pp. 568-69, 576.) The 2003 memo was distributed to providers and is posted on the Agency's website. (*Id.*, p. 570.)

227. The memorandum referred to by Mr. Smith written by Lee Hoffman, then Chief of the CON Section, dated July 10, 2003, which referenced 10A N.C.A.C. 14C .0204, states in pertinent part:

> [P]lease note that nothing contained in oral or written comments can be used to amend (i.e. revise, change or supplement) the application filed with the Certificate of Need section.
>
> . . .
>
> Therefore, the application cannot be amended with information contained in any letters or materials received during the written comment period or at the public hearing, even if the applicant states in the application that such letters will be submitted. Consequently, all information the applicant intends to rely on to demonstrate conformance of the application with the review criteria must be provided by the applicant in its application when first submitted to the Agency.
>
> (Jt. Ex. 1, pp. 208, 294-295; Smith, T. Vol. 3, pp. 568-569)

228. At the hearing Mr. Smith was asked about the amendment rule at 10A N.C.A.C. 14C .0204. According to Mr. Smith, if the late filed information was considered, it is in violation of the rule regarding amendments at 10A N.C.A.C. 14C .0204. (Smith, T. Vol. 3, p. 571) According to Mr. Smith, the information filed after the application would not be considered because it would be in violation of the amendment rule if it were considered. (Smith, T. Vol. 3, pp. 571-572)

229. Even if information was not stamped "not considered" that, in and of itself, does not necessarily determine that the information was not considered. (Smith, T. Vol. 3, p. 575)

230. Instead, the determination of whether late filed information has been considered is made by establishing if the Agency, in this case, Mr. McKillip or Mr. Smith, considered that late filed information in making its determinations and what use is made of that information. (Smith, T. Vol. 3, pp. 574-575, 571, T. Vol. 5, p. 1090)

231. In determining whether or not an application has been amended, defining two key words is paramount: "consider" and "amend." To "consider" is to think about carefully and seriously; or alternatively to believe after deliberation. It means to contemplate, to weigh, to think about in order to arrive at a decision. To "amend" is to put right, to change or modify for the better, or to alter formally by modification, deletion or addition. It is to "improve, enhance, enrich, perfect, or refine." *http://www.merriam-webster.com/distionary*. Therefore, one may "consider" something and not "amend" it.

232. The test of amending the application is not solely whether the reviewer "considered" the additional material; the test is whether or not that material effected a change in the application. For the purposes of these applications the addition of missing information may be considered by the reviewer; i.e. looked upon thoughtfully and reflectively, but is of no consequence unless the reviewer uses that information to effectively change the application or to change his or her position relative to the application.

233. 10A N.C.A.C. 14C .0204 only speaks to amendment. The Hoffman memo is not statute or rule; nor is it even unenforceable policy. It is a recitation of her perception of how to

treat support letters that are supplied after the application has been submitted and more generally how to treat any information that is received late. It has been the guidance of the Agency since its issuance, and is not inapposite of the definitions as stated above.

1. Missing Application pages

234. HSSC failed to include its responses to application Sections III.3 - III.9. In its Competitive Comments, Rex pointed out that HSSC omitted these portions of its application. (Jt. Ex. 1, p. 152, Smith, T. Vol. 3, pp. 538-539)

235. HSSC was unaware it had omitted any portions of its application until it read Rex's Competitive Comments. (Freedy, T. Vol. 9, pp. 2018-2019)

236. When it filed its Response to Competitive Comments, HSSC admitted that it had inadvertently omitted these pages from its application and included the pages, as Attachment D, to its Responsive Comments. (Jt. Ex. 1, pp. 642, 885; Freedy, T. Vol. 10, p. 2019, T. Vol. 10, pp. 2198-2199, 2202)

237. Attachment D was not stamped "not considered." (Smith, T. Vol. 3, p. 575; McKillip, T. Vol. 4, p. 867)

238. Sections III.3 – III.9 are not optional questions in the CON application form and must be addressed. (Smith, T. Vol. 3, p. 577)

239. Mr. McKillip acknowledges that Sections III.3 through III.9 that were missing from the HSSC application and that he first became aware that HSSC did not include all of the subsections in the application during the public hearing.

240. Mr. McKillip also acknowledges that he read and considered Attachment D which was the missing pages from HSSC's application. (McKillip, T. Vol. 4, pp. 865, 867, 1041) He acknowledges that he read and considered Attachment E, a letter of support from Triangle Orthopedic Associates. "Yes, I read and considered all of the attachments." (McKillip, T. Vol. 4, pp. 865-867)

241. Mr. McKillip stated that he did not base any of the HSSC findings of conformity or any of his findings in the comparative analysis on his consideration of Attachment D. (McKillip, T. Vol. 5, p. 1041; Carter, T. Vol. 7, pp. 1396-1397)

242. The Agency routinely looks at all parts of an application and its exhibits to find information responsive to review criteria, and Petitioners' witnesses admitted that the Agency is permitted to review the entire application for information responsive to the applicable criteria. (Sullivan T. Vol. 4 at 796-97; McKillip T. Vol. 5 at 1045-46; Daniel Carter T. Vol. 7 at 1505). The answers to the missing questions in Sections III.3 through III.9 were found by the agency in other parts of the application by reviewing the entire application.

243. In the Agency's view, an applicant "amends" its application when it submits new information to the Agency during the course of the review period that is necessary to evaluate the conformity of the application with applicable criteria or rules. (Smith T. Vol. 3 at 569).

244. HSSC attached certain information to its responses to comments submitted in the Review that were inadvertently omitted from its application, including responses to Questions III.3 – III.9 (several of which were not applicable), and the support letter from Triangle Orthopaedic Associates. (Jt. Ex. 1 at 767-74, 787-88, 873-87)

245. However, the responses to Questions III.3 – III.9 submitted by HSSC were not necessary to evaluate the HSSC Application's conformity with the applicable criteria and standards, nor did answers to questions materially change the HSSC Application, since all the necessary information in those materials was contained elsewhere in the HSSC Application. (Jt. Ex. 1 at 767-74, 787-88). Mr. McKillip read the information provided by HSSC, as his practice is to read all materials submitted by all applicants, but Mr. McKillip did not use it in determining whether to approve HSSC's Application. (McKillip T. Vol. 5 at 1041-42). Similarly, CON Section Chief Smith testified that he did not consider these documents in any way. (Smith T. Vol. 3 at 574-76).

246. HSSC did not improperly amend its application by providing the missing answers to the questions in the application, and to that issue alone the Agency was correct in finding that HSSC did not improperly amend its application.

2. Physician Support Letter

247. In its application, HSSC listed nineteen (19) Wake County based surgeons and represented that these surgeons *signed letters of support and intended to practice at HSSC.* However, HSSC failed to include a letter from the twelve (12) Triangle Orthopaedic Associates ("TOA") physicians included on the list. (Jt. Ex. 2, pp. 34-35, Freedy, T. Vol. 9, pp. 2032-2033)

248. The memorandum from Ms. Hoffman referred to above remains on the Agency's website and still represents the Agency's position and interpretation of the rule regarding the submission of physician letters of support after an application has been filed. (Jt. Ex. 1, pp. 294-295; Smith, T. Vol. 3, pp. 568-569)

249. In its Response to Competitive Comments, HSSC conceded that the TOA letter was not in its application. HSSC included the letter in its Response to Competitive Comments as Attachment E. (Jt. Ex. 1, pp. 657, 886-887)

250. Attachment E was not stamped "not considered." (Smith, T. Vol. 3, p. 576; McKillip, T. Vol. 4, pp. 867, 872)

251. Mr. McKillip acknowledges that he read and considered Attachment E, the TOA support letter, just as he did with Attachment D, the missing answers to the questions on the application. (McKillip, T. Vol. 4, pp. 865, 867, 872)

252. Mr. McKillip stated that he did not base any of the HSSC findings of conformity or any of his findings in the comparative analysis on his consideration of Attachment E. (McKillip, T. Vol. 5, pp. 1041, 872)

253. It is apparent that Mr. McKillip considered Attachments D and E in the same manner that he considered the information in the working papers, Competitive Comments and the Responses to Comments. Just because Mr. McKillip did not overtly cite to "amended" materials in the Agency Findings does not negate his own admission that he considered that information in arriving at his decision. (McKillip, T. Vol. 4, pp. 909-910, T. Vol. 5, pp. 1008-1009, 1041-1042, 1056-1057)

254. Although the HSSC application represented that the TOA physicians provided a letter of support, there was no documentation in the application that these physicians actually supported HSSC's project. However, TOA's support for HSSC was a factor in finding HSSC conforming with the review criteria. (Jt. Ex. 2; McKillip, T. Vol. 4, pp. 872, 874-876)

255. Further, the Agency Findings state that the physicians from TOA "expressed" support for the HSSC project. However, without considering the late-filed letter from TOA, there was no way to discern if these physicians had indeed "expressed" their support. (Jt. Ex. 1, p. 1707; McKillip, T. Vol. 4, pp. 874-875; Smith, T. Vol. 5, p. 1091)

256. The only way to have determined that the TOA's physicians actually supported HSSC's project was to have considered the letter included in Attachment E. This fact corroborates Mr. McKillip's testimony that he considered Attachment E. (Smith, T. Vol. 5, p. 1091; McKillip, T. Vol. 4, pp. 874-875)

257. Barb Freedy, an expert witness for HSSC who was involved in the preparation of the HSSC application, acknowledged that the Triangle Orthopaedic support letter was not included in the HSSC application filed on February 15, 2010 and that HSSC submitted the missing portions of the application and the support letter from Triangle Orthopedic at the public hearing. (Freedy, T. Vol. 10, pp. 2198-99.)

258. Consistent with his testimony regarding the missing answers, Mr. Smith stated that the late-filed documents submitted by HSSC, including the letter of support from Triangle Orthopedic, should not have been considered, citing the 2003 Agency memo by then-CON Chief Hoffman that specifically prohibits submission of support letters and other documentation after the filing deadline. (Smith, T. Vol. 3, pp. 568-69, 576.)

259. The 2006 New Hanover County Operating Room Agency Findings corroborates Mr. Smith's testimony regarding the Agency's policy for documents submitted after the application filing date. In that review, one applicant, HealthSouth, submitted physician letters of support during the written comment period. In its findings, the Agency determined:

> Because the letters submitted during the written comment period and at the public hearing were not requested by the Agency and provided additional information required to be included in the application, these documents are determined to be amendments to the application and cannot be considered.

(Jt. Ex. 1, p. 1122; Smith, T. Vol. 3, pp. 636-639, T. Vol. 6, pp. 1170-1171)

260. The Triangle Orthopaedic support letter was in fact substantively considered and used to evaluate the HSSC application and thereby was an impermissible amendment to the application; and, therefore, the Agency erred in finding that HSSC had not amended its application as it pertains to the TOA letter.

III. WAKE MED APPLICATION.

261. As reflected in the Agency Findings issued August 4, 2010, the Agency determined that WakeMed's application to add three shared operating rooms to WakeMed Cary Hospital was conforming to all applicable statutory and regulatory review criteria.

262. Specifically, the Agency found that WakeMed's application was conforming to Criteria 1, 3, 4, 5, 6, 7, 8, 12, 13a, 13b, 13c, 13d, 14, 18a, and 20, and with the regulatory criteria at .2102(b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), (b)(8), (b)(9); .2103(a), (b)(1), (c), (g); .2104(a), (b); .2105(a), (b), (c); .2106(c). The Agency found all other statutory and regulatory criteria not applicable to the WakeMed application. (Joint Ex. 1 pp. 1581-1710.)

A. CRITERION 1

263. Criterion 1 requires that a "proposed project . . . be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating room, or home health offices that may be approved." N.C. Gen. Stat. § 131E-183(a)(1).

264. Rex contends that WakeMed should have been found nonconforming with Criterion 1 for the same reasons that it should have been found nonconforming with Criterion 3. (Carter, T. Vol. 6, p. 1313)

265. As set forth below, it is found that WakeMed was correctly found by the Agency to be conforming to Criterion 3; and, therefore, would be found to be conforming to Criterion 1. There is otherwise sufficient and credible evidence for WakeMed to be found conforming to Criterion 1.

B. CRITERION 3

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

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

267. The Agency found WakeMed conforming to Criterion 3, finding that WakeMed adequately identified the population to be served and demonstrated the need that population had for the proposed project. (Joint Ex. 1 pp. 1587-1605.)

268. WakeMed provided ample documentation in its application to support its position that the people of Wake County need additional shared operating room capacity. As shown in Table 6A of the 2010 SMFP, and as reflected on WakeMed Exhibit 109, existing shared operating rooms in Wake County are operating at or near capacity. (Roberts, T. Vol. 1, pp. 199-200.) Based on the utilization data reported by existing facilities, shared operating rooms as a whole in Wake County are operating at 98% of capacity, while ambulatory operating rooms are operating at only 60% of capacity. When the available capacity of the additional ambulatory operating rooms that have been approved but not yet developed is factored in, the percentage of approved ambulatory operating room capacity that is utilized drops to only 38.2%. (*Id.*)

269. WakeMed's application contained information regarding WakeMed Cary Hospital's steady growth in surgical cases, including growth in inpatient surgical cases, since fiscal year 2008. (Joint Ex. 5 pp. 80-88.) Factors underlying this growth include the addition of 42 inpatient beds at the hospital, overall population growth in Wake County, and demographic factors such as the aging of the "Baby Boomer" generation, which is fueling an increase in demand for inpatient surgical services. (Joint Ex. 6 p. 86; Roberts, T. Vol. 1, pp. 112-17; WakeMed Ex. 111.)

