

# ***NORTH CAROLINA REGISTER***

**VOLUME 28 • ISSUE 16 • Pages 1847 - 2039**

**February 17, 2014**

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Joint Legislative Administrative Procedure Oversight Committee  
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**NORTH CAROLINA REGISTER**  
Publication Schedule for January 2014 – December 2014

| 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<br>31st legislative day of the session beginning: | 270 <sup>th</sup> day from publication in the Register |
| 28:13                 | 01/02/14   | 12/06/13            | 01/17/14                         | 03/03/14                       | 03/20/14   | 05/01/14                             | 05/2014   | 09/29/14   |
| 28:14                 | 01/15/14   | 12/19/13            | 01/30/14                         | 03/17/14                       | 03/20/14   | 05/01/14                             | 05/2014   | 10/12/14   |
| 28:15                 | 02/03/14   | 01/10/14            | 02/18/14                         | 04/04/14                       | 04/21/14   | 06/01/14                             | 01/2015   | 10/31/14   |
| 28:16                 | 02/17/14   | 01/27/14            | 03/04/14                         | 04/21/14                       | 05/20/14   | 07/01/14                             | 01/2015   | 11/14/14   |
| 28:17                 | 03/03/14   | 02/10/14            | 03/18/14                         | 05/02/14                       | 05/20/14   | 07/01/14                             | 01/2015   | 11/28/14   |
| 28:18                 | 03/17/14   | 02/24/14            | 04/01/14                         | 05/16/14                       | 05/20/14   | 07/01/14                             | 01/2015   | 12/12/14   |
| 28:19                 | 04/01/14   | 03/11/14            | 04/16/14                         | 06/02/14                       | 06/20/14   | 08/01/14                             | 01/2015   | 12/27/14   |
| 28:20                 | 04/15/14   | 03/25/14            | 04/30/14                         | 06/16/14                       | 06/20/14   | 08/01/14                             | 01/2015   | 01/10/15   |
| 28:21                 | 05/01/14   | 04/09/14            | 05/16/14                         | 06/30/14                       | 07/21/14   | 09/01/14                             | 01/2015   | 01/26/15   |
| 28:22                 | 05/15/14   | 04/24/14            | 05/30/14                         | 07/14/14                       | 07/21/14   | 09/01/14                             | 01/2015   | 02/09/15   |
| 28:23                 | 06/02/14   | 05/09/14            | 06/17/14                         | 08/01/14                       | 08/20/14   | 10/01/14                             | 01/2015   | 02/27/15   |
| 28:24                 | 06/16/14   | 05/23/14            | 07/01/14                         | 08/15/14                       | 08/20/14   | 10/01/14                             | 01/2015   | 03/13/15   |
| 29:01                 | 07/01/14   | 06/10/14            | 07/16/14                         | 09/02/14                       | 09/22/14   | 11/01/14                             | 01/2015   | 03/28/15   |
| 29:02                 | 07/15/14   | 06/23/14            | 07/30/14                         | 09/15/14                       | 09/22/14   | 11/01/14                             | 01/2015   | 04/11/15   |
| 29:03                 | 08/01/14   | 07/11/14            | 08/16/14                         | 09/30/14                       | 10/20/14   | 12/01/14                             | 01/2015   | 04/28/15   |
| 29:04                 | 08/15/14   | 07/25/14            | 08/30/14                         | 10/14/14                       | 10/20/14   | 12/01/14                             | 01/2015   | 05/12/15   |
| 29:05                 | 09/02/14   | 08/11/14            | 09/17/14                         | 11/03/14                       | 11/20/14   | 01/01/15                             | 01/2015   | 05/30/15   |
| 29:06                 | 09/15/14   | 08/22/14            | 09/30/14                         | 11/14/14                       | 11/20/14   | 01/01/15                             | 01/2015   | 06/12/15   |
| 29:07                 | 10/01/14   | 09/10/14            | 10/16/14                         | 12/01/14                       | 12/22/14   | 02/01/15                             | 05/2016   | 06/28/15   |
| 29:08                 | 10/15/14   | 09/24/14            | 10/30/14                         | 12/15/14                       | 12/22/14   | 02/01/15                             | 05/2016   | 07/12/15   |
| 29:09                 | 11/03/14   | 10/13/14            | 11/18/14                         | 01/02/15                       | 01/20/15   | 03/01/15                             | 05/2016   | 07/31/15   |
| 29:10                 | 11/17/14   | 10/24/14            | 12/02/14                         | 01/16/15                       | 01/20/15   | 03/01/15                             | 05/2016   | 08/14/15   |
| 29:11                 | 12/01/14   | 11/05/14            | 12/16/14                         | 01/30/15                       | 02/20/15   | 04/01/15                             | 05/2016   | 08/28/15   |
| 29:12                 | 12/15/14   | 11/20/14            | 12/30/14                         | 02/13/15                       | 02/20/15   | 04/01/15                             | 05/2016   | 09/11/15   |

## **EXPLANATION OF THE PUBLICATION SCHEDULE**

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

### **GENERAL**

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

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

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

### **FILING DEADLINES**

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

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

### **NOTICE OF TEXT**

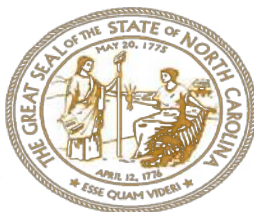
**EARLIEST DATE FOR PUBLIC HEARING:** The hearing date shall be at least 15 days after the date a notice of the hearing is published.

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

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

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





# State of North Carolina

PAT McCRORY  
GOVERNOR

January 15, 2014

## EXECUTIVE ORDER NO. 39

### TEMPORARY SUSPENSION OF MOTOR VEHICLE REGULATIONS TO ENSURE ADEQUATE FUEL SUPPLIES THROUGHOUT THE STATE

**WHEREAS**, the uninterrupted supply of fuel oil, diesel oil, gasoline, kerosene, propane, and liquid petroleum gas to residential and commercial establishments is an essential need of the public during the wintertime, and any interruption in the delivery of those fuels threatens the public welfare; and

**WHEREAS**, the periods of extreme cold weather this season has increased the demand for those heating fuels and threatens the uninterrupted delivery of those fuels to residential and commercial customers, thereby justifying an exemption from 49 CFR Part 395 (Federal Motor Carrier Safety Regulations); and

**WHEREAS**, 49 CFR § 390.23 allows the governor of a state to suspend the rules and regulations under 49 CFR Part 395 for up to 30 days if the Governor determines that an emergency condition exists; and

**WHEREAS**, under N.C.G.S. §§ 166A-19.3(6) and 166A-19.70, the Governor may declare that the health, safety, or economic well-being of persons or property in this State require that the maximum hours of service for drivers prescribed by N.C.G.S. § 20-381 be waived for persons transporting essential fuels.

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

#### Section 1.

The Department of Public Safety, in conjunction with the North Carolina Department of Transportation, shall waive the maximum hours of service for drivers prescribed by the Department of Public Safety pursuant to N.C.G.S. § 20-381.

#### Section 2.

Notwithstanding the waiver set forth above, size and weight restrictions and penalties are not waived.

#### Section 3.

The waiver of regulations under 49 CFR Part 395 (Federal Motor Carrier Safety Regulations) does not apply to the commercial drivers' licenses and insurance requirements.

**Section 4.**

The North Carolina State Highway Patrol shall enforce the conditions set forth in Sections 1, 2, and 3 of this Executive Order in a manner which will implement this rule without endangering motorists in North Carolina.

**Section 5.**

Upon request by law enforcement officers, exempted vehicles must produce documentation sufficient to establish their loads are being used for relief efforts associated with the cold weather.

**Section 6.**

This Executive Order is effective immediately and shall remain in effect for thirty (30) days or the duration of the emergency, whichever is less.

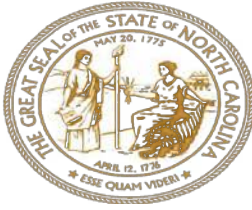
IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this fifteenth day of January in the year of our Lord two thousand and fourteen, and of the Independence of the United States of America the two hundred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

  
Pat McCrory  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State





# State of North Carolina

PAT McCrory  
GOVERNOR

January 28, 2014

## EXECUTIVE ORDER NO. 40

### DECLARATION OF A STATE OF EMERGENCY BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA

#### Section 1.

I hereby declare that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(18) exists in the State of North Carolina due to the approaching winter storm that will impact a significant portion of this State. The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) is the entire State of North Carolina.

#### Section 2.

I order all state and local government entities and agencies to cooperate in the implementation of the provisions of this declaration and the provisions of the North Carolina Emergency Operations Plan.

#### Section 3.

I delegate to Frank L. Perry, the Secretary of the Department Public Safety, or his designee, all power and authority granted to me and required of me by Article 1A of Chapter 166A of the General Statutes for the purpose of implementing the State's Emergency Operations Plan and deploying the State Emergency Response Team to take the appropriate actions as is necessary to promote and secure the safety and protection of the populace in North Carolina.

#### Section 4.

Further, Secretary Perry, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in G. S. § 143B-602.

**Section 5.**

I further direct Secretary Perry or his designee, to seek assistance from any and all agencies of the United States Government as may be needed to meet the emergency and seek reimbursement for costs incurred by the State in responding to this emergency.

**Section 6.**

I hereby order this declaration: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the circumstances of the state of emergency prevent or impede, to be promptly filed with the Secretary of the Department of Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this declaration.

**Section 7.**

This declaration does not prohibit or restrict lawfully possessed firearms or ammunition or impose any limitation on the consumption, transportation, sale or purchase of alcoholic beverages as provided in N.C.G.S. § 166A-19.30(c).

**Section 8.**

Pursuant to N.C.G.S. § 166A-19.23, this declaration triggers the prohibition against excessive pricing as provided in N.C.G.S. § 75-37 and 75-38 in the declared emergency area.

**Section 9.**

This declaration is effective immediately and shall remain in effect until rescinded.

**IN WITNESS WHEREOF**, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 28<sup>th</sup> day of January in the year of our Lord two thousand and fourteen, and of the Independence of the United States of America the two hundred and thirty-eight.

  
Pat McCrory  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State





# State of North Carolina

PAT McCrory  
GOVERNOR

January 28, 2014

## EXECUTIVE ORDER NO. 41

### TEMPORARY SUSPENSION OF MOTOR VEHICLE REGULATIONS TO ENSURE RESTORATION OF UTILITY SERVICES, TRANSPORTING ESSENTIALS AND REMOVING DEBRIS THROUGHOUT THE STATE

**WHEREAS**, due to the approaching winter storm, vehicles bearing equipment and supplies for utility restoration, carrying essentials and for debris removal need to be moved on the highways of North Carolina; and

**WHEREAS**, I have declared that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(18) exists due to the approaching winter storm and its likely impact in this State. The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) is the State of North Carolina; and

**WHEREAS**, under the provisions of N.C.G.S. § 166A-19.30(b)(3) the Governor, with the concurrence of the Council of State, may regulate and control the flow of vehicular traffic and the operation of transportation services; and

**WHEREAS**, with the concurrence of the Council of State, I have found that bearing equipment and supplies for utility restoration, carrying essentials and for debris removal must adhere to the registration requirements of N.C.G.S. § 20-86.1 and 20-382, fuel tax requirements of N.C.G.S. § 105-449.47, and the size and weight requirements of N.C.G.S. §§ 20-116 and 20-118. I have further found that citizens in this State may suffered losses and will likely suffer imminent further widespread damage within the meaning of N.C.G.S. § 166A-19.3(3) and N.C.G.S. § 166A-19.21(b) and;

**WHEREAS**, the uninterrupted supply of electricity, fuel oil, diesel oil, gasoline, kerosene, propane, liquid petroleum gas, food, water, and medical supplies to residential and commercial establishments is essential during and after the winter storm and any interruption in the delivery of those commodities threatens the public welfare; and

**WHEREAS**, the prompt restoration of utility services to citizens is essential to their safety and well-being; and

**WHEREAS**, 49 CFR § 390.23 allows the Governor of a state to suspend the rules and regulations under 49 CFR Part 395 for up to 30 days if the Governor determines that an emergency condition exists; and

**WHEREAS**, under N.C.G.S. § 166A-19.70, the Governor may declare that the health, safety, or economic well-being of persons or property requires that the maximum hours of service for



drivers prescribed by N.C.G.S. § 20-381 should be waived for persons transporting essential fuels, food, water, and medical supplies, and for restoration of utility services.

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

**Section 1.**

The Department of Public Safety in conjunction with the North Carolina Department of Transportation shall waive the maximum hours of service for drivers prescribed by the Department of Public Safety pursuant to N.C.G.S. § 20-381.

**Section 2.**

The Department of Public Safety in conjunction with the North Carolina Department of Transportation shall waive certain size and weight restrictions and penalties arising under N.C.G.S. §§ 20-116 and 20-118, and certain registration requirements and penalties arising under N.C.G.S. §§ 20-86.1, 20-382, 105-449.47, and 105-449.49 for the vehicles transporting equipment and supplies for the restoration of utility services, carrying essentials and for equipment for any debris removal along North Carolina roadways to our impacted counties.

**Section 3.**

Notwithstanding the waivers set forth above, size and weight restrictions and penalties have not been waived under the following conditions:

- a. When the vehicle weight exceeds the maximum gross weight criteria established by the manufacturer (GVWR) or 90,000 pounds gross weight, whichever is less.
- b. When the tandem axle weight exceeds 42,000 pounds and the single axle weight exceeds 22,000 pounds.
- c. When a vehicle and vehicle combination exceeds 12 feet in width and a total overall vehicle combination length of 75 feet from bumper to bumper.
- d. Vehicles and vehicle combinations subject to exemptions or permits by authority of this Executive Order shall not be exempt from the requirement of having a yellow banner on the front and rear measuring a total length of 7 feet by 18 inches bearing the legend "Oversized Load" in 10 inch black letters 1.5 inches wide and red flags measuring 18 inches square to be displayed on all sides at the widest point of the load. In addition, when operating between sunset and sunrise, a certified escort shall be required for loads exceeding 8 feet 6 inches in width.

**Section 4.**

Vehicles referenced under Sections 2 and 3 shall be exempt from the following registration requirements:

- a. The \$50.00 fee listed in N.C.G.S. § 105-449.49 for a temporary trip permit is waived for the vehicles described above. No quarterly fuel tax is required because the exception in N.C.G.S. § 105-449.45(a)(1) applies.
- b. The registration requirements under N.C.G.S. § 20-382.1 concerning intrastate and interstate for-hire authority is waived; however, vehicles shall maintain the required limits of insurance as required.
- c. Non-participants in North Carolina's International Registration Plan will be permitted into North Carolina in accordance with the exemptions identified by this Executive Order.

**Section 5.**

The size and weight exemption for vehicles will be allowed on all routes designated by the North Carolina Department of Transportation, except those routes designated as light traffic roads under N.C.G.S. § 20-118. This order shall not be in effect on bridges posted pursuant to N.C.G.S. § 136-72.

**Section 6.**

The waiver of regulations under Title 49 of the Code of Federal Regulations (Federal Motor Carrier Safety Regulations) does not apply to the CDL and Insurance Requirements. This waiver shall be in effect for 30 days or the duration of the emergency, whichever is less.

**Section 7.**

The North Carolina State Highway Patrol shall enforce the conditions set forth in Sections 1 through 6 of this Executive Order in a manner which will implement these provisions without endangering motorists in North Carolina.

**Section 8.**

Upon request by law enforcement officers, exempted vehicles must produce documentation sufficient to establish their loads are being used for bearing equipment and supplies for utility restoration, carrying essentials and for debris removal in the State of North Carolina.

**Section 9.**

This Executive Order does not prohibit or restrict lawfully possessed firearms or ammunition or impose any limitation on the consumption, transportation, sale or purchase of alcoholic beverages as provided in N.C.G.S. § 166A-19.30(c).

**Section 10.**

Pursuant to N.C.G.S. § 166A-19.23, this declaration triggers the prohibition against excessive pricing as provided in N.C.G.S. § 75-37 and 75-38 in the declared emergency area.

**Section 11.**

This Executive Order is effective immediately and shall remain in effect for thirty (30) days or the duration of the emergency, whichever is less.

**IN WITNESS WHEREOF**, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 28<sup>th</sup> day of January in the year of our Lord two thousand and fourteen, and of the Independence of the United States of America the two hundred and thirty-eight.

  
Pat McCrory  
Governor

**ATTEST:**

  
Elaine F. Marshall  
Secretary of State



NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

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

**Citation to Existing Rule Affected by this Rule-Making:** *North Carolina Building, Fire, Fuel Gas, Mechanical, Plumbing, and Residential Codes.*

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

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

**Public Hearing:** *Tuesday, March 11, 2014, 9:00AM, NCSU McKimmon Center, 1101 Gorman Street, Raleigh, NC 27606. Comments on both the proposed rule and any fiscal impact will be accepted.*

**Comment Procedures:** *Written comments may be sent to Chris Noles, Secretary, NC Building Code Council, NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comments on both the proposed rule and any fiscal impact will be accepted. Comment period expires on April 21, 2014.*

**Statement of Subject Matter:**

**1. Request by Apartment Association of North Carolina, to amend the 2012 NC Building Code, Section 901.6.1. The proposed amendment is as follows:**

**901.6.1 Automatic sprinkler systems.** Automatic sprinkler systems shall be monitored by an *approved* supervising station.

**Exceptions:**

1. A supervising station is not required for *automatic sprinkler systems* protecting one- and two-family dwellings.
2. Limited area systems serving fewer than 20 sprinklers.

3. A group R-2 building less than 4-stories in height sprinklered in accordance with NFPA 13R where sprinklers are provided for porches, balconies, corridors and stairs that are open and attached and installed in accordance with Section 903.4. At a minimum an approved audible alarm device shall be provided on every sprinklered R-2 building in accordance with Section 903.4.2 of the NC Fire Code. No on-site supervision is required at a constantly attended location.

**Motion/Second/Approved** – The request was granted and sent to the Building/Fire Committee for review. The proposed effective date of this rule is January 1, 2015.

**Reason Given** – Group R-2 apartments are equipped with an audible outside water-flow alarm and are generally continuously occupied. The alarm is expected to be reported to the Fire Department by either the occupants or passersby.

**Fiscal Statement** – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**2. Request by Apartment Association of North Carolina, to amend the 2012 NC Building Code, Section 2902.1.1. The proposed amendment is as follows:**

**2902.1.1 Fixture calculations.** To determine the *occupant load* of each sex, the total *occupant load* shall be divided in half. To determine the required number of fixtures, the fixture ratio or ratios for each fixture type shall be applied to the *occupant load* of each sex in accordance with Table 2902.1. Fractional numbers resulting from applying the fixture ratios of Table 2902.1 shall be rounded up to the next whole number. For calculations involving multiple occupancies, such fractional numbers for each occupancy shall first be summed and then rounded up to the next whole number.

**Exceptions:**

1. The total *occupant load* shall not be required to be divided in half where *approved* statistical data indicate a distribution of the sexes of other than 50 percent of each sex.
2. In buildings that contain dwellings or sleeping units that have a pool dedicated to the residents, a percentage reduction of the total required fixtures provided for a pool and pool deck without bleachers and grandstands may be taken equal to the percentage of total residential units whose entries fall within 500 feet walking distance of the pool deck.



**Motion/Second/Approved** – The request was granted and sent to the Building/Mechanical Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – The intent of this proposal is to provide a graduated approach to dealing with swimming pool and pool deck plumbing fixture counts beyond a reasonable travel distance to the occupants' private bathroom.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**3. Request by Apartment Association of North Carolina, to amend the 2012 NC Plumbing Code, Section 403.1.1. The proposed amendment is as follows:**

**403.1.1 Fixture calculations.** To determine the occupant load of each sex, the total occupant load shall be divided in half. To determine the required number of fixtures, the fixture ratio or ratios for each fixture type shall be applied to the occupant load of each sex in accordance with Table 403.1. Fractional numbers resulting from applying the fixture ratios of Table 403.1 shall be rounded up to the next whole number. For calculations involving multiple *occupancies*, such fractional numbers for each *occupancy* shall first be summed and then rounded up to the next whole number.

**Exceptions:**

1. The total occupant load shall not be required to be divided in half where *approved* statistical data indicates a distribution of the sexes of other than 50 percent of each sex.

2. In buildings that contain dwellings or sleeping units that have a pool dedicated to the residents, a percentage reduction of the total required fixtures provided for a pool and pool deck without bleachers and grandstands may be taken equal to the percentage of total residential units whose entries fall within 500 feet walking distance of the pool deck.

**Motion/Second/Approved** – The request was granted and sent to the Building/Mechanical Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – The intent of this proposal is to provide a graduated approach to dealing with swimming pool and pool deck plumbing fixture counts beyond a reasonable travel distance to the occupants' private bathroom.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**4. Request by Robert Hall, representing Viega, LLC, to amend the 2012 NC Fuel Gas Code, Section 403.10.1. The proposed amendment is as follows:**

**403.10.1 Pipe joints.** Pipe joints shall be threaded, flanged, brazed, ~~or~~ welded, or made with press-connect fittings complying with ANSI LC-4. Where nonferrous pipe is brazed, the brazing materials shall have a melting point in excess of 1,000°F (538°C). Brazing alloys shall not contain more than 0.05-percent phosphorous.

**Motion/Second/Approved** – The request was granted and sent to the Mechanical Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – This proposal is to recognize press-connect fittings for pipe joints in addition to tubing joints.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**5. Request by Randall Shackelford, representing Simpson Strong-Tie Co., to amend the 2012 NC Residential Code, Appendix M, Section AM104. The proposed amendment is as follows:**

**SECTION AM104 DECK ATTACHMENT**

**AM104.1 Deck attachment to wood.** When a deck is supported at the structure by attaching the deck ledger to the wood band of the structure, ~~the following attachment schedules shall apply for attaching the deck band~~ ledger shall be attached to the structure in accordance with either Section AM104.1.1 or Section AM104.1.2.

**AM104.1.1 Attachment to wood.** When the deck is attached to a wood band joist, fastening shall be in accordance with Table AM104.1.1.

**TABLE AM104.1.1 All structures except brick veneer structures-LEDGER ATTACHMENT TO WOOD**

**AM104.1.1 All structures except brick veneer structures.**

| FASTENERS   | 8' MAX JOIST SPAN <sup>a</sup> | 16' MAX JOIST SPAN <sup>a</sup> |
|---|--------------------------------|---------------------------------|
| $\frac{5}{8}$ " Hot dipped galv. bolts with nut and washer <sup>b</sup> | 1 @ 3'-6" o.c.                 | 1 @ 1'-8" o.c.                  |
| and   | and                            | and                             |
| 12d Common hot dipped galv. nails <sup>c</sup>                          | 2 @ 8" o.c.                    | 3 @ 6" o.c.                     |

- a. Attachment interpolation between 8 foot and 16 foot joists span is allowed.  
b. Minimum edge distance for bolts is 2½ inches.  
c. Nails must penetrate the supporting structure band a minimum of 1½ inches.

**AM104.1.2 Alternate deck ledger attachment to band joist.** For decks supporting a total design load of 50 pounds per square foot [40 pounds per square foot live load plus 10 pounds per square foot dead load], the connection between a deck ledger of pressure-preservative-treated Southern Pine, incised pressure-preservative-treated Hem-Fir or approved decay-resistant species, and a 2-inch nominal lumber band joist bearing on a sill plate or wall plate shall be constructed with ½-inch lag screws or bolts with washers in accordance with Table AM104.1.2(1). Lag screws, bolts and washers shall be hot-dipped galvanized or stainless steel. The lag screws or bolts in deck ledgers and band joists shall be placed in accordance with Table AM104.1.2(2) and Figures AM104.1.2(1) and AM104.1.2(2).

**TABLE AM104.1.2(1)**

**FASTENER SPACING FOR A SOUTHERN PINE OR HEM-FIR DECK LEDGER AND  
A 2-INCH-NOMINAL SOLID-SAWN SPRUCE-PINE-FIR BAND JOIST<sup>c, f, g</sup>  
(Deck live load = 40 psf, deck dead load = 10 psf)**

| JOIST SPAN  | 6' and less  | 6'1" to 8' | 8'1" to 10' | 10'1" to 12' | 12'1" to 14' | 14'1" to 16' | 16'1" to 18' |
|---|--|------------|-------------|--------------|--------------|--------------|--------------|
| <b>Connection details</b>   | <b>On-center spacing of fasteners<sup>d, e</sup></b> |            |             |              |              |              |              |
| ½ inch diameter lag screw with 15/32 inch maximum sheathing <sup>a</sup>                          | 30   | 23         | 18          | 15           | 13           | 11           | 10           |
| ½ inch diameter bolt with 15/32 inch maximum sheathing  | 36   | 36         | 34          | 29           | 24           | 21           | 19           |
| ½ inch diameter bolt with 15/32 inch maximum sheathing and ½ inch stacked washers <sup>b, h</sup> | 36   | 36         | 29          | 24           | 21           | 18           | 16           |

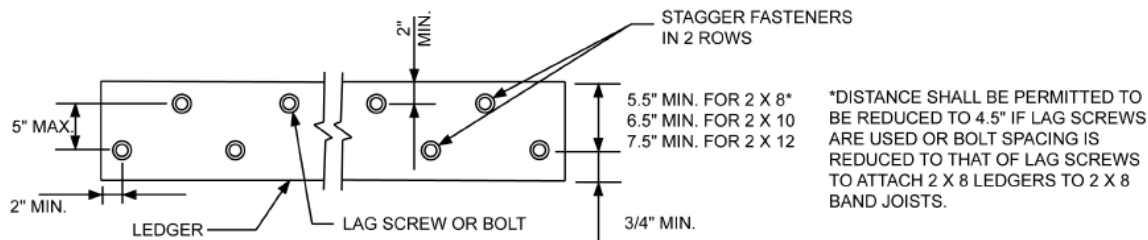
- a. The tip of the lag screw shall fully extend beyond the inside face of the band joist.  
b. The maximum gap between the face of the ledger board and face of the wall sheathing shall be ½ inch.  
c. Ledgers shall be flashed to prevent water from contacting the house band joist.  
d. Lag screws and bolts shall be staggered in accordance with Section R507.2.1.  
e. Deck ledger shall be minimum 2 × 8 pressure-preservative-treated No. 2 grade lumber, or other approved materials as established by standard engineering practice.  
f. When solid-sawn pressure-preservative-treated deck ledgers are attached to a minimum 1-inch-thick engineered wood product (structural composite lumber, laminated veneer lumber or wood structural panel band joist), the ledger attachment shall be designed in accordance with accepted engineering practice.  
g. A minimum 1 × 9½ Douglas Fir laminated veneer lumber rimboard shall be permitted in lieu of the 2-inch nominal band joist.  
h. Wood structural panel sheathing, gypsum board sheathing or foam sheathing not exceeding 1 inch in thickness shall be permitted. Washers are permitted to be used only with wood structural panel sheathing. The maximum distance between the face of the ledger board and the face of the band joist shall be 1 inch.

**TABLE AM104.1.2(2)**

**PLACEMENT OF LAG SCREWS AND BOLTS IN DECK LEDGERS AND BAND JOISTS**

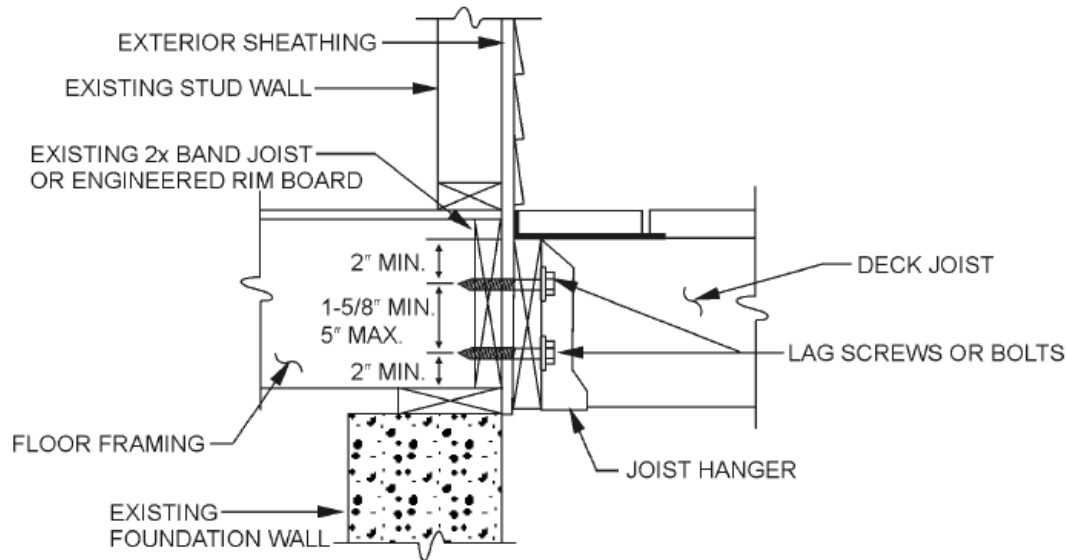
| <b>MINIMUM END AND EDGE DISTANCES AND SPACING BETWEEN ROWS</b> |                       |             |                       |                        |
|--|-----------------------|-------------|-----------------------|------------------------|
|  | TOP EDGE              | BOTTOM EDGE | ENDS                  | ROW SPACING            |
| Ledger <sup>a</sup>  | 2 inches <sup>d</sup> | ¼ inch      | 2 inches <sup>b</sup> | 1⅝ inches <sup>b</sup> |
| Band Joist <sup>c</sup>  | ¾ inch                | 2 inches    | 2 inches <sup>b</sup> | 1⅝ inches <sup>b</sup> |

- a. Lag screws or bolts shall be staggered from the top to the bottom along the horizontal run of the deck ledger in accordance with Figure AM104.1.2(1).  
b. Maximum 5 inches.  
c. For engineered rim joists, the manufacturer's recommendations shall govern.  
d. The minimum distance from bottom row of lag screws or bolts to the top edge of the ledger shall be in accordance with Figure AM104.1.2(1).



For SI: 1 inch = 25.4 mm.

**FIGURE AM104.1.2(1) PLACEMENT OF LAG SCREWS AND BOLTS IN LEDGERS**



For SI: 1 inch = 25.4 mm.

**FIGURE AM104.1.2(2) PLACEMENT OF LAG SCREWS AND BOLTS IN BAND JOISTS**

**AM104.2 Deck attachment to brick veneer.** When a deck is supported at the structure by attaching the wood ledger to brick veneer, fastening shall be as specified in Table AM104.2.

**TABLE AM104.1.2 BRICK VENEER STRUCTURES**

| FASTENERS  | 8' MAX JOIST SPAN <sup>a</sup> | 16' MAX JOIST SPAN <sup>a</sup> |
|--|--------------------------------|---------------------------------|
| 5/8" Hot dipped galv. bolts with nut and washer <sup>b</sup> | 1 @ 2'-4" o.c.                 | 1 @ 1'-4" o.c.                  |

a. Attachment interpolation between 8 foot and 16 foot joist span is allowed.

b. Minimum edge distance for bolts is 2 1/2 inches.

**AM104.1.3 Masonry ledge support.** If the deck band is supported by a minimum of 1/2 inch masonry ledge along the foundation wall, 5/8 inch hot dipped galvanized bolts with washers spaced at 48 inches o.c. may be used for support.

**AM104.1.4 Other means of support.** Joist hangers or other means of attachment may be connected to house band and shall be properly flashed

**Motion/Second/Approved** – The request was granted and sent to the Residential Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – This proposal is to bring the deck ledger attachment table and details from the 2012 IRC as an optional method, while maintaining the existing NC Code ledger attachment.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**6. Request by Robert Privott, representing NCHBA, to amend the 2012 NC Mechanical Code/Abridged Residential Code Edition, Section 505.2. The proposed amendment is as follows:**

**505.2 Makeup air required.** Exhaust hood systems capable of exhausting in excess of 400 cubic feet per minute (0.19 m<sup>3</sup>/s) shall be provided with makeup air at a rate approximately equal to the exhaust air rate that is in excess of 400 cubic feet per minute (0.19 m<sup>3</sup>/s). Such makeup air systems shall be equipped with a means of closure and shall be automatically controlled to start and operate simultaneously with the exhaust system.

**Exception:** Where all appliances in the house are direct-vent, power-vent, unvented, or electric, makeup air shall be provided where exhaust fans are capable of exhausting more than 600 cubic feet per minute (0.28 m<sup>3</sup>/s). Exhaust hood systems capable of exhausting more than 600 cubic feet per minute shall be provided with makeup air at a rate approximately equal to the exhaust air rate that is in excess of 600 cubic feet per minute.

**Motion/Second/Approved** – The request was granted and sent to the Mechanical Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – This proposal requires makeup air equal to the amount above 400-cfm. Essentially there is no different effect on a house between a 400-cfm fan and a 600-cfm fan with 200-cfm makeup air.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**7. Request by Marvin Strzyzewski, representing MiTek USA, Inc./Truss Engineering Company, to amend the 2012 NC Residential Code, Section R4605.5 and Table R4605.5. The proposed amendment is as follows:**

**R4605.5** In the coastal hazard area and the ocean hazard area, all metal connectors and fasteners outside conditioned spaces shall be hot-dip galvanized steel after fabrication and meet ASTM A 153. Exposed metal connectors, such as tie-down straps on porches, decks, and areas under the structure, shall be a minimum 3/16-inch (5mm) thick, and shall be hot-dip galvanized after fabrication and meet ASTM A 123 or ASTM A 153. Stainless steel light-gage metal connectors shall be permitted in exposed locations. Metal connectors of approved equivalent corrosion-resistant material may be accepted. See Table R4605.5.

**TABLE R4605.5<sup>a</sup> CORROSION RESISTANCE** (Applies only to Structures Located in Coastal High-Hazard Areas and Ocean Hazard Areas)

|   | <b>OPEN</b><br>(exterior, porches, under house)   | <b>EXPOSURE LEVEL VENTED/ENCLOSED</b><br>(attic, floor trusses, enclosed crawl spaces and stud cavity)   | <b>CONDITIONED</b><br>(heated/cooled living areas)         |
|---|---|--|--|
| Nails, staples, screws  | Hot-dip galvanized  | Hot-dip galvanized   | —  |
| Nuts, bolts, washers, tie rods  | Hot-dipped galvanized   | Hot-dip galvanized   | —  |
| Steel connection plates and straps (3/16" minimum thickness)                | Hot-dip galvanized after fabrication  | Hot-dip galvanized   | —  |
| Sheet metal connectors, wind anchors, joist hangers, steel joists and beams | Stainless steel, <del>or</del> hot-dip galvanized after fabrication <u>or triple galvanized<sup>b</sup></u> | Hot-dip galvanized after plate fabrication <u>or triple galvanized<sup>b</sup></u>   | Hot-dip galvanized <u>or triple galvanized<sup>b</sup></u> |
| Truss plates  | Stainless steel, <del>or</del> hot-dip galvanized after fabrication <u>or triple galvanized<sup>b</sup></u> | Hot-dip galvanized after fabrication, <del>or</del> stainless steel, <u>triple galvanized<sup>b</sup> or in accordance with TPI-1 of the Truss Plate Institute within 6'-0" of a gable louver, ridge or soffit vent. Otherwise in accordance with TPI 1 of the Truss Plate</u> | Standard galvanized <sup>b</sup>                           |

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**IN ADDITION**

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|  |  |  |
|--|--|--|
|  | Institute Standard galvanized <sup>b</sup> . |  |
|--|--|--|

a. Applies only to structures located in Coastal High-Hazard Areas and Ocean High Hazard Areas

b. Triple galvanizing – G185, standard galvanizing – G60 both per ASTM A 653 / A 653M

**Motion/Second/Approved** – The request was granted and sent to the Residential Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – This proposal is to update Section R4605.5 for the additional products and coating types available today.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**NOTICE:**

**Commentary and Interpretations** of the North Carolina State Building Codes are published online at the following link.

[http://www.ncdoi.com/OSFM/Engineering and Codes/Default.aspx?field1=Code Interpretations&user=Code Enforcement Resources](http://www.ncdoi.com/OSFM/Engineering_and_Codes/Default.aspx?field1=Code%20Interpretations&user=Code%20Enforcement%20Resources)

**NOTICE:**

**Objections and Legislative Review** requests may be made to the NC Office of Administrative Hearings in accordance with G.S. 150B-21.3(b2) after Rules are adopted by the Building Code Council.

<http://www.ncoah.com/rules/>

Public Notice  
North Carolina Department of Environment and Natural Resources (NCDENR)

Division of Water Resources  
Modeling and Assessment Branch  
1611 Mail Service Center  
Raleigh, North Carolina 27699-1611

Notice of Recommendation that the Environmental Management Commission  
Approve the Cape Fear/Neuse River Basin Hydrologic Model

The N.C. Division of Water Resources (DWR), within the N.C. Department of Environment and Natural Resources (DENR), recommends that the Environmental Management Commission approve the Cape Fear/Neuse River Basin Hydrologic Model. Information and details about the Cape Fear/Neuse River Basin Hydrologic Model are available on the Division's website at [http://www.ncwater.org/Data\\_and\\_Modeling/Cape\\_Fear-Neuse/](http://www.ncwater.org/Data_and_Modeling/Cape_Fear-Neuse/).

Written comments regarding the proposed Cape Fear/Neuse River Basin Hydrologic Model will be accepted for 60 days after the publication date of this notice and must be received by DWR before close of business April 21, 2014. The Division will provide training in the use of the model during the 60-day comment period if there is sufficient interest. You can email comments and training requests to [dwr-neuse-staff@lists.ncmail.net](mailto:dwr-neuse-staff@lists.ncmail.net), or mail comments to DWR at the address above.

You can contact Kathy Stecker at [kathy.stecker@ncdenr.gov](mailto:kathy.stecker@ncdenr.gov), or (919) 807-6422 for more information.

**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 14B – DEPARTMENT OF PUBLIC SAFETY

*Notice is hereby given in accordance with G.S. 150B-21.2 that NC Department of Public Safety, State Highway Patrol intends to amend the rule cited as 14B NCAC 07A .0116.*

Agency obtained G.S. 150B-19.1 certification:

- ☒ OSBM certified on: January 27, 2014
- ☐ RRC certified on:
- ☐ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):  
[www.ncdps.gov](http://www.ncdps.gov)

Proposed Effective Date: July 1, 2014

Public Hearing:

Date: March 4, 2014

Time: 9:00 a.m.

Location: SHP Troop C Headquarters, 1831 Blue Ridge Road, Raleigh, NC 27607

**Reason for Proposed Action:** Rule is required by G.S. 20-309 and the agency desires to improve existing rules by amending with further clarification of rule.

**Comments may be submitted to:** Captain Freddy L. Johnson, Jr., 4231 Mail Service Center, Raleigh, NC 27699-4231; phone (919) 436-3072; fax (919) 733-2161; email [freddy.johnson@ncdps.gov](mailto:freddy.johnson@ncdps.gov)

Comment period ends: April 21, 2014

**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 (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

## CHAPTER 07 – STATE HIGHWAY PATROL

### SUBCHAPTER 07A – ENFORCEMENT REGULATIONS

#### SECTION .0100 – ENFORCEMENT REGULATIONS

#### 14B NCAC 07A .0116 ROTATION WRECKER SERVICE REGULATIONS

(a) The Troop Commander shall include on the Patrol Rotation Wrecker List only those wrecker services which agree in writing to adhere to the following provisions:

- (1) A wrecker service desiring to be included on the Highway Patrol Rotation Wrecker List shall complete a wrecker application on a form designated by the Patrol. All applications shall be submitted to the appropriate District First Sergeant.
- (2) In order to be listed on a rotation wrecker list within a zone, a wrecker service must have a full-time business office within that Rotation Wrecker Zone that is staffed and open during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding holidays, and a storage facility. The Wrecker service must have someone available to accept telephone calls from the Patrol, and to allow access to towed vehicles, or to retrieve towed vehicles by the registered owner, operator, or legal possessor during business hours. The business office may not be the same physical address as the owner's residence unless zoned for commercial purposes and advertised as a business property. A representative from the wrecker service shall be available on call on a 24-hour basis, for emergencies. The wrecker service shall allow vehicles to be retrieved between the hours of 8:00 a.m. to 5:00 p.m., seven days a week, excluding holidays. An individual (registered owner, legal possessor, or operator) shall not be charged a storage fee for days that he/she could not retrieve his/her vehicle as a result of an action or omission on

- the part of the wrecker service (such as where the wrecker service was not open, did not answer the telephone or a representative was not available to release the vehicle).
- (3) Wrecker service facilities and equipment, including vehicles, office, telephone lines, office equipment and storage facilities may not be shared with or otherwise located on the property of another wrecker service and must be independently insured. Vehicles towed at the request of the Patrol must be placed in the storage owned and operated by the wrecker service on the rotation list. A storage facility for a small wrecker shall be located within the assigned zone. For wrecker services with large wreckers the storage facility for vehicles towed with the large wrecker may be located anywhere within the county. To be listed on the large rotation wrecker list, a wrecker service must have at least one large ~~wrecker~~ wrecker located within the county and designated for the sole use in that county. To be listed on the small rotation wrecker list, a wrecker service must have at least one small ~~wrecker~~ wrecker located within the assigned zone and designated for the sole use in that assigned zone. A wrecker may not be on more than one Patrol Rotation list. In any case where husband and wife or other family members are engaged in the business of towing vehicles and desire to list each business separately on the Patrol wrecker rotation list, the wrecker service shall establish that it is a separate legal entity for every purpose, including federal and state tax purposes. Nothing in this Rule precludes a wrecker service from responding to private calls outside the assigned zone or county.
  - (4) Each wrecker must be equipped with legally required lighting and other safety equipment to protect the public and the equipment must be in good working order.
  - (5) Each wrecker on the Patrol Rotation Wrecker List must be equipped with the equipment required on the application list and the equipment must, at all times, be operating properly.
  - (6) The wrecker service operator must remove all debris, other than hazardous materials, from the highway and the right-of-way prior to leaving the incident/collision scene. This service must be completed as a part of the required rotation service and shall not be charged as an extra service provided. Hazardous materials consist of those materials and amounts that are required by law to be handled by local Hazardous Materials Teams. Hazardous Materials or road clean-up other than debris may be billed in quarter hour increments after the first hour on scene.
  - (7) The wrecker service must be available to the Patrol for rotation service on a 24-hour per day basis and accept collect calls (if applicable) from the Patrol. Calls for service must not go unanswered for any reason.
  - (8) The wrecker service shall respond, under normal conditions, in a timely manner. Failure to respond in a timely manner may result in a second rotation wrecker being requested. If the second wrecker is requested before the arrival of the first rotation wrecker, the initial requested wrecker shall forfeit the call and shall immediately leave the collision/incident scene.
  - (9) For Patrol-involved incidents, the wrecker service shall respond only upon request from Patrol authority or at the request of the person in apparent control of the vehicle to be towed.
  - (10) The wrecker service, when responding to rotation wrecker calls, shall charge reasonable fees for services rendered. Towing, storage and related fees charged for rotation services may not exceed the wrecker service's charges for nonrotation service calls that provide the same service, labor, and conditions. Wrecker services may secure assistance from another rotation wrecker service when necessary, but only one bill shall be presented to the owner or operator of the vehicle for the work performed. A price list for recovery, towing and storage shall be established and kept on file at the place of business. A price list for all small wreckers and rollbacks with a GVWR of less than 26,001 pounds shall be furnished, in writing on a Patrol form, to the District First Sergeant upon request. The District First Sergeant shall approve all price lists submitted within their respective District if they are determined to be reasonable, consistent with fees charged by other Highway Patrol rotation wrecker services within the District and do not exceed the wrecker service's charges for nonrotation service calls that provide the same service, labor, and conditions. The District First Sergeant shall retain a copy of all approved price lists in the appropriate wrecker service file located in the district office. Storage fees shall not begin to accrue until the next calendar day following the initial towing of the vehicle. Wrecker service towing fees for recovery and transport of vehicles after 5:00 p.m. and on weekends may not exceed the towing fees for recovery and transport of vehicles charged during regular "Business Hours" by more than 10 percent. A mileage fee may only be charged if the customer requests the vehicle to be towed to a location



- outside of the assigned wrecker zone or county. If a mileage fee is warranted, the wrecker driver shall inform the owner, operator or legal possessor of the vehicle of any additional charge for mileage prior to towing. Each Troop Commander shall designate a Troop Lieutenant to serve as a Rotation Wrecker Liaison for their respective Troop. The individual price list for each respective wrecker service shall be made available to customers upon request. Copies of the approved price list shall be maintained within each wrecker and shall be given to the owner, operator or legal possessor of a vehicle being towed as a result of a Highway Patrol rotation wrecker call by the wrecker driver, if the owner, operator or legal possessor of the vehicle being towed is present at the scene. Prices indicated on this form shall be the maximum amount that will be charged for a particular service; however, this does not prevent charges of a lesser amount for said service.
- (11) All wrecker operators shall have a valid driver's license for the type of vehicles driven; a limited driving privilege is not allowed.
  - (12) Wrecker owners, operators and employees shall not be abusive, disrespectful, or use profane language when dealing with the public or any member of the Patrol and shall cooperate at all times with members of the Patrol.
  - (13) The wrecker service shall adhere to all Federal and State laws and local ordinances and regulations related to registration and operation of wrecker service vehicles and have insurance as required by G.S. 20-309(a).
  - (14) The wrecker service shall employ only wrecker operators who demonstrate an ability to perform required services in a safe, timely, efficient and courteous manner and who satisfy all of the requirements for wrecker drivers established or referenced ~~herein~~ herein; and shall not allow unauthorized passengers when responding to Highway Patrol rotation calls.
  - (15) The wrecker service must notify the District First Sergeant of any insurance lapse or change. Wrecker Services shall ensure the NC Highway Patrol is listed as "Certificate Holder" on the Certificate of Liability Insurance, in c/o the District First Sergeant, complete with the current mailing address for the Highway Patrol District Office tasked with the responsibility for ensuring compliance with Highway Patrol policy regarding the respective wrecker service.
  - (16) The wrecker service shall notify the Patrol whenever the wrecker service is unable to respond to calls.
  - (17) Notification of rotation wrecker calls shall be made to the owner/operator or employee of the wrecker service. Notification shall not be made to any answering service, pager or answering machine.
  - (18) Wrecker service vehicles shall be marked on each side by printing the wrecker service name, city and state in at least three inch letters. No magnetic or stick-on signs shall be used. Decals are permissible. The wrecker service operator shall provide a business card to the investigating officer or person in apparent control of the vehicle before leaving the scene.
  - (19) Each wrecker service vehicle must be registered with the Division of Motor Vehicles in the name of the wrecker service and insured by the wrecker service. Dealer tags shall not be displayed on wreckers that respond to rotation calls.
  - (20) Wrecker Services shall secure all personal property at the scene of a collision to the extent possible, and preserve personal property in a vehicle which is about to be towed.
  - (21) Upon application to the Patrol Rotation Wrecker List, the owner shall ensure that the owner and each wrecker driver has not been convicted of, pled guilty to, or received a prayer for judgment continued (PJC):
    - (A) Within the last five years of:
      - (i) A first offense under G.S. 20-138.1, G.S. 20-138.2, G.S. 20-138.2A or G.S. 20-138.2B;
      - (ii) Any misdemeanor involving an assault, an affray, disorderly conduct, being drunk and disruptive, larceny or fraud;
      - (iii) Misdemeanor Speeding to Elude Arrest; or
      - (iv) A violation of G.S. 14-223, Resist, Obstruct, Delay.
    - (B) Within the last ten years of:
      - (i) Two or more offenses in violation of G.S. 20-138.1, G.S. 20-138.2, G.S. 20-138.2A or G.S. 20-138.2B;
      - (ii) Felony speeding to elude arrest; or
      - (iii) Any Class F, G, H or I felony involving sexual assault, assault, affray, disorderly conduct, being drunk and disruptive, fraud,

- larceny, misappropriation of property or embezzlement.
- (C) At any time of:
- (i) Class A, B1, B2, C, D, or E felonies;
  - (ii) Any violation of G.S. 14-34.2, Assault with deadly weapon on a government officer or employee, 14-34.5, Assault with firearm on a law enforcement officer; or G.S. 14-34.7, Assault on law enforcement officer inflicting injury;
  - (iii) Any violation of G.S. 20-138.5, Habitual DWI. For convictions occurring in federal court, another state or country or for North Carolina convictions for felonies which were not assigned a class at the time of conviction, the North Carolina offense which is substantially similar to the federal or out of state conviction or the class of felony which is substantially similar to the North Carolina felony shall be used to determine whether the owner or driver is eligible. Any question from the owner of a Wrecker Service concerning a criminal record shall be discussed with the First Sergeant or his designee; or
  - (iv) Three felony offenses in any federal or state court or combination thereof. The commission of a felony is not considered to be a second or subsequent felony unless it is committed after the conviction or guilty plea to the previous felony.
- (22) Upon employment or upon the request of the District First Sergeant, the owner of the wrecker service shall supply the Patrol with the full name, current address, date of birth, and photo copy of drivers license, valid work VISA, or other INS Documentation for all wrecker drivers and owner(s) in order for the Patrol to obtain criminal history information. The Wrecker Service shall also provide a certified copy of the driving record for the owner and each driver authorized to drive on rotation upon initial application, upon the hiring of a driver if hired after initial application, and at the time of periodic wrecker inspections. The wrecker service shall inform the District First Sergeant if the owner or a driver is charged with, convicted of, enters a plea of guilty or no contest to, or receives a prayer for judgment continued (PJC) for any of the crimes listed in Subparagraph (21) of this Paragraph. Upon notification that a driver or owner was charged with any of the crimes listed in this Rule, the Patrol may conduct an independent administrative investigation. Willful failure to notify the District First Sergeant as required herein shall result in removal from the rotation wrecker service for a minimum of 12 months.
- (23) Upon request or demand, the rotation wrecker shall return personal property stored in or with a vehicle, whether or not the towing, repair, or storage fee on the vehicle has been or will be paid. Personal property, for purposes of this provision, includes any goods, wares, freight, or any other property having any value whatsoever other than the functioning vehicle itself.
- (24) The wrecker service shall tow disabled vehicles to any destination requested by the vehicle owner or other person with apparent authority, after financial obligations have been finalized.
- (25) Unless the vehicle is being preserved by the Patrol as evidence, the wrecker service shall allow insurance adjusters access to and allow inspection of the vehicle at any time during normal working hours.
- (26) Being called by the Patrol, to tow a vehicle, does not create a contract with or obligation on the part of Patrol or Patrol personnel to pay any fee or towing charge except when towing a vehicle owned by the Patrol, a vehicle that is later forfeited to the Patrol, or if a court determines that the Patrol wrongfully authorized the tow and orders the Patrol to pay transportation and storage fees.
- (27) Being placed on the Patrol Rotation Wrecker List does not guarantee a particular number or quantity of calls, does not guarantee an equivalent number of calls to every wrecker service on the rotation wrecker list, nor entitle any wrecker service to any compensation as a consequence for not being called in accordance with the list or when removed from the rotation wrecker list.
- (28) The failure to respond to a call by the Patrol shall result in the wrecker service being placed at the bottom of any rotation wrecker list and the wrecker service shall then be "automatically by-passed" when that wrecker service comes up for its next rotation call.

- (29) The District First Sergeant or his designee shall subject rotation wreckers and facilities to inspections during normal business hours.
- (30) A rotation wrecker service, upon accepting a call for service from the Patrol, must use its wrecker. Wrecker companies shall not refer a call to another wrecker company or substitute for each other.
- (31) If a rotation wrecker service moves its business location or has a change of address, the owner of the wrecker service must notify the District First Sergeant of the new address or location. Notification shall be made in writing, no later than ten days prior to the projected move. The wrecker service is not entitled to receive rotation calls prior to inspection of the new facility.
- (32) A wrecker service may dispatch either a wrecker or a car carrier "rollback" in response to a Patrol rotation wrecker call, except where the wrecker service is advised that a particular type of recovery vehicle is needed due to existing circumstances.
- (33) A rotation wrecker driver or employee shall not respond to a Patrol related incident with the odor of alcohol on his/her breath or while under the influence of alcohol, drugs or any impairing substance.
- (34) A wrecker service shall have in effect a valid hook or cargo insurance policy issued by a company authorized to do business in the State of North Carolina in the amount of fifty thousand dollars (\$50,000) for each small wrecker and one hundred fifty thousand dollars (\$150,000) for each large wrecker or as otherwise required by Federal regulation, whichever is greater. In addition, each wrecker service shall have a garage keeper's insurance policy from an insurance company authorized to do business in the State of North Carolina covering towed vehicles in the amount of one hundred thousand dollars (\$100,000).

(b) The District First Sergeant shall conduct an investigation of each wrecker service desiring to be placed on the Patrol Rotation Wrecker List and determine if the wrecker service meets the requirements set forth in this Rule. If the District First Sergeant determines that a wrecker service fails to satisfy one or more of the requirements set forth in this Rule, the First Sergeant shall notify the wrecker service owner of the reason(s) for refusing to place it on the rotation wrecker list. Any wrecker service that fails to comply with the requirements of this Rule may be removed from the rotation wrecker list.

(c) The Troop Commander or designee shall ensure that a wrecker service will only be included once on each rotation wrecker list.

(d) If the Troop Commander or designee chooses to use a contract, zone, or other system administered by a local agency, the local agency rules govern the system.

(e) If a wrecker service responds to a call it shall be placed at the bottom of the rotation wrecker list unless the wrecker service, through no fault of its own, is not used and receives no compensation for the call. In that event, it shall be placed back at the top of the rotation list.

*Authority G.S. 20-184; 20-185; 20-187; 20-188.*

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

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rule cited as 15A NCAC 02B .0306.*

### **Agency obtained G.S. 150B-19.1 certification:**

- ☒ **OSBM certified on:** September 30, 2013
- ☐ **RRC certified on:**
- ☐ **Not Required**

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<http://portal.ncdenr.org/web/wq/rules>

**Proposed Effective Date:** September 1, 2014

### **Public Hearing:**

**Date:** March 27, 2014

**Time:** 6:00 p.m.

**Location:** Polk County Middle School, 321 Wolverine Trail, Mill Spring, NC 28756

### **Reason for Proposed Action:**

#### ***Proposed Reclassification for a portion of the Green River***

*A portion of the Green River, including Lake Adger, in Polk County (Broad River Basin) is proposed to be reclassified from Class C to Class WS-IV Critical Area (CA) and WS-IV (Protected Area or PA). Polk County requested this reclassification. The reclassification is needed to construct a public water supply intake in Lake Adger. This new water supply source will allow Polk County to meet local water demands.*

*A Finding of No Significant Impact (FONSI) for this project has not yet been issued but is being pursued, and the waters to be reclassified meet water supply water quality standards according to 2011 DWR studies.*

*The proposed CA would extend approximately 0.5 mile from and draining to Lake Adger as measured from the normal pool elevation of that reservoir; it would include nearly 3,154 acres around the lake. The proposed PA would extend approximately 5 miles from and draining to Lake Adger as measured from the normal pool elevation of that reservoir; it would include nearly 17,421 acres. There are several tributaries to the Green River included in this reclassification proposal. Silver Creek, Ostin Creek, Rotten Creek, and Panther Creek drain to Lake Adger and are located within the proposed PA and proposed CA; each waterbody would become WS-IV CA within 0.5 mile of the*

reservoir's normal pool elevation, and the remainder of each waterbody would become WS-IV (PA). Rash Creek, which drains to the Green River, and its two named tributaries, Brights Creek and Harm Creek, are located entirely within the proposed PA and, therefore, are proposed to be reclassified to WS-IV (PA).

If reclassified, wastewater discharge and new development restrictions will apply throughout the proposed watershed. Other requirements, which apply only in the proposed CA, are additional treatment for new industrial process wastewater discharges as well as no new landfills and no new land application sites. There are no permitted wastewater discharges located in the entire proposed watershed. In addition, there are not any known planned land application sites or landfills in the proposed CA, and no known planned wastewater discharges or new developments in the entire proposed area.

Polk County is the only local government with jurisdiction in the proposed area. This local government would need to modify its water supply watershed protection ordinance within the required 270 days after the reclassification effective date. A fiscal analysis for this proposal has been approved by the Office of State Budget and Management, and the fiscal analysis' quantifiable results showed a one-time cost of approximately \$1,600 and \$800 to Polk County and the state, respectively.

The public hearing and comment period are to be held in accordance with the federal Water Pollution Control Act (the Clean Water Act) which requires States, at least every three years, to review and revise water quality standards to protect aquatic life and human health. The process is called the Triennial Review and includes an assessment and revision of the designated uses of waters (classifications) and the water quality criteria (standards), which are based on the designated uses. More specifically, the public hearing and comment period are to address the potential assignment of a WS-IV classification to a portion of the Green River watershed, including Lake Adger, for the purpose of protecting the proposed designated use as a public water supply. This proposal will result in changing the water quality standards for waters within the above-mentioned Critical Area and Protected Area.

You may attend the public hearing and provide verbal comments, and/or submit written comments, data or other information by April 21, 2014. The comments, data and information provided during the comment period should specifically address the proposed reclassification of the Green River. The Hearing Officer may limit the length of time that you may speak at the public hearing, if necessary, so that all those who wish to speak may have an opportunity to do so.

All persons interested and potentially affected by the proposal are encouraged to read this entire notice and make comments on the proposed reclassification. The EMC may not adopt a rule that differs substantially from the text of the proposed rule published in this notice unless the EMC publishes the text of the proposed different rule and accepts comments on the new text [General Statute 150B 21.2 (g)]. Written comments on the proposed reclassification of the Green River may be submitted to

Elizabeth Kountis of the Division of Water Resources Planning Section at the postal address, e-mail address, or fax number listed in this notice.

**Comments may be submitted to:** Elizabeth Kountis, DENR/DWR Planning Section, 1617 Mail Service Center, Raleigh, NC 27699-1617; phone (919) 807-6418; fax (919) 807-6497; email [elizabeth.kountis@ncdenr.gov](mailto:elizabeth.kountis@ncdenr.gov)

**Comment period ends:** April 21, 2014

**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 (check all that apply).**

- ☒ **State funds affected**
- ☐ **Environmental permitting of DOT affected**
- ☐ **Analysis submitted to Board of Transportation**
- ☒ **Local funds affected**
- ☐ **Substantial economic impact (≥\$1,000,000)**
- ☐ **No fiscal note required by G.S. 150B-21.4**

## CHAPTER 02 – ENVIRONMENTAL MANAGEMENT COMMISSION

### SUBCHAPTER 02B – SURFACE WATER AND WETLAND STANDARDS

#### SECTION .0300 – ASSIGNMENT OF STREAM CLASSIFICATIONS

##### **15A NCAC 02B .0306 BROAD RIVER BASIN**

(a) Effective February 1, 1976, the adopted classifications assigned to the waters within the Broad River Basin are set forth in the The Broad River Basin Schedule of Classifications and Water Quality Standards, which may be inspected at the following places:

- (1) the Internet at  
<http://portal.ncdenr.org/web/wq/ps/csu/classifications>; and Clerk of Court:  
 Buncombe County  
 Cleveland County  
 Gaston County  
 Henderson County  
 Lincoln County

~~McDowell County~~

~~Polk County~~

~~Rutherford County~~

- (2) North Carolina Department of Environment and Natural Resources:

(A) Mooresville Regional Office  
610 East Center Avenue  
Suite 301

(B) Asheville Regional Office  
2090 US Highway 70  
Swannanoa, North Carolina.

