IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI STATE DEPARTMENT OF HEALTH and DESOTO IMAGING & DIAGNOSTICS, LLC — **APPELLANTS**

VS. — **NO. 2007-SA-00035**

BAPTIST MEMORIAL HOSPITAL-DESOTO, INC. and DESOTO DIAGNOSTIC IMAGING, LLC, d/b/a CARVEL IMAGING — **APPELLEES**

APPEAL FROM THE DECISION OF THE HINDS CHANCERY COURT, FIRST JUDICIAL DIVISION

BRIEF OF APPELLEE DESOTO DIAGNOSTIC IMAGING, LLC

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justice of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualifications or recusal.

(1) DeSoto Imaging & Diagnostics, LLC

(2) Kevin Blackwell, President and CEO of DeSoto Imaging & Diagnostics, LLC

(3) Thomas L. Kirkland, Jr., Esquire

(4) Allison C. Simpson, Esquire

(5) Andy Lowry, Esquire

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(7) Mississippi State Department of Health

(8) Donald E. Eicher, III, Esquire

(9) Desoto Diagnostic Imaging, LLC d/b/a Carvel Imaging

(10) Lynn T. Carvel, M.D., Managing Member of Desoto Diagnostic Imaging, LLC d/b/a Carvel Imaging

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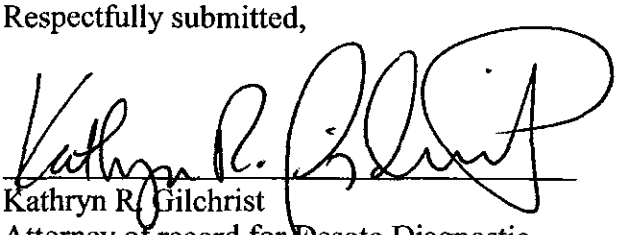
(17) Ricky Lee Boggan, Esquire, Hearing Officer

(18) Honorable Patricia D. Wise, Chancellor

Respectfully submitted,



Kathryn R. Gilchrist
Attorney of record for Desoto Diagnostic Imaging, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. STATEMENT OF THE ISSUES

A. Whether the Department had substantial evidence upon which to base its finding that DeSoto Imaging & Diagnostic satisfied the need requirement.

B. Whether the Department committed reversible error in its treatment of post-hearing evidence.

C. Whether the Department had substantial evidence to support its conclusion that the Application satisfied the general review criteria and the general goals of the *State Health Plan*.

II. STATEMENT OF THE CASE[1]

This is an appeal from a decision of the Mississippi State Department of Health ("the Department") to approve a Certificate of Need (CON) Application and the subsequent reversal of that decision by the Chancery Court of Hinds County. The Applicant, and Appellant here, DeSoto Imaging and Diagnostics, LLC ("DeSoto Imaging"), is a closely held, member-managed, limited liability company having two members at the time of the filing of the subject Application, Kevin Blackwell and Jason Morris. In its Application, DeSoto Imaging proposed to provide Magnetic Resonance Imaging ("MRI") services two days a week to patients in Southaven, Mississippi, Desoto County, and General Hospital Service Area 2 as part of a mobile MRI route operated by Alliance Imaging.[2] [R. Vol. 2 (CON App. at 3, 5, 9, Hrg. Ex. 2)].

On September 8, 2005, DeSoto Imaging filed the subject CON Application seeking approval from the Department of its plan to provide mobile MRI services in Southaven. As the basis for its Application, DeSoto Imaging stated that there was substantial need for additional MRI capacity in Southaven and neighboring communities. In particular, DeSoto Imaging stated that Southaven and Desoto County were among the fastest growing populations in the State, and the existing MRI services were busy. DeSoto Imaging took the position that the proposed new service would not cause any adverse impact to existing service providers, but would enable patients in Desoto County and the Service Area to obtain MRI service without any wait time. [R. Vol. 2 (CON App. at 8-9, Hrg. Ex. 2)].

DeSoto Imaging stated that because it would be joining an existing mobile MRI route, there would be no capital expenditure associated with this project, but only operational expenses.

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[1] Due to the nature of the certificate of need process, the statement of the proceedings below and the statement of relevant facts are combined.

[2] Citations to the Record on Appeal will be designated "R. ____," unless otherwise indicated. Because the Record is not numbered throughout, some references will be to the Volume of the Record with specific information as to the particular document cited (for example [R. Vol. 3 (CON App. at 6)].

[R. Vol. 2 (CON App. at 7, Hrg. Ex. 2)]. DeSoto Imaging projected that the project would be financially feasible and estimated incomes in the first three years of $89,812, $174,118, and $265,422, respectively. [R. Vol. 2 (CON App. at 10, Hrg. Ex. 2)].

Appellees, Baptist Memorial Hospital-Desoto ("Baptist-Desoto") and Desoto Diagnostic Imaging, LLC, d/b/a Carvel Imaging, ("Carvel Imaging"), both located in Southaven, Mississippi, opposed DeSoto Imaging's Application and requested a Hearing During the Course of Review. Baptist-Desoto and Carvel Imaging both provided MRI services in Southaven at the time of the Application. As the basis of their opposition to the Application, Baptist-Desoto and Carvel Imaging both contended that there was no need for additional MRI capacity in Southaven or Desoto County and that DeSoto Imaging was further unable to satisfy the requirements of the *State Health Plan* or the CON Review Manual.

CON applications for MRI equipment and/or services are subject to review in accordance with *Miss. Code Ann.* §§ 41-7-191(1)(d)(xii) (1972, as amended), as well as the duly adopted rules, procedures, plans, criteria and standards of the Department. The Department is charged with reviewing all such applications for compliance with the *State Health Plan* then in effect – in this case the 2006 *State Health Plan* ("*SHP*") – and Section I of the Mississippi Certificate of Need Review Manual.

Pursuant to *Miss. Code Ann.* § 41-7-197(2) (1972, as amended), a "Hearing During the Course of Review" took place on March 22–24, 2006, as requested. At the Hearing, legal representatives for DeSoto Imaging, Baptist-Desoto, Carvel Imaging, and the Department were present. Twelve (12) witnesses testified, and twenty-four (24) exhibits were introduced into evidence. Following the Hearing, the parties submitted proposed findings of fact and conclusions of law to the Hearing Officer on May 16, 2006. On June 30 2006, the Hearing Officer issued his Findings of Fact and Conclusions of Law regarding this matter.

After the release of the Hearing Officer's Findings, but before the State Health Officer's announcement of a final decision, Baptist-DeSoto and Carvel Imaging jointly moved for a reopening of the record for the admission of supplemental evidence and reconsideration of the Hearing Officer's decision. By subsequent opinion issued August 17, 2006, the Hearing Officer denied the motion and left his original opinion unchanged.

On August 31, 2006, the State Health Officer announced his concurrence with the Hearing Officer's recommendation and finally approved the Application.