270. In addition to its examination of historical data, WakeMed also provided a detailed and lengthy need methodology and analysis of market conditions that supported a finding that the future need for surgical services in Wake County will be for both ambulatory surgical services and inpatient surgical services, a need that cannot be met by ambulatory operating rooms. (Joint Ex. 5 pp. 36-57.) Compared to ambulatory operating rooms, only shared operating rooms can provide access to both inpatients and outpatients. (Wm Ex. 146; Roberts, T. Vol. 1, pp. 152-53; Smith, T. Vol. 3, p. 533; Sullivan, T. Vol. 4, p. 680; McKillip, T. Vol. 5, p. 1023.)

271. As noted by WakeMed in Section III of its application, "by adding the three shared operating rooms, optimum flexibility is achieved in meeting all of the current and future surgical needs of Wake County residents, whether they are ambulatory surgical patients or inpatient surgical patients." (Joint Trial Ex. 5 p. 80)

272. Rex argued in its written comments and at the hearing that WakeMed should have been found non-conforming to Criterion 3. Rex and HSSC both contend that the methodology used by WakeMed to project future utilization was flawed, resulting in overstated growth rates. (Joint Ex. 1 pp. 154-55, 159-63; Carter, T. Vol. 7, pp. 1573-75.) (Joint Ex. 1 pp. 314-16.)

273. Daniel Carter, an expert witness for Rex, testified that each step of the WakeMed utilization methodology was appropriate, but that he disagreed with the outcome of the methodology because he believed the use rates calculated as a result of the methodology were too high. (Carter, T. Vol. 6, pp. 1289-90.)

274. Mr. Carter agreed that a linear regression model, which was the statistical analysis tool used by WakeMed in its methodology, was generally an acceptable model to use in

constructing a need methodology. (Carter, T. Vol. 7, p. 1569.) Mr. Carter testified that WakeMed erred by failing to list the "coefficient of determination," or R^2 associated with the linear regression analysis, but conceded that the R^2 factor could be calculated based on the algebraic formulae provided by WakeMed on page 44 of its application. (Carter, T. Vol. 6, pp. 1294-96; Vol. 7, pp. 1577-78.) Mr. Carter conceded that WakeMed used a full five years of historical data as the basis for its projections of future utilization, in contrast with Rex's use of only three years of data. (Carter, T. Vol. 7, pp. 1569-70.)

275. WakeMed provided detailed calculations that showed the growth rate by county projected from the historical growth rate for that county. The growth rate varied by county and increased, decreased or remained flat based on the past historical trend; WakeMed did not inflate growth rates across the board. (Joint Ex. 5 p. 45; WakeMed Ex. 635.)

276. Both Rex and HSSC also contended that WakeMed's methodology should be found unreasonable and thus non-conforming to Criterion 3 due to WakeMed's use of Thomson data in its application. Nancy Bres Martin, a witness for HSSC, argued that Thomson data was unreliable because of inconsistencies in how certain procedures were classified as surgical or non-surgical procedures, and that WakeMed's use of Thomson data rendered its application non-conforming to Criterion 3 and on that basis alone, with Criteria 1 and 4. (Bres Martin, T. Vol. 8, pp. 1803-05, 1824; Vol. 12, pp. 2598-99; *see also* Carter, T. Vol. 7, pp. 1573-75.)

277. Thomson data is generated from the actual billing data for procedures performed at North Carolina facilities and is updated at various points throughout the year. (Carter, T. Vol. 7, pp. 1572-73.) Evidence at the hearing showed that Thomson data provides more current data and a greater level of detail than licensure renewal application data, which is compiled by the facility and self-reported by writing the information by hand on an annual form. (WakeMed Ex. 117; Roberts, T. vol. 1 pp. 132-34, 137-38; Carter, T. Vol. 7, pp. 1572-73.) WakeMed also provided as Attachment 15 extensive data showing each CPT code (standardized codes used in the health care industry to identify procedures for billing purposes) that was included in its methodology, as well as the non-surgical procedure CPT codes that WakeMed excluded from the Thomson data. (Joint Ex. 5 p. 404-26; Carter, T. Vol. 7, pp. 1571-72.)

278. Rex used Thomson data in its application and written comments, while Ms. Bres Martin acknowledged that she had used Thomson data in developing portions of the HSSC Application and HSSC's written comments referred to Thomson data, which undercuts the applicants' criticisms of WakeMed's reliance on Thomson data. (Roberts, T. Vol. 1, pp. 132-34; Carter, T. Vol. 7, pp. 1570-71; Bres Martin, T. Vol. 8, pp. 1797-98, Vol. 12, p. 2559.) Thomson data is also available to the Agency from the Sheps Center at UNC. (McKillip, T. Vol. 4, pp. 907-08; Smith, T. Vol. 5, pp. 1100-02; Roberts, T. Vol. 1, pp. 134-36; WakeMed Ex. 168.)

279. Mr. Smith testified that the Agency found WakeMed's use of Thomson data to be appropriate, given the extensive work put in by WakeMed to review every CPT code and remove from the analysis of surgical growth rates any non-surgical procedures. (Smith, T. Vol. 6, pp. 1160-61.)

280. Mr. Smith also acknowledged that Medicare provides coverage for certain services only if they are provided in a hospital-based setting. (Smith, T. Vol. 3, pp. 534-35.) Therefore, hospital shared operating rooms provide elderly Medicare beneficiaries with access to

surgical services that they cannot receive in an ambulatory surgical facility. Additionally, low income persons and other persons who do not have an existing relationship with a physician or surgeon can present to the hospital and receive services, including surgical services. (Smith, T. Vol. 3, p. 535; Sullivan, T. Vol. 4, pp. 680-83.) Such individuals can more easily access the surgical services provided by a hospital than by an ambulatory surgical facility. *Id.; see also* Findings of Fact 75-83, 154-183.)

281. WakeMed's application to add three shared operating rooms at WakeMed Cary Hospital identified the population to be served, demonstrated the need the population has is for three shared operating rooms, and demonstrated that all residents of the area, including low income persons and other medically underserved groups, would have greater access to surgical services provided in shared operating rooms.

282. The Agency's acceptance of WakeMed's need methodology and its projected growth rates was reasonable. HSSC and Rex failed to satisfy their burden of showing that the Agency's determination was without basis or erroneous.

283. The Agency appropriately determined that WakeMed's application was conforming to Criterion 3.

C. OTHER REVIEW CRITERIA:

284. In as much as Rex contends that WakeMed should have been found non-conforming to Criteria 1, 4, 5, 6, and 18a on the basis alone that WakeMed should have been found non-conforming to Criterion 3, and it is found that WakeMed was confoming to Criterion 3, then Rex's contentions are not supported and Rex has not carried it's burden.

285. Except as set forth above, HSSC's primary objection to the WakeMed application is HSSC's contention that WakeMed impermissibly amended it's application which is addressed below.

286. The Agency appropriately determined that WakeMed was conforming to Criteria 1, 4, 5, 6, and 18a.

287. Neither Rex nor HSSC have contended nor produced evidence that WakeMed's application was non-conforming to the remaining review criteria. Without setting forth the specific findings since they are not contested, it is found that there is substantial evidence to support the Agency's finding and WakeMed is found to be conforming with the review criteria as found by the Agency.

D. DID WAKE/MED IMPROPERLY AMEND ITS APPLICATION:

1. The Impact of the SCA Transaction on The WakeMed Application.

288. In their comments and at the hearing, HSSC and Rex contended that by entering into the business transaction with Surgical Care Affiliates ("SCA"), and Blue Ridge GP, LLC on April 1, 2010 ("the SCA Transaction") WakeMed impermissibly amended its application, that the application was incomplete and non-conforming to the statutory and regulatory review criteria and WakeMed had a duty to disclose the potential transaction in its application filed on February 15, 2010. (WakeMed Exs. 125 to 131, HSSC Exs. 420, 422, 424 to 428, 430; D. Carter, T. Vol. 8 pp. 1680-85; Freedy, T. Vol. 10 pp. 2165-68; Joint Ex. 1 pp. 138-39, 148-50, 179-80, 223-24, 305-06, 332-47.) The Agency considered and rejected these arguments and found that the WakeMed application conformed to the review criteria. (Joint Ex. 1 p. 1707; Smith, T. Vol. 3 pp. 469-76.)

289. The SCA Transaction involved: (1) separate agreements between WakeMed and SCA concerning the provision of management services to the surgery departments of WakeMed Cary and another WakeMed facility; and (2) agreements among SCA, WakeMed and the Blue Ridge limited partners concerning WakeMed's purchase of an ownership interest in the general partner of Blue Ridge Day Surgery Center, L.P., the limited partnership that owns and operates Blue Ridge Surgery Center. (WakeMed Exs. 125-131, HSSC Exs. 420, 422, 424-428, 430; Taylor, T. Vol. 2 pp. 350-52.)

2. WakeMed's Confidential Negotiations with SCA.

290. SCA and WakeMed began exploring opportunities for SCA and WakeMed to form a partnership in which WakeMed would obtain an interest in the Blue Ridge Surgery Center during the fall of 2009. (Taylor, T. Vol. 2 pp. 338-41.)

291. SCA and WakeMed entered into a letter of understanding on or around October 5, 2009. (*Id.*, pp. 336-42.) The letter of understanding required both parties to keep confidential their discussions and information the parties may chose to share with each other. This letter did not set out any binding terms other than to keep information and discussions confidential. (WakeMed Ex. 124; HSSC Ex. 423; Taylor, T. Vol. 2 pp. 336-42.)

292. After executing the letter of understanding, WakeMed and SCA began exchanging information and discussing possible ways they could work together, but negotiations did not occur until months later. (Taylor, T. Vol. 2 pp. 339-46.)

293. A memorandum dated January 15, 2010 was presented to the Finance Committee of WakeMed's Board of Directors at its meeting on January 21, 2010 and requested permission to negotiate a potential transaction with SCA and Blue Ridge within certain defined parameters. (WakeMed Ex. 125, p. WM-Cary 022224; Taylor, T. Vol. 2 pp. 344-47.) The Finance Committee recommended that WakeMed management be permitted to negotiate a possible transaction with SCA and Blue Ridge up to a defined dollar threshold for acquisition of an interest in Blue Ridge Surgery Center and for SCA to provide management services to certain surgery departments of WakeMed on the condition that any management fee to be paid to SCA must be offset by cost reductions to WakeMed in such surgery department. (WakeMed Ex. 125, p. WM-Cary 022224; Taylor, T. Vol. 2 pp. 344-47.)

294. At its meeting on February 2, 2010, the WakeMed Board of Directors considered and approved the recommendation of the Finance Committee and authorized WakeMed

management to negotiate with SCA and Blue Ridge within the parameters and on the conditions stated by the Finance Committee. There was no agreement with SCA and Blue Ridge at the time of the February 2, 2010 WakeMed Board of Directors' meeting, and the WakeMed Board of Directors did not finalize a transaction with SCA or Blue Ridge at the time of that meeting. (WakeMed Ex. 125, WM-Cary 022224; Taylor, T. Vol. 2 pp. 346-47.)

295. WakeMed and SCA did not begin negotiating the language of the potential agreements in earnest until late February or March 2010. (WakeMed Exs. 122, 133, 136 to 138; Taylor, T. Vol. 2 pp. 352-58.)

296. At the time the CON applications in this case were filed, on or about February 15, 2010, WakeMed had not entered into any transaction, WakeMed had no certainty that a transaction would occur, and confidential negotiations were ongoing. (*Id.* pp. 354-55.)

297. The limited partners of Blue Ridge Day Surgery Center LP expressed reservations regarding the proposed transaction and negotiated for certain conditions and provisions in any agreement. The limited partners did not vote to agree to the proposed transaction with WakeMed until March 15, 2010, well after the CON applications were filed. (WakeMed Exs. 132-133, 136; Taylor, T. Vol. 2 pp. 353-357.)

298. Evidence substantiates that the parties were negotiating the terms of the agreement until a matter of hours before the documents were finalized and signed on March 31, 2010 to be effective April 1. (WakeMed Exs. 132, 133, 136 to 138.)

3. The Agency Had Access to the SCA Transaction Information During its Review.

299. Well before the CON's were filed, WakeMed issued a press release with SCA's approval on October 29, 2009 stating that it was exploring the possibility of working with SCA. The press release indicated that possible collaborations between the parties might include WakeMed's acquisition of a stake in the Blue Ridge Surgery Center and SCA's provision of certain surgical management services to WakeMed. (Joint Ex. 1 p. 338; Taylor, T. Vol. 2 pp. 342-43.) The press release and subsequent news articles about the possibility of an arrangement between WakeMed and SCA were available to the Agency, and were included with the written comments submitted by HSSC and Rex to the Agency. (Joint Ex. 1 pp. 223-24, 332-47.)

300. In late March 2010, when it became apparent that the SCA transaction might occur, WakeMed issued a press release and media outlets published stories stating that (1) WakeMed was purchasing a controlling interest in the general partnership that operates the Blue Ridge Surgery Center, which would be jointly owned by WakeMed, SCA, and physician partners; and (2) WakeMed and SCA were entering into a surgical management services agreement whereby SCA would manage surgical services at WakeMed Cary Hospital. (*Id.* 1 pp. 332-37.) The Agency was aware of this information during the review. (*Id.* 138-39, 148-50, 179-80, 223-24, 305-06, 332-47; Smith, T. Vol. 3 pp. 469-73.)

301. WakeMed's response to written comments and public hearing documents, which also included statements by SCA stated that WakeMed and SCA would abide by the

representations in the CON application and the SCA Transaction would not cause any material change. (*Id.* 1 pp. 488-89, 495-501, 504; Smith, T. Vol. 3 p. 472.)