- (b) Unnamed Streams. Such streams entering South Carolina are classified "C."

- (c) The Broad River Basin Schedule of Classifications and Water Quality Standards was amended effective:

- (1) March 1, 1977;
- (2) February 12, 1979;
- (3) August 12, 1979;
- (4) April 1, 1983;
- (5) February 1, 1986; 1986.
- ~~(6) August 3, 1992;~~
- ~~(7) September 1, 1994;~~
- ~~(8) August 1, 1998;~~
- ~~(9) August 1, 2000;~~
- ~~(10) April 1, 2001;~~
- ~~(11) March 1, 2007.~~

- (d) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 02B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

- (e) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective September 1, 1994 with the reclassification of the Second Broad River [Index No. 9-41-(0.5)] from its source to Roberson Creek including associated tributaries was reclassified from Class WS-V to Classes WS-V, WS-IV and WS-IV CA.

- (f) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective August 1, 1998 with the revision to the primary classification for portions of the Broad River [Index No. 9-(23.5)] from Class WS-IV to Class C and Second Broad River [Index Nos. 9-41-(10.5) and 9-41-(14.5)] and First Broad River [Index No. 9-50-(11)] from Class WS-IV to Class WS-V.

- (g) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended August 1, 2000 with the reclassification of the Green River [Index No. 9-

29-(1)], including all tributaries, from its source to its mouth in Lake Summit at elevation 2011 from Class C Tr to Class B Tr.

- (h) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective August 1, 2000 with the reclassification of Lake Montonia [Index No. 9-54-1-(1)], and all tributaries, from Class B to Class B HQW.

- (i) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective April 1, 2001 with the reclassification of the Green River [Index No. 9-29-(1)], including all tributaries, from its source to the downstream side of the mouth of Rock Creek from Class B Tr to Class B Tr HQW.

- (j) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective March 1, 2007 with the reclassification of the North Fork First Broad River (Index No. 9-50-4), including all tributaries, from its source to the First Broad River from Class C Tr to Class C Tr ORW.

- (k) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective March 1, 2007 with the reclassification of a segment of the Broad River [Index No. 9-(25.5)] from a point 0.5 mile upstream of the City of Shelby proposed water supply intake to the City of Shelby proposed water supply intake from Class C to Class WS-IV CA, and from a point 0.5 mile upstream of the City of Shelby proposed water supply intake to a point approximately 0.3 mile downstream of its confluence with Cane Creek from Class C to Class WS-IV. The City of Shelby proposed water supply intake is to be placed on the Broad River at a point approximately one mile upstream of its confluence with the First Broad River.

- (l) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective March 1, 2007 with the reclassification of a segment of the Broad River [Index No. 9-(25.5)] from a point 0.5 mile upstream of the Town of Forest City proposed water supply intake to the Town of Forest City proposed water supply intake from Class C to Class WS-IV CA, and from a point 0.5 mile upstream of the Town of Forest City proposed water supply intake to a point approximately 0.2 mile downstream of Rutherford County SR 1145 (Town of Rutherfordton water supply intake) from Class C to Class WS-IV. The Town of Forest City proposed water supply intake is to be placed on the Broad River at a point approximately 0.4 mile downstream of McKinney Creek.

- (m) The Schedule of Classifications and Water Quality Standards for the Broad River Basin was amended effective September 1, 2014, in order to allow a water supply intake to be placed in Lake Adger by Polk County, as follows:

- (1) a portion of the Green River [Index No. 9-29-(33)] (including tributaries) from the dam at Lake Adger to a point 0.35 mile downstream of Rash Creek from Class C to Class WS-IV CA. The CA extends 0.5 mile from and draining to the normal pool elevation of Lake Adger.

- (2) a portion of the Green River [Index No. 9-29-(33)] (including tributaries) from a point 0.35 mile downstream of Rash Creek to a point 300 feet downstream of Laurel Branch from Class C to Class WS-IV. The PA extends 5.0 miles

from and draining to the normal pool elevation of Lake Adger.

Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1).

## **TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS**

### **CHAPTER 10 – BOARD OF CHIROPRACTIC EXAMINERS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Chiropractic Examiners intends to adopt the rule cited as 21 NCAC 10 .0213 and amend the rule cited as 21 NCAC 10 .0204.*

**Agency obtained G.S. 150B-19.1 certification:**

- ☐ OSBM certified on:
- ☐ RRC certified on:
- ☒ Not Required

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
ncchiroboard.com

**Proposed Effective Date:** July 1, 2014

**Public Hearing:**

**Date:** March 20, 2014

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

**Location:** Office of the Board of Examiners, 174 Church Street North, Concord, NC 28025

**Reason for Proposed Action:**

**21 NCAC 10 .0204** – The existing rule requires licensed chiropractic physicians to notify the Board of any changes to their mailing addresses within 30 days of the change. The reason for the proposed amendment is to modernize the ability of the Board to communicate with licensees by requiring chiropractors who have office email addresses and facsimile machine telephone numbers to provide that information to the Board. The rule also declares that email addresses and facsimile machine numbers so obtained shall not be disclosed to the public.

**21 NCAC 10 .0213** – The reason for the proposed rule is to implement the mandate of the General Assembly requiring the Board of Examiners to certify the competency of chiropractic clinical assistants pursuant to a new statute, G.S. 90-143.4. The rule specifies the requirements for certification, establishes the application procedures for initial and renewal certification, establishes the minimum requirements for education programs and sets the fees to be paid by applicants.

**Comments may be submitted to:** Carol Hall, Executive Secretary, NC Board of Chiropractic Examiners, P.O. Box 312, Concord, NC 28026

**Comment period ends:** April 22, 2014

**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 (check all that apply).**

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

## **SECTION .0200 – PRACTICE OF CHIROPRACTIC**

### **21 NCAC 10 .0204 LICENSURE**

(a) Initial Licensure. The initial license awarded to an applicant who passed the examination ~~will~~ shall be mailed to the address appearing on the application form.

(b) Change of Address. It shall be the responsibility of the licensee to inform the Board of any change in his or her mailing address. Updated address information ~~should~~ shall be forwarded to the secretary in writing within 30 days after any such change.

(c) Email and Facsimile. A licensee who maintains an office email address or office facsimile machine shall inform the Board of his or her current email address or facsimile machine telephone number. This contact information shall not be made available to the public and shall be used only for expediting the dissemination of official messages the Board deems high priority or urgent.

Authority G.S. 90-155; 90-142; 93B-15.

### **21 NCAC 10 .0213 CERTIFICATION OF CLINICAL ASSISTANTS**

(a) Classification of Applicants. The Board hereby establishes the following categories of applicants for clinical assistant competency certification. Different certification requirements apply to each category.

- (1) Grandfathered applicants. (Note: this category is temporary; the opportunity to be grandfathered shall expire 120 days after the effective date of this Rule.) A grandfathered applicant is an applicant who is currently employed as a clinical assistant, who has been trained by the applicant's employing physician

to perform the duties of a clinical assistant as defined in G.S. 90-143.4(a), and who will have amassed at least 500 working hours in the capacity of a clinical assistant as of the effective date of this Rule.

- (2) Reciprocity applicants. A reciprocity applicant is an applicant who is currently certified or registered as a clinical assistant in another state whose requirements for certification or registration are substantially similar to or more stringent than the requirements for certification in North Carolina.

- (3) New applicants. A new applicant is any applicant who is not a grandfathered applicant or a reciprocity applicant.

(b) Requirements for Certification. Every applicant, regardless of classification, shall complete an application form provided by the Board and submit evidence satisfactory to the Board that the applicant is at least 18 years of age, a high school graduate or the equivalent, and possessed of good moral character. An affidavit attesting to good moral character and signed by a chiropractic physician or other responsible party who knows the applicant and is not related to the applicant shall constitute prima facie evidence of the applicant's good moral character. Every applicant, regardless of classification, shall pay to the Board an initial certification fee in the amount of twenty dollars (\$20.00). In addition to the foregoing general requirements, an applicant shall satisfy the requirements for the applicant's individual category, as follows:

- (1) Grandfathered Applicants. A grandfathered applicant shall submit, on a form provided by the Board, an attestation signed by the applicant's employing physician confirming that the applicant is currently employed as a clinical assistant, has received sufficient on-the-job training from the employing physician to perform the duties of a clinical assistant, and has amassed at least 500 hours' work experience in the capacity of a clinical assistant as of the effective date of this Rule. In addition, a grandfathered applicant shall take and pass a refresher proficiency examination administered by or under the authority of the Board, as described in Paragraph (d) of this Rule. (Note: grandfathered applications will be accepted for only 120 days after the effective date of this Rule.)

- (2) Reciprocity Applicants. A reciprocity applicant shall submit a copy of the applicant's current certification or registration as a clinical assistant in a state with which North Carolina reciprocates and shall submit evidence satisfactory to the Board that the applicant is in good standing in said state.

- (3) New Applicants. A new applicant shall submit evidence satisfactory to the Board that the applicant has completed an approved clinical

assistant education program as described in Paragraph (c) of this Rule and has passed the standard proficiency examination administered by or under the authority of the Board, as described in Paragraph (d) of this Rule.

(c) Education Programs. In order to be approved by the Board, a clinical assistant education program for new applicants shall be at least 24 hours in length, of which at least six hours shall be in-person didactic training with an instructor or instructors deemed competent by the Board to teach that portion of the curriculum to which the instructor has been assigned. Credit for online coursework shall not exceed 18 hours, and all online coursework shall precede didactic training. At a minimum, the education program shall provide sufficient instruction in the five subjects set forth in G.S. 90-143.4(c) to enable its graduates to satisfy all applicable standards of care.

(d) Examinations. The refresher proficiency examination shall emphasize the practical skills possessed by grandfathered applicants and shall be available online. (Note: this examination shall be discontinued 120 days after the effective date of this Rule.) The standard proficiency examination for new applicants shall assess both academic knowledge and practical skills acquired through education programs and shall be administered in person at least four times per year on the fourth Saturday in January, April, July and October. In its discretion, the Board may authorize additional testing sessions to facilitate the timely issuance of certificates of competency.

(e) Certificate Expiration and Renewal. Unless renewed, a certificate of competency shall expire on June 30<sup>th</sup> of the second year following the year in which it was issued. A certificate holder seeking to renew shall complete a renewal application form provided by the Board and shall submit evidence satisfactory to the Board that the applicant has completed six hours of Board-approved continuing education. The applicant shall pay to the Board a renewal fee in the amount of ten dollars (\$10.00).

(f) Lapsed Certificates. If a certificate of competency has lapsed due to non-renewal and the lapse does not exceed 12 months, the certificate holder may obtain reinstatement by making up the accrued deficiency in continuing education. If the lapse is greater than 12 months, no make-up continuing education is required, but the certificate holder shall re-take and pass the standard proficiency examination for new applicants. Regardless of the length of lapse, a certificate holder seeking reinstatement shall pay to the Board a renewal fee in the amount of ten dollars (\$10.00).

(g) Exemptions. Graduates of accredited chiropractic colleges and students enrolled in accredited chiropractic colleges who are serving college-sponsored preceptorships in North Carolina are deemed by the Board to have satisfied all requirements imposed by this rule and are declared competent to perform the duties of a clinical assistant.

Authority G.S. 90-142; 90-143.4.

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## CHAPTER 16 – STATE BOARD OF DENTAL EXAMINERS

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Dental Examiners intends to adopt the rules cited as 21 NCAC 16C .0311, .0601; amend the rules cited as 21 NCAC 16C .0101, .0202, .0301, .0303, .0501; and repeal the rules cited as 21 NCAC 16C .0401-.0405.*

**Agency obtained G.S. 150B-19.1 certification:**

- ☐ OSBM certified on:
- ☐ RRC certified on:
- ☒ Not Required

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
[www.ncdentalboard.org](http://www.ncdentalboard.org)

**Proposed Effective Date:** June 1, 2014

**Public Hearing:**

**Date:** March 20, 2014

**Time:** 6:30 p.m.

**Location:** Dental Board office, 507 Airport Boulevard, Suite 105, Morrisville, NC 27560

**Reason for Proposed Action:**

**21 NCAC 16C .0101** – The Board proposes to amend Rule .0101 to clarify that all dental hygienists must maintain current CPR certification at all times.

**21 NCAC 16C .0202, .0301, .0501** – The Board proposes to amend Rules .0202, .0301 and .0501 to make the language of these rules consistent with their counterparts in Subchapter 16B, the rules governing licensing dentists.

**21 NCAC 16C .0303** – The Board proposes to amend Rule .0303 to make the examination requirements reflect what is required by the Board's current testing agency.

**21 NCAC 16C .0311** – The Board proposes to adopt Rule .0311 to clarify the process for administering re-examinations.

**21 NCAC 16C .0401, .0402, .0403, .0404, .0405** – The Board proposes to repeal Rules .0401-.0405, because the Board no longer gives a dental hygiene examination.

**21 NCAC 16C .0601** – The Board proposes to adopt Rule .0601 to clarify the process relating to reinstatement of dental hygiene licenses.

**Comments may be submitted to:** Bobby D. White, 507 Airport Boulevard, Suite 105, Morrisville, NC 27560

**Comment period ends:** April 21, 2014

**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 (check all that apply).**

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

**SUBCHAPTER 16C - LICENSURE DENTAL  
HYGIENISTS**

**SECTION .0100 - GENERAL PROVISIONS**

**21 NCAC 16C .0101 LICENSURE**

(a) All dental hygienists must be licensed by the North Carolina State Board of Dental Examiners before practicing dental hygiene in this state.

(b) The examination requirement does not apply to persons who do not hold a North Carolina dental hygiene license who are seeking volunteer licenses pursuant to G.S. 90-21.107 or license by endorsement pursuant to Rules 16G .0107 or .0108 of this Chapter.

(c) All dental hygienists must maintain current CPR certification at all times.

Authority G.S. 90-223; 90-224.

**SECTION .0200 – QUALIFICATIONS**

**21 NCAC 16C .0202 STUDENT MAY APPLY**

The Board shall accept dental hygienist applications from students currently enrolled in schools of dental hygiene. ~~The Board shall deny such applications if the applicant fails to complete the required course of study. Applications will~~ automatically be denied if the applicant fails to complete the required course of study or fails a Board approved licensure examination.

Authority G.S. 90-223; 90-224.

**SECTION .0300 – APPLICATION**

**21 NCAC 16C .0301 APPLICATION FOR  
LICENSURE**

(a) All applications for licensure shall be made on the forms furnished by the Board at [www.ncdentalboard.org](http://www.ncdentalboard.org) and no application shall be deemed complete which does not set forth all the information required relative to the applicant. Incomplete applications will be returned to the applicant. Any applicant who changes his address shall notify the Board office within 10 business days. Applicants shall ensure that a final transcript from his or her high school is sent to the Board office in a sealed envelope, proof of graduation from high school or its equivalent is sent to the Board office. Applicants must also ensure that an



official final transcript ~~proof of graduation~~ from a dental hygiene program as set forth in G.S. 90-224 is sent in a sealed envelope to the Board office.

(b) The nonrefundable application fee shall accompany the application.

(c) Applicants who are licensed in other states shall ensure that the Board receives verification of licensure from the board of each state in which they are licensed. A photograph of the applicant, taken within six months prior to the date of the application, must be affixed to the application.

(d) All applicants shall submit to the Board a signed release form and completed Fingerprint Record Card and other form(s) required to perform a criminal history check at the time of the application. The form and card are available from the Board office.

(e) All applicants shall arrange for and ensure the submission to the Board office the examination scores required by Rule .0303 of this Subchapter. The examination requirement does not apply to individuals who do not hold a North Carolina dental hygiene license who are seeking volunteer licenses pursuant to G.S. 90-21.107 or licensure by endorsement pursuant to Rules 16G .0107 or 16G .0108 of this Chapter.

(f) All applicants must include a statement disclosing and explaining periods, within the last 10 years, of any voluntary or involuntary commitment to any hospital or treatment facility, observation, assessment, or treatment for substance abuse, with verification demonstrating that the applicant has complied with all provisions and terms of any drug treatment program, or impaired dental hygienists or other impaired professionals program.

(g) All applicants for dental hygiene licensure shall achieve a passing score on the Dental Hygiene National Board examination administered by the Joint Commission on National Dental Examinations.

*Authority G.S. 90-223; 90-224.*

### **21 NCAC 16C .0303 BOARD APPROVED EXAMINATIONS**

(a) All applicants for dental hygiene licensure shall achieve passing scores on the Board's sterilization and jurisprudence examinations. Reexamination on the written examinations shall be governed by Rule ~~16C .0405~~, 16C .0311.

(b) All applicants for dental hygiene licensure shall achieve passing scores on written and clinical examinations administered by ~~the board or~~ Board approved testing agencies according to this Rule.

(c) Clinical testing agencies must permit Board representation on the Board of Directors and the Examination Review Committee or equivalent committee and allow Board input in the examination development and administration.

(d) The clinical examination shall:

- (1) be substantially equivalent to or an improvement to the clinical licensure examination most recently administered by the Board;
- (2) include procedures performed on human subjects as part of the assessment of clinical competency;

(3) include probing, supra and subgingival scaling and soft tissue management;

(4) provide the following:

(A) anonymity between applicants and examination raters;

(B) standardization and calibration of raters;

(C) a mechanism for post exam analysis;

(D) conjunctive scoring, which is scoring that requires applicants to earn a passing grade on all sections or areas tested and that does not allow weighted, averaged or overall scoring to compensate for failures in individual subject areas;

(E) a minimum passing score ~~set by the Board~~ for each subject area tested;

(F) an annual review of the examination; ~~and its technical manual by the Board and a psychometrician selected by the Board;~~

(G) a task analysis performed once every ~~seven~~ four years which surveys dentists ~~on a nationwide survey~~ to determine the content domain to be scored and how the sections of the examination are scored;

(H) a defined system of quality assurance to ensure uniform, consistent administration of the examination at each testing site; and

~~(I) a system of applicant assessment which utilizes raters of applicant performance who are not full time employees of any dental academic institution.~~

(I) does not permit a dental hygiene instructor to grade candidates at any institution at which the instructor is employed on a full time basis.

~~(e)(d)~~ The Board shall accept scores upon approved examinations for a period of five years following the date of such examinations. Each applicant shall arrange for and ensure that the applicant's scores are submitted to the Board office. The applicant shall comply with all requirements of such testing agency in applying for and taking the examination.

~~(f)(e)~~ The Board shall specify the ~~times, places and agencies~~ which will conduct Board approved licensure ~~examinations in the state.~~ examinations.

*Authority G.S. 90-224.*

### **21 NCAC 16C .0311 REEXAMINATION**

(a) Any applicant who has passed the written examination but has failed the clinical portion of any Board approved examination must also re-take the written examination unless the applicant successfully passes the clinical examination within one year of passing the written examination. The Board will not

accept scores from the written examination that are more than one year old.

(b) Any applicant who has failed the written examination may retake the written portion of the examination two additional times during a one year period and need not retake the clinical portion of the examination. The applicant must wait at least 72 hours before attempting to retake the written examination. If the applicant does not pass the written portion of the examination upon the second reexamination, the applicant must retake the written and clinical portions of the examination upon subsequent reexamination.

(c) Any applicant who has failed the written or clinical portions of the examination three times shall successfully complete an additional Board approved course of study in the area(s) of deficiency exhibited on the examination. Such applicant must send evidence of the additional study, along with the application, before admitted for reexamination.

*Authority G.S. 90-223, 90-224.*

#### **SECTION .0400 – LICENSURE BY EXAMINATION CONDUCTED BY THE BOARD**

##### **21 NCAC 16C .0401 APPLICATION FOR EXAMINATION CONDUCTED BY THE BOARD**

~~(a) All applications for licensure examination conducted by the Board shall be made on the forms furnished by the Board, and no application shall be deemed complete which does not set forth all the information required by these Rules relative to the applicant. Any candidate who changes his address shall notify the Board office.~~

~~(b) The fee for such examination or re-examination must accompany the application. Such fee is non refundable.~~

~~(c) Two identical photographs of the applicant, taken within six months prior to the date of the application, not over two inches in height, must be submitted. One photograph must be affixed to the application and the second photograph must be paper clipped to the application to be used as part of the identification badge.~~

*Authority G.S. 90-223; 90-224.1.*

##### **21 NCAC 16C .0402 TIME FOR FILING**

~~The completed application, fee, photographs, and sealed proof of graduation from the school as required by G.S. 90-224(a) must be received in the Board's office at least 90 days prior to the date of the examination conducted by the Board. Sealed proof of graduation from dental hygiene school for those still in dental hygiene school at the time of the application must be sent in upon graduation. All data received by the Board concerning the applicant shall be part of the application and shall be retained as part of the record.~~

*Authority G.S. 90-223; 90-224.*

##### **21 NCAC 16C .0403 EXAMINATION CONDUCTED BY THE BOARD**

~~(a) Each candidate shall be given a numbered badge. This badge shall contain the candidate's photograph and shall be presented to the candidate prior to the examination. The number~~

~~on the badge shall be the only identification allowed on any paper or manuscript during this examination. The badge must be returned to the Board at the completion of the examination.~~

~~(b) The Board may dismiss any candidate who is using or appears to be using any assistance not provided as an accommodation. If such violation is discovered by the Board after a license has been issued to the violator, the license shall be revoked.~~

*Authority G.S. 90-223; 90-224.*

##### **21 NCAC 16C .0404 PATIENTS AND SUPPLIES FOR BOARD CONDUCTED CLINICAL EXAMINATION**

~~(a) Each candidate must furnish his own patients and instruments for the Board conducted clinical examination.~~

~~(b) Supplies necessary for all clinical work are to be provided by the candidate.~~

*Authority G.S. 90-223; 90-224.*

##### **21 NCAC 16C .0405 BOARD CONDUCTED REEXAMINATION**

~~(a) A complete application, except for official proof of graduation as required by G.S. 90-224(a) and National Board score, is required in case of reexamination.~~

~~(b) Any applicant who has passed the written portion of the examination but has failed the clinical portion of the examination conducted by the Board must also re take the written examination unless the applicant successfully passes the clinical examination within one year of passing the written examination.~~

~~(c) Any applicant who has passed the clinical portion of the examination conducted by the Board but has failed the written portion of the examination may retake the written portion of the examination two additional times during a one year period and need not retake the clinical portion of the examination. If the applicant does not pass the written portion of the examination upon the second reexamination, the applicant must retake both the written and clinical portions of the examination upon subsequent reexamination.~~

~~(d) Any applicant who has failed the written or clinical portions of the examination three times shall successfully complete an additional Board approved course of study in the area(s) of deficiency exhibited on the examination. Such applicant must send evidence of the additional study, along with the application, before admitted for reexamination.~~

*Authority G.S. 90-223; 90-224.*

#### **SECTION .0500 – LICENSURE BY CREDENTIALS**

##### **21 NCAC 16C .0501 DENTAL HYGIENE LICENSURE BY CREDENTIALS**

(a) An applicant for a dental hygiene license by credentials shall submit to the Board:

- (1) a completed, notarized application form provided by the Board;
- (2) the nonrefundable licensure by credentials fee;

- (3) an affidavit from the applicant stating for the two years immediately preceding the application:
    - (A) the dates that and locations where the applicant has practiced dental hygiene;
    - (B) that the applicant has provided at least 2000 hours of clinical care directly to patients; and
    - (C) that the applicant has continuously held an active, unrestricted dental hygiene license issued by another U.S. state or any U.S. territory.
  - (4) a statement disclosing and explaining any disciplinary actions, investigations, malpractice claims, state or federal agency complaints, judgments, settlements, or criminal charges;
  - (5) ~~if applicable,~~ a statement disclosing and explaining periods, within the last 10 years, of any voluntary or involuntary commitment to a hospital or treatment facility, observation, assessment, or treatment for substance abuse, with verification demonstrating that the applicant has complied with all provisions and terms of any county or state drug treatment program, or impaired dental hygiene or other impaired professionals program; and
  - (6) a copy of a current CPR certificate, an unexpired course completion certification card in cardiopulmonary resuscitation.
- (b) In addition to the requirements of Paragraph (a) of this Rule, an applicant for a dental hygiene license by credentials shall arrange for and ensure the submission to the Board office, the following documents as a package, with each document in an unopened envelope sealed by the entity involved:
- (1) official transcripts certifying that the applicant has graduated from a dental hygiene program accredited by the Commission on Dental Accreditation of the American Dental Association;
  - (2) if the applicant is or has ever been employed as a ~~dentist or~~ dental hygienist by or under contract with a federal agency, a ~~certification letter certifying of~~ the applicant's current status and disciplinary history from each federal agency where the applicant is or has been employed or under contract;
  - (3) certificate of the applicant's licensure status from the regulatory authority or other occupational or professional regulatory authority and complete information regarding all disciplinary actions taken or investigations pending, from all licensing jurisdictions where the applicant holds or has ever held a dental hygiene license or other occupational or professional license;
  - (4) a report from the National Practitioner Databank, ~~if reporting is required or allowed by federal law; Databank;~~
  - (5) a report of any pending or final malpractice actions against the applicant verified by the malpractice insurance carrier covering the applicant. The applicant must submit a letter of coverage history from all current and all previous malpractice insurance carriers covering the applicant;
  - (6) the applicant's passing score on the National Board Dental Hygiene Examination administered by the Joint Commission on National Dental Examinations; and
  - (7) the applicant's passing score on the licensure examination conducted by a regional testing agency or independent state licensure examination that is substantially equivalent to the clinical licensure examination required in North Carolina.
- (c) All information required must be completed and received by the Board office as a complete package with the initial application and application fee. ~~Incomplete applications If all of the information is not received as a complete package, the application shall be returned to the applicant.~~
- (d) All applicants shall submit to the Board a signed release form, completed Fingerprint Record Card, and other form(s) required to perform a criminal history check at the time of the application.
- (e) An applicant for dental hygiene licensure by credentials must successfully complete written examinations and, if deemed necessary based on the applicant's history, a clinical simulation examination administered by the Board. If the applicant fails ~~any of the written examinations,~~ the applicant may retake the examination ~~failed~~ two additional times during a one year ~~period.~~ period, as required by Rule .0311 of this Subchapter. Applicants who fail the clinical examination or who do not pass the written examination after three attempts within one year may not reapply for licensure by credentials.
- (f) Should the applicant reapply for licensure by credentials, an additional licensure by credentials fee shall be required.
- (g) Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

Authority G.S. 90-223; 90-224.1.

## SECTION .0600 – REINSTATEMENT OF DENTAL HYGIENE LICENSE

### 21 NCAC 16C .0601 PROOF OF COMPETENCY

(a) All applications for reinstatement shall be made on the forms furnished by the Board at [www.ncdentalboard.org](http://www.ncdentalboard.org) and no application shall be deemed complete which does not set forth all the information required relative to the applicant. Incomplete applications will be returned to the applicant. Any applicant who changes his address shall notify the Board office within 10 business days.

(b) The reinstatement fee shall accompany the application.

(c) All applicants for reinstatement whose North Carolina license has been revoked, suspended, inactive or lapsed for more than five years must successfully pass the clinical examination given to first-time applicants before seeking reinstatement.

(d) Applicants for reinstatement whose North Carolina license has been revoked, suspended, inactive or lapsed for two to five years may, at the Board's discretion, be required to take refresher courses as specified by the Board.

(e) Applicants who are licensed in other states shall ensure that the Board receives verification of licensure from the board of each state in which they are licensed.

(f) Applicants whose North Carolina license has been revoked, suspended, inactive or lapsed for more than one year shall submit to the Board a signed release form, completed

Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of the application for reinstatement. The form and card are available from the Board office.

(g) Documentation of continuing education in clinical patient care, by Board-approved sponsors, equal to the number of hours currently required for the renewal of a dental hygiene license and current CPR certification.

(h) Two letters of character reference from non-family members.

(i) A report from the National Practitioner Databank.

*Authority G.S. 90-223; 90-224.*

*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**

J. Randolph Ward  
Selina Brooks  
Melissa Owens Lassiter  
Don Overby

Randall May  
A. B. Elkins II  
Craig Croom

| <u>AGENCY</u>  | <u>CASE<br/>NUMBER</u> | <u>DATE</u> | <u>PUBLISHED<br/>DECISION<br/>REGISTER<br/>CITATION</u> |
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| Angela Moye v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry   | 12 DHR 00642 | 08/23/12 | 27:12 NCR 1218 |
| Jessica Lynn Ward v. DHHS  | 12 DHR 00643 | 05/17/12 |                |
| Howard Gene Whitaker v. DHHS, Office of Emergency Medical Services   | 12 DHR 00888 | 09/05/13 | 28:13 NCR 1534 |
| Trinity Child Care II & I v. DHHS, Division of Public Health, Child and Adult Care Food Program  | 12 DHR 00861 | 04/20/12 | 27:04 NCR 518  |
| Dr. Karen J. Williams, LPC v. DHHS, Division of Medical Assistance   | 12 DHR 00926 | 09/18/12 |                |
| Faith Home Care of NC, Bonita Wright v. DHHS, DMA  | 12 DHR 00928 | 07/25/12 |                |
| Olar Underwood v. Division of Child Development and Early Education  | 12 DHR 00990 | 10/22/12 |                |
| Angela C Jackson v. DHHS   | 12 DHR 01097 | 06/19/12 |                |
| Paula N Umstead v. DHHS  | 12 DHR 01098 | 05/11/12 |                |
| Daniel W. Harris, Jr., v. DHHS, Division of Health Service Regulation  | 12 DHR 01138 | 10/19/12 |                |
| ACI Support Specialists Inc. Case #2009-4249 v. DHHS   | 12 DHR 01141 | 06/06/12 |                |
| AriLand Healthcare Service, LLC, NCMHL #018-092, Shawn Kuhl Director of Operations v. DHHS, Emery E. Milliken, General Counsel                                 | 12 DHR 01165 | 05/25/12 |                |
| Kenneth Holman v. DHHS   | 12 DHR 01244 | 06/05/12 |                |
| Hillcrest Resthome Inc. (\$2000 penalty) v. DHHS   | 12 DHR 01289 | 05/30/12 |                |
| Hillcrest Resthome Inc. (\$4000 penalty) v. DHHS   | 12 DHR 01290 | 05/30/12 |                |
| Vivian Barrear v. DHHS, Division of Medical Assistance DHHS  | 12 DHR 01296 | 06/06/12 |                |
| Patricia Satterwhite v. DHHS   | 12 DHR 01338 | 07/23/12 |                |
| Anthony Moore d/b/a Hearts of Gold II v. DHHS, Division of Health Service Regulation, Adult Care Licensure Section   | 12 DHR 01346 | 04/12/13 | 28:03 NCR 256  |
| Timothy L Durham v. DHHS, Division of Health Services Regulation   | 12 DHR 01396 | 09/04/12 |                |
| Clydette Dickens v. Nash Co DSS  | 12 DHR 01625 | 05/15/12 |                |
| Nicole Lynn Hudson v. DHHS, Division of Health Service Regulation  | 12 DHR 01732 | 03/11/13 | 28:09 NCR 921  |
| American Mobility LLC, Norman Mazer v. DHHS  | 12 DHR 01733 | 11/20/12 | 27:21 NCR 1980 |
| American Mobility LLC, Norman Mazer v. DHHS  | 12 DHR 01733 | 03/6/13  | 28:03 NCR 266  |
| Robert Lee Raines v. DHHS  | 12 DHR 01736 | 05/30/12 |                |
| Ms. Antoinette L. Williams v. DHHS   | 12 DHR 01739 | 06/15/12 |                |
| Felicia McGee Owner of Carrie's Loving Hand Inc. and Caring Arms Inc v. DHHS, DHSR Mental Health Licensure Certification                                       | 12 DHR 01796 | 01/22/13 |                |
| Tricia Watkins v. DHHS, Division of Medical Assistance, Office of Medicaid TLW-Auditing Office   | 12 DHR 01807 | 06/01/12 |                |
| First Path Home Care Services Gregory Locklear v. DHHS   | 12 DHR 01878 | 06/22/12 |                |
| Rochelle A. Gaddy v. DHHS, Division of Health Service Regulation   | 12 DHR 01998 | 06/04/13 | 28:11 NCR 1253 |
| Patriotic Health Care Systems, LLC v. DHHS   | 12 DHR 02105 | 09/19/12 |                |
| John and Christina Shipman v. DHHS   | 12 DHR 02107 | 07/24/12 |                |
| Team Daniel, LLC v. DHHS, DMA  | 12 DHR 02162 | 09/11/13 | 27:16 NCR 1696 |
| Leslie Taylor, Octavia Carlton, Paula Carlton  | 12 DHR 02217 | 08/31/12 |                |
| Madeline Brown v. DHHS, Division of Health Service Regulation  | 12 DHR 02257 | 06/01/12 |                |
| Evelyn Evans v. DHHS, Division of Health Service Regulation  | 12 DHR 02258 | 07/02/12 |                |
| Shannon Santimore v. DHHS, Division of Public Health, Epidemiology Section   | 12 DHR 02348 | 12/20/12 |                |
| Precious Haven Inc. Melissa McAllister v. DHHS, Program Integrity  | 12 DHR 02430 | 05/18/12 |                |
| Michael and Jamie Hart v. Davidson County, Department of Social Services   | 12 DHR 02542 | 07/03/12 |                |
| Annamae R. Smith v. DHHS, Division of Medical Assistance   | 12 DHR 02657 | 11/05/12 |                |
| Our Daily Living, Christopher OnWuka, Director v. DHHS   | 12 DHR 02777 | 10/17/12 |                |
| Right Trax Inc., Maria Lewis v. DHHS, Division of Health Service Regulation, Mental Health Licensure & Certification   | 12 DHR 02779 | 05/06/13 |                |
| Jessica L Thomas v. Randolph County DSS  | 12 DHR 02955 | 07/24/12 |                |
| Moses E Shoffner v. DHHS, Division of Child Development  | 12 DHR 03459 | 08/15/12 |                |
| Marco Evans v. DHHS, Division of Health Service Regulation   | 12 DHR 04110 | 07/30/12 |                |
| James C. Bartley v. DHHS, DMA  | 12 DHR 04116 | 07/25/12 |                |

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| Estate of Mary P Lipe Medicaid ID #901463645S Alvena C Heggins v. DHHS, DMS (DHHS Medicaid)                                 | 12 DHR 04260 | 01/16/13 |                |
| Emelda Bih Che v. Health Care Personnel Registry  | 12 DHR 04834 | 01/24/13 |                |
| Daycare for all the Nations, Abura B. Jackson v. DHHS, Division of Child Development  | 12 DHR 04944 | 01/03/13 | 28:03 NCR 275  |
| LaBrenda Jane Elliot v. DHHS, Division of Medical Assistance  | 12 DHR 04993 | 09/24/12 |                |
| Esther H Beal v. Office of Chief Medical Examiner   | 12 DHR 05094 | 11/14/12 | 27:21 NCR 1987 |
| James Johnson v. DHHS, Division of Health Service Regulation  | 12 DHR 05148 | 09/11/12 |                |
| Youth Opportunities v. DHHS, Division of Medical Assistance   | 12 DHR 05227 | 07/11/13 |                |
| Tammy Isley v. Division of Child Development and Early Education  | 12 DHR 05405 | 05/15/13 |                |
| Cathy Crosland v. DHHS, Division of Health Service Regulation   | 12 DHR 05610 | 08/06/12 |                |
| Dwight William Osborne v. Glana M Surles, DHHS (Medicaid)   | 12 DHR 05693 | 09/14/12 |                |
| Brenda Triplett Andrews v. DHHS, Division of Health Service Regulation  | 12 DHR 05745 | 12/10/12 |                |
| Southern Living Home Care Agency Inc., v. DHHS  | 12 DHR 05864 | 11/06/12 |                |
| Symakla Home Healthcare v. DHHS-Hearing Office  | 12 DHR 05918 | 08/02/13 |                |
| Beverly Coleman v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section                      | 12 DHR 05961 | 09/05/12 |                |
| Esther McMillian v. DHHS  | 12 DHR 06061 | 11/26/13 |                |
| Gregory Howard v. Health Care Personnel Registry  | 12 DHR 06157 | 09/07/12 |                |
| Joshua Goss v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry                                  | 12 DHR 06158 | 03/04/13 |                |
| Harrison E Shell Jr v. Wake County Human Services   | 12 DHR 06203 | 08/28/12 |                |
| A Unique Solution Bertha M. Darden v. Division of Child Development & Early Education                                       | 12 DHR 06314 | 05/20/13 |                |
| Valtina Bronson v. DHHS, Division of Health Service Regulation  | 12 DHR 06365 | 08/29/12 |                |
| Danny Skipper AKA Danny Skipper v. DHHS, Division of Health Services Regulation   | 12 DHR 06403 | 10/22/12 |                |
| Stalin Bailon v. Department of Social Services  | 12 DHR 06528 | 10/17/12 |                |
| Tonya Diane Warfield v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section                 | 12 DHR 06682 | 01/07/13 |                |
| Our Daily Living, Christopher OnWuka, Director v. DHHS  | 12 DHR 06683 | 10/17/12 |                |
| Latricia N. Yelton, OT v. DHHS, Division of Medical Assistance  | 12 DHR 06686 | 04/10/13 | 28:03 NCR 282  |
| Brittney Nicole Brabham v. DHHS, Division Health Service Regulation, Healthcare Personnel Registry                          | 12 DHR 06786 | 03/27/13 |                |
| Darina Renee Ford v. DHHS   | 12 DHR 07166 | 11/19/12 |                |
| Marquis Gerade Harrell v. DHHS, Health Care Personnel Registry, Leslie Chabet   | 12 DHR 07170 | 10/23/12 |                |
| Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section | 12 DHR 07215 | 04/16/13 | 28:05 NCR 443  |
| Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section | 12 DHR 07216 | 04/16/13 | 28:05 NCR 443  |
| Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section | 12 DHR 07217 | 04/16/13 | 28:05 NCR 443  |
| KMG Holdings Inc. – The Lighthouse II of Clayton MHL #051-138 v. DHHS, Division of Health Licensure and Certification       | 12 DHR 07292 | 11/08/12 |                |
| Curtain Climbers, Rhonda Corn v. Division of Child Development, DHHS  | 12 DHR 07295 | 01/16/13 |                |
| Speakeasy Therapy, LLC v. DHHS, Division of Medical Assistance  | 12 DHR 07296 | 04/25/13 | 28:05 NCR 462  |
| Faline Dial v. DHHS, Division of Medical Assistance   | 12 DHR 07440 | 02/07/13 | 28:05 NCR 488  |
| PRN Medical Resources, PLLC v. DHHS, Division of Medical Assistance   | 12 DHR 07441 | 03/19/13 | 28:05 NCR 500  |
| Denise Marie Shear v. DHHS, Division of Health Service Regulation   | 12 DHR 07547 | 11/07/12 |                |
| Irene Renee McGhee v. DHHS  | 12 DHR 07589 | 08/29/13 |                |
| Terique Epps, Family Legacy Mental Health Services DBA Task Inc v. DHHS and PBH   | 12 DHR 07616 | 11/09/12 |                |
| Angela Mackey v. DHHS, Division of Health Service Regulation  | 12 DHR 07619 | 10/05/12 |                |
| Eloise Downtin v. The Emmanuel Home IV v. Division of Health Service Regulation   | 12 DHR 07620 | 11/06/12 |                |
| Orlando Stephen Murphy v. DHHS, DHSR, Health Care Personnel   | 12 DHR 07640 | 02/05/13 |                |
| Irene Wortham Center, Inc., v. DHHS, DMA  | 12 DHR 07699 | 04/12/13 |                |
| Yolanda McKinnon v. DHHS  | 12 DHR 07711 | 01/11/13 |                |
| Koffi Paul Aboagye v. DHHS, Division of Health Service Regulation   | 12 DHR 07731 | 11/20/12 |                |
| Mark Thomas v. DHHS, Division of Health Service Regulation  | 12 DHR 07853 | 01/04/13 |                |
| Annie Garner Ham v. DHHS, Division Health Service Regulation  | 12 DHR 08103 | 03/04/13 |                |
| Darrion Smith v. Murdock Developmental Center and the NC DHHS; Ricky Bass v. NC DHHS; Darrion Smith v. NC DHHS              | 12 DHR 08134 | 07/24/13 | 28:12 NCR 1472 |
| Darrion Smith v. Murdock Developmental Center and the NC DHHS; Ricky Bass v. NC DHHS; Darrion Smith v. NC DHHS              | 12 DHR 08136 | 07/24/13 | 28:12 NCR 1472 |
| Daniel Saft, A+ Residential Care (MHL #092-811) v. DHHS, DHSR, Mental Health Licensure and Certification Section            | 12 DHR 08197 | 01/16/13 |                |
| Jannett E. Myers v. DHHS, Division of Health Service Regulation   | 12 DHR 08257 | 08/07/13 |                |
| Gloria Mitchell v. DHHS, Division of Medical Assistance   | 12 DHR 08258 | 02/14/13 | 28:05 NCR 511  |
| Katherine Free v. DHHS, Division of Medical Assistance  | 12 DHR 08395 | 04/12/13 |                |



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**CONTESTED CASE DECISIONS**

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|---|--------------|----------|----------------|
| Ronald Dixon v. Division of Child Development, DHHS   | 12 DHR 08446 | 11/14/12 |                |
| Hillcrest Convalescent Center, Inc. v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC; Britthaven, Inc. and Spruce LTC Group, LLC; and AH North Carolina Owner LLC d/b/a The Heritage of Raleigh | 12 DHR 08666 | 06/20/13 | 28:09 NCR 928  |
| Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Hillcrest Convalescent Center, Inc.; E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Britthaven, Inc. and Spruce LTC Group, LLC; and AH North Carolina Owner LLC d/b/a The Heritage of Raleigh | 12 DHR 08669 | 06/20/13 | 28:09 NCR 928  |
| Jah Mary Weese v. DHHS, Division of Health Service Regulation   | 12 DHR 08672 | 01/09/13 |                |
| AH North Carolina Owner LLC d/b/a The Heritage of Raleigh v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Hillcrest Convalescent Center, Inc.; E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC; and Britthaven, Inc. and Spruce LTC Group, LLC | 12 DHR 08691 | 06/20/13 | 28:09 NCR 928  |
| Mission Hospital, Inc. v. DHHS Division of Health Service Regulation Certificate of Need Section, and Fletcher Hospital, Inc. d/b/a Park Ridge Health and Carolina Gastroenterology Endoscopy Center, LLC   | 12 DHR 08733 | 06/18/13 | 28:10 NCR 1095 |
| Clifford Lee Druml v. DHHS, Division of Medical Assistance  | 12 DHR 08776 | 04/25/13 |                |
| Natasha Dionne Howell v. DHHS, Division of Health Service Regulation  | 12 DHR 08814 | 03/07/13 |                |
| White Oak Homes II Inc., Lisa Atkinson v. DHHS, Mental Health Licensure and Certification Section, Division of Health Service   | 12 DHR 08994 | 02/08/13 |                |
| Erica Eileen Thomas v. DHHS, Division of Health Service Regulation  | 12 DHR 09139 | 04/17/13 |                |
| Tammy Isley v. Division of Child Development and Early Education  | 12 DHR 09350 | 05/15/13 |                |
| Eddie Cannon v. DHHS, Division of Health Service Regulation, Personnel Registry   | 12 DHR 09352 | 05/21/13 |                |
| Carolyn Ragin v. DHHS, Division of Health Services Regulation   | 12 DHR 09373 | 12/18/12 |                |
| Omar Vickers v. Office of Administrative Hearings   | 12 DHR 09475 | 04/16/13 |                |
| April Hood-Baker v. DHHS, DMA Glana M Surles  | 12 DHR 09489 | 01/15/13 |                |
| Heritage Home Care Agency Inc., Rico Akvia Wagner v. Department of Human Services Hearing Office  | 12 DHR 09511 | 07/05/13 |                |
| Surgical Care Affiliates, LLC and Blue Ridge Day Surgery Center, L.P. v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and WakeMed  | 12 DHR 09678 | 07/23/13 |                |
| Tyshon & Shannetta Barfield v. DHHS   | 12 DHR 09692 | 02/08/13 |                |
| Vicki Lucas-Crowder v. Division of Medical Assistance   | 12 DHR 09832 | 04/26/13 |                |
| Cynthia M Rose v. Division of Child Development, DHHS   | 12 DHR 09846 | 01/23/13 |                |
| Gina Lynne Gilmore Lipscomb v. Health Care Personnel Registry   | 12 DHR 09953 | 09/17/13 |                |
| Asheville Speech Associates v. DHHS, Division of Medical Assistance   | 12 DHR 10367 | 06/21/13 |                |
| Our Daily Living MHL 032-481 Christopher Onwuka v. DHHS, DHSR, Mental Health Licensure and Certification  | 12 DHR 10402 | 05/06/13 |                |
| Glenda Lee Hansley v. DHHS  | 12 DHR 10430 | 08/01/13 |                |
| Therapeutic Life Center, Inc. v. DHHS, Division of Medical Assistance   | 12 DHR 10447 | 07/08/13 | 28:12 NCR 1450 |
| Sonia Coles Bowers v. DHHS, Division of Social Services   | 12 DHR 10511 | 08/26/13 |                |
| A Great Choice for Home Care, Inc. v. DHHS  | 12 DHR 10569 | 08/09/13 | 28:12 NCR 1461 |
| Carolina Solution, Inc v DHHS   | 12 DHR 10668 | 02/08/13 |                |
| A Unique Solution Bertha M. Darden v. Division of Child Development & Early Education   | 12 DHR 10926 | 05/20/13 |                |
| Angels Home Health, Charlotte Robinson, and LaShonda Wofford v. DHHS  | 12 DHR 11035 | 04/22/13 |                |
| David Keith Trayford v. Division of Medical Assistance via Administrative Hearing Office  | 12 DHR 11180 | 07/01/13 |                |
| Favour McKinnon v. DHHS, Division of Health Service Regulation  | 12 DHR 11319 | 11/15/13 |                |
| Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc.; Cumberland County Hospital System Inc. d/b/a Cape Fear Valley Medical Center v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc.  | 12 DHR 12086 | 09/17/13 | 28:16 NCR 1888 |
| Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System v. DHHS, Division of Health Service Regulation Certificate of Need Section and FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital  | 12 DHR 12088 | 05/23/13 | 28:11 NCR 1262 |

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| Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHelath of the Carolinas, Inc.; Cumberland County Hospital System Inc. d/b/a Cape Fear Valley Medical Center v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc. | 12 DHR 12090 | 09/17/13 | 28:16 NCR 1888 |
| Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHelath of the Carolinas, Inc.; Cumberland County Hospital System Inc. d/b/a Cape Fear Valley Medical Center v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc. | 12 DHR 12094 | 09/17/13 | 28:16 NCR 1888 |
| Speech and Therapy Solutions v. DHHS   | 12 DHR 12402 | 03/27/13 |                |
| Agape Services, Inc. v. Program Integrity Section of DMA   | 12 DHR 12405 | 05/23/13 | 28:11 NCR 1269 |
| Treasure Dominique Corry v. State of NC Nurse Aide Registry  | 12 DHR 12408 | 03/15/13 |                |
| Bio-Medical Applications of North Carolina, Inc., D/B/A FMC Anderson Creek   | 12 DHR 19650 | 12/17/12 | 27:22 NCR 2101 |
| Linda Johnson v. Caswell Center  | 13 DHR 01926 | 03/06/13 |                |
| Carolina Family Alliance, c/o Sabrian Mack Exec Director v. DHHS   | 13 DHR 02679 | 03/28/13 |                |
| National Deaf Academy Judy Caldwell, RN v. Office of Administrative Hearings, Value Options North Carolina   | 13 DHR 02701 | 11/15/13 |                |
| Inder P Singh v. DHHS, WIC   | 13 DHR 05263 | 03/27/13 |                |
| Natasha Howell v. DHHS, Division of Health Service Regulation  | 13 DHR 07602 | 08/02/13 |                |
| Restoration Home Care Services, Inc., Diane Sherrill, Owner/President v. PCG Consulting Group Consulting Group, DHHS   | 13 DHR 08373 | 12/13/13 |                |
| Loretta Tinnin v. Division of Medical Assistance   | 13 DHR 08954 | 10/03/13 |                |
| Family Choice Home Care v. DHHS  | 13 DHR 08987 | 08/14/13 |                |
| Leenorta Cooper v. DHHS, Division of Health Service Regulation   | 13 DHR 09097 | 10/03/13 |                |
| Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry   | 13 DHR 09144 | 07/15/13 |                |
| Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry   | 13 DHR 09145 | 07/15/13 |                |
| Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry   | 13 DHR 09146 | 07/15/13 |                |
| Nikko & Shannon Scott v. DHHS  | 13 DHR 09422 | 06/26/13 |                |
| Brittany Hinson v. DHHS  | 13 DHR 09511 | 11/19/13 |                |
| Myra Evans v. Moore County Department of Social Services   | 13 DHR 09729 | 10/24/13 | 28:15 NCR 1818 |
| Clarice Johnson v. DHHS, Division of Health Service Regulation   | 13 DHR 09736 | 10/28/13 |                |
| Doris Wilson v. DHHS, Division of Health Service Regulation  | 13 DHR 09742 | 07/15/13 |                |
| Kesha Johnson v. DHHS, Division of Health Service Regulation   | 13 DHR 09799 | 09/03/13 | 28:15 NCR 1825 |
| Elton Bishop v. Food Stamps  | 13 DHR 09976 | 12/05/13 |                |
| Teresa Anne Davis v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry   | 13 DHR 10037 | 09/20/13 |                |
| Marcella Marsh v. Forsyth County Department of Social Services   | 13 DHR 10124 | 06/21/13 |                |
| Wanda Jones v. DHHS  | 13 DHR 10289 | 08/15/13 |                |
| Berta M. Spencer v. DHHS, Office of the Controller   | 13 DHR 10335 | 07/05/13 |                |
| Benjamin Headen and Pamela Headen v. DHHS  | 13 DHR 10488 | 08/02/13 |                |
| Lelia Knox v. DHHS, Division of Child Development  | 13 DHR 10556 | 08/28/13 |                |
| Lashondrea Nixon v. DHHS, Division of Health Service Regulation  | 13 DHR 10594 | 08/30/13 |                |
| Edward E. Speaks, Jr. v. Central Regional Hospital   | 13 DHR 10749 | 09/10/13 |                |
| Scott Hollifield v. McDowell County DSS  | 13 DHR 10793 | 07/25/13 |                |
| Tammi D. Nichols v. DHHS, Division of Health Service Regulation  | 13 DHR 10795 | 10/25/13 |                |
| Holly L. Crowell v. DHHS, Division of Health Service Regulation  | 13 DHR 11091 | 07/05/13 |                |
| Christopher H. Brown DDS PA v. Department of Medical Assistance  | 13 DHR 11610 | 07/01/13 |                |
| Lawson Support Services LLC v. DHHS, Division of Medical Assistance  | 13 DHR 11836 | 10/04/13 |                |
| Juan M. Noble v. DHHS, Division of Health Service Regulation   | 13 DHR 11965 | 07/12/13 |                |
| Veronica Janae McLemore v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry   | 13 DHR 12033 | 12/02/13 |                |
| Supermexicana Los Reyes Elena D. Flores Garcia Owner v. Nutrition Services Branch, DHHS, Division of Public Health   | 13 DHR 12129 | 08/01/13 | 28:14 NCR 1677 |
| Monalisa Victoria Freeman v. DHHS, Division of Health Service Regulation   | 13 DHR 12328 | 07/31/13 |                |
| Johnathan Bradley v. DHHS, Division of Health Service Regulation   | 13 DHR 12685 | 08/02/13 |                |
| Melissa Stephen Ingle v. DHHS, Division of Child Development   | 13 DHR 12700 | 08/30/13 |                |
| E. W. Stone Adult Care Center, Evelyn W. Stone v. DHHS   | 13 DHR 12814 | 07/29/13 |                |
| Martha Watson v. DHHS, Division of Social Services   | 13 DHR 13302 | 11/12/13 |                |

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| Lawson Support Services LLC v. DHHS, Division of Medical Assistance   | 13 DHR 13349 | 11/13/13 |
| Matthew Bradshaw v. DHHS, Division of Health Service Regulation   | 13 DHR 13381 | 09/03/13 |
| Countryside Villa Hal 026-046 John A. Weeks v. DHHS, Division of Health Service Regulation                            | 13 DHR 13545 | 09/19/13 |
| Betty S. Mintz v. DHHS, Division of Health Service Regulation   | 13 DHR 13547 | 09/10/13 |
| Lashawn R. Holland v. DHHS, Division of Health Service Regulation   | 13 DHR 13858 | 09/03/13 |
| Thomas and Elberta Hudson v. DHHS, Division of Social Services  | 13 DHR 13957 | 08/02/13 |
| Victoria S. Hargrave v. DHHS, Division of Health Service Regulation   | 13 DHR 15147 | 08/07/13 |
| Paul A. Fredette v. DHHS, Division of Health Service Regulation   | 13 DHR 14025 | 09/30/13 |
| A Angel's Touch In Home Care v. DHHS  | 13 DHR 14303 | 09/24/13 |
| Tabitha Mason v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry                          | 13 DHR 14452 | 12/06/13 |
| Candace Richardson v. Health Care Personnel Registry  | 13 DHR 15028 | 09/30/13 |
| Americare "Hardin House", Perry Tanis Watkins v. DHHS   | 13 DHR 16307 | 11/19/13 |
| Kenneth W. Haney v. DHHS, Medical Assistance, Third Party Recovery Section  | 13 DHR 16563 | 11/20/13 |
| Estate of Ross Lewis; Ronald B. Lewis v. Office of Administrative Hearings  | 13 DHR 16694 | 10/23/13 |
| Prosperous Home Care Services LLC, Lennis Brown v. DHHS DHSR, Acute and Home Care Licensure and Certification Section | 13 DHR 16962 | 11/26/13 |
| Dennishia Marsalia DuBose v. Sol Weiner RN HCPR Investigator  | 13 DHR 17085 | 11/06/13 |
| Precyous Cheniae Johnson v. DHHS, Division of Health Service Regulation   | 13 DHR 17316 | 11/05/13 |
| A Angel's Touch In Home Care v. DHHS  | 13 DHR 17446 | 10/31/13 |
| Elizabeth Shea Bonner v. DHHS   | 13 DHR 17448 | 11/15/13 |
| Shonda Richardson v. DHHS, Liberty Commons Nursing & Rehab  | 13 DHR 17910 | 11/15/13 |
| Latesha Monique Morse v. Nash County Department of Social Services, Food & Nutrition Unit                             | 13 DHR 18224 | 01/02/14 |

**DEPARTMENT OF ADMINISTRATION**

|  |              |          |                |
|--|--------------|----------|----------------|
| Meherrin Indian Tribe v. Commission of Indian Affairs  | 12 DOA 00986 | 01/18/13 |                |
| Medical Review of North Carolina, Inc. d/b/a The Carolinas Center for Medical Excellence v. NC Department of Administration and NC DHHS and Liberty Healthcare Corporation | 13 DOA 12702 | 08/30/13 | 28:13 NCR 1585 |

**DEPARTMENT OF CORRECTIONS**

|  |              |          |  |
|--|--------------|----------|--|
| Myron Roderick Nunn v. Jennifer O'Neal, Accountant DOC           | 12 DOC 01022 | 07/12/12 |  |
| Moses Leon Faison v. Department of Correction                    | 13 DOC 10227 | 04/08/13 |  |
| Clarence E. Williams, Jr. v. State of NC, D.H.O. Austin          | 13 DOC 12137 | 09/30/13 |  |
| Clarence E. Williams, Jr. v. State of NC, D.H.O. Linwood M. Best | 13 DOC 14201 | 09/30/13 |  |

**DEPARTMENT OF JUSTICE**

|   |              |          |                |
|---|--------------|----------|----------------|
| Tommy Keith Lymon v. Criminal Justice Education and Training Standards Commission       | 09 DOJ 03751 | 07/30/12 | 27:06 NCR 649  |
| Greary Michael Chlebus v. Criminal Justice Education and Training Standards Commission  | 11 DOJ 4829  | 04/27/12 |                |
| Steven Davis Boone v. Sheriffs' Education and Training Standards Commission             | 11 DOJ 06781 | 06/18/13 | 28:10 NCR 1062 |
| Dillan Nathaniel Hymes v. Criminal Justice Education and Training Standards Commission  | 11 DOJ 10315 | 07/23/12 | 27:06 NCR 661  |
| Barbara Renay Whaley v. Criminal Justice Education and Training Standards Commission    | 11 DOJ 10316 | 04/25/12 |                |
| Robert Kendrick Mewborn v. Criminal Justice Education and Training Standards Commission | 11 DOJ 10318 | 04/23/12 |                |
| Athena Lynn Prevatte v. Sheriffs' Education and Training Standards Commission           | 11 DOJ 13148 | 05/25/12 | 27:04 NCR 529  |
| Shatel Nate Coates v. Sheriffs' Education and Training Standards                        | 11 DOJ 13151 | 07/05/12 |                |
| James Lee Ray v. Sheriffs' Education Training Standards                                 | 11 DOJ 13152 | 08/27/12 |                |
| Ko Yang v. Sheriff's Education and Training Standards Commission                        | 11 DOJ 13153 | 06/14/12 |                |
| Dustin Edward Wright v. Sheriffs' Education and Training Standards Commission           | 11 DOJ 13154 | 08/08/12 |                |
| Walter Scott Thomas v. Sheriff's Education and Training Standards Commission            | 11 DOJ 13155 | 05/10/12 |                |
| Darryl Howard v. Criminal Justice Education and Training Standards Commission           | 11 DOJ 13157 | 04/12/12 |                |
| John Jay O'Neal v. Criminal Justice Education and Training Standards Commission         | 11 DOJ 13158 | 07/06/12 | 27:07 NCR 749  |
| Charlesene Cotton v. Criminal Justice Education and Training Standards Commission       | 11 DOJ 13159 | 06/05/12 | 27:04 NCR 538  |
| William James Becker v. Criminal Justice Education and Training Standards Commission    | 11 DOJ 13160 | 08/16/12 |                |
| Steve Michael Galloway, Jr, Private Protective Services Board                           | 11 DOJ 14434 | 04/23/12 |                |
| Justin Thomas Medlin v. Alarm Systems Licensing Board                                   | 11 DOJ 14493 | 04/23/12 |                |
| Argentina Rojas v. Department of Justice, Campus Police Officer Commission              | 12 DOJ 00394 | 11/02/12 |                |
| Bruce Clyde Shoe v. Private Protective Services Board                                   | 12 DOJ 00556 | 09/26/12 |                |
| Angela Louise Giles v. Private Protective Services Board                                | 12 DOJ 00557 | 04/18/12 |                |