On September 25, 2006, both Baptist-DeSoto and Carvel Imaging timely appealed the State Health Officer's approval to the Hinds County Circuit Court, Judge Patricia Wise presiding. Briefs were submitted by all parties, and following oral argument on December 14, 2006, Judge Wise reversed the Department's decision. She adopted the substance of the oral arguments made by counsel for both opponents, and specifically held that the Application did not satisfy the specific Criterion or need or the General Review Criterion on economic viability. She recognized the limitation on the Chancery Court's review of an agency decision, but held that here the Hearing Officer had acted in an arbitrary and capricious manner, as the Application was not supported by substantial evidence. She ordered the Department's approval of the Application reversed and vacated.

On January 4, 2007, DeSoto Imaging appealed to this Court.

III. SUMMARY OF THE ARGUMENT

The Chancellor's decision was well within the statutory limitations applicable to an appellate review of an agency decision. Chancellor Wise recognized those limits and expressly found that the Department's decision had been arbitrary and capricious and inconsistent with the evidence presented in the Hearing. Furthermore, the Chancellor found the Hearing Officer committed reversible error post-hearing when he accepted a statement of an entirely new mobile

route as satisfying to the need criterion and did not allow for any cross-examination on the matter by Carvel Imaging, Baptist-DeSoto or the Department. Her decision was in all respects the right one.

The Hearing Officer's decision in this matter was not supported by substantial evidence, and was, indeed, in several respects, directly contrary to the evidence presented in the Hearing. The Hearing Officer's own language in his opinion belies the arbitrary and capricious nature of his final conclusion. The Hearing Officer stated:

> [T]his Application is troublesome in several ways. The route of which this new service will become a part is less than concrete. The provider of the mobile unit, Alliance Imaging, is engaged in contract negotiations with Gilmore Memorial and is currently providing service at that location on a month to month basis.
>
> Additionally, the Applicant proposes that it will generate 520 procedures in the first year, 650 procedures in the second year, and 780 procedures in the third year of operation. Opponents of the Application question the basis for these projections. The Application contains affidavits from eight local physicians that account for 336 procedures per year. Much like the cloud of doubt hanging over the composition of the mobile route, the sufficiency of these affidavits is a close call.

[R. 000048-49 (Hrg. Off. Findings at 2-3)].

Consistent with the Hearing Officer's "troubled" observations, the Applicant was never able to establish that its proposed mobile MRI unit would perform the required 1,700 procedures per year. To the contrary, the evidence established without any real question that the total number of procedures to be performed by that unit would <u>not</u> satisfy that standard.[3] To make that conclusion even more inescapable, evidence was presented that one of the anchor members of the proposed route – Gilmore – was not certain even to be on the route in the future because there was no contract in place between the mobile service provider and Gilmore at the time of

[3] Appellant states that the *SHP* never mentions the "route" in its discussion of the need requirement. (Appellant's brief at 11.) Indeed, a "route" is never mentioned. The requirement, however, is that the MRI machine to be used at the proposed new site must perform at least 1,700 procedures annually – at all sites where it provides services. So, it is elementary that the <u>route</u> that machine takes (which includes all of its service locations) must satisfy that requirement. The number of procedures performed by the unit and the number of procedures performed on that machine's route are the same number.

the Hearing. At the very least, the route was uncertain – "less than concrete" the Hearing Officer termed it. [R. 000048 (Hrg. Off. Findings at 2)]. It is the Applicant's burden to demonstrate compliance with all of the *SHP*'s specific criteria, and the uncertainty of the proposed mobile route equated to a failure to carry that burden. The Hearing Officer, having expressly recognized the uncertainty of the proposed route, should have disapproved the Application on that basis. His approval of the Application in the face of admitted uncertainty of one of the primary criteria for approval was, as the Chancellor held, clear error.

Second, as the Hearing Officer and the Chancellor both also recognized, the number of procedures projected to be performed at the Applicant's Southaven location far exceeded the procedures actually attested to by any physician (whether in testimony or by affidavit). Nevertheless, in the end, the Hearing Officer (again, erroneously) found the Applicant's projections of procedures to be reliable. In fact, under the well-established law of this Supreme Court, those projections were not sufficient. The Hearing Officer noted that "the sufficiency of the affidavits [was] a close call." [R. 000049 (Hrg. Off. Findings at 3)]. As discussed below, however, the evidence at the Hearing actually demonstrated the complete unreliability (and thus INsufficiency) of most, if not all, of the physician affidavits/projections provided by the Applicant.

The Hearing Officer noted all of these problems with this Application – and then he waived them all aside and recommended approval of the Application anyway. As the Chancellor rightly concluded, under the Department's own rules and regulations, as well as precedent established by this Court regarding the standard of review of these cases, the decision by the Health Officer, and thus of the Department, constituted clear error and must be reversed.

Further error was committed when, after the Hearing, the Hearing Officer was faced with a Motion to Reopen the Hearing to accept some additional, new evidence that, admittedly by the

Applicant was true and that completely demonstrated the insufficiency of the Application. The Hearing Officer found he had authority to hear and consider the evidence – and then, in the face of DeSoto Imaging's own admission that the subject evidence was true, the Hearing Officer brushed it aside and relied instead on DeSoto Imaging's statement in its brief that it would simply put the machine on yet another route. This one, DeSoto Imaging assured the Court, will meet the requirements. DeSoto Imaging's proposed replacement route, however, was never submitted to testing by any source – including cross exam by the opponents. Even made in a vacuum, an assumption that the proposed new route would meet the SHP's requirements would be clear error. To make that assumption in the face of the original proposed route's wholesale failure to satisfy the applicable criteria is, as the Chancellor found, nothing short of arbitrary and capricious conduct by the Department.

IV. ARGUMENT

A. STANDARD OF REVIEW

Unquestionably, the law of this State has established a presumption in favor of the decisions of an administrative agency. Indeed, as the appellant has stated repeatedly, a court may alter a decision of the Department only if it is convinced the decision is arbitrary, capricious, or unreasonable, or is not supported by substantial evidence. Where a decision **is** arbitrary, capricious, unreasonable, or not supported by substantial evidence, however, the appellate courts must overturn the Department's action. *Mississippi State Department of Health v. Natchez Community Hospital*, 743 So. 2d 973, 977 (Miss. 1999) (it is within the power of the appellate court to reverse where the department's decision is not supported by substantial evidence) (citing *Mississippi Real Estate Commission v. Anding*, 732 So. 2d 192, 196 (Miss. 1999)); *St. Dominic-Jackson Memorial Hospital v. Mississippi State Department of Health*, 728 So. 2d 81, 83 (Miss. 1998) (citing *Mississippi State Department of Health v. Southwest*

Mississippi Regional Medical Center, 580 So. 2d 1238, 1239 (Miss. 1991). As this Court stated, "by way of contrast, where an administrative agency errs as a matter of law, courts of competent jurisdiction should not hesitate to intervene." *Grant Center Hospital of Mississippi, Inc. v. Health Group of Jackson, Mississippi, Inc.*, 528 So. 2d 804, 808 (Miss. 1988). Indeed, where the Department's decision has been "repugnant" to the express provisions of the *SHP* or the CON Review Manual, neither the Chancellor nor this Supreme Court has deferred to the agency. *See Grant Center*, 528 So. 2d at 808 (citing *Mississippi State Tax Commission v. Dyer Investment Co., Inc.*, 507 So. 2d 1287, 1289 (Miss. 1987); *Universal Manufacturing Corp. v. Brady*, 320 So. 2d 784, 786 (Miss. 1975)).