4. WakeMed had no Duty to Disclose Information about Confidential Negotiations with SCA in its Application.

302. HSSC and Rex contend that WakeMed had a duty to disclose the uncertain, confidential negotiations about a potential business transaction with SCA in the WakeMed application. (Freedy, T. Vol. 10 pp. 2165-66; D. Carter, T. Vol. 8 pp 681-82.)

303. No statute, regulation, or even guidance from the CON Section requires applicants to disclose information about confidential negotiations concerning potential business transactions that may or may not come to fruition on a CON application, which is a public document. (Freedy, T. Vol. 11 p. 2380.)

304. Project Analyst Michael McKillip testified that applicants have no duty to disclose confidential negotiations that may or may not result in a future business transaction on their CON applications. (McKillip, T. Vol. 5, pp. 1009-10.)

305. Stan Taylor, Vice President, Corporate Planning and Managed Care of WakeMed, who was primarily responsible for negotiating with SCA and Blue Ridge, testified that whether the transaction would occur was not certain until the agreements were signed on March 31, 2010. (Taylor, T. Vol. 2 pp. 352-57.)

306. The CON Section is a public agency whose records and communications are governed by the public records law. *See* N.C. Gen. Stat. § 132-1. Mr. Taylor also testified that the confidentiality provision in the letter of understanding remained in effect until the agreement was finalized and WakeMed did not have permission from SCA to disclose information concerning the potential transaction, other than as stated in the press releases contained in the Agency File. (*Id.* pp. 339-42.)

307. HSSC witness Barb Freedy's contention that WakeMed had a "duty" to disclose the ongoing negotiations with SCA and Blue Ridge, despite the confidentiality agreement and despite the fact that the parties were still negotiating with no guarantee of reaching an agreement is not supported by other HSSC witnesses and other credible evidence. (Freedy, T. Vol. 10, p. 2151.)

308. Ms. Freedy admitted that HSSC does not recognize any such duty when preparing its own applications. (Freedy, T. Vol. 11, pp. 2430-31.) Ms. Freedy acknowledged that HSSC does not have a policy to include information about ongoing, confidential business negotiations in a CON application. (*Id.*, pp. 2430-31)

309. No evidence was presented of any prior Agency Decision determining that an applicant had a duty to disclose ongoing, confidential business negotiations in a CON application where an agreement had not been finalized and failed to do so.

310. There is substantial evidence to show that the nature, cost, and control over the project proposed in the application would remain the same. (Taylor, T. Vol. 2, pp. 358-69; WakeMed Exs. 125, 140, 142.)

5. The Agency Properly Found That WakeMed Did Not Amend its Application

311. 10A N.C.A.C. 14C.0204 prohibits applicants from amending their certificate of need applications. However, the regulation does not define what constitutes an amendment, nor does it specify the consequences if an applicant is considered to have amended its application. The Hoffman memo referenced above speaks to amendments but is of no consequence to the issue for WakeMed.

312. No statute discusses the amendment of CON applications or defines the term "amendment." The CON Act simply provides that a CON "shall be valid only for the defined scope, physical location, and person named in the application," N.C. Gen. Stat. § 131E-181(a), and directs the Agency to establish, through its rules, "schedules for submission and review of completed applications" that "shall provide that applications for similar proposals in the same service area will be reviewed together." N.C. Gen. Stat. § 131E-182(a). The CON Act also requires an applicant to materially comply with representations in its application. N.C. Gen. Stat. § 131E-189. (See Finding of Fact 231 above for definition of "amend.")

313. There is no evidence of any written Agency policy or guideline on what constitutes amending an application or the consequences, if any, if an applicant is considered to have attempted to amend its application.

314. CON Section Chief Craig Smith defined an amendment to a CON application as the submission of information after the application filing deadline that changes the conformity of the application with the review criteria. When an applicant submits information after the filing deadline, the Agency typically will not consider the late information to avoid having an impermissible amendment. (Smith, T. Vol. 3, pp. 568-76.)

315. The SCA Transaction did not change the accuracy of WakeMed's responses to Sections I.6 and I.10(c) of the application, which request the identity of the owner and manager of the *facility*. WakeMed remains the owner and manager of the facility, WakeMed Cary Hospital. The SCA Transaction concerns only the surgery department of WakeMed Cary Hospital, not the entire hospital. (Joint Ex. 5 p. 3; Taylor, T. Vol. 2 p. 361)

316. Mr. Taylor testified to an extensive list of factors, based on information available to the Agency during its review that remained the same following execution of the agreements between WakeMed and SCA and was not controverted by the parties. (Taylor, T. Vol. 2, pp. 363-69.)

317. The evidence at trial corroborated the information before the Agency at the time of the review that SCA committed to reduce the average adjusted cost per surgical case, and represented that the resulting cost savings would offset the management fee paid to SCA, to abide by all state and federal laws, including the CON Act and to comply with representations in

WakeMed's application. (Joint Ex. 1 p. 504; WakeMed Exs. 140, 141; Taylor, T. Vol. 2, pp. 345, 347-48, 358-62, 364-69.)

318. Neither HSSC nor Rex presented any facts concerning the SCA Transaction that differed from the facts available to the Agency during the review, that would change the representations in the application, or that showed WakeMed's application did not conform with any applicable criteria.

319. Mr. Smith testified that a certificate of need is valid for the scope, location, and person named in the application. (Smith, T. Vol. 3, p. 475.) Mr. Smith and Mr. McKillip reviewed and considered the written comments and attachments thereto, including the *Presbyterian-Orthopedic* case; the press releases and newspaper articles; the public hearing comments; and WakeMed's response to comments. (Smith, T. Vol. 3, pp. 470-79; McKillip, Vol. 5, pp. 1008-10.) The Agency determined that WakeMed's application was complete and the SCA Transaction did not change the scope, location, person named or representations in the WakeMed's application. (Joint Ex. 5 p. 3; Smith, T. Vol. 3 pp. 473-74.)

320. The Agency properly found that WakeMed did not improperly amend its application.

E. THE TYPE OF OPERATING ROOMS NEEDED BY WAKE COUNTY: SHARED v. AMBULATORY OR's:

321. Of primary concern in the WakeMed application is whether or not the Agency should have evaluated the type of operating rooms, and the Agency's failure to do so was error.

322. In enacting the Certificate of Need program, the legislature determined:

> That the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria as determined by provisions of this Article or by the North Carolina Department of Health and Human Services pursuant to provisions of this Article prior to such services being offered or developed in order that *only appropriate and needed institutional health services are made available in the area to be served.*

N.C. Gen. Stat. § 131E-175(7) (emphasis added).

323. Using mandatory language, the legislature directed that "the Department *shall* review all applications utilizing the criteria outlined in this subsection and 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." N.C. Gen. Stat. § 131E-183(a) (emphasis added). The Agency is required to make the determinations under each of the applicable review criteria

for each application and cannot choose to ignore an applicable criterion in whole or in part. *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 386, 455 S.E.2d 455, 461 (1995); *Presbyterian-Orthopaedic Hospital v. N.C. Dep't of Health and Human Res.*, 122 N.C. App. 529, 534, 470 S.E.2d 831, 834 (1996) (noting that an application must conform to the review criteria).

324. Criterion 3 requires that 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." N.C. Gen. Stat. § 131E-183(a)(3).

325. Criterion 3 therefore requires the Agency to determine whether the "services proposed" by the applicant meet "the need that this population has for the services proposed." As the State agency created to carry out the purpose and requirements of the CON Act, it was the responsibility of the Agency to evaluate which surgical services proposal would best meet the need of Wake County patients. *Id.*

326. Mr. McKillip acknowledged at trial that the Agency has a duty to determine what specific services are needed by the population to be served, and that the focus should be the needs of patients, not the needs of the applicant. (McKillip, T. Vol. 5, pp. 1070-71.)

327. Mr. Smith agreed that the Agency is responsible under Criterion 3 for determining whether the services proposed by the applicant meet the needs of the population to be served. (Smith, T. Vol. 3, pp. 480-81.)

328. N.C. Gen. Stat. § 131-186(b) requires the Agency to "provide written notice of all the findings and conclusions upon which it based its decision, including the criteria used by the Department in making its decision, to the applicant." (emphasis added) All the findings and conclusions upon which the Agency relies must therefore be stated in the Required State Agency Findings ("Agency Findings").

329. The Agency Findings dated July 28, 2010 do not include any analysis or finding of whether the Wake County population had a need for shared, hospital based ambulatory or freestanding ambulatory operating rooms. (Joint Ex. 1 pp. 1581-1710.)

330. The work papers in the Agency File do not contain any information or analysis concerning whether the Wake County population had a need for shared, hospital based ambulatory, or freestanding ambulatory operating rooms. (Joint Ex. 1 pp. 902-1580.)

331. Neither Mr. McKillip nor Mr. Smith could point to any documentation of analysis by the Agency of the type of operating room needed by the Wake County population. (Smith, T. Vol. 3, pp. 479-80; McKillip, T. Vol. 5, pp. 1010-11.) Mr. McKillip and Mr. Smith admitted that they had not done any such analysis. (McKillip, T. Vol. 5, p. 1010; Smith, T. Vol. 3, pp. 496-97.)

332. The Agency had available to it the 2010 SMFP as well as the underlying licensure renewal application data showing the utilization of existing shared operating rooms versus

existing ambulatory operating rooms in Wake County. The Agency also had available to it information regarding its approval of additional ambulatory surgical facilities in Wake County. (Smith, T. Vol. 3, pp. 493-96; T. Vol. 6, pp. 1180-81.)

1. *Need for Shared Operating Rooms in Wake County*

333. The 2010 SMFP included a determination that three operating rooms were needed in Wake County and that applications for such rooms must be filed by February 15, 2010. (Joint Ex. 22 p. 81.) Unlike the single specialty ambulatory surgery facility demonstration project, however, the SMFP did not determine the type of operating room needed in Wake County and left it to the applicants to submit proposals and to the Agency to determine during the review the type of operating room needed. (Joint Ex. 22 p. 81.)

334. WakeMed contends that the population of Wake County will best be served and needs met by additional shared operating rooms.

335. A shared operating room in a hospital is accessible to and can serve a much larger group of patients than can a dedicated ambulatory operating room in an ambulatory surgical facility. A hospital shared operating room can accommodate both outpatients and inpatients, as well as routine, scheduled procedures and emergency procedures. Because hospitals generally have a broad range of specialists on staff, the types of procedures offered in shared operating rooms are not as constrained as at ambulatory surgical facilities. Furthermore, any patient in need of surgical services can access shared operating rooms by presenting to the hospital emergency department. (WakeMed Ex. 146; Sullivan, T. Vol. 4, pp. 680-83; McKillip, T. Vol. 5, pp. 1023-25; Smith, T. Vol. 3, pp. 533-35.)

336. The SMFP also contained data regarding the types of existing operating rooms in Wake County and the utilization of such rooms for fiscal year October 1, 2007 through September 30, 2008, as reported in the 2009 Hospital and Ambulatory Surgical Facility License Renewal Applications. (Joint Ex. 22.)

337. The Agency had available to it during the review SMFPs and licensure renewal application forms from past years that contained comparable operating room inventory and utilization information. (Joint Ex. 1 pp. 913-93; McKillip, T. Vol. 5, pp. 1102, 1110-11; Smith, T. Vol. 3, pp. 478, 485, 493-96; T. Vol. 6, pp. 1180-81; Sullivan, T. Vol. 4, p. 857.)

338. Mr. Smith confirmed that sixteen (16) operating rooms were upgraded for development in ambulatory surgical facilities that were approved by the Agency and are currently under development, eight (8) of which are brand-new ambulatory operating rooms. (Smith, T. Vol. 3, p. 493.)

339. At the time of the review, data in the SMFPs available to the Agency showed that existing ambulatory operating rooms had significant available capacity, while existing shared operating rooms were at or above practical capacity using the threshold of 1,872 procedures per year used in the SMFP for triggering the need for a new operating room. (WakeMed Ex. 109.)

340. The data showed that from fiscal years 2007 to 2009, utilization of shared operating rooms ranged from 99 to 107 % of the SMFP need threshold, whereas utilization of

ambulatory operating rooms during the same time period was only 60 to 61 %. (WakeMed Ex. 631.)

341. Similarly, licensure renewal data and information in the annual SMFPs available to the Agency at the time of the review demonstrated that, in North Carolina as a whole, hours per operating room per year ranged from 1,849 in fiscal 2007 to 2,006 in fiscal year 2009 for shared operating rooms, whereas ambulatory operating rooms were utilized at only 1,115 to 1,149 hours per year during the same time period. (WakeMed Ex. 630.)

342. Despite available capacity in ambulatory rooms, utilization of shared operating rooms continued to increase while utilization of ambulatory operating rooms remained flat in Wake County. (Roberts, T. Vol. 1, pp. 129-30; WakeMed Exs. 630, 631.)

343. Mr. Smith acknowledged that data showed that Wake County patients and physicians were choosing to receive and provide care in the hospital setting. (Smith, T. Vol. 3, p. 534; *see also* Roberts, T. Vol. 1, p. 112.)

344. WakeMed's application included discussion and data that showed the population of Wake County was aging and that the number of inpatient cases materially increased in comparison to outpatient surgeries with the ageing of the population. (WakeMed Ex. 628; Joint Ex. 5 pp. 83-88.)

345. Despite the amount of information and data presented to the Agency concerning the utilization of shared versus ambulatory operating rooms, the Agency did not analyze which type of operating room was needed by the Wake County population.

2. Consideration of Scope of Services Under Criterion 3

346. Evaluation of the need that the population has for the services proposed, as required by Criterion 3, must also include an analysis of the scope of services proposed and the scope of patient conditions that can be addressed by the applicant. (Sullivan, T. Vol. 4, p. 685; Smith, T. Vol. 6, p. 1220.)