# CONTESTED CASE DECISIONS

|  |              |          |                |
|--|--------------|----------|----------------|
| Marshall Todd Martin v. Sheriffs' Education  | 12 DOJ 00650 | 07/13/12 |                |
| Frances Gentry Denton v. Sheriffs' Education and Training Standards Commission                     | 12 DOJ 00651 | 08/30/12 |                |
| James Philip Davenport v. Criminal Justice Education and Training Standards Commission             | 12 DOJ 00653 | 11/21/12 |                |
| Alvin Louis Daniels v. Criminal Justice Education and Training Standards Commission                | 12 DOJ 00654 | 08/17/12 |                |
| Michael Wayne McFalling v. Private Protective Services Board                                       | 12 DOJ 00814 | 05/21/12 |                |
| Robert John Farmer v. Alarm Systems Licensing Board  | 12 DOJ 00887 | 05/04/12 |                |
| Ricky Lee Ruhlman v. Private Protective Services Board   | 12 DOJ 01211 | 04/18/12 |                |
| Leroy Wilson Jr., Private Protective Services Board  | 12 DOJ 01293 | 04/18/12 |                |
| Clyde Eric Lovette v. Alarm Systems Licensing Board  | 12 DOJ 01498 | 05/02/12 |                |
| Vincent Tyron Griffin v. Alarm Systems Licensing Board   | 12 DOJ 01663 | 09/27/12 |                |
| Andre Carl Banks Jr., v. Alarm Systems Licensing Board   | 12 DOJ 01695 | 06/22/12 |                |
| Ryan Patrick Brooks v. Private Protective Services Board   | 12 DOJ 01696 | 06/05/12 |                |
| Dustin Lee Chavis v. Private Protective Services Board   | 12 DOJ 01697 | 06/01/12 |                |
| Jeffrey Adam Hopson v. Sheriffs' Education and Training Standards Commission                       | 12 DOJ 01761 | 06/07/12 |                |
| John Henry Ceaser v. Sheriffs' Education and Training Standards Commission                         | 12 DOJ 01762 | 06/18/12 |                |
| Jerome Douglas Mayfield v. Private Protective Services Board                                       | 12 DOJ 02381 | 06/15/12 |                |
| Elijah K. Vogel v. Private Protective Services Board   | 12 DOJ 02619 | 06/05/12 |                |
| Timmy Dean Adams v. Department of Justice, Company Police Program                                  | 12 DOJ 02778 | 12/21/12 |                |
| Carlito Soler v. Alarm Systems Licensing Board   | 12 DOJ 03457 | 09/26/12 |                |
| Danielle Marie Taylor v. Criminal Justice Education and Training Standards Commission              | 12 DOJ 03838 | 01/24/13 | 28:06 NCR 554  |
| Rodney Lyndolph Bland v. Criminal Justice Education and Training Standards Commission              | 12 DOJ 03839 | 01/11/13 |                |
| Sherman Montrell Devon McQueen v. Criminal Justice Education and Training and Standards Commission | 12 DOJ 03842 | 12/21/12 |                |
| Matthew Brian Hayes v. Criminal Justice Education and Training Standards Commission                | 12 DOJ 03843 | 11/27/12 | 27:22 NCR 2139 |
| Antonio Cornelius Hardy v. Criminal Justice Education and Training Standards Commission            | 12 DOJ 03844 | 11/19/12 | 27:21 NCR 1994 |
| Jonathan Dryden Dunn v. Sheriffs' Education and Training Standards                                 | 12 DOJ 03845 | 03/28/13 |                |
| Barry Louis Christopher, Jr v. Private Protective Services Board                                   | 12 DOJ 05041 | 08/27/12 | 27:15 NCR 1570 |
| Bettina Hedwig Vredenburg v. Sheriffs' Education and Training Standards Commission                 | 12 DOJ 05140 | 11/09/12 | 27:21 NCR 2002 |
| Wallace Connell Ranson v. Sheriffs' Education and Training Standards Commission                    | 12 DOJ 05141 | 05/07/13 | 28:07 NCR 676  |
| Raymond Louis Soulet v. Sheriffs' Education and Training Standards Commission                      | 12 DOJ 05142 | 08/27/12 |                |
| Graham Avon Hager v. Sheriffs' Education and Training Standards Commission                         | 12 DOJ 05143 | 12/19/12 | 28:07 NCR 686  |
| Dustin Wilson Grant v. Sheriffs' Education and Training Standards Commission                       | 12 DOJ 05145 | 10/25/12 |                |
| Glenn Alvin Brand v. Sheriffs' Education and Training Standards Commission                         | 12 DOJ 05146 | 10/08/12 |                |
| Shannon Wallace v. DHHS  | 12 DOJ 05355 | 02/26/13 |                |
| Lawrence W. Sitgraves v. Private Protective Services   | 12 DOJ 06059 | 09/13/12 |                |
| Collin Michael Berry v. Private Protective Services Board  | 12 DOJ 06590 | 10/22/12 |                |
| Tiffany Ann Misel v. Private Protective Services Board   | 12 DOJ 06817 | 10/17/12 |                |
| John Machouis v. Alarm Systems Licensing Board   | 12 DOJ 07161 | 12/19/12 |                |
| Christopher A. Field v. Private Protective Services Board  | 12 DOJ 07548 | 12/19/12 |                |
| Porschea Renee Williams v. Private Protective Services Board                                       | 12 DOJ 07549 | 01/09/13 |                |
| Ralph R. Hines v. Criminal Justice Education and Training Standards                                | 12 DOJ 07812 | 11/07/12 |                |
| Shannon Pendergrass v. Criminal Justice Education and Training Standards Commission                | 12 DOJ 08008 | 12/05/13 |                |
| William Franklin Dietz v. Criminal Justice Education and Training Standards                        | 12 DOJ 08010 | 02/19/13 |                |
| Elizabeth Crooks Goode v. Criminal Justice Education and Training Standards Commission             | 12 DOJ 08014 | 12/14/12 |                |
| Kareen Jesaad Taylor v. Sheriffs' Education and Training Standards Commission                      | 12 DOJ 08018 | 04/02/13 | 28:08 NCR 751  |
| Brian Thomas Jones v. Sheriffs' Education and Training Standards Commission                        | 12 DOJ 08023 | 11/26/13 |                |
| Sheronica Hall Smith v. Sheriffs' Education and Training Standards Commission                      | 12 DOJ 08026 | 09/11/13 | 28:15 NCR 1831 |
| Sabrina Richelle Wright v. Sheriffs' Education and Training Standards Commission                   | 12 DOJ 08048 | 01/16/13 |                |
| Phillip Eugene Dendy v. Sheriffs' Education and Training Standards Commission                      | 12 DOJ 08049 | 01/18/13 |                |
| Reginald E. James v. Private Protective Services Board   | 12 DOJ 08195 | 12/20/12 |                |
| Omega Young v. Private Protective Services Board   | 12 DOJ 08261 | 12/17/12 |                |
| Joseph T. Ferrara v. Private Protective Services Board   | 12 DOJ 08309 | 01/11/13 |                |
| Jovan Lamont Sears v. Private Protective Services Board  | 12 DOJ 08447 | 12/20/12 |                |
| Christopher Robell Hunter v. Sheriffs' Education and Training Standards Commission                 | 12 DOJ 10182 | 05/07/13 | 28:08 NCR 758  |
| Joseph Ryan Fowler v. Sheriffs' Education and Training Standards Commission                        | 12 DOJ 10184 | 11/26/13 |                |
| Marilyn Cash Smalls v. Sheriffs' Education and Training Standards Commission                       | 12 DOJ 10188 | 04/29/13 |                |
| Timothy Allen Bruton v. Criminal Justice Education and Training Standards Commission               | 12 DOJ 10199 | 05/29/13 |                |
| Bilal Abdus-Salaam v. Criminal Justice Education and Training Standards Commission                 | 12 DOJ 10200 | 08/16/13 |                |
| Lee Daniel Wilkerson v. Criminal Justice Education and Training Standards Commission               | 12 DOJ 10201 | 10/10/13 |                |
| Brad Tisdale v. Criminal Justice Education Training Standards Commission                           | 12 DOJ 10203 | 05/06/13 |                |
| Ron Allen Hedrington v. Criminal Justice Education and Training Standards Commission               | 12 DOJ 10204 | 08/23/13 | 28:13 NCR 1544 |
| Clinton Weatherbee Jr v. Criminal Justice Education and Training Standards Commission              | 12 DOJ 10206 | 03/25/13 |                |
| JonPaul D. Wallace v. Private Protective Services Board  | 13 DOJ 02422 | 04/26/13 |                |
| Andrew George Anderson v. Sheriffs' Education and Training Standards Commission                    | 13 DOJ 03417 | 08/29/13 |                |

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**CONTESTED CASE DECISIONS**

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| Frank John Fontana, Jr. v. NC Alarm Systems Licensing Board                            | 13 DOJ 03740 | 09/12/13 |                |
| Jerome Douglas Mayfield v. Private Protective Services Board                           | 13 DOJ 04393 | 04/26/13 |                |
| Cameron Imhotep Clinkscale v. Private Protective Services Board                        | 13 DOJ 05095 | 04/26/13 |                |
| Ashely B. Sellers v. NC Alarm Systems Licensing Board                                  | 13 DOJ 08759 | 10/30/13 |                |
| Eddie Hugh Hardison v. Private Protective Services Board                               | 13 DOJ 08765 | 04/02/13 |                |
| Tony Lynn Cannon v. Sheriffs' Education and Training Standards Commission              | 13 DOJ 09567 | 10/22/13 |                |
| Antonio R. Dickens v. Private Protective Services Board                                | 13 DOJ 08953 | 08/09/13 | 28:14 NCR 1684 |
| Danielle J. Rankin v. Private Protective Services Board                                | 13 DOJ 09038 | 08/09/13 | 28:14 NCR 1689 |
| Thomas Lee Phillips, Jr. v. Sheriffs' Education and Training Standards Commission      | 13 DOJ 09571 | 11/19/13 |                |
| Jesse Alan Tyner v. NC Alarm Systems Licensing Board                                   | 13 DOJ 09863 | 08/09/13 | 28:15 NCR 1837 |
| Marcus Teer Benson v. Private Protective Services Board                                | 13 DOJ 09974 | 05/15/13 | 28:10 NCR 1155 |
| Steven Wesley Jones v. Sheriffs' Education and Training Standards Commission           | 13 DOJ 11188 | 10/22/13 |                |
| Logan Roy Clonts v. Sheriffs' Education and Training Standards Commission              | 13 DOJ 11694 | 10/17/13 |                |
| LaMarcus Jarrel Outing v. Criminal Justice Education and Training Standards Commission | 13 DOJ 11932 | 08/07/13 |                |
| Jeffrey D. Angell v. NC Alarm Systems Licensing Board                                  | 13 DOJ 12333 | 10/09/13 |                |
| Patricia Mary Cotto v. Criminal Justice Education and Training Standards Commission    | 13 DOJ 12452 | 12/10/13 |                |
| Myron Troy Davidson v. Private Protective Services Board                               | 13 DOJ 13379 | 09/13/13 |                |
| Rhonda N. Thorpe v. NC Alarm Systems Licensing Board                                   | 13 DOJ 13600 | 12/11/13 |                |
| Marcus L. Fuller v. Private Protective Services Board                                  | 13 DOJ 13653 | 09/03/13 |                |
| Christopher T. Place v. NC Alarm Systems Licensing Board                               | 13 DOJ 13859 | 08/02/13 | 28:14 NCR 1695 |
| Martise Lamar Jones v. NC Alarm Systems Licensing Board                                | 13 DOJ 14844 | 10/30/13 |                |
| Charles Robert Austin, Jr. v. NC Alarm Systems Licensing Board                         | 13 DOJ 15507 | 10/30/13 |                |
| Deane Eugene Barnette v. Sheriffs' Education and Training Standards Commission         | 13 DOJ 16248 | 12/03/13 |                |
| Reza M. Salami v. NC Department of Justice and Attorney General Roy Cooper             | 13 DOJ 17903 | 11/12/13 |                |

**DEPARTMENT OF LABOR**

|   |              |          |  |
|---|--------------|----------|--|
| United Quest Care Services v. Department of Labor                       | 13 DOL 12224 | 09/17/13 |  |
| Absolute Contracting Service Inc., Felicia Myers v. NCDOL, Adriana King | 13 DOL 16701 | 10/30/13 |  |

**DEPARTMENT OF TRANSPORTATION**

|   |              |          |               |
|---|--------------|----------|---------------|
| Lorie Cramer v. NC Quick Pass Customer Service Center and DOT | 13 DOT 08753 | 07/19/13 | 28:06 NCR 589 |
|---|--------------|----------|---------------|

**DEPARTMENT OF STATE TREASURER**

|  |              |          |                |
|--|--------------|----------|----------------|
| Dwaine C. Coley v. Department of State Treasurer                               | 10 DST 00233 | 04/05/13 | 28:02 NCR 81   |
| Ella Joyner v. Department of State Treasurer Retirement System Division        | 11 DST 02437 | 07/12/12 | 27:07 NCR 758  |
| William R. Tate v. Department of Treasurer, Retirement System Division         | 11 DST 04675 | 09/07/12 | 27:15 NCR 1574 |
| Brenda C. Hemphill v. Department of Treasurer, Retirement System Division      | 11 DST 10252 | 09/26/12 |                |
| Russell E. Greene v. Department of State Treasurer Retirement Systems Division | 11 DST 10875 | 06/14/12 | 27:04 NCR 543  |
| James A Layton v. Department of State Treasurer                                | 11 DST 12958 | 11/30/12 |                |
| Marsha W Lilly, Robert L Hinton v. Retirement System                           | 12 DST 01108 | 05/22/12 |                |

**STATE ETHICS COMMISSION**

|   |              |          |  |
|---|--------------|----------|--|
| Reza M. Salami v. North Carolina A & T State University, Chancellor Harold Martin, General Counsel Charles Waldrup, Vice Chancellor Linda McAbee, Interim Provost Winsor Alexander, and Chairman Willie Deese | 13 EBD 13916 | 11/20/13 |  |
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**STATE BOARD OF EDUCATION**

|   |              |          |                |
|---|--------------|----------|----------------|
| Louis A. Hrebar v. State Board of Education                                   | 11 EDC 01445 | 07/27/12 |                |
| Delene Huggins v. Department of Public Instruction                            | 11 EDC 08899 | 06/28/12 |                |
| Myra F. Moore v. NC Board of Education  | 11 EDC 11927 | 05/01/12 |                |
| Dwayne White v. Department of Public Instruction, NC State Board of Education | 11 EDC 11864 | 07/18/12 | 27:07 NCR 769  |
| Jeffery Sloan v. NCDPI  | 11 EDC 14077 | 11/09/12 | 27:21 NCR 1974 |
| Lia C Long v. DPI   | 12 EDC 00805 | 10/18/13 | 27:16 NCR 1716 |
| North Carolina Learns Inc. d/b/a North Carolina Virtual Academy               | 12 EDC 01801 | 05/18/12 |                |
| Katherine Kwesell Harris v. Public Schools, Board of Education                | 12 EDC 06520 | 09/05/12 |                |
| Bonnie Aleman v. State Board of Education, Department of Public Instruction   | 12 EDC 07293 | 06/14/13 |                |
| Emma Seward v. Department of Public Instruction                               | 12 EDC 07438 | 07/17/13 |                |
| Jodi Esper v. Department of Public Instruction                                | 12 EDC 10259 | 06/04/13 |                |
| Glennette McRae v. NC State Board of Education                                | 12 EDC 10448 | 11/15/13 |                |
| Matthew Schneider v. Department of Public Instruction                         | 12 EDC 12183 | 07/17/13 | 28:12 NCR 1467 |
| Wanda McLaughlin v. State Board of Education                                  | 12 EDC 12410 | 03/27/13 |                |

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

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**CONTESTED CASE DECISIONS**

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| Pamlico-Tar River Foundation, NC Coastal Federation, Environmental Defense Fund, and Sierra Club v. DENR, Division of Water Quality and PCS Phosphate Company, Inc                                 | 09 EHR 1839  | 04/26/12 | 27:01 NCR 87   |
| ALCHEM Inc., v. NCDENR   | 10 EHR 00296 | 02/05/13 |                |
| Don Hillebrand v. County of Watauga County Health Dept   | 10 EHR 00933 | 05/10/12 |                |
| ALCHEM Inc., v. NCDENR   | 10 EHR 05463 | 02/05/13 |                |
| House of Raeford Farms, Inc., v. DENR  | 10 EHR 05508 | 05/31/12 | 27:01 NCR 99   |
| Lacy H Caple DDS v. Division of Radiation Protection Bennifer Pate   | 11 EHR 11454 | 05/09/12 |                |
| Friends of the Green Swamp and Blue Ridge Environmental Defense League, Inc v. DENR Division of Waste Management and Waste Management of the Carolinas, Inc., d/b/a Waste Management of Wilmington | 11 EHR 12185 | 08/08/12 | 27:12 NCR 1224 |
| Holmes Development & Realty, LLC, and H.L. Homes v. DENR – Land Quality Section (Re: LQS 11-018)   | 11 EHR 13208 | 06/29/12 | 27:07 NCR 774  |
| Ik Kim IT and K Enterprise v. DENR   | 11 EHR 13910 | 11/06/12 |                |
| Edward Dale Parker v. DENR   | 11 EHR 14390 | 02/22/13 |                |
| Janezic Building Group LLC v. Orange County  | 12 EHR 01104 | 12/03/12 | 27:21 NCR 2008 |
| Save Mart of Duplin LLC v. DENR  | 12 EHR 02328 | 07/25/12 |                |
| NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality and Carolina Cement Company, LLC   | 12 EHR 02850 | 09/23/13 |                |
| James D. Halsey v. DENR, Division of Environmental Health  | 13 EHR 10216 | 06/05/13 |                |
| Joe Waldroop v. NC DENR  | 13 EHR 12077 | 11/20/13 |                |
| NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality  | 13 EHR 16148 | 11/04/13 |                |

**DIVISION OF EMPLOYMENT SECURITY**

|   |              |          |  |
|---|--------------|----------|--|
| Dwight Marvin Wright v. Department of Commerce, Division of Employment Security | 12 ESC 05042 | 07/27/12 |  |
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**DEPARTMENT OF INSURANCE**

|  |              |          |               |
|--|--------------|----------|---------------|
| Megan L. Hartzog v. NC State Health Plan                             | 12 INS 00364 | 05/06/13 | 28:07 NCR 691 |
| Jan Fjelsted v. NC State Health Plan                                 | 12 INS 04763 | 01/16/13 | 28:07 NCR 706 |
| Susan E. Montgomery Lee v. State Health Plan; Blue Cross Blue Shield | 12 INS 10145 | 03/25/13 |               |
| Lori Matney v. Blue Cross Blue Shield of NC, State Health Plan       | 12 INS 10790 | 08/20/13 |               |
| Jean Kirkland and John Ritchie v. State Health Plan                  | 12 INS 11957 | 04/11/13 |               |

**MISCELLANEOUS**

|   |              |          |                |
|---|--------------|----------|----------------|
| Richard Lee Taylor v. City of Charlotte                               | 11 MIS 14140 | 05/15/12 |                |
| Lloyd M Anthony v. New Hanover County Sheriff Office                  | 12 MIS 01803 | 06/07/12 |                |
| Jackie Poole, Jamyan Brooks v. Orange County                          | 12 MIS 02379 | 11/09/12 | 27:21 NCR 2016 |
| David L. Smith v. NC Innocence Inquiry Commission                     | 13 MIS 12404 | 06/19/13 | 28:10 NCR 1160 |
| Thomas Franklin Cross, Jr. v. NC Innocence Inquiry Commission         | 13 MIS 12642 | 06/19/13 | 28:10 NCR 1160 |
| Moses Leon Faison v. NC Parole Commission, Paul G. Butler, Jr.        | 13 MIS 13004 | 09/05/13 |                |
| Jabar Ballard v. NC Innocence Inquiry Commission                      | 13 MIS 13005 | 06/19/13 | 28:10 NCR 1160 |
| Paul Michael Simmons v. Luis Hernandez, Forest City Police Department | 13 MIS 14274 | 11/13/13 |                |

**OFFICE OF STATE PERSONNEL**

|   |              |          |                |
|---|--------------|----------|----------------|
| Amanda Thaxton v. State Ethics Commission   | 09 OSP 03754 | 09/20/12 |                |
| Jacob W. Scott v. Department of Crime Control and Public Safety Alcohol Law Enforcement         | 10 OSP 04582 | 07/19/13 | 28:12 NCR 1419 |
| Dorothy H. Williams v. DHHS, Central Regional Hospital  | 10 OSP 05424 | 03/28/12 | 27:01 NCR 119  |
| Stephen R. West v. The University of North Carolina at Chapel Hill                              | 10 OSP 01567 | 11/26/12 | 27:21 NCR 1959 |
| Larry F. Murphy v. Employment Security Commission of North Carolina                             | 10 OSP 03213 | 06/04/12 |                |
| Walter Bruce Williams v. Dept. of Crime Control and Public Safety Butner Public Safety Division | 10 OSP 03551 | 04/23/12 | 27:01 NCR 148  |
| Teresa J. Barrett v. DENR   | 10 OSP 04754 | 10/22/12 | 27:16 NCR 1726 |
| Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division          | 10 OSP 04792 | 05/30/12 |                |
| Steven M Mukumgu v. DAG   | 10 OSP 05199 | 08/07/12 |                |

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**CONTESTED CASE DECISIONS**

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|--|--------------|----------|----------------|
| Valerie Small v. NC Agricultural and Technical State University  | 11 OSP 03245 | 05/24/13 | 28:11 NCR 1231 |
| Beatrice T. Jackson v. Durham County Health Department   | 11 OSP 3835  | 06/08/12 |                |
| Brenda D. Triplett v. DOC  | 11 OSP 4605  | 03/20/12 | 27:06 NCR 669  |
| Barry G. Eriksen v. NC State University  | 11 OSP 4968  | 12/16/13 |                |
| Tommie J. Porter v. DOC  | 11 OSP 5352  | 06/05/12 | 27:06 NCR 678  |
| Fortae McWilliams v. DOC   | 11 OSP 06236 | 05/30/12 | 27:06 NCR 684  |
| Katheryn Renee Johnson v. NC Department of Correction  | 11 OSP 06493 | 12/16/13 |                |
| Kimberly F. Loflin v. DOT, DMV   | 11 OSP 06762 | 07/10/12 |                |
| John Hardin Swain v. DOC, Hyde Correctional Inst.  | 11 OSP 07956 | 04/23/12 | 27:06 NCR 693  |
| John Fargher v. DOT  | 11 OSP 08111 | 04/18/12 |                |
| Maria Isabel Prudencio-Arias v. UNC at Chapel Hill   | 11 OSP 09374 | 03/28/13 | 28:02 NCR 99   |
| Gerald Price v. Department of Agriculture & Consumer Services, Standards Division  | 11 OSP 09588 | 02/27/13 | 28:02 NCR 139  |
| Tammy Cagle v. Swain County, Department of Social Services   | 11 OSP 10307 | 09/26/12 | 27:16 NCR 1747 |
| Doris Wearing v. Polk Correctional Inst. Mr. Solomon Superintendent  | 11 OSP 11023 | 10/19/12 |                |
| Fredericka Florentina Demmings v. County of Durham   | 11 OSP 11498 | 06/12/12 |                |
| Derick A Proctor v. Crime Control and Public Safety, State Capital Police Division   | 11 OSP 11499 | 12/06/12 |                |
| David B. Stone v. Department of Cultural Resources   | 11 OSP 11926 | 08/10/12 | 27:12 NCR 1245 |
| Pattie Hollingsworth v. Fayetteville State University  | 11 OSP 12152 | 02/27/13 |                |
| William C. Spender v. Dept. of Agriculture & Consumer Services, Veterinary Division  | 11 OSP 12479 | 04/27/12 |                |
| Terrence McDonald v. NCSU  | 11 OSP 12682 | 05/21/12 |                |
| Terrence McDonald v. DHHS, Emery Milliken  | 11 OSP 12683 | 05/18/12 |                |
| Phyllis Campbell v. DOC  | 11 OSP 13381 | 08/27/12 | 27:15 NCR 1579 |
| Thomas W. Wheeler v. NC Department of Transportation   | 11 OSP 13440 | 12/03/13 |                |
| Raeford Quick v. DOC   | 11 OSP 14436 | 05/22/12 |                |
|  |              |          |                |
| Tawana McLaurin v. DOC   | 12 OSP 00116 | 08/21/12 |                |
| Vera Ricks v. NC Department of Public Safety   | 12 OSP 00246 | 03/28/13 | 28:07 NCR 714  |
| Marva G. Scott v. Edgecombe County Social Services Board (Larry Woodley, Fate Taylor, Ernest Taylor, Viola Harris and Evelyn Johnson), Edgecombe County Commissioners and Edgecombe county manager, Lorenzo Carmon | 12 OSP 00430 | 12/20/12 | 27:22 NCR 2152 |
| Ladeana Z. Farmer v. Department of Public Safety   | 12 OSP 00460 | 04/10/13 | 28:06 NCR 564  |
| Rhonda Whitaker v. DHHS  | 12 OSP 00519 | 05/17/13 | 28:08 NCR 766  |
| Thomas B. Warren v. DAG, Forest Services Division  | 12 OSP 00615 | 11/27/12 |                |
| Bon-Jerald Jacobs v. Pitt County Department of Social Services   | 12 OSP 00634 | 06/12/12 |                |
| Sherry Baker v. Department of Public Safety  | 12 OSP 00841 | 10/09/12 |                |
| Diane Farrington v. Chapel Hill-Carrboro City Schools  | 12 OSP 01300 | 07/12/12 |                |
| Cynthia Moats v. Harnett County Health Dept  | 12 OSP 01536 | 08/10/12 |                |
| Natalie Wallace-Gomes v. Winston-Salem State University  | 12 OSP 01627 | 05/15/12 |                |
| Clark D. Whitlow v. UNC-Chapel Hill  | 12 OSP 01740 | 06/12/12 |                |
| John Medina v. Department of Public Safety   | 12 OSP 01940 | 01/30/13 | 28:08 NCR 783  |
| Jeffrey L Wardick, v. Employment Securities Commission of NC   | 12 OSP 02027 | 07/17/12 |                |
| Ricco Donnell Boyd v. NC A&T University  | 12 OSP 02219 | 01/31/13 |                |
| Larry C. Goldston v. UNC-Chapel Hill   | 12 OSP 02222 | 09/26/12 | 27:16 NCR 1754 |
| Larry Batton v. Dept of Public Safety  | 12 OSP 02320 | 02/18/13 |                |
| Sandra Kay Tillman v. County of Moore Department of Social Services, John L. Benton, Director  | 12 OSP 02433 | 07/29/13 |                |
| Sheila Bradley v. Community College System Sandhills Community College   | 12 OSP 02473 | 06/06/12 |                |
| Brenda S. Sessoms v. Department of Public Safety   | 12 OSP 02507 | 07/25/12 |                |
| Donnette J Amaro v. Onslow County Department of Social Services  | 12 OSP 02578 | 11/21/12 |                |
| Ronald Gilliard v. N.C. Alcoholic Law Enforcement  | 12 OSP 02618 | 09/26/12 |                |
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| Natalie Wallace-Gomes v. Winston Salem State University  | 12 OSP 02950 | 08/01/12 |                |
| Katie F. Walker v. Rutherford County/Department of Social Services   | 12 OSP 03041 | 03/15/13 | 28:08 NCR 791  |
| Norlishia Y. Pridgeon v. Department of Public Safety, Division of Adult Correction and Department of Corrections   | 12 OSP 03150 | 08/02/13 |                |
| Jaymar v. Department of Corrections, Central Prison  | 12 OSP 03381 | 07/20/12 |                |
| Ronald Wayne Crabtree Jr., v. Butner Public Safety   | 12 OSP 03846 | 10/09/12 |                |
| Natalie Wallace-Gomes v. Winston Salem State University  | 12 OSP 03910 | 10/22/12 |                |
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| Edwards Robert Esslinger v. DPI  | 12 OSP 05459 | 09/12/12 |                |

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| Natalie Wallace-Gomes v. Winston Salem State University  | 12 OSP 06309 | 10/22/12 |                |
| Paul Jeffrey Treadway v. Department of Public Safety, Division of Adult Supervision  | 12 OSP 06634 | 12/18/12 |                |
| Darrion Smith v. Murdock Developmental Center and the NC DHHS; Ricky Bass v. NC DHHS; Darrion Smith v. NC DHHS                   | 12 OSP 06780 | 07/24/13 | 28:12 NCR 1472 |
| Phillip W Smith v. Department of Commerce, Division of Employment Security   | 12 OSP 06821 | 09/20/12 |                |
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| Oswald Woode v. DHHS, Central Regional Hospital  | 12 OSP 08664 | 01/09/13 |                |
| Gwendolyn Claire Montgomery v. NC DPS/DOCC/Lori Dunn   | 12 OSP 09069 | 08/05/13 | 28:13 NCR 1562 |
| Gary C. Clement v. DHHS  | 12 OSP 09581 | 01/04/13 |                |
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| Patricia Burgess v. NC Community College System  | 12 OSP 10339 | 08/09/13 | 28:14 NCR 1669 |
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| Jeffrey Wayne Ellis v. North Carolina A & T University   | 13 OSP 09564 | 08/08/13 |                |
| Kimberly D. Hinton v. Department of Transportation   | 13 OSP 09565 | 09/06/13 |                |
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| Ronnie Lee Nixon v. Department of Revenue           | 12 REV 01881 | 10/03/12 |               |
| James M. Slowin, REFS LLC v. Department of Revenue  | 12 REV 02218 | 02/11/13 | 28:06 NCR 583 |
| William S. Hall v. Department of Revenue            | 12 REV 04115 | 08/27/12 |               |
| Noah D. Sheffield v. Department of Revenue          | 12 REV 07074 | 11/14/12 |               |



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**CONTESTED CASE DECISIONS**

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| Karim B. Mawji/Mama Brava's v. Department of Revenue    | 13 REV 13648 | 12/18/13 |                |
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| Annie E. Jarrett v. UNC Hospitals                                   | 12 UNC 03716 | 10/09/12 |  |
| Vikki J Goings v. UNC Hospital                                      | 12 UNC 04109 | 09/18/12 |  |
| Elonnie Alston v. UNC Hospitals                                     | 12 UNC 04551 | 09/11/12 |  |
| Diara Z Andrews v. UNC Hospitals                                    | 12 UNC 04827 | 08/15/12 |  |
| David Ryan Pierce v. UNC Hospitals, Patient Account Services, SODCA | 12 UNC 05306 | 03/20/13 |  |
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| Candis Miller v. UNC Hospitals                                      | 13 UNC 10374 | 08/19/13 |  |
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| Chiduzie Oriaku v. UNC Hospitals                                    | 13 UNC 11434 | 10/07/13 |  |
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| Jason Paylor v. UNC Hospitals Patient Accounts                      | 13 UNC 12636 | 07/26/13 |  |
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| People for the Ethical Treatment of Animals, Inc., v. NC Wildlife Resources Commission | 12 WRC 07077 | 11/13/12 | 27:22 NCR 2165 |
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Filed

STATE OF NORTH CAROLINA

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IN THE OFFICE OF

ADMINISTRATIVE HEARINGS

COUNTY OF HOKE

Office of

SURGICAL CARE AFFILIATES, LLC AND  
FAYETTEVILLE AMBULATORY  
SURGERY CENTER LIMITED  
PARTNERSHIP,  
Petitioner,

v.

NC DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, DIVISION OF  
HEALTH SERVICE REGULATION,  
CERTIFICATE OF NEED SECTION,  
Respondent,

and

FIRSTHEALTH OF THE CAROLINAS,  
INC.,  
Respondent – Intervenor.

12DHR12086

CUMBERLAND COUNTY HOSPITAL  
SYSTEM INC. d/b/a CAPE FEAR VALLEY  
MEDICAL CENTER,  
Petitioner,

v.

NC DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, DIVISION OF  
HEALTH SERVICE REGULATION,  
CERTIFICATE OF NEED SECTION,  
Respondent,

and

FIRSTHEALTH OF THE CAROLINAS,  
INC.,  
Respondent-Intervenor.

12DHR12090

|  |                          |
|--|--------------------------|
| <p>CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. d/b/a CAPE FEAR VALLEY HEALTH SYSTEM,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS, INC.,<br/>Respondent – Intervenor.</p> | <p><b>12DHR12094</b></p> |
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**FINAL DECISION**

Case number 12 DHR 12090 came on for hearing before Beecher R. Gray, Administrative Law Judge, on June 3-6, June 24-28, July 1-3, July 29-30, and August 19, 2013 at the Office of Administrative Hearings (“OAH”) in Raleigh, North Carolina.

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

**APPEARANCES**

For Petitioner Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System (“Cape Fear”):

Gary S. Qualls  
 Susan K. Hackney  
 Steven G. Pine  
 K&L Gates LLP  
 430 Davis Drive, Suite 400  
 Morrisville, North Carolina 27560

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

June S. Ferrell  
Special Deputy Attorney General  
Scott T. Stroud  
Assistant Attorney General  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629

For Respondent-Intervenor FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital ("FirstHealth"):

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

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

#### **ISSUES PRESENTED**

Whether the Agency: (1) substantially prejudiced Cape Fear's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in denying the Cape Fear certificate of need ("CON") application to add 28 acute care beds at Cape Fear Valley Medical Center on Owen Drive, Fayetteville, Cumberland County, North Carolina, identified as Project I.D. No. M-8833-12; and (2) substantially prejudiced Cape Fear's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in approving the FirstHealth CON application to add 28 acute care beds to its approved 8-bed acute care hospital in Raeford, Hoke County, North Carolina, identified as Project I.D. No. N-8838-12.

#### **PARTIES**

Petitioner Cape Fear is a North Carolina corporation with its principal place of business at 1638 Owen Drive, Fayetteville, Cumberland County, North Carolina, 28304. Cape Fear is

licensed to provide acute care hospital services under Chapter 131E, Article 5 of the North Carolina General Statutes.

Respondent CON Section is the agency of the State of North Carolina that administers the Certificate of Need Law (the “CON Law”), codified at Article 9 of Chapter 131E of the North Carolina General Statutes.

Respondent-Intervenor FirstHealth is a North Carolina corporation with its principal place of business at 155 Memorial Drive, Pinehurst, Moore County, North Carolina, 28374. FirstHealth is licensed to provide acute care hospital services under Chapter 131E, Article 5 of the North Carolina General Statutes.

#### **APPLICABLE LAW**

1. The procedural law applicable to this contested case hearing is the North Carolina Administrative Procedure Act (“APA”), N.C. General Statutes § 150B-1, *et seq.*, to the extent not inconsistent with the CON Law, N.C. Gen. Stat. § 131E-175, *et seq.*
2. The substantive law applicable to this contested case is the North Carolina CON Law, N.C. Gen. Stat. § 131E-175, *et seq.*
3. The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Regulations, 10A N.C.A.C. 14C .0101 *et seq.*, 10A N.C.A.C. 14C .1200, *et seq.*, 10A N.C.A.C. 14C .3800, *et seq.* and the Office of Administrative Hearing Rules, 26 N.C.A.C. 3.0101, *et seq.*

#### **STIPULATED FACTS**

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

1. On June 15, 2012, Cape Fear filed a CON application with the Agency proposing to add 28 acute care beds to its existing hospital located at Owen Drive in Cumberland County, identified as Project I.D. No. M-8833-12 (the “Cape Fear Application”).
2. On June 15, 2012, FirstHealth filed a CON application with the Agency proposing to add 28 acute care beds to its approved 8-bed FirstHealth Hoke Community Hospital, identified as Project I.D. No. N-8838-12 (the “FirstHealth Application”).
3. On June 15, 2012, FirstHealth filed a CON application with the Agency proposing to relocate one operating room (“OR”) from FirstHealth Moore Regional Hospital (“FirstHealth Moore”) to FirstHealth Hoke, resulting in a total of two operating rooms at FirstHealth Hoke upon project completion, identified as Project I.D. No. N-8843-12 (the “FirstHealth OR Application”).

4. By separate decision letters dated November 27, 2012, and separate findings dated December 4, 2012, the Agency: (a) approved the FirstHealth Application and denied the Cape Fear Application; and (b) approved the FirstHealth OR Application.
5. On December 21, 2012, Cape Fear filed a Petition for a contested case hearing with the Office of Administrative Hearings ("OAH")--case number 12 DHR 12090--appealing the Agency's denial of the Cape Fear Application and the approval of the FirstHealth Application (the "28 Bed Case").
6. On December 21, 2012, Cape Fear filed a Petition for a contested case hearing with OAH--case number 12 DHR 12094--appealing the Agency's approval of the FirstHealth OR Application (the "Cape Fear OR Case").
7. On December 21, 2012, Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership (collectively, "SCA") filed a Petition for a contested case hearing with OAH--case number 12 DHR 12086--appealing the agency's approval of the FirstHealth OR Application (the "SCA OR Case").
8. On February 25, 2013, the Chief Administrative Law Judge Julian Mann, III consolidated the three cases, finding that Cape Fear's appeal in the 28 Bed Case shared common questions of law and fact with the Cape Fear OR Case and the SCA OR Case (collectively, the "OR Cases").

#### **PROCEDURAL HISTORY**

No party objected to designation of the Administrative Law Judge, Notice of Hearing, or the dates and location of hearing. On January 15, 2013, FirstHealth moved to dismiss this case for lack of subject matter jurisdiction, asserting that Cape Fear had failed to file a bond in an adequate amount as required by N.C. Gen. Stat. § 131E-188(a1). Following a hearing on February 13, 2013, that Motion was denied. No other objection to jurisdiction was made by any party. This Final Decision concerns only case number 12 DHR 12090. SCA was not a party to case number 12 DHR 12090. As such, SCA was not a party to this contested case hearing.

#### **12 DHR 12090—28 Bed Case**

On May 17, 2013, FirstHealth and the Agency filed a Motion for Partial Summary Judgment against Cape Fear asserting that Cape Fear was contractually barred from challenging the Agency's denial of its 28 Bed Application under Criterion (20) of the CON Law, N.C. Gen. Stat. § 131E-183(a)(20).

Following a hearing on May 31 and June 3, 2013, the Undersigned denied the Joint Motion.

On May 17, 2013, Cape Fear filed a Motion for Summary Judgment alleging that the Agency erred in finding the FirstHealth Application conforming with Criteria (3) and (6) of the CON Law, N.C. Gen. Stat. §§ 131E-183(a)(3) and (6), the rule at 10A N.C.A.C. 14C .3803(a),

and by finding the FirstHealth OR Application conforming with Criteria (3) and (6) of the CON Law on the basis of an alleged “Double Counting Issue.” Cape Fear further sought summary judgment arguing that the Agency erred in finding the Cape Fear Application non-conforming with Criterion (20) and, consequently, non-conforming with criteria (1), (4), and (18a).

Following a hearing on May 31 and June 3, 2013, the Undersigned granted summary judgment in favor of FirstHealth and the Agency on the Double Counting Issue as it related to Criteria (3), (6) and 10A N.C.A.C. 14C .3803(a) in case numbers 12 DHR 12090 and 12 DHR 12094. The Undersigned granted Cape Fear’s Motion in part by finding the Agency erred as a matter of law in finding the Cape Fear Application non-conforming with Criteria (1), (4), (18a), and (20) in the CON Law, N.C. Gen. Stat. §§ 131E-183(a)(1), (4), (18a) and (20).

These decisions on the summary judgment motions are the subject of separate orders and are being filed at the time of issuance of this Final Decision, although not contained within this Final Decision.

**12 DHR 12086—SCA OR Case and 12 DHR 12094—Cape Fear OR Case**

On May 17, 2013, FirstHealth and the Agency filed a Joint Motion for Summary Judgment concerning the FirstHealth OR Application against both SCA and Cape Fear in case numbers 12 DHR 12086 and 12 DHR 12094, asserting that both SCA and Cape Fear failed to prove facts tending to establish that their rights were substantially prejudiced by the Agency’s decision in the non-competitive OR review.

Following a hearing on May 31 and June 3, 2013, the Undersigned granted FirstHealth’s Motion for Summary Judgment against both SCA and Cape Fear in case numbers 12 DHR 12086 and 12 DHR 12094 by separate order.

On May 17, 2013, SCA filed a Motion for Summary Judgment (“SCA’s Motion for Summary Judgment”) alleging that the Agency’s decision approving the FirstHealth OR Application was erroneous and substantially prejudiced SCA’s rights in case number 12 DHR 12086.

Following a hearing on May 31 and June 3, 2013, the Undersigned denied SCA’s Motion for Summary Judgment and granted summary judgment in favor of FirstHealth and the Agency in 12 DHR 12086 by separate order.

These decisions on the summary judgment Motions are the subject of separate orders and are not contained within this Final Decision.

**Motion in Limine**

On June 4, 2013, FirstHealth and the Agency filed a Joint Motion in Limine seeking to exclude certain evidence at the contested case hearing, specifically: (1) the use of Cape Fear’s expert witness’ Venn diagrams as substantive evidence, specifically Cape Fear Exhibits 1031, 1078, 1094, 1095, 1132 and 1272; and (2) comments from other CON reviews and a Georgia

Certificate of Need Application designated as Cape Fear Exhibits 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244 and 1245.

Following arguments from counsel on June 04, 2013, Cape Fear consented to the use of Exhibits 1031, 1078, 1094, 1095, 1132 and 1272 for illustrative purposes only. The Undersigned reserved ruling on the remaining subject exhibits until such time as they were presented during the hearing.

**BURDEN OF PROOF**

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

**WITNESSES**

**Witnesses for Cape Fear:**

1. Nancy Bres Martin: Ms. Bres Martin is a health planning consultant with NBM Health Planning who works on certificate of need projects for hospitals, nursing homes, and other health care providers throughout North Carolina. (Bres Martin, Vol. 1 at 88-89) Ms. Bres Martin was qualified as an expert in CON preparation and analysis and health planning. (Bres Martin, Vol. 1 at 97)
2. Craig R. Smith (adverse): Mr. Smith currently serves as the Chief of the CON Section. (Smith, Vol. 3 at 419) He has held that position since 2009, prior to which time he served as Assistant Chief of the CON Section for fifteen years. (Smith, Vol. 3 at 502) He also served as a Project Analyst for six years and has a total of 25 years of experience in working for the CON Section. (*Id.*) Mr. Smith participated in the decision with the Project Analyst, Mr. Gregory Yakaboski, in approving the FirstHealth Application and denying the Cape Fear Application. (Smith, Vol. 3 at 420)
3. Gregory Yakaboski (adverse): Mr. Yakaboski was the Project Analyst who conducted the review of the FirstHealth Application and the Cape Fear Application. (Yakaboski, Vol. 3 at 561-62) Mr. Yakaboski reviewed the FirstHealth Application and the Cape Fear Application in their entirety. (Yakaboski, Vol. 3 at 563) Mr. Yakaboski is licensed to practice law in the State of New York. He holds an undergraduate degree from William and Mary and a law degree from Case Western Reserve University. He has been employed as a Project Analyst since April 2008. (Yakaboski, Vol. 14 at 2385-86)



4. Daniel Carter: Mr. Carter is a principal with Ascendient who works on certificate of need projects. (Carter, Vol. 4 at 613) Mr. Carter was qualified and accepted as an expert in CON preparation and analysis and health planning. (Carter, Vol. 4 at 615)
5. Christopher Taylor Aul, M.D.: Dr. Aul is currently the Chief Medical Officer for Cape Fear. Dr. Aul joined the medical staff of Cape Fear in 1980 and became employed by Cape Fear as a family medicine physician in 2001. In 2006, Dr. Aul transitioned to work in Cape Fear's Express Care urgent care centers. In 2007, he became medical director of Express Care. On October 1, 2011, Dr. Aul became Associate Chief Medical Officer for Quality and Patient Safety at Cape Fear. In May 2013, Dr. Aul assumed his current position of Chief Medical Officer. At the time of the Agency decision in this review, Dr. Aul was the Associate Chief Medical Officer for Quality and Patient Safety. (Aul, Vol. 4 at 767-768)

**Witnesses for the Agency:**

Gregory Yakaboski

**Witnesses for FirstHealth:**

1. Azzie Conley: Ms. Conley is Section Chief for the Acute and Home Care Licensure and Certification Section, Division of Health Service Regulation (the "Licensure and Certification Section"). (Conley, Vol. 9 at 1681) Ms. Conley held the position of branch manager of the Licensure and Certification Section beginning in 2000, which position was upgraded to Section Chief in 2007. (*Id.*) Ms. Conley's day-to-day duties include ensuring that the Section staff conducts quality of care surveys to ensure that providers are in compliance with either state licensure and/or CMS federal regulations. (*Id.*) Prior to joining the Licensure and Certification Section in 2000, Ms. Conley worked as a Project Analyst for the CON Section. (*Id.*) The Licensure and Certification Section and the CON Section work together closely with respect to the quality of care that is being provided within licensed or Medicare certified provider facilities. (*Id.* at 1682)
2. David Legarth: Mr. Legarth is the owner of DanEs Planning, which is a healthcare consulting firm that provides services to hospitals, physicians, and other healthcare organizations in North Carolina. (Legarth, Vol. 9 at 1731; 1733) In his fifteen (15) years of work in the healthcare industry, Mr. Legarth has prepared between 175 and 250 CON applications for a variety of healthcare services including MRI services, acute care beds, CT services, hospice services, home health agencies, long-term care nursing facility beds, renovations and expansion of services, end-stage renal disease facilities, cardiac catheterization, and operating rooms. (Legarth, Vol. 9 at 1733) He holds a Bachelors of Science in Business Administration and a Masters in Healthcare Administration. (Legarth, Vol. 9 at 1734) Mr. Legarth was qualified and accepted as an expert in CON preparation and analysis and health planning. (*Id.*)

3. Kathryn M.T. Platt: Ms. Platt is the owner of Platt HMC, a healthcare consulting firm. (Platt, Vol. 12 at 2056) She received her Bachelors of Science from Emory University and her Masters in Business Administration with a concentration in healthcare management and finance from Boston University. (Platt, Vol. 12 at 2059) Ms. Platt has worked on CON projects for hospital beds and services, ICU beds, neonatal beds, psychiatric beds, rehabilitation beds, long-term care projects, home health, hospice, nursing home services, ambulatory surgery, and imaging centers, among others. (Platt, Vol. 12 at 2058) In addition to providing CON and other healthcare consulting services in North Carolina, Ms. Platt also works in the CON field in Georgia, South Carolina, Florida, Kentucky, Tennessee, Alabama, and Washington, D.C. (Platt, Vol. 12 at 2057) She has reviewed both the North Carolina CON Law and the applicable State Medical Facilities Plan ("SMFP"). Ms. Platt has prepared over 300 CON applications in different states throughout her more than 22 years of experience in the healthcare industry. (Platt, Vol. 12 at 2057-58) Ms. Platt has been accepted as an expert witness in CON proceedings in North Carolina, Florida, Georgia, South Carolina, Kentucky, and Tennessee. (Platt, Vol. 12 at 2058-59) She was qualified and accepted as an expert in CON preparation and analysis and health planning. (Platt, Vol. 12 at 2059-60)

**EXHIBITS ADMITTED INTO EVIDENCE**

The following joint exhibits were offered and admitted into evidence:

**Joint Exhibits**

- Joint Exhibit 1:        Agency File
- Joint Exhibit 2:        CON Application of FirstHealth of the Carolinas, Inc., Project I.D. No. N-8838-12
- Joint Exhibit 3:        CON Application of Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Medical Center, Project I.D. No. M-8833-12

**Cape Fear Exhibits**

- Exhibit 1068:        Nancy Bres Martin Resume (Depo Ex. 68)
- Exhibit 1079:        Agency Findings dated 3/30/2007 issued to Cabarrus Memorial Hospital d/b/a NorthEast Medical Center/Develop two new GI Endoscopy procedure rooms in NorthEast at Harrisburg, licensed as part of the hospital, Project I.D. No. F-7729-06 (Depo Ex. 79)
- Exhibit 1085:        CON Application of Hoke Healthcare, LLC d/b/a Hoke Community Hospital filed 4/15/2010 (Sections 1-4) (Depo Ex. 85)

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| Exhibit 1090:  | Agency Findings dated 9/27/2011 regarding 2011 Wake County Acute Care Bed Review (Depo Ex. 90)         |
| Exhibit 1091:  | Agency Findings dated 9/27/2010 regarding 2010 Hoke County Acute Care Bed Review (Depo Ex. 91)         |
| Exhibit 1092:  | 2010 CON Application for FirstHealth of the Carolinas proposing an 8-bed hospital for Hoke County      |
| Exhibit 1116:  | Chapter 5 of the 2012 SMFP (Depo Ex. 116)  |
| Exhibit 1133:  | NBM Opinion FH 28 beds: Attachment 3 (Depo Ex. 133)  |
| Exhibit 1134:  | Agency Findings dated 11/4/08 regarding 2008 Mecklenburg County Acute Care Bed Review (Depo Ex. 134)   |
| Exhibit 1135:  | NBM Opinion FH 28 beds: Attachment 4, Table 6 only (Depo Ex. 135)                                      |
| Exhibit 1135A: | NBM Opinion FH 28 beds: Attachment 4, Table 5 and Revised Table 5 only (Depo Ex. 135)                  |
| Exhibit 1135B: | NBM Opinion FH 28 beds: Attachment 4, Tables 7, 7A, 8, 11, 11A and Revised Table 7 only (Depo Ex. 135) |
| Exhibit 1135C: | NBM Opinion FH 28 beds: Attachment 4, Table 10 only (Depo Ex. 135)                                     |
| Exhibit 1135D: | NBM Opinion FH 28 beds: Attachment 4, Table 9, pp. 5-12 only (Depo Ex. 135)                            |
| Exhibit 1136*: | NBM Opinion FH 28 beds: Attachment 5 (Depo Ex. 136)<br><i>*admitted for illustrative purposes only</i> |
| Exhibit 1137*: | NBM Opinion FH 28 beds: Attachment 6 (Depo Ex. 137)<br><i>*admitted for illustrative purposes only</i> |
| Exhibit 1138:  | NBM Opinion FH 28 beds: Attachment 7 (Depo Ex. 138)  |
| Exhibit 1139:  | NBM Opinion FH 28 beds: Attachment 8, Tables 13, 13A, 14, 16, 16A, 16B and 17 only (Depo Ex. 139)      |
| Exhibit 1150:  | Resume of Daniel Carter (Depo Ex. 150)   |
| Exhibit 1155*: | Map showing discharges in the FirstHealth Hoke Patient Pool (Depo Ex. 155)                             |

*\*admitted for illustrative purposes only*

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| Exhibit 1156:  | FirstHealth Hoke Community Hospital Form A – revised by Mr. Carter (Depo Ex. 156)   |
| Exhibit 1157:  | Chart prepared by Mr. Carter entitled: The FirstHealth Hoke Application only proposes to address a portion of the total bed need in the Cumberland-Hoke Service Area (Depo Ex. 157) |
| Exhibit 1158:  | Comparison of Acuity Levels: Percent of Patients above 2.0 Acuity Level (Depo Ex. 158)  |
| Exhibit 1233A: | C.V. of Christopher Taylor Aul, M.D.  |
| Exhibit 1233C: | Licensure and Certification Section Letter dated 11/23/2011   |
| Exhibit 1233D: | CMS Letter dated 11/29/2011   |
| Exhibit 1233E: | Licensure and Certification Section Letter dated 12/28/2011   |
| Exhibit 1233F: | Licensure and Certification Section Letter dated 1/30/2012  |
| Exhibit 1233G: | Licensure and Certification Section Letter dated 8/28/2012  |
| Exhibit 1233H: | CMS Letter dated 1/5/2012   |
| Exhibit 1233K: | CMS Letter dated 1/3/2012   |
| Exhibit 1233L: | CMS Letter dated 1/11/2012  |
| Exhibit 1233M: | Licensure and Certification Section Letter dated 1/17/2012  |
| Exhibit 1233N: | CMS Letter dated 3/3/2012   |
| Exhibit 1233O: | CMS Letter dated 2/14/2012  |
| Exhibit 1233P: | Licensure and Certification Section Letter dated 3/1/2012   |
| Exhibit 1233Q: | CMS Letter dated 7/11/2012  |
| Exhibit 1233R: | CMS Letter dated 8/30/2012  |
| Exhibit 1233S: | The Joint Commission Letter dated 6/1/2012  |
| Exhibit 1233U: | The Joint Commission Letter dated 3/29/2012   |

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| Exhibit 1233V: | Chart re: Medicare Conditions of Participation Status   |
| Exhibit 1245:  | Polk County, Georgia CON application prepared by Kathy Platt  |
| Exhibit 1259:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 1, Tables A-C only  |
| Exhibit 1260:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 2   |
| Exhibit 1261:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 3   |
| Exhibit 1262:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 4   |
| Exhibit 1263:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 5, Tables D-F only  |
| Exhibit 1264:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 6   |
| Exhibit 1265:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 7   |
| Exhibit 1266:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 8   |
| Exhibit 1267:  | Nancy Bres Martin's Rebuttal Opinions: Attachment 9   |
| Exhibit 1275*: | Nancy Bres Martin's Substantial Prejudice Rebuttal Opinions:<br>Service Area Overlay Map<br><i>*admitted for illustrative purposes only</i> |

**Agency Exhibits**

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| Exhibit 1: | 2012 State Medical Facilities Plan |
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**FirstHealth Exhibits**

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| Exhibit 4:  | Systems Improvement Agreement (Depo Ex. 28)  |
| Exhibit 6:  | Settlement Agreement, <i>Hoke Healthcare, LLC v. NCDHHS</i> , File No. 11 DHR 12423 (Depo Ex. 37)  |
| Exhibit 8:  | Progress Report dated November 15, 2012 of Hoke Healthcare (Depo Ex. 42)   |
| Exhibit 12: | Cape Fear Valley Health System Petition for an Adjustment to the Acute Care Bed Need Determination in the Proposed 2013 SMFP (Depo Ex. 47) |

- Exhibit 13: Charts re: SHCC (Depo Ex. 48)
- Exhibit 14: Charts re: SHCC (Depo Ex. 49)
- Exhibit 15: Documents produced by Cape Fear (CFV28bed 002344-002353) (Depo Ex. 50)
- Exhibit 36: Letter dated 11/21/2011 to Mike Nagowski from NCDHHS with attached 11/17/2011 survey (Depo Ex. 99)
- Exhibit 37: Letter dated 11/23/2011 to Mike Nagowski from NCDHHS with attached 11/17/2011 survey (Depo Ex. 100)
- Exhibit 39: Letter dated 11/29/2011 to Mike Nagowski from CMS (Depo Ex. 102)
- Exhibit 40: Letter dated 12/5/2011 to Mike Nagowski from CMS (Depo Ex. 103)
- Exhibit 43: Letter dated 12/8/2011 to Mike Nagowski from CMS (Depo Ex. 106)
- Exhibit 44: Survey dated 1/26/2012 of Cape Fear Valley Medical Center (Depo Ex. 107)
- Exhibit 46: Letter dated 3/1/2012 to Mike Nagowski from NCDHHS with attached 2/23/2012 Survey (Depo Ex. 109)
- Exhibit 47: Letter dated 7/12/2012 to Mike Nagowski from CMS (Depo Ex. 110)
- Exhibit 52: Article: "CMS' Systems Improvement Agreement: A Last Chance Alternative to Medicare Termination?" (Depo Ex. 117)
- Exhibit 58: Cape Fear Valley Health System Request for an Adjustment to the Acute Care Bed Need Determination in the Cumberland/Hoke Service Area, North Carolina (CFV28bed 002950-002951) (Depo Ex. 124)
- Exhibit 59: CON Application of Cape Fear Valley Health, Project I.D. No. M-8696-11 (Depo Ex. 125)
- Exhibit 75B: Projected Utilization of FHCH with 28 Beds KMTP Model
- Exhibit 75C: Comparison of KMTP Model to CON Page 104

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| Exhibit 75D: | Discharges and Days Subtracted for LTACH and Psych Analysis   |
| Exhibit 75E: | Comparison of KMTP Model Less LTACH to CON Page 104   |
| Exhibit 75F: | Comparison of Severity Adjustment Methodology Chart   |
| Exhibit 75G: | Ingenix DRG Expert Comprehensive Guidebook to the DRG Classification System Excerpt                                       |
| Exhibit 75H: | Projected Total Hoke Service Area Bed Need Analysis   |
| Exhibit 75I: | Projected Hoke County Bed Need Analysis   |
| Exhibit 75J: | Distribution of Hoke County Bed Need Analysis   |
| Exhibit 75K: | Discharges and Days Subtracted for Medical Detox Analysis   |
| Exhibit 75L: | Comparison of County Patient Origin for Year 2 HCMC Projects Higher In-migration Table                                    |
| Exhibit 75M: | Hoke County Population is Growing Faster than Cumberland County for All Age Groups Analysis                               |
| Exhibit 75N: | Annual County Population Statistics, May 2012   |
| Exhibit 75O: | Reconciliation of Patients by Service Line Charts for Cumberland County, Robeson County, Scotland County, and Hoke County |
| Exhibit 75P: | FHCH Appropriately Acuity Adjusted Discharges for Community Hospital Analysis   |
| Exhibit 75Q: | FHCH's Projected ALOS is Reasonable and Lower than HCMC   |
| Exhibit 75R: | Comparison of FHCH Projected ED Visit Volume  |
| Exhibit 75S: | Comparison of Non-FirstHealth Admissions from the ED  |
| Exhibit 75T: | Comparison of Hoke County ICU Projection Rates  |
| Exhibit 75U: | Hoke County Market Share FY 2017 Analysis   |
| Exhibit 75V: | Comparison of Outpatient Imaging Volume Projections   |
| Exhibit 75W: | Clarified Form A Balance Sheet (FHCH Application Page 177)  |

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| Exhibit 75X:  | Cape Fear Valley Medical Center Service Area Population Comparison of NCOSBM Source Used by FirstHealth to CFV Page 44  |
| Exhibit 75Y:  | Analysis of Population Growth by Age for FHHCH Service Area   |
| Exhibit 75Z:  | Table 7 Projected Population and Weighted Population Growth Rates CORRECTED Table   |
| Exhibit 75AA: | CFVMC, CFV-North, and HCMC Projected Utilization Before Shifts Analysis   |
| Exhibit 75AB: | CFVMC, CFV-North, and HCMC Projected Utilization Before Shifts Corrected for Population Data Analysis   |
| Exhibit 75AC: | Combined CFV Utilization from CFV-North CON Table   |
| Exhibit 75AD: | CFVMC-Owen Drive Location Projected Acute Care Patient Days-Revised to Reflect Original Shifts to CFV-North & HCMC Analysis   |
| Exhibit 75AF: | CFVMC Analysis of Licensed and Observation Bed Space  |
| Exhibit 75AG: | CFVMC, CFV-North, and HCMC Projected Utilization Before Shifts Corrected for Population Data and Including Observation Days Analysis  |
| Exhibit 75AH: | Cumberland/Hoke 28 Bed Competitive Review Comparative Analysis Chart  |
| Exhibit 75AI: | Comparison of Cost Effectiveness and Efficiency FHCH 8-Bed CON v. 28-Bed CON  |
| Exhibit 76:   | Timeline of Events Related to Criterion (20) regarding Cape Fear (Depo Ex. 185)   |
| Exhibit 80:   | Email dated 5/1/2012 to Anderson from Esslinger re: 2012 CON Section VII – 28 Bed CON (Depo Ex. 191)  |
| Exhibit 96:   | Cape Fear Valley Health System’s Petition for Adjustment to Need Determination to Adjust the Acute Care Bed, Operating Room and MRI Multi-County Service Areas for Moore, Hoke and Cumberland Counties by Applying Updated Data in Step 1 of the Defined Methodologies (Depo Ex. 232) |



- Exhibit 97: FirstHealth of the Carolinas, Inc.'s Response to Cape Fear Valley Health System's Petition for Adjustment to Eliminate a Need for 119 Acute Care Beds in the Cumberland/Hoke Service Area (Depo Ex. 233)
- Exhibit 116: CON Application of Hoke Healthcare, LLC d/b/a Hoke Community Medical Center, Project I.D. No. N-8499-10

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

**FINDINGS OF FACT**

1. The parties received notice of hearing more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. The CON Section is the agency within the Department that carries out the Department's responsibility to review and approve the development of new institutional health services under the CON Law, codified at N.C. Gen. Stat. Chapter 131E, Article 9.
3. The CON Law establishes a regulatory framework under which proposals to develop new health care facilities or services or purchase certain regulated equipment must be reviewed and approved by the Agency prior to development. The CON Law has multiple purposes, including providing access to services and ensuring quality. *See* N.C. Gen. Stat. § 131E-175.
4. The 2012 SMFP included a need determination for 28 acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. (Cape Fear Ex. 1116 at 58) The SMFP was neutral as to which county the 28 beds went to as long they stayed within the Cumberland-Hoke Acute Care Bed Service Area. (Bres Martin, Vol. 6 at 988)
5. The Cumberland-Hoke Acute Care Bed Service Area first appeared in the 2010 SMFP. It was established because of a petition Cape Fear filed in 2009 with the State Health Coordinating Council ("SHCC"). (FirstHealth Ex. 96; Bres Martin, Vol. 6 at 999-1001)
6. Ms. Bres Martin opined that the Moore-Hoke Acute Care Bed Service Area and the Cumberland-Hoke Acute Care Bed Service Area overlap. (Bres Martin, Vol. 1 at 117)

7. The SMFP includes a map depicting the acute care bed service areas in North Carolina. That map shows the Moore-Hoke and Cumberland-Hoke Acute Care Bed Service Areas as separate service areas which do not overlap. (Cape Fear Ex. 1116 at 49; Platt, Vol. 12 at 2061-62)
8. It is clear in both the SMFP illustrations and need methodologies that even though Hoke County is in both the Moore-Hoke and Cumberland-Hoke Acute Care Bed Service Areas, the Moore-Hoke and Cumberland-Hoke Acute Care Bed Service Areas are considered to be two separate service areas. (Platt, Vol. 12 at 2062; Cape Fear Ex. 1116 at 49)
9. There is no Venn diagram in the SMFP joining the Moore-Hoke and Cumberland-Hoke Acute Care Bed Service Areas. (*Id.*)
10. The need determination for 28 beds in the 2012 SMFP did not specify that the bed need was for tertiary care beds as opposed to primary care beds. (Smith, Vol. 3 at 531)
11. The need determination in the 2012 SMFP expressed no preference for:
  - tertiary hospitals or community hospitals;
  - the applicant that generated the need;
  - the applicant that treats higher acuity patients;
  - the county with the higher population;
  - the applicant with the higher inpatient utilization;
  - the applicant with the greater level of in-migration; or
  - the applicant with the lowest capital cost.