Here, as the Chancellor rightly concluded, the Department's decision was, in some respects, arbitrary and capricious, and was entirely contrary to the manifest weight of the evidence. Specifically, as is set forth in detail in the following pages, the evidence presented at the Hearing demonstrated that DeSoto Imaging failed to satisfy the requirements of the *SHP* or the CON Review Manual. In particular, no substantial evidence was presented in support of any showing of need or economic viability of the proposed project. Instead, the evidence presented made it clear that the project will not perform the required number of procedures and that there is no objective need for additional MRI services in Desoto County. The Hearing Officer erred in recommending approval of the Application in the face of the Applicant's inability to satisfy its burden of proof on these issues. In addition, the Hearing Officer committed further reversible error in his handling of evidence presented by the opponents post-hearing.

The applicable standard of review requires deference to the Department – but only to a point. The Department crossed the line in this matter. Its decision was repugnant to the evidence and the applicable regulations. The Chancellor made the right decision and her decision must be affirmed.

B. THE APPLICATION DID NOT SATISFY THE NEED REQUIREMENT

1. The Staff Analysis Was Correct

Immediately following submission of the Application, the Department's Staff performed its routine review of the Application and issued its Staff Analysis concluding that the Application failed to satisfy either the need requirement in the *SHP* or that in the CON Review Manual. Because there was no need for additional service, the Staff also concluded that adverse impact would result to existing service providers if the Application were granted. The Staff recommended disapproval of the Application.

At the Hearing, DeSoto Imaging challenged the Staff's Analysis of its Application on several grounds. Primarily, DeSoto Imaging contended that in looking at the utilization of all other providers in the General Hospital Service Area, the Staff applied a methodology inconsistent with its previous review of applications for MRI service and equipment and that the Staff focused too strongly on the Department's stated optimal performance levels of 2,000 to 2,500 procedures per year for an MRI machine and treated that optimal performance level as a requirement for approval.

Contrary to DeSoto Imaging's arguments, it was entirely appropriate for the Staff to consider the utilization levels of all other service providers in the Service Area in order to determine compliance with General Review Criterion 5 (Need), as well as the *SHP*'s goal of avoiding any unnecessary duplication of service. In fact, General Review Criterion 5 requires the Department to evaluate every application in terms of the existing utilization levels. R.E. 1 at 101-02. Mr. Dawkins, testifying for the Department, confirmed this fact when he stated that "any proposed addition of capacity in a particular Service Area should be evaluated based on its impact on other similar facilities in that area." R.E. 1 at 104. The Staff did nothing inappropriate

in considering the area-wide utilization in its review of this Application. Indeed, it could not correctly have evaluated the Application without that consideration.

Secondly, the Staff was also correct to consider existing utilization in the context of the Department's stated optimal utilization level of 2,000 to 2,500 procedures. Contrary to the position taken by DeSoto Imaging, evidence at the Hearing made clear that the Staff did not treat the optimal performance level as a requirement for the approval of this Application. Rather, it was just one of the factors that the Staff considered in its review of the Application.

Finally, as to the Staff's Analysis of DeSoto Imaging's Application, it is important to note that the Staff Analysis is always a preliminary document, prepared without the benefit of evidence submitted subsequently to a hearing officer. As a result, it is frequently the case that Staff Analyses do not contain all of the detailed bases for either the approval or disapproval of an Application which may become evident later in the case. The Staff's Analysis tends to become the object of significant attack when it should not be.[4] Here, there are numerous reasons why the Hearing Officer's decision to approve this Application was wrong. And for those reasons – some of which were identified by the Staff, and some of which were not, but all of which are supported by the record from the Hearing – the Chancellor's decision to disapprove the Application must be affirmed.

2. The Proposed Route – and Thus the Proposed MRI Unit – Will Not Perform 1,700 Procedures per Year

Specific Criterion 1 in the *SHP* requires that an applicant for MRI service demonstrate that the requested service will perform at least 1,700 procedures annually. That need criterion states as follows:

[4] Importantly, DeSoto Imaging argues in its brief that the Staff was wrong. (Appellant's Brf. at 4-5). However, neither the Hearing Officer nor the Chancellor relied to any degree on the Staff's Analysis. The Staff was correct. But even if it had not been, it would be of no import at this level of appeal.

> Need Criterion: The entity desiring to offer MRI services must document that the equipment shall perform a minimum of 1,700 procedures per year. The applicant shall use the procedures estimation methodology appearing in this section of the *Plan* to project the annual patient service volume for the applicant hospital. This criterion includes both fixed and mobile MRI equipment.
>
> Applicants for non-hospital based MRI facilities may submit affidavits from referring physicians in lieu of the estimation methodology required for hospital based facilities. MRI procedures projected in affidavits shall be based on actual MRI procedures referred during the year.
>
> It is recognized that a particular MRI unit may be utilized by more than one provider of MRI services; some of which may be located outside of Mississippi. In such cases all existing or proposed providers of MRI services must jointly meet the required service volume of 1,700 procedures annually. If the MRI unit in question is presently utilized by other providers of MRI services, the actual number of procedures performed by them during the most recent twelve month period may be used instead of the formula projections.

[R. Vol. 2 (*SHP* at XI-47, Hrg. Ex. 4)].

As the Hearing Officer duly noted, where, as here, the application is for mobile service, it is permitted by the Department for the applicant to demonstrate simply that the MRI unit to be utilized for the proposed new service location is already performing at least 1,700 procedures on the route which the applicant will join if the Application is approved. [R. Vol. 2 (*SHP* at XI-47, Hrg. Ex. 4)]. The applicant must, however, demonstrate that the new route – the route which will include the proposed new location – will satisfy this standard going forward. Historical performance of the route before the addition of the new location is meaningless.[5]

DeSoto Imaging asserted in its Application that it would join an "existing route" which already satisfied the 1,700 procedures requirement – i.e. an established route which was already performing in excess of the required 1,700 procedures annually with facilities which would remain part of the route along with DeSoto Imaging. In addition, the Applicant projected in the

[5] This is undisputably true in every case unless the old route will remain completely unchanged and will merely add the new location to its existing members. In that case, the Department considers historical performance plus procedures to be performed at the new location. Regardless of the Applicant's certified statements to the contrary, however, the route proposed here is not the same as it was before the new location was added.