347. Table 6A in the SMFP lists eleven existing or approved surgical providers for Wake County. Seven of the providers (Orthopaedic Surgery Center of Raleigh, Blue Ridge Surgery Center, Raleigh Plastic Surgery Center, Raleigh Women's Health Organization, Rex Surgery Center of Cary, and WakeMed Apex Day Surgery Center) are ambulatory surgical facilities. The remaining four providers (Duke Health Raleigh Hospital, Rex Hospital, WakeMed Raleigh Hospital, and WakeMed Cary Hospital) are hospital providers. (*Id.* pp. 65-66; Roberts, T. Vol. 1 pp. 122-24; Joint Ex. 1 p. 116.)

348. In addition to the seven existing or approved ambulatory surgical facilities listed in the 2010 SMFP at the time of the review, the CON Section had also approved the development of Rex Wakefield, Rex Macon Pond and WakeMed Raleigh Surgery Center, ambulatory surgical facilities in Wakefield and in Raleigh. (Roberts, T. Vol. 1 p. 124; Joint Ex. 1 p. 116.)

349. Shared operating rooms provide access to patients with a greater variety of conditions that need a broader range of procedures than ambulatory operating rooms. (Sullivan, T. Vol. 4, pp. 680-83; Roberts, T. Vol. 1, pp. 154-55; Smith, T. Vol. 3, pp. 533-36, 548; McKillip, T. Vol. 5, pp. 1023-25; Daniel Carter, T. Vol. 7, pp. 1585-86.)

350. The Agency findings did not contain any analysis or discussion of the types of procedures that could be performed and the variety of patient conditions that could be addressed in shared versus ambulatory operating rooms. (Joint Ex. 1 pp. 1459-1710.)

351. The work papers in the Agency File did not contain any analysis related to the types of procedures and the types of patient conditions that could be addressed in a shared or an ambulatory operating room. (Joint Ex. 1 pp. 902-1580.)

352. The Agency witnesses confirmed that they had not analyzed the range of procedures or the types of patient conditions that could be addressed in a shared or ambulatory operating room during the review of the applications. (McKillip, T. Vol. 5, pp. 1010-11; Smith, T. Vol. 3, pp. 480, 497-98.)

353. Despite not making a specific analysis between shared and ambulatory operating rooms, the Agency was able to determine "the need that this population has for the services proposed" in regards to each application. The Agency did not err by not making an analysis between shared and ambulatory operating rooms as applied to the statutory review criteria. (Emphasis added)

IV. REX APPLICATION:

354. The Agency determined that Rex's application to construct a new ambulatory surgical facility in Holly Springs with two dedicated ambulatory operating rooms was conforming to all applicable statutory and regulatory review criteria.

355. The Agency determined that Rex's application to add one shared operating room at its main hospital campus was conforming to all applicable statutory and regulatory review criteria.

356. The Agency found that Rex's ambulatory surgical facility application and the application at the main hospital were conforming to Criteria 1, 3, 4, 5, 6, 7, 8, 12, 13a, 13b, 13c, 13d, 14, 18a, and 20, and with the regulatory criteria at .2102(b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), (b)(8), (b)(9); .2103(a), (b)(1), (c), (g); .2104(a), (b); .2105(a), (b), (c); .2106(c). The Agency found all other statutory and regulatory criteria not applicable to the Rex applications. (Joint Ex. 1 pp. 1581-1703.)

A. CRITERION 1

357. Criterion 1 requires the Agency to determine that the proposed project is "consistent with applicable policies and need determinations in the State Medical Facilities Plan." N.C. Gen. Stat. § 131E-183(a)(1). (Joint Ex. 1, p. 1581.)

358. The 2010 SMFP identified a need for three operating rooms in Wake County. Rex contends that the need in the SMFP was generated by the historical and projected volume for Rex and that if Rex does not qualify for operating rooms, then no one does. (Carter, T. Vol. 6, p. 1241)

359. The Agency found Rex's Holly Springs Application conforming to Criterion 1, which requires that a "proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan." The Agency found that Rex adequately demonstrated that its proposal incorporated the principles of Policy Gen-3, cost-effectiveness, quality, and access to services, in meeting the needs of patients to be served. (Jt. Ex. 1, pp. 1584-1586)

360. The Agency found Rex's Raleigh Application conforming to Criterion 1. The Agency found that Rex adequately demonstrated that its proposal incorporated the principles of Policy Gen-3, cost-effectiveness, quality, and access to services, in meeting the needs of patients to be served. (Jt. Ex. 1, pp. 1584-1586)

361. WakeMed contends that the Agency did not evaluate whether the addition of more dedicated ambulatory operating rooms would promote equitable access, maximize health care value, or address the needs of all Wake County patients in light of existing Wake County ambulatory operating rooms and the ambulatory surgical facility projects under development that will incorporate 16 more ambulatory operating rooms; and therefore the Rex Holly Springs application was non-conforming to Criterion 1 and Policy GEN-3. (Joint Ex. 1, pp. 1584-85; Smith, T. Vol. 3, pp. 479-80; 492; 497; 548; McKillip, T. Vol. 5, pp. 1010-11.)

362. WakeMed also contends that the Agency also did not consider Rex's high total capital costs or high total capital costs per operating room, which demonstrated that its proposals would not maximize health care value. (Joint Ex. 1, pp. 1584-85; *see* Findings of Fact 594 to 599.)

363. Wake also contends that, as discussed above, there are significant differences in the access and scope of services provided by shared operating rooms when compared to dedicated ambulatory operating rooms.

364. Central to HSSC's argument is the prudence of Rex closing minor procedure rooms and attempting to replace them with operating rooms.

365. There is substantial credible evidence that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 1.

B. CRITERION 3

366. Criterion 3 requires that 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." N.C. Gen. Stat. § 131E-183(a)(3).

367. 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.

368. The Agency found that both the Rex Holly Springs Application and the Rex Raleigh Application adequately identified the population to be served by the proposed project and demonstrated the need that population has for the services it proposes and were conforming with Criterion 3. (Jt. Ex. 1, pp. 1609-1629).

369. Rex's methodology used to project utilization in both applications was conservative and reasonable. Rex projected that future growth rate would match Rex's aggregate growth rate for surgery cases and remain the same as the historical growth rate. (Carter, T. Vol. 6, pp. 1251-1252)

370. In both of Rex's Applications, Section III and portions of Section IV explained how (1) Rex's historical surgical volumes generated the need for three Wake County operating rooms; and (2) other existing Wake County surgical providers have a net surplus of operating rooms. (Carter, T. Vol. 6, pp. 1253-1254)

371. The overall need in Wake County for operating rooms was listed in the SMFP as 3.24 operating rooms. Since there were other facilities with surpluses of operating rooms in Wake County, the need was reduced to three (3) operating rooms. Rex contends that it has a need for nine (9) operating rooms. (Carter, T. Vol. 6, p. 1254)

372. HSSC and WakeMed contend that Rex improperly used or counted surgical cases that had been performed historically in its procedure rooms. (Carter, T. Vol. 6, p. 1254)

373. In addition, HSSC and WakeMed alleged that Rex has underutilized facilities or capacity available at existing facilities such as Rex Cary and Rex Wakefield. (Carter, T. Vol. 6, p. 1254)

374. WakeMed contends that the Agency failed to analyze or acknowledge the need the population of Wake County as a whole, and in particular as applicable in Criterion 3 low income persons, the elderly, and other underserved groups, had for shared ambulatory operating rooms as opposed to free standing ambulatory operating rooms. WakeMed further contends that the Agency also did not analyze or acknowledge the access constraints that may be caused by existing shared operating rooms operating at or near capacity, or whether it was reasonable to

add more ambulatory operating room capacity when existing ambulatory rooms are operating well below capacity. (Joint Ex. 1, pp. 1609-29.)

375. HSSC primarily questions the propriety of Rex's decision to close four minor procedure rooms and to replace them with operating rooms. (Sullivan T. Vol. 5 at 755-61; Bres Martin T. Vol. 8 at 1838-39). HSSC contends that Rex provided unsupported statements and failed to document the need to close the four minor procedure rooms, and that the Agency did not address the importance of Rex's decision to close its minor procedure rooms in the Agency Findings.

376. The procedure room surgery cases that were used in Rex's methodology were reported on Rex's annual License Renewal Applications. (Carter, T. Vol. 6, pp. 1254-1255)

377. The State's 2009 Licensure Renewal Application form instructed Rex to count all surgical cases, including cases performed in procedure rooms or other locations. (Jt. Ex. 1, 962; Carter, T. Vol. 6, p. 1257)

378. The 2010 SMFP was based upon the same information collected from the Licensure Renewal Applications. (Rex Ex. 209, p. 73; Carter, T. Vol. 6, p. 1259)

379. Rex was proposing to perform those surgery cases in operating rooms in the future rather than in its minor procedure rooms. (Carter, T. Vol. 6, p. 1255) Rex did not inflate its growth rate by using those surgical procedures performed in minor procedure rooms because it will be performing them in operating rooms in the future (Carter, T. Vol. 6, p. 1256)

380. Rex contends that it's reported surgical volumes helped drive the need in the 2010 SMFP, and to criticize its use of procedure room volume was to undermine the finding of need in the SMFP which all applicants were applying to meet. (Joint Ex. 1, p. 586; Carter, T. Vol. 6, pp. 1255-57; D. Carter, T. Vol. 8, pp. 1688-89.)

381. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 3.

C. CRITERION 4

382. Criterion 4 requires the Agency to determine that "where alternative methods of meeting the needs for the proposed project exist, the applicant [has demonstrated] that the least costly or most effective alternative has been proposed." N.C. Gen. Stat. § 131E-183(a)(4)

383. The Agency found that both the Rex Holly Spring Application and the Rex Raleigh Application were conforming with Criterion 4. (Jt. Ex. 1, p. 1657).

384. WakeMed contends that Rex was nonconforming to Criterion 4 on the theory that Rex should have continued performing cases in Rex's procedure rooms rather than closing the procedure rooms and applying for the three new operating rooms.

385. Rex's Applications were clear in explaining why the continued use of procedure rooms as opposed to new operating rooms was not the best alternative. (Jt. Ex. 3, p. 77; Carter, T. Vol. 6, p. 1278)

386. The SMFP's need methodology considers all surgery cases without regard to location. Rex agrees that the optimal place to do the surgeries is in operating rooms; however, Rex has been forced to perform many surgical cases in procedure rooms due to capacity constraints, resulting from greater demand for Rex's surgical services. (Carter, T. Vol. 6, pp. 1278-1279)

387. Mr. McKillip testified that if an applicant's utilization projections analyzed under Criterion 3 are unreasonable, the applicant would also be found non-conforming to Criterion 4. (McKillip, T. Vol. 5, pp. 1116-17.) Rex is found to have conformed to Criterion 3 and on that basis would be conforming to Criterion 4.

388. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 4.

D. Criterion 5

389. Criterion 5 requires the Agency to determine that financial and operational projections for the project "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." N.C. Gen. Stat. § 131E-183(a)(5).

390. The Agency found that the Rex Holly Springs Application adequately demonstrated the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal and was conforming to Criterion 5. (Jt. Ex. 1, pp. 1609-1629).

391. The Agency found that the Rex Raleigh Application adequately demonstrated the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal and was conforming to Criterion 5. (Jt. Ex. 1, pp. 1629-1643)

392. WakeMed basically contends that Rex should have been found non-conforming to Criterion 5 because of it's nonconformity to Criterion 1 and/or Criterion 3; however, since Rex is found to be conforming to Criteria 1 and 3, this argument is without foundation.

393. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 5.

E. CRITERION 6

394. Criterion 6 requires the Agency to determine that the applicant demonstrated "that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C. Gen. Stat. § 131E-183(a)(6).

395. The Agency found that both the Rex Holly Springs Application and the Rex Raleigh Application would not result in unnecessary duplication and were conforming with Criterion 6. (Jt. Ex. 1, p. 1663).

396. WakeMed contends that the Rex Holly Springs Project will unnecessarily duplicate Harnett Health System, which is managed by WakeMed. The Agency had already approved development of three new operating rooms at Harnett Health System in Lillington that are not yet operational. (Joint Ex. 1, p. 125; *see also* Roberts, T. Vol. 1, p. 161.) The Agency did not consider these three operating rooms in its analysis under Criterion 6. (Joint Ex. 1, p. 1663.) Harnett County is in a different health care service area.

397. Rex Holly Springs projected that 17.8 % of its total cases would originate in Harnett County where Harnett Health System would be located. (Joint Ex. 1, p. 125.)

398. The patients that Rex projected would be treated at Rex Holly Springs were already existing patients of Rex that lived in that service area. (Carter, T. Vol. 6, pp. 1271-1272)

399. Rex developed its service area by looking at zip codes in southern Wake County and northern Harnett County and a few in Johnston County, which were the zip codes for patients who were coming to Rex's main campus. Rex already had a pattern of patients being referred to Rex regardless of location (Carter, T. Vol. 6, p. 1273)

400. Since such patients were already coming to Rex Hospital from those zip codes, Rex believed it was reasonable that some portion of those patients would remain closer to home and go to Rex Holly Springs instead of Rex Raleigh for services. (Carter, T. Vol. 6, p. 1274)

401. Rex's overall surgical volume projections are matched to the patients from the service area and many patients from that service area that are coming to Rex Hospital for services. (Carter, T. Vol. 6, pp. 1274-1275)

402. WakeMed alleges that the Rex Holly Springs Application "gerrymandered" its service area to exclude Rex Cary and WakeMed Cary.