(Bres Martin, Vol. 6 at 988-90)<sup>1</sup>

12. The need determination in the 2012 SMFP did not indicate that the beds should be split between Cumberland County or Hoke County, or divided between the two counties in accordance with population or some other criteria. (Bres Martin, Vol. 6 at 989)
13. The need determination in the 2012 SMFP expressed no preference with regard to which inpatient specialties would be offered in a hospital applying for the 28 beds. (Bres Martin, Vol. 6 at 989)
14. The need determination in the 2012 SMFP did not say that an applicant for the 28 beds must serve a certain number of patients from Hoke County and a certain number of patients from Cumberland County. The need determination in the 2012 SMFP did not say that an applicant could not propose to serve residents from outside Cumberland and Hoke Counties. The need determination in the 2012 SMFP said nothing about inflow or

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<sup>1</sup> "Tertiary hospital" means a hospital that provides advanced services like open heart surgery, trauma care and higher-level intensive care and neonatal intensive care services. "Community hospital" means a hospital that provides primary and secondary level services, but not tertiary level services. The term "in-migration" refers to patients coming to an applicant's facility from outside an applicant's designated service area. (Bres Martin, Vol. 6 at 984-87)

outflow of patients or in-migration or out-migration of patients. (Bres Martin, Vol. 6 at 990)

15. Cape Fear received a CON in 2012 for Project I.D. No. N-8499-10, which is a 41-bed acute care hospital to be constructed in Hoke County. This hospital will be known as Hoke Community Medical Center. This hospital is scheduled to open in 2014. (Jt. Ex. 1 at 2291; Jt. Ex. 3 at 17; FirstHealth Ex. 8)
16. FirstHealth received a CON in 2012 for Project I.D. No. N-8497-10, which is an 8-bed acute care hospital in Hoke County. This hospital will be known as FirstHealth Hoke Community Hospital ("FirstHealth Hoke"). It will open in late 2013. (Jt. Ex. 1 at 2288; Bres Martin, Vol. 2 at 373-74)
17. In 2012, Cape Fear also received a CON for Project I.D. No. M-8689-11, which is a 65-bed acute care hospital in northern Cumberland County. This hospital will be known as Cape Fear Valley North. (Jt. Ex. 1 at 2456; FirstHealth Exs. 6 and 59)
18. The FirstHealth of the Carolinas system is comprised of three hospitals and numerous outpatient services. FirstHealth operates FirstHealth Moore in Pinehurst, Moore County, a tertiary referral facility that serves patients from Moore County and surrounding counties. (Legarth, Vol. 9 at 1737)
19. FirstHealth Richmond Memorial Hospital ("FirstHealth Richmond") is a 99-bed hospital located in Rockingham, Richmond County. (Jt. Ex. 1 at 2195-98)
20. FirstHealth Montgomery Memorial Hospital ("FirstHealth Montgomery"), located in Montgomery County, is licensed for 37 beds. However, FirstHealth Montgomery is designated as a critical access hospital, which means it can operate a maximum of 25 acute care beds. (Legarth, Vol. 9 at 1737-37; Jt. Ex. 1 at 2123-28)
21. In the CON application for Project I.D. No. N-8838-12, FirstHealth proposed to expand its previously-approved 8-bed hospital in Hoke County by adding 28 beds, under the need determination in the 2012 SMFP for 28 acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. Therefore, upon project completion, FirstHealth Hoke Community Hospital would have 36 acute care beds. (Jt. Ex. 2 at 10, 19)
22. The expanded FirstHealth Hoke Community Hospital will be a 75,000 square foot hospital with the latest medical technology, private rooms for patients, computerized radiology systems, and electronic medical records and will be electronically integrated fully with FirstHealth Moore and other medical providers with compatible systems. (Jt. Ex. 2 at 32; Legarth, Vol. 9 at 1738-39)
23. Additionally, the expanded FirstHealth Hoke will offer additional inpatient services and increased capacity for Hoke County patients and patients from the proposed service area. The facility also will include an Intensive Care Unit ("ICU"). These expanded services will decrease the out-migration of Hoke County residents and help to ease hardships on

family members of patients because of lack of transportation or transportation expenses. (Jt. Ex. 2 at 32; Legarth, Vol. 9 at 1739-40)

24. In the CON Application for Project I.D. No. M-8833-12, Cape Fear proposed to add 28 acute care beds to its hospital located at 1638 Owen Drive, Fayetteville, North Carolina, under the need determination in the 2012 SMFP for 28 acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. Therefore, upon project completion, Cape Fear would have 518 acute care beds on its Owen Drive campus. (Jt. Ex. 3 at 17-18) This number does not include the 65 beds at Cape Fear Valley North or the 41 beds at Hoke Community Medical Center. (Jt. Ex. 1 at 11, 17-18)
25. David Legarth was the primary preparer of the FirstHealth Application. (Legarth, Vol. 9 at 1735) Kathy Platt also was engaged to review the FirstHealth Application prior to its filing with the CON Section. (Platt, Vol. 12 at 2060)
26. Mr. Legarth was the author of the FirstHealth Hoke Application filed in 2010. (Legarth, Vol. 9 at 1735-36)

**Agency Review**

27. Mr. Yakaboski reviewed the entirety of both the FirstHealth Application and the Cape Fear Application, the comments in opposition and responses to comments in opposition submitted by the applicants, and attended the public hearing in conducting his review and analysis in this matter. (Yakaboski, Vol. 3 at 563) Mr. Yakaboski was responsible for drafting the Agency Findings and worked in collaboration with Mr. Smith in finalizing the Agency Findings. (Yakaboski, Vol. 3 at 564-66)
28. Mr. Yakaboski also consulted prior Agency Findings in determining the appropriate comparative factors to use for this review. (Yakaboski, Vol. 3 at 567-69)
29. Mr. Smith, the CON Section Chief and co-signor of the review at issue, reviewed the comments in opposition, response to comments, and applications from both parties. (Smith, Vol. 3 at 421-22) Mr. Smith also consulted with Mr. Yakaboski during the course of the review and preparation of the Agency Findings. (Smith, Vol. 3 at 422)

**Criterion (1)**

30. N.C. Gen. Stat. § 131E-183(a)(1), Criterion (1), states:

The proposed project shall 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 rooms, or home health offices that may be approved.

31. Criterion (1) has two parts: first, the applicant must be conforming with any applicable need determination in the SMFP; and second, the applicant must be conforming with any applicable policies in the SMFP. (Yakaboski, Vol. 14 at 2387; Legarth, Vol. 9 at 1741; Platt, Vol. 12 at 2063)
32. Two SMFP policies applied in this review: Policy GEN-3 and Policy GEN-4. (Jt. Ex. 1 at 2700)
33. The Agency found the FirstHealth Application conforming with Criterion (1). Specifically, the Agency determined that FirstHealth was conforming with Policy GEN-3 because it adequately demonstrated how its proposal would maximize healthcare value and promote safety, quality, and equitable access. The Agency further found FirstHealth conforming with Policy GEN-4. The Agency stated in its Findings that:

FirstHealth does not propose to develop more than 28 acute care beds in the Cumberland-Hoke Acute Care Bed Service area. Therefore, the application is conforming to the 2012 need determination for 28-acute care beds in the Cumberland-Hoke Acute Care Bed Service area.

(Jt. Ex. 1 at 2702-03)
34. In order to be found conforming with Criterion (1), an applicant is required to show that its proposal either meets or is less than the need determination. In this case, an applicant could therefore propose anywhere from one up to 28 acute care beds for that service area. A proposal exceeding the 28 acute care beds identified in the need determination could, however, be found non-conforming with Criterion (1). (Legarth, Vol. 9 at 1741)
35. The FirstHealth Application was submitted in response to the need determination for 28 acute care beds in the 2012 SMFP. FirstHealth proposed to add only 28 new acute care beds. (Legarth, Vol. 9 at 1741-42; Yakaboski, Vol. 14 at 2387; 2389; Jt. Ex. 2 at 65)
36. FirstHealth proposed to locate its beds in Raeford, Hoke County, which is located in the Cumberland-Hoke Acute Care Bed Service Area as defined by the SMFP. (Jt. Ex. 2 at 9; Smith, Vol. 3 at 506; Legarth, Vol. 9 at 1742; Bres Martin, Vol. 7 at 1229; Yakaboski, Vol. 14 at 2389)
37. FirstHealth did not propose to add any acute care beds in Moore County and did not propose to relocate any acute care beds from Moore County. (Legarth, Vol. 9 at 1743)
38. Ms. Bres Martin acknowledged that FirstHealth was proposing to put 28 beds in Hoke County. (Bres Martin, Vol. 7 at 1228-29)
39. Nevertheless, Ms. Bres Martin believes that FirstHealth should have been found non-conforming with Criterion (1). In her opinion, the FirstHealth proposal did not meet the need for 28 acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. Ms. Bres Martin testified that FirstHealth proposed to shift 7,929 patient days from

FirstHealth Moore in the Moore-Hoke Acute Care Bed Service Area to the Cumberland-Hoke Acute Care Bed Service Area. In Ms. Bres Martin's view, this would create a surplus of beds in Moore County, while leading to a continuing need for 29 beds in Cumberland County. (Bres Martin, Vol. 1 at 175-80)

40. Ms. Bres Martin acknowledged that FirstHealth was not proposing to put any of the 28 beds in Moore County. (Bres Martin, Vol. 7 at 1233)
41. Ms. Bres Martin further opined that the Agency should have done "further analysis" of the FirstHealth Application under Criterion (1) and should not simply have checked to see that FirstHealth was proposing 28 beds in Hoke County. (Bres Martin, Vol. 1, at 180)
42. Ms. Bres Martin admitted that there is no statute, rule, or case directing the Agency to evaluate Criterion (1) in the way she proposed, nor does the SMFP require such an interpretation. (Bres Martin, Vol. 7 at 1234-35; 1240-41; 1243)
43. Ms. Platt testified that she is aware of no basis for Ms. Bres Martin's opinion and has never seen Criterion (1) applied in the way Ms. Bres Martin opined. (Platt, Vol. 12 at 2069-70)
44. Ms. Bres Martin testified that because FirstHealth is proposing to treat patients from Cumberland, Scotland, and Robeson Counties, in addition to Hoke County, it is not truly meeting the need for 28 new acute care beds in the Cumberland-Hoke service area. (Bres Martin, Vol. 6 at 1123)
45. The need for additional acute care beds identified in the SMFP is determined not just by examining Cumberland County and Hoke County patients that receive care, but all patients that receive care within that service area. Thus, some percentage of the days of care for that need determination is generated by patients originating from Robeson, Scotland, Bladen, Harnett, and a number of other counties who currently seek care at Cape Fear Valley Medical Center, the only currently-operational facility in the Cumberland-Hoke Acute Care Bed Service Area. (Legarth, Vol. 10 at 1830)
46. As Ms. Platt explained:

The need determination in the State Medical Facilities Plan identifies generally within the two county service area where the beds have to be located. They have to be within the service area, but it doesn't at all restrict where the patients who will use those beds reside or where they'll come from. There's--it's up to each individual applicant to define their service area, define their patient origin, and present that information in the application.

(Platt, Vol. 12 at 2068)

47. Moreover, Cape Fear's position that adding beds to Hoke County is increasing the surplus of beds in the Moore-Hoke Acute Care Bed Service Area mischaracterizes the service areas as defined by the SMFP. The Cumberland-Hoke and Moore-Hoke Acute Care Bed Service Areas are distinct, non-overlapping service areas, as defined in the SMFP. (Legarth, Vol. 10 at 1832)
48. Ms. Platt testified that there is no surplus or deficit created by the FirstHealth Application. As she explained, "there's clearly an identified need for 28 beds, and the application is for 28 beds." (Platt, Vol. 12 at 2067)
49. Mr. Legarth testified that he completely disagreed with Ms. Bres Martin's opinion that FirstHealth should have been found non-conforming with Criterion (1). FirstHealth only proposed to add 28 new beds and proposed to locate those beds within the Cumberland-Hoke Acute Care Bed Service Area identified in the SMFP. (Legarth, Vol. 9 at 1743)
50. The fact that FirstHealth proposed to shift some patients from FirstHealth Moore to FirstHealth Hoke was not relevant to the Agency's analysis under Criterion (1). There was nothing in the SMFP that precluded FirstHealth from proposing to serve patients in its expanded service area of Cumberland, Scotland, and Robeson Counties in addition to Hoke County. (Legarth, Vol. 9 at 1743-44)
51. There is nothing in the SMFP that restricts the population an applicant could propose to serve with the 28 new beds. The need determination generally defines the two-county area in which the beds must be located, but in no way restricts where the patients who will be treated in those beds will reside. It is up to the applicant to define its service area and patient origin. Ms. Platt testified that she always has seen the SMFP interpreted in this manner. (Platt, Vol. 12 at 2068)
52. Moreover, FirstHealth clearly documented that it met Policies GEN-3 and GEN-4. (Platt, Vol. 12 at 2067) Cape Fear did not offer any testimony to contradict the Agency's findings that the FirstHealth Application conformed with Policy GEN-3 and GEN-4.
53. Ms. Bres Martin opined that approval of the 28 beds in Hoke County results in a continued need for 29 acute care beds in Cumberland County. (Bres Martin, Vol. 1 at 180) However, as Ms. Platt testified, the need for the 28 new beds is calculated in the SMFP for the two-county service area, Cumberland and Hoke. Regardless of whether the new beds are added in Hoke County or in Cumberland County, it meets the need defined in the SMFP. This interpretation is consistent with the interpretation and application of need determinations in other CON reviews in Ms. Platt's experience. (Platt, Vol. 12 at 2067-68)
54. The Agency correctly determined that the FirstHealth Application was conforming with Criterion (1). (Legarth, Vol. 9 at 1744; Platt, Vol. 12 at 2064)

**Criterion (3)**

55. N.C. Gen. Stat. § 131E-183(a)(3), Criterion (3), states:

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.

56. The Agency found that:

FirstHealth adequately demonstrates the need to develop 28 acute care beds at FHCH including the extent to which medically underserved groups will have access to the proposed acute care beds. Therefore, the application is conforming [with] this criterion, subject to conditions #2 and #3.

(Jt. Ex. 1 at 2730)

57. While it is the case that Cape Fear generated the need for the 28 beds in the Cumberland-Hoke Acute Care Bed Service Area in the 2012 SMFP because it is the only acute care hospital that is open in the service area at the present time, there is no statute, rule, or case that guaranteed that Cape Fear would be approved for the 28 beds. (Yakaboski, Vol. 14 at 2421-22; Bres Martin, Vol. 7 at 1505; Cape Fear Ex. 1116 at 51)
58. The fact that Cape Fear generated the need for the 28 beds did not give Cape Fear priority status for these beds. (Platt, Vol. 13 at 2367)
59. Ms. Bres Martin acknowledged that Cape Fear was not entitled to the 28 beds and did not have priority status over any other applicant for the 28 beds. (Bres Martin, Vol. 6 at 1125-26)

**Service Area**

60. The FirstHealth Application identified a four-county service area for its project including Hoke, Cumberland, Robeson, and Scotland Counties. These counties were chosen for the service area because patients from these counties currently travel through Hoke County to Moore County to receive services at FirstHealth Moore. The FirstHealth project will bring services closer to patients who currently choose to drive through Hoke County in order to receive services from FirstHealth. (Jt. Ex. 2 at 89; Legarth, Vol. 9 at 1746)
61. An applicant is free to determine its own service area within an application. (Legarth, Vol. 9 at 1750)



62. The service area in the FirstHealth Hoke Application for 8 beds is not the same as the service area in the FirstHealth Application proposing 28 additional beds for FirstHealth Hoke. The proposed service area in the FirstHealth Application is an expansion of the service area chosen for the 8-bed FirstHealth Hoke Application. In the 8-bed FirstHealth Hoke Application, the service area was limited to Hoke County only. (Legarth, Vol. 9 at 1746-1747; Cape Fear Ex. 1092, p. 187)
63. There is no prohibition or rule in the SMFP or CON Law that would prevent an applicant from changing its defined service area in a subsequent application. There were no restrictions in the SMFP or in the CON Law that limited FirstHealth to proposing a service area of Hoke County only. The applicant is free to identify its service area as it chooses. (Legarth, Vol. 9 at 1747)
64. Cape Fear criticized the FirstHealth Application's service area as being too broad. Ms. Bres Martin opined that it is not likely that FirstHealth Hoke will attract patients from Cumberland, Scotland, and Robeson Counties as projected. (Bres Martin, Vol. 1 at 199)
65. The FirstHealth service area is based upon current utilization of services by patients originating in its defined service area who already use FirstHealth Moore for all types of acute care services. Moreover, the location of FirstHealth Hoke in Raeford and its proximity to roads commonly traveled by patients to FirstHealth Moore from those counties further supports FirstHealth's designated service area. (Legarth, Vol. 9 at 1750-52)
66. Patients from Hoke, Cumberland, Scotland, and Robeson Counties currently seek not only tertiary services at FirstHealth Moore, but also all types of acute care services there, including services that are provided at a community hospital. (Legarth, Vol. 9 at 1752)
67. In-migration refers to patients coming to an applicant's facility from counties not specifically identified as part of the applicant's service area. (Legarth, Vol. 9 at 1747)
68. FirstHealth did not project to have any in-migration for its proposed project. (Jt. Ex. 2 at 89; Legarth, Vol. 9 at 1748) There was no need for FirstHealth to project in-migration for its proposed project. Because FirstHealth Hoke is a new facility, FirstHealth determined that it was better to detail the patient origin as it did in the application. (Legarth, Vol. 9 at 1748)
69. On page 81 of its application, FirstHealth included a chart prepared by Ms. Platt. This chart was prepared to show an area-wide Hoke County need for acute care beds since the projections in the application were focused specifically on utilization projections for the hospital at an institutional level. In that chart, Ms. Platt included the total acute care admissions for Hoke County residents and then narrowed that data down to community hospital admissions only. The application further projected the number of beds that would be necessary to serve those patients, which was 68.5 beds based solely on the needs of Hoke County residents for community hospital services. (Jt. Ex. 2 at 81; Platt, Vol. 12 at 2081-82; Legarth, Vol. 10 at 1872-74)

70. The purpose of the analysis on page 81 of the FirstHealth Application was to examine specifically the number of beds needed in Hoke County for Hoke County residents. (Jt. Ex. 2 at 81; Platt, Vol. 12 at 2082-83)
71. The FirstHealth analysis then included a rough factor of 15 percent of patients to show that with the “in-migration” from Cumberland, Robeson, and Scotland Counties, there is a need for the total number of approved and proposed 77 beds. (Platt, Vol. 12 at 2082)
72. For purposes of the analysis on page 81 of the FirstHealth Application, the term “in-migration” refers only to patients coming from Scotland, Robeson, and Cumberland Counties. However, the service area definition in the application includes a four-county service area (Hoke, Cumberland, Robeson, and Scotland Counties), so there is no in-migration in the application, as that term is defined in Finding of Fact No. 66, *supra*. (Jt. Ex. 2 at 81; Platt, Vol. 12 at 2083)
73. Thus, FirstHealth did not propose to serve any patients coming from outside the four-county service area. (Platt, Vol. 12 at 2083)
74. The chart on page 81 of the FirstHealth Application shows that in total, the population proposed to be served by FirstHealth in its application needs 80.5 beds. In total, Cape Fear and FirstHealth have been approved for a total of 77 beds in Hoke County. (Jt. Ex. 2 at 81-2)
75. FirstHealth Exhibit 75L is a chart prepared by Ms. Platt which compares the patient origin of the FirstHealth Application for 28 beds to the Cape Fear Hoke Community Medical Center Application for 41 beds. (FirstHealth Ex. 75L; Platt, Vol. 12 at 2084)
76. According to FirstHealth Exhibit 75L, FirstHealth's patient origin is 66% from Hoke County; 20.8% from Robeson County; 7.1% from Cumberland County; and 5.9% from Scotland County. Cape Fear's patient origin for its 41-bed Hoke Community Medical Center is 59.5% from Cumberland County; 36.5% from Hoke County; and 4% from Robeson County. (FirstHealth Ex. 75L; Platt, Vol. 12 at 2084-85)
77. In comparing the patient origin for the two Hoke County hospitals, Ms. Platt found that the FirstHealth patient origin was reasonable because over 66% of patients are coming from the home county of Hoke County. By comparison, in the Cape Fear Hoke Community Medical Center application, most patients are projected to come from outside of Hoke County. (Platt, Vol. 12 at 2085)
78. Ms. Platt opined that there is sufficient volume in the service area to support both Cape Fear's 41-bed hospital and FirstHealth's 36-bed hospital, and that all 77 beds are needed. In addition to the chart on page 81 of the FirstHealth Application, Ms. Platt further analyzed this issue in FirstHealth Exhibits 75H, 75I and 75J. (Platt, Vol. 12 at 2085-86; FirstHealth Ex. 75H, 75I and 75J)

79. In FirstHealth Exhibit 75H, Ms. Platt examined the acute care bed need for just Hoke County residents. Eliminating tertiary level services, Ms. Platt determined that in 2017, Hoke County residents could support 57.6 acute care beds for community hospital discharges. This does not factor in hospital utilization by residents of Scotland, Cumberland, or Robeson Counties. (Platt, Vol. 12 at 2086-87; FirstHealth Ex. 75H)
80. FirstHealth Exhibit 75I analyzes the number of beds to be located in Hoke County. Hoke Community Medical Center will have 41 beds, and FirstHealth Hoke will have a total of 36 beds. Based on patient origin projections, 27.2 of FirstHealth Hoke's 36 beds are projected to be used by Hoke County residents. With regard to Hoke Community Medical Center, 17.7 of its 41 beds are projected to be used by Hoke County residents. Thus, Hoke County residents are projected to use 44.9 of the approved beds in Hoke County. However, as FirstHealth Exhibit 75H shows, Hoke County residents need a total of 57.6 acute care beds for community hospital discharges. Thus, there is a deficit of 12.7 beds to serve Hoke residents. This analysis focuses only on Hoke County residents and does not include utilization of hospital beds in Hoke County by residents of other counties. (Platt, Vol. 12 at 2087-88; FirstHealth Ex. 75H and 75I)
81. FirstHealth Exhibit 75J compares the information in FirstHealth Exhibits 75H and 75I. As shown in Exhibit 75I, Hoke County residents are projected to use 44.9 of the beds that have been approved. Thus, there is a deficit of 12.7 beds to serve Hoke residents. This analysis focuses only on Hoke County residents and does not include utilization of hospital beds in Hoke County by residents of other counties. (Platt, Vol. 12 at 2088-89; FirstHealth Ex. 75J)
82. Both the FirstHealth Application and Cape Fear's 41-bed application project to serve many residents from outside Hoke County. (Jt. Ex. 1 at 2771; Jt. Ex. 2 at 107; Cape Fear Ex. 1085 at 144, 183)
83. Ms. Bres Martin opined that FirstHealth should have considered the service areas of FirstHealth Richmond and FirstHealth Montgomery in developing the service area for the FirstHealth Application. (Bres Martin, Vol. 1 at 214-15) However, neither FirstHealth Richmond nor FirstHealth Montgomery is sufficiently similar to FirstHealth Hoke to serve as a model for this proposed project. (Legarth, Vol. 9 at 1749)
84. FirstHealth Richmond is located some distance from FirstHealth Moore and does not share medical staff with FirstHealth Moore. Licensed for 99 acute care beds, FirstHealth Richmond has more than 2.5 times the number of beds of the proposed expanded FirstHealth Hoke. Although FirstHealth Richmond is licensed for 99 acute care beds, its average daily census was just 25.1 patients, according to its 2012 Hospital License Renewal Application. FirstHealth Richmond is not comparable to the Hoke facility. (Jt. Ex. 1 at 2197-98; Legarth, Vol. 9 at 1749-50; Bres Martin, Vol. 7 at 1320-21)
85. FirstHealth Montgomery is a critical access hospital. Although it is licensed for 37 beds, it is only allowed to operate a maximum of 25 beds. Montgomery County has a significantly smaller population than Hoke County. FirstHealth Montgomery essentially

serves patients' immediate needs before transporting them to larger facilities as needed. According to FirstHealth Montgomery's 2012 Hospital License Renewal Application, its average daily census was just 2.75 patients. (Jt. Ex. 1 at 2127-28; Legarth, Vol. 9 at 1749; Vol. 10 at 1842).

86. FirstHealth Hoke is not proposed to be a critical access hospital and would not even qualify to be a critical access hospital. (Bres Martin, Vol. 7 at 1319)
87. There is also no language in the CON Law or SMFP that required FirstHealth to utilize FirstHealth Richmond and FirstHealth Montgomery in this application. (Legarth, Vol. 9 at 1750; Bres Martin, Vol. 7 at 1317-1318) It is merely Ms. Bres Martin's opinion that FirstHealth should have considered FirstHealth Richmond and FirstHealth Montgomery in the context of the FirstHealth Application.
88. Bladen County Hospital ("Bladen") is a critical access hospital owned by Cape Fear. Ms. Bres Martin acknowledged that Cape Fear did not rely upon Bladen's service area in the Cape Fear Application. (Bres Martin, Vol. 7 at 1318-19)
89. The utilization projections for FirstHealth Hoke also do not correlate to the admissions at FirstHealth Montgomery, where the average daily census is only 2.75 as compared to a projected average daily census of nearly 30 at FirstHealth Hoke. (Jt. Ex. 2 at 104; Legarth, Vol. 10 at 1842-43; Jt. Ex. 1 at 2127-28)
90. Mr. Carter opined that FirstHealth should have considered the impact of Scotland Memorial Hospital's ("Scotland Memorial") 2006 CON application to develop 21 acute care beds. The 21 beds became available under the 2006 SMFP. Scotland Memorial has not developed the 21 beds. As of the time of the Agency's decision in this review, November 2012, the 21 beds had been undeveloped for six years. (Carter, Vol. 4 at 637; 698-99)
91. The 2012 SMFP did not forgo a need determination for 28 beds in the Cumberland-Hoke Acute Care Bed Service Area because Scotland Memorial had 21 undeveloped beds under the 2006 SMFP. (Carter, Vol. 4 at 699-700)
92. There is no way for FirstHealth to know when or if the project would be developed. Moreover, because the basis for the FirstHealth project is to serve patients currently choosing FirstHealth Moore for their care, the Scotland Memorial project would have no impact on the FirstHealth Hoke project. (Legarth, Vol. 10 at 1844)
93. Scotland Memorial did not file comments against the FirstHealth Application and did not seek to intervene in this contested case. Of the four counties from which FirstHealth Hoke projects to draw patients, Scotland County comprises the smallest percentage of the total. (Jt. Ex. 2 at 89; Carter, Vol. 4 at 701).
94. In Ms. Platt's opinion, it was not necessary for FirstHealth to consider the 21 undeveloped beds at Scotland Memorial. As Ms. Platt testified, "You can't just sort of

wait in abeyance for a project that you never know when it's going to be implemented. You have to move forward with your planning process and with the best assumptions on utilization that are available.” (Platt, Vol. 12 at 2168-69)

95. Ms. Bres Martin testified that FirstHealth should have provided utilization assumptions for services other than the 28 beds, such as emergency department and imaging volumes. (Bres Martin, Vol. 2 at 257-258) These services already had been approved in the FirstHealth 8-bed application filed in 2010. (Bres Martin, Vol. 7 at 1347-48)
96. Ms. Bres Martin acknowledged that in its 28-bed application, the only thing FirstHealth was proposing was to add 28 beds; it was not proposing to increase the number of emergency department bays or acquire more imaging equipment. (Bres Martin, Vol. 7, p. 1348)
97. In its 28-bed application, FirstHealth only was required to show volume projections for the addition of the 28 proposed new beds. It was not required to make volume projections for any other departments or services within FirstHealth Hoke because the only proposal at issue was the 28 beds. (Legarth, Vol. 10 at 1840-41) Ordinarily, when the applicant is approved to offer a service, there is no requirement to present utilization projections that would rejustify a service that already had been approved. (Platt, Vol. 12 at 2168)
98. In its 28-bed application, Cape Fear was only applying for 28 beds; it did not provide assumptions for other services like emergency department or imaging. (Bres Martin, Vol.7 at 1348-49)

#### **Need Methodology**

99. The need methodology for the FirstHealth Application is presented in Section IV of the application. (Legarth, Vol. 9 at 1752-53) The FirstHealth need methodology is a detailed, 19-step methodology. (Jt. Ex. 2 at 93-107)
100. There is not a single approved way to do a need methodology for an acute care bed CON application. (Legarth, Vol. 9 at 1753; Bres Martin, Vol. 6 at 1003)
101. There are no regulations or standards in the CON Law directing applicants to utilize specific methodologies for acute care bed applications. (Legarth, Vol. 9 at 1753; Bres Martin, Vol. 6 at 1003)
102. The CON Section accepts many different kinds of need methodologies in CON applications for acute care beds. Just because Ms. Bres Martin might use a particular need methodology would not require other CON consultants to follow her lead. (Bres Martin, Vol. 6 at 1008)
103. Mr. Legarth testified that he does not utilize the same need methodology for every application that he prepares. (Legarth, Vol. 9 at 1753-54)

104. In Step 1 of its need methodology, FirstHealth set forth the population projections for the four-county service area from 2011–2018, utilizing data from the North Carolina Office of State Budget and Management (“NCOSBM”) from May 2012. The May 2012 population data was the most current population data available at the time FirstHealth filed its application. (Jt. Ex. 2 at 93; Legarth, Vol. 9 at 1756)
105. Ms. Platt was able to obtain this data from NCOSBM, and it aligned exactly with what Mr. Legarth represented in the FirstHealth Application. (Platt, Vol. 12 at 2095; FirstHealth Ex. 75N)
106. By contrast, Ms. Bres Martin did not use the most current population data available from NCOSBM in preparing the Cape Fear Application. (Bres Martin, Vol. 6 at 1155)
107. Ms. Platt could not determine the source of Cape Fear's population data in its application because Cape Fear did not include the underlying source data in its application. (Platt, Vol. 12 at 2081; 2094)
108. In Mr. Legarth's opinion, the applicant should utilize the most current population projections available in the need methodology because population projections change dramatically from year to year, sometimes swinging from positive growth to negative growth. (Legarth, Vol. 9 at 1757) Ms. Bres Martin also testified that the applicant should use the most current data available. (Bres Martin, Vol. 6 at 1157)
109. FirstHealth Exhibits 75M and 75Y, prepared by Ms. Platt, show significant growth in the Hoke County population, especially in the 65 and older age groups. In Ms. Platt's opinion, these exhibits support the need for more beds in Hoke County. (Platt, Vol. 12 at 2096-2098; FirstHealth Ex. 75M and 75Y)
110. In FirstHealth Exhibit 75X, Ms. Platt compared the population data Ms. Bres Martin included in the Cape Fear Application against the population data used by Mr. Legarth in the FirstHealth Application. There were differences in the two data sets, and the population in the Cape Fear Application was in total much higher than the FirstHealth Application. The difference was 37,000 residents. (Platt, Vol. 12 at 2102-03; FirstHealth Ex. 75X)
111. In Step 2 of its methodology, FirstHealth examined the annual population change from 2011-2018 in its four-county service area. (Jt. Ex. 2 at 93; Legarth, Vol. 9 at 1758)
112. In Step 3, utilizing the Thomson (now called Truven) inpatient database information, FirstHealth identified the number of patients and days of care provided to residents of its four-county service area by all hospitals in North Carolina in FY 2011, excluding all patients and days of care related to admissions for chemical dependency, normal newborns, psychiatric services, and rehabilitation services. (Jt. Ex. 2 at 94; Legarth, Vol. 9 at 1760) The purpose of this analysis was to provide a big picture assessment examining where residents from the four-county service area are seeking hospital services in North Carolina. (Legarth, Vol. 9 at 1759-60)

113. Patient days of care represent the number of days that a patient was in the hospital as measured from the date of admission to discharge. (Legarth, Vol. 9 at 1760)
114. Utilizing the volumes identified in Step 3 of the methodology, FirstHealth then projected, in Step 4 of its methodology, the number of admissions for the patients in its proposed service area from 2011-2018. All patients and days of care related to admissions for chemical dependency, normal newborns, psychiatric services, and rehabilitation services were excluded. FirstHealth increased the admissions based on population change in the respective counties. (Jt. Ex. 2 at 94; Legarth, Vol. 9 at 1761) The total increase in the number of admissions over that seven year time period was less than three percent. (Legarth, Vol. 9 at 1761)
115. In Step 5 of the need methodology, FirstHealth identified the number of patients and days of care provided to residents of its four-county service area by all hospitals in North Carolina. In this step, FirstHealth excluded additional services from the projections. Specifically, in addition to the four excluded services of chemical dependency, normal newborns, psychiatric services, and rehabilitation services excluded in Step 3, FirstHealth excluded seven additional service lines that are not proposed to be offered at FirstHealth Hoke: OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery. (Jt. Ex. 2 at 95; Legarth, Vol. 9 at 1762)
116. The result of this additional service line exclusion is to further decrease the projected patients and patient days of care in FirstHealth's projections. These projections, including their appropriate service line exclusions, paint a more accurate picture of the types of cases that will be treated appropriately at FirstHealth Hoke. (Legarth, Vol. 9 at 1763)
117. In Step 6, FirstHealth calculated the number of admissions from the four-county service area, excluding the eleven service lines identified above (chemical dependency, normal newborns, psychiatric, rehabilitation, OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery) utilizing the same annual population change as utilized in Step 4. (Jt. Ex. 2 at 95; Legarth, Vol. 9 at 1763-64)
118. Step 7 represents the first step in the need methodology where the actual projections for FirstHealth Hoke are developed. In that step, FirstHealth further decreased the volumes from Step 5 (excluding chemical dependency, normal newborns, psychiatric, rehabilitation, OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery) and identified only those patients and days of care provided at FirstHealth Moore to patients from the four-county service area. (Jt. Ex. 2 at 96; Legarth, Vol. 9 at 1764-1765)
119. FirstHealth specifically stated in its application that:

By excluding services that are not planned to be provided at [FirstHealth Hoke] because of the capacity of the hospital, the availability of a medical or surgical specialists, and/or the need for the patient to receive care at a

tertiary care facility, FirstHealth is decreasing the number of inpatient and inpatient days of care that are available to 'shift' to [FirstHealth Hoke].

(Jt. Ex. 1 at 96)

120. This information specifically was included to show the first adjustment in the need methodology to account for the acuity of patients' illnesses (the "acuity adjustment"). This information shows that services that have high acuity patients were not included in the FirstHealth volume projections for FirstHealth Hoke. (Legarth, Vol. 9 at 1766-1767)
  
121. In Step 8, FirstHealth applied the population change identified in Step 2 of the need methodology and projected the number of admissions to FirstHealth Moore, excluding all eleven service lines previously identified (chemical dependency, normal newborns, psychiatric, rehabilitation, OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery), from the four-county service area from 2011-2018. This step assumes that admission rates for these types of admissions remain constant throughout the projection period. Further, these projections assume that FirstHealth Moore's market share for these services remains constant throughout the time period. (Jt. Ex. 2 at 96; Legarth, Vol. 9 at 1769-70)
  
122. In Step 9, FirstHealth utilized the 2011 days of care by county identified in Step 7 and divided by the patient admissions by county from Step 7 to calculate average length of stay ("ALOS") for each county. FirstHealth then applied that ALOS to the projected number of admissions by county from Step 8 to project the number of days of care associated with FirstHealth Moore patient admissions from its four-county service area. This step still excludes days of care from the eleven service lines previously identified (chemical dependency, normal newborns, psychiatric, rehabilitation, OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery). (Jt. Ex. 2 at 97; Legarth, Vol. 9 at 1770-71)
  
123. It should be noted that Step 9 assumed no increase or decrease in the ALOS over the seven-year time period projected. These projections represent the patient admissions that would have received their care at FirstHealth Moore if FirstHealth Hoke did not exist to serve their needs. (Legarth, Vol. 9 at 1771-72)
  
124. Using the 2011 patients and days of care data identified in Steps 8 and 9, in Step 10, FirstHealth identified the number of patients and days of care for medical/surgical admissions for 2011 that FirstHealth Moore provided to the residents of the four-county service area. Patients and days of care related to chemical dependency, normal newborns, psychiatric, rehabilitation, OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery were excluded. (Jt. Ex. 2 at 98; Legarth, Vol. 9 at 1773-74)
  
125. In Step 11 of the need methodology, FirstHealth multiplied the projected number of admissions by the medical and surgical admission percentages calculated in Step 10 to project the surgical and medical admissions for FirstHealth Moore from the four-county



service area for 2011 through 2018. Patients and days of care related to chemical dependency, normal newborns, psychiatric, rehabilitation, OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery were excluded. (Jt. Ex. 2 at 99; Legarth, Vol. 9 at 1774)

126. In Step 12 of the need methodology, FirstHealth projected the number of surgical inpatients that would shift to FirstHealth Hoke for their needs rather than seek care at FirstHealth Moore based upon proximity to the facility and accounting for acuity of the patients in the different service lines. FirstHealth projected that approximately 20.8% of surgical patients from the non-excluded medical and surgical specialty categories would receive their care at FirstHealth Hoke rather than at FirstHealth Moore in 2015, the first project year. That percentage increased to 41.9% in 2017, the third project year. (Jt. Ex. 2 at 100; Legarth, Vol. 9 at 1774-75)
  
127. FirstHealth stated in its application that "[t]hese percentages clearly allow for patient preference and patients with a higher acuity to remain at FMRH [FirstHealth Moore]." (Jt. Ex. 2 at 100)
  
128. As noted in the application, "Higher acuity surgical specialties already have been excluded from the need methodology and an additional 40.0 to 80.0 percent of remaining current [FirstHealth Moore] patients from the 4-county service area have been identified as not receiving care at [FirstHealth Hoke]." (Jt. Ex. 2 at 100)
  
129. This information provided additional clarification that patients with higher acuity levels were excluded from FirstHealth's volume projections. (Legarth, Vol. 9 at 1777-78)
  
130. Step 12 did not project that 100% of patients who *could* shift from the four-county service area actually *would* shift to FirstHealth Hoke. (Legarth, Vol. 9 at 1775-76)
  
131. Thus, in both Steps 5 and 12 of the need methodology, FirstHealth adjusted its projections for acuity of illness to ensure that patients who would not be appropriately treated at FirstHealth Hoke were not included in those projections. In total, between 40% and 80% of patients outside of the eleven service lines excluded still would continue to seek their care at FirstHealth Moore based on FirstHealth's projections. (Legarth, Vol. 10 at 1814)
  
132. In Step 13 of the need methodology, FirstHealth projected the number of medical inpatients that would shift from FirstHealth Moore and receive their care at FirstHealth Hoke. FirstHealth projected that 28.8% of medical patients from the non-excluded medical and surgical specialty categories would receive their care at FirstHealth Hoke rather than at FirstHealth Moore in 2015, the first project year. That percentage increased to 52.9% in 2017, the third project year. (Jt. Ex. 2 at 102)
  
133. FirstHealth stated in its application that "[t]his percentage clearly allows for patient preference, including preference for CFVHS's [Cape Fear] 41-bed Hoke County hospital,

and patients with higher acuity to remain at FMRH [FirstHealth Moore] or another tertiary hospital." (Jt. Ex. 2 at 102)

134. The medical inpatient percentage projections are slightly higher than the surgical projections because medical patients' acuity is less than that of surgical patients. (Legarth, Vol. 10 at 1790)
135. FirstHealth noted again that:

This projected 'shift' in existing patients takes into account patient preference and patient acuity. Higher acuity surgical specialties have already been excluded from the need methodology and an additional 35.0 to 75.0 percent of remaining current [FirstHealth Moore] patients from the 4-county service area ha[ve] been identified as not receiving care at [FirstHealth Hoke].

(Jt. Ex. 2 at 102)
136. FirstHealth included this information to specifically identify the fact that it was not assuming that all medical patients will receive care at FirstHealth Hoke, but only a reasonable percentage of patients that could receive such care would do so. (Legarth, Vol. 10 at 1791)
137. In Step 14 of the need methodology, FirstHealth identified the number of emergency department ("ED") inpatient admissions it had projected would shift from non-FirstHealth facilities to FirstHealth Hoke in its previously-approved 8-bed application from 2010. It then increased those projections from 2015 through 2017 by applying a 5.0% growth rate for the 2014 to 2015 projection and a 1.0% annual increase for the two years following. (Jt. Ex. 2 at 103)
138. Recognizing the changes in the market since 2010, specifically the approval of two emergency departments in Hoke County (at FirstHealth Hoke and Cape Fear's Hoke Community Medical Center), and in order to be especially conservative in its projections, FirstHealth then decreased its ED inpatient admissions from non-FirstHealth facilities by 50% in each of the three project years. (Jt. Ex. 2 at 103; Legarth, Vol. 10 at 1792-96)
139. Thus, although FirstHealth's 8-bed application already had been approved with projections shifting 713, 735 and 756 ED patients from non-FirstHealth facilities to FirstHealth Hoke in its first three project years, FirstHealth was now only projecting to shift 397, 401, and 405 ED patients, respectively, from non-FirstHealth facilities in each of the first three project years. (Jt. Ex. 2 at 103; Legarth, Vol. 10 at 1795-96)
140. FirstHealth was not required to decrease its ED inpatient admissions from non-FirstHealth facilities by 50% to account for the approval of the Cape Fear facility. In fact, FirstHealth could have increased its previous ED inpatient admission projections

from non-FirstHealth facilities by 5%, then 1% annually thereafter, without any further decrease. (Legarth, Vol. 10 at 1793-95)

141. Ms. Bres Martin was highly critical of FirstHealth's Step 14. She opined that FirstHealth did not document the underlying assumptions for this step. (Bres Martin, Vol. 2 at 231-32, 235, 238; Vol. 7 at 1333)
142. FirstHealth chose to decrease the projections by 50% to reflect that two hospitals of similar size in close proximity would now be offering ED services. This was a reasonable and conservative assumption to make. (Legarth, Vol. 10 at 1796-97)
143. While Ms. Bres Martin opined that Step 14 should not have been included at all, she believes the 50% reduction shown in Step 14 was unreasonable. Step 14 depends on 100% of the patients coming from non-FirstHealth facilities, and in Ms. Bres Martin's opinion, as much as 95% of the volume to be shifted from non-FirstHealth facilities would come from Cape Fear. (Bres Martin, Vol. 7 at 1335, 1342)
144. However, as Mr. Legarth testified, there was no basis for Ms. Bres Martin's opinion. Fifty percent is a conservative and reasonable assumption. (Legarth, Vol. 10 at 1798)
145. Ms. Platt reviewed Step 14 before FirstHealth filed its application, and she did not have any concerns with this step. Ms. Platt testified:

I think the assumptions are stated in the text right prior to the table. It's clear that FirstHealth looked at the previous need for shifting emergency department inpatients from their original application back in 2010. They've applied a growth factor going out since the passage of time from 2015 out to 2017. And then they very conservatively have cut that volume in half, applying the 50 percent. So I think it's very clear what's happening in the table from an assumptions standpoint, and I think it's very reasonable and conservative.

(Platt, Vol. 12 at 2149)

146. Ms. Platt also found the 50% reduction that is taken in Step 14 to be appropriate and reasonable because it reflects the fact that two hospitals have been approved for Hoke County. Ms. Platt did not find this 50% reduction to be ambiguous or confusing. (Platt, Vol. 12 at 2149-50)
147. Ms. Platt testified that the emergency department projections in the FirstHealth Application appropriately took into account that another emergency department has been approved in Hoke County. The number of emergency department visits in the 2012 application is actually lower than what was projected in the 2010 CON application. This is despite the fact that two years had elapsed between the filing of the 2010 and 2012 applications, and that population had grown during that time. (Platt, Vol. 12 at 2167; Jt. Ex. 2 at 178; Cape Fear Ex. 1092 at 215)

148. In the 2010 FirstHealth Hoke application, FirstHealth projected that all of its admissions would come from the emergency department. The 2012 FirstHealth Application relies on an entirely different methodology as Section IV of 2012 application demonstrates. (Cape Fear Ex. 1092 at 199; Jt. Ex. 2 at 92-107; Platt, Vol. 12 at 2166)
  
149. FirstHealth Exhibit 75S is a comparison that Ms. Platt created of the 2010 FirstHealth Hoke application and the 2012 FirstHealth Application, focusing on emergency department admissions shifting from non-FirstHealth facilities. It shows that the projected admissions from the emergency department for the 28-bed project are lower and much more conservative than the original emergency department admissions in the 2010 application. (Platt, Vol. 12 at 2165-66; FirstHealth Ex. 75S; Jt. Ex. 2 at 103)
  
150. In FirstHealth Exhibit 75R, Ms. Platt compared total emergency department volumes in the two applications. The emergency department volume in the 2012 application is lower than the emergency department volume in the 2010 application. (Platt, Vol. 12 at 2166-67; FirstHealth Ex. 75R; Jt. Ex. 2 at 178; Cape Fear Ex. 1092 at 215)
  
151. The emergency department at FirstHealth Hoke already had been approved by the time the 2012 application for 28 beds was filed, and FirstHealth was not required to reprove the need for the emergency department. (Platt, Vol. 12 at 2167-68)
  
152. In Step 15, FirstHealth calculated the total number of inpatient cases and inpatient days of care by adding the volumes projected in Steps 12, 13 and 14. (Jt. Ex. 2 at 104; Legarth, Vol. 10 at 1801)
  
153. In Step 16 of the need methodology, FirstHealth calculated the daily census and occupancy rate for FirstHealth Hoke, which results in an occupancy rate of 73.8% in project Year 3. (Jt. Ex. 2 at 104; Legarth, Vol. 10 at 1801-02) The target occupancy for this facility with an average daily census of less than 100 by Year 3 is 66.7% according to the SMFP. (Agency Ex. 1 at 24; 10A N.C.A.C. 14C .3803(a); Jt. Ex. 1 at 2760-61; Legarth, Vol. 10 at 1802)
  
154. In Step 17 of the need methodology (mis-numbered as Step 16 on page 105 of the FirstHealth Application), FirstHealth identified the occupancy of its ICU beds specifically. To do so, FirstHealth utilized FirstHealth Moore's medical/surgical ICU days of care as a proxy. FirstHealth utilized FirstHealth Moore's volumes rather than FirstHealth Richmond's ICU days in order to be more conservative. FirstHealth Richmond has a higher percentage of ICU days of care and ICU inpatients at over 14% as compared to FirstHealth Moore at 9.6%. (Jt. Ex. 2 at 105; Legarth, Vol. 10 at 1803-04)
  
155. In FirstHealth Exhibit 75T, Ms. Platt tested the reasonableness of FirstHealth's ICU assumptions against the assumptions that Cape Fear included in its 41-bed Hoke Community Medical Center application. Ms. Platt excluded obstetrics from the analysis because FirstHealth Hoke does not propose to offer this service and because obstetrics patients rarely stay in the ICU. Hoke Community Medical Center's ICU to medical-surgical ratio ranges from 12.3% in 2015 to 12.9% in 2016. It therefore is higher than

- FirstHealth Hoke's ICU to medical-surgical ratio of 9.6%. Ms. Platt concluded that FirstHealth Hoke's ICU ratio was very reasonable. (Platt, Vol. 12 at 2155-56; FirstHealth Ex. 75T; Jt. Ex. 2 at 105)
156. In the Step 18 (mis-numbered as Step 17 on page 106 of the FirstHealth Application), FirstHealth calculated its effective market share in the four counties of its service area. In Hoke County, FirstHealth's market shares range from 23.4% to 35.3% from 2015-2017. (Jt. Ex. 2 at 106; Legarth, Vol. 10 at 1805-06)
157. FirstHealth also noted in its application:
- This table indicates that FirstHealth is conservative in both the number of patients and days of care that it projects to serve in the 4-county service area. The largest effective market share that FirstHealth projects is in Hoke County, where if this CON application is approved, [FirstHealth Hoke], will operate 47% of the acute care beds within Hoke County, but only projects an effective market share of approximately 35%. This means that adding 28 beds to [FirstHealth Hoke] will not adversely impact Cape Fear Valley's proposed hospital in Hoke County.
- (Jt. Ex. 2 at 106)
158. FirstHealth included this information in its application because it wanted the Agency to see that it had considered the effect of adding 28 beds on the Cape Fear Hoke facility. Further, this demonstrates that, but for a small number of patients, FirstHealth is treating only those patients already choosing to seek their care at FirstHealth Moore and thus FirstHealth is not assuming to take market share away from Hoke Community Medical Center. (Legarth, Vol. 10 at 1806-1807)
159. Ms. Platt analyzed FirstHealth's projected market share in FirstHealth Exhibit 75U. This exhibit shows that by 2017, FirstHealth Hoke would have a 34.8% market share, Hoke Community Medical Center would have a 26.5% market share, and other providers would have a 38.7% market share, which means that 38.7% of Hoke County residents would still be leaving the area to obtain services at other hospitals, including tertiary facilities such as Cape Fear in Fayetteville and FirstHealth Moore in Pinehurst. Ms. Platt found this to be a reasonable distribution of market share. (Platt, Vol. 12 at 2158-59: FirstHealth Ex. 75U)
160. In the final step of the FirstHealth need methodology, Step 19 (mis-numbered as Step 18 on page 107 of the FirstHealth Application), FirstHealth calculates its patient origin for each county in its four-county service area for each of the first three years of its project. (Jt. Ex. 2 at 107) This information clearly shows that 100% of its patients come from its four-county service area and that no additional in-migration is projected. (Legarth, Vol. 10 at 1807-08)

161. Ms. Platt conducted her own analysis to determine the reasonableness of FirstHealth's methodology. Her analysis is reflected in FirstHealth Exhibits 75B and 75C. She testified: "I was able to re-create it [the presentation of need] and check it based on the information in the application. And then applying my own approach to need, I come up with very, very similar results." (Platt Vol. 12 at 2093; FirstHealth Ex. 75B and 75C)
  
162. In FirstHealth Exhibit 75C, Ms. Platt projected a slightly higher occupancy for the 36 beds at FirstHealth Hoke than did Mr. Legarth. In Ms. Platt's opinion, this confirms the conservative nature of Mr. Legarth's projections and assumptions. (Platt, Vol. 12 at 2095; FirstHealth Ex. 75C)
  
163. In FirstHealth Exhibit 75V, Ms. Platt compared the imaging volumes that were projected in FirstHealth's 2010 application for the 8-bed FirstHealth Hoke against the imaging volumes that were projected in the 2012 FirstHealth Application, where the end result would be a 36-bed FirstHealth Hoke. She determined that in 2015, there was only a 3% difference in the volumes, and thereafter a growth of only 1%. She concluded that this was reasonable given the growth rate of population in the service area, and the fact that with the 28 bed addition, the 36-bed FirstHealth Hoke would be a larger facility with more services, including a second OR. (Platt, Vol. 2160-61; FirstHealth Ex. 75V)
  
164. Ms. Platt also noted that the project years for the 2010 application and the 2012 application were not the same. She pointed out that the 3% difference in 2015 equaled just 236 patients. She found this increase reasonable because it is a very low number of patients, and it is spread across a variety of different imaging modalities that are proposed to be offered, such as ultrasound and x-ray. (Platt, Vol. 12 at 2162)
  
165. Mr. Carter opined that FirstHealth only projected a need for six beds. (Carter, Vol. 4 at 619-22, 638, 656, 659, 696; Cape Fear Ex. 1157)
  
166. Ms. Platt disagreed with Mr. Carter's testimony, noting that the analysis of where the patients come from is completely independent of the need determination for 28 acute care beds in the 2012 SMFP. (Platt, Vol. 12 at 2153) Ms. Platt found Cape Fear's criticism inconsistent with Cape Fear's own 28-bed application, where patients were projected to come from many different counties, not just Cumberland County or Hoke County. (Platt, Vol. 12 at 2153; Jt. Ex. 3 at 66)

**Acuity Adjustment**

167. In support of its need methodology, FirstHealth included a significant amount of data from the Thomson North Carolina inpatient database in Exhibit 28 of its Application. Specifically, FirstHealth included a list of Diagnostic Related Groups ("DRGs") for each of the four counties in its proposed service area, the number of patients, whether the patient was a medical or surgical patient and whether the DRG was medical or surgical. (Jt. Ex. 2 at Exhibit 28, pp. 539-83; Legarth, Vol. 10 at 1808-09)

168. As Ms. Platt explained, DRGs originally were developed as a weighting system to classify Medicare patients for reimbursement purposes. Over time, DRGs have been expanded to cover all patients in a hospital. A DRG's relative weight takes into consideration the severity of the illness, the prognosis, the treatment difficulty, need for intervention, and resource intensity. Often, the DRG weight also will have a corresponding factor with the length of stay because resource intensity is an important part of the DRG assignment. (Platt, Vol. 12 at 2132-33; FirstHealth Ex. 75G; Legarth, Vol. 10 at 1812-13)
  
169. A DRG is assigned after the patient leaves the hospital. The people who work in a hospital billing office typically would take all of the information in the patient's record to identify and assign a DRG to the patient. (Platt, Vol. 12 at 2134)
  
170. The DRG tables for FirstHealth Moore included in the FirstHealth Application did not include chemical dependency, normal newborns, rehabilitation, or psychiatric patients. (Jt. Ex. 2 at 540-45; Legarth, Vol. 10 at 1808-09)
  
171. FirstHealth included DRG tables for FirstHealth Moore and for each of the four counties in its service area that excluded the eleven service lines previously excluded in the need methodology (chemical dependency, normal newborns, psychiatric, rehabilitation, OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery). These tables were used to generate the information included in Step 5 of the need methodology. (Jt. Ex. 2 at 546-51; Legarth, Vol. 10 at 1810)
  
172. FirstHealth also included a breakdown of the medical and surgical admissions for each county in the four-county service area. (Jt. Ex. 2 at 552-70; Legarth, Vol. 10 at 1811)
  
173. As noted, FirstHealth made two adjustments for acuity of patients' illness in its need methodology in Steps 5 and 12. (Legarth, Vol. 10 at 1813-15) Moreover, FirstHealth assumed that in most cases, less than 50% of those patients who *could* be treated at FirstHealth Hoke *would* be treated at FirstHealth Hoke. The fact that FirstHealth Hoke is a community hospital that will not be offering all the services found at a tertiary facility does not mean that it provides fewer services for less complicated patients. (Legarth, Vol. 10 at 1814; Jt. Ex. 2 at 95; 100-03)
  
174. In addition to the service line adjustments, FirstHealth did not assume that all or even high percentages of its patients would shift from FirstHealth Moore to FirstHealth Hoke. Instead, FirstHealth assumed that far less than 100% of the patients who *could* shift to FirstHealth Hoke *would* shift to FirstHealth Hoke, taking into account patient proximity, patient preference, and acuity levels. (Legarth, Vol. 10 at 1829; Jt. Ex. 2 at 100-03)
  
175. Although Ms. Bres Martin opined that FirstHealth should have applied its acuity adjustment in Step 7 of its need methodology, she provided no basis or authority for that position, other than that it was her opinion. (Bres Martin, Vol. 1 at 200; Vol. 6 at 1005-06)

176. There is nothing in the SMFP or the CON Law that requires an acuity adjustment to be made at a specific step in a need methodology, and it is unreasonable to change FirstHealth's methodology as proposed by Ms. Bres Martin. There also is no mention of the word "acuity" or "adjustment" in the regulation applicable to acute care bed projects. (Legarth, Vol. 10 at 1815-16)
177. It is the job of the Agency and the Project Analyst to review the need methodology presented and the supporting documentation, and to determine whether it is reasonable, supported, and meets all applicable performance standards. (Legarth, Vol. 10 at 1816)
178. Ms. Bres Martin further opined that a DRG weight of 2.0 is a "line in the sand" to be utilized in doing projections for community hospitals and that FirstHealth should have excluded all volumes related to DRGs with a weight above 2.0. In Ms. Bres Martin's opinion, the inclusion of any DRGs with a weight above 2.0 means that FirstHealth failed to sufficiently acuity adjust its volume projections. (Bres Martin, Vol. 1 at 190)
179. There is nothing in the CON Law or the SMFP about the 2.0 DRG weight "line in the sand." Ms. Bres Martin adopted this "line in the sand" from another consultant. Ms. Bres Martin was not aware of any statute, rule, or case to support her opinion about the "line in the sand." (Bres Martin, Vol. 7 at 1264-65).
180. All of the expert witnesses and CON consultants who testified in this case agreed that there is nothing in the SMFP or in the CON Law that limits community hospitals to treating cases with DRG weights of 2.0 or less. (Bres Martin, Vol. 7 at 1264-65; Carter, Vol. 4 at 683; Legarth, Vol. 10 at 1817-18; Platt, Vol. 12 at 2135)
181. There also is nothing in the licensure requirements for hospitals that limits a community hospital to treating cases with a DRG weight of 2.0 or less. (Carter, Vol. 4 at 684)
182. Mr. Legarth testified that a hospital does not know what DRG a patient will be assigned when the patient checks in. Hospitals see patients of all types and DRG weights. FirstHealth therefore felt it would be unreasonable to state that only DRG level 2.0 patients and below would seek services at FirstHealth Hoke. (Legarth, Vol. 10 at 1817)
183. There was no reason for FirstHealth to include a DRG cutoff as advocated by Ms. Bres Martin in its need methodology, particularly given the conservative acuity adjustments already incorporated by FirstHealth in its projections. (Legarth, Vol. 10 at 1829)
184. Ms. Platt testified that the 2.0 DRG weight "line in the sand" is very arbitrary and not reflective of the types of cases that community hospitals serve. Using this "line in the sand" is an inaccurate way of projecting utilization for a community hospital. (Platt, Vol. 12 at 2134).