Application that its proposed service (in Southaven) would perform 520 procedures the first year, 650 procedures the second year, and 780 procedures the third year of its operation. [R. Vol. 2 (CON App. at 10, Hrg. Ex. 2)]. The Hearing Officer took these representations as accurate and relied on them as the basis of his findings. He erred in doing so. Evidence presented at the Hearing established without question that neither of these assertions was true, and as a result, the Application did not satisfy the need requirement. The entire basis of the Hearing Officer's recommendation (and thus of the State Health Officer's concurrence) is fallacious. The Chancellor concluded that the Hearing Officer's decision was contrary to the manifest weight of the evidence. Where that is the case, the presumption in favor of the Department ceases to have effect. The Chancellor made the only decision supported by substantial evidence. Her decision must be affirmed.

a. The Proposed Mobile Route Does Not Currently Exist and Cannot Be Established as Proposed

Although the Applicant repeatedly referred to its intent to join an **existing** mobile route, evidence presented at the Hearing established without question that the route the Applicant proposed to "join" did not actually exist at the time of the Application or the Hearing, but instead would be established as a route if and when this Application was approved. In fact, the other providers who the Applicant stated would purportedly share the proposed route with DeSoto Imaging were, at the time of the Hearing, actually being served on separate routes, by at least three different MRI units. Furthermore, evidence at the Hearing established that to establish the proposed route as the Applicant certified that it would was and is a practical impossibility – the proposed route cannot be established as proposed.

In the Application (filed in September 2005), DeSoto Imaging stated that it would become "a part of an already existing and established route through a contractual agreement with Alliance Imaging, Inc," that "[t]he proposed mobile MRI unit is a 1.5 Tesla unit that currently

serves Gilmore Memorial Hospital . . . and Mission Primary Care Clinic . . . on a mobile route," that "DeSoto Imaging will simply join this existing route," and that the so-called existing route was "already performing over 1,700 procedures annually, 1,440 procedures at Gilmore in 2004 and 562 procedures at Mission in 2004." [R. Vol. 2 (CON App. at 2, 6, 8, Hrg. Ex. 2)(emphasis added)].

The Applicant misrepresented (or was misinformed about) the situation. Testimony presented by the Applicant at the Hearing from Gordon Smith, Area Sales Manager for Alliance Imaging, established that there was no current or previously existing mobile route serving both Gilmore and Mission Primary. Instead, those two facilities were being serviced on separate routes by different machines. R.E. 1 at 251. What's more, given the undisputed specifics concerning the service required by those two facilities, the proposed route (serving Gilmore, Mission Primary, and DeSoto Imaging with the same unit) could not be established going forward. This conclusion was inescapable due simply to the numbers of days required by the three proposed route members. At Hearing time, Gilmore was being serviced from four to four-and-a-half days a week. R.E. 1 at 248. None of those days was a Saturday.[6] R.E. 1 at 250. Mission Primary, the other member of the allegedly "existing" mobile route, received service from another MRI unit two days a week. R.E. 1 at 255. As with Gilmore, Mission Primary's days were both weekdays. R.E. 1 at 255. The conclusion is obvious: there can be no route established which can serve Gilmore four weekdays a week, Mission Primary two weekdays a week and DeSoto Imaging two weekdays a week. There are only five weekdays to work with, and to put these three providers on a route together would require eight weekdays. Even if service were to be provided on Saturdays, or even seven days a week, the proposed route could

[6] Smith confirmed that at the time of the Hearing, Gilmore was receiving service from Alliance on Mondays, Tuesdays, half of every Wednesday, and Fridays. Mission Primary was receiving service from a different MRI unit on Tuesdays and Thursdays. R.E. at 271.

not be established and permit Gilmore and Mission Primary to maintain their then current number of days of service.

The Applicant attempted to address this failure in its Application by eliciting testimony from Mr. Smith to the effect that Alliance would fit DeSoto Imaging into the proposed route by requiring Gilmore and Mission Primary to accept a reduced number of days of service on a weekly basis. Mr. Smith testified further that, in order to fit DeSoto Imaging in, it would require Gilmore to accept Saturdays as one of its reduced days of service. R.E. 1 at 258-62. The end result, according to Alliance, would be a route that would serve DeSoto Imaging two weekdays, Mission Primary one weekday, and Gilmore two weekdays and Saturdays. R.E. 1 at 241.

On cross-examination, however, the entire route was shown to be completely uncertain (as the Hearing Officer recognized). Smith admitted not only that Gilmore (an acute care hospital) has never accepted Saturdays as one of its main days of service from Alliance, but, even more importantly, that there was no existing contract for service with Gilmore and that Gilmore had not indicated a willingness to enter into a contract that would reduce its number of days OR include Saturdays as one of the reduced number of days.[7] R.E. 1 at 258-62. According to Smith, Alliance and Gilmore were, at Hearing time, renegotiating the contract for MRI service at Gilmore and Alliance was continuing to provide four-day-a-week service to Gilmore on a month-to-month basis pending the completion of that renegotiation process. R.E. 1 at 270. Smith could provide no assurance of the Hearing Officer, however, that any agreeable resolution would be reached with Gilmore, and the Applicant presented no testimony from any Gilmore representative. As a result, the very existence of a contract for service between Alliance and

[7] Obviously, an inpatient facility has the need for diagnostic imaging services on a regular basis. Presumably, that is why Gilmore had historically contracted for four days of service per week. It was the Applicant's burden of proof to demonstrate that it would satisfy the need requirement. To do so, it would have had to establish that Gilmore would accept fewer days, a Saturday as one of those fewer days, and that it could provide the same number of procedures on those fewer days. DeSoto Imaging did not establish any of those three things. Instead, it asked the Department to "take it at its word." DeSoto Imaging's presumptions, however, do not constitute "substantial evidence."

Gilmore, not to mention what number of procedures (if any) Alliance might perform at Gilmore going forward, was uncertain at the close of the Hearing.[8]

In light of the testimony at the Hearing from Alliance's own representative, it was undisputable that there was no existing mobile route serving both Gilmore and Mission Primary.[9] Similarly, it was, in the Hearing Officer's own words merely "stating the obvious" that Alliance could not combine the historical level of service at Gilmore and Mission Primary on the same route with only those two participants, much less on a route which would add DeSoto Imaging for two weekdays. [R. 000062 (Hrg. Off. Findings at 16)]. It simply is not possible. Finally, even if a route could ultimately be established with all three of these providers, there is no substantial evidence that the procedure numbers would be anywhere close to 1,700, because forming such a route would require that Gilmore's and Mission Primary's days of service be reduced from the current total of six weekdays and some Saturdays to only three weekdays and Saturdays. If the number of days is reduced, the procedures will necessarily be reduced as well, and there was no evidence provided at the Hearing as to what Gilmore's numbers would be with only three days of service where one of those days is a Saturday. Nor was there evidence presented as to the number of procedures to be performed at Mission Primary with only one day of service available. The Applicant's only answer to this dilemma was to have Mr. Smith testify that Alliance would do whatever it had to do to "fit" Diagnostic Imaging into the route.