403. Rex's Holly Springs Application explains how Rex showed its need for additional surgery services in Holly Springs by shifting those cases that are already coming to Rex Hospital back to Holly Springs. (Jt. Ex. 2, pp. 72-75)

404. The Rex Holly Springs Application shows the specific zip codes of the patients that would likely be treated at Rex Holly Springs and Rex conservatively assumed that not all patients from all of those zip codes could come to the new facility to the same degree. (Carter, T. Vol. 6, pp. 1275-1276)

405. In addition, WakeMed contends that Rex would be unnecessarily duplicating its existing Wakefield and Cary facilities, which have been historically less utilized than Rex Raleigh.

406. Rex's Wakefield facility is new and is still increasing its volume and is projected to be fully utilized by its third year of operation. (Carter, T. Vol. 6, p. 1283)

407. Rex's application contained representations that certain physicians had bought an ownership interest in Rex Cary, and, therefore, Rex Cary will also become full utilized since physicians will be transferring their patients from non-Rex facilities to Rex Cary for services. (Carter, T. Vol. 6, p. 1283)

408. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 6.

F. CRITERION 12

409. Criterion 12 requires the Agency to determine for projects involving construction that the applicant demonstrated "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" and that the project incorporates "applicable energy saving features." N.C. Gen. Stat. § 131E-183(a)(12).

410. The total capital cost of the Rex Holly Springs project was $7,586,384 ($3,793,193 per operating room). (Joint Ex. 1, p. 1659) Combined, the Rex projects total $8,730,169 or $2,910,056 per operating room. (Joint Ex. 1, pp. 1659, 1660.) Rex projected the highest total capital cost of any applicant. (Joint Ex. 1, pp. 1657-63.) In contrast, WakeMed projected capital costs of $1,955,951 per operating room. (Joint Ex. 1, p. 1657.)

411. The Agency correctly evaluated the applicants' compliance with Criterion 12 in terms of whether the "cost, design, and means of construction proposed" represented the most reasonable alternative for the individual applicant. (Joint Ex. 1, pp. 1668-69.)

412. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 12.

G. CRITERION 13a

413. Criterion 13a requires the Agency, in order to determine the extent to which the proposed service will be accessible, to find that the applicant demonstrated "the extent to which medically underserved populations currently use the applicant's existing services in comparison to the percentage of the population in the applicant's service area which is medically underserved." N.C. Gen. Stat. § 131E-183(a)(13)a.

414. In evaluating applicants' conformity with Criterion 13a, the Agency evaluated the applicants' payer mix percentages. (Joint Ex. 1, pp. 1669-70, 1671.) The Agency did not evaluate the charity care provided by the applicants, either in terms of total dollars or percentages.

415. WakeMed contends that it provides more charity care to Wake County residents than does Rex and that Rex does not provide a proportionate share of care to the medically underserved in Wake County; and, therefore, Rex failed to demonstrate conformity with Criterion 13a.

416. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 13a.

H. CRITERION 13d

417. Criterion 13d requires the Agency, in order to determine the extent to which the proposed service will be accessible, to find that the applicant demonstrated "that the applicant offers a range of means by which a person will have access to its services. Examples of a range of means are outpatient services, admission by house staff, and admission by personal physicians." N.C. Gen. Stat. § 131E-183(a)(13)d.

418. The Agency made a single finding of conformity applicable to all parties: "In Section VI.9 of the application, all applicants state that patients will have access to the services offered by a range of means, including physician referral." (Joint Ex. 1, p. 1675.)

419. WakeMed contends that in finding all applicants equally conforming to Criterion 13d, the Agency did not analyze or acknowledge the various means of access provided by hospital shared operating rooms as opposed to ambulatory surgical facility operating rooms. (Joint Ex. 1, p. 1675.)

420. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 13d.

I. CRITERION 18a

421. Criterion 18a requires the Agency to determine that the applicant demonstrated "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." N.C. Gen. Stat. § 131E-183(a)(18a).

422. The Agency found the Rex Holly Springs application conforming to Criterion 18a. (Joint Ex. 1, p. 1677.) WakeMed contends that the Agency failed to acknowledge or

analyze the impact of the excess ambulatory operating room capacity that already exists in Wake County.

423. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with Criterion 13d.

J. OTHER REVIEW CRITERIA

424. Subsection (b) of N.C. Gen. Stat. § 131E-183 provides that the Agency may "adopt rules for the review of particular types of applications that will be used in addition to those criteria outlined in subsection (a) of this section."

425. The rules at 10A N.C.A.C. 14C.2100, "Criteria and Standards for Surgical Services and Operating Rooms" are applicable to certificate of need applications proposing the development of operating rooms.

426. The Agency applied the rules at 10A N.C.A.C. 14C.2100 to the Rex Holly Springs application, and found Rex conforming to all applicable rules. (Joint Ex. 1, p. 1679.)

1. 10A N.C.A.C. 14C.2102(b)(3)

427. HSSC and WakeMed claim that Rex is nonconforming to 10A N.C.A.C. 14C. 2102(b)(3), alleging that Rex did not properly show the number of surgical cases as required by this rule.

428. The Agency properly found both Rex Applications conforming with this rule because Rex provided the number of surgical cases performed in the most recent 12 month period in operating rooms in each licensed facility as required by the rule. In addition, to be consistent with Rex's Licensure Renewal Application, Rex also included information on the number of surgical cases performed regardless of location. (Carter, T. Vol. 6, pp. 1264-1265)

429. Both Rex and the Agency provided credible evidence and testimony at the hearing demonstrating that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with 10A N.C.A.C. 14C.2102(b)(3).

430. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with 10A N.C.A.C. 14C. 2102(b)(3).

2. 10A N.C.A.C. 14C.2102(b)(4)

431. 10A N.C.A.C. 14C. 2102(b)(4) requires an applicant to provide the number of inpatient surgical cases, excluding trauma cases, cases from dedicated burn intensive care units, and cases performed in dedicated open heart and c-section operating rooms, and the number of outpatient surgical cases that will be performed in the operating rooms identified in response to (b)(1) and (b)(2) during each of the first three operating years of the proposed project.

432. Rex summarizes those cases then breaks the cases down; in essence a summary of what was previously described in Section III. The projections in both Rex Applications reasonably met the projection standard in this rule. (Carter, T. Vol. 6, p. 1266)

433. The Rex Cary projections are not tied to WakeMed Cary, since overall aggregate volume was based on historical volume, without projecting for the future. That volume was split among the various facilities using the methodology in the Rex Applications. (Carter, T. Vol. 6, p. 1268)

434. Rex's need methodology in both applications was conservative in that the physician support letters for Rex Cary were not included in the methodology. Rex's Cary facility has not been a well utilized facility. (Jt. Ex. 3, p. 122; Carter, T. Vol. 6, p. 1270)

435. The applications describe that Rex Cary will be well utilized in the future because of the significant influx of surgical cases now projected to result from physicians that will now be owners in that facility. (Carter, T. Vol. 6, p. 1268)

436. The Agency properly found both Rex Applications conforming to N.C.A.C. 14C .2102(b)(4), in part citing the table provided in the Rex applications showing the number of surgical cases by type to be performed in the proposed operating rooms. The Agency cross-referenced "Criterion (3) for discussion of reasonableness." (Joint Ex. 1, p. 1685.)

437. HSSC and WakeMed claim that Rex is nonconforming with rule 10A N.C.A.C. 14C. 2102(b)(4).

438. WakeMed and HSSC argue that Rex's non-compliance with Criterion 3, based in part on Rex's utilization projections and their basis in procedure room volumes, is sufficient for finding Rex non-conforming to both .2102(b)(4) and (b)(5).

439. In as much as Rex has been found conforming to Criterion 3, any contention that Rex does not conform to this rule based on Criterion 3 is without foundation. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with 10A N.C.A.C. 14C. 2102(b)(4).

3. 10A N.C.A.C. 14C .2102(b)(5)

440. 10A N.C.A.C. 14C .2102(b)(5) requires an applicant to provide a detailed description of and documentation to support the assumptions and methodologies used to develop

the projections of surgical procedures to be performed during the first three years of operation of the project.

441. The Agency found the Rex Applications conforming to10A N.C.A.C. 14C .2102(b)(5), citing Rex's provision of a description of its methodology and assumptions in Section III.1, pages 87-98 and 127-128 of the Rex Hospital Application. The Agency cross-referenced "Criterion (3) for discussion of reasonableness." (Joint Ex. 1 pp. 1686-87.)

442. HSSC and WakeMed claim that Rex is nonconforming with rule 10A N.C.A.C. 14C. 2102(b)(5).

443. WakeMed and HSSC argue that Rex's non-compliance with Criterion 3, based in part on Rex's utilization projections and their basis in procedure room volumes, is sufficient for finding Rex non-conforming to both .2102(b)(4) and (b)(5).

444. In as much as Rex has been found conforming to Criterion 3, any contention that Rex does not conform to this rule based on Criterion 3 is without foundation. There is substantial and credible evidence to support finding that the Agency correctly and properly found Rex's Holly Springs Application and Rex's Raleigh Application conforming with 10A N.C.A.C. 14C. 2102(b)(5).

445. Neither WakeMed nor HSSC have contended nor produced evidence that Rex's applications were non-conforming to the remaining review criteria. Without setting forth the specific findings since they are not contested, it is found that there is substantial evidence to support the Agency's finding and Rex is found to be conforming with the remaining review criteria as found by the Agency.

V. COMPARATIVE ANALYSIS OF THE APPLICATIONS

446. The Agency must first review each of the applications standing alone against the applicable statutory review criteria. Whenever there are multiple applicants involved in a review and not all can be approved, the Agency conducts a comparative analysis of the applications. The Agency compares the competing applications on the basis of several different factors to evaluate which application, among the approvable applicants, is the most effective alternative. The difference between the applicants must be material for the Agency to determine that one applicant is more effective than another. (Carter, T. Vol. 7, p. 1429; Smith, T. Vol. 3, p. 547)

447. If an application is nonconforming to any of the review criteria, the application is not approvable. In addition, when the Agency finds an applicant nonconforming with statutory review criteria, it uses a comparative factor that relates back to the review criteria to demonstrate that the applicant's proposed project is not the most effective alternative. (Carter, T. Vol. 7, pp. 1429-1430; Smith, T. Vol. 3, p. 547)

448. The Agency found WakeMed, Rex, and HSSC conforming to all applicable statutory and regulatory review criteria, and found Duke Raleigh non-conforming. (Joint Ex. 1

pp. 1581-1703.) The Agency then conducted a comparative analysis of the applications in order to determine which applicant presented the most effective alternative. (Joint Ex. 1 pp. 1704-10.)

449. The CON Act does not mandate the use of particular comparative factors; the Agency selects factors related to the statutory review criteria. (Smith, T. Vol. 6, pp. 1134-35.) In this review, the Agency selected six comparative factors under which to evaluate the applicants: (1) geographic accessibility; (2) access by underserved groups; (3) revenue; (4) operating expenses; (5) demonstration of physician support; and (6) conformity with review criteria. (Joint Ex. 1 pp. 1704-10.)

450. There is no statute, rule, policy or regulation that establishes the comparative factors the Agency uses, including the six chosen for this review. (Roberts T. Vol. 2 at 250-51; Sullivan T. Vol. 4 at 834-35).

451. The contention that WakeMed improperly amended its application by changing management companies for its proposed project after its application was filed has not been substantiated and supported by substantial, credible evidence. Therefore, the WakeMed application was approvable.

452. The contention that HSSC improperly amended its application by submitting the omitted pages from its application has not been substantiated and supported by substantial, credible evidence. The contention that HSSC improperly amended its application by submitting the TOA support letter after the application had been filed has been substantiated and supported by substantial, credible evidence.

453. HSSC is found to not be conforming to review criteria 1, 3, 4, 5, 6, and 13c, as well as the corresponding regulatory rules. Therefore, the HSSC application was not approvable.

454. Based on the comparative analysis, the Agency decided that HSSC was the most effective alternative. (Joint Ex. 1 pp. 1708-09.) The Agency did not rank the applicants or determine a "runner up." (McKillip, T. Vol. 5, p. 1030; Smith, T. Vol. 6, p. 1204.)

455. While an application may be reviewed under the comparative analysis when it has been determined to be non-conforming to one of the applicable statutory or regulatory review criteria, an application cannot be found comparatively superior if it has been determined not to conform to one of the statutory or regulatory review criteria. (Smith, T. Vol. 3, p. 547.)

456. Based upon the findings herein of HSSC's non-conformity to review criteria, HSSC cannot be comparatively superior to either Rex or WakeMed.

A. GEOGRAPHIC ACCESSIBILITY

457. Under the geographic accessibility comparison, the Agency found Rex Holly Springs and HSSC to be the most effective alternatives. (Joint Ex. 1 p. 1704.) The Agency based this finding on Rex's and HSSC's proposals to locate their proposed ambulatory surgical facilities in Holly Springs in Southern Wake County where there are currently no surgical facilities.

458. The Agency's finding as to geographic access was consistent with the 2008 Wake OR Findings, in which HSH's proposed location in Holly Springs was found to be the comparatively superior location for new operating rooms in Wake County. (Jt. Ex. 1 at 1374-75) Throughout the course of the Findings in this CON review the Agency has alternately referred favorably to the 2008 Wake OR Findings while at other times distancing itself from those findings as being of no consequence in this review.

459. Ambulatory surgical facilities offer procedures on an elective, scheduled, non-emergent basis. (Bres Martin, T. Vol. 8, p. 1750; Sullivan, T. Vol. 4, pp. 706-07, 775-76.)