185. Ms. Platt further explained:

So a doctor when he's deciding whether to admit a patient to a hospital or perform a case--a surgical case in a hospital, they're not thinking in terms of, you know, "Oh, this patient is going to be DRG whatever with a weight over 2.0, so I can't do that case at the hospital." That's not the way a physician thinks.

So again, it's taking sort of the end of the process from a billing perspective and applying it to the decision for how patients can be served in a hospital. And I don't think that makes any sense.

(Platt, Vol. 12 at 2135)

186. Ms. Bres Martin created a document intended to show that FirstHealth had projected numerous procedures with DRGs greater than 2.0 (Cape Fear Exhibit 1139). However, as Mr. Legarth testified, Table 14 of that exhibit contains a DRG list taken from Exhibit 28 of the FirstHealth Application. Page 16 of Cape Fear Exhibit 1139 provides the percentage of total cases presented that were a DRG of less than 2.0, the total number of surgical cases less than 2.0 and the total number of medical cases less than 2.0. By way of example, 96% of each medical admission by county is a DRG weight of 2.0 or less. As illustrated in Step 13 of the FirstHealth need methodology, the highest percentage assumed to shift for medical patients was only 65% in Hoke County. Thus, with respect to the medical case projections, Table 14 of Cape Fear Exhibit 1139 shows that all patients projected to shift are essentially DRG weights of 2.0 or less. (Legarth, Vol. 10 at 1819-20; Cape Fear Ex. 1139, Table 14)
187. Similarly, with respect to surgical cases, in Cape Fear Exhibit 1139, Cumberland County is identified as having 49% of surgical patients with a DRG at or less than 2.0. For Hoke County, the corresponding percentage is 43%. For Robeson County, the corresponding percentage is 34%. For Scotland County, the corresponding percentage is 48.2%. FirstHealth's projected shift for both Cumberland and Scotland were less than Ms. Bres Martin's own calculations of surgical cases with a DRG weight of 2.0 or less. (Legarth, Vol. 10 at 1820-21; Jt. Ex. 2 at 100)
188. FirstHealth projected a shift of 40% for surgical patients from Robeson County in Project Year 3, slightly larger than Ms. Bres Martin's calculation of 34%. FirstHealth projected 165 patients in Year 3 from Robeson County for that 40% shift. Based on Ms. Bres Martin's calculations, 142 of the Robeson County DRGs were 2.0 or less, which leaves a difference of just 23 patients that would fall above a DRG of 2.0. (Legarth, Vol. 10 at 1819-23; Jt. Ex. 2 at 100)
189. Similarly, in Project Year 3, FirstHealth projected a 60% shift in surgical patients from Hoke County, which would equate to 187 patients in Year 3. As reflected on page 16 of Cape Fear Exhibit 1139, by Ms. Bres Martin's calculations, 124 cases have a DRG

weight of less than 2.0. That is a difference of only 63 cases. (Legarth, Vol. 10 at 1824; Jt. Ex. 2 at 100)

190. Thus, the number of projected cases that may have a DRG weight greater than 2.0 is very minimal and those cases have a weight of up to only 2.1039, a negligible difference from Ms. Bres Martin's artificial cutoff of 2.0. (Legarth, Vol. 10 at 1825)
191. Cape Fear also presented testimony from Mr. Carter, who created a chart with DRG weight percentages from some, but not all, hospitals in North Carolina. (Carter, Vol. 4 at 629; Cape Fear Ex. 1158)
192. Mr. Carter testified that his chart included FirstHealth Moore as well as community hospitals of varying sizes, and the percentage of cases these hospitals treat with DRG weights greater than 2.0. The purpose of the chart is to show that FirstHealth Hoke's percentage of cases with DRG weights above 2.0 is similar to FirstHealth Moore, a tertiary hospital, rather than FirstHealth Montgomery, a critical access hospital, and FirstHealth Richmond, a community hospital. (Carter, Vol. 4 at 630-31, 684, 686; Cape Fear Ex. 1158)
193. Mr. Legarth testified, however, that the pool of patients with the potential to shift to FirstHealth Hoke is identical or relatively close to FirstHealth Moore patients because FirstHealth Moore is where the FirstHealth Hoke patients will be coming from. However, that does not equate to an assumption that 20.3% of FirstHealth Hoke's patients will have DRG weights higher than 2.0. (Legarth, Vol. 10 at 1826)
194. Moreover, Cape Fear Exhibit 1158 shows that hospitals of varying sizes provide care to patients with DRG weights of higher than 2.0 and even 3.0. Thus, this information supports the reasonableness of the FirstHealth Application and its position that a community hospital is not limited to providing care only to patients with a DRG weight of 2.0 or lower. (Legarth, Vol. 10 at 1827; Cape Fear Ex. 1158)
195. Regarding Cape Fear Exhibit 1158, Ms. Platt testified that:

... And what I think is interesting to note is that under Ms. Bres Martin's theory, there would be no patients with a case mix weight over 2.0 served at FirstHealth Hoke. But yet this analysis shows very specifically that there are other community hospitals in the state that are serving patients over a 2.0.

So just looking down the left-hand section of this chart, you can see that, you know, say Valdeese Hospital and Grace Hospital had 15.9 percent and 15.5 percent respectively of their patients at an acuity of 2.0. Going on down, the number and the percentage drops for various hospitals, but they're all serving some patients that are over 2.0.

So if you were to unnecessarily restrict FirstHealth Hoke to a 2.0 cutoff for health planning purposes, you would not in my opinion accurately reflect the pool of patients that would be appropriately served at the proposed 28 beds at the FirstHealth Hoke hospital.

(Platt, Vol. 12 at 2141-42; Cape Fear Ex. 1158)

196. Ms. Platt opined that just because hospitals are in the same system does not mean they should have a similar experience regarding the percentage of cases they treat with DRG weights of 2.0 and above. It is the type of service offered that is important, not membership in a particular system. For example, FirstHealth Montgomery is a critical access hospital which, by its nature, is very different from FirstHealth Moore, a tertiary hospital. FirstHealth Montgomery's experience regarding the number of cases it treats with DRG weights above 2.0 would be different, therefore, from number of cases FirstHealth Moore treats with DRG weights above 2.0. (Platt, Vol. 12 at 2143)
197. Regarding Mr. Carter's testimony that FirstHealth Hoke's experience with respect to cases with DRG weights of 2.0 and above should be more like FirstHealth Montgomery's experience and FirstHealth Richmond's experience, Ms. Platt testified that any similarities would depend on the types of services proposed to be offered and the physicians on staff. (Platt, Vol. 12 at 2143-2144). Ms. Platt does not find the comparison to FirstHealth Montgomery relevant at all because it is a critical access hospital. (Ms. Platt, Vol. 12 at 2143)
198. Cape Fear did not offer any evidence to show any similarities in services offered at FirstHealth Hoke, FirstHealth Montgomery and FirstHealth Richmond. Cape Fear did not offer any evidence to show any overlap in the medical staffs of these three hospitals.
199. Regarding Cape Fear Exhibit 1158, Ms. Platt also pointed out:

The other thing that I think is important to note is on Mr. Carter's testimony, he's identified--sort of highlighted on this exhibit FirstHealth Hoke patient pool with 20 percent of patients above 2.0. That is just the starting point of the pool of patients expected to come from Moore Regional and shift to Hoke. That pool is then reduced significantly in the next step of the need methodology by applying the percent shift.

So once that percent shift is applied, we don't really know what the percent of patients above 2.0 will be at FirstHealth Hoke. But it's being reduced again, the total pool of patients, and it only makes logical sense that some of the patients who would not shift would be those with a higher acuity.

(Platt, Vol. 12 at 2144; Cape Fear Ex. 1158; Jt. Ex. 2 at 95, 100-03)

200. FirstHealth Exhibit 75F is a summary Ms. Platt created to illustrate the procedures that Ms. Bres Martin testified would and would not be appropriate to serve at FirstHealth Hoke using Ms. Bres Martin's "line in the sand" of DRG weights greater than 2.0. One example is appendectomy. There are four DRGs that relate to appendectomy with DRG weights ranging from .95 to 2.26. The factors that would influence the DRG weight may not be known at the time the patient is admitted. According to Ms. Bres Martin's analysis, the appendectomy with the 2.26 DRG weight (DRG 341) would not be appropriate for treatment at FirstHealth Hoke. (Platt, Vol. 12 at 2137-39; FirstHealth Ex. 75F)
  
201. However, as Ms. Platt testified, it does not make sense from a health planning perspective to restrict the patients who are included in the analysis of projected utilization to only those cases with DRG weights of 2.0 or less. Using some of the DRG weights on FirstHealth Exhibit 75F as examples, Ms. Platt does not know of a health planning rationale to exclude from FirstHealth Hoke's projected utilization cases with DRG weights of 2.26, 2.72 or 5.2. (Platt, Vol. 12 at 2140; FirstHealth Ex. 75F)
  
202. Ms. Platt does not know of any health planning rationale to exclude any of the cases shown on FirstHealth Exhibit 75F. (Platt, Vol. 12 at 2141; FirstHealth Ex. 75F)
  
203. Ms. Platt does not know of any reason why Ms. Bres Martin chose to draw her "line in the sand" at 2.0 as opposed to 2.6 or 3.0 or some other number. (Platt, Vol. 12 at 2141)
  
204. Ms. Platt testified that there was nothing in the CON Law, the SMFP or the health planning literature that supported Ms. Bres Martin's "line in the sand." (Platt, Vol. 12 at 2144-45)
  
205. In FirstHealth Exhibit 75P, Ms. Platt analyzed the exclusions from FirstHealth's utilization projections, including the exclusion of several service lines and the shifting of patients as explained in Steps 12 and 13 of the methodology. (Platt, Vol. 12 at 2145-2146; FirstHealth Ex. 75P)
  
206. FirstHealth also adjusted patients' average length of stay ("ALOS") by removing certain service lines from its projections. In FirstHealth Exhibit 75Q, Ms. Platt compared the projected ALOS from the FirstHealth Application to the ALOS that Cape Fear proposed in its 41-bed Hoke Community Medical Center application. Ms. Platt did this to test the reasonableness of FirstHealth's ALOS assumption. To ensure comparability, Ms. Platt excluded obstetrics from the Cape Fear ALOS because FirstHealth Hoke does not propose to offer that service. Obstetrics patients also tend to have a very short ALOS. Ms. Platt's analysis showed that FirstHealth's ALOS was approximately 4.23 and that Cape Fear's ALOS was approximately 4.36. Ms. Platt found the FirstHealth ALOS to be reasonable and conservative because it actually is shorter than what is projected for the community hospital services at Hoke Community Medical Center. (Platt, Vol. 12 at 2147-48; FirstHealth Ex. 75Q).

207. On cross examination, Ms. Platt was asked about a CON application she had prepared in 2012 for a replacement facility for Polk Regional Medical Center, a critical access hospital in Polk County, Georgia. In the Polk application, a consulting firm, ECG Management, developed a list of DRGs that would be served at the proposed replacement facility. (Platt, Vol. 13 at 2302-03; Cape Fear Ex. 1245 at 11.19)
  
208. While Cape Fear suggested that the Polk application supported Ms. Bres Martin's "line in the sand" theory, Ms. Platt explained that DRGs were used in the Polk application in much the same way Mr. Legarth used DRGs to exclude certain service lines from the utilization projections in the FirstHealth Application. Ms. Platt testified that she did not disagree with using DRGs as a health planning tool. Rather, "[w]hat I disagree with is drawing a line in the sand based on a case weight." (Platt, Vol. 13 at 2303)
  
209. Moreover, the Polk review was not subject to North Carolina's CON Law and is not relevant to this case.
  
210. Ms. Bres Martin also testified that in its 2011 65-bed application, FirstHealth did not make an acuity adjustment for its projections. (Bres Martin, Vol. 1 at 202) The lack of an acuity adjustment was one of the reasons that the Agency found the FirstHealth 65-bed application non-conforming with Criterion (3). (Jt. Ex. 1 at 2546, 2553, 2566) Thus, Cape Fear asserted that FirstHealth had made the same error twice.
  
211. Mr. Legarth, the preparer of the FirstHealth 65-bed application, demonstrated that there are numerous differences in the need methodologies between the 65-bed application and the 28-bed application. The applications are so completely different that there is no way to do a meaningful comparison between the two. (Legarth, Vol. 9 at 1754-55; Vol. 10 at 1833-34)
  
212. Mr. Yakaboski also was the Project Analyst for the FirstHealth 65-bed application. (Jt. Ex. 1 at 2454; Yakaboski, Vol. 14 at 2390) He testified that in the review of FirstHealth's 28-bed Application, ". . . I really was watching to see and analyzing if they [FirstHealth] had made acuity adjustments in this particular case [the 28 bed review], and I found that they had made acuity adjustments. In my mind, they [FirstHealth] had almost made a double acuity adjustment." (Yakaboski, Vol. 14 at 2392-93)
  
213. Mr. Yakaboski explained that by "double acuity adjustment," he meant that in Step 5 of its need methodology, FirstHealth backed out the following service lines from its projections: chemical dependency, normal newborns, psychiatric, rehabilitation, OB deliveries, neonatology, trauma, open heart, surgical cardiology, neurosurgery, and thoracic surgery. (Yakaboski, Vol. 14 at 2394; Jt. Ex. 2 at 95) FirstHealth did not back out these service lines in the 2011 65-bed application. (Yakaboski, Vol. 14 at 2395)
  
214. Mr. Yakaboski explained that the second acuity adjustment comes in Steps 12 and 13 of the methodology. Mr. Yakaboski testified: "They [FirstHealth] did it once [in Step 5] and then they've identified a pool of patients for which it's logical to project to shift over,

and they're not even projecting all of those to come over." (Yakaboski, Vol. 14 at 2397-98; Jt. Ex. 2 at 100-03)

215. Mr. Yakaboski determined that the need methodology in the FirstHealth 28-bed Application was reasonable, credible, and supported by the documentation. (Yakaboski, Vol. 14 at 2398)
  
216. In the 28-bed application, FirstHealth clearly adjusted its utilization projections for acuity of patients' illnesses by excluding multiple service lines from its volume projections and then shifting only small percentages of the remaining patients based upon proximity, patient preference, and illness acuity. (Legarth, Vol. 10 at 1834)
  
217. Ms. Platt reviewed the entire FirstHealth need methodology before the application was submitted in June 2012, and she testified that she had no concerns about how Mr. Legarth performed the acuity adjustment. She testified, "I did not have any concerns at all because it's exactly the same approach that I have taken to acuity adjust projections for community hospitals in many, many instances in many states. So it's exactly the same way I would approach the acuity adjustment on a product line specific basis." (Platt, Vol. 12 at 2129-30)
  
218. Ms. Bres Martin further opined that FirstHealth improperly included Long-Term Acute Care ("LTAC") days in its volume projections. (Bres Martin, Vol. 2 at 348-52) However, the actual volumes used to identify the patient volume projections and shift did not include LTAC days. (Legarth, Vol. 10 at 1836-37)
  
219. Using her own analysis contained in FirstHealth Exhibits 75D, 75E, 75K, and 75O, Ms. Platt confirmed that FirstHealth did not include LTAC days in its projection methodology. (Platt, Vol. 12 at 2122-27; FirstHealth Ex. 75D, 75E, 75K and 75O)
  
220. The Agency properly concluded that the FirstHealth Application was conforming with Criterion (3).

**Criterion (3a)**

221. N.C. Gen. Stat. § 131E-183(a)(3a), Criterion (3a), states:

In the case of a *reduction or elimination of a service*, including the *relocation of a facility or a service*, the applicant shall demonstrate that the needs of the population presently served will be met adequately by the proposed relocation or by alternative arrangements, and *the effect of the reduction, elimination or relocation* of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care.

(Emphasis added).

222. The Agency found that Criterion (3a) was not applicable to the FirstHealth Application. (Jt. Ex. 1 at 2730)

223. Mr. Yakaboski explained how he analyzed Criterion (3a) with respect to the FirstHealth Application:

... [Criterion] (3a) is applicable in a situation where there's going to be 'a reduction or elimination of a service, including the relocation of a facility or a service.'

And in this case with respect to FirstHealth, FirstHealth, just to kind of reference everybody back in, had an approved, as yet undeveloped eight bed hospital with an OR, with certain medical equipment in--already approved, sited in Hoke County.

What we have here was in 2012 there was a need determination for 28 acute care beds for the Cumberland-Hoke multicounty service area. The approved eight bed hospital of FirstHealth Hoke was already sited within--and approved within that service area. FirstHealth in this application was simply looking to add 28 acute care beds to that existing, approved, but as yet undeveloped, hospital.

So as to FirstHealth, (3a), Criterion (3a), was not applicable, nor was (3a) applicable to Cape Fear's. Again, they were simply--both applicants were simply looking to add 28 acute care beds.

(Yakaboski, Vol. 14 at 2398-99)

224. During the review period, Cape Fear did not make any comments about Criterion (3a) when it filed comments against the FirstHealth Application. (Jt. Ex. 1 at 862; Bres Martin, Vol. 7 at 1359) Cape Fear's Petition for contested case hearing in this matter does not allege Agency error with respect to Criterion (3a).

225. Ms. Bres Martin understood that in the 28-bed application, FirstHealth was proposing to add beds to FirstHealth Hoke; it was not proposing to take beds away from FirstHealth Hoke. (Bres Martin, Vol. 7 at 1360)

226. Ms. Bres Martin opined that the FirstHealth Application should have been found non-conforming with Criterion (3a) because FirstHealth expanded its service area to four counties in the 28-bed application, as compared to just Hoke County in the 8-bed application. According to Ms. Bres Martin, the effect was to decrease medical services to Hoke County residents. (Bres Martin, Vol. 2 at 260, 262; Vol. 7 at 1362)

227. Ms. Platt testified that Ms. Bres Martin's opinion is without support. (Platt, Vol. 12 at 2172) Ms. Platt testified that she never had seen the Agency interpret Criterion (3a) in the way Ms. Bres Martin suggested. In Ms. Bres Martin's opinion, a shift in patient

volume from surgical to medical constitutes a reduction in services. In Ms. Platt's experience, however, shifts in service offerings or the number of patients served does not trigger Criterion (3a). Rather, Criterion (3a) is triggered when there is an actual reduction or elimination of services at a facility or the relocation of a facility or service. (Platt, Vol. 12 at 2170-71)

228. In its application, FirstHealth did not propose to reduce, eliminate, or relocate any service or facility.
229. Criterion (3a) was not applicable to the FirstHealth Application because there was no physical reduction of services, elimination of services, or relocation of services associated with the 28-bed project. Instead, the FirstHealth Application involves an increase of 28 beds to an approved eight-bed hospital and there is no reduction of any service offerings. (Platt, Vol. 12 at 2170; Yakaboski, Vol. 14 at 2399; Jt. Ex. 2 at 2730)
230. At the same time FirstHealth filed the 28-bed application, FirstHealth also filed the FirstHealth OR Application proposing to relocate a second OR to FirstHealth Hoke from FirstHealth Moore, which was approved by the Agency. (Legarth, Vol. 10 at 1847-48)
231. Although Cape Fear and a third party, SCA, challenged the Agency's approval of the FirstHealth OR Application, following a hearing on May 31 and June 3, 2013, the Undersigned granted summary judgment in favor of FirstHealth against both Cape Fear and SCA in those cases. Therefore, there will be two ORs at FirstHealth Hoke Hospital, which represents an expansion of surgical services.
232. The 2011 Wake County acute care bed review is the only set of findings that Ms. Bres Martin could identify to support her opinions with respect to Criterion (3a). In that review, Novant proposed to relocate two ORs from a previously-approved ambulatory surgical facility to a proposed new hospital. Criterion (3a) applied to the Novant application. (Bres Martin, Vol. 2 at 270-71; Cape Fear Ex. 1090)
233. Ms. Bres Martin acknowledged that in this case, FirstHealth is not eliminating any beds or moving ORs from a previously-approved ambulatory surgical facility, and is not relocating beds from FirstHealth Hoke. (Bres Martin, Vol. 7 at 1360-62) Ms. Bres Martin also acknowledged that she would not expect FirstHealth Hoke to employ a quota system for the number of Hoke residents it would treat under which FirstHealth would turn away any Hoke residents who exceeded the quota. (Bres Martin, Vol. 7 at 1362-63)
234. Ms. Platt was an expert witness for one of the parties in the 2011 Wake County review. Ms. Platt testified that the 2011 Wake County bed review was inapposite to the FirstHealth Application. In Wake County, ORs were being relocated from an approved ambulatory surgery center to a hospital and thus there was an elimination or reduction of ORs at that ambulatory surgery center. That is a very different factual scenario than the present one where there is no physical reduction, elimination, or relocation of services. (Platt, Vol. 12 at 2172-74)



235. The Agency properly concluded that Criterion (3a) was not applicable to the FirstHealth Application.

**Criterion (4)**

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

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

237. The Agency found that FirstHealth adequately demonstrated that its proposal is the least costly or most effective alternative to meet the need and was further conforming with all applicable statutory review criteria and regulations. It noted specifically that a “project that cannot be approved cannot be an effective alternative.” (Jt. Ex. 1 at 2732-33)
238. In its application, FirstHealth discussed three different alternatives that it considered, including maintaining the status quo, forming a joint venture, or proposing to expand FirstHealth Hoke Hospital by 28 beds, based on the need determination. (Legarth, Vol. 10 at 1850)
239. FirstHealth clearly articulated four different reasons why maintaining the status quo was not an appropriate alternative and was not the least costly or most effective alternative. (Jt. Ex. 1 at 2732; Platt, Vol. 12 at 2177)
240. Ms. Bres Martin opined that FirstHealth should have been found non-conforming with Criterion (4) because its project was not needed under Criterion (3) and because FirstHealth should have considered the option of relocating beds from FirstHealth Moore to FirstHealth Hoke as an alternative to applying for 28 beds under the 2012 SMFP. (Bres Martin, Vol. 2 at 271-72 )
241. In support of her opinion, Ms. Bres Martin relied on Cape Fear Exhibit 1079, which is a set of findings issued in 2007 to NorthEast Medical Center. In that case, NorthEast proposed to modify a previously-disapproved project. (Cape Fear Ex. 1079; Bres Martin, Vol. 2 at 273-74; Vol. 7 at 1370). Here, however, FirstHealth is not proposing to modify a previously-disapproved project. (Bres Martin, Vol. 7 at 1370)
242. FirstHealth did not identify relocating additional beds from FirstHealth Moore to FirstHealth Hoke as one of its options because it is not a valid option. In the previous applications for FirstHealth Hoke, FirstHealth already had explained that 8 beds was the limit of the number of beds it could relocate. Further, as shown in the 2012 SMFP, there already is a deficit of acute care beds at FirstHealth Moore, though not yet a deficit large enough to generate a need determination in the SMFP. (Legarth, Vol. 10 at 1850-51; Cape Fear Ex. 1116 at 55)

243. There is no language in the CON Law or the SMFP that would have required FirstHealth to consider a particular alternative, including the alternative of relocating more beds from FirstHealth Moore to FirstHealth Hoke. (Legarth, Vol. 10 at 1851-52; Bres Martin, Vol. 7 at 1367-68)
244. In the Cape Fear Application, prepared by Ms. Bres Martin, Cape Fear's discussion of alternatives did not include the alternative of implementing on Cape Fear's main campus the 41 beds proposed for Hoke Community Medical Center instead of applying for the 28 beds in the 2012 SMFP. Cape Fear also did not discuss the alternative of developing on the main campus the 65 beds proposed for Cape Fear Valley North instead of applying for the 28 beds in the 2012 SMFP. (Jt. Ex. 3 at 62-3; Platt, Vol. 12 at 2175)
245. Ms. Bres Martin acknowledged that in its 65-bed application filed in 2011, Cape Fear did not discuss the alternative of relocating beds from Cape Fear Valley Medical Center to northern Cumberland County in lieu of applying for the 65 beds available in the 2011 SMFP. (Bres Martin, Vol. 6 at 995-96; FirstHealth Ex. 59 at 143-45)
246. There also was no discussion in the Cape Fear Application evaluating the use of temporary beds at Cape Fear in lieu of applying for 28 additional beds. (Platt, Vol. 12 at 2176; 10A N.C.A.C. 13B .3111(a))
247. Ms. Bres Martin was not aware of any statute, rule, or case that would have required the Agency to analyze Criterion (4) the way she would have. (Bres Martin, Vol. 7 at 1371)
248. The Agency properly concluded that the FirstHealth Application was conforming with Criterion (4).

**Criterion (5)**

249. N.C. Gen. Stat. § 131E-183(a)(5), Criterion (5), states:

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

250. The total capital cost for the 28 bed expansion was \$17,516,000. FirstHealth included a funding letter committing the necessary funds to complete the project as well as a copy of its audited financial statements demonstrating that FirstHealth has the funds available to cover the cost of the project. (Jt. Ex. 2 at 160, 667, 669-73; Legarth, Vol. 10 at 1860-61) FirstHealth had an unrestricted balance of \$484,000,000 as of September 30, 2011. (Jt. Ex. 2 at 674; Legarth, Vol. 10 at 1862) Additionally, FirstHealth had \$407,000,000 in the category marked "Assets Limited as to Use," which are accounts available to FirstHealth that may have some restrictions attached to them. (Jt. Ex. 2 at 684; Legarth, Vol. 10 at 1862)

251. Cape Fear did not challenge FirstHealth's ability to fund the project. (Bres Martin, Vol. 7 at 1372)
  
252. The pro forma financial projections included a Form A balance sheet for the entire FirstHealth Hoke facility. (Jt. Ex. 2 at 176; Legarth, Vol. 10 at 1853) The balance sheet is a required form for CON applications and represents only one step in the preparation of the pro formas, with the first step being the income statement and the second being the cash flow statement, which lead to the balance sheet. (Platt, Vol. 12 at 2178)
  
253. The FirstHealth Application also included a Form B statement of revenues and expenses for the entire facility, which includes volumes for the individual components of the entire facility including ED visits, inpatient surgical cases, outpatient surgical cases, inpatient ICU, outpatient imaging, inpatient cases, and observation cases. Although these volumes were not required to be provided, FirstHealth did provide them in the pro formas in order to demonstrate the financial feasibility of the entire facility. (Jt. Ex. 2 at 178; Legarth, Vol. 10 at 1853-54) The assumptions worksheet included in the application shows all of the direct and indirect expenses that would be associated with the entire facility, not just individual service components. (Jt. Ex. 2 at 179; Legarth, Vol. 10 at 1854)
  
254. FirstHealth included a staffing worksheet in its application that shows all of the hospital physicians, their assumed annual salaries, and the total salary expenses for all full-time equivalent ("FTE") employees that would be working at FirstHealth Hoke. (Jt. Ex. 2 at 181-86; Legarth, Vol. 10 at 1855)
  
255. The FirstHealth Application included a statement of cash flow that reflects the initial shortfall in cash flow experienced at the beginning of any operation, which is then incorporated into the working capital needs for the proposed project. (Jt. Ex. 2 at 187-88; Legarth, Vol. 10 at 1855)
  
256. FirstHealth included Forms C, D, and E for its emergency department in the pro forma section of its application. (Jt. Ex. 2 at 189-96) Although these forms are required to be provided only for the affected component of the project, FirstHealth included Forms C, D, and E for essentially all components of the hospital, not just for the affected component of acute care beds. (Legarth, Vol. 10 at 1855-56)
  
257. Form E specifically provided actual historical reimbursements for specific service lines. FirstHealth included in Form E the average reimbursement for procedures because the average reimbursement most accurately reflects what the hospital is getting paid. (*Id.*)
  
258. FirstHealth included Forms C, D, and E, as well as assumptions for those forms for the observation department, inpatient department (including the proposed 28 beds), the ICU department, the surgical department, and imaging department. (Jt. Ex. 2 at 197-239; Legarth, Vol. 10 at 1858-59)
  
259. Page 239 of the FirstHealth Application included specific surgical volume projections for both inpatient procedures and outpatient procedures. Although they were not required to

be provided in the application, they were reasonable and incorporated projections from the 2010 8-bed FirstHealth Hoke application. (Jt. Ex. 2 at 239; Legarth, Vol. 10 at 1958-60)

260. The balance sheet in the FirstHealth Application balanced as the total assets and total liabilities and net worth match. (Jt. Ex. 2 at 177; Platt, Vol. 12 at 2178)
261. Mr. Carter opined that the FirstHealth balance sheet did not balance. (Carter, Vol. 4 at 639, 642) The basis for Mr. Carter's criticism is that the assets on the balance sheet do not subtotal correctly. (Carter, Vol. 4 at 641-42)
262. Specifically, Mr. Carter discerned that the total assets do not sum correctly. On the balance sheet, the assets are shown as \$54,000,000, but when correctly summed, they total \$62,000,000. (Carter, Vol. 4 at 642; Cape Fear Ex. 1156)
263. Thus, FirstHealth understated its assets by \$8 million. (Carter, Vol. 4 at 642)
264. However, Mr. Carter's criticism is not meaningful because it is based on a line item for accumulated depreciation for property, plant, and equipment in the assets section that simply failed to print on the balance sheet or was "hidden." (Legarth, Vol. 10 at 1863; Platt, Vol. 12 at 2179-80)
265. A hidden row on a Microsoft Excel sheet is one that is selected within the program to not show up on a document when printed. Mr. Legarth testified that he merely did not "unhide" the row prior to printing. (Legarth, Vol. 10 at 1866-67)
266. Accumulated depreciation is a means to show that cash has been taken out of an asset so that it can be used for replacement in the future. The line item for depreciation is actually included in the application on the assumption sheet and totals \$1,897,000 in Year 1. This value exactly matches the amount by which Mr. Carter alleges the balance sheet is unbalanced in that year. The same is true for the amounts for each of the three project years. (Jt. Ex. 2 at 180; Legarth, Vol. 10 at 1864-65)
267. Thus, the property, plant, and equipment line is accurate with the exception that accumulated depreciation does not show up on the balance sheet. (Legarth, Vol. 10 at 1865)
268. Moreover, the numbers needed to calculate the accumulated depreciation are included in the FirstHealth Application. (*Id.*)
269. As shown in FirstHealth Exhibit 75W, when the inadvertently hidden line for accumulated depreciation is reflected, it is clear that the cumulative depreciation was the missing line item, and the information to calculate the same was included in the application. This missing line item was merely a clerical error. (FirstHealth Ex. 75W; Platt, Vol. 12 at 2180)

270. The fact that the depreciation line item did not print on the balance sheet is of no consequence. The balance sheet still contains all of the information necessary to ensure the balance sheet does accurately balance. (Platt, Vol. 12 at 2180-81) The balance sheet balances to the dollar. (Legarth, Vol. 10 at 1867)
  
271. Moreover, the alleged balance sheet "error" is in favor of FirstHealth in that it would mean that FirstHealth underestimated its assets by \$8 million.
  
272. Cape Fear's criticism regarding the FirstHealth balance sheet was not included in Cape Fear's comments in opposition to the FirstHealth Application. (Jt. Ex. 1 at 862-864) Thus, FirstHealth had no opportunity to respond to this criticism.
  
273. When Mr. Yakaboski reviewed the balance sheet, the numbers balanced. (Yakaboski, Vol. 14 at 2401). He explained that when he reviews pro formas, including the balance sheet, he does not add every line and column. (Yakaboski, Vol. 14 at 2402)
  
274. Mr. Yakaboski stated that while he did not notice the "error" in the balance sheet until Cape Fear brought it up during the course of the contested case, he heard Mr. Legarth's explanation and found it to be reasonable. (Yakaboski, Vol. 14 at 2402-03)
  
275. Mr. Yakaboski further explained that what he is looking for with respect to the balance sheet is whether the applicant has enough money to fund the project. In the case of the FirstHealth balance sheet, in Year 3, the applicant projected approximately \$54 million in assets, approximately \$716,000 in liabilities, and the capital cost of the project was approximately \$17.5 million. (Yakaboski, Vol. 14 at 2400-01; Jt. Ex. 1 at 160, 177)
  
276. Although Cape Fear's comments did not reference the balance sheet "error," Mr. Yakaboski analogized the testimony about the "error" to comments in opposition:

... [L]et's say Cape Fear had noticed this earlier and put it in the comments. And let's say FirstHealth had responded the way they responded on the stand. I would have found that to be reasonable, a reasonable response, because Cape Fear has commented on other things throughout their comments, and FirstHealth responded.

Another scenario is Cape Fear noticed it and FirstHealth for whatever reason did not put a response to comments in, and then so there was an \$8 million question mark. Well, at first glance, \$8 million--it was a positive \$8 million. They were low. It should have been--instead of being \$40 million and change, it should have been \$48 million and change.

But even if I'd held that worst case scenario against FirstHealth, \$8 million, you have to look at what was going on overall. FirstHealth was projecting assets of \$54 million and change and liabilities of \$716,000. Even if I took \$8 million against them, I'm only down to \$46 million in total assets and \$716,000 in liabilities.

... [W]e find mathematical errors in a lot of applications. And if they are small or de minimis in light of the fact pattern, we move on. We might mention it. So I probably would have mentioned it and moved on, and I would have found it still to be conforming.

(Yakaboski, Vol. 14 at 2403-04)

277. The Agency did not err in its review of the FirstHealth Application by not including the analysis proffered by Mr. Carter. The Agency typically ensures that the balance sheet balances, but it would not be the primary focus of their analysis of a project's financial feasibility. (Platt, Vol. 12 at 2181-82) The balance sheet is the least meaningful part of the financial projections because it is just an accumulation of the information from the income statement and the cash flow statement. (Platt, Vol. 12 at 2181)
278. Ms. Bres Martin also opined that there was a \$7 million "error" in the surgical services Form C of the FirstHealth pro formas. (Bres Martin, Vol. 2 at 278)
279. Again, Cape Fear's criticism is not meaningful. The calculation in the pro forma was intended to take the total projected expenses and divide them by both the inpatient and outpatient surgical volumes. However, the expenses were mistakenly divided by only the inpatient surgical volume. (Legarth, Vol. 10 at 1868; Platt, Vol. 12 at 2182)
280. Merely utilizing the wrong divisor for this particular cell of the worksheet does not impact the financial feasibility of the project because it has nothing to do with the total expenses for the surgical component of the project and is not a required calculation. (Legarth, Vol. 1 at 1869; Platt Vol. 12 at 2182-83)
281. The second to last row on the spreadsheet entitled Total Expense Per Patient Days, Cases, or Procedures is an after-the-fact calculation of the data previously presented. There is nothing in the Agency's model requiring an applicant to calculate its expenses per patient day, case, or procedure. It merely was additional information that Mr. Legarth included on the Excel spreadsheet. (Jt. Ex. 2 at 222; Legarth, Vol. 10 at 1867-68)
282. Thus, this calculation is not an assumption that leads to anything in the financial projections, nor does it alter the expenses associated with the surgical services in the application. It was not a required calculation, but merely an additional detail that was not even necessary to provide in the application. (Legarth, Vol. 10 at 1869-70; Platt, Vol. 12 at 2182-83)
283. The FirstHealth Application included significantly more supporting detail than the information included in the Cape Fear Application. In its application, Cape Fear failed to provide any financial projections specific to the proposed 28 beds. Cape Fear provided no schedules or supporting information for any ancillary services such as its surgical, emergency room, or imaging services. (Platt, Vol. 12 at 2184)

284. The Agency properly concluded that the FirstHealth Application was conforming with Criterion (5).

**Criterion (6)**

285. N.C. Gen. Stat. § 131E-183(a)(6), Criterion (6), states:

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

286. In Ms. Bres Martin's opinion, there was no need for FirstHealth's project under Criterion (3) and therefore, the FirstHealth Application also should have been found non-conforming with Criterion (6). (Bres Martin, Vol. 2 at 281)
287. The documentation of need and projected utilization in the FirstHealth Application were reasonable and supported with assumptions and underlying documentation. (Platt, Vol. 12 at 2186)
288. Based upon the presentation of the utilization projections in the FirstHealth Application, it was clear that it was focused on serving FirstHealth's existing patient base rather than a broad market of patients. (Platt, Vol. 12 at 2187; Jt. Ex. 2 at 106)
289. The FirstHealth Application also made additional conservative assumptions and reductions in its projections in order to factor in the approved 41-bed Hoke Community Medical Center and its services, including an additional emergency department. One example is Step 14 of the need methodology where an assumption for utilization was reduced to specifically reflect the existence of another hospital in the county. (*Id.*; Jt. Ex. 2 at 103)
290. The expansion of FirstHealth Hoke to 36 beds does not duplicate the approved 41-bed Hoke Community Medical Center in Hoke County because the FirstHealth project is focused on serving patients who already are choosing the FirstHealth system for their care. FirstHealth is bringing services closer to where these patients reside, rather than serving patients who might be served by Cape Fear. (Platt, Vol. 12 at 2188)
291. The Agency properly concluded that the FirstHealth Application was conforming with Criterion (6).

**Criterion (13)c.**

292. N.C. Gen. Stat. § 131E-183(a)(13)c., Criterion (13)c., requires the applicant to demonstrate:

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 . . . .

293. Section VI of the FirstHealth Application states that all persons will have access to care at FirstHealth Hoke, regardless of their ability to pay. The application also included information regarding FirstHealth's charity care policies, including its non-discrimination policy and credit and collection policies. (Jt. Ex. 2 at 132-33, App. Exhibits 19 and 27; Legarth, Vol. 10 at 1875-77)
  
294. In Fiscal Year 2011, the last full fiscal year before the FirstHealth Application was filed, the FirstHealth system provided \$33 million in charity care. This equals 7.5% of FirstHealth's net revenue. (Jt. Ex. 2 at 139)
  
295. FirstHealth Hoke projected it would provide approximately \$2.9 million in charity care in 2015 and approximately \$3.6 million in charity care in 2016. This equals 15.2% of FirstHealth Hoke's projected net revenue. (Jt. Ex. 2 at 139; Legarth, Vol. 10 at 1878)
  
296. Bad debt is the amount of a bill that a patient can pay but is unwilling to pay. Bad debt, which is written off and not expected to be collected, is not included in the amount of charity care projected by FirstHealth. In addition to charity care, FirstHealth Hoke projects to have approximately \$2.9 million in bad debt in 2015 and approximately \$3.6 million in bad debt in 2016. This equals 15.2% of FirstHealth Hoke's projected net revenue. (*Id.*)
  
297. FirstHealth included tables with its payor mix projections for the second year of its proposed project for the entire FirstHealth Hoke facility, as well as the two components of the hospital impacted by the expansion, general inpatient services, and ICU services. (Jt. Ex. 2 at 143-144; Legarth, Vol. 10 at 1879)
  
298. The assumptions for this information were taken from the historical information from patients from the four-county service area who had historically received services at FirstHealth Moore. These assumptions are accurate, reasonable, and not inflated. (Legarth, Vol. 10 at 1879-80)
  
299. This information provided in the FirstHealth Application demonstrates that the elderly and medically-underserved populations will receive care at FirstHealth Hoke. (Legarth, Vol. 10 at 1879, 1882)
  
300. Obstetrical services tend to increase the Medicaid payor mix. (Bres Martin, Vol. 9 at 1626) FirstHealth did not choose to offer obstetrical services at FirstHealth Hoke. There is no requirement in the CON Law or the SMFP that would require a community hospital to offer obstetrical services. Moreover, FirstHealth recognized that extensive obstetrical services currently exist at FirstHealth Moore and Cape Fear including neonatal intensive care units. Cape Fear's Hoke Community Medical Center proposed to provide obstetrical services and is located in close proximity to FirstHealth Hoke. As such, the need for



obstetrical services is being met by the existing and approved providers. (Legarth, Vol. 10 at 1881)

301. Ms. Bres Martin has worked on community hospital projects that did not propose obstetrics, and she did not have any problem with that. (Bres Martin, Vol. 7 at 1260-61) Mr. Carter also has worked on community hospital applications that did not propose obstetrics. (Carter, Vol. 4 at 731-32) It is within the discretion of the hospital whether to offer obstetrics. (Bres Martin, Vol. 7 at 1262)
302. FirstHealth's projected payor mix and the basis for the projected number of patients and patient days by payor is reasonable and accurately reflects the needs of the market. (Platt, Vol. 12 at 2191)
303. Ms. Platt reviewed documentation included in the application with regard to FirstHealth's policies to ensure that all patients, including the elderly and the medically-underserved, would be accepted at FirstHealth Hoke. Based on that information, Ms. Platt determined that the Agency correctly found FirstHealth to be conforming with Criterion (13)c. (*Id.*)
304. A large portion of the FirstHealth patient mix will be Medicare patients. The FirstHealth Application also contains documentation of its policies and procedures to ensure that all patients, including the elderly and medically-underserved, will receive care at FirstHealth. (*Id.*)
305. Ms. Bres Martin testified that FirstHealth should have been found non-conforming with Criterion (13)c.. Her opinion regarding Criterion (13)c. is twofold. First, Ms. Bres Martin stated that FirstHealth should have been found non-conforming with Criterion (13)c. for the reasons she previously articulated with respect to Criterion (3a). Second, Ms. Bres Martin stated that FirstHealth incorrectly based its projected payor mix on FirstHealth Moore's payor mix for treating patients in its four-county service area. Ms. Bres Martin believes that the amount of Medicaid and self-pay patients that FirstHealth Hoke will experience will be greater than what FirstHealth Moore experiences in treating patients from the four-county service area. (Bres Martin, Vol. 2 at 282-85)
306. Ms. Bres Martin opined that FirstHealth Hoke's Medicaid percentage should have been 13%. FirstHealth Hoke projects 12.5% Medicaid for the hospital as a whole, as shown on page 143 of the FirstHealth Application. FirstHealth Hoke projects 10.4% Medicaid for the inpatient services only and 10.8% Medicaid for the ICU. (Bres Martin, Vol. 7 at 1391-92; Jt. Ex. 2 at 143-44)
307. Ms. Bres Martin is not aware of anything that would have required FirstHealth to analyze Criterion (13)c. the way she would have. (Bres Martin, Vol. 7 at 1394)
308. Section VI of the FirstHealth Application deals with access by underserved populations, including FirstHealth's existing and proposed charity care. Page 143 of the FirstHealth Application shows that in Year 2 of the project, FirstHealth proposes that 6.6% of its patients will be self-pay/charity, and 12.5% will be Medicaid. (Jt. Ex. 2 at 143) Ms.

Bres Martin does not question anything in Section VI other than the projected payor mix. Ms. Bres Martin believes FirstHealth intends to serve lower-income patients. (Bres Martin, Vol. 7 at 1386-88)

309. The Agency properly concluded that the FirstHealth Application was conforming with Criterion (13)c..

**Criterion (18a)**

310. N.C. Gen. Stat. § 131E-183(a)(18a), Criterion (18a), states:

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

311. Ms. Bres Martin opined that FirstHealth should have been found non-conforming with Criterion (18a) because its project is not needed and does not increase competition. (Bres Martin, Vol. 2 at 286)
312. As for the need for the FirstHealth project, *see* discussion under Criterion (3), *supra*.
313. Adding 28 acute care beds at FirstHealth Hoke will increase competition in Hoke County. First, it will help to balance the size of the Cape Fear and FirstHealth hospitals in Hoke County. FirstHealth would have a total of 36 acute care beds and Cape Fear has already received approval for 41 beds. (Platt, Vol. 12 at 2194)
314. Second, adding 28 beds to the FirstHealth Hoke Hospital will increase the number of beds that FirstHealth has to compete with Cape Fear. (*Id.*)
315. Ms. Bres Martin opined that competition is increased when there is a documented need for a project and when a new provider is coming into a market. (Bres Martin, Vol. 2 at 287-88)
316. Criterion (18a) is applicable to all CON reviews, regardless of whether it would result in a new provider coming into the market. (Legarth, Vol. 10 at 1888)
317. As Ms. Platt testified, competition itself is created by a variety of factors and is not just limited to new providers entering a market. For example, the availability of a service and a change in capacity in a market can lead to increased competition. (Platt, Vol. 12 at 2195)

318. Quality is an important element of Criterion (18a). FirstHealth demonstrated that it would continue to offer quality care based upon its track record, policies, and procedures included in the Application. (*Id.*)
319. In addition, the FirstHealth Application is cost effective and will spread costs over a greater number of beds, thus enhancing the cost effectiveness of the services offered there. (*Id.*)
320. In response to Question V.7. in the application, FirstHealth stated that "[FirstHealth Hoke] is a true alternative to [Cape Fear] for service area residents who desire a choice in their healthcare provider." FirstHealth then identified the gains from increased healthcare market competition:
1. Lower charges to third-party insurers and patients
  2. A greater discipline on hospitals to keep costs down
  3. Improvements in technology with positive effects on care and outcomes
  4. A greater variety of services (giving more choice)
  5. A faster pace of innovation of care
  6. Improvements to the quality of care for patients
  7. Better performance and quality information available allowing patients to make more informed choices
  8. Create jobs

(Jt. Ex. 2 at 120) The FirstHealth Application stated that "[FirstHealth Hoke] will foster competition by promoting the cost effectiveness, quality, and access to services in Hoke County." (Jt. Ex. 2 at 121)

321. In response to Question V.7. in the application, FirstHealth provided information regarding its safety and quality policies which are a part of the policies for the larger FirstHealth of the Carolinas healthcare system, including its accreditations and recent accolades. FirstHealth discussed the more than two dozen health insurance plans accepted by FirstHealth Hoke as well as the coordination with other health care providers to ensure the needs of their patients are being met. (Jt. Ex. 2 at 121-28; Legarth, Vol. 10 at 1885-86)
322. The Agency properly concluded that the FirstHealth Application was conforming with Criterion (18a).

#### **Other Review Criteria**

323. The Agency found that N.C. Gen. Stat. § 131E-183(a)(9), Criterion (9), and N.C. Gen. Stat. § 131E-183(a)(10), Criterion (10), were not applicable to FirstHealth in this review. Cape Fear did not challenge these findings.
324. The Agency properly found that Criterion (9) and Criterion (10) were not applicable to the FirstHealth Application.

325. The Agency found that the FirstHealth Application was conforming with N.C. Gen. Stat. § 131E-183(a)(7), Criterion (7), N.C. Gen. Stat. § 131E-183(a)(8), Criterion (8), N.C. Gen. Stat. § 131E-183(a)(12), Criterion (12), N.C. Gen. Stat. § 131E-183(a)(13)(a), (b) and (d), Criteria (13)a., (13)b. and (13)d., N.C. Gen. Stat. § 131E-183(a)(14), Criterion (14), and N.C. Gen. Stat. § 131E-183(a)(20), Criterion (20). Cape Fear did not challenge these findings.
326. The Agency properly found that the FirstHealth Application was conforming with Criterion (7), Criterion (8), Criterion (12), Criteria (13)a., b., and d., Criterion (14), and Criterion (20).

**Administrative Regulations**

327. Cape Fear alleged that the FirstHealth Application should have been found non-conforming with: 10A N.C.A.C. 14C .1203; 10A N.C.A.C. 14C .3802(b)(5), 10A N.C.A.C. 14C .3803(a) and (b), 10A N.C.A.C. 14C .3805(d).
328. Ms. Bres Martin opined that the FirstHealth Application should have been found non-conforming with the rule at 10A N.C.A.C. 14C .3802(b)(5) which requires an application to include: “the projected number of inpatient days of care to be provided in the total number of licensed acute care beds in the facility, by county of residence, for each of the first three years following completion of the proposed project, including all assumptions, data, and methodologies.” (Jt. Ex. 1 at 2755; Bres Martin, Vol. 2 at 289)
329. Ms. Bres Martin's opinion that FirstHealth should have been found non-conforming with 10A N.C.A.C. 14C .3802(b)(5) was based upon or merely derivative of her opinion that FirstHealth was non-conforming with Criterion (3). Ms. Bres Martin offered no additional bases for her opinion that FirstHealth should have been found non-conforming with 10A N.C.A.C. 14C .3802(b)(5). (Bres Martin, Vol. 2 at 289; Vol. 7 at 1399)
330. The information required under 10A N.C.A.C. 14C .3802(b)(5) was provided on page 107 of the FirstHealth Application in the final step (Step 18) of the need methodology. (Jt. Ex. 2 at 107; Legarth, Vol. 10 at 1889-90)
331. Ms. Platt agreed with the Agency's finding that FirstHealth was conforming with 10A N.C.A.C. 14C .3802(b)(5). This rule requires that the applicant project the total number of inpatient days of care and provide its assumptions, data, and methodologies. FirstHealth provided all of that information and presented a reasonable projection of utilization. (Platt, Vol. 12 at 2165)
332. Ms. Bres Martin opined that the FirstHealth Application should have been found non-conforming with the performance standards for acute care beds under 10A N.C.A.C. 14C .3803(a) and (b). (Bres Martin, Vol. 2 at 289-90; Vol. 7 at 1400; Jt. Ex. 1 at 2760-62)
333. Again, Ms. Bres Martin's opinion that FirstHealth should have been found non-conforming with 10A N.C.A.C. 14C .3803(a) and (b) was derivative of her opinions

- regarding FirstHealth's alleged non-conformity with Criterion (3). Ms. Bres Martin offered no additional bases for her opinion that FirstHealth should have been found non-conforming with 10A N.C.A.C. 14C .3803(a) and (b) (Bres Martin, Vol. 2 at 289-90; Vol. 7 at 1400)
334. The rule at 10A N.C.A.C. 14C .3803(a) requires the facility to meet a certain target occupancy based upon the facility's average daily census. On page 104 of the FirstHealth Application, Step 16 of the need methodology, FirstHealth demonstrates that its occupancy rate is projected to be 73.8%, which is higher than the 66.7% performance standard required by 10A N.C.A.C. 14C .3803(a). (Jt. Ex. 2 at 104; Legarth, Vol. 10 at 1891)
  335. With respect to the rule at 10A N.C.A.C. 14C .3803(b), the applicant is required to provide the assumptions and data supporting its projections, including inpatient utilization and average daily census. 10A N.C.A.C. 14C.3803(b).
  336. The need methodology provided in the FirstHealth Application detailed each step and included all of the required information used to make those projections and calculations. (Jt. Ex. 2 at 93-107; Legarth, Vol. 10 at 1892)
  337. Ms. Platt opined that the Agency correctly found FirstHealth conforming with the rules at 10A N.C.A.C. 14C .3803(a) and (b) because FirstHealth exceeded the performance standard and provided clear assumptions in support of its projections. (Platt, Vol. 12 at 2163-64)
  338. Ms. Bres Martin further opined in her testimony that FirstHealth should have been found non-conforming with 10A N.C.A.C. 14C .3805(d) which provides: "An applicant proposing to develop new acute care beds shall document the availability of admitting physicians who shall admit and care for patients in each of the major diagnostic categories to be served by the applicant." (Jt. Ex. 1 at 2764; Bres Martin, Vol. 2 at 291-92; Vol. 7 at 1400)
  339. Ms. Bres Martin alleged that FirstHealth projected to perform vascular procedures at FirstHealth Hoke but did not include vascular surgeons in its medical staff list. (Bres Martin, Vol. 2 at 291-92; Vol. 7 at 1400-01) However, she acknowledged on cross examination that general surgeons can perform vascular procedures and that she was aware of no evidence that FirstHealth general surgeons would not perform vascular procedures. (Bres Martin, Vol. 7 at 1401; Legarth, Vol. 10 at 1893; Platt, Vol. 12 at 2189)
  340. The medical staff list for FirstHealth Hoke lists 5 general surgeons. (Jt. Ex. 2 at 157)
  341. Ms. Bres Martin further acknowledged that the FirstHealth Application presented evidence that vascular surgeons supported the proposed project and represented that FirstHealth Hoke would have an open medical staff. This means any qualified individual

could seek staff privileges to perform procedures there. (Bres Martin, Vol. 7 at 1401-1402; Jt. Ex. 2 at 112; Legarth, Vol. 10 at 1893-94)

342. FirstHealth provided substantial documentation regarding the physicians expected to support the project and practice at FirstHealth Hoke, which reasonably aligned with the services proposed. There is no requirement that an applicant document each physician in relation to the types of services it proposes to offer. (Platt, Vol. 12 at 2188-89)
  
343. Exhibit 44 of the FirstHealth Application included numerous letters of support and letters of referral from physicians and healthcare providers, non-healthcare providers, and residents of the service area. (Jt. Ex. 2 at 724-823; Legarth, Vol. 10 at 1894) For example, Exhibit 44 included a letter from Dr. Atkinson, a vascular specialist, who stated "I will accept new patients who are referred to my practice by physicians serving the community hospital." (Jt. Ex. 2 at 725; Legarth, Vol. 10 at 1895)
  
344. Exhibit 44 included letters from vascular specialist physicians Dr. Berman and Dr. Albrecht committing to accept new patients referred to their practice by physicians serving FirstHealth Hoke. (Jt. Ex. 2 at 726, 729; Legarth, Vol. 10 at 1895-96)
  
345. Ms. Bres Martin opined that the Agency should have found the FirstHealth Application non-conforming with 10A N.C.A.C. 14C .1203(a)-(b), the performance standards applicable to proposals for new or expanded intensive care services. (Bres Martin, Vol. 2 at 292-93; Jt. Ex. 1 at 2767-68)
  
346. Ms. Bres Martin's opinions with respect to this rule were entirely derivative of her testimony with respect to Criterion (3) and her opinions that FirstHealth's projections were "incorrect and overstated." (Bres Martin, Vol. 2 at 293; Vol. 7 at 1403) Ms. Bres Martin offered no other bases for her opinion that the FirstHealth Application should have been found non-conforming with 10A N.C.A.C. 14C .1203(a)-(b). (*Id.*)
  
347. The FirstHealth Application included the projected daily census for ICU patients and a proposed occupancy rate of 63.8%, which is higher than the 60% occupancy rate required by the performance standard. FirstHealth also included detailed assumptions to show how this data was calculated. (Jt. Ex. 2 at 105; Legarth, Vol. 10 at 1897-98)
  
348. Ms. Platt testified that, based on the documentation included in the FirstHealth Application, her analysis of the projection methodology and assumptions, the underlying data, and testing some of those assumptions against the assumptions made by Cape Fear in its 41-bed Hoke Community Medical Center application, FirstHealth is consistent and conforming with performance standards in 10A N.C.A.C. 14C .1203(a)-(b). (Platt, Vol. 12 at 2157)
  
349. Based on the findings of fact set forth above, specifically with reference to Criterion (3), the Agency properly found that the FirstHealth Application was conforming with 10A N.C.A.C. 14C .1203, 10A N.C.A.C. 14C .3802(b)(5), 10A N.C.A.C. 14C .3803(a) and (b), and 10A N.C.A.C. 14C .3805(d).

350. The Agency found that the FirstHealth Application was conforming with the regulations at: 10A N.C.A.C. 14C .1202, .1204, .1205, .3802(a), .3802(b)(1)-(4), (6)-(12), .3802(c), .3804, and .3805(a)-(c) and (e). Cape Fear did not challenge these findings.
351. The Agency properly found that the FirstHealth Application was conforming with the regulations at: 10A N.C.A.C. 14C .1202, .1204, .1205, 14C .3802(a), .3802(b)(1)-(4), (6)-(12), .3802(c), .3804, and .3805(a)-(c) and (e).