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[8] Similarly, there was testimony at the Hearing that although Mission Primary "obviously want[s] to keep two days" of service, Alliance would reduce Mission Primary to one day. R.E. 1 at 262. Smith testified that Mission Primary was essentially without any option but to accept Alliance's reduction in its days of service because its contract with Alliance had two years remaining in its term. R.E. 1 at 265. As with Gilmore, Smith's testimony called into question the reliability of the procedure numbers from Mission Primary. Diagnostic Imaging cannot rely on numbers from Mission Primary which were accomplished in two days of service, when Alliance intends to limit Mission Primary to only one day of service going forward.

[9] Despite his previous statement to the contrary, the Hearing Officer agreed that there was no existing route, AND that the proposed route was an impossibility. [R. 000061, 000062 (Hrg. Off. Findings at 15, 16)].

Faced with this vast uncertainty of the numbers – the very thing that must be shown to establish the need required by the *SHP* – the Hearing Officer stated:

> The Opponents point out that there can be no route established which can serve Gilmore Memorial four [week-]days a week, Mission Primary two [week-]days a week, and Diagnostic Imaging two [week-]days a week. Again, stating the obvious, the Opponents argue that even if service were to be provided on Saturdays as well, or even seven days a week, the proposed route cannot be established and permit Gilmore Memorial and Mission Primary to maintain their current days of service.
>
> * * * *
>
> Notwithstanding the Opponents' determined run at this issue, Smith's comments ultimately are **the most concrete evidence contained in the record**. The number of scans performed by Alliance Imaging at Gilmore Memorial and Mission Primary when combined exceed 1,700. As Smith pointed out, it is not uncommon to alter routes or lose contracts. **While this issue does become a bit convoluted**, the fact remains that Alliance has been and continues to serve these two facilities with mobile MRI service.

[R. 000062-63 (Hrg. Off. Findings at 16-17) (emphasis added)].

The Hearing Officer recognized that there was no route currently that served both of these locations and that, in fact, according to the Applicant's own witnesses, there can be no route that will provide service to both locations at the level previously provided on the two separate routes.[10] Mr. Smith's testimony may have been the "most concrete" evidence the Hearing Officer had to work with, but that is not the point. Indeed, if the Hearing Officer's analysis were to be applied generally, an Applicant would need only find a few providers whose procedure numbers together exceeded 1,700, and (regardless of the number of days of service they had to get to their procedure numbers) simply add them together, put them on the same route, and commit to "do whatever is necessary" to make the new route work. Clearly, this would be an absurd (and counterproductive) result. As the Applicant, DeSoto Imaging was required to demonstrate with "substantial evidence" that its Application complied with the *SHP*

[10] That Alliance "had been and was continuing" to serve Gilmore and Mission Primary was irrelevant given that the two facilities were being served by different machines and different numbers of days than would be permitted going forward. And yet, the Hearing Officer's decision hinged on this fact. His decision, like the Application, was not supported by substantial evidence.

and the CON Review Manual. As the Hearing Officer essentially recognized in his Opinion, DeSoto Imaging did not satisfy that burden as to the procedures from Gilmore and Mission Primary. The Need criterion was not met, and the Hearing Officer's approval of the Application was error.

b. The Projections of Procedures to Be Performed at DeSoto Imaging Are Not Supported by Substantial Evidence

Other than the procedure numbers at Gilmore and Mission Primary, DeSoto Imaging could only rely on procedures that would be performed at its proposed Southaven location to satisfy the *SHP*'s need requirement. In an effort to document some referrals to its proposed service, DeSoto Imaging attached eight affidavits from area physicians and presented testimony at the Hearing from one additional physician who did not submit an affidavit. The affidavits and lone testifying physician are addressed separately in the following paragraphs.

First, the eight affidavits together, if determined to be reliable,[11] would account for 312 to 372 procedures yearly. [R. Vol. 2 (Exhibit I to CON App., Hrg. Exh. 2)]. The Hearing Officer took the middle road and stated that DeSoto Imaging provided affidavits supporting the referral of 336 procedures. [R. Vol. 2 (Hrg. Off. Findings at 3)]. As the Mississippi Supreme Court has held, however, unsupported statements of referrals by physicians will not be deemed to constitute substantial evidence upon which the Department should grant a CON. *Mississippi Department of Health, et al. v. Natchez Community Hospital*, 743 So. 2d 973, 978 (Miss. 1999). This Applicant presented no supporting evidence for the attached affidavits. Not a single attesting physician testified. There was no evidence of historical utilization, no evidence of what sorts of diagnoses (if any) would cause the attesting physicians to need MRI technology for their

[11] Under the 2006 *SHP*, a non-hospital applicant for MRI service or equipment may submit affidavits of referring physicians indicating some number of procedures the physicians project they will refer to the proposed service. [R. Vol. 2 (Hrg. Ex. 4)]. Those projections, however, must still meet the test established by the Mississippi Supreme Court for reliability.

patients, no evidence concerning the patient bases of the attesting physicians or the areas of residence of those patients. In short, there was no evidence or testimony presented to provide any support whatsoever to the eight form affidavits which were attached to the Application. On their face, those affidavits do not satisfy the standard for reliability established by this Court in *Natchez* and cannot be relied upon as support for the Application. Furthermore, even if the affidavits were completely reliable and were found to constitute proof of the number of procedures the attesting physicians project therein, they would still only support a finding of, according to the Hearing Officer, 336 procedures per year[12] – more than 1,300 short of satisfying the need requirement. With the complete uncertainty as to the Gilmore and Mission Primary numbers, 336 procedures was not close to being a sufficient number to enable the Hearing Officer to find the need requirement satisfied.

The lone testifying physician called by DeSoto Imaging did not add any credible projection of procedures. Carol Ann Wright Smith, M.D., a chiropractor from Memphis, Tennessee, testified that if DeSoto Imaging were successful, she would immediately begin referring MRI patients to the Southaven facility. Dr. Smith testified, however, that her patient base was almost entirely Tennessee residents, and that at the time she used one particular Memphis facility, although there are numerous other Memphis facilities available to her. Dr. Smith confirmed that she had <u>never</u> sent a single patient to a Mississippi provider for an MRI.