460. Referral patterns for scheduled, non-emergent surgery procedures are primarily determined by physician preference of location rather than proximity to a patient's home. (*See* Joint Ex. 3 pp. 119; Sullivan, T. Vol. 4, pp. 766-67, 776-77.)

461. Mr. Smith acknowledged that in the case of elective, ambulatory surgical procedures, patients generally select a surgeon and then the surgeon advises the patient where he will perform the surgery; proximity to the patient's home is not the determining factor. (Smith, T. Vol. 6, p. 1217.) Patients do not come to a surgery center and present for or request care without a prior surgeon referral. (Smith, T. Vol. 3, p. 535; Sullivan, T. Vol. 4, p. 703; Roberts, T. Vol. 2, pp. 283-84.)

462. The role of geographic accessibility as a determinative factor in scheduling surgery is illustrated by the fact that many patients from Holly Springs travel past Rex Cary to undergo surgery at Rex Hospital's main campus in Raleigh. The fact that there is higher utilization of WakeMed Cary and continued underutilization of Rex Cary demonstrates that factors other than geographic location drive the decision of where a surgical procedure will be performed; however, geographic accessibility is a factor worthy of consideration. (Sullivan, T. Vol. 4, pp. 750-51, 775-76.)

463. WakeMed contends that the Agency did not consider information available to it during the review concerning the volume and concentration of population in Wake County in relation to the locations for the operating rooms proposed by the applicants. In 2014, the Holly Springs/Fuquay-Varina areas projected to have only 99,585 people compared to 207,174 people projected for the Cary/Apex area. (Joint Ex. 1 p. 123.) The Cary/West area is projected to increase by 29,965 people from 2009 to 2014, whereas, Holly Springs/Fuquay-Varina is projected to increase only by 17,669. (Joint Ex. 1 p. 123.)

464. The location of the proposed Holly Springs Surgery Center is 6.75 miles to the southeast of WakeMed Cary. (WakeMed Exs. 152, 170; Joint Ex. 2, p. 30.)

465. The location of the Rex Holly Springs Surgery Center is 9.5 miles from WakeMed Cary and 11 miles from Rex Cary. (WakeMed Ex. 152; Joint Ex. 1 p. 124.)

466. At the hearing, Mr. Smith acknowledged that Cary and Holly Springs are located in the same geographic area, while Mr. McKillip testified that WakeMed Cary serves the Southern Wake County census tracts proposed to be served by HSSC. (Smith, T. Vol. 3, p. 490; McKillip, T. Vol. 5, pp. 1030-31.)

467. HSSC proposed a service area based upon census tracts to the south and east of Cary. (Joint Ex. 2 p. 41; WakeMed Exs. 149, 151; Sullivan, T. Vol. 4, pp. 700-01.) HSSC did not propose to locate its surgery center in a central location in its proposed service area and, therefore, did not propose to materially change geographic accessibility for the majority of its proposed service area. (WakeMed Ex. 151; Bres Martin, T. Vol. 12, p. 2590; Sullivan, T. Vol. 4, pp. 700-01.)

468. No testimony was given at the contested case hearing that any patients had difficulty traveling to WakeMed Cary or Rex Cary for scheduled procedures.

469. The Agency did not consider the scope of services proposed to be offered by the competing applicants or the range of procedures or types of patient conditions to be served by the competing applicants in assessing geographical accessibility. Physical location does not afford access if the facility does not offer the type of procedures or treat the type or range of condition presented by the patient. (Joint Ex. 1 p. 1704.)

470. The Agency did not consider that existing shared operating rooms were functioning at or above practical capacity, whereas existing ambulatory operating rooms had ample capacity to accommodate scheduled, elective surgery procedures with additional ambulatory operating rooms being approved or under construction. (Joint Ex. 1 p. 1704.) The failure of the Agency to consider in its analysis of geographic accessibility the ability of existing and approved shared and ambulatory operating rooms to accommodate patients made the analysis flawed.

471. Most of the service area proposed to be served by HSSC and Rex Holly Springs is located within a ten-mile radius of WakeMed Cary and Rex Cary. (WakeMed Ex. 151.)

472. HSSC projected to have its second highest volume of procedures drawn from the census tract bordering WakeMed Cary and Rex Cary, which is Census Tract 534.04. HSSC projects relatively few of its procedure volume to come from Census Tracts 529, 531.04 and 531.03 to the southeast of its proposed location. (Joint Ex. 2, pp. 41, 77; WakeMed Ex. 158.)

473. Rex Holly Springs projected its second highest volume of procedures to come from the zip code in which WakeMed Cary and Rex Cary are located, zip code 27540. (Joint Ex. 3, p. 153; WakeMed Ex. 161.)

474. Neither HSSC nor Rex Holly Springs addressed in their applications or took into account the approval of three shared operating rooms for a new hospital in Lillington projected to open before or around the same time as the operating rooms proposed by the competing applicants in this review. The three shared operating rooms approved for Lillington would be closer geographically to the southeastern parts of HSSC's and Rex Holly Springs' service areas than the locations that they proposed in Holly Springs. (WakeMed Ex. 161; Roberts, T. Vol. 1, p. 161.)

475. Based upon the findings herein of HSSC's non-conformity to review criteria, HSSC cannot be comparatively superior to either Rex or WakeMed.

476. In light of the evidence, WakeMed and Rex were equally effective alternatives.

B. ACCESS BY UNDERSERVED GROUPS

477. In evaluating which application projected to provide the greatest access to medically underserved groups, the Agency only compared the Medicare and Medicaid payer mixes projected by the applicants. (Joint Ex. 1 p. 1705.) The Agency found HSSC to be comparatively superior to WakeMed or Rex because it projected the highest percentage of services to be provided to Medicaid patients and the third highest percentage to Medicare patients. (*Id.*)

478. The CON statute defines medically underserved groups as the elderly, low income persons, racial and ethnic minorities, women, handicapped persons, and "other underserved groups." N.C. Gen. Stat. §§ 131E-183(a)(3), (a)(13). By limiting its comparison to Medicare and Medicaid projections only, the Agency disregarded the question of access by racial and ethnic minorities, women, and handicapped persons, and only marginally addressed the issue of access by low income persons.

479. Medicare and Medicaid are government-funded insurance programs; unlike charity care patients, Medicare and Medicaid beneficiaries do have health insurance coverage. (Roberts, T. Vol. 1, p. 185; Vol. 2, p. 311; Smith, T. Vol. 3, p. 546.)

480. The Agency considers higher Medicare and Medicaid percentages to be more favorable. (Smith, T. Vol. 3, p. 650.) Mr. Smith acknowledged that a new provider without historical Medicare and Medicaid percentages that the Agency can use as a point of comparison may be able to "game the system" by projecting inflated Medicare and Medicaid percentages. (Smith, T. Vol. 3, pp. 650-51.) He also acknowledged that he did have the concern that HSSC may have engaged in inflating its Medicaid percentage. (Smith, T. Vol. 3, p. 651.)

481. WakeMed and Rex presented evidence regarding the unreasonableness of HSSC's Medicare and Medicaid projections. The evidence showed that HSSC's projected Medicaid percentage of 9.1% was almost double the historical Wake County Medicaid average of 5.08%. (Joint Ex. 1, pp. 1670, 1674.)

482. Mr. McKillip acknowledged that his finding that HSSC was the comparatively superior applicant with regard to access to the underserved is only valid if the HSSC Medicaid and Medicare projections are reasonable. (McKillip, T. Vol. 5, pp. 1001-03.)

483. Evidence was also presented regarding the Agency's failure to use charity care provided to self-pay and indigent patients under the comparative factor of access by underserved groups. (Joint Ex. 1, p. 1705; Roberts, T. Vol. 1, p. 187; Sullivan, T. Vol. 4, pp. 778-79; McKillip, T. Vol. 5, pp. 1027-28.) While Medicare and Medicaid patients are insured and are guaranteed access to health care, self-pay and indigent patients are uninsured and make up a medically underserved group. (Roberts, T. Vol. 1, p. 187.)

484. Mr. Smith testified that the Agency did not use charity care as a comparative factor because some applicants combine their charity care and bad debt numbers, meaning that the Agency does not have a consistently defined set of numbers to compare, but the Agency has used charity care as a comparative factor in the past. (Smith, T. Vol. 6, pp. 1137-38.) In this review, WakeMed, Rex, and HSSC all presented separate charity care and bad debt numbers in

Section VI.8.(b) of their applications; i.e., the information was available for comparison. (Joint Ex. 2 pp. 110-11; Joint Ex. 3, pp. 180-81; Joint Ex. 4 p. 178; Joint Ex. 5 pp. 127-28.)

485. Mr. McKillip had not received any specific Agency policy or instruction explaining why charity care was not used as a comparative factor. (McKillip, T. Vol. 5, pp. 1027-28.)

486. The Agency's failure to use charity care as a comparative factor in this review and rely solely on Medicare and Medicaid percentages was unreasonable.

487. WakeMed proposed the highest amounts of charity care.

488. WakeMed Cary was second highest behind HSSC in the percentage of services to be provided to Medicaid recipients at 4.92 % (Joint Ex. 1 p. 1705.) WakeMed Cary should be considered to project the highest percentage of services to be provided to Medicaid recipients.

489. The Agency's analysis was flawed by failing to conclude that WakeMed Cary was the most effective alternative with regard to access by underserved groups given its past track record of providing charity care, its projected amount of charity care, and that it projected the highest percentage of services to be provided to Medicaid recipients of the applicants providing reasonable, credible projections.

C. REVENUE

490. The Agency compared the applicants' gross revenue per surgical case and net revenue per surgical case in the third project year. (Joint Ex. 1 pp. 1705-06.) The Agency found that HSSC projected the lowest gross and net revenue per surgical case, but noted that "it is not possible to make conclusive statements about which of the applicants represents the most effective alternative with regard to gross and net revenue per surgical case" because Rex Holly Springs and HSSC proposed to develop ambulatory surgical services only, while Rex and WakeMed proposed to offer both inpatient and outpatient surgical services in shared operating rooms. (Joint Ex. 1 p. 1706.)

491. In its summary findings the Agency listed as a reason it found HSSC the comparatively superior applicant the fact that HSSC "[p]rojects the lowest gross revenue and lowest net revenue per surgical case of the two proposed outpatient surgical facilities." (Joint Ex. 1 p. 1707.) Assuming *arguendo* that fact to be true, it ignores any comparison of all applicants, drawing an arbitrary distinction between the applicants.

492. To appropriately compare gross and/or net revenue among the competing applicants, there should be some analysis of whether the proposed operating rooms will be shared, hospital based ambulatory, or freestanding ambulatory rooms, the projected types of procedures, and case mix and the projected payer mix. (Sullivan, T. Vol. 4, pp. 779-81, 783, 832-33; Carter, T. vol. 7, pp. 1403-04; D. Carter, T. Vol. 8, p. 1673.)

493. Mr. Smith testified that there was also a risk of a new provider "gaming the system" by projecting artificially low gross and net revenue numbers. (Smith, T. Vol. 3, p. 662.)

494. An alternative method of analysis would be to use the providers' operating margins, which are calculated by dividing net income by total gross revenue. The operating margin takes into account all the providers' expenses, and is a better way to evaluate the providers' costs and profits. (Roberts, T. Vol. 1, pp. 189-91; Joint Ex. 1 p. 134.) A lower operating margin signals that the facility's charges are in line with its costs. (Roberts, T. Vol. 1, p. 191.)

495. While it is true that the Agency was not required to compare applicants based on operating margins, it was likewise not prohibited from such comparison either. (Roberts T. Vol. 2 at 280). CON Section Chief Smith further testified that as the Agency considers operating margin indirectly by ensuring that applicants project sufficient revenues per case to be financially feasible, thereby. (Smith T. Vol. 6 at 1138).

496. A comparison of operating margins projected in the competing applications was contained in WakeMed's comments submitted to the Agency during the review, which showed that WakeMed proposed the lowest operating margins among the applicants. (Joint Ex. 1 p. 134.)

497. Mr. McKillip testified that he did not know why the agency evaluates gross and net revenue per case rather than the providers' operating margins. (McKillip, T. Vol. 5, pp. 1028-29.)

498. Based upon the findings herein of HSSC's non-conformity to review criteria, HSSC cannot be comparatively superior to either Rex or WakeMed.

499. In as much as there are two hospital-based and one free standing ambulatory surgical centers remaining for comparison, the Agency's determination that a reasonable comparison of gross revenue could not be made in this review is appropriate.

D. OPERATING EXPENSES

500. The Agency compared the applicants' operating expenses per surgical case in project year three and determined that HSSC projected the lowest operating expense of the applicants. (Joint Ex. 1 p. 1706.) The Agency concluded, however, that "it is not possible to make conclusive statements about which of the applicants represents the most effective alternative with regard to operating expenses per surgical case" because Rex Holly Springs and HSSC proposed to develop ambulatory surgical services only, while Rex and WakeMed proposed to offer both inpatient and outpatient surgical services in shared operating rooms. (Joint Ex. 1 p. 1706.)

501. Nevertheless, in its summary findings the Agency listed as a reason it found HSSC the comparatively superior applicant the fact that HSSC "[p]rojects the lowest operating expense per surgical case of the two proposed outpatient surgical facilities." (Joint Ex. 1 p. 1708.)

502. At the hearing, Mr. Smith testified that freestanding ambulatory surgical facilities have lower cost structures than hospitals and hospital-based facilities and thus will always have lower operating expenses. (Smith, T. Vol. 6, pp. 1221.) This testimony supports the Agency's

original conclusion that a valid comparison cannot be made between the applicants with regard to operating expenses.

503. Given the Agency's own determination that a reasonable comparison of operating expenses could not be made in this review, it was not reasonable for the Agency to use operating expenses as a comparative factor and to find HSSC the comparatively superior applicant based on its projected operating expenses.