**Comparative Analysis**

352. There is no statute or rule that directs the Agency as to what factors it should consider in a particular comparative analysis. (Smith, Vol. 3 at 506)
353. There are no statutes or rules that provide any guidance to the Agency as to how the Agency should apply the comparative factors it utilizes in a review. (Smith, Vol. 3 at 507)
354. The Agency utilized the following comparative factors in this review, each addressed in turn below: Geographic Accessibility, Access by Underserved Groups, Demonstration of Need, Financial Feasibility, Competition, Coordination with Existing Healthcare System, Community Support, Revenues, Operating Expenses, and Quality. (Jt. Ex. 1 at 2770-76)
355. Mr. Yakaboski explained that he had been the Project Analyst in the 2011 65-bed review and that for the most part, in the 28-bed review, the Agency decided to use the same comparative factors that had been used in the 65-bed review. (Yakaboski, Vol. 14 at 2406) The Agency was not, however, limited to using only the comparative factors that were used in the 65-bed review. (Yakaboski, Vol.14 at 2406-07)
356. For example, the Agency added competition as a comparative factor in the 28-bed review. This factor was not used in the comparative analysis of the 65-bed applications in 2011. (Jt. Ex. 1 at 2646-50; 2770-76)
357. Mr. Yakaboski explained, "[a]nd in this case competition really stood out for the disparity of acute care beds between the two applicants, and the two proposed projects. So that's why competition is there." (Yakaboski, Vol. 14 at 2408)
358. The Agency makes its own determination as to the factors it will use in a comparative analysis. The factors do not have to be the same from review to review; for example, the Agency was not required in the 2012 28-bed review to use the same comparative factors it used in the 2011 65-bed review. (Bres Martin, Vol. 8 at 1412)
359. There is no minimum number of comparative factors for which an applicant must be deemed superior in order to be chosen as the approved applicant. Even one factor is sufficient to justify the Agency's approval based on its analysis. (Bres Martin, Vol. 8 at 1412-13)

360. The Agency found FirstHealth to be the more effective alternative than Cape Fear with respect to three factors: Geographic Accessibility, Competition, and Quality. (Jt. Ex. 1 at 2770-76) The Agency concluded that "the application submitted by FirstHealth is the most effective alternative proposed in this review for the development of 28 acute care beds in the Cumberland-Hoke Multi-County Acute Care Bed Service Area and is approved." (Jt. Ex. 1 at 2776)
361. Ms. Platt agreed with the Agency's decision to find FirstHealth comparatively superior to Cape Fear regarding Geographic Accessibility, Competition, and Quality. She summarized her opinions regarding the comparative analysis in a chart identified as FirstHealth Exhibit 75AH. (Platt, Vol. 12 at 2205-06; FirstHealth Ex. 75AH)

**Geographic Accessibility**

362. Geographic Accessibility is a comparative factor that the Agency has utilized in virtually every comparative analysis and can be one of the key determining factors of comparative superiority. (Smith, Vol. 3 at 506; Yakaboski, Vol. 14 at 2410)
363. There is no statute or rule that directs the CON Section how to apply the comparative factor of Geographic Accessibility in its review and analysis. (Smith, Vol. 3 at 507)
364. In its analysis, the Agency identified the number of existing and approved acute care beds in Cumberland County as well as in Hoke County and the location of those beds within each county. Cumberland County has 555 acute care beds (490 existing beds at the Cape Fear Owen Drive Campus plus 65 approved beds at the Cape Fear North campus). Hoke County has 49 acute care beds (41 approved beds at the Cape Fear Hoke Community Medical Center plus 8 approved beds at the FirstHealth Hoke Community campus). (Jt. Ex. 1 at 2770; Smith, Vol. 3 at 507)
365. The Agency also calculated the current ratio of existing and approved acute care beds to the population in Cumberland County and Hoke County based upon FY 2016 population data. (Smith, Vol. 3 at 507)
366. The Agency determined that the current ratio of beds to population in Cumberland County is 1 acute care bed to every 608 people. The current ratio of beds to population in Hoke County is 1 acute care bed to every 1,132 people. (Jt. Ex. 1 at 2771)
367. If the proposed 28 acute care beds at issue are awarded to FirstHealth, the total number of approved acute care beds in Hoke County would increase to 77 beds. The ratio of beds to population in Hoke County would then decrease to 1 acute care bed for every 720 people. (Jt. Ex. 1 at 2771; Smith, Vol. 3 at 508) Thus, the discrepancy between the beds to population ratios in Cumberland and Hoke County would decrease significantly if the beds are awarded to FirstHealth and placed in Hoke County.
368. Cape Fear did not dispute the accuracy of these calculations. (Bres Martin, Vol. 8 at 1418)



369. Nothing in the CON Law precluded the use of a beds-per-1,000-population ratio in its comparative analysis. There is no case from either the North Carolina Court of Appeals or the North Carolina Supreme Court that precludes the use of a beds-per-1,000-population ratio in its comparative analysis. (Bres Martin, Vol. 8 at 1425)
370. Ms. Bres Martin opined that the Agency should have adjusted for in-migration and acuity in calculating an acute care beds per 1,000 population ratio. (Cape Fear Ex. 1135; Bres Martin, Vol. 8 at 1426)
371. Ms. Bres Martin analyzed Geographic Accessibility six different ways, but the Agency was not required to do so. (Bres Martin, Vol. 8 at 1436) There is no statute, rule, or court decision that would require the Agency to analyze Geographic Accessibility in the manner endorsed by Ms. Bres Martin. (Smith, Vol. 3 at 510, 556-57; Platt, Vol. 12 at 2214) Ms. Bres Martin admitted that there is no authority requiring Geographic Accessibility to be analyzed in the way she would have analyzed it. (Bres Martin, Vol. 8 at 1438)
372. Moreover, the Agency chose to use a straightforward ratio of beds to population rather than attempting to make adjustments for acuity, in- or out-migration or other factors. As Mr. Smith testified:

I felt in this case where you were looking at a community with no operational hospital and a community with an established medical center that the simple comparison was actually more effective and more telling than an elaborate mechanism that tried to weigh all sorts of factors, realizing that you have to be very—when you start weighing factors, you have to include all the factors and sometimes it's easy to leave one out, so that just a plain carte blanche what is the bed ratio in this community that has no operational hospital today which has two under development and where one proposes more beds as compared to a hospital that is proposing to build a satellite campus that is a tertiary facility.

On the other hand, we don't know, you know, to what level of care those beds are going. They're not ICU beds. We know that. So they're not going to the most acutely ill patient because special rules are not applied. But we don't know if they're going to be—at what level of acuity the patients in these specific beds are going.

So it was just as easy to do a simple comparison. I understand sometimes in dealing with complex problems, simple solutions are the better.

(Smith, Vol. 3 at 557-58)

373. An analysis does not need to be complicated in order for it to be effective. The more variables that are included in an analysis, the more opportunity exists for distortion in the analysis. (Legarth, Vol. 10 at 1900)

374. Ms. Bres Martin opined that in its geographic access analysis, the Agency should have considered that FirstHealth Hoke is not going to offer the range of services offered by Cape Fear. (Bres Martin, Vol. 8 at 1425). Ms. Bres Martin acknowledged, however, the beds did not have to be awarded to a tertiary facility. (*Id.*) The SMFP did not specify that the beds should go to a tertiary or community hospital. (Platt, Vol. 12 at 2209)
375. Mr. Smith further testified that the services provided by facilities change over time and hospitals often add services that once were not offered. (Smith, Vol. 3 at 456-57)
376. Mr. Smith also testified that the Agency was cognizant of the comments in opposition filed by Cape Fear alleging that there was a need for only 50.4 acute care beds in Hoke County. In fact, the Agency addressed this issue in its analysis of the applications under Criterion (6). (Smith, Vol. 3 at 549-61) However, the Agency noted in the Findings that based on the projections in the Cape Fear Hoke 41-bed hospital application, Hoke County patients would utilize only 36.5% or 15 of the approved beds. Based on projections in the FirstHealth applications, Hoke residents would utilize only 25 of the approved 8 and proposed 28 beds at FirstHealth Hoke Community Hospital, for a total of 40 beds between the two facilities. (Jt. Ex. 1 at 2736-37)
377. Further, Cape Fear projected that nearly 60% of its patients at the approved 41- bed Hoke hospital would come from Cumberland County, which equates to 24 of the approved beds at that facility. (*Id.*)
378. Moreover, Mr. Smith testified that he was present for the testimony of Ms. Bres Martin which included numerous detailed charts of her opinions with respect to appropriate acuity and in-migration adjustments for the geographic accessibility analysis. However, Ms. Bres Martin's data failed to exclude the 60% of Cumberland County residents that were projected to seek care at Cape Fear's 41-bed Hoke County hospital. (Smith, Vol. 3 at 461) Instead, Ms. Bres Martin's analyses incorrectly treated those 60% of Cumberland County residents as though they were Hoke County residents. (*Id.*)
379. Ms. Bres Martin's analyses did not include the military population of Cumberland County and Womack Army Hospital's capabilities of dealing with that population in her analysis. (Smith, Vol. 3 at 462; Bres Martin, Vol. 8 at 1430)
380. The Agency concluded, therefore, that the best analysis was a simple analysis because:
- [T]here are no perfect analyses in this because for one thing you're dealing with projections of population and projections of patient utilization and we're dealing with various unknowns including the effect of the Affordable Care Act and the effect of continued military base alignment in this particular service area. So there are so many—there are so many variables to consider, at some point you're better off keeping the analysis fairly simple and straightforward and realizing that it's not a perfect world, but to provide a – at least a framework for where the beds are now and

where the beds would be needed in the future in order to balance and improve accessibility for the residents of Hoke County.

(Smith, Vol. 3 at 462-63)

381. Mr. Smith further testified that the 50.4 beds calculated by Cape Fear as the purported bed need in Hoke County was not utilized as a "cap" for Hoke County because the approved hospitals in Hoke County are proposing to serve a very large percentage of their patients from contiguous counties. Applying such a cap to Hoke County would be arbitrary in this context given the large number of patients, especially at the approved Cape Fear 41-bed Hoke hospital, that would come from Cumberland County. (Smith, Vol. 3 at 465)
382. Ms. Platt reviewed the Agency's geographic access analysis and found it to be reasonable. As she testified:

... The decision here is really whether there should be 28 beds approved in Hoke County or in Cumberland County from a geographic standpoint. And so in my opinion a bed to population ratio is a reasonable way to assess the area that might need more beds. And the bed to population analysis also takes into consideration the population growth that's expected to occur in the counties. And as I mentioned earlier, the population is growing more rapidly in Hoke County than in Cumberland County.

(Platt, Vol. 12 at 2207)

383. An analysis does not need to be more complicated than the one the Agency presented because it becomes almost impossible to control for everything that might influence how the beds are utilized. (Platt, Vol. 12 at 2207-08)
384. Ms. Platt disagreed with Ms. Bres Martin's opinion that the Geographic Accessibility analysis needed to be adjusted for the acuity of patients' illnesses. Ms. Platt noted that it was not possible to tell from the Cape Fear Application the service lines for which Cape Fear would use the 28 beds. Ms. Platt attempted to recreate Ms. Bres Martin's acuity adjustment analysis in Cape Fear Exhibit 1135 and was not able to do so. (Platt, Vol. 12 at 2208-10)
385. Ms. Platt opined that if patient acuity were factored into the Geographic Accessibility analysis, that would tend to favor tertiary providers because more patients can use tertiary facilities. Favoring tertiary facilities does not always enhance Geographic Accessibility. (Platt, Vol. 12 at 2211)
386. One of the basic principles of the CON Law is to ensure that access is available not only in large, urban areas but also in rural communities that may have fewer health care

services. Hoke County is more rural than Cumberland County. (Platt, Vol. 12 at 2212-13; N.C. Gen. Stat. § 131E-175(3) and (3a))

387. The Agency properly found that the FirstHealth Application was the more effective alternative with respect to geographic access.

**Competition**

388. In its comparative analysis, the Agency determined that Cape Fear and its subsidiaries currently control 596 of the 604 existing or approved acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. Were the Agency to approve the 28 acute care beds for placement at Cape Fear's Owen Drive campus as proposed, Cape Fear would control 624 (or 98.7%) of the 632 existing or approved acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. (Jt. Ex. 1 at 2773; Smith, Vol. 3 at 523)

389. As Mr. Yakaboski testified:

... One applicant had control of a tremendous amount of the beds already in that service area. And if Cape Fear was awarded 28 more beds, that would have just been a lopsided disparity between beds within that service area. And competition is-- one of the reasons the criteria look at it is competition is believed to be beneficial.

So to me it was a--from a competition standpoint it was very obvious that on that particular factor that FirstHealth would have been the most effective alternative. I really could not make an argument that Cape Fear would be the most effective alternative, nor could I make an argument that it would be neutral.

(Yakaboski, Vol. 14 at 2410)

390. Mr. Yakaboski went on to state:

From a competition standpoint, which is the most effective alternative? So you have your four corners. Within the four corners, you have one outfit, one applicant, had eight approved acute care beds. The other outfit has 596 acute care beds.

To me it was a no-brainer from a--I mean it really took about three seconds from a competition standpoint in terms of acute care beds, competition only, that the folks with the eight acute care beds were the most effective alternative. ...

(Yakaboski, Vol. 14 at 2557)

391. FirstHealth controls only 8 (1.3%) of the 604 existing or approved acute care beds in the Cumberland-Hoke service area. The Agency determined in its analysis that if FirstHealth were approved for the proposed 28 acute care beds, it would then control 36 (or 5.7%) of the 632 beds in the Cumberland-Hoke Acute Care Bed Service Area. (Jt. Ex. 1 at 2773; Smith, Vol. 3 at 523)
392. Thus, with regard to the comparative factor of Competition, the Agency found FirstHealth to be the most effective alternative. (Jt. Ex. 1 at 2773)
393. Ms. Bres Martin opined that Competition should not have been considered as a comparative factor in this review. (Bres Martin, Vol. 8 at 1446-47) Ms. Bres Martin testified that there is already Competition for patients in Hoke County and that the patients FirstHealth is proposing to serve are patients it currently serves, so Competition is not enhanced by awarding the beds to FirstHealth. (Bres Martin, Vol. 8 at 1447)
394. Ms. Bres Martin also noted that a new provider was not coming into the market in this review. Ms. Bres Martin does not believe, however, that Competition is only relevant when a new provider is entering a market. (Bres Martin, Vol. 8 at 1449)
395. In Ms. Bres Martin's view, Competition is only relevant when there is a need for the services proposed, and in this case, Ms. Bres Martin does not believe that any additional beds are needed in Hoke County. (*Id.*)
396. There are no specific statutes or rules or court decisions that govern how the Agency must consider or apply the factor of Competition in a comparative analysis. (Smith, Vol. 3 at 523-24) Ms. Bres Martin could not cite any court opinion to demonstrate that the Agency was wrong to consider Competition as a comparative factor in this review or any authority to show that the Agency conducted the comparative analysis of Competition incorrectly. (Bres Martin, Vol. 8 at 1450)
397. Ms. Platt agreed with the Agency's decision that FirstHealth was the more effective alternative with respect to Competition. (Platt, Vol. 12 at 2216-17) She testified:
- ... Having more capacity to offer a service and therefore the potential to increase your market share to balance that of your competitor I think is also an important consideration in regards to competition.
- So you know, I think, as I said before, the 28 beds is not a huge number, but it certainly helps balance out the level of competition in the market regardless of whether there's a new entrant or not.
- (Platt, Vol. 12 at 2218)
398. The Agency properly found that the FirstHealth Application was the more effective alternative with respect to Competition.

**Quality**

399. In its Comparative Analysis, the Agency found that:

“CFVMC has [*sic*] did not demonstrate that it would provide quality care. In contrast, FHCH did adequately demonstrate that it would provide quality care. See discussion in Criterion (20) which is incorporated hereby as if fully set forth herein. Therefore, with regard to quality of care, the application submitted by FHCH is a more effective alternative than the application submitted by CFVMC.”

(Jt. Ex. 1 at 2775)

400. There is no statute or rule that directs the Agency how to evaluate the factor of Quality in a comparative analysis. (Smith, Vol. 3 at 534)
401. There is no statute or rule that directs the Agency regarding the information it can consider in evaluating the factor of Quality in a comparative analysis. (*Id.*)

**Quality Inquiry**

402. Azzie Conley is Chief of the Licensure and Certification Section. The Licensure and Certification Section is the State Agency that oversees staff who are responsible for conducting quality of care surveys to ensure that providers are in compliance with state licensure and/or CMS federal regulations. (Conley, Vol. 9 at 1680-81)
403. The Licensure and Certification Section and the federal Centers for Medicare and Medicaid Services ("CMS") have a contractual relationship. The Licensure and Certification Section is a member of the state agency that is contracted by CMS to conduct Medicare surveys in order to determine a facility's compliance with those requirements. (Conley, Vol. 9 at 1685)
404. The Joint Commission on Accreditation of Health Care Organizations (the "Joint Commission" or "TJC") is an organization with which licensed hospitals and other providers can voluntarily contract. The Joint Commission conducts a variety of surveys of those facilities with whom it is contracted. (*Id.*)
405. An organization may get approval from CMS as a "deemed" provider. If a facility is accredited by an accredited organization, such as The Joint Commission, that facility is "deemed" by CMS to be in compliance with the Medicare Conditions of Participation. (Conley, Vol. 9 at 1686)
406. The Licensure and Certification Section regularly receives and responds to requests from the CON Section regarding the quality of care provided at existing healthcare facilities. (Conley, Vol. 9 at 1682, 1686-87)

407. Included in the Agency File is correspondence between Mr. Yakaboski and Ms. Conley in which Mr. Yakaboski asked in a "Quality Check:" "Was the facility [Cape Fear] in compliance with all applicable Medicare Conditions of Participation during the last 18 months?" (Jt. Ex. 1 at 1377)
408. Mr. Smith testified that this "Quality Check" form of inquiry is supposed to be used in all reviews, except for nursing home and dialysis reviews, which have slight variations in their inquiry forms. (Smith, Vol. 3 at 536; Conley, Vol. 9 at 1688)
409. On December 3, 2012, Ms. Conley contacted Rosemary Robinson with CMS via email and inquired whether Cape Fear was "considered to be non-deemed?" (Jt. Ex. 1 at 1382; Conley, Vol. 9 at 1691) Ms. Robinson responded via email that Cape Fear was "[c]onsidered non-deemed until meet all conditions of participation." (*Id.*; Conley, Vol. 9 at 1692)
410. Ms. Conley was seeking clarification as to whether Cape Fear was considered to be accredited by the accrediting organization and deemed to be in compliance with the Medicare Conditions of Participation, or if not, whether Cape Fear was considered to be "non-deemed, which means they [Cape Fear] would not be considered to be in compliance with the Medicare Conditions of Participation." (Conley, Vol. 9 at 1691)
411. According to Mr. Smith's handwritten note in the Agency File, Mr. Smith "[c]alled and spoke with Rosemary Robinson after lunch on Dec. 4, 2012. She confirmed the email message. All conditions have not been met. Waiting for survey to be done in early 2013." (Jt. Ex. 1 at 1382; Smith, Vol. 3 at 541-42)
412. Mr. Smith testified that when a hospital "get[s] into difficulty with Criterion (20) issues, we look for a hospital to have a full validation survey and return to deemed status by The Joint Commission, which is integral to their relationship with CMS." (Smith, Vol. 3 at 542) The CON Section was aware that Cape Fear had a survey in August 2012, but did not know if Cape Fear was considered in deemed status by the Joint Commission and CMS. The email and telephone communication with Ms. Robinson "confirmed that they [Cape Fear] had not been given the deemed status." (*Id.*)
413. The Agency included the same inquiry with respect to FirstHealth in the Agency File. (Jt. Ex. 1 at 1381) In its response, the Licensure and Certification Section noted that there had been no incidents in the prior 18 months at FirstHealth for which any sanctions or penalties related to quality of care were imposed by the State on the facility. The Licensure and Certification Section further informed the CON Section that FirstHealth was in compliance with all applicable Medicare Conditions of Participation during the 18 months prior to the inquiry. (Jt. Ex. 1 at 1381; Smith, Vol. 3 at 538)
414. The FirstHealth Application included its quality and safety utilization policies, a listing of it numerous certification, licensures, and quality-related awards received in the last four years. (Jt. Ex. 2 at 33-34; Legarth, Vol. 10 at 1916-17)

Cape Fear Survey Results

415. Dr. Christopher Aul, Cape Fear's Chief Medical Officer, testified that quality surveys are conducted

... to assure that the processes of care and the structure of care is provided in as safe a way and with the highest quality possible. It assures that we meet regulatory standards as set forth by CMS and also other accrediting agencies such as The Joint Commission, that we fulfill those standards and qualify for continued licensure.

(Aul, Vol. 4 at 772)

416. The Agency File included a letter from CMS dated October 28, 2011, which referenced a substantial allegation survey conducted at Cape Fear on October 17-21, 2011, as well as a copy of the survey results. (Jt. Ex. 1 at 331-39; Aul, Vol. 5 at 840)
417. During the substantial allegation survey, CMS cited Cape Fear for an immediate jeopardy and four Condition-level deficiencies. The letter from CMS stated "When a hospital, regardless of its TJC accreditation status, is found to be out of compliance with one or more Conditions of Participation, and immediate or serious threat to patient health and safety exists, a determination must be made that the facility no longer meets the requirements for participation as a provider of services in the Medicare program." (Jt. Ex. 1 at 331)
418. Conditions of Participation are similar to a contract between CMS and a healthcare facility and provide the terms by which the facility must abide in order to remain in compliance with the contract. (Smith, Vol. 3 at 514)
419. Specifically, as noted in the survey, the complaint investigation of October 17-21, 2011 showed that a 27-year-old behavioral health patient:

was physically restrained on the floor of his ED [emergency department] room by two hospital contracted Company Police Officers, who were not trained in patient de-escalation or therapeutic techniques, and two hospital contracted Security Officers, without adequate nursing supervision to ensure the patient's safety, resulting in harm to the patient. The patient went into cardiopulmonary arrest immediately following the restraint, with unsuccessful resuscitative efforts by hospital staff. The patient died on 4/17/2011 at 2211. An autopsy was completed by the Office of the Chief Medical Examiner, who determined the cause of death to be 'asphyxia due to restraint.'

(Jt. Ex. 1 at 335)



420. Dr. Aul understood that even if a hospital is accredited by The Joint Commission, it can still be found out of compliance with the Medicare Conditions of Participation. (Aul, Vol. 5 at 841)

421. Dr. Aul acknowledged the distinction between a Joint Commission survey and a CMS survey. He agreed with his deposition testimony in this case, in which he testified:

. . . a Joint Commission survey is generally more collegial; it's educational; it's instructive; there's more interactive, interaction about what is found, and what might be done to improve the situation or correct a situation. . . . The CMS survey is much more prescriptive and investigatory in nature.

(Aul, Vol. 5 at 841-42)

422. The CMS letter of October 28, 2011 further stated that: "Such a determination has been made in the case of Cape Fear Valley Medical Center and accordingly, the Medicare provider agreement between Cape Fear Valley Medical Center and the Secretary of the Department of Health and Human Services is being terminated. This termination will be effective November 13, 2011." (Jt. Ex. 1 at 333; Aul, Vol. 5 at 841)

423. CMS also sent a letter dated November 29, 2011, to Cape Fear, which Dr. Aul acknowledged having received around that same time. (FirstHealth Ex. 39; Aul, Vol. 5 at 843) That letter references a full survey conducted by the Licensure and Certification Section on November 9-17, 2011 at Cape Fear Valley Medical Center during which survey six Conditions of Participation were not met by Cape Fear. Four of those Conditions were the ones with which Cape Fear had been found out of compliance in a previous survey. (*Id.*; Aul, Vol. 5 at 844)

424. Dr. Aul testified that he was concerned by seeing the same Conditions of Participation repeatedly out of compliance. (*Id.*)

425. The November 29, 2011 letter from CMS contained language regarding the termination of Cape Fear's Medicare provider language that was very similar to the language found in the October 28, 2011 letter. (*Id.*)

426. The actual survey reported an incident in which a female patient was escorted out of the emergency department of Cape Fear because she was refusing to cooperate with staff. The patient refused to give up her blankets because she was cold. The patient was advised by security that she would be arrested if she did not give up the blankets. The patient was then placed in handcuffs and reported she felt tightness in her chest and was finally placed in a treatment room approximately 45 minutes after being escorted from the hospital property. The patient had a temperature of 102.6 degree Fahrenheit, sharp stabbing pain, nausea, and vomiting. She was later diagnosed with a severe kidney infection and severe sepsis, meaning a severe infection probably originating from the kidney infection but potentially in her bloodstream. The treatment notes reported that the

patient's mental status was changed, she was disoriented and had a rapid heart rate. She was ultimately admitted into the hospital's ICU and discharged seven days later. (FirstHealth Ex. 37; Aul, Vol. 5 at 846-49)

427. Dr. Aul candidly admitted that Cape Fear did not provide that patient with good quality care when she presented for treatment at the facility. (Aul, Vol. 5 at 849)
428. CMS sent a letter to Cape Fear dated December 8, 2011, which Dr. Aul acknowledged having received on or about that date. The letter referenced a November 17, 2011 complaint survey in which Cape Fear was determined to have violated two provisions of EMTALA, the Emergency Medical Treatment and Labor Act, specifically sections 489.24 and/or 489.20 of the Code of Federal Regulations: Responsibilities of Medicare Participating Hospitals in Emergency Cases, as well as failing to provide an appropriate medical screening examination within the hospital's capability. (FirstHealth Ex. 43; Aul, Vol. 5 at 850-51)
429. As a result of the findings, CMS informed Cape Fear that "[w]e have determined that the deficiencies are so serious that they constitute an immediate threat to the health and safety of any individual who comes to your hospital with an emergency medical condition." (*Id.*)
430. CMS further informed Cape Fear that its Medicare provider agreement would terminate on December 30, 2011. (*Id.*)
431. The Licensure and Certification Section also sent Cape Fear a letter dated November 21, 2011, along with an attached survey noting Cape Fear was not in compliance with two Conditions of Participation in the Medicare program. (FirstHealth Ex. 36; Aul, Vol. 5 at 851-52)
432. Additionally, CMS sent Cape Fear a letter dated December 5, 2011, in which the Licensure and Certification Section was also copied. (FirstHealth Ex. 40; Aul, Vol. 5 at 852)
433. Specifically, that letter references yet another survey conducted in the same time period at Cape Fear: "A subsequent substantial allegation and complaint survey was conducted by the NC SSA [North Carolina State Survey Agency] at Cape Fear Valley Medical Center on November 29, 2011 through November 30, 2011, with immediate jeopardy being identified." (FirstHealth Ex. 40, Aul, Vol. 5 at 853)
434. The November 29-30, 2011 complaint survey was completed at Cape Fear in response to a November 22, 2011 incident. In that incident, a 29 year old cancer patient had been admitted to Cape Fear after presenting to the hospital's emergency department. The cancer patient was discharged. The hospital staff, however, failed to respond to notification of a change in the patient's condition before putting him in a taxicab to go home. That patient died in the taxicab on the way to his home. (Jt. Ex. 1 at 606-50; Aul, Vol. 5 at 854-55)

435. CMS again notified Cape Fear that its Medicare provider agreement was being terminated, effective December 23, 2011. (FirstHealth Ex. 36, Aul, Vol. 5 at 853)
436. Dr. Aul again agreed that Cape Fear did not provide good quality of care to the cancer patient when he was discharged. (Aul, Vol. 5 at 855)
437. Cape Fear received another letter and survey findings from CMS dated January 3, 2012, regarding “follow-up, focused and substantial allegation complaint surveys [that] were conducted by the NC State Survey Agency at Cape Fear Valley Medical ending December 22, 2011.” (Jt. Ex. 1 at 651-703; Aul, Vol. 5 at 855-56)
438. That notice provides that “the conditions that led to the determination of Immediate Jeopardy were removed and the termination action as outlined in our letter dated December 5, 2011 was rescinded, *however deficiencies remained.*” (Emphasis added) (Jt. Ex. 1 at 651; Aul, Vol. 5 at 856)
439. The notice further states that during complaint investigations on December 22, 2011, an immediate jeopardy was identified as a result of incidents occurring on December 12, 2011, and Cape Fear had continued non-compliance with three Medicare Conditions of Participation. (Jt. Ex. 1 at 652; Aul, Vol. 5 at 856)
440. The immediate jeopardy identified on December 22, 2011, was again the result of a patient’s death where nursing staff failed to “report, respond and assess a reported change in the telemetry monitoring (heart monitoring) status of a patient. . . . on the day of the patient’s death (12/12/2011) a cardiac rhythm strip at 0000 revealed controlled atrial fibrillation and a rhythm strip at 0033 revealed Asystole (rhythm where the heart is not beating and life cannot be sustained). . . . the leads were off on Patient #17.” (Jt. Ex. 1 at 658-59)
441. CMS again notified Cape Fear that its Medicare provider agreement would be terminated and set a termination date of January 19, 2012. (Jt. Ex. 1 at 651; Aul, Vol. 5 at 857)
442. CMS completed yet another survey at Cape Fear on January 26, 2012, where Cape Fear was deemed non-compliant with several Conditions of Participation. For example, Cape Fear was found to have failed to have a system in place to ensure the prevention and control of infections and communicable diseases. (FirstHealth Ex. 44; Aul, Vol. 5 at 858)
443. Dr. Aul admitted that the prevention and control of infections and communicable diseases is an important part of a hospital’s safety program. (Aul, Vol. 5 at 858)
444. Nursing services was another Condition of Participation with which Cape Fear was deemed non-compliant. That condition had also been cited as out of compliance in several prior surveys. (Aul, Vol. 5 at 859)
445. The Licensure and Certification Section sent Cape Fear a letter dated March 1, 2012, referencing an EMTALA investigation conducted at Cape Fear on February 21 through

February 23, 2012. (FirstHealth Ex. 46; Aul, Vol. 5 at 859) Cape Fear was found out of compliance with multiple standards of participation in the Medicare program, including for Cape Fear's failure to: "provide an appropriate medical screening examination to determine whether or not an emergency medical condition existed" for its patient, failing "to provide stabilizing treatment within its capabilities," and failing to "ensure an appropriate transfer by failing to provide medical treatment within the hospital's capacity and failing to ensure the receiving facility had an available bed." (FirstHealth Ex. 46)

446. CMS transmitted a letter to Cape Fear dated July 12, 2012, noting several violations of the federal EMTALA statute by Cape Fear resulting from a February 23, 2012 survey. (FirstHealth Ex. 47; Aul, Vol. 5 at 861)
447. Cape Fear was under the Systems Improvement Agreement discussed below during the time of this February 23, 2012 survey. (FirstHealth Ex. 4 at 1)
448. Dr. Aul agreed that the EMTALA provisions relate to the provision of quality care by a hospital. (Aul, Vol. 5 at 861)
449. Dr. Aul testified that he was "absolutely" concerned about receiving these survey results when he became the Associate Chief Medical Officer for Quality and Patient Safety at Cape Fear in October 2011. He was also surprised by the number of deficiencies cited in the survey reports. (Aul, Vol. 5 at 862)
450. Dr. Aul did not dispute that these incidents, including three patient deaths, did occur. He further agreed that in his experience, he believed it was unusual for a hospital to have this number of deficiencies and immediate jeopardies within a few months' time. (*Id.*)
451. On August 28, 2012, Debbie McCarty from the Licensure and Certification Section sent a letter to Cape Fear regarding an August 2012 follow up survey that stated:

The purpose of conducting the survey was to evaluate the Hospital's compliance with the Federal Medicare Conditions of Participation and follow up on outstanding deficiencies in the survey of January 26, 2012. As discussed in the exit conference, 0 of 20 allegations were substantiated. There were no deficiencies cited as a result of the investigation.

(Cape Fear Ex. 1233G; Conley, Vol. 9 at 1697)

452. In summary, the undisputed evidence at trial established that there were multiple quality surveys, many of which were complaint investigations, conducted at Cape Fear during the relevant 18-month look-back period in this review.
453. Three of the complaint surveys during the relevant 18-month look-back period of the Agency's review cited Cape Fear with immediate jeopardy violations: surveys on October 17-21, 2011, November 29-30, 2011, and December 22, 2011. Each of these surveys recounts a patient death. One patient was asphyxiated in the emergency

department by Cape Fear's security staff. A cancer patient was sent home from Cape Fear in a taxicab and died en route due to the nursing staff's failure to assess changes in the patient's condition prior to putting him in the transportation service. Another patient died because her heart monitoring equipment was not monitored. Two of these patient deaths occurred within one month of each other. (Jt. Ex. 1 at 335-539; 606-32; 658-91)

454. Multiple Condition-level and standard-level deficiencies were also cited at Cape Fear during the surveys conducted during this 18-month look-back period. Many of these Condition-level deficiencies were repeat deficiencies where the same Conditions were found to be continually out of compliance. (FirstHealth Ex. 39; Aul, Vol. 5 at 843-44)
  
455. As a result of these surveys, between October 2011 and December 2011, Cape Fear Valley was given at least four notices of Medicare's intention to terminate its Medicare provider agreement. (Jt. Ex. 1 at 33; FirstHealth Ex. 36; FirstHealth Ex. 39; FirstHealth Ex. 43)
  
456. There were no quality surveys, termination notices, or evidence of quality complaints, investigations, or deficiencies at FirstHealth during the relevant 18-month look-back period. (Jt. Ex. 1 at 1381)
  
457. With regard to the survey that was conducted at Cape Fear in August 2012 (Jt. Ex. 1 at 2752), Ms. Conley noted that the letter from Licensure and Certification was only a recommendation to the regional office of CMS concerning that specific on-site visit in August 2012 and that Licensure and Certification was careful to use the term "recommend." During that time, the hospital was considered to be no longer deemed and the Systems Improvement Agreement was still in effect until the Licensure and Certification Section returned to conduct a full survey to determine whether Cape Fear was in compliance with all regulations. (Conley, Vol. 9 at 1699, 1702)
  
458. A full validation survey includes a survey of every single condition that a hospital is required to be in compliance with in order to meet the Medicare Conditions of Participation. It includes a survey of the quality care standards and/or Conditions of Participation, as well as a life safety survey, inclusive of the main hospital facility and all off-campus sites that are considered to be part of that entity. (Conley, Vol. 9 at 1728-29)
  
459. Full validation surveys are conducted any time a Condition-level deficiency is cited or any time an immediate jeopardy situation is cited. Licensure and Certification also conducts surveys within 60 days of an accrediting organization's survey in order to validate those findings. (Conley, Vol. 9 at 1729)
  
460. As of the dates of the Agency decision and Findings in this review (November 27 and December 4, 2012, respectively), Licensure and Certification had not conducted a full validation survey at Cape Fear. (*Id.*)

Systems Improvement Agreement ("SIA")

461. In its discussion under Criterion (20), the Agency noted that "CFVMC negotiated and signed a Systems Improvement Agreement (SIA) with CMS on January [19], 2012 that stayed the effective date of the termination of its Medicare provider agreement." (Jt. Ex. 1 at 2752)

462. The SIA between CMS and Cape Fear stated:

Whereas, CFVMC was surveyed for compliance with Medicare Conditions of Participation and EMTALA a number of times between October 21, 2011 to January 3, 2012, and the surveys found noncompliance with several Medicare requirements, and CMS issued a November 29, 2011, Termination Letter to CFVMC terminating the Medicare Provider Agreement effective January 19, 2012.

(FirstHealth Ex. 4 at 1)

463. The SIA between CMS and Cape Fear further recites:

Therefore, in the interest of avoiding termination on January 19, 2012 of CFVMC's Medicare Provider Agreement and of bringing CFVMC into full compliance in a timely manner with all CoPs [Conditions of Participation] and all the requirements of the EMTALA, the Parties agree as follows: CMS agrees to stay the scheduled termination action during the pendency of this Agreement by written notice to be executed and delivered to CFVMC within 24 hours of execution of the Agreement.

(*Id.*)

464. January 19, 2012 is the same date that Cape Fear had been notified that its Medicare provider agreement would be terminated by CMS. (Aul, Vol. 5 at 867)

465. CMS did in fact notify Cape Fear that the termination action referenced in the SIA had been stayed during the period of the agreement. (Aul, Vol. 5 at 867-68)

466. As of the date Cape Fear filed its 28-bed application, June 15, 2012, CMS had notified Cape Fear that its Medicare provider agreement was being terminated, but then stayed that action under the terms of the SIA. (Aul, Vol. 5 at 869)

467. The SIA provided: "This agreement is in effect for the time period of one year beginning January 19, 2012, through the date of the full Medicare Certification survey referenced below, unless voluntary withdrawal or termination of the Medicare Provider Agreement occurs earlier in accordance with the provisions contained in this Agreement." (FirstHealth Ex. 4 at 1)

468. The reference to the full Medicare survey in the SIA states: "Surveys: CMS will authorize a Medicare certification survey of all Medicare hospital Conditions of Participation and EMTALA no sooner than 90 days and no later than 365 days from the date that CMS accepts the consultative experts' action plans provided in 1.b." (FirstHealth Ex. 4 at 4)
469. The SIA required Cape Fear to obtain an independent expert onsite review to provide the following: "a comprehensive hospital-wide gap analysis of CFVMC's current operations compared to accepted standards of practice." (FirstHealth Ex. 4 at 2; Aul, Vol. 5 at 870) Cape Fear engaged The Greeley Company in satisfaction of this requirement. (Aul, Vol. 5 at 870-71)
470. The Greeley Company was required to provide "recommendations for hospital-wide changes and improvements to ensure compliance with all [Conditions of Participation] and all requirements of EMTALA." (FirstHealth Ex. 4 at 2) The Greeley Company did provide such recommendations. (Aul, Vol. 5 at 871)
471. The Greeley Company also was required under the SIA to provide "assistance in implementing and evaluating such changes and improvements. It was required to assist in the implementation of an effective and ongoing hospital-wide Quality Assessment and Performance Improvement program to ensure continued compliance with all [Conditions of Participation] and with the EMTALA." (FirstHealth Ex. 4 at 2) The Greeley Company did facilitate such a program at Cape Fear. (Aul, Vol. 5 at 871-72)
472. In addition, Cape Fear was required by the SIA to engage an "independent, on-site Compliance Monitor." (FirstHealth Ex. 4 at 3) Cape Fear engaged the services of Glenn Krasker for this requirement. (Aul, Vol. 5 at 872-73)
473. As of the date of the Agency Findings in this case, December 4, 2012, Mr. Krasker was still engaged as the on-site Compliance Monitor at Cape Fear. (Aul, Vol. 5 at 874)
474. Cape Fear was subject to the SIA at the time of the Agency's decision in this review, and the Agency was aware of the SIA at the time it made its decision on November 27, 2012. (Smith, Vol. 3 at 515-16)
475. The CON Section verified that Cape Fear still was subject to the SIA before rendering its decision by confirming this fact with Ms. Conley. (Smith, Vol. 3 at 516; Conley, Vol. 9 at 1693)
476. Mr. Smith testified that the Agency understood that CMS had notified Cape Fear that its Medicare provider agreement would be terminated, but then had stayed that termination while the SIA was in effect. (Smith, Vol. 3 at 517, 560)
477. The SIA also provided that: "In the event the survey referenced in Section 4 herein demonstrates that CFVMC is found with Condition-level non-compliance in one or more [Conditions of Participation] or any requirements of EMTALA, CMS will promptly

notify CFVMC of these findings and set a date for termination of the hospital's Medicare provider agreement." (FirstHealth Ex. 4 at 4)

478. As of the December 4, 2012 Findings in this review, since the survey referenced above had not yet taken place, Cape Fear was still faced with the possibility of termination of its Medicare provider agreement. (Aul, Vol. 5 at 876)
479. The date on which CMS restored Cape Fear's deemed status and dismissed the SIA was after the Agency's decision on November 27, 2012. (Aul, Vol. 5 at 884)
480. In his 25 years working with the CON Section as a Project Analyst, Assistant Chief, and Chief of the Section, Mr. Smith testified that he never had seen another North Carolina hospital that was an applicant in a CON review be required by CMS to enter into an SIA to avoid termination of its Medicare provider agreement. (Smith, Vol. 3 at 543) Similarly, Ms. Conley was not aware of any other North Carolina hospitals subject to an SIA, other than Cape Fear. (Conley, Vol. 9 at 1693-94)
481. Dr. Aul's his research did not identify any other North Carolina hospital under a SIA or similar agreement. (Aul, Vol. 5 at 880) Ms. Platt also researched this issue, and the only other hospital she could find that was under an SIA was in Texas. (Platt, Vol. 12 at 2229-30)
482. FirstHealth was not under an SIA with CMS at the time of this review. (Legarth, Vol. 10 at 1919)
483. Cape Fear asked Ms. Conley about a number of letters from the Licensure and Certification Section and the CMS Regional Office concerning survey results of facilities in North Carolina that were not parties to this review or appeal. These letters mostly occurred outside of the Agency's review period for this case. The apparent purpose of these letters was to show that facilities other than Cape Fear have had negative surveys in the past. However, the Undersigned does not find these documents to be relevant to the present review or persuasive with respect to the comparison of the provision of quality care as between FirstHealth and Cape Fear because the circumstances presented in these letters are sufficiently different from the Cape Fear situation. Moreover, none of those facilities was required to enter into an SIA with CMS. (Conley, Vol. 9 at 1730)
484. Ms. Platt is familiar with the Undersigned's decision to grant summary judgment in favor of Cape Fear regarding Criterion (20). She testified that there are number of reasons why she believes that Quality is still a relevant consideration in the comparative analysis:

... One, there are a number of issues in the comparative analysis for all projects that might rely on the same underlying facts, data, analysis as some of the criteria. And just because a criterion is found to be met doesn't mean that it's not still relevant for comparative review.



And then also I've spent some time studying Cape Fear Valley's history with respect to quality and the information that's in their application. And honestly, I would be very surprised if quality was not a comparative factor in this review, given the substantial quality issues that have occurred at Cape Fear Valley.

(Platt, Vol. 12 at 2221)

485. Ms. Platt further testified that Quality is a major issue in CON review, and is one of the tenets of the CON Law. Quality is relevant to Criterion (1), (4), (6), (18a) and (20). Quality is also a factor in the Findings of Fact for the CON Law, N.C. Gen. Stat. § 131E-175(7), and in Policy GEN-3 of the SMFP. (Platt, Vol. 12 at 2222-24)
486. Ms. Platt opined that the Agency would have been remiss not to consider Quality in its comparative analysis since Cape Fear had a significant quality issue. (Platt, Vol. 12 at 2224)
487. Ms. Platt agreed with the Agency's decision to find FirstHealth comparatively superior with respect to Quality. She testified:

Well, the FirstHealth track record with regards to licensure is clean. They haven't had any issues whatsoever that were documented in the application. Again, they presented all their policies and procedures. And so on that basis, I think it's very clear that FirstHealth has and will continue to provide quality of care.

By contrast, Cape Fear Valley noted in their application that they have had surveys with condition level and IJ [immediate jeopardy] level deficiencies. And they were in fact under a systems improvement agreement with CMS at the time of the decision on this project. So given--given those issues, I think it's clear and I agree with the Agency's finding that FirstHealth is superior with respect to quality of care.

(Platt, Vol. 12 at 2224-25)

488. Ms. Platt did not find the Agency's analysis of Quality as a comparative factor to be merely duplicative of its analysis of quality under Criterion (20). She testified that "just because you are conforming with the criterion standing alone doesn't mean that you might not be the most favorable applicant when you're looked at in comparison to another provider in the same review." (Platt, Vol. 12 at 2226)
489. FirstHealth Exhibit 76 is a summary Ms. Platt prepared of quality issues at Cape Fear. (FirstHealth Ex. 76; Platt, Vol. 12 at 2226-27)
490. Using FirstHealth Exhibit 76, Ms. Platt testified:

Well, there are a large number of licensure issues that occurred and they're substantial issues. There are IJ [immediate jeopardy] level deficiencies. There are IJ level deficiencies involving the death of patients. So you know, they're severe, they involve patient harm, and they're repeated. And you've got--intertwined with some of those IJ level deficiencies, you've also got EMTALA violations.

So when you look at these all together and you see the close time frame in which these occurred and how they're overlapping each other without, you know, correction--they're sort of repeating the same kinds of issues--it causes me a significant concern.

And then also documented on here is the timing and the dates of the systems improvement agreement. And again, the amount of issues, the severity of the issues to me is demonstration that there's far less level of quality care at Cape Fear Valley than at FirstHealth.

(Platt, Vol. 12 at 2227-28)

491. Criterion (20) looks at quality care in the past. *See* N.C. Gen. Stat. § 131E-183(a)(20). Ms. Platt noted that Cape Fear's SIA, while based on past events, was forward-looking because it required Cape Fear to take certain steps, such as hiring a consultant, to ensure on a going-forward basis that the same types of problems that occurred in 2011 were not continuing to occur in the future. (Platt, Vol. 12 at 2231)
492. Based on all the documentation she reviewed, Ms. Platt concluded that FirstHealth was "very clearly the favorable applicant with respect to quality of care." (*Id.*)
493. The SIA was material to Ms. Platt's opinions because it embodied the issues regarding Quality and also obligated Cape Fear to take steps to ensure that quality care is provided in the future. (Platt, Vol. 12 at 2232)
494. There were no assurances, promises, or representations in the SIA that Cape Fear would meet all Medicare Conditions of Participation once a full survey was done at Cape Fear. (FirstHealth Ex. 4; Platt, Vol. 12 at 2232)
495. Ms. Platt reviewed Dr. Aul's testimony. Dr. Aul is a clinician who acknowledged that there were quality problems at Cape Fear. Dr. Aul's testimony corroborated Ms. Platt's opinion that FirstHealth was the superior applicant regarding quality of care. (Platt, Vol. 12 at 2239-40)
496. Mr. Yakaboski explained that in the comparative analysis involving Cape Fear and FirstHealth, ". . . Quality seemed to be a factor, a comparative factor that really jumped off the table here, and--between the two applicants." (Yakaboski, Vol. 14 at 2415)

497. Mr. Yakaboski referenced the 2011 65-bed review, in which Cape Fear was found non-conforming with Criterion (20). He then explained:

Now we're in 2012. We did a quality check with the Licensure and Certification Section for both hospitals-- for both applicants. FirstHealth came back with no negatives cited by Licensure and Certification. And Cape Fear came back within the 18 month period of negatives and some serious negatives in quality.

So while I don't do surveys on quality or go out into the field, looking at what the experts have given me, again it was really no contest. One applicant had no negative history; one applicant had a negative history in the lookback.

(Yakaboski, Vol. 14 at 2415-16)

498. Mr. Yakaboski also testified:

. . . And again, if I just listed what--a piece of paper, a line drawn down the middle across the top, FirstHealth on one side, Cape Fear on the other, what quality issue does Licensure and Certification identify for FirstHealth? Zero. What quality issues, positive or negative, does Licensure and Certification identify for Cape Fear? Several. To me it was a--it was a no-brainer as to comparative--as to the comparative section.

(Yakaboski, Vol. 14 at 2580-81)

499. Mr. Yakaboski recognized that the Undersigned granted summary judgment in Cape Fear's favor regarding Criterion (20). However, he pointed out that with respect to Quality, ". . . the fact pattern doesn't change. The facts are what the facts are." (Yakaboski, Vol. 14 at 2416)

500. Mr. Yakaboski testified that in the comparative analysis, the operating assumption is that both applicants are approvable standing alone. In the comparative analysis, the Agency is looking for factors that differentiate the applicants, and in this case, the applicants were different with respect to Competition, Quality, and Geographic Accessibility. (Yakaboski, Vol. 14 at 2418)

501. Mr. Yakaboski attended several days of the hearing in this matter. He testified that he did not hear any testimony that would have caused him to change his decision in this case. Mr. Yakaboski stated that "[a]ctually, everything that came forth made me more secure in the decision that was made." (Yakaboski, Vol. 14 at 2423)

502. Ms. Bres Martin opined that Quality should have been a "neutral" factor in this review, in which neither applicant would have been found superior. (Bres Martin, Vol. 2 at 384) Given the substantial evidence in the record regarding Cape Fear's recent negative survey

history--as compared to the recent history of FirstHealth--and Cape Fear's SIA, Cape Fear's position as stated by Ms. Bres Martin is far from persuasive. There were clear distinctions between the two applicants with regard to quality.

503. The Agency properly found that the FirstHealth Application was the more effective alternative with regard to quality of care.

**Operating Expenses**

504. The Agency concluded that FirstHealth projected lower operating costs per inpatient day than Cape Fear in the third full fiscal year of operation. However, because Cape Fear is a tertiary hospital and offers more services and handles patients with greater levels of acuity as compared to a community hospital like FirstHealth, the Agency determined that it was not possible to make conclusive comparisons of the operating expenses of the two projects. (Jt. Ex. 1 at 2775)
505. Cape Fear did not challenge the Agency's finding that the FirstHealth Application and Cape Fear Application could not be compared because of differences in the proposed projects.
506. The Agency properly found that it could not make conclusive comparisons of the FirstHealth and Cape Fear Applications with respect to operating expenses.

**Access by Underserved Groups**

507. The Agency utilizes the comparative factor of Access by Underserved Groups in virtually every comparative analysis that it conducts. (Smith, Vol. 3 at 511)
508. The Agency analyzed the projected percentage of services to be provided to Medicare recipients and the projected percentage of services to be provided to Medicaid recipients as proposed by FirstHealth and Cape Fear in their respective applications. Cape Fear projected 51.2% of its services would be provided to Medicare recipients whereas FirstHealth projected 51.0% of its services would be provided to Medicare recipients. Cape Fear projected 24.6% of its services would be provided to Medicaid recipients and FirstHealth projected that 10.4% of its services would be provided to Medicaid recipients. (Jt. Ex. 1 at 2772)
509. The Agency noted in its Findings that Cape Fear projects the higher percentage of total services to be provided to Medicaid recipients, but noted that "CFVMC-Owen Drive Campus offers obstetrical services, a service which often has a high percentage of Medicaid recipients. In contrast, obstetrical services will not be offered at FHCH." (*Id.*)
510. Mr. Smith testified that the Agency included a statement in the Findings regarding the provision of obstetrical services because such services largely are paid for by Medicaid. (Smith, Vol. 3 at 511) Mr. Smith testified that, as to Medicaid, Cape Fear was more effective when compared to FirstHealth.

511. The Agency determined that access by Medicare recipients by both applicants is comparable. (Jt. Ex. 1 at 2772) Cape Fear agreed with the Agency's conclusion, but did assert that the Agency should have looked at other factors. Ms. Bres Martin acknowledged, however, that there was nothing that required the Agency to analyze Access by Medically-Underserved Groups the way she would have analyzed this comparative factor. (Bres Martin, Vol. 8 at 1441-42)
512. Mr. Smith testified that if Cape Fear's Medicare provider agreement were terminated, Cape Fear would not be paid to treat Medicare and Medicaid patients. (Smith, Vol. 3 at 517)
513. Mr. Smith further testified that if a CON applicant's Medicare provider agreement was revoked at the time of the decision, it would likely cause the Agency to find that provider a less effective alternative in the comparative analysis under Access by Underserved Groups as it would not likely be able to live up to its projections in the application. (Smith, Vol. 3 at 518)
514. If CMS terminated Cape Fear's Medicare provider agreement, Cape Fear could continue to treat Medicare and Medicaid patients, but it would not receive any reimbursement for treating those patients. In such an event, it would be questionable whether Cape Fear could survive, as Medicare and Medicaid are typically the largest payor source for hospitals. (Platt, Vol. 12 at 2233)
515. Page 94 of the Cape Fear Application shows that in Project Year 2, more than 75% of Cape Fear's reimbursement is projected to come from Medicare and Medicaid (Jt. Ex. 3 at 94)
516. The Agency properly found that, with regard to access by Medicare recipients, both applicants were comparable.

#### **Revenues**

517. Mr. Smith testified that the Agency typically looks at gross revenue per inpatient day and typically compares the net revenue per patient day in comparative reviews. (Smith, Vol. 3 at 535)
518. With respect to the comparative factor of Revenues, the Agency noted the gross and net revenues per inpatient day as projected by both FirstHealth and Cape Fear. FirstHealth projected gross revenues per inpatient day of \$9,442 as compared to a projection of \$21,608 for the Cape Fear project. (Jt. Ex. 1 at 2774) FirstHealth projected net revenues per patient day of \$2,987 versus a projection of \$5,206 by Cape Fear. (Jt. Ex. 1 at 2775)
519. The Agency further noted that Cape Fear is a tertiary hospital which, by its nature, offers more services and handles patients with greater levels of acuity than will FirstHealth Hoke. As such, "[d]ue to the differences in the two projects, it is not possible to make

conclusive comparisons of the two applications with regard to gross revenue per inpatient day.” (Jt. Ex. 1 at 2774-75)

- 520. Gross revenue per inpatient day is the charges for the services. It is calculated by dividing the applicant’s gross revenue by the patient days. (Smith, Vol. 3 at 524)
- 521. Cape Fear did not challenge the Agency’s finding that the FirstHealth Application and Cape Fear Application could not be compared because of differences in the proposed projects.
- 522. The Agency properly found that it could not make conclusive comparisons of the FirstHealth and Cape Fear Applications with respect to gross and net revenues per patient day.

**Demonstration of Need**

- 523. The Agency concluded in its Findings that both the FirstHealth and Cape Fear Applications demonstrated the need for all of the components of their respective proposals based upon reasonable, credible, and supported assumptions. (Jt. Ex. 1 at 2772-73) Thus, the Agency found FirstHealth and Cape Fear’s proposals to be equally effective. (Smith, Vol. 3 at 519)
- 524. Mr. Smith testified that if the Agency had used a need analysis similar to the beds-to-population ratio analysis used in the Geographic Accessibility comparative factor, the Agency would have concluded that Hoke County likely was in greater need for additional acute care beds than is Cumberland County. (Smith, Vol. 3 at 510)
- 525. Ms. Platt agreed with Mr. Smith’s testimony. She noted that if the Agency analyzed which applicant needs the beds more and used a beds-to-population ratio to help decide that issue, the analysis would show a greater need for the beds in Hoke County than in Cumberland County. (Platt, Vol. 12 at 2239)
- 526. Mr. Smith was aware of the 65 approved beds for the Cape Fear North project and the 41 acute care beds approved for the Cape Fear Hoke Community Medical Center. In both applications, Cape Fear represented that the opening of those facilities would shift some patients out of the Owen Drive location and decompress capacity at that facility. (Smith, Vol. 3 at 519-21) Both of these approved facilities are community hospitals. (Smith, Vol. 3 at 531)
- 527. Cape Fear could have proposed to develop 28 acute care beds at one of those facilities. (Smith, Vol. 3 at 532)
- 528. The Agency is aware of tertiary and community-level hospitals that currently serve residents of the Cumberland-Hoke service area other than Cape Fear and FirstHealth Moore. (Smith, Vol. 3 at 530-31)

529. The Agency properly found both applicants equally effective with respect to Demonstration of Need.

**Financial Feasibility**

530. The Agency concluded that both FirstHealth and Cape Fear demonstrated that the Financial Feasibility of their respective projects was based upon reasonable projections of costs and revenues and therefore the two applications were equally effective alternatives. (Jt. Ex. 1 at 2773)
531. Mr. Smith testified that had Cape Fear's Medicare provider agreement been terminated at the time of the Agency's decision, the Agency would have determined that Cape Fear would not be getting paid for nearly 75 percent of its days of care, which would seriously impact its Financial Feasibility. (Smith, Vol. 3 at 522)
532. The Agency properly found both applicants equally effective alternatives with regard to Financial Feasibility.

**Coordination with Existing Healthcare System**

533. The Agency determined that both FirstHealth and Cape Fear are existing providers with established physician and healthcare provider relationships and thus were equally effective alternatives with respect to Coordination with the Existing Healthcare System. (Jt. Ex. 1 at 2773)
534. Cape Fear did not challenge this finding by the Agency.
535. The Agency properly found FirstHealth and Cape Fear to be equally effective alternatives with respect to Coordination with the Existing Healthcare System.

**Community Support**

536. The Agency determined that both FirstHealth and Cape Fear demonstrated that their respective projects have significant Community Support and were therefore equally effective alternatives with respect to Community Support. (Jt. Ex. 1 at 2774)
537. Cape Fear did not challenge this finding by the Agency.
538. The Agency properly found FirstHealth and Cape Fear equally effective alternatives with respect to Community Support.

**Substantial Prejudice**

539. A petitioner in a CON contested case is required to prove both Agency error and that the petitioner's rights were substantially prejudiced by the Agency's decision. N.C. Gen. Stat. § 150B-23(a).

540. Ms. Bres Martin opined that Cape Fear was substantially prejudiced by the Agency's decision to approve the FirstHealth Application and disapprove the Cape Fear Application. (Bres Martin, Vol. 1 at 174)
  
541. Ms. Bres Martin further testified that Cape Fear has "no relief" for its high levels of utilization. (*Id.*)
  
542. Approximately six weeks after filing its application for the 28 beds on June 15, 2012, Cape Fear filed a petition with the State Health Coordinating Council ("SHCC") in which Cape Fear asked the SHCC to eliminate a need determination for 119 new acute care beds in the Cumberland-Hoke Acute Care Bed Service Area under the draft 2013 SMFP. (FirstHealth Ex. 12; Bres Martin, Vol. 6 at 1100)
  
543. Ms. Bres Martin was one of the people who prepared this petition for Cape Fear. (*Id.*)
  
544. By May 2012, Cape Fear had begun laying the ground work for a potential petition with the SHCC to eliminate the need in the draft 2013 SMFP for 119 acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. (Bres Martin, Vol. 6 at 1101-02; FirstHealth Ex. 15)
  
545. FirstHealth Exhibit 58 is a two-page summary sheet used to educate members of the SHCC about Cape Fear's petition to eliminate the need determination in the draft 2013 SMFP for 119 acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. (FirstHealth Ex. 58; Bres Martin, Vol. 6 at 1104)
  
546. At the time of this review, Cape Fear had two undeveloped acute care bed projects: (1) 41 beds that are proposed to be developed at Hoke Community Medical Center; and (2) 65 beds proposed to be developed at Cape Fear Valley North. (FirstHealth Ex. 8; Bres Martin, Vol. 6 at 1041, 1058)
  
547. The applications for Hoke Community Medical Center and Cape Fear Valley North discuss shifting patients from Cape Fear's Owen Drive campus to these new facilities. (FirstHealth Ex. 59 at 83; FirstHealth Ex. 116 at 95; Bres Martin, Vol. 6 at 1030-40, 1050-1058, 1061) Ms. Bres Martin believes that these projects will help decompress Cape Fear's Owen Drive campus, where the 28 beds are proposed to be located. (Bres Martin, Vol. 6 at 1040-41, 1058)
  
548. Cape Fear's 28-bed application includes information about the number of patient days that Cape Fear projects will shift from the Owen Drive campus to Hoke Community Medical Center and Cape Fear Valley North. By Project Year 3, Ms. Bres Martin estimated that 22,265 patient days will have shifted from the Owen Drive campus to either Hoke Community Medical Center or Cape Fear Valley North. By Project Year 5, that number is projected to increase to 28,510 patient days. This equates to 100 beds' worth of patient days shifting away from the Owen Drive campus of Cape Fear and moving to either Hoke Community Medical Center or Cape Fear Valley North. (Jt. Ex. 3 at 50-51; Bres Martin, Vol. 6 at 1060-65)



549. Ms. Platt conducted her own analysis of the patient days projected to shift from Cape Fear to Hoke Community Medical Center and Cape Fear Valley North. When the correct population growth rate is applied, and factoring in the shift of patients, the analysis shows that Cape Fear will be operating at approximately 83% occupancy, which is a reasonable level of occupancy. (Platt, Vol. 12 at 2109-10; FirstHealth Ex. 75AC and 75AD)
550. Ms. Platt does not believe that adding 28 beds to Cape Fear will make a tremendous difference in alleviating any capacity constraints Cape Fear has. Cape Fear did not explain in its application how it planned to use these beds or that a particular type of bed or service line is highly utilized. (Platt, Vol. 12 at 2110)
551. A provision in the North Carolina Administrative Code, 10A N.C.A.C. 13B .3111(a), allows a hospital to request a temporary increase in its licensed bed capacity. The provision allows an increase of up to 10% of the hospital's licensed bed capacity for 60 days, provided that the hospital census is at least 90% of its licensed bed capacity. These requests are made to the Licensure and Certification Section. (Jt. Ex. 3 at Exhibit 6)
552. Thus, based on its present licensed bed capacity of 490 acute care beds, Cape Fear is allowed to increase, on a temporary basis, its bed capacity by 49 acute care beds every time it receives permission for a temporary increase. That number will increase to 55.5 once Cape Fear Valley North opens because that facility is proposed to be licensed under Cape Fear's license. (Platt, Vol. 12 at 2118; FirstHealth Ex. 59 at 20)
553. There is no limit to the number of times Cape Fear can apply for and receive temporary increases in licensed bed capacity. As documented in Exhibit 6 to the Cape Fear Application, Cape Fear has requested and received temporary increases on numerous occasions. These temporary increases have helped ease capacity constraints at Cape Fear. (Bres Martin, Vol. 6 at 936; Jt. Ex. 3 at Exhibit 6)
554. The Licensure and Certification Section has been very responsive to Cape Fear's requests for temporary increases. (Bres Martin, Vol. 6 at 938)
555. In addition to the temporary increases, Cape Fear has 129 observation beds. (Jt. Ex. 3 at 18) Observation beds cannot be used for inpatient stays, but they can be used for patients with a variety of diagnoses. (Bres Martin, Vol. 6 at 951) Observation beds can help with the day-to-day management of the patient census at a hospital. (Platt, Vol. 12 at 2101, 2112, 2114)
556. In FirstHealth Exhibit 75AF, Ms. Platt showed that utilizing all of Cape Fear's beds (both acute care and observation beds), its occupancy was 80.2% in 2012. (Platt, Vol. 12 at 2112; FirstHealth Ex. 75AF). The performance standard in 10A N.C.A.C. 14C .3803(a) for new acute care beds in a hospital of Cape Fear's size is 75.2%. (Jt. Ex. 1 at 2760-61)
557. In FirstHealth Exhibit 75AG, Ms. Platt showed that using all existing and approved bed spaces, including observation beds at Cape Fear, and applying the correct population

growth, Cape Fear's occupancy rate would be 72.51%, which did not indicate a capacity constraint to Ms. Platt. (Platt, Vol. 12 at 2118-19; FirstHealth Ex. 75AG)

558. Ms. Platt opined that Cape Fear was not substantially prejudiced by the Agency's decision in this review. In Ms. Platt's opinion, Cape Fear had many other options to relieve its alleged capacity constraints, including the 41-bed and 65-bed projects, the temporary bed increases, and the observation beds. (Platt, Vol. 12 at 2199)
559. Ms. Platt also opined that Cape Fear's 2012 petition to the SHCC to eliminate the need for 119 acute care beds in the Cumberland-Hoke Acute Care Bed Service Area confirmed that Cape Fear did not need the 28 beds. There is no way Cape Fear could have known that it would have been approved for the 28 beds. Given the potential for its 28-bed application to be denied, Cape Fear nevertheless told the SHCC that there was no need for more beds in its service area. In Ms. Platt's opinion, this tends to show that Cape Fear had other alternatives to ensure adequate bed capacity. (Platt, Vol. 12 at 2199-2200; FirstHealth Ex. 12)
560. According to FirstHealth Exhibit 116, which is Cape Fear's 2010 application for 41 acute care beds in Hoke County, the 41 beds originally were identified as part of a 44-bed need determination in the 2004 SMFP. Only three of these 44 beds ever have been developed. The remaining 41 beds are now scheduled to be open in 2014. Between 2004 and 2009, Cape Fear was approved for 137 new acute care beds. This does not include the 65 beds scheduled to be developed at Cape Fear Valley North. Including the 65 beds at Cape Fear Valley North brings the grand total of beds for which Cape Fear has been approved to 202. This is a 45.9% increase in Cape Fear's bed capacity, or almost doubling in size the number of beds available to Cape Fear. (Platt, Vol. 12 at 2200-02; FirstHealth Ex. 116 at 25; FirstHealth Ex. 8)
561. Ms. Platt disagreed with Ms. Bres Martin's testimony that Cape Fear has "no relief" for its high utilization. (Platt, Vol. 12 at 2098) Using FirstHealth Exhibits 75X, 75Z, 75AA and 75AB, Ms. Platt determined that "when they bring their--all of their approved beds online and when you factor in the correct population growth that they will be operating at a very reasonable level of occupancy." (Platt, Vol. 12 at 2106; FirstHealth Ex. 75X, 75Z, 75AA and 75AB)
562. Ms. Platt concluded:

... [T]hey've had the ability to add beds almost annually for year after year after year, and there's not been any problem with them gaining additional bed capacity.