[12] It is important for the Court to note that, although DeSoto Imaging provided affidavits suggesting it might receive 336 referrals annually, it "projected" that it would perform 520 procedures the first year, 650 in year two, and 780 in year three. There was never any support provided for those "projections." None. Instead, as the Hearing Officer succinctly stated, DeSoto Imaging explained the difference between the affidavit number and the projections by stating that "there are more than eight physicians in Desoto County, [and] . . . population growth in the area." [R. 000059 (Hrg. Off. Findings at 13)]. Neither of those things (both of which are unquestionably true) constitutes substantial evidence upon which a CON applicant may base exaggerated projections of procedures to be performed. The *Natchez* case forbids it.

R.E. 1 at 305. As part of a proffer[13], Dr. Smith testified that she would be able to send from two to five MRI procedures a month – 24 to 60 procedures a year – to the Southaven facility. R.E. 1 at 299. As the Hearing Officer recognized, Smith's testimony was completely incredible.

Neither Dr. Smith nor the attesting physicians satisfy the standard established by the Supreme Court in *Natchez* and subsequently applied by the Department many times. Furthermore, even if all of the projections by the attesting physicians were reliable, there would be only 350 to 400 procedures accounted for – not even close to the number required by the *SHP*. The need criterion was not satisfied and on that basis alone, the Application should have failed.

In summary on this point, DeSoto Imaging proposed a route that was shown to be a practical impossibility. Absent a change in the fundamental basis of our calendar (i.e. substituting an eight day week for our seven day week), DeSoto Imaging's proposed route can never be established. DeSoto Imaging has the burden of proof on this issue. It was not able to provide substantial evidence that its proposed route would do 1,700 procedures or more after two years. This failure alone causes the Application to fail.

C. FURTHER ERROR WAS COMMITTED IN THE HEARING OFFICER'S TREATMENT OF POST-HEARING EVIDENCE

As is detailed in the preceding section, DeSoto Imaging's proposed mobile MRI route (which translates into the number of procedures the mobile machine would perform annually) was based on speculation and wishfulness. The evidence presented at the Hearing, however, was not sufficient to carry the burden of proof as to the specific criterion on need. Furthermore, following the Hearing, Gilmore Medical Center, the "anchor provider" on the proposed mobile route, notified Alliance that it would not accept the new terms proposed by Alliance – to reduce

[13] Counsel opposite's objection was sustained, disallowing sworn testimony into the record concerning Dr. Smith's estimate of the number of procedures 50 to 100 other non-testifying chiropractors in Tennessee might refer to the proposed facility.

the number of days of MRI service Alliance would provide and to make one of those days a Saturday. Gilmore gave Alliance notice that it would not continue to do business with Alliance and that the relationship between the two of them would cease as of August 25, 2006. [R. 000228 (Affidavit of Monte Bostwick)].

This notice from Gilmore came after the completion of the Hearing, but before the Department's decision on the Application. Immediately after learning of this information, Carvel Imaging and Baptist-DeSoto jointly moved to reopen the record to accept this new evidence. [R. 000223-227 (Joint Motion)]. Importantly, the Hearing Officer's findings and conclusions are merely a recommendation to the Department regarding what action should be taken on a subject CON application. Until the Department acts on that recommendation, through the State Health Officer, the Hearing Officer continues to have authority to re-open a hearing, reconsider his findings, and consider newly discovered evidence. As a result, the Joint Motion to Reopen the Record and for the Hearing Officer to Reconsider his Findings of Fact and Conclusions of Law was timely and was not subject to any procedural bar.[14]

In the motion to reopen the hearing, Carvel Imaging and Baptist-DeSoto asked the Hearing Officer to consider the new evidence and reverse his recommendation, recognizing that Gilmore's withdrawal from the proposed route made it indisputable that the route would not satisfy the need requirement. In the alternative, Carvel Imaging and Baptist-DeSoto requested that the Hearing be reopened and that the Hearing Officer hear additional evidence on the issue from both sides before providing any recommendation to the Department. [R. 000223-227 (Joint Motion)].

[14] Indeed, the Department has recently permitted numerous CON applicants to withdraw their applications post-hearing, but pre-final Department decision, and thus avoid the prohibition against refiling an application for the same or similar service for a year from the Department's action. Clearly, the Department does not consider any "action" to have been taken until it rules on a hearing officer's recommendation.

In response, DeSoto Imaging conceded that Gilmore had withdrawn, and in an effort to secure its application, suggested simply that Alliance would compose an entirely new route which would without question satisfy the 1,700 procedure mark required by the Department. [R. 000234 (Response to Joint Motion at 5)].

The Hearing Officer first found, correctly, that it was within his authority and jurisdiction to reopen the record. He then, however, concluded that he would accept Carvel Imaging's statements that Alliance would simply substitute a new route and that that route would satisfy the requirement. As the Chancellor recognized, the Hearing Officer committed clear reversible error in so holding. The "new route" was never proposed to the Department. It was never evaluated by the Department's Staff. It was never the subject of examination – direct or cross. Neither Carvel Imaging nor Baptist-DeSoto was permitted to cross examine the applicant or Alliance concerning its reliability.

As the Chancellor concluded, the Hearing Officer's actions regarding the post-hearing motion violated the rights of Carvel Imaging and Baptist-DeSoto under the CON laws and it violated their due process rights. *See Miss. Code Ann.* §41-7-197. The correct recommendation by the Hearing Officer would have been one of disapproval of the Application outright, due to its failure to satisfy the specific need criterion as well as the general review criteria on need and economic viability. But even absent that ruling, the Hearing Officer had no rational basis upon which to rule that he was authorized to accept the new evidence which proved the route unworkable and then approve the Application, regardless of that evidence, based on a completely new route, proposed for the first time in a response brief, and which was never subject to any review by anyone, including the Hearing Officer. In so doing, the Hearing Officer acted in an arbitrary and capricious manner, and the decision of the Department made in reliance on his recommendation must be reversed.

D. ADDITIONAL BASES EXIST FOR REVERSAL OF THE DEPARTMENT'S DECISION

In its appeal brief, DeSoto Imaging addresses only two issues – the need requirement and the Hearing Officer's treatment of post-hearing evidence presented by the opponents of the Application. Additional bases also exist for the disapproval of DeSoto Imaging's Application – bases which were rejected or overlooked by the Hearing Officer, but which are part of the Record and as to which the Chancellor heard oral argument -- argument she adopted in its entirety as part of her ruling reversing the Department. Those matters are as follows:

1. The General Review Criterion on Economic Viability Was Not Satisfied[15]

GR-4: Economic Viability: The immediate and long-term financial feasibility of the proposal, as well as the probable effect of the proposal on the costs and charges for providing health services by the institution or service. Projections should be reasonable and based upon generally accepted accounting procedures.

a. The proposed charges should be comparable to those charges established by other facilities for similar services within the service area or state. The applicant should document how the proposed charges were calculated.

b. The projected levels of utilization should be reasonably consistent with those experienced by similar facilities in the service area and/or state. In addition, projected levels of utilization should be consistent with the need level of the service area.

c. If the capital expenditure of the proposed project is $2 million or more, the applicant must submit a financial feasibility study prepared by an