504. Similar to the analysis of revenues above, operating margins could have been a valid tool for comparison of the applications. WakeMed proposed the lowest operating margins for all three projected project years. (Joint Ex. 1 p. 134.)

505. Based upon the findings herein of HSSC's non-conformity to review criteria, HSSC cannot be comparatively superior to either Rex or WakeMed.

506. In as much as there are two hospital-based and one free standing ambulatory surgical centers remaining for comparison, the Agency's determination that a reasonable comparison of operating expenses could not be made in this review is appropriate.

E. DEMONSTRATION OF PHYSICIAN SUPPORT

507. Under the comparative factor "demonstration of physician support," the Agency found the applicants to be comparable "with regard to demonstration of physician support from Wake County physicians and surgeons." (Joint Ex. 1 p. 1707.)

508. Findings above address the deficiencies in the HSSC physician letters and are a part of finding HSSC non-conforming to review criteria.

509. The Agency erroneously relied upon the support of Triangle Orthopaedic when determining that HSSC was comparable with regard to physician support. (Joint Ex. 1 p. 749.)

510. The Agency erroneously determined that HSSC was comparable with regard to physician support when it should have determined that HSSC was a less effective alternative.

511. Mr. McKillip acknowledged that in the prior 2008 review, he and Mr. Smith were comfortable with comparing the applicants based on the quantity of support letters presented. (McKillip, T. Vol. 5, pp. 887.)

512. In light of the evidence presented, it was not reasonable for the Agency to find that the physician support letters included by HSSC in its application were "comparable" to the levels of support demonstrated by WakeMed and Rex.

513. Based upon the findings herein of HSSC's non-conformity to review criteria, HSSC cannot be comparatively superior to either Rex or WakeMed.

514. WakeMed and Rex are comparable "with regard to demonstration of physician support from Wake County physicians and surgeons."

F. CONFORMITY WITH REVIEW CRITERIA

515. The Agency uses "conformity with review criteria" when one or more applicants in a competitive review are found non-conforming to a review criterion. (McKillip, T. Vol. 5, pp. 981.)

516. WakeMed, Rex, and HSSC Applications were found to be conforming to all statutory and regulatory review criteria, and were thus found comparable, but Duke was found to not have conformed to all of the review criteria. (Joint Ex. 1 p. 1707.)

517. Based upon the findings herein of HSSC's non-conformity to review criteria, HSSC cannot be comparatively superior to either Rex or WakeMed.

518. The Agency correctly found WakeMed and Rex to be conforming to review criteria and they are comparable.

G. ADDITIONAL COMPARATIVE FACTORS:

1. Shared Operating Rooms

519. In the initial review of the applications, the Agency must look at each application individually to test it against the review criteria, without regard to the competing applications. Once more than one application is found to be conforming to the review criteria, then the Agency does the comparative analysis to see which applicant is best.

520. There was nothing "magical" about the six factors above that the Agency used in the comparative analysis of these applications. The Agency was not limited in any regard to the number off comparative factors it could use. The Agency was free to use any reasonable factor to assess which of the competing applications was best in providing the services at issue as approved by the SMFP.

521. The SMFP approved three operating rooms for Wake County for this cycle without any designation of what type of operating rooms should be approved.

522. This Tribunal has found above that in initially reviewing the applications against the review criteria, the Agency did not have to weigh which type of operating room was appropriate in order to assess each application independently, although there is a compelling argument to the contrary. However, it is essential to make a determination of which type of operating room best suits the purposes and need within Wake County in making the final comparative analysis. (See Findings of Fact 329 – 352 above.)

523. The Agency did not compare whether the applicants proposed the service and type of operating room that was most needed by and appropriate for patients in Wake County.

524. The Agency did not compare the applicants with regard to whether the services proposed—either ambulatory operating rooms or shared operating rooms—best met the need demonstrated by the population of Wake County.

525. The access to a broad variety of types of surgeries for patients with myriad conditions should have been at least considered as a comparative factor when determining "the need that this population has for the services proposed." In this review under the conditions exiting in Wake County at the time, a determination of which type of operating room—ambulatory operating rooms or shared operating rooms—was essential in determining where the myriad of surgeries may optimally be performed.

526. The SMFP contained data regarding the types of existing operating rooms in Wake County and the utilization of such rooms for fiscal year October 1, 2007 through September 30, 2008, as reported in the 2009 Hospital and Ambulatory Surgical Facility License Renewal Applications. (Joint Ex. 22.)

527. The Agency also had available to it during the review SMFPs and licensure renewal application forms from past years that contained comparable operating room inventory and utilization information. (Joint Ex. 1 pp. 913-93; McKillip, T. Vol. 5, pp. 1102, 1110-11; Smith, T. Vol. 3, pp. 478, 485, 493-96; T. Vol. 6, pp. 1180-81; Sullivan, T. Vol. 4, p. 857.)

528. At the time of the review, data in the SMFPs available to the Agency showed that existing ambulatory operating rooms had significant available capacity, while existing shared operating rooms were at or above practical capacity using the threshold of 1,872 procedures per year used in the SMFP for triggering the need for a new operating room. (WakeMed Ex. 109.)

529. Mr. Smith confirmed that sixteen (16) operating rooms were upgraded for development in ambulatory surgical facilities that were approved by the Agency and are currently under development in Wake County, eight (8) of which are brand-new ambulatory operating rooms. (Smith, T. Vol. 3, p. 493.) (Joint Ex. 1 pp. 114-15, 142, 144, 376-77; Joint Ex. 22; Smith, T. Vol. 3, p. 493-96.)

530. Data available to the Agency during the review from the annual SMFPs and licensure renewal applications showed that the high utilization of shared operating rooms versus ambulatory operating rooms in Wake County reported in the 2010 SMFP was not an aberration. This data showed that from fiscal years 2007 to 2009, utilization of shared operating rooms ranged from 99 to 107 % of the SMFP need threshold, whereas utilization of ambulatory operating rooms during the same time period was only 60 to 61 %. (WakeMed Ex. 631.)

531. Similarly, licensure renewal data and information in the annual SMFPs available to the Agency at the time of the review demonstrated that, in North Carolina as a whole, hours per operating room per year ranged from 1,849 in fiscal 2007 to 2,006 in fiscal year 2009 for shared operating rooms, whereas ambulatory operating rooms were utilized at only 1,115 to 1,149 hours per year during the same time period. (WakeMed Ex. 630.)

532. Despite available capacity in ambulatory rooms, utilization of shared operating rooms continued to increase while utilization of ambulatory operating rooms remained flat in Wake County. (Roberts, T. Vol. 1, pp. 129-30; WakeMed Exs. 630, 631.)

533. Despite the fact that the Agency has approved for development additional ambulatory surgical facilities that include sixteen (16) ambulatory operating rooms, however, Mr. Smith and Mr. McKillip acknowledged that the Agency did not consider that approving an

additional ambulatory surgical facility would duplicate the capacity available in existing and approved ambulatory surgical facilities. (Smith, T. Vol. 3, pp. 492-97; McKillip, T. Vol. 5, pp. 1029-30.)

534. The ambulatory surgical facility proposed by Rex would duplicate existing ambulatory surgical facilities in Wake County, including Rex's own Rex Cary and Rex Wakefield, as well as proposed ambulatory operating room capacity at OSCR, Rex Macon Pond, and WakeMed Raleigh. (Joint Ex. 1, pp. 125-26, 445-46; Roberts, T. Vol. 1, p. 119; Sullivan, T. Vol. 4, pp. 768-70.)

535. The 2010 SMFP and the licensure data for Rex Cary showed that the four ambulatory operating rooms at Rex Cary had existing capacity and were utilized at only approximately 59% of practical capacity. (Joint Ex. 1, p. 114; Joint Ex. 22.)

536. The Agency did not analyze or acknowledge the need the population of Wake County as a whole, and in particular as applicable in Criterion 3 low income persons, the elderly, and other underserved groups, had for shared ambulatory operating rooms as opposed to free standing ambulatory operating rooms. The Agency also did not analyze or acknowledge the access constraints that may be caused by existing shared operating rooms operating at or near capacity, or whether it was reasonable to add more ambulatory operating room capacity when existing ambulatory rooms are operating well below capacity. (Joint Ex. 1, pp. 1609-29.)

537. The Rex Raleigh application proposes one shared operating room whereas the Rex Holly Springs application proposes only free-standing ambulatory operating rooms. The WakeMed application proposes three shared operating rooms. Based upon the findings herein of HSSC's non-conformity to review criteria, HSSC cannot be comparatively superior to either Rex or WakeMed. WakeMed is comparatively superior in this comparative analysis.

2. Construction Costs

538. Although the Agency properly evaluated singularly the applications conformity with Criteria 12, the Agency did not compare the proposed capital or construction costs proposed by the applicants. (Joint Ex. 1 p. 1704-10.)

539. The total cost for both Rex projects for three operating rooms was $8,730,169, and the total cost per operating room for Rex was $2,910,056. The total cost for WakeMed's proposed three operating rooms was $5,867,854, which is substantially less than Rex in both total costs and per operating room. (WakeMed Ex. 147; Joint Ex. 1 p. 130.)

540. Mr. McKillip testified that he did not know why the Agency did not evaluate the project capital costs of the competing applicants. Mr. Smith testified that the Agency was not as concerned with the costs of developing a project as it was with the operating expenses of the project. (McKillip, T. Vol. 5, pp. 1032-33; Smith, T. Vol. 6, p. 1138.)

541. The legislative findings at N.C. Gen. Stat. § 131E-175 express concerns regarding the enormous economic burden on the public of construction costs. N.C. Gen. Stat. § 131E-175(6) finds that excess capacity places a burden on the public "who pay for the construction and operation of these facilities." Criterion 12 requires each applicant to demonstrate that the costs,

design and means of construction proposed represent the most reasonable alternative and that the construction project will not unduly increase the cost of providing health services. N.C. Gen. Stat. § 131E-183(a)(12).

542. The Agency's failure to consider the project capital costs was not reasonable in light of the statutory language related to capital and construction costs.

543. WakeMed is comparatively superior in this comparative analysis.

544. For the reasons stated above, the Agency's comparative analysis was erroneous as a matter of law, unreasonable, contrary to the requirements of the CON Act, and arbitrary and capricious.

H. PRIOR AGENCY FINDINGS:

545. Numerous prior agency findings were introduced into evidence for consideration of various points and to demonstrate the position the Agency has taken on similar issues previously. Those Findings have been considered in making the Findings of Fact herein and given the weight deemed appropriate.

CONCLUSIONS OF LAW

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

2. A court need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

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

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

5. In a contested case, "[u]nder N.C. General Statutes § 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 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. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). The burden of persuasion placed upon the Petitioner is the "greater weight of evidence." *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 712, 513 S.E.2d 823, 828 (1999) (stating "the standard of proof in administrative matters is by the greater weight of evidence. . . .").

6. In a CON contested case, the court is limited to a review of the information presented or available to the CON Section at the time of the review. *Britthaven, Inc.*, 118 N.C.

App. at 382, 455 S.E.2d at 459; *see also In re Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 791 (1987) An ALJ is not limited to information that the Agency actually reviewed or relied upon in making its decision regarding an application. *Dialysis Care of North Carolina, LLC v. N.C. Dept. of Health and Human Services*, 137 N.C. App. 638, 648, 529 S.E.2d 257, 262, affirmed per curium, 353 N.C. 258, 538 S.E.2d 566 (2000). ("The hearing officer is properly limited to consideration of evidence which was before the Section when making its initial decision, but the hearing officer is not limited to that part of the evidence before it that the Section actually relied upon in making its decision.").

7. While deference to the Agency's decision is appropriate in some cases, whether deference will be given "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Martin v. N.C. Dep't of Health and Human Servs.*, 194 N.C. App. 716, 720, 670 S.E.2d 629, 632 (2009), quoting *Total Renal Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005). "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *Martin,* 670 S.E.2d at 635, quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434, 457 n. 30 (1987).

8. The North Carolina Court of Appeals has held that the exercise of an applicant's right to an evidentiary hearing under the contested case provision of N.C. Gen. Stat. § 131E-188(a) does not commence a de novo proceeding by the ALJ intended to lead to a formulation of the final decision. Britthaven, Inc. v. N.C. Dept. of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). The Court expressly recognized that to do so would misconstrue the nature of contested case hearings under the CON Law and the Administrative Procedure Act. Id.

I. THE AGENCY ERRED IN ITS REVIEW OF THE APPLICATIONS.

9. The Agency must evaluate CON applications pursuant to North Carolina's CON statute. *See* N.C. Gen. Stat. §§ 131E-182, 131E-183; *see also Living Centers-Southeast, Inc. v. N.C. Dep't of Health and Human Servs.*, 138 N.C. App. 572, 574, 532 S.E.2d 192, 194 (2000). In the initial review of the applications, the Agency must look at each application individually to test it against the review criteria, without regard to the competing applications.

10. The Agency must determine whether an application is consistent or not in conflict with the review criteria set forth in N.C. General Statute § 131E-183 and the standards, plans and criteria promulgated there under in effect at the time the review commences. 10A N.C.A.C. 14C.0207.

11. The review criteria are not optional, and the applicant must either conform to each separate criterion or be able to be found conditionally conforming in order for the application to be approved. *See Parkway Urology, P.A. v. N.C. Dep't of Health and Human Servs.*, -- N.C. App. --, 696 S.E.2d 187 (2010)

B. HSSC APPLICATION

12. HSSC is not time barred from contesting issues raised by the Agency's decision because it did not file a petition as WakeMed contends. HSSC properly and timely intervened with full rights as a party.