And then the fact that not all of these beds implemented, that there's been a substantial delay of really ten years in implementing the 44 beds that were approved back in this project M-7093-04, the original 44 beds, if they were in such dire need of bed capacity, they could have brought those beds online at any point in time prior to proposing to move those beds

over to Hoke County. So I guess based on all of that, I don't see how they are substantially prejudiced by FirstHealth getting approval for 28 beds.

(Platt, Vol. 12 at 2203)

**FIRSTHEALTH'S OFFER OF PROOF**

563. Criteria (1), (4), (18a) and (20) all include an element of Quality of Care. (Platt, Vol. 12 at 2243)
564. Based upon a review of the documentation included in the Cape Fear Application, the Agency File, Licensure and Certification and CMS surveys, correspondence and other documentation produced in discovery and presented at trial, Cape Fear failed to demonstrate that it has provided a high level of Quality of Care in the past. (*Id.*)
565. Cape Fear's track record of quality problems and the SIA that Cape Fear entered with CMS, which was still on-going at the time of the Agency's decision, provided a sufficient basis to support the Agency's determination that the Cape Fear Application was non-conforming with Criteria (1), (4), (18a) and (20). (*Id.*)

**CONCLUSIONS OF LAW**

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

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.
2. The parties properly are before the Office of Administrative Hearings. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.
3. Cape Fear timely filed its Petition for contested case hearing under N.C. Gen. Stat. § 131E-188(a).
4. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in this matter as required by N.C. Gen. Stat. § 150B-23.
5. A court need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 449, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

6. The subject matter of this contested case is the Agency's decisions to disapprove the Cape Fear Application and to approve the FirstHealth Application. See N.C. Gen. Stat. § 131E-188(a) (providing for administrative review of an Agency decision to issue, deny or withdraw a certificate of need); *Presbyterian Hospital v. N.C. Dep't of Health & Human Services*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). ("The subject matter of a contested case hearing by the ALJ [administrative law judge] is an agency decision.").
7. "The correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." 10A N.C.A.C. 14C .0402. This means that the CON Law and the SMFP cannot be challenged in this review.
8. Under N.C. Gen. Stat. 131E-183(a), the Agency "shall determine that an application either is consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued."
9. The CON Law does not require an application to be found consistent with or not in conflict with the form used for a CON application. N.C. Gen. Stat. 131E-183(a).
10. To obtain a CON for a proposed project, a CON application must satisfy all of the review criteria set forth in N.C. Gen. Stat. 131E-183(a). If an applicant fails to conform with any one of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law. "[A]n application must comply with *all* review criteria." (emphasis in original). *Presbyterian-Orthopaedic Hospital v. N.C. Dep't of Human Resources*, 122N.C. App. 529, 534-535, 470 S.E. 2d 831, 834 (1966) "[A]n application must be found consistent with the statutory criteria before a Certificate of Need may be issued." See *Bio-Medical Applications of North Carolina, Inc. v. N.C. Dep't of Human Resources*, 136 N.C. App. 103, 109, 523 S.E. 2d 677, 681 (1999).
11. The CON Section determines whether an application is consistent with or not in conflict with the review criteria set forth in N.C. Gen. Stat. 131E-183 and any applicable standards, plans, and criteria promulgated thereunder in effect at the time the review commences. See 10A N.C.A.C. 14C .0207.
12. Upon the Agency's decision to issue, deny, or withdraw a certificate of need, pursuant to N.C. Gen. Stat. § 131E-188, any affected person is entitled to a contested case hearing. The statute also allows affected persons to intervene in a contested case hearing. See N.C. Gen. Stat. § 131E-188(a).
13. Cape Fear asserted that the Agency erred in its application of the statutory review criteria, N.C. Gen. Stat. § 131E-183, to the FirstHealth Application. Specifically, Cape Fear asserted that the Agency acted erroneously in finding FirstHealth conforming with N.C. Gen. Stat. § 131E-183(a)(1), Criterion (1), N.C. Gen. Stat. § 131E-183(a)(3), Criterion (3), N.C. Gen. Stat. § 131E-183(a)(3a), Criterion (3a), N.C. Gen. Stat. § 131E-183(a)(4), Criterion (4), N.C. Gen. Stat. § 131E-183(a)(5), Criterion (5), N.C. Gen. Stat. § 131E-

- 183(a)(6), Criterion (6), N.C. Gen. Stat. § 131E-183(a)(13)c., Criterion (13)c., N.C. Gen. Stat. § 131E-183(a)(18a), Criterion (18a), N.C. Gen. Stat. § 131E-183(b) and the Regulatory Criteria at 10A N.C.A.C. 14C .1203, 10A N.C.A.C. 14C .3802(b)(5), 10A N.C.A.C. 14C .3803(a) and (b), and 10A N.C.A.C. 14C .3805(d).
14. Cape Fear further asserted that the Agency erred in its application of the Comparative Analysis in finding the FirstHealth Application comparatively superior to the Cape Fear Application and in approving the FirstHealth Application and disapproving the Cape Fear Application.
  15. Petitioner Cape Fear has failed to meet its burden of demonstrating that the Agency acted outside its authority and jurisdiction, acted erroneously, used improper procedure, acted arbitrarily and capriciously, or failed to act as required by law and rule in disapproving the Cape Fear Application and approving the FirstHealth Application.
  16. In a competitive review, where the Agency finds more than one applicant conforming to the applicable review criteria, it may conduct a comparison of the conforming applications to determine which applicant should be awarded the CON. Britthaven, 118 N.C. App. at 385–86, 455 S.E.2d at 461. There is no statute or rule which requires the Agency to utilize certain comparative factors. Id. at 384, 455 S.E.2d at 459. In employing a comparative analysis, the Agency may include other “findings and conclusions upon which it based its decision.” Id. at 385, 455 S.E.2d at 459 (quoting N.C. Gen. Stat. § 131E–186(b)). “Those additional findings and conclusions give the Agency the opportunity to explain why it finds one applicant preferable to another on a comparative basis.” Id.
  17. Deference must be given to the Agency's decision where it chooses between two reasonable alternatives. It would be improper for the Undersigned to substitute my judgment for the Agency's decision where there is substantial evidence in the record to support its findings. *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006)(citing *Dialysis Care of North Carolina, LLC v. N.C. Dep't of Health and Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000))
  18. Even though the Undersigned granted Cape Fear's Motion for Summary Judgment regarding Criterion (20)--as to Cape Fear's provision of Quality Care in the past--the Cape Fear Application cannot be approved because Cape Fear failed to demonstrate that the Agency erred in finding the FirstHealth Application to be the comparatively superior application in this review, including Quality Care considerations . . . See, e.g., N.C. Gen. Stat. § 131E-183(a)(1); Jt. Ex. 1 at 2770; *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 464.

#### **STANDARD OF REVIEW**

19. The burden of persuasion placed upon the petitioner is by a “preponderance of the evidence.” N.C. Gen. Stat. § 150B-29 (“the party with the burden of proof in a contested

case must establish the facts required by N.C. General Statute § 150B-23(a) by a preponderance of the evidence. . . .”).

20. The CON Section and the Respondent-Intervenor do not have the burden of proof in this matter.
21. In a contested case, “[u]nder N.C. General Statute § 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*, 118 N.C. App. at 382, 455 S.E.2d at 459.
22. In order to prevail, a petitioner must satisfy both: (1) the independent prima facie requirement of a showing of substantial prejudice under N.C. Gen. Stat. § 150B-23(a); and (2) its burden in showing 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.” N.C. Gen. Stat. § 150B-23 (providing that a petitioner in a contested case “shall state facts tending to establish that the agency . . . has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights”).
23. When considering the Agency decision in a contested CON 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*, 118 N.C. App. at 382, 455 S.E.2d at 459; *In re Wake Kidney Clinic, P.A.*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 791 (1987) (“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.”). See also *Dialysis Care of North Carolina, LLC v. N.C. Dep’t of Health and Human Servs.*, 137 N.C. App. 638, 647-48, 529 S.E.2d 257, 262 (2000) (“The hearing officer (ALJ) is properly limited to consideration of evidence which was before the CON Section when making its initial decision.”); *Presbyterian-Orthopaedic Hospital v. N.C. Dep’t of Human Resources*, 122 N.C. App. 529, 537-38, 470 S.E.2d 831, 836 (1996)(“[I]n a certificate of need case, the hearing officer may only consider the evidence contained in an applicant’s certificate of need application which was before the Certificate of Need Section when it made its initial decision”).
24. When evaluating the Agency decision, the Undersigned considered evidence that was presented or available to the Agency during the review period. *Living Centers-Southeast, Inc. v. N.C. Dep’t of Health & Human Services*, 138 N.C. App. 572, 581, 532 S.E.2d 192, 194 (2000); *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (citing *In re Wake Kidney Clinic, P.A.*, 85 N.C. App. 639, 355 S.E.2d 788 (1987)).
25. The administrative law judge may only set aside the initial agency decision if the petitioner proves, by the greater weight of the evidence, one of the stated grounds for overturning an agency decision. The administrative law judge may not overturn the

- initial agency decision because the judge might have made a different judgment if he or she had been the person making the initial agency decision. N.C. Gen. Stat. § 150B-23(a).
26. The appropriate standard of review depends upon the issue being reviewed. When an appellant charges that a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency. *Britthaven*, 118 N.C. App. at 384, 455 S.E.2d at 460. However, when an appellant questions whether the Agency's decision was supported by the evidence or whether it was arbitrary or capricious, the appropriate standard is the whole record test. *Id.*
  27. The appropriate standard of review in this case is the whole record test. This contested case solely involves alleged factual errors regarding the Agency's determination of conformity with the applicable review criteria under N.C. Gen. Stat. § 131E-183 and the comparative analysis between FirstHealth and Cape Fear. Cases involving the conformity of a CON application with N.C. Gen. Stat. § 131E-183 have been reviewed under the whole record test to determine whether a factual error occurred. *See Good Hope Health Sys. v. N.C. Dep't of Health and Human Servs.*, 189 N.C. App. 534, 577, 659 S.E.2d 456, 481 (2008); *Parkway Urology, P.A. v. N.C. Dep't of Health and Human Servs.*, 205 N.C. App. 529, 543, 696 S.E.2d 187, 197 (2010); *E. Carolina Internal Med., P.A. v. N.C. Dep't of Health & Human Servs.*, 211 N.C. App. 397, 418, 710 S.E.2d 245, 259 (2011); *Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461. Similarly, the whole record test has been used to review the analysis of competitive applications for a CON. *See Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006).
  28. Under the whole record test, "a court must examine all the record evidence -- that which detracts from the agency's findings and conclusions as well as that which tends to support them -- to determine whether there is substantial evidence to justify the agency's decision." *Good Hope*, 189 N.C. App. at 543, 659 S.E.2d at 462 (quoting *Watkins v. N.C. State Bd. of Dental Exmn'rs.*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)), *aff'd*, 362 N.C. 504, 666 S.E.2d 749 (2008). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b). The whole record test merely gives the reviewing court the capability to determine whether the administrative decision has a rational basis in the evidence. *Carillon Assisted Living, LLC v. N.C. Dep't of Health and Human Servs.*, 175 N.C. App. 265, 270, 623 S.E.2d 629, 633 (2006).
  29. When employing the whole record test, the Court may not substitute its opinion for that of the Agency even if it would reach a different conclusion given its consideration of the whole record.<sup>2</sup> *Gordon v. N.C. Dep't of Corr.*, 173 N.C. App. 22, 34, 618 S.E.2d 280, 289 (2005); *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. at 199, 593 S.E.2d at 769. The whole record test cannot be used as a "tool of judicial intrusion." *E. Carolina*

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<sup>2</sup> The Court also may not replace its judgment for that of the Agency even if it "might have reached a different result if the matter were [reviewed] *de novo*." *Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 *aff'd*, 353 N.C. 258, 538 S.E.2d 566 (2000).

*Internal Med.*, 211 N.C. App. at 407, 710 S.E.2d at 253 (quoting *Hosp. Grp. of W. N. Carolina, Inc. v. N.C. Dep't of Human Res.*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985)).

30. Findings of fact under the whole record test "are conclusive on appeal if they are supported by substantial evidence in the record reviewed as a whole." *In re Wake Kidney Clinic, P.A.*, 85 N.C. App. 639, 644, 355 S.E.2d 788, 791 (1987).
  
31. Under the whole record test, even an error in the Agency's analysis of an applicant may be harmless if it does not affect the outcome in the review. *Britthaven*, 118 N.C. App. at 386-89, 455 S.E.2d at 461-63. If the Court finds that the Agency's analysis included an error that if correctly decided would have lead to the same decision, this is harmless error under the whole record test. *Id.*
  
32. The "arbitrary and capricious" standard is a difficult one to meet. *Blalock v. N.C. Dep't of Health & Human Services*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001). Administrative agency decisions may be reversed as arbitrary and capricious only if they are "patently in bad faith" or "whimsical" in the sense that "they indicate a lack of fair and careful consideration," of "fail to indicate 'any course of reasoning and the exercise of judgment' . . . ." *ACT-UP Triangle v. Comm'n for Health Services*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997).
  
33. By contrast, alleged errors of law such as decisions in violation of a constitutional provision, in excess of statutory authority or jurisdiction, or upon unlawful procedure are reviewed under a *de novo* standard of review.<sup>3</sup> There is nothing in the record in this case to suggest that the challenged decision involves an alleged error of law, and thus *de novo* review is inappropriate. *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459. This contested case is *not* a *de novo* review of the CON Section's decision. *Id.* The Undersigned may not substitute his judgment for that of the Agency, "even though the court justifiably could have reached a different result had the matter been before it *de novo*." *Charter Pines Hosp., Inc. v. N.C. Dep't of Human Res.*, 83 N.C. App. 161, 171, 349 S.E.2d 639, 646 (1986) (citations omitted).
  
34. The question arises as to whether an agency is entitled to any particular "deference" in how it has addressed the issues in a particular contested case. It is true that North Carolina law gives great weight to an agency's interpretation of a law it administers. *Frye Regional Med. Center v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). Further, the Agency's interpretation and application of the statutes and rules it is empowered to enforce are entitled to deference, as long as the Agency's interpretation is reasonable and based on a permissible construction of the statute. *Good Hope Health System, LLC v. N.C. Dep't of Health & Human Services*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (2008), *aff'd*, 362 N.C. 504, 666 S.E.2d 749 (2008); *Craven*, 176 N.C.

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<sup>3</sup> See *City of Rockingham v. N.C. Dep't of Env't & Natural Res.*, 736 S.E.2d 764, 767 (N.C. Ct. App. 2012); *Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 207 N.C. App. 618, 623, 701 S.E.2d 284, 289 (2010); *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005); *Kea v. N.C. Dep't of Health & Human Servs.*, 153 N.C. App. 595, 603, 570 S.E.2d 919, 924 (2002).



App. at 58, 625 S.E.2d 837 at 844; *see also* *Carpenter v. N.C. Dep't of Human Resources*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992).

35. North Carolina law also presumes that the Agency has properly performed its duties. *In re Broad & Gales Creek Community Assoc.*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); *Adams v. N.C. State Bd. of Reg. for Prof. Eng. & Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998) (stating "proper to presume administrative agency has properly performed its official duties"); *In re Land and Mineral Co.*, 49 N.C. App. 529, 531, 272 S.E.2d 6, 7 (1980) (stating that "the official acts of a public agency . . . are presumed to be made in good faith and in accordance with the law.").

#### AGENCY FINDINGS

36. Cape Fear failed to prove by a preponderance of the evidence that the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it found the FirstHealth Application conforming with all applicable statutory review criteria and regulations.
37. Cape Fear failed to prove by a preponderance of the evidence that the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it found the FirstHealth Application comparatively superior to the Cape Fear Application, approved the FirstHealth Application, and disapproved the Cape Fear Application.
38. The Agency acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily or capriciously, did not act erroneously, and acted as required by law and rule in finding that the FirstHealth Application was conforming to all applicable statutory and regulatory review criteria.
39. The Agency acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily or capriciously, did not act erroneously, and acted as required by law and rule in finding that the FirstHealth Application was comparatively superior to the Cape Fear Application, in approving the FirstHealth Application, and disapproving the Cape Fear Application.
40. The Agency Findings were based upon information available to the Agency during the review of the Cape Fear Application and the FirstHealth Application, were not arbitrary or capricious, were not based on any improper procedure, and did not constitute Agency error.

#### Criterion (1)

41. N.C. Gen. Stat. § 131E-183(a)(1), Criterion (1), provides that: "The proposed project shall 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 rooms, or home health offices that may be approved.”

42. In its application, FirstHealth applied for 28 beds, which was the maximum number of beds available under the 2012 SMFP for the Cumberland-Hoke Acute Care Bed Service Area. FirstHealth also was found conforming with Policy GEN-3 and Policy GEN-4, which were the two SMFP policies applicable to the FirstHealth Application. Cape Fear did not offer any evidence to contradict the Agency's findings on these two policies.
43. Cape Fear did not provide any support for its opinion that the Agency should have analyzed Criterion (1) the way Cape Fear suggests it should have.
44. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was conforming with Criterion (1).
45. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with Criterion (1).
46. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth conforming with Criterion (1).

Criterion (3)

47. N.C. Gen. Stat. § 131E-183(a)(3), 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).
48. Using a detailed, reasonable and supported methodology, FirstHealth identified the population it proposes to serve; the need that the 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.
49. Cape Fear did not provide support for its position that cases with DRG weights above 2.0 should have been excluded from FirstHealth's utilization projections.
50. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was conforming with Criterion (3).

- 51. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with Criterion (3).
- 52. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth conforming with Criterion (3).

Criterion (3a)

- 53. N.C. Gen. Stat. § 131E-183(a)(3a), Criterion (3a), provides: "In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the applicant shall demonstrate that the needs of the population presently served will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care." N.C. Gen. Stat. § 131E-183(a)(3a).
- 54. The FirstHealth Application was filed in response to a need determination for 28 acute care beds in the Cumberland-Hoke Acute Care Bed Service Area. The application proposed to add beds for the provision of acute care services at FirstHealth Hoke Hospital. It did not propose to reduce, eliminate, or relocate a service. As such, Criterion (3a) was not applicable to the FirstHealth Application.
- 55. Cape Fear presented no authority for its proposition that Criterion (3a) is applicable to a project proposing the addition of acute care beds to a facility.
- 56. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that Criterion (3a) was not applicable to the FirstHealth Application.
- 57. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that Criterion (3a) did not apply to the FirstHealth Application.
- 58. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding Criterion (3a) not applicable to FirstHealth.

Criterion (4)

- 59. N.C. Gen. Stat. § 131E-183(a)(4), Criterion (4), requires that: "Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed." N.C. Gen. Stat. § 131E-183(a)(4).

60. FirstHealth adequately demonstrated that its application proposed the least costly or most effective alternative. FirstHealth was not required to propose to relocate additional beds from Moore Regional in lieu of the applying for the 28 beds available in the SMFP.
61. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was conforming with Criterion (4).
62. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with Criterion (4).
63. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth conforming with Criterion (4).

Criterion (5)

64. Under N.C. Gen. Stat. § 131E-183(a)(5), Criterion (5), "Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service." N.C. Gen. Stat. § 131E-183(a)(5).
65. Cape Fear did not challenge FirstHealth's ability to fund its project. The alleged errors that Cape Fear noted in the FirstHealth pro formas were immaterial and did not impact the financial feasibility of FirstHealth's project.
66. FirstHealth demonstrated 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.
67. The Agency correctly concluded that FirstHealth adequately demonstrated that the financial feasibility of the proposal was based on reasonable projections of costs and charges.
68. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was conforming with Criterion (5).
69. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with Criterion (5).
70. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth conforming with Criterion (5).

Criterion (6)

71. To satisfy N.C. Gen. Stat. § 131E-183(a)(6), Criterion (6), “[t]he applicant shall demonstrate 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).
72. In its need methodology, FirstHealth appropriately took into consideration the CON that had been approved for Hoke Community Medical Center. Using a detailed, reasonable, and supported methodology, FirstHealth demonstrated that its project would not unnecessarily duplicate existing or approved health service capabilities or facilities, including Hoke Community Medical Center.
73. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was conforming with Criterion (6).
74. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with Criterion (6).
75. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth conforming with Criterion (6).

Criterion (13)c.

76. N.C. Gen. Stat. § 131E-183(a)(13)c., Criterion (13)c., states “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; . . . .”
77. In Section VI of its application, FirstHealth demonstrated that it would provide care to the elderly and medically underserved groups.
78. Cape Fear did not offer any evidence to show FirstHealth would not provide care to the elderly and medically underserved groups. Cape Fear did not provide support for its opinion that the Agency should have analyzed Criterion (13)c. the way Cape Fear suggested it should have.
79. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was conforming with Criterion (13)c.
80. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with Criterion (13)c.

81. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth conforming with Criterion (13)c.

Criterion (18a)

82. N.C. Gen. Stat. § 131E-183(a)(18a), Criterion (18a), requires, in pertinent part, that: "The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed...." N.C. Gen. Stat. § 131E-183(a)(18a).
83. Criterion (18a) applies regardless of whether the applicant is a new entrant in the market. FirstHealth demonstrated that its proposal would enhance competition because it demonstrated that its proposal was needed, and would better enable FirstHealth Hoke to compete with Hoke Community Medical Center.
84. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was conforming with Criterion (18a).
85. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with Criterion (18a).
86. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth conforming with Criterion (18a).

Conclusions with Respect to Other Review Criteria

87. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that Criteria (9) and (10) were not applicable to the FirstHealth Application.
88. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with Criteria (7), (8), (12), (13)a., (13)b., (13)d., (14) and (20).

Conclusions with Respect to the Administrative Regulations

89. For the reasons articulated above, substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was conforming with: 10A N.C.A.C. 14C .1203, 10A N.C.A.C. 14C .3802(b)(5), 10A N.C.A.C. 14C .3803(a) and (b), and 10A N.C.A.C. 14C .3805(d).

90. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with 10A N.C.A.C. 14C .1203, .3802(b)(5), 10A N.C.A.C. 14C .3803(a) and (b), 10A N.C.A.C. and 14C .3805(d).
91. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth conforming with: 10A N.C.A.C. 14C .1203, .3802(b)(5), 10A N.C.A.C. 14C .3803(a) and (b), and 10A N.C.A.C. 14C .3805(d).
92. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was conforming with the regulations at: 10A N.C.A.C. 14C .1200 *et seq* and 10A N.C.A.C. 14C .3800 *et seq*.

Comparative Analysis

93. In a competitive review, the CON Section must first evaluate each application on its own merits and then perform a comparative review utilizing factors of its choosing to determine which applicant is the superior applicant and should receive the CON need. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 464.
94. There are no statutes, rules, or other authority that dictate the comparative factors the Agency must utilize in a competitive review. There are also no statutes, rules, or other authority that direct the Agency in the manner in which it must apply those comparative factors utilized. The Agency selects the appropriate factors to utilize in a competitive review based on the specific facts and circumstances of the review.
95. The Agency's determination of the comparative factors to utilize in this review was appropriate and application of the comparative factors in this review was reasonable and was not arbitrary or capricious.
96. There is no minimum number of comparative factors for which an applicant must be deemed superior in order to be chosen as the approved applicant. Even one factor is sufficient to justify the Agency's approval of one application over another application.
97. The Agency properly evaluated the FirstHealth and Cape Fear Applications independently, and then conducted a comparative analysis in reaching its decision that the FirstHealth Application was the superior application.

Geographic Accessibility

98. The vast majority of acute care beds in the Cumberland-Hoke Acute Care Bed Service area are located in Cumberland County. Using a bed-to-population ratio, the Agency correctly determined that Cumberland County has many more beds to serve its population and therefore has greater Geographic Accessibility than does Hoke County.

99. Awarding the 28 beds to FirstHealth would improve the bed-to-population ratio and Geographic Accessibility in Hoke County.
100. While Cape Fear offered many different ways that the Agency could have analyzed the comparative factor of Geographic Accessibility, Cape Fear did not produce evidence to show that the Agency erred in not analyzing Geographic Accessibility in the way Cape Fear says it should have.
101. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was comparatively superior to the Cape Fear Application with respect to Geographic Accessibility.
102. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was comparatively superior to the Cape Fear Application with respect to Geographic Accessibility.
103. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth comparatively superior with respect to Geographic Accessibility.

Competition

104. As the North Carolina Court of Appeals held in *Total Renal Care of N.C. v. N.C. Dep't of Health and Human Serv.*, 171 N.C. App. 734, 741, 615 S.E.2d 81, 85 (2005):

We find increased competition and consumer choice to be well within the established criteria in N.C. Gen. Stat. § 131E-183 and not inconsistent with the General Assembly's findings in N.C. Gen. Stat. § 131E-175. . . Also, this Court has approved of "competition" as a rational means of comparing competing applications and awarding a certificate of need.

105. Competition is a relevant consideration regardless of whether an applicant is a new entrant.
106. The vast majority of acute care beds in the Cumberland-Hoke Acute Care Bed Service Area are under Cape Fear's control. Awarding 28 beds to FirstHealth in Hoke County allows FirstHealth to expand its service in Hoke County and therefore compete more effectively against Cape Fear.
107. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was comparatively superior to the Cape Fear Application with respect to Competition.
108. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in



determining that the FirstHealth Application was comparatively superior to the Cape Fear Application with respect to Competition.

109. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth comparatively superior with respect to Competition.

Quality

110. Quality is an important issue in CON review. Even though an applicant may be found conforming with Criterion (20), that does not mean the applicant is the comparatively superior applicant with respect to Quality.
111. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the FirstHealth Application was comparatively superior to the Cape Fear Application with respect to Quality. Cape Fear had numerous Medicare Condition-level deficiencies and immediate jeopardy citations, including three patient deaths, in the 18 months prior to the Agency's decision in this review. The number and severity of these events lead CMS and Cape Fear to enter into the SIA. The SIA was still in effect at the time of the Agency's decision. Unlike Criterion (20), which looks into the past, the SIA is forward-looking because it required Cape Fear to take certain actions to ensure quality care in the future. Cape Fear was required to take these steps or else risk termination from the Medicare program, which would have been financially devastating to Cape Fear.
112. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the FirstHealth Application was comparatively superior to the Cape Fear Application with respect to Quality.
113. Cape Fear failed to meet its burden demonstrating that the Agency erred in finding FirstHealth comparatively superior with respect to Quality.

Operating Expenses

114. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the Cape Fear Application and the FirstHealth Application could not be compared with respect to Operating Expenses.
115. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the applicants could not be compared with respect to Operating Expenses.

Access by Underserved Groups

116. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that Cape Fear projects the highest percentage of total services to be provided to Medicaid recipients, and that both Cape Fear and FirstHealth are comparable with respect to access by Medicare recipients.
117. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that Cape Fear projects the highest percentage of total services to be provided to Medicaid recipients, and that both Cape Fear and FirstHealth are comparable with respect to Access by Medicare recipients.

Revenues

118. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that the Cape Fear Application and the FirstHealth Application could not be compared with respect to Revenues.
119. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that the applicants could not be compared with respect to Revenues.

Demonstration of Need

120. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that both applicants are equally effective alternatives with respect to Demonstration of Need.
121. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that both applicants are equally effective alternatives with respect to Demonstration of Need.

Financial Feasibility

122. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that both applicants are equally effective alternatives with respect to Financial Feasibility.
123. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that both applicants are equally effective alternatives with respect to Financial Feasibility.

Coordination with the Existing Healthcare System

124. Substantial evidence in the record of this case shows that the Agency correctly and reasonably determined that both applicants are equally effective alternatives with respect to Coordination with the Existing Healthcare System.
125. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that both applicants are equally effective alternatives with respect to Coordination with the Existing Healthcare System.

Community Support

126. Substantial evidence the record of this case shows that the Agency correctly and reasonably determined that both applicants are equally effective alternatives with respect to Community Support.
127. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in determining that both applicants are equally effective alternatives with respect to Community Support.

Summary

128. The Agency's decision was not erroneous, arbitrary, capricious, in excess of statutory authority and jurisdiction, or contrary to law or rule.
129. Substantial evidence appears in the record of this case to support the Agency's decision to approve the FirstHealth Application and to disapprove the Cape Fear Application.
130. Cape Fear failed to show by a preponderance of the evidence that the Agency erred in finding the FirstHealth Application conforming with all applicable review criteria. Specifically, Cape Fear failed to show by a preponderance of the evidence that the Agency erred in finding the FirstHealth Application conforming with Criteria (1), (3), (4), (5), (6), (13)c. and 18a and that Criterion (3a) was not applicable to the FirstHealth Application.
131. Cape Fear failed to show by a preponderance of the evidence that the Agency erred in finding the FirstHealth Application conforming with 10A N.C.A.C. 14C .1203., 10A N.C.A.C. 14C .3802(b)(5), 10A N.C.A.C. 14C .3803(a) and (b), 10A N.C.A.C. 14C .3805(d).
132. Cape Fear failed to show by a preponderance of the evidence that the Agency erred in finding the FirstHealth Application comparatively superior to the Cape Fear Application.

133. Cape Fear failed to show by a preponderance of the evidence that the Agency erred in approving the FirstHealth Application and in disapproving the Cape Fear Application.

**SUBSTANTIAL PREJUDICE**

134. Because Cape Fear failed to show that the Agency erred in approving the FirstHealth Application and in disapproving the Cape Fear Application, the Undersigned finds that there has been no showing that the Agency substantially prejudiced Cape Fear's rights in this Certificate of Need review and contested case hearing.

**FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby enters the following FINAL DECISION under N.C. Gen. Stat. §§ 150B-34 and 131E-188, based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

IT HEREBY IS ORDERED as follows:

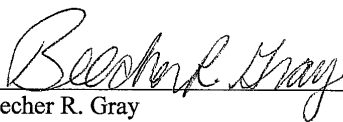
The decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section in this review is supported by the evidence and is **AFFIRMED**.

**NOTICE**

Under the provisions of N.C. Gen. Stat. § 131E-188(b), any party wishing to appeal the final decision of the Administrative Law Judge must file a Notice of Appeal with the Office of Administrative Hearings and serve the Notice on the N.C. Department of Health and Human Services and all other affected persons who were parties to the contested case. The appealing party must file the Notice within 30 days of the receipt of the written notice of the Final Decision. Under N.C. Gen. Stat. § 131E-188(b1) before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of Appeals. In conformity with the Office of Administrative Hearings' Rule 26 N.C.A.C. 03.012 and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

IT IS SO ORDERED.

This the 17 day of September, 2013.

  
Beecher R. Gray  
Administrative Law Judge

On this date mailed to:

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This the 17<sup>th</sup> day of September, 2013.



Office of Administrative Hearings  
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Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF HOKE

|  |                   |
|--|-------------------|
| <p>SURGICAL CARE AFFILIATES, LLC AND<br/>FAYETTEVILLE AMBULATORY<br/>SURGERY CENTER LIMITED<br/>PARTNERSHIP,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND<br/>HUMAN SERVICES, DIVISION OF<br/>HEALTH SERVICE REGULATION,<br/>CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS,<br/>INC.,<br/>Respondent – Intervenor.</p> | <p>12DHR12086</p> |
| <p>CUMBERLAND COUNTY HOSPITAL<br/>SYSTEM INC. d/b/a CAPE FEAR VALLEY<br/>MEDICAL CENTER,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND<br/>HUMAN SERVICES, DIVISION OF<br/>HEALTH SERVICE REGULATION,<br/>CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS,<br/>INC.,<br/>Respondent-Intervenor.</p>                       | <p>12DHR12090</p> |

CUMBERLAND COUNTY HOSPITAL  
SYSTEM, INC. d/b/a CAPE FEAR VALLEY  
HEALTH SYSTEM,  
Petitioner,

v.

NC DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, DIVISION OF  
HEALTH SERVICE REGULATION,  
CERTIFICATE OF NEED SECTION,  
Respondent,

and

FIRSTHEALTH OF THE CAROLINAS,  
INC.,  
Respondent – Intervenor.

12DHR12094

THIS MATTER came before the undersigned Administrative Law Judge for hearing on Cape Fear's Motion for Partial Summary Judgment (the "Motion").<sup>1</sup> The Motion, filed against both FirstHealth and the Agency in cases 12 DHR 12086 and 12 DHR 12090, alleged that the (1) the Agency erred by determining that the FirstHealth 28 Beds Application was conforming with

<sup>1</sup> In this Final Decision, the following abbreviations are used:

- "FirstHealth" means respondent-intervenor FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital.
- "Cape Fear" means petitioner Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Medical Center.
- The "Agency" means the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section.
- "CON" means certificate of need.
- FirstHealth's CON application to relocate one of its existing operating rooms ("OR") from FirstHealth Moore Regional Hospital to FirstHealth Hoke Community Hospital ("FirstHealth Hoke"), in Project I.D. No. N-8843-12, is referred to as the "FirstHealth OR Application."
- FirstHealth's CON application to add twenty-eight (28) acute care beds to FirstHealth Hoke, Project I.D. No. N-8838-12, is referred to as the "FirstHealth 28 Beds Application."
- FirstHealth's CON application to renovate two floors of FirstHealth Moore Regional Hospital in Moore County, Project I.D. No. H-8839-12, is referred to as the "FirstHealth Renovation Application."
- Cape Fear's CON application to develop twenty-eight (28) beds at Cape Fear Valley Medical Center in Fayetteville, Cumberland County, North Carolina, in Project I.D. No. M-8833-12 is referred to as the "Cape Fear 28 Beds Application."
- "SMFP" refers to the State Medical Facilities Plan.
- "Criterion (3)" refers to N.C. Gen. Stat. § 131E-183(a)(3) and "Criterion (6)" refers to N.C. Gen. Stat. § 131E-183(a)(6).
- The Memorandum Cape Fear filed in support of its Motion is referred to as "Cape Fear's Memorandum."
- "NOF" refers to "Notice of Filing."
- All exhibits are referred to by the abbreviation "Ex." and were attached to the Notice of Filing filed concurrently with FirstHealth and the Agency's Response to Cape Fear's Partial Motion.

Criteria (3) and (6) and 10A N.C.A.C. 14C.3803(a); and (2) the Agency erred by determining that the FirstHealth OR Application was conforming with Criteria (3) and (6). Cape Fear asserts that FirstHealth double counted patient days as between: (a) the FirstHealth 28 Beds Application and OR Application; and (b) the FirstHealth Renovation Application (the "Double Counting Issue"). In their response, FirstHealth and the Agency asked that summary judgment be entered in their favor pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c). Although the Motion is entitled Motion for Partial Summary Judgment, at oral argument, counsel for Cape Fear represented that the Motion was for full summary judgment. *See* Transcript of Motions Hearing, May 28, 2013, pp. 3; 15. Accordingly, the undersigned Administrative Law Judge will treat the Motion as a motion for full summary judgment on the Double Counting Issue.

Having considered Cape Fear's Motion, FirstHealth's and the Agency's response in opposition to the Motion, and the various deposition transcripts, affidavits and other exhibits submitted by the parties, and having heard arguments of counsel for all parties, the undersigned Administrative Law Judge GRANTS summary judgment in favor of FirstHealth and the Agency on the Double Counting Issue as it relates to Criteria (3) and (6), and 10A N.C.A.C. 14C.3803(a).

#### **SUMMARY OF UNDISPUTED FACTS**

1. On July 15, 2012, FirstHealth filed three separate CON applications: the 28 Beds Application, the OR Relocation Application and the Renovation Application.
2. By its decision dated November 27, 2012 and findings dated December 4, 2012, the Agency approved all three of FirstHealth's CON applications.
3. On December 21, 2012, Cape Fear filed three separate petitions for contested case hearing to review the Agency's decisions approving the FirstHealth 28 Beds Application, the FirstHealth OR Application and the FirstHealth Renovation Application.
4. The above-captioned contested cases involve: (1) the FirstHealth 28 Beds Application; (2) the Cape Fear 28 Beds Application; and (3) the FirstHealth OR Application.
5. Cape Fear contends that the Agency erred in finding the FirstHealth 28 Beds Application and the FirstHealth OR Application conforming with Criteria 3 and 6, and the FirstHealth 28 Beds Application conforming with the performance standard at 10A N.C.A.C. 14C .3803(a) on the grounds that FirstHealth double counted patient days as between the FirstHealth 28 Beds Application and OR Application and the FirstHealth Renovation Application.

#### **Cape Fear's Double Counting Theory**

6. Cape Fear asserts that "[t]he Agency should have found the FirstHealth 28-Bed Application and the FirstHealth OR Application nonconforming with Criteria 3 and 6, and the FirstHealth 28-Bed Application nonconforming with the performance standard at 10A N.C.A.C. 14C .3803(a) because each of the applications relied on the exact same projected patient days



used to demonstrate the need in FirstHealth's [Renovation] Application." Cape Fear's Memorandum, p. 5.

7. Cape Fear further asserts that since the undersigned Administrative Law Judge granted summary judgment in favor of FirstHealth and the Agency with respect to the FirstHealth Renovation Application in 12 DHR 12088, the patient days in the FirstHealth Renovation Application are now "committed" or "assigned" to the FirstHealth Renovation Application, and cannot also be used to support the volume projections in FirstHealth's 28 Beds Application and FirstHealth's OR Application. *Id.*, pp. 5; 20.

8. In the FirstHealth Renovation Application, FirstHealth sought to renovate two floors of Moore Regional Hospital in Pinehurst. *See* Ex. 37 to NOF, p. 55. The population proposed to be served by the Renovation Application consisted of Moore, Lee, Richmond, Montgomery, Hoke, Robeson, and Scotland Counties. *See* Ex. 37 to NOF, p. 48.

9. The FirstHealth Renovation Application methodology examined the general days of care and the medical intensive care unit (ICU) days of care in the entire hospital, and calculated the average change in the growth in general days of care and medical ICU days of care from 2006 to 2011 (2.43% and 2.11%, respectively). FirstHealth then cut the growth rates in half (1.21% and 1.06%, respectively) and applied the 1.21% growth rate to calculate general days of care from 2012 to 2018 in the entire hospital, and applied the 1.06% growth rate to calculate medical ICU days of care from 2012 to 2018 in the entire hospital. Because only certain units in the hospital were being renovated, FirstHealth calculated the percentage of the total days of care from 2012 to 2018 that would be served in the particular units being renovated. *See* Ex. 37 to NOF, pp. 38-39, 56-57. Out of a total of 71,105 patient days projected in the general units and medical ICU in 2018, only 25,858 were to be provided in the units to be renovated, leaving an "extra" 45,237 patient days. *See* Ex. 37 to NOF, pp. 39, 42.

10. The FirstHealth 28 Beds Application proposed to develop 28 new acute care beds at FirstHealth Hoke pursuant to the need determination in the 2012 SMFP. The FirstHealth 28 Beds Application did not use the same patient origin as the FirstHealth Renovation Application. Rather, the FirstHealth 28 Beds Application proposed to serve patients from Hoke, Cumberland, Scotland and Robeson Counties. *See* Ex. 38 to NOF, p. 89.

11. The FirstHealth 28 Beds Application contained a longer and more complex need methodology than that used in the FirstHealth Renovation Application. *Cf.*, Ex. 37 to NOF, Sections III and IV to Ex. 38 to NOF, Sections III and IV.

12. Unlike the FirstHealth Renovation Application, the FirstHealth 28 Beds Application relies on a shift of patients from Cumberland, Hoke, Scotland and Robeson Counties who currently present to FirstHealth Moore Regional for care. FirstHealth assumed that a certain percentage of these patients would find it more convenient to use FirstHealth Hoke rather than continuing to drive to FirstHealth Moore Regional. *See, e.g.*, Ex. 38 to NOF, pp. 100-103.

13. Cape Fear asserts that FirstHealth projects to shift 7,929 patient days from FirstHealth Moore Regional to FirstHealth Hoke by 2017, and that these same 7,929 patient days

are needed to support the FirstHealth Renovation Application. Cape Fear further contends since the same patient days cannot be allocated to two different applications simultaneously, then either the FirstHealth 28 Beds or OR Application must be disapproved. *See* Cape Fear Memorandum, pp. 5, 12-13, 21.

14. FirstHealth and the Agency contend that there was no double counting of patient days as between the FirstHealth Renovation Application and the FirstHealth 28 Beds Application. The evidence of record demonstrates that there was no double counting of patient days:

|                 |  |
|-----------------|--|
| 71,105          | (patient days in 2018 in general and medical ICU)              |
| - <u>25,868</u> | (patient days in the units to be renovated)                    |
| 45,237          | (remaining patient days at Moore Regional)                     |
| - <u>7,929</u>  | (patient days shifted from Moore Regional to FirstHealth Hoke) |
| 37,308          | (patient days remaining at Moore Regional)                     |

*See* Ex. 37 to the Motion, pp. 37, 42.

15. Even if the 7,929 patient days going to FirstHealth Hoke were deducted from the 25,868 patient days going to the renovated units, that still leaves 17,939 patient days at Moore Regional. *See* Ex. 5 to NOF, pp. 103-104, 113-114; *see also* Ex. 2 to NOF, pp. 35-36, 47-48, Ex. 34 to NOF; Ex. 1 to NOF, pp. 215-219, 224; Ex. 33 to NOF; Ex. 40 to NOF, pp. 24-25, 70, 73, 77-78.

16. Cape Fear contends that David Legarth did not "deduct" the 7,929 days of care shown on page 139 of the financial pro formas for the FirstHealth Renovation Application, which provides information for all of FirstHealth Moore Regional Hospital. In FY 2018, FirstHealth projects 90,611 inpatient days of care for all of FirstHealth Moore Regional Hospital, which includes more than the general units and medical ICU. Deducting the 7,929 days of care from 90,611 inpatient days of care on page 139 of the FirstHealth Renovation Application shows the following:

|                 |  |
|-----------------|--|
| 90,611          | (total inpatient days of care patient days in 2018 at Moore)   |
| - <u>25,868</u> | (patient days in the units to be renovated)                    |
| 64,743          | (remaining patient days at Moore Regional)                     |
| - <u>7,929</u>  | (patient days shifted from Moore Regional to FirstHealth Hoke) |
| 56,814          | (patient days remaining at Moore Regional)                     |

17. As the foregoing calculations demonstrate, the 7,929 patient days can shift to FirstHealth Hoke without impacting FirstHealth Moore Regional. There was no double counting of patient days as between the FirstHealth Renovation Application and the FirstHealth 28 Beds Application.

18. Cape Fear contends that the FirstHealth OR Application double counted patients by "rely[ing] on 1,880 surgical inpatient days of care duplicated at Moore Regional in the [Renovation] Application." Cape Fear's Memorandum, p. 19. The evidence, however,

demonstrates that there was no double counting as between the FirstHealth Renovation Application and the FirstHealth OR Application. *See* Ex. 12 to NOF; pp. 47, 49-51; *see also* Ex. 39 to NOF, pp. 584-586.

19. Cape Fear also contends that "[t]he Agency's error stemmed from the fact that the Agency did not review the FirstHealth 28-Bed and OR Applications competitively with the FirstHealth [Renovations] Application (per 10A N.C.A.C. 14C .0202), and thus failed to realize the mutual exclusivity of the patient day volumes. . . ." *See* Cape Fear Memorandum, pp. 21.

20. Cape Fear's own experts could cite no support for the theory that the FirstHealth Renovation and FirstHealth 28 Beds Applications were competitive. *See* Ex. 48 to the NOF, pp. 87-90; *see also* Ex. 49 to NOF, pp. 157-158; Ex. 50 to NOF, pp. 35-36. Ms. Bres Martin, one of Cape Fear's experts, acknowledged that the FirstHealth 28 Beds Application was subject to a need determination in the SMFP while the FirstHealth Renovation Application was not. She could not identify any prior Agency decisions where the Agency deemed an application that was in response to a need determination in a service area was competitive with an application that was not subject to a need determination in a separate service area. *Id.* at 90-91.

### **CONCLUSIONS OF LAW**

1. The parties are properly before the Office of Administrative Hearings.
2. Administrative Law Judges may rule on all prehearing motions authorized under the North Carolina rules of Civil Procedure, including motions for summary judgment. *See* N.C. Gen. Stat. § 150B-33(b)(3a); 26 N.C.A.C. 3.0105(1) and (6).
3. Under N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment appropriately is awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." In addition, Rule 56(c) provides that "[s]ummary judgment, when appropriate, may be rendered against the movant."
4. A court need not make findings as to every fact that arises from the evidence and need only find those facts that are material to the settlement of the dispute. *See Flanders v. Gabriel*, 110 N.C. App. 438, 449, 429 S.E.2d 611, 612 (1993).
5. The subject matter of this contested case is the Agency's decision to conditionally approve the FirstHealth 28 Beds and OR Applications and disapprove the Cape Fear 28 Beds Application. *See* N.C. Gen. Stat. § 131E-188(a); *see also Presbyterian Hosp. v. N.C. Dep't of Health and Human Servs.*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006), *rev. denied*, 361 N.C. 221, 642 S.E.2d 446 (2007); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).
6. To obtain a CON for a proposed project, a CON application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an application fails to conform with any one of these criteria, then the applicant is not entitled to a CON for the proposed

project as a matter of law. See *Presbyterian-Orthopaedic Hosp. v. N.C. Dep't of Human Res.*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996) (holding that "an application must comply with *all* review criteria" and that failure to comply with one review criteria supports entry of summary judgment against the applicant) (emphasis in original).

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

8. The burden of proof which a petitioner must meet in order to prevail in a contested case is set forth in N.C. Gen. Stat. § 150B-23(a).

9. Applying N.C. Gen. Stat. § 150B-23(a) the Court of Appeals has explained the petitioner's burden of proof in a CON case as follows:

The subject matter of a contested case hearing by the ALJ is an agency decision. Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used an 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) (emphasis omitted).

10. As petitioner, Cape Fear bears the burden of proof on each and every element of its case. See *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-448 (2006). The burden of persuasion placed upon Cape Fear is the "greater weight of the 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 the evidence.") Therefore, Cape Fear has the burden of proof on issues presented to the ALJ regarding the Agency's conditional approval of the FirstHealth Applications and the disapproval of the Cape Fear Application. See *Southland Amusements and Vending, Inc. v. Rourk*, 143 N.C. App. 88, 94, 545 S.E.2d 254, 257 (2001).

11. The appropriate standard of review in this case depends upon the issue being reviewed. When an appellant charges that a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency. See *Britthaven, Inc.*, 118 N.C. App. at 386, 455 S.E.2d at 461.

12. Since Cape Fear seeks a reversal of the Agency's decision on Criteria (3) and (6) with respect to the FirstHealth 28 Beds and OR Applications, and on 10A N.C.A.C. 14C.3803(a) with respect to the FirstHealth 28 Beds Application, the appropriate standard of review is the whole record test. *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 43, 684 S.E.2d

914, 920 (2009). ("fact-intensive issues such as sufficiency of the evidence to support [the Agency's] decision are all reviewed under the whole-record test").

13. Under the "whole record" test:

[T]he reviewing court is required to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We should not replace the agency's judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter were before us *de novo*. While the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency.

*Parkway Urology, P.A. v. N.C. Dep't of Health and Human Servs.*, 205 N.C. App. 529, 535, 696 S.E.2d 187, 192 (2010) (quoting *Dialysis Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000)), *rev. denied*, \_\_\_ N.C. \_\_\_, 705 S.E.2d 739, and 705 S.E.2d 753 (2011).

14. The whole record test merely gives the reviewing court the capability to determine whether the administrative decision has a rational basis in the evidence. *See Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 265, 270, 623 S.E.2d 629, 633 (2006).

15. Substantial evidence in the record demonstrated that there was no double counting of the patient days as between the FirstHealth 28 Beds and FirstHealth Renovation Applications or the FirstHealth OR and FirstHealth Renovation Applications.

16. With regard to the Agency's finding that FirstHealth was conforming to Criterion 3 and Criterion 6, FirstHealth conservatively and reasonably projected that the 7,929 patient days can shift from FirstHealth Moore Regional to FirstHealth Hoke with extra days left over at FirstHealth Moore Regional so as not to cause any issues at Moore Regional. Thus, the Agency properly determined that the FirstHealth 28 Beds and OR Applications were conforming to Criterion 3 and Criterion 6.

17. The evidence demonstrated that the patient days used to support inpatient surgeries were not duplicated, and that the types of surgeries to be performed at FirstHealth Moore Regional will likely be different from the types of surgeries that will be performed at FirstHealth Hoke. *See Ex. 12 to NOF*, pp. 47, 49-51.

18. Substantial evidence in the record demonstrated that the Agency did not act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by law or rule in determining that the FirstHealth 28 Beds Application and FirstHealth OR Application were conforming with Criteria (3) and (6).

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

20. Cape Fear's own experts, Ms. Bres Martin and Mr. Carter, were unable to substantiate through precedent or otherwise Cape Fear's theory that the FirstHealth Renovation Application and the FirstHealth 28 Beds Application and OR Application were competitive applications that should have been assigned to one project analyst.

21. The evidence demonstrated that FirstHealth 28 Beds Application was subject to a need determination in the SMFP; the FirstHealth Renovation Application was not subject to any need determination in the SMFP. The evidence further demonstrated that the FirstHealth 28 Beds Application was proposed for Hoke County, and consisted of a four-county service area whereas the FirstHealth Renovation Application was proposed for Moore County, and consisted of a seven-county service area.

22. Substantial evidence in the record demonstrated that the Agency did not act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by law or rule in determining that the FirstHealth Renovation Application and the FirstHealth 28 Beds Application and OR Application were noncompetitive applications pursuant to 10A N.C.A.C. 14C .0202(f).

23. There is no genuine issue of material fact in this case, and FirstHealth and the Agency are entitled to judgment as a matter of law with respect to Criterion (3) and Criterion (6) on the Double Counting Issue.

24. 10A N.C.A.C. 14C .3803(a) provides:

- (a) An applicant proposing to develop new acute care beds shall demonstrate that the projected average daily census (ADC) of the total number of licensed acute care beds proposed to be licensed within the service area, under common ownership with the applicant, divided by the total number of those licensed acute care beds is reasonably projected to be at least 66.7 percent when the projected ADC is less than 100 patients, 71.4 percent when the projected ADC is 100 to 200 patients, and 75.2 percent when the projected ADC is greater than 200 patients, in the third operating year following completion of the proposed project or in the year for which the need determination is identified in the State Medical Facilities Plan, whichever is later.

25. The evidence showed that there was no double counting between the FirstHealth 28 Beds and FirstHealth Renovation Applications, and that the 7,929 patient days should not be deducted from the FirstHealth 28 Beds Application.

26. Without the deduction of the 7,929 patient days from the FirstHealth 28 Beds Application, FirstHealth Hoke remains above the 66.7 percent performance standard required by 10A N.C.A.C. 14C .3803(a). As a result, the Agency did not err in finding the FirstHealth 28 Beds Application conforming with 10A N.C.A.C. 14C .3803(a).

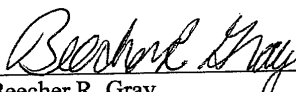
27. Substantial evidence in the record demonstrated that the Agency did not act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by law or rule in determining that the FirstHealth 28 Beds Application was conforming with 10A N.C.A.C. 14C .3803(a).

28. There is no genuine issue of material fact in this case, and FirstHealth and the Agency are entitled to judgment as a matter of law with respect to 10A N.C.A.C. 14C .3803(a) on the Double Counting Issue.

#### **DECISION**

Based on the foregoing undisputed facts and conclusions of law, the undersigned Administrative Law Judge holds, as a matter of law, that Cape Fear's Motion is hereby DENIED as to the Double Counting Issue, and FirstHealth's and the Agency's Motion is GRANTED as to the Double Counting Issue. This interlocutory decision is not immediately appealable. Instead, this order will become part of the Final Agency Decision in these contested cases.

This the 25 day of June, 2013.

  
\_\_\_\_\_  
Beecher R. Gray  
Administrative Law Judge

On this date mailed or hand-delivered to:

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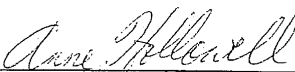
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This the 26<sup>th</sup> day of June, 2013.

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STATE OF NORTH CAROLINA 703 SEP 17 PM 1:42 IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF HOKE

Office of  
Administrative Hearings

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| <p>SURGICAL CARE AFFILIATES, LLC AND<br/>FAYETTEVILLE AMBULATORY<br/>SURGERY CENTER LIMITED<br/>PARTNERSHIP,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND<br/>HUMAN SERVICES, DIVISION OF<br/>HEALTH SERVICE REGULATION,<br/>CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS,<br/>INC.,<br/>Respondent – Intervenor.</p> | <p>12DHR12086</p> |
| <p>CUMBERLAND COUNTY HOSPITAL<br/>SYSTEM INC. d/b/a CAPE FEAR VALLEY<br/>MEDICAL CENTER,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND<br/>HUMAN SERVICES, DIVISION OF<br/>HEALTH SERVICE REGULATION,<br/>CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS,<br/>INC.,<br/>Respondent-Intervenor.</p>                       | <p>12DHR12090</p> |

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| <p>CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. d/b/a CAPE FEAR VALLEY HEALTH SYSTEM,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS, INC.,<br/>Respondent – Intervenor.</p> | <p><b>12DHR12094</b></p> |
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**FINAL DECISION AND PARTIAL SUMMARY JUDGMENT ORDER**

THIS cause came before the undersigned Administrative Law Judge upon Petitioner Cape Fear's<sup>1</sup> Motion for Partial Summary Judgment filed May 17, 2013. Cape Fear's motion sought partial summary judgment as a matter of law against FirstHealth and the Agency on the basis that the Agency erred as a matter of law in its decision finding the Cape Fear Application nonconforming under Criteria (1), (4), (18a), and (20) of the CON Act, N.C. Gen. Stat. § 131E-183(a)(1), (4), (18a), and (20). FirstHealth and the Agency filed a response to Cape Fear's Motion for Partial Summary Judgment on May 28, 2013 and requested, pursuant to N.C. Rules of Civil Procedure 56(c), that the Undersigned grant summary judgment in favor of FirstHealth

<sup>1</sup> In this Partial Summary Judgment Order the following abbreviations are used:

- "Agency" shall refer to the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section.
- "Cape Fear" shall refer to Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Medical Center and Cape Fear Valley Health System.
- "FirstHealth" shall refer to FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital.
- The "Cape Fear Application" or "Cape Fear 28-Bed Application" is Cape Fear's CON Application, identified as Project I.D. No. M-8833-12 to develop 28 acute care beds in Cumberland County.
- The "FirstHealth 28-Bed Application" is FirstHealth's CON Application, identified as Project I.D. No. N-8838-12 to develop 28 acute care beds at FirstHealth Hoke.
- "CON" means certificate of need.
- "OAH" means the North Carolina Office of Administrative Hearings.
- "SMFP" means the State Medical Facilities Plan.
- "CMS" means the Centers for Medicare and Medicaid Services.
- "Licensure and Certification Section" is the Department of Health and Human Services, Division of Health Service Regulation, Licensure and Certification Section.

and the Agency on this issue on the ground that the Agency decision was supported by substantial evidence.

Having considered Cape Fear's Motion, the briefs filed by Cape Fear, FirstHealth and the Agency, the record in this case, and the argument of counsel at a hearing conducted on May 31, 2013, the undersigned Administrative Law Judges enters this Order GRANTING Cape Fear's Motion for Partial Summary Judgment against the Agency and FirstHealth concerning Cape Fear's application on the basis that the Agency erred as a matter of law in its decision and findings concerning Criteria (1), (4), (18a), and (20) regarding the Cape Fear application in the 2012 Cumberland-Hoke Acute Care Bed Review.