[15] On page 23 of his Findings, the Hearing Officer took the position that the General Review Criteria are somehow less important or inapplicable in cases where specific criteria are provided in the *SHP* for the requested service. The CON Review Manual expressly provides otherwise. The Manual provides on page 57 that "[r]eview, evaluation, and determination of whether a CON is to be issued or denied will be based upon the following general considerations **and** any service specific criteria which are applicable to the project under consideration." [R. Vol. 2 (CON Manual at 57, Hrg. Ex. 10)(emphasis added)]. Not only is there no indication that the CON Review Manual's general considerations pale in importance where specific criteria exist, the implication to be drawn from the wording of the Manual is that the General Review Criteria are equally or more important, as they apply to every CON application that is reviewed by the Department. DeSoto Diagnostic's Application must comply with the General Review Criteria as well as with the *SHP*'s service specific criteria. The Hearing Officer erred in discounting the importance of that compliance.

accountant, CPA or the facility's financial officer. The study must include the financial analyst's opinion of the ability of the facility to undertake the obligation and the probable effect of the expenditure on present and future operating costs. In addition, the report must be signed by the preparer.

In its initial review, the Staff of the Department indicated concern that this project would not be financially feasible. The basis for the Staff's concern was primarily that DeSoto Imaging was incapable of maintaining a profitable business without also adversely impacting other service providers in the service area. [R. Vol. 2 (Staff Analysis at 6, Hrg. Ex. 3)]. In addition to the Staff's stated concern, additional evidence was presented at the Hearing which established that, regardless of any adverse impact to other service providers, this Application is not economically viable. Two primary reasons were revealed for the obvious financial failure of the Application: the lack of support for the projected procedure numbers, and the omission from the Application's financial analysis of significant essential costs which would outweigh the profit shown in each year of the three year projected operating statement attached to the Application.

First, DeSoto Imaging's financial numbers were generally unsupported in the Application, and when cross-examined about the basis for those numbers during the Hearing, Mr. Blackwell, who prepared the Application, could provide no explanation of where his numbers came from, other than that they were the product of his own personal speculation and guesswork. R.E. 1 at 224-226. No documentary evidence was provided by the Applicant of what expenses were included and what expenses were not included in the Application, and Mr. Blackwell had no independent recollection of those matters. As a result, many of the figures in the financial analysis are completely unsupported. For example, DeSoto Imaging allowed $20,000 for salaries, and yet did not include any amount for compensation to a medical director, did not know what hourly rate would apply to a receptionist or to nursing personnel, and was unable to say whether the $20,000 amount included compensation for billing and other necessary support personnel. R.E. 1 at 225-26. Further, the Application did not include any expense for

the space to be occupied by the MRI. This omission is despite Blackwell's admission that common areas will be necessary for the provision of the MRI service. Blackwell was also unable to testify to how he calculated the contractual adjustments included in the Application. R.E. 1 at 226-27. Finally, DeSoto Imaging did not indicate in the Application or in testimony what method of storage it will use for images. There are basically two options – the standard film storage and a PACS (computerized archival system). Regardless which method DeSoto Imaging might ultimately have intended to implement, there would be significant cost associated with the storage of images. No cost was included in the Application for either option. These errors and omissions in the Financial Analysis portion of the Application call into question the economic viability of the project. With all the uncertainty on Blackwell's part, the Hearing Officer should have concluded that the Application failed to establish viability.

One further error in the financial portion of the Application makes it clear that this project will not be profitable by year three. DeSoto Imaging included only half of the equipment lease cost associated with a two-day mobile MRI service. The three year projected operating statement reflects an expense of $182,000 for the equipment lease, when, in fact, the expense should have been $360,000 – a difference of $178,000. [R. Vol. 2 (Ex. J to CON App., Hrg. Ex. 2)]. Because DeSoto Imaging projected net incomes in the first and second years of less than $178,000, that adjustment alone (without even considering the uncertainty of nearly every number in the financial statement as set forth above) puts the project at a loss for the first two years of service.[16] In a frantic effort to salvage the Application, Noel Falls, who testified as DeSoto Imaging's expert in health planning, opined that even with the additional lease expense

[16] When one takes into consideration as well the uncertain expense allocations for salaries, space lease (which was omitted altogether), an image storage system (also altogether omitted), and the other items Mr. Blackwell could not account for in testimony, it is clear that this Application would not reach economic viability in the third year, even with DeSoto Imaging's inflated procedure numbers. The Hearing Officer simply turned a blind eye to these matters, and in so doing, committed reversible error.

the project should be considered profitable in year two because only eight more procedures than were projected for year eight would create a net gain for that year. R.E. 1 at 590-91. Mr. Falls' testimony on this point is actually counterproductive. The Applicant projected a number of procedures. While those projections were not shown to be reliable, DeSoto Imaging certainly was not at liberty to simply bump that number up or down during the Hearing to accommodate its failing financials. Not even an expert witness can change the numbers. Fall's testimony is tantamount to an admission of the failure of this Application – on multiple grounds.

DeSoto Imaging's projected procedure numbers for years one through three are similarly unreliable. With regard to the number of procedures projected to be performed by the proposed new service, Blackwell testified that the procedure numbers were "basically a budget number." R.E. 1 at 228. He testified when questioned further about the basis for the projections simply that "I believe we're going to do more than . . . the affidavits show." R.E. 1 at 228. The Hearing Officer apparently concluded that Mr. Blackwell's "belief" – sincere though it may have been – was sufficient to satisfy the "substantial evidence" threshold. The Supreme Court's decision in *Natchez* says otherwise. Mr. Blackwell's personal belief about the number of procedures his MRI service will perform is a classic example of an unsupported statement of referrals. And Blackwell himself confirmed that the Department was not provided with a single piece of evidence to support the projections of procedure numbers used to complete the financial analysis. R.E. 1 at 229.

The fact is, the only procedure numbers which DeSoto Imaging may even arguably rely on to calculate the financial feasibility of this Application are the numbers attested to in the attached affidavits of the eight supporting physicians. And, as calculations performed and testified to by Ed Witek, expert for the opponents to this Application, revealed, those numbers

were not sufficient to carry the Application into financial feasibility – even in year three.[17] R.E. 1 at 527-29.

The Hearing Officer recognized all of these issues in his Findings, and then did not address them. He simply concluded that although "the pro forma . . . should have been given more attention," based on the numbers of scans projected, the project could achieve financial feasibility. [R. 000069 (Hrg. Off. Findings at 23)]. The Hearing Officer's conclusion is inconsistent with the myriad errors and omissions he acknowledged were contained in the financial portion of the Application. He agreed there was no basis provided for the Applicant's calculations, and then found them to be sufficient, even though baseless. His conclusions were not supported by the evidence. They were contrary to it.