13. The Agency erred as a matter of law in finding the HSSC application to develop a new ambulatory surgical facility with three dedicated ambulatory operating rooms conforming to all statutory and regulatory review criteria.

14. The Agency erred as a matter of law and acted contrary to the requirements of the CON Act and the plain language of the statute in finding the HSSC Application conforming to Criterion 1.

15. Criterion 1 requires that the Agency evaluate the applicant's conformity to "applicable policies and need determinations in the State Medical Facilities Plan," in this case, Policy GEN-3. N.C. Gen. Stat. § 131E-183(a)(1). Policy GEN-3 in turn requires an applicant to demonstrate how the project will (1) "promote safety and quality in the delivery of health care services;" (2) "promot[e] equitable access;" (3) "maximiz[e] healthcare value for resources expended;" and (4) "address[ ] the needs of all residents in the proposed service area." These four factors in essence restate the fundamental purposes of the CON Act.

16. Although the HSSC application otherwise would have been conforming, in as much as HSSC is found to not be in conformity with Criterion 3, then it is not in conformity with Criterion 1.

17. The Agency erred as a matter of law in finding the HSSC Application conforming to Criterion 3. Like Criterion 1, Criterion 3 goes to the heart of the CON Act, requiring the applicant to demonstrate "the need that this population has for the services proposed, and the extent to which all residents of the areas, and, in particular, low income persons, the elderly, and other underserved groups are likely to have access to the services proposed." N.C. Gen. Stat. § 131E-183(a)(3).

18. HSSC's application did not conform to Criterion 3, and the Agency as a matter of law erroneously found HSSC's application conforming to this criterion.

19. The Agency erred as a matter of law in finding the HSSC Application conforming to Criterion 4, which requires the applicant, "[w]here alternative methods of meeting the needs for the proposed project exist" to demonstrate "that the least costly or most effective alternative has been proposed."

20. By failing as an initial matter to determine whether the population of Wake County had a need for the ambulatory operating rooms as proposed by HSSC and as required by Criterion 3, the Agency erred as a matter of law. HSSC was nonconforming with Criterion 3 and, thus, was nonconforming under Criterion 4.

21. The Agency erred as a matter of law and acted contrary to the requirements of the CON Act and the plain language of the statute in finding HSSC's Application conforming to

Criterion 5 which requires "[f]inancial and operational projections for the project shall demonstrate the availability of funds . . . and the immediate and long-term financial feasibility of the proposal, based upon *reasonable projections* of the costs of and charges for providing health services." N.C. Gen. Stat. § 131E-183(a)(5).

22. The information in HSSC's application, including its written comments and its working papers, which were otherwise available to the Agency, showed HSSC's financial projections were not supported or reasonable.

23. When an application is found nonconforming with Criterion 3, then the application is found nonconforming with Criterion 5 because the financial projections are based on unreasonable volume projections.

24. The Agency erred as a matter of law and acted contrary to the requirements of the CON Act in finding the HSSC Application conforming to Criterion 6, which requires that "the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C. Gen. Stat. § 131E-183(a).

25. In as much as HSSC should have been found by the Agency to be non-conforming to Criterion 3, then HSSC should have been found non-conforming to Criterion 6.

26. The Agency did not err as a matter of law in finding the HSSC Application conforming to Criterion 7, which requires the applicant to "show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided." N.C. Gen. Stat. § 131E-183(a)(7).

27. Although Petitioners raised issues upon which they disagree with the Agency's conclusion that the HSSC Application conformed to Criterion 7; however, there is substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 7.

28. The Agency did not err as a matter of law in finding that the HSSC Application conformed to Criterion 8, which requires the applicant to demonstrate that it will "make available, or otherwise make arrangements for, the provision of the necessary ancillary and support services" and will demonstrate "that the proposed service will be coordinated with the existing health care system." N.C. Gen. Stat. § 131E-183(a)(8).

29. Although Petitioners raised issues upon which they disagree with the Agency's conclusion that the HSSC Application conformed to Criterion 8, the issue of support letters has been discussed above. The record contains sufficient and substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 8.

30. The Agency did not err as a matter of law in finding the HSSC Application conforming to Criterion 12, which requires an applicant to 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." N.C. Gen. Stat. § 131E-183(a)(12).

31. The Agency properly evaluated the applicants' compliance with Criterion 12 in terms of whether the "cost, design, and means of construction proposed" represented the most reasonable alternative for the individual applicant.

32. The record contains sufficient and substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 12.

33. The Agency erred in finding the HSSC Application conforming to Criterion 13c, which requires the applicant to demonstrate the extent to which the proposed project will meet the needs of the elderly and other underserved groups by showing "[t]hat the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services." N.C. Gen. Stat. § 131E-183(a)(13)c.

34. HSSC was nonconforming with Criterion 13(c) because its projections of payor mix were not based on reasonable assumptions. The Agency abused its discretion in finding the HSSC projected payer mix to be reasonable. The Agency acknowledged at the hearing that HSSC failed to provide documentation in its application necessary to support its projected payer mix, and Mr. Johnson's testimony at the hearing indicated that the projections were not in fact based on any data. The evidence also showed that the projected payer mix did not correlate to and was not supported by the actual Wake County payer mix, the demographics of the proposed service area, the proposed surgical specialties for which HSSC obtained physician letters of support, or payer mix data from Wake County ambulatory surgical facilities or from other HSSC ambulatory surgical facilities. Moreover, the testimony offered in support of the HSSC projections—that the residents of the affluent Holly Springs area were more aware of the HSSC charity care policy than any other population in the state of North Carolina and that factor would somehow change the expected payer mix—was simply not credible.

35. The Agency did not err as a matter of law in finding the HSSC application conforming to Criterion 13d, which requires the applicant to demonstrate the extent to which the proposed project will meet the needs of the elderly and other underserved groups by showing "that the applicant offers a range of means by which a person will have access to its services." N.C. Gen. Stat. § 131E-183(a)(13)d.

36. The record contains sufficient and substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 13d.

37. The Agency did not err as a matter of law in finding the HSSC application conforming to Criterion 18a, which focuses on the applications' impact on competition, by making the determination that HSSC's application would "have a positive impact upon the cost effectiveness, quality, and access to the services proposed." N.C. Gen. Stat. § 131E-183(a)(18a).

38. The record contains sufficient and substantial evidence supporting the Agency's determination that HSSC was conforming to Criterion 18a.

39. Because HSSC's Application is found to be non-conforming to Criterion 3 discussed above, the application would be non-conforming to 10A N.C.A.C. 14C.2102(b)(4) and

(b)(5), and the Agency erred as a matter of law in finding the HSSC Application conforming to these two regulatory review criteria.

40. Because HSSC's costs and charges were not reasonable as required by Criterion 5, the Agency also erred in finding HSSC conforming to the rule at 10A N.C.A.C. 14C.2102(b)(8).

41. The Agency also erred as a matter of law in finding the HSSC Application conforming to 10A N.C.A.C. 14C.2103(b), (c), (g).

42. As stated above, HSSC is found to be non-conforming to various review criteria as set forth in N.C. Gen. Stat. § 131E-183(a), and to the degree that those review criteria apply to the rules at 10A N.C.A.C. 14C.2100, *et. seq.*, and the rules would be derivative of the substantive review criteria, and have not been set forth specifically in these conclusions of law, then HSSC would likewise be non-conforming. Otherwise, there is sufficient evidence of record to support the Agency's decision as it relates to the rules.

43. Other than is specified above in these conclusions of law, 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 HSSC Application was conforming with review criteria and the regulatory review rules 10A N.C.A.C. 14C. 2100, et. seq.

44. An applicant may not amend an application after it has been filed. 10A NCAC 14C .2014; *Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources*, 122 N.C. App. 529, 537, 470 S.E.2d 831, 836 (1996).

45. If the Agency considers information it received from an applicant after the filing date, the application may have been amended pursuant to 10A N.C.A.C. 14C .0204 and the application cannot be approved.

46. The test of amending the application is not solely whether the reviewer "considered" the additional material; the test is whether or not that material effected a change in the application. For the purposes of these applications the addition of missing information may be "considered" by the reviewer; i.e. looked upon thoughtfully and reflectively, but is of no consequence unless the reviewer uses that information to effectively change the application or to change his or her position relative to the application.

47. HSSC did not improperly amend its application by providing the missing answers to the questions in the application, and to that issue alone the Agency did not err in finding that HSSC did not improperly amend its application.

48. The Triangle Orthopaedic support letter was in fact substantively considered in the HSSC application and thereby was an impermissible amendment to the application; and, therefore, the Agency erred as a matter of law in finding that HSSC had not amended its application as it pertains to the TOA letter.

C. WAKEMED APPLICATION

49. The Agency properly found WakeMed's application conforming to all applicable criteria and standards. Specifically, the Agency properly found WakeMed conforming to Criteria 1, 3, 4, 5, 6, 7, 8, 12, 13, 14, 18a, 20 and all applicable rules at 10A N.C.A.C. 14C .2100 *et. seq*.

50. The Agency properly found that the WakeMed application was complete, eligible for review, and not amended as a result of the SCA Transaction. The substantial evidence in the record demonstrates that the SCA transaction did not result in any change in the person, location or scope of WakeMed's application, any material change in the representations in WakeMed's application, or any alteration in the conformity of the WakeMed application to the applicable review criteria.

D. REX APPLICATIONS

51. The Agency properly found Rex's applications conforming to all applicable criteria and standards. Specifically, the Agency properly found Rex conforming to Criteria 1, 3, 4, 5, 6, 12, 13, 18a, and all applicable rules at 10A N.C.A.C. 14C .2100 *et. seq*.

E. COMPARATIVE ANALYSIS

52. The Agency erred as a matter of law in its analysis and comparison of the competing applicants.

53. The Agency erred as a matter of law in approving HSSC's application because it was not conforming to statutory and rules review criteria. Based upon the findings herein of HSSC's non-conformity to review criteria, HSSC cannot be comparatively superior to either Rex or WakeMed.

54. In considering and comparing the applications concerning geographic accessibility, both WakeMed and Rex are comparable and substantially equal.

55. In considering and comparing the applications concerning access by underserved groups, WakeMed and Rex are comparable, however, WakeMed's application is comparatively superior.

56. In considering and comparing the applications concerning gross and net revenues, the Agency was not in error to find that the applications between WakeMed and the Rex applications cannot be compared, however, WakeMed did show the lowest margins.

57. In considering and comparing the applications concerning operating expenses, the Agency was not in error to find that the applications between WakeMed and the Rex applications cannot be compared, however, WakeMed had the lowest operating margins.

58. In considering and comparing the applications concerning physician letters of support, both WakeMed and Rex are comparable and substantially equal.

59. In considering and comparing the applications concerning compliance with review criteria, both WakeMed and Rex are comparable and substantially equal.

60. The Agency erroneously did not consider as a comparative factor the value of shared operating rooms as opposed to ambulatory operating rooms.

61. At the time of the review, existing ambulatory operating rooms had significant available capacity, while existing shared operating rooms were at or above practical capacity. Sixteen (16) operating rooms were upgraded for development in ambulatory surgical facilities that were already approved by the Agency and are currently under development in Wake County, including eight (8) brand-new ambulatory operating rooms.

62. Despite available capacity in ambulatory rooms, utilization of shared operating rooms continued to increase while utilization of ambulatory operating rooms remained flat in Wake County.

63. In considering and comparing the applications concerning proposed shared operating rooms as opposed to ambulatory operating rooms, WakeMed and Rex are comparable, however, WakeMed's application is comparatively superior.

64. The Agency erroneously did not compare the proposed capital or construction costs proposed by the applicants. WakeMed is comparatively superior in this comparative analysis.

65. The Agency errors in conducting the comparative analysis warrant reversal of the Agency Decision, and require approval of WakeMed's application.

RECOMMENDED DECISION

This Recommended Decision is made in accord with N. C. Gen. Stat. § 150B-34 "based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." The Findings of Fact are based upon substantial and credible evidence and by the greater weight of the evidence. Due and appropriate deference has been given to the Agency in all respects. On review, the Agency shall adopt the findings herein unless clearly contrary to the preponderance of the admissible evidence after giving due regard to the opportunity of the Administrative Law Judge to observe and evaluate the credibility of the witnesses in accord with N. C. Gen. Stat. § 150B-36, not based upon the fact that the decision-maker disagrees with the decision herein.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby recommended that the decision and findings of the Certificate of Need Section approving HSSC's application and disapproving WakeMed's application be **REVERSED**, that WakeMed's application be approved, that the application of Rex and HSSC be disapproved, and that a certificate of need be awarded to WakeMed authorizing the development of three shared operating rooms at WakeMed Cary Hospital as proposed in WakeMed's application, identified as Project I.D. No. J-8463-10.

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.

This the 17th day of May, 2011.

Donald W. Overby
Administrative Law Judge

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

Maureen Demarest Murray
Allyson Jones Labban
Smith Moore Leatherwood LLP
P.O. Box 21927
Greensboro, NC 27420
Attorneys for WakeMed

Gary S. Qualls
Colleen M. Crowley
William W. Stewart
Susan K. Hackney
K & L Gates, LLP
P.O. Box 14210
Research Triangle Park, NC 27709
Attorneys for Rex Hospital, Inc., d/b/a Rex Healthcare

Marcus C. Hewitt
Elizabeth Sims Hedrick
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Attorney for Holly Springs Surgery Center, LLC and Novant Health, Inc.

Angel Gray
Stephanie Brennan
Assistant Attorneys General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
Attorneys for N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section

This the 18th day of May, 2011.

Vicky Bullock

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Telephone: (919)431-3000
Facsimile: (919)431-3100