**SUMMARY OF UNDISPUTED FACTS**

1. On June 15, 2012, Cape Fear and FirstHealth each filed CON Applications for the 28 acute care bed need determination for the Cumberland/Hoke service area which was designated as a multi-county service area for the acute care bed need methodology in the 2012 SMFP.
2. On November 27, 2012, the Agency issued its Decision, sending notification to Cape Fear that its CON application had been denied.
3. The Decision letter stated that "[w]ritten notice of all findings and conclusions upon which the decision was based will be provided to the applicants within five business days after the date of the decision."
4. Five business days later, on December 4, 2012, the Agency issued the Agency Findings.
5. The Agency Findings stated that Cape Fear was non-conforming with the statutory review criteria at N.C. Gen. Stat. § 131E-183(a)(20) ("Criterion 20") and, as a result, was also found nonconforming to the statutory review criteria at N.C. Gen. Stat. § 131E-183(a)(1),(4), and (18a) ("Criteria 1, 4, and 18a").
6. During late 2011 and early 2012, events occurred at Cape Fear that resulted in Immediate Jeopardy citations and findings that Cape Fear was out of compliance with several Medicare Conditions of Participation.
7. During the review, Cape Fear was subject to a Systems Improvement Agreement ("SIA") with the Centers for Medicare and Medicaid Services ("CMS"). The SIA recites, among other things, that "CFVMC was surveyed for compliance with Medicare Conditions of Participation and EMTALA a number of times between October 21, 2011 to January 3, 2012, and the surveys found non-compliance with several Medicare requirements, and CMS issued a November 29, 2011, Termination Letter to CFVMC terminating the Medicare Provider Agreement effective January 19, 2012." The SIA is Exhibit G to Exhibit 10 of Cape Fear's May 17, 2013 Notice of Filing.
8. The SIA did not end until January 2013.

9. However, by the November 27, 2012 Decision Date, the following events had occurred:
  - (a) In March 2012, The Joint Commission's full survey determined that Cape Fear was in compliance with all Medicare Conditions of Participation;
  - (b) On April 20, 2012, the CON Section entered into a settlement agreement with Cape Fear in Case No. 11 DHR 14886 after receiving confirmation that Cape Fear had received accreditation from The Joint Commission after a full survey;
  - (c) The April 20, 2012 settlement agreement between the CON Section and Cape Fear resulted in the issuance of a CON to Cape Fear to develop 65 acute care beds in Cumberland County;
  - (d) On August 22, 2012, the Licensure and Certification Section conducted a survey at Cape Fear, determining that 0 of 20 allegations were substantiated and finding Cape Fear in compliance with all Medicare Conditions of Participation; and
  - (e) On November 5, 2012, the Licensure and Certification Section's e-mail to the Agency confirmed that Cape Fear was in compliance with all Medicare Conditions of Participation.
10. The Agency's own administrative rule provides that the "agency shall determine whether a proposal is consistent with the review criteria set forth in G.S. 131E-183 and the standards, plans, and criteria *promulgated thereunder in effect at the time the review commences.*" 10A N.C.A.C. 14C.0207 (emphasis added). Thus, any statutory or regulatory requirement that an applicant must meet in order to be found conforming to the criteria must be in effect at the time the Agency's review begins.
11. In prior reviews, the Agency has found applicants conforming with Criterion (20) despite Immediate Jeopardy citations or the applicant being out of compliance with the Medicare Conditions of Participation within the 18 months prior to the CON decision, so long as the Agency saw evidence or information indicating that the applicant was compliant with such Conditions of Participation at the time of the CON Decision.
12. Despite evidence that Cape Fear was in compliance with all Medicare Conditions of Participation at the time of the decision, the Agency determined that Cape Fear could only demonstrate conformity to Criterion (20) by undergoing a full validation survey.
13. On the date of the Agency decision, November 27, 2012, the rationale for the Agency's decision that Cape Fear was non-conforming with Criterion (20) was that Craig Smith, Chief of the CON Section, did not have evidence that Cape Fear had undergone a full validation survey. See Smith Deposition, Vol. 1, p. 28, attached as Ex. 9 to Cape Fear's May 17, 2013 Notice of Filing. Mr. Smith was aware that Cape Fear had had several surveys but did not know whether these surveys constituted full validation surveys. *Id.* It was not until December 4, 2012, that Mr. Smith learned that a full validation survey had not been conducted. See Smith Dep., Vol. 1, p. 39; Agency File, p. 1382, attached as Ex. 1 to Cape Fear's May 17, 2013 Notice of Filing.

14. It is the Agency's customary practice to use the full validation survey to remove negative survey findings. *See* Smith Dep., Vol. 1, p. 30.
15. On December 3, 2012, Azzie Y. Conley, Chief of the Acute and Home Care Licensure and Certification Section of the North Carolina Department Health and Human Services Division of Health Service Regulation, exchanged emails with Rosemary Robinson of the Centers for Medicare and Medicaid Services ("CMS"). Ms. Conley asked whether Cape Fear was considered non-deemed with the Medicare Conditions of Participation. Ms. Robinson replied "[c]onsidered non-deemed until meet all Conditions of Participation." *See* Agency File, p. 1382.
16. On December 4, 2012, Craig R. Smith, Chief of the CON Section, spoke by telephone with Ms. Robinson to clarify the information contained in the December 3, 2012 email with Ms. Conley. Mr. Smith's note of this call states "[c]alled and spoke w/Rosemary Robinson after lunch on December 4, 2012. She confirmed the email message. All conditions have not been met. Waiting for survey to be done in early 2013. CRSmith." *See* Agency File, p. 1382.

#### **CONCLUSIONS OF LAW**

1. An Administrative Law Judge may rule on all pre-hearing motions which are authorized under the North Carolina Rules of Civil Procedure, including summary judgment motions. *See* N.C. Gen. Stat. § 150B-33(b)(3a); 26 N.C.A.C. § 3.0105(1) and (6).
2. Summary judgment is appropriate when all pleadings, answers to interrogatories, depositions, and affidavits establish there is no triable issue of material fact. *See* N.C. R. Civ. P. Rule 56(c).
3. Partial summary judgment is appropriate in this case because there is no genuine issue of material fact that must be resolved by the trier of fact. N.C. Gen. Stat. § 1A-1, Rule 56. Moreover, partial summary judgment is appropriate when, like here, the issue deals with an applicant's conformity or nonconformity with the statutory or regulatory criteria and not whether an applicant is comparatively superior to another applicant.
4. Criterion (20) requires that an "applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past." N.C. Gen. Stat. § 131E-183(a)(20). As written, Criterion (20) focuses on the applicant affirmatively demonstrating quality care generally. Criterion (20) does not require an applicant to have a perfect record of quality care without any past incidents.
5. The Agency erroneously applied Criterion (20) and relied on an unpromulgated rule when it required Cape Fear to undergo a full validation survey in order to demonstrate conformity to Criterion (20), notwithstanding two consecutive positive surveys evaluating Cape Fear under the Medicare Conditions of Participation.

6. The Agency is required to make a decision to approve or deny an application by the Decision Date. *See* N.C. Gen. Stat. § 131E-185; N.C. Gen. Stat. § 131E-186. Within five business days after it makes its decision, the Agency must provide the applicant with notice of all the findings and conclusions upon which it based its decision, including the criteria used by the Department in making its decision. N.C. Gen. Stat. § 131E-186(b)
7. The Agency did exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, and fail to act as required by rule or law in finding the Cape Fear 28-Bed Application nonconforming with Criteria (1), (4), (18a), and (20).
8. The Agency did exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, and fail to act as required by rule or law in finding the Cape Fear 28-Bed Application nonconforming with Criteria (1), (4), (18a), and (20).
9. The Agency did exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, and fail to act as required by rule or law when it relied on an unpromulgated rule to find the Cape Fear 28-Bed Application nonconforming with Criteria (1), (4), (18a), and (20).
10. The Agency did exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, and fail to act as required by rule or law when it relied on information obtained after the Decision Date to find the Cape Fear 28-Bed Application nonconforming with Criteria (1), (4), (18a), and (20).
11. There is no genuine issue of material fact in this case as to this issue, and Cape Fear is entitled to judgment as a matter of law.

#### **FINAL DECISION**

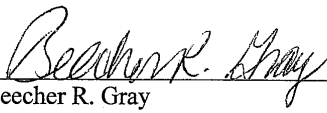
Based on the foregoing undisputed facts and conclusions of law, the undersigned Administrative Law Judge holds, as a matter of law, that Cape Fear's Motion is hereby GRANTED because the Agency erred as a matter of law in finding the Cape Fear Application nonconforming with Criteria (1), (4), (18a), and (20). FirstHealth's and the Agency's Motion is denied. This interlocutory decision is not immediately appealable. Instead, this order will become part of the Final Agency Decision in this contested case.

#### **NOTICE**

Under the provisions of N.C. Gen. Stat. § 131E-188(b), any party wishing to appeal the final decision of the Administrative Law Judge must file a Notice of Appeal with the Office of Administrative Hearings and serve the Notice on the N.C. Department of Health and Human Services and all other affected persons who were parties to the contested case. The appealing party must file the Notice within 30 days of the receipt of the written notice of the Final Decision. Under N.C. Gen. Stat. § 131E-188(b1) before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of Appeals. In conformity with the Office of Administrative Hearings' Rule 26 N.C.A.C. 03.012

and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

This the 17 day of September, 2013.

  
\_\_\_\_\_  
Beecher R. Gray  
Administrative Law Judge

On this date mailed to:

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This the 17<sup>th</sup> day of September, 2013.

  
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THIS MATTER came before the undersigned Administrative Law Judge for hearing on SCA’s Motion for Summary Judgment (the “Motion”).<sup>1</sup> The Motion, filed against both FirstHealth and the Agency in case 12 DHR 12086, alleged that the Agency’s decision to

<sup>1</sup> In this Final Decision, the following abbreviations are used:

- “FirstHealth” means respondent-intervenor FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital.
- “Cape Fear” means petitioner Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Medical Center.
- “SCA” means petitioners Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership (“FASC”) collectively.
- The “Agency” means the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section.
- “CON” means certificate of need.
- FirstHealth’s CON application to relocate one of its existing operating rooms (“OR”) from FirstHealth Moore Regional Hospital to FirstHealth Hoke Community Hospital (“FirstHealth Hoke”), in Project I.D. No. N-8843-12, is referred to as the “FirstHealth OR Application.”
- FirstHealth’s CON application to add twenty-eight (28) acute care beds to FirstHealth Hoke; Project I.D. No. N-8838-12, is referred to as the “FirstHealth 28 Beds Application.”
- FirstHealth’s CON application to renovate two floors of FirstHealth Moore Regional Hospital in Moore County, Project I.D. No. H-8839-12, is referred to as the “FirstHealth Renovation Application.”
- Cape Fear’s CON application to develop twenty-eight (28) beds at Cape Fear Valley Medical Center in Fayetteville, Cumberland County, North Carolina, in Project I.D. No. M-8833-12 is referred to as the “Cape Fear 28 Beds Application.”
- “SMFP” refers to the State Medical Facilities Plan.
- “Criterion (1)” refers to N.C. Gen. Stat. § 131E-183(a)(1), “Criterion (3)” refers to N.C. Gen. Stat. § 131E-183(a)(3) and “Criterion (6)” refers to N.C. Gen. Stat. § 131E-183(a)(6).
- All exhibits are referred to by the abbreviation “Ex.” and were attached to the Notice of Filing (“NOF”) filed concurrently with FirstHealth and the Agency’s Response to SCA’s Motion or attached to FirstHealth and the Agency’s Joint Motion for Summary Judgment filed on May 17 (“May 17 Motion”).

approve the FirstHealth OR Application was erroneous and substantially prejudiced SCA's rights on the grounds that the proposed relocation of an existing FirstHealth OR within the Moore-Hoke OR Service Area added an OR to the Cumberland-Hoke OR Service Area. In their response, FirstHealth and the Agency requested summary judgment in their favor under N.C. Gen. Stat. § 1A-1, Rule 56(c). Having considered SCA's Motion, FirstHealth's and the Agency's response in opposition to the Motion, and the various deposition transcripts, affidavits and other exhibits submitted by the parties, and having heard arguments of counsel for all parties, the undersigned Administrative Law Judge DENIES the Motion.

**SUMMARY OF UNDISPUTED FACTS**

1. On June 15, 2012, FirstHealth filed an application for a CON to relocate one of its existing ORs from FirstHealth Moore Regional Hospital ("FirstHealth Moore") in Pinehurst, Moore County, North Carolina to its FirstHealth Hoke Community Hospital ("FirstHealth Hoke") in Hoke County, North Carolina. Upon completion of that project, FirstHealth Hoke would have two ORs at its hospital.
2. The FirstHealth OR Application was a noncompetitive application under 10A NCAC 14C.0202(f). The approval of the FirstHealth OR Application did not cause the disapproval of any other application, and no one else filed an OR application in the same 2012 review cycle. *See* Ex. 1 to May 17 Motion, p. 26; *see also* Ex. 7 to May 17 Motion, pp. 19-20.
3. The FirstHealth OR Application explained that:

Moore County and Hoke County are within the Moore-Hoke Operating Room Service Area and the project will not result in an increase in the number of operating rooms within the service area. After completion of the project, FirstHealth Hoke Community Hospital will have two shared operating rooms.

Ex. 36 to NOF.
4. The FirstHealth OR Application proposes to relocate an existing OR within the Moore-Hoke OR Service Area, and it is not adding an OR to any service area. *See* Ex. 38 to May 17 Motion, p. 125.
5. By its decision dated November 27, 2012 and findings dated December 4, 2012, the Agency approved the FirstHealth OR Application and determined that a CON should be issued for FirstHealth to relocate an existing OR from FirstHealth Moore to FirstHealth Hoke.
6. On December 21, 2012, SCA filed a Petition for a contested case hearing appealing the Agency's decision approving the FirstHealth OR Application.

**The Moore-Hoke OR Service Area and Cumberland-Hoke OR Service Area**

7. The 2012 SMFP was the SMFP applicable to the FirstHealth OR Application. *See* Ex. 3 to May 17 Motion, p. 29; *see also* Ex. 7 to May 17 Motion, pp. 60, 87-88, 126, 172-173. There are two OR Service Areas in the 2012 SMFP that are relevant to this Motion: the Moore-Hoke OR Service Area and the Cumberland-Hoke OR Service Area. *See* Ex. 19 to May 17 Motion. The Moore-Hoke OR Service Area and the Cumberland-Hoke OR Service Area are separate service areas. *See* Ex. 7 to May 17 Motion, p. 18.
8. The 2012 SMFP allowed a provider within the Moore-Hoke OR Service Area to propose to relocate an existing operating room within the Moore-Hoke OR Service Area. *See* Ex. 19 to May 17 Motion; *see also* Ex. 3 to May 17 Motion, pp. 122-123; Ex. 7 to May 17 Motion, pp. 18-19; 60; Ex. 9 to May 17 Motion, pp. 40-41.
9. The SMFP created the Cumberland-Hoke OR Area in 2010 as a result of a 2009 Petition to the State Health Coordinating Council (“SHCC”) filed by Cape Fear. *See* Ex. 27 to May 17 Motion. SCA supported Cape Fear’s 2009 Petition to the SHCC to create the Cumberland/Hoke Service Area for ORs and beds. *See* Ex. 9 to May 17 Motion, pp. 43, 94; *see also* Ex. 27 to May 17 Motion.
10. SCA contends that the relocation of the OR within the Moore-Hoke OR Service Area causes an increase in the operating rooms in the Cumberland-Hoke OR Service Area. SCA argues that this causes the FirstHealth OR Application to be non-conforming with Criteria (1), (3) and (6). SCA further contends that the Agency erred by not applying the rule at 10A N.C.A.C. 14C.2103 which specifically addresses the addition of a new OR to a service area.
11. SCA argues that the Agency’s decision prejudices SCA as a matter of law.
12. SCA’s expert acknowledged that the Moore-Hoke and Cumberland-Hoke OR Service Areas are separate service areas. Ex 7 to May 17 Motion, p. 18.
13. Chapter 6 of the 2012 SMFP states:

A county lacking a licensed facility with at least one operating room becomes a single county operating room service area upon licensure of a facility with at least one operating room in that county. If a certificate of need is issued for development of a facility with at least one operating room in a county lacking a facility with at least one operating room, the operating room(s) for which the certificate of need has been issued will be included in the inventory of operating rooms in that county’s multicounty operating room service area until those operating rooms are licensed.

*See* Ex. 19 to May 17 Motion, pp. 62-63.

14. Under the 2012 SMFP, once a licensed health service facility with at least one OR opens in Hoke County, Hoke County will become its own service area. *See* Ex. 19 to May 17 Motion, pp. 62-63.
15. The relocated OR will be located in Hoke County.
16. It is not possible for FirstHealth to increase ORs in the Cumberland-Hoke OR Service Area when the SMFP, which defines the OR Service Areas, requires that the OR proposed to be relocated stay on Moore County's OR inventory until such time as a hospital opens in Hoke County, and Hoke County becomes its own service area. *See* Ex. 19 to May 17 Motion, pp. 62-63.
17. FirstHealth's proposal to relocate an existing OR from FirstHealth Moore Regional to FirstHealth Hoke within the Moore-Hoke OR Service Area cannot impact any surplus of ORs within the Cumberland-Hoke OR Service Area. When one of the facilities in Hoke County is operational, Hoke County will become its own service area and that OR will reside in Hoke County. *See* Ex. 12 to NOF, pp. 68, 71-73; *see also* Ex. 9 to NOF, pp. 145-146.
18. Thus, a relocation of an OR within the Moore-Hoke OR Service Area is not tantamount to relocating an OR to the Cumberland-Hoke OR Service Area and has no bearing on any surplus of ORs in Cumberland County since at no time will the OR become part of Cumberland County's OR inventory. *See* Ex. 12 to NOF, pp. 71-73, 79.

**SCA's Theory of Interrelatedness of FirstHealth's 28 Beds Project**

19. SCA contends that the need for a second OR is directly connected to the need generated for additional beds in the Cumberland-Hoke Service Area, which will result in an additional OR being added to the Cumberland-Hoke OR Service Area. *See* SCA Memorandum, p. 10-11.
20. SCA contends that it is contradictory for FirstHealth to assert that the OR relocation is within the Moore-Hoke OR-Service Area and not include Moore County in the proposed patient origin service area. SCA Memorandum, pp. 11-12.
21. SCA's expert witness testified that an applicant can define its proposed service area as it wishes. *See* Ex. 7 to May 17 Motion, p. 143.
22. As the FirstHealth OR Application states:

FirstHealth identifies the following four counties to be within the FHCH Service Area:

- Hoke County
- Cumberland County
- Robeson County

- Scotland County

These four counties have been identified because each has patients that travel through Hoke County to obtain services at FMRH. With the development of FHCH and the services of FirstHealth physicians in Hoke County, specifically at FHCH, FirstHealth believes that many residents from these counties who would travel to FMRH for services will instead receive services at FHCH.

Ex. 36 to NOF, p. 72.

23. The FirstHealth OR Application defined the service area, projected the number of patients that would be coming from each of the counties within that service area, projected the inpatient and outpatient utilization of the facility, identified demographic trends for the population proposed to be served, and included letters of support. *See* Ex. 38 to May 17 Motion, pp. 213-14; *see also* Ex. 39 to May 17 Motion.
24. The FirstHealth OR Application did not unnecessarily duplicate services since no new ORs were being created and the application demonstrated that the ORs are needed based on the projected, reasonably-high levels of utilization. *See* Ex. 38 to May 17 Motion, pp. 143, 213-14; *see also* Ex. 39 to May 17 Motion.

#### **CONCLUSIONS OF LAW**

1. The parties properly are before the Office of Administrative Hearings.
2. Administrative Law Judges may rule on all prehearing motions authorized under the North Carolina rules of Civil Procedure, including motions for summary judgment. *See* N.C. Gen. Stat. § 150B-33(b)(3a); 26 N.C.A.C. 3.0105(1) and (6).
3. Under N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment appropriately is awarded “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.”
4. Summary judgment may be granted against the movant. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).
5. A court need not make findings as to every fact that arises from the evidence and need only find those facts that are material to the settlement of the dispute. *See Flanders v. Gabriel*, 110 N.C. App. 438, 449, 429 S.E.2d 611, 612 (1993).
6. The subject matter of this contested case is the Agency’s decision to conditionally approve the FirstHealth 28 Beds and OR Applications and disapprove the Cape Fear 28 Beds Application. N.C. Gen. Stat. § 131E-188(a); *Presbyterian Hosp. v. N.C. Dep’t of Health and Human Servs.*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006), *rev.*

*denied*, 361 N.C. 221, 642 S.E.2d 446 (2007); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

7. To obtain a CON for a proposed project, a CON application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an application fails to conform with any one of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law. *See Presbyterian-Orthopaedic Hosp. v. N.C. Dep't of Human Res.*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996) (holding that “an application must comply with *all* review criteria” and that failure to comply with one review criteria supports entry of summary judgment against the applicant) (emphasis in original).
8. Under N.C. Gen. Stat. § 131E-183(a), the Agency “shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued.”
9. The burden of proof which a petitioner must meet in order to prevail in a contested case is set forth in N.C. Gen. Stat. § 150B-23(a).
10. Applying N.C. Gen. Stat. § 150B-23(a) the Court of Appeals has explained the petitioner’s burden of proof in a CON case as follows:

The subject matter of a contested case hearing by the ALJ is an agency decision. Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner’s rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used an improper procedure, or failed to act as required by law or rule.

*Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (emphasis omitted).

11. In the eighteen years since the Court of Appeals’ decision in *Britthaven*, its subsequent decisions have consistently recognized that both substantial prejudice to a petitioner’s rights and agency error must be pled in a petition, and ultimately proven at the hearing, for a petitioner to obtain relief in a CON case. *See Novant Health, Inc. v. N.C. Dep’t of Health and Human Servs.*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138 (Nov. 6, 2012) (unpublished), *rev. denied*, 738 S.E.2d 398 (2013); *Wake Radiology Servs., LLC v. N.C. Dep’t of Health and Human Servs.*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 390 (2011) (unpublished); *Parkway Urology, P.A. v. N.C. Dep’t of Health and Human Servs.*, 205 N.C. App. 529, 536, 696 S.E.2d 187, 193 (2010), *rev. denied*, \_\_\_ N.C. App. \_\_\_, 705 S.E.2d 739 (2011) and 705 S.E.2d 753 (2011); *Presbyterian Hosp.*, 177 N.C. App. at 785, 630 S.E.2d at 216 (upholding ALJ’s grant of summary judgment on the basis that petitioner failed to demonstrate substantial prejudice to its rights from the grant of a non-competitive CON to petitioner’s competitor); and *Bio-Medical Applications v. N.C. Dep’t of Health and Human Servs.*, No. COA04-1644, 2005 N.C. App. LEXIS 2090 (2005)

(holding that petitioner failed to carry its burden of proving substantial prejudice to its rights from a grant of a non-competitive CON to petitioner's competitor).

12. As petitioner, SCA bears the burden of proof on each and every element of its case. *See Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006). The burden of persuasion placed upon Cape Fear is the "greater weight of the 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 the evidence."). Therefore, SCA has the burden of proof on issues presented to the ALJ regarding the Agency's approval of the FirstHealth OR Application. *See Southland Amusements and Vending, Inc. v. Rourk*, 143 N.C. App. 88, 94, 545 S.E.2d 254, 257 (2001).
13. The appropriate standard of review in this case depends upon the issue being reviewed. When an appellant charges that a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency. *See Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461.
14. Since SCA seeks a reversal of the Agency's decision on Criteria (1), (3) and (6) and 10A N.C.A.C 14C .2103, the appropriate standard of review is the whole record test. *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 43, 684 S.E.2d 914, 920 (2009) ("fact-intensive issues such as sufficiency of the evidence to support [the Agency's] decision are all reviewed under the whole-record test").

15. Under the "whole record" test:

[T]he reviewing court is required to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We should not replace the agency's judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter were before us *de novo*. While the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency.

*Parkway Urology*, 205 N.C. App. at 535, 696 S.E.2d at 192 (quoting *Dialysis Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000)), *rev. denied*, \_\_\_ N.C. \_\_\_, 705 S.E.2d 739, and 705 S.E.2d 753 (2011).

16. The whole record test merely gives the reviewing court the capability to determine whether the administrative decision has a rational basis in the evidence. *See Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 265, 270, 623 S.E.2d 629, 633 (2006).



17. In its Petition, SCA did not state facts tending to establish, and after discovery cannot forecast evidence to show, that the Agency's decision to approve FirstHealth's OR Application was erroneous or that the decision substantially prejudiced SCA's rights.
18. The sole basis for SCA's argument that the Agency erred with respect to Criteria (1), (3) and (6) and 10A N.C.A.C. 14C.3803(a) is SCA's contention that by relocating an OR within the Moore-Hoke OR Service Area, FirstHealth was also adding an OR to the Cumberland-Hoke OR Service Area and thereby increasing a surplus of ORs in Cumberland County.
19. Substantial evidence in the record demonstrated that FirstHealth's relocation of an OR within the Moore-Hoke OR Service Area was not tantamount to a relocation of an OR to the Cumberland-Hoke OR Service Area and did not increase a surplus of ORs in Cumberland County.
20. Substantial evidence in the record demonstrated that the Agency did not act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by law or rule in determining that the FirstHealth OR Application was conforming with Criteria (1), (3) and (6).
21. FirstHealth's project does not involve an increase in the number of ORs in any service area, and therefore the rule at 10A N.C.A.C. 14C.2103 does not apply to the FirstHealth OR Application.
22. Substantial evidence in the record demonstrated that the Agency did not act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by law or rule in determining that 10A N.C.A.C. 14C.2103 does not apply to the FirstHealth OR Application.
23. SCA failed to demonstrate that the Agency erred in finding the FirstHealth OR Application conforming with Criteria (1), (3), and (6) and 10A N.C.A.C. 14C.2103 as required by N.C. Gen. Stat. § 150B-23.
24. There is no genuine issue of material fact in this case, and FirstHealth and the Agency are entitled to judgment as a matter of law on Criteria (1), (3) (6) and 10A N.C.A.C. 14C.2103.
25. Whether an appellant's showing of prejudice is sufficient is determined as a matter of law. *See Novant Health*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d at 2 (*citing Hospice at Greensboro, Inc. v. N.C. Dep't of Health and Human Servs.*, 185 N.C. App. 1, 16, 647 S.E.2d 651, 661 (2007)). "In cases appealed from administrative agencies, [q]uestions of law receive *de novo* review." *Bill Davis Racing*, 201 N.C. App. at 43, 684 S.E.2d at 920.
26. SCA has asserted that the Agency's decision to approve the FirstHealth OR Application substantially prejudiced it as a matter of law. However, it is clear from the decisions of

the North Carolina Court of Appeals that an erroneous Agency decision— even if proven— does not substantially prejudice a competitor’s rights as a matter of law. See *Novant Health*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138; see also *Wake Radiology Servs.*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 87; *Ridge Care, Inc. v. N.C. Dep’t of Health and Human Servs.*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 390 (2011); *Parkway Urology*, 205 N.C. App. at 536, 696 S.E.2d at 193; *Presbyterian Hosp.*, 177 N.C. App. at 785, 630 S.E.2d at 216.

27. A party seeking to show prejudice must “provide specific evidence of harm resulting from the award of the CON to [a competitor] that went beyond any harm that necessarily resulted from additional . . . competition[.]” *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195.
  
28. The evidence demonstrated that SCA’s primary concern is the effect of competition. There is no legally protectable right to be free from competition. See *Bruton v. Smith*, 225 N.C. 584, 586, 36 S.E.2d 9, 10 (1945) (“[T]he law does not protect one against competition.”). The North Carolina Constitution provides, in Article I, § 34, that “monopolies are contrary to the genius of a free state and shall not be allowed.” Similarly, in Article I, § 32, it provides that “[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” Thus, the CON Law does not, and constitutionally cannot, protect Cape Fear’s and SCA’s facilities from competition. See *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195.
  
29. Increased competition is not substantial prejudice. *Id.* at 536, 696 S.E.2d at 193; *Novant Health*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138.
  
30. The fact that some patients may choose to receive services at FirstHealth Hoke rather than at SCA does not support or define any legal right that is substantially prejudiced by the Agency’s decision to grant FirstHealth a CON to relocate an OR from FirstHealth Moore to FirstHealth Hoke. “Everyone [has] the right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition.” *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 655 (1945). SCA is “not being prevented from benefiting from ‘the fruits and advantages of [their] own enterprise, industry, skill and credit,’ but merely is being required to compete for such benefit.” *Bio-Medical Applications v. N.C. Dep’t of Health and Human Servs.*, 179 N.C. App. 483, 491-492, 634 S.E.2d 572, 578 (2006) (quoting *Coleman*, 225 N.C. at 506, 35 S.E.2d at 665).
  
31. The potential economic losses alleged by SCA as a result of increased competition do not establish substantial prejudice. See *Novant Health*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138.
  
32. SCA failed to offer any competent evidence or testimony to show how the relocation of FirstHealth’s OR from FirstHealth Moore Regional to FirstHealth Hoke would substantially prejudice its rights in any way. Accordingly, it has not met its burden to show that the Agency decision regarding FirstHealth’s OR Relocation Application substantially prejudiced its rights. See *Britthaven, Inc.*, 118 N.C. App. at 382, 455 S.E.2d

at 459; *Presbyterian*, 177 N.C. App. at 785, 630 S.E.2d at 216; *Bio-Medical Applications*, No. COA04-1644, 2005 N.C. App. LEXIS 2090, at 13.

33. There is no genuine issue of material fact in this case, and FirstHealth and the Agency are entitled to judgment as a matter of law that SCA's rights were not substantially prejudiced by the Agency's approval of the FirstHealth OR Application.

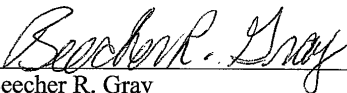
**FINAL DECISION**

Based on the undisputed facts recited above and the foregoing conclusions of law, SCA's Motion for Summary Judgment is hereby DENIED as a matter of law, and Summary Judgment is hereby GRANTED in favor of FirstHealth and the Agency in 12 DHR 12086.

**NOTICE**

Under the provisions of N.C. Gen. Stat. § 131E-188(b), any party wishing to appeal the final decision of the Administrative Law Judge must file a Notice of Appeal with the Office of Administrative Hearings and serve the Notice on the N.C. Department of Health and Human Services and all other affected persons who were parties to the contested case. The appealing party must file the Notice within 30 days of the receipt of the written notice of the Final Decision. Under N.C. Gen. Stat. § 131E-188(b1) before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of Appeals. In conformity with the Office of Administrative Hearings' Rule 26 N.C.A.C. 03.012 and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

This the 17 day of September, 2013.

  
Beecher R. Gray  
Administrative Law Judge

On this date mailed to:

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This the 17<sup>th</sup> day of September, 2013.



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Filed

STATE OF NORTH CAROLINA

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IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF HOKE

Office of  
Administrative Hearings

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| <p>SURGICAL CARE AFFILIATES, LLC AND<br/>FAYETTEVILLE AMBULATORY<br/>SURGERY CENTER LIMITED<br/>PARTNERSHIP,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND<br/>HUMAN SERVICES, DIVISION OF<br/>HEALTH SERVICE REGULATION,<br/>CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS,<br/>INC.,<br/>Respondent – Intervenor.</p> | <p align="center"><b>12DHR12086</b></p> |
| <p>CUMBERLAND COUNTY HOSPITAL<br/>SYSTEM INC. d/b/a CAPE FEAR VALLEY<br/>MEDICAL CENTER,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND<br/>HUMAN SERVICES, DIVISION OF<br/>HEALTH SERVICE REGULATION,<br/>CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS,<br/>INC.,<br/>Respondent-Intervenor.</p>                       | <p align="center"><b>12DHR12090</b></p> |

|  |                          |
|--|--------------------------|
| <p>CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. d/b/a CAPE FEAR VALLEY HEALTH SYSTEM,<br/>Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION,<br/>Respondent,</p> <p>and</p> <p>FIRSTHEALTH OF THE CAROLINAS, INC.,<br/>Respondent – Intervenor.</p> | <p><b>12DHR12094</b></p> |
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**FINAL DECISION**

THIS MATTER came before the undersigned Administrative Law Judge for hearing on FirstHealth's and the Agency's Joint Motion for Summary Judgment. (the "Motion").<sup>1</sup> The

<sup>1</sup> In this Final Decision, the following abbreviations are used:

- "FirstHealth" means respondent-intervenor FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital.
- "Cape Fear" means petitioner Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Medical Center.
- "SCA" mean petitioners Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership ("FASC"). SCA and FASC are collectively referred to as "SCA."
- The "Agency" means the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section.
- "CON" means certificate of need.
- FirstHealth's CON application to relocate one of its existing operating rooms ("OR") from FirstHealth Moore Regional Hospital to FirstHealth Hoke Community Hospital ("FirstHealth Hoke"), in Project I.D. No. N-8843-12, is referred to as the "FirstHealth OR Application."
- FirstHealth's CON application to add twenty-eight (28) acute care beds to FirstHealth Hoke, Project I.D. No. N-8838-12, is referred to as the "FirstHealth 28 Beds Application."
- FirstHealth's CON application to renovate two floors of FirstHealth Moore Regional Hospital in Moore County, Project I.D. No. H-8839-12, is referred to as the "FirstHealth Renovation Application."
- Cape Fear's CON application to develop twenty-eight (28) beds at Cape Fear Valley Medical Center in Fayetteville, Cumberland County, North Carolina, in Project I.D. No. M-8833-12 is referred to as the "Cape Fear 28 Beds Application."
- "SMFP" refers to the State Medical Facilities Plan.
- "SHCC" means State Health Coordinating Council.
- "Criterion (20)" refers to N.C. Gen. Stat. § 131E-183(a)(20).
- All exhibits are referred to by the abbreviation "Ex." All depositions and exhibits referenced in this Response are attached to Joint Motion for Summary Judgment.

Motion, filed against both Petitioners Cape Fear and SCA in cases 12 DHR 12086 and 12 DHR 12094, concerns the Agency's decision to approve the FirstHealth OR Application to relocate one of its ORs from FirstHealth Moore Regional Hospital ("FirstHealth Moore Regional") in Pinehurst, Moore County, North Carolina to the approved FirstHealth Hoke Community Hospital ("FirstHealth Hoke") in Hoke County, North Carolina. Having considered the Motion, Cape Fear's and SCA's responses in opposition to the Motion, and the various deposition transcripts, affidavits and other exhibits submitted by the parties, and having heard arguments of counsel for all parties, the undersigned Administrative Law Judge GRANTS said motion.

**SUMMARY OF UNDISPUTED FACTS**

1. On June 15, 2012, FirstHealth filed the FirstHealth OR Application.
2. By its decision dated November 27, 2012 and findings dated December 4, 2012, the Agency approved the FirstHealth OR Application and determined that a CON should be issued to FirstHealth. *See* Exhibit 13 to the Motion.
3. On December 21, 2012, Cape Fear and SCA filed separate Petitions for contested case hearings to review the Agency's decision approving the FirstHealth OR Application.
4. As described in the FirstHealth OR Application, FirstHealth proposed to relocate one (1) existing OR from FirstHealth Moore Regional to the approved FirstHealth Hoke Community Hospital (Project ID # N-8497-10) for which FirstHealth received a CON pursuant to a 2012 settlement to develop an 8-bed, 1-OR hospital in Hoke County). *See* Ex. 21 and Ex. 22 to the Motion; *see also* Ex. 11 to the Motion, p. 8
5. The FirstHealth OR Application explained that:

Moore County and Hoke County are within the Moore-Hoke Operating Room Service Area and the project will not result in an increase in the number of operating rooms within the service area. After completion of the project, FirstHealth Hoke Community Hospital will have two shared operating rooms.

*See* Exhibit 11 to the Motion, p. 8.
6. The 2012 SMFP was the SMFP applicable to the FirstHealth OR Application. *See* Ex. 3 to the Motion, p. 29; *see also* Ex. 7 to the Motion, pp. 60, 87-88, 126, 172-173. There are two OR Service Areas in the 2012 SMFP that are relevant to this Motion: the Moore-Hoke OR Service Area and the Cumberland-Hoke OR Service Area. *See* Ex. 19 to the Motion. The Moore-Hoke OR Service Area and the Cumberland-Hoke OR Service Area are separate service areas. *See* Ex. 7 to the Motion, p. 18.
7. The 2012 SMFP allowed a provider within the Moore-Hoke OR Service Area to propose to relocate an existing operating room within the Moore-Hoke OR Service Area. *See* Ex.

19 to the Motion; *see also* Ex. 3 to the Motion, pp. 122-123; Ex. 7 to the Motion, pp. 18-19; 60; Ex. 9 to the Motion, pp. 40-41.

8. In 2010, Cape Fear filed a CON application to relocate two of its ORs from Cumberland County and 41 of its previously-approved but undeveloped acute care beds to develop a hospital in Hoke County, Project I.D. No. N-8499-10. Cape Fear received its CON for this hospital in 2012. *See* Ex. 20 to the Motion; *see also* Ex. 1 to the Motion, p. 27.
9. The OR in the FirstHealth OR Application is an existing OR located in the Moore-Hoke OR Service Area. *See* Ex. 19 to the Motion; *see also* Ex. 3 to the Motion, p. 34; Ex. 7 to the Motion, p. 16.
10. The FirstHealth OR Application did not involve the addition of any new health service facility beds, services, or equipment for which there was a need determination in the SMFP. *See* Ex. 13 to the Motion, p. 2778; *see also* Ex. 38 to the Motion, pp. 129-130, 149, 155, 181; Ex. 39 to the Motion, Op. I.
11. The FirstHealth OR Application was not a competitive application because the approval of the FirstHealth OR Application did not cause the disapproval of any other CON application for the same or similar services reviewed in the same review period. *See* 10A N.C.A.C. 14C.0202(f), attached as Ex. 30 to the Motion; *see also* Ex. 3 to the Motion, p. 86; Ex. 39 to the Motion, Ops. I, IV.
12. Neither Cape Fear nor SCA filed any OR CON applications in 2012. *See* Ex. 1 to the Motion, p. 26; *see also* Ex. 7 to the Motion, pp. 19-20; Ex. 5 to the Motion, p. 126; Ex. 39 to the Motion, Op. I.
13. The Agency's Decision and Findings on the FirstHealth OR Application are in different documents from the Agency's Decision and Findings on the FirstHealth 28 Beds Application. *See* Ex. 13 to the Motion.
14. Cape Fear appealed the Agency's decision on the FirstHealth OR Application separately from the Agency's decision on the 28 beds and posted separate bonds in support of those appeals. *See* Ex. 17 to the Motion; *see also* Ex. 3 to the Motion, pp. 78-80. SCA is not a party to the appeal involving the 28 beds applications.
15. During discovery in this case, FirstHealth took the deposition of Nancy Bres Martin. Ms. Bres Martin was identified by Cape Fear as an expert witness and designated by Cape Fear pursuant to N.C. Gen. Stat. § 1A-1, Rule 30(b)(6) to testify on issues related to whether the Agency's decision approving the FirstHealth OR Application substantially prejudiced any rights of Cape Fear. *See* Ex. 3 to the Motion, p. 15. Ms. Bres Martin was not able to identify any way in which the Agency's approval of FirstHealth's OR Application would substantially prejudice any rights of Cape Fear. *See* Ex. 3 to the Motion.



16. Also during discovery in this case, FirstHealth took the depositions of Armand Balsano, identified as an expert witness by SCA, and John Henley, M.D., SCA's Medical Director, a manager of FASC and a member of Cape Fear's Board of Trustees. Under N.C. Gen. Stat. § 1A-1, Rule 30(b)(6), SCA designated both Mr. Balsano and Dr. Henley to testify on issues related to whether the Agency's decision approving the FirstHealth OR Application substantially prejudiced any rights of SCA. Neither of these witnesses was able to identify any way in which the Agency's approval of FirstHealth's OR Application would substantially prejudice any rights of SCA. *See* Exs. 7 and 9 to the Motion.
17. Cape Fear contends that it is substantially prejudiced by the Agency's decision approving the FirstHealth OR Application for several reasons, including: (1) the approval of the FirstHealth OR application is linked to the disapproval of the Cape Fear 28 Beds Application; (2) the FirstHealth OR Application is "interrelated" with the FirstHealth 28 Beds Application and the FirstHealth Renovation Application; (3) the relocation of an OR within the Moore-Hoke OR Service Area results in an increased surplus of ORs in the Cumberland-Hoke OR Service Area; (4) the Agency made errors in its review; and (5) a market share shift would result in potential economic losses to Cape Fear. *See* Ex. 3 to the Motion, pp. 70-75; *see also* Ex. 14 to the Motion.
18. Similarly, SCA contends that it is substantially prejudiced by the Agency's decision to approve the FirstHealth OR Application for several reasons, including: (1) the FirstHealth OR Application is interrelated with the FirstHealth 28 Beds Application and the FirstHealth Renovation Application; (2) the relocation of the OR within the Moore-Hoke OR Service Area results in an increased surplus of ORs in the Cumberland-Hoke OR Service Area; (3) the Agency made errors in its review; and (4) potential economic losses to SCA. *See* Ex. 16 to the Motion, p. 4; *see also* Ex. 7 to the Motion.

**Cape Fear's Theory of Substantial Prejudice Based on Linkage of FirstHealth Applications**

19. Cape Fear asserts that the FirstHealth 28 Beds Application must have a second operating room in order to meet the surgical volume proposed in the FirstHealth 28 Beds Application. Cape Fear further contends that because the FirstHealth OR Application was approved, the Agency could approve the FirstHealth 28 Beds Application, which resulted in the denial of the Cape Fear 28 Bed Application. As a result, Cape Fear contends the approval of the FirstHealth OR application is linked to the disapproval of the Cape Fear 28 Beds Application. *See* Ex. 3 to the Motion, pp. 77-80; *see also* Ex. 14 to the Motion.
20. However, Cape Fear admitted that the Agency Findings on the OR and the 28 Beds Applications draw no connection between the approval of the FirstHealth OR Application and the disapproval of the Cape Fear 28 Beds Application. *See* Ex. 13 to the Motion; *see also* Ex. 3 to the Motion, pp. 80-81, 113. Ms. Bres Martin was unable to point to anything in the Agency Findings or work papers for the FirstHealth OR Application that showed that the Agency's decision to approve the FirstHealth OR Application resulted in the denial of Cape Fear's 28 Beds Application. *See* Ex. 3 to the Motion, pp. 112-113.

21. FirstHealth's three CON applications, filed on June 15, 2012, (28 Beds, OR, and Renovations), were prepared independently of one another. *See* Ex. 38 to the Motion, pp. 169-170. The Agency issued separate decisions on all three applications, and Cape Fear filed separate appeals of all three Agency decisions and posted separate bonds for all three appeals. *See* Ex. 3 to the Motion, pp. 77-80; *see also* Ex. 14 to the Motion.
22. The Agency denied the Cape Fear 28 Beds Application because the Agency determined that Cape Fear was non-conforming with Criterion (20), which deals with whether the applicant has provided quality care in the past. *See* Ex. 13 to the Motion, pp. 2752-2753.
23. There is no connection between Cape Fear's Criterion (20) issue and the FirstHealth OR Application. Rather, the FirstHealth 28 Beds Application and Cape Fear's 28 Beds Application are the subject of a separate contested case currently pending in OAH in which the undersigned Administrative Law Judge presides, 12 DHR 12090.<sup>2</sup>

**Cape Fear's and SCA's Theories of Substantial Prejudice Based on Interrelatedness of FirstHealth Applications**

24. Cape Fear asserts that it was substantially prejudiced by the Agency's decision to approve the FirstHealth OR Application because all three applications filed by FirstHealth in June 2012 (28 beds, OR and Renovation) are "interrelated" such that the approval of one is contingent on the approval of the other. *See* Ex. 3 to the Motion, pp. 72, 90-91. In support of this theory, Ms. Bres Martin testified that the need methodology FirstHealth used in the OR Application was the same as it used in the 28 Beds Application. *See* Ex. 3 to the Motion, p. 72, 90-91. However, Ms. Bres Martin testified that a methodology, standing alone, does not cause prejudice. *See* Ex. 3 to the Motion, pp. 90-91.
25. Similarly, SCA contends that the FirstHealth OR Application and the FirstHealth 28 Beds Application are interrelated. *See* Ex. 7 to the Motion, p.47; *see also* Ex. 16 to the Motion, p. 4. In support of SCA's theory of interrelatedness, Mr. Balsano testified that the volumes from the 28 beds are needed to support the additional OR. *See* Ex. 7 to the Motion, pp. 53-54.

**Cape Fear's and SCA's Theories of Substantial Prejudice Based on OR Service Areas**

26. Cape Fear and SCA contend that relocating the existing OR from Moore County to Hoke County increases the surplus of ORs in the Cumberland-Hoke OR Service Area, resulting in substantial prejudice to Cape Fear and SCA. *See* Ex. 3 to the Motion, pp. 144-145; *see also* Ex. 5 to the Motion, pp. 134-137; Ex. 7 to the Motion, pp. 13-14, 45, 55-56, 67-68.
27. However, Ms. Bres Martin acknowledged the existence of the Moore-Hoke OR Service Area in the 2012 SMFP and agreed that a relocation of an existing operating room within

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<sup>2</sup> The undersigned Administrative Law Judge granted Cape Fear's Motion for Summary Judgment in 12 DHR 12090 on the grounds that the Agency erred by determining that the Cape Fear 28 Beds Application was non-conforming with Criterion (20). That ruling does not change the fact that the Agency's decision to disapprove the Cape Fear 28 Beds Application was unrelated to its decision to approve the FirstHealth OR Application.

the same service area in which it already exists does not increase the operating room inventory. *See* Ex. 3 to the Motion, p. 42; *see also* Ex. 19 to the Motion, Chapter 6 and Figure 6.1. Mr. Balsano testified that the Moore-Hoke OR Service Area is separate from the Cumberland-Hoke OR Service Area and that the 2012 SMFP allowed Moore Regional to relocate an operating room from Moore County to Hoke County. *See* Ex. 7 to the Motion, pp. 18-19, 46-47, 60-61.

28. Chapter 6 of the 2012 SMFP makes it clear that once Hoke County has a licensed facility with at least one OR, it will become its own service area, and until that time, the OR moving from Moore County stays in the Moore County OR inventory. *See* Ex. 19 to the Motion, Chapter 6, pp. 62-53. Presently, there is no licensed facility with at least one OR in Hoke County.
29. Neither Cape Fear nor SCA filed any petitions with the SHCC to change the OR Service Areas in the 2012 SMFP. *See* Ex. 3 to the Motion, pp. 120-121; *see also* Ex. 38 to the Motion, 211-212, Ex. 9 to the Motion, p. 40; Ex. 7 to the Motion, pp. 46-47, 60-61.
30. Mr. Balsano further opined that FirstHealth will receive an “unfair competitive advantage” through the approval of its OR application and that the Agency does not consistently apply the CON Law to FirstHealth. *See* Ex. 7 to the Motion, pp. 55, 60.
31. Cape Fear and SCA acknowledge that they have no right to be free from competition and that the CON Law does not protect them from competition. *See, e.g.,* Ex. 9 to the Motion, p. 46; Ex. 7 to the Motion, pp. 30-31, 63; Ex. 3 to the Motion, pp. 47; 183-184; Ex. 39 to the Motion, Op. III and V.

**Cape Fear's and SCA's Theories of Substantial Prejudice Based on Agency Error**

32. Cape Fear contends that it was substantially prejudiced as a result of Agency errors. *See, e.g.,* Ex. 14 to the Motion, ¶¶ 3-9. SCA also contends that the Agency erred by failing to consistently apply the CON Law to FirstHealth, which resulted in substantial prejudice to SCA. *See* Ex. 16 to the Motion, p. 4. Cape Fear and SCA both asserted that the Agency's decision to approve the FirstHealth OR Application substantially prejudiced their rights as a matter of law.

**Cape Fear's and SCA's Theories of Substantial Prejudice Based on Potential Economic Losses**

33. Cape Fear asserts that relocating an operating room to FirstHealth Hoke would substantially prejudice Cape Fear because it would result in economic losses to Cape Fear. *See* Ex. 3 to the Motion, pp. 76-77, 150, 155-157, 183; 191-192; *see also* Ex. 14 to the Motion.
34. Similarly, SCA asserts that the FirstHealth OR Application would result in a loss of cases to SCA with resulting financial losses. *See* Ex. 7 to the Motion, pp. 13, 16, 47, 55-56, 64, 67-68. SCA's expert, Mr. Balsano, testified that the loss of cases was attributable to

patients being treated in both ORs at FirstHealth Hoke--not just the OR that was relocated from FirstHealth Moore to FirstHealth Hoke. Ex. 7 to the Motion, p. 61. However, SCA was not a party to litigation involving FirstHealth's 8-bed, 1-OR application, and did not appeal the settlement for that project which was signed in April 2012. See Ex. 9 to the Motion, pp. 45-46, 113.

35. FirstHealth and the Agency contend that the majority of volume for the relocated operating room is coming from an existing base of patients at FirstHealth Moore with population growth alone. See Ex. 38 to the Motion, pp. 155, 173-174, 181, 197; see also Ex. 39 to the Motion, Op. II, V and VI; and Ex. 11 to the Motion, Section IV.

#### **CONCLUSIONS OF LAW**

1. The parties are properly before the Office of Administrative Hearings.
2. A court need not make findings as to every fact that arises from the evidence and need only find those facts that are material to the settlement of the dispute. See *Flanders v. Gabriel*, 110 N.C. App. 438, 449, 429 S.E.2d 611, 612 (1993).
3. Administrative Law Judges may rule on all prehearing motions authorized under the North Carolina rules of Civil Procedure, including motions for summary judgment. See N.C. Gen. Stat. § 150B-33(b)(3a); 26 N.C.A.C. 3.0105(1) and (6).
4. Under N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment appropriately is awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."
5. The burden of proof which a petitioner must meet in order to prevail in a contested case is set forth in N.C. Gen. Stat. § 150B-23(a).
6. Applying N.C. Gen. Stat. § 150B-23(a) the Court of Appeals has explained the petitioner's burden of proof in a CON case as follows:

The subject matter of a contested case hearing by the ALJ is an agency decision. Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used an 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) (emphasis omitted).

7. In the eighteen years since the Court of Appeals' decision in *Britthaven*, its subsequent decisions have consistently recognized that both substantial prejudice to a petitioner's

rights and agency error must be pled in a petition, and ultimately proven at the hearing, in order for a petitioner to obtain relief in a CON case. See *Novant Health, Inc. v. N.C. Dep't of Health and Human Servs.*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138 (Nov. 6, 2012) (unpublished), *rev. denied*, 738 S.E.2d 398 (2013); *Wake Radiology Servs., LLC v. N.C. Dep't of Health and Human Servs.*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 390 (2011) (unpublished), *rev. denied*, \_\_\_ N.C. \_\_\_, 726 S.E.2d 838 (2012); *Parkway Urology, P.A. v. N.C. Dep't of Health and Human Servs.*, 205 N.C. App. 529, 536, 696 S.E.2d 187, 193 (2010), *rev. denied*, \_\_\_ N.C. App. \_\_\_, 705 S.E.2d 739 (2011) and 705 S.E.2d 753 (2011); *Presbyterian Hosp. v. N.C. Dep't of Health and Human Servs.*, 177 N.C. App. 780, 785, 630 S.E.2d 213, 216 (2006) (upholding ALJ's grant of summary judgment on the basis that petitioner failed to demonstrate substantial prejudice to its rights from the grant of a non-competitive CON to petitioner's competitor); and *Bio-Medical Applications v. N.C. Dep't of Health and Human Servs.*, No. COA04-1644, 2005 N.C. App. LEXIS 2090 (2005) (holding that petitioner failed to carry its burden of proving substantial prejudice to its rights from a grant of a non-competitive CON to petitioner's competitor).

8. Whether an appellant's showing of prejudice is sufficient is determined as a matter of law. See *Novant Health, Inc.*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138 (citing *Hospice at Greensboro, Inc. v. N.C. Dep't of Health and Human Servs.*, 185 N.C. App. 1, 16, 647 S.E.2d 651, 661 (2007)). "In cases appealed from administrative agencies, [q]uestions of law receive *de novo* review." *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 43, 684 S.E.2d 914, 920 (2009).
9. Cape Fear and SCA have asserted that the Agency's decision to approve the FirstHealth OR Application substantially prejudiced them as a matter of law. However, it is clear from the foregoing decisions that an erroneous Agency decision--even if proven--does not substantially prejudice a competitor's rights as a matter of law. See *Novant Health, Inc.*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138; see also *Wake Radiology Servs., LLC*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 87; *Ridge Care, Inc. v. N.C. Dep't of Health and Human Servs.*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 390 (2011); *Parkway Urology, P.A.*, 205 N.C. App. at 536, 696 S.E.2d at 193; *Presbyterian Hosp.*, 177 N.C. App. at 785, 630 S.E.2d at 216.
10. The plain language of N.C. Gen. Stat. § 150B-23(a) makes it clear that error and prejudice are different requirements; they are not interchangeable. If the petitioner cannot demonstrate prejudice, the Court need not reach the allegations of Agency error. *Wake Radiology Servs., LLC*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 87.
11. As petitioners, Cape Fear and SCA bear the burden of proof on each and every element of their respective cases. See *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-448 (2006). The burden of persuasion placed upon Cape Fear and SCA is the "greater weight of the 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 the evidence.")
12. Cape Fear's and SCA's burden, therefore, is two-fold: (1) to demonstrate substantial prejudice to their rights; and (2) to demonstrate that the Agency acted erroneously,

arbitrarily and capriciously, or used an improper procedure, or failed to act as required by law or rule. See *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995) (emphasis omitted). "It is well established that 'the word "Shall" is generally imperative or mandatory.'" *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 362 N.C. 372, 378, 646 S.E.2d 356, 360 (2007).

13. In their Petitions, Cape Fear and SCA did not state facts tending to establish, and after discovery cannot forecast evidence to show, that the Agency's decision to approve FirstHealth's OR Application substantially prejudiced their rights.
14. Cape Fear and SCA failed to demonstrate substantial prejudice to their rights as required by N.C. Gen. Stat. § 150B-23.
15. No competent evidence was offered to show that the Agency's denial of the Cape Fear 28 Beds Application was linked to the Agency's approval of FirstHealth's OR Application.
16. The FirstHealth OR Application was a noncompetitive application. 10A N.C.A.C. 14C.0202(f).
17. No competent evidence was offered to show that any interrelationship of the FirstHealth OR Application and the FirstHealth 28 Beds Application substantially prejudiced Cape Fear's and SCA's rights. Instead, testimony by the only Cape Fear witness designated to testify on substantial prejudice revealed that even if the FirstHealth OR Application and the FirstHealth 28 Bed Application used the same or similar methodologies, a methodology alone does not cause prejudice. Regardless of any interrelationship between applications, petitioners must establish substantial prejudice to their rights based on each application under appeal.
18. No competent evidence was offered to show that the OR Service Areas in the 2012 SMFP substantially prejudiced Cape Fear's and SCA's rights. Instead, the evidence demonstrated that a relocation of an existing OR within the same service area in which it already exists does not increase the OR inventory.
19. Moreover, the SMFP cannot be challenged in a contested case hearing. 10A N.C.A.C. 14C .0402 provides that "[t]he correctness, adequacy, or appropriateness of criteria, plans and standards shall not be an issue in a contested case hearing."
20. A party seeking to show prejudice must "provide specific evidence of harm resulting from the award of the CON to [a competitor] that went beyond any harm that necessarily resulted from additional . . . competition[.]" *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195.
21. The evidence demonstrated that Cape Fear's and SCA's primary concern is the effect of competition. There is no legally protectable right to be free from competition. See *Bruton v. Smith*, 225 N.C. 584, 586, 36 S.E.2d 9, 10 (1945) ("[T]he law does not protect one against competition."). The North Carolina Constitution provides, in Article I, § 34,

that "monopolies are contrary to the genius of a free state and shall not be allowed." Similarly, in Article I, § 32, it provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." Thus, the CON Law does not, and constitutionally cannot, protect Cape Fear's and SCA's facilities from competition. See *Parkway Urology, P.A.*, 205 N.C. App. at 539, 696 S.E.2d 195.

22. Increased competition is not substantial prejudice. *Parkway Urology, P.A.*, 205 N.C. App. at 536, 696 S.E.2d at 193 (2010); *Novant Health, Inc.*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138.
  
23. The fact that some patients may choose to receive services at FirstHealth Hoke rather than at a Cape Fear facility or at SCA does not support or define any legal right that is substantially prejudiced by the Agency's decision to grant FirstHealth a CON to relocate an OR from FirstHealth Moore to FirstHealth Hoke. "Everyone [has] the right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition." *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 655 (1945). Cape Fear and SCA are "not being prevented from benefiting from 'the fruits and advantages of [their] own enterprise, industry, skill and credit,' but merely is being required to compete for such benefit." *Bio-Medical Applications*, 179 N.C. App. at 491-492, 634 S.E.2d at 578 (quoting *Coleman*, 225 N.C. at 506, 35 S.E.2d at 665).
  
24. The potential economic losses alleged by Cape Fear and SCA as a result of increased competition do not establish substantial prejudice. See *Novant Health, Inc.*, \_\_\_ N.C. App. \_\_\_, 734 S.E.2d 138.
  
25. To the extent that SCA's potential economic losses relate to the OR that was approved for FirstHealth Hoke in its 2010 application, the time period to appeal the settlement of that application ended in May 2012. See N.C. Gen. Stat. § 131E-188(a). SCA did not appeal the settlement, so any claims related to the OR in the 2010 application are time barred.
  
26. Cape Fear and SCA failed to offer any competent evidence or testimony to show how the relocation of FirstHealth's OR from FirstHealth Moore Regional to FirstHealth Hoke would substantially prejudice their rights in any way. Accordingly, they have not met their burden to show that the Agency decision on FirstHealth's OR Relocation Application substantially prejudiced their rights. See *Britthaven, Inc.*, 118 N.C. App. at 382, 455 S.E.2d at 459; *Presbyterian*, 177 N.C. App. at 785, 630 S.E.2d at 216; *Bio-Medical Applications*, No. COA04-1644, 2005 N.C. App. LEXIS 2090, at 13.
  
27. Because Cape Fear and SCA cannot establish an essential element of their claim in this contested case, that the Agency's approval of the FirstHealth OR Application substantially prejudiced their rights, any issue of fact as to whether the Agency's decision approving the FirstHealth OR Application was erroneous is immaterial. See e.g., *Presbyterian Hospital*, 177 N.C. App. at 785, 630 S.E.2d at 216. If the petitioner cannot demonstrate prejudice, the Court need not reach the allegations of Agency error. *Wake Radiology Servs., LLC*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 87.

28. There is no genuine issue of material fact in these cases, and FirstHealth and the Agency are entitled to judgment as a matter of law.


**FINAL DECISION**

Based on the undisputed facts recited above and the foregoing conclusions of law, FirstHealth and the Agency's Joint Motion for Summary Judgment hereby is GRANTED as a matter of law in 12 DHR 12086 and 12 DHR 12094.

**NOTICE**

Under the provisions of N.C. Gen. Stat. § 131E-188(b), any party wishing to appeal the final decision of the Administrative Law Judge must file a Notice of Appeal with the Office of Administrative Hearings and serve the Notice on the N.C. Department of Health and Human Services and all other affected persons who were parties to the contested case. The appealing party must file the Notice within 30 days of the receipt of the written notice of the Final Decision. Under N.C. Gen. Stat. § 131E-188(b1) before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of Appeals. In conformity with the Office of Administrative Hearings' Rule 26 N.C.A.C. 03.012 and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

This the 17 day of September, 2013.

  
Beecher R. Gray  
Administrative Law Judge



On this date mailed to:

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