In short, DeSoto Imaging failed entirely to demonstrate that this Application could achieve financial feasibility or economic viability by the end of the third year of operation. The "financial analysis" in the Application was meaningless. The projected utilization of the proposed service was speculative at best, the financials were based (admittedly by the Applicant) on sheer speculation and conjecture, and essential (and weighty) expense items were entirely omitted from the accounting process. For all of these reasons, the Application failed to substantially comply with General Review Criterion 4. Its disapproval is warranted by this failure along.

[17] Witek was conservative in his approach to these calculations on the stand, giving the Applicant the benefit of the doubt in years two and three. Witek calculated the attested affidavit numbers as a percentage of the number of procedures projected by the applicant for purposes of its financial proforma – that number was 65% for the first year. He then applied that same percentage to the proforma numbers for years two and three, thus showing an increase in procedures for each year (even when no increase was accounted for in the affidavits supplied by DeSoto Imaging). R.E. at 528-29. Even at those numbers, the project showed a loss of approximately $160,000 in year three. R.E. at 529.

2. The General Review Criterion in Need Was Not Satisfied

GR-5: Need for the Project: One or more of the following items may be considered in determining whether a need for the project exists:

> **c. The current and projected utilization of like facilities or services within the proposed service area will be considered in determining the need for additional facilities or services. Unless clearly shown otherwise, data where available from the Division of Health Planning and Resource Development shall be considered to be the most reliable data available.**

While the specific need criterion addresses the minimum acceptable number of procedures that an applicant must demonstrate a new MRI service will perform, the General Review Criterion on need deals with the actual need in the community for additional service capacity and the potential for adverse impact to existing service providers. There are two existing providers of MRI service in Desoto County – Baptist-Desoto and Carvel Imaging. At Hearing time, Carvel Imaging, the only other freestanding provider, operates one fixed MRI unit at its center in Olive Branch and one mobile MRI unit one day a week at its center in Southaven. R.E. 1 at 441. Carvel Imaging's Southaven location is directly across the street from the proposed new service. Prior to the Hearing, Carvel Imaging had already obtained a Determination of Nonreviewability from the Department, authorizing it to proceed with the replacement of its mobile service with a fixed unit in Southaven. [R. Vol. 3 (Hrg. Ex. 18)]. Dr. Lynn Carvel, owner of Carvel Imaging, testified at the Hearing that she planned to begin providing MRI service in Southaven seven days a week within a few months.

The Department has defined the optimum utilization of an MRI unit to be somewhere between 2,000 and 2,500 procedures per year. As technology has improved, however, the number of procedures an MRI unit is capable of performing has grown to well in excess of the 2,500 mark. In fact, Mr. Smith, Alliance's representative, testified that a single unit can perform anywhere from ten to fifteen procedures a day during normal working hours. Based on a five-day workweek, those numbers yield annual procedure numbers between 2,500 and 3,750.

Extending days or hours of service (as is always the case in a hospital setting, and is more and more the case in an outpatient setting) only increases the capacity of the subject MRI unit for a higher number of procedures.

At the time of the Application, 2004 data reflected that Baptist-Desoto's two fixed MRI units were performing at an average of slightly less than 2,500 procedures per year. Dr. Carvel was attempting to increase her service in Southaven from one day to two days a week. However, due to difficulties with her service provider, she was unable to reach an agreement. She testified that it was more economically feasible to invest in a fixed unit than to pay for mobile service for even three days a week. R.E. 1 at 443. According to Dr. Carvel, two days a week on her Southaven unit would have been more than sufficient to meet the need for service in Southaven and Desoto County. R.E. 1 at 444. No evidence was presented at the Hearing that any patients seeking imaging services, and particularly MRI services in Desoto County, have experienced any delay at all. Dr. Carvel testified that her facilities can always get patients in at Olive Branch on the same day or the next day after the referring physician calls in an order, and that she has never been unable to accommodate an emergency testing need immediately. R.E. 1 at 445, 446. In Southaven, there has been as much as a week's wait due to there only having been service available on Wednesdays. However, according to Carvel, if a patient is called in to the Southaven office on Thursday, Carvel will offer that patient the option of being tested in Olive Branch on the same or following day instead of waiting until the mobile unit returns to Southaven the following week. R.E. 1 at 445. Now, with a fixed unit in Southaven replacing the one-day-a-week service, that will no longer be an issue.

In short, it is evident that with the addition of a second fixed unit at Carvel Imaging in Southaven, there is no shortage of MRI capacity in Southaven or Desoto County. To the contrary, the evidence at the Hearing established that there was adequate capacity in the system

before the Hearing, and that the addition at Carvel Imaging of another fixed unit will result in significant excess capacity.[18] There is no need for additional MRI service in Southaven or Desoto County, and GR-5 is not satisfied by this Application. Once again, the Hearing Officer elected not to specifically address this Criterion other than to state that "the record contains substantial evidence. . . ." [R. 000071 (Hrg. Off. Findings at 25)]. There is indeed substantial evidence on this point in the record – it simply does not support a finding that this general consideration was satisfied.

> **d. The probable effect of the proposed facility or service on existing facilities or services providing similar services to those proposed will be considered. When the service area of the proposed facility or service overlaps the service area of an existing facility or service, then the effect on the existing facility or service may be considered. The applicant or interested party must clearly present the methodologies and assumptions upon which any proposed project's impact on utilization in affected facilities or services is calculated. Also, the appropriate and efficient use of existing facilities/services may be considered.**

Because there is no evidence of need in Southaven or Desoto County for any additional MRI capacity, the only conclusion reasonably to be drawn is that procedures performed at the proposed new service location will be procedures that are taken away from existing providers. As a result, if this Application is approved, existing service providers will suffer unquestionably significant adverse impact. DeSoto Imaging did nothing to demonstrate otherwise, and the burden to do so was on it.

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[18] DeSoto Imaging took exception at the Hearing to Carvel Imaging's recently acquired Determination of Nonreviewability and suggested (through counsel) that Carvel requested that Determination purely to create support for her opposition to this Application, and further, that Carvel has no intent to actually put that second fixed base unit into operation in Southaven. R.E. 1 at 461-62. These objections were without support. Carvel Imaging was fully entitled under the *SHP* and the CON Review Manual to do what it did. Replacement of mobile MRI services with fixed units has been accomplished routinely throughout the State over the last several years and is not an objectionable action under the Rules.

CONCLUSION

For all the reasons set forth above, the decision of the Chancellor should be affirmed and the Application disapproved.

Dated this the 5th day of September, 2007.

Respectfully submitted,

DESOTO DIAGNOSTIC IMAGING, LLC d/b/a CARVEL IMAGING COMPANY

By: _____
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CERTIFICATE OF SERVICE

I, Kathryn R. Gilchrist, do hereby certify that I have served the foregoing, by placing a true and correct copy of the same in the United States Mail, First Class postage prepaid, and properly addressed to the following:

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This the 5th day of September, 2007.

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