IN THE SUPREME COURT OF MISSISSIPPI

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

VS. — **NO. 2007-SA-00035**

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

APPEAL FROM THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEE BAPTIST MEMORIAL HOSPITAL-DESOTO, INC., d/b/a BAPTIST MEMORIAL HOSPITAL-DESOTO

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. DeSoto Imaging & Diagnostics, LLC and Mississippi State Department of Health (Appellants).

2. Kevin Blackwell, President and Chief Executive Officer of DeSoto Imaging & Diagnostics, LLC.

3. Thomas L. Kirkland, Jr., Allison C. Simpson, Esq., and Andy Lowry, Esq., of Copeland, Cook, Taylor & Bush, P.A., counsel for DeSoto Imaging & Diagnostics, LLC.

4. Donald E. Eicher, III, Esq., counsel for the Mississippi State Department of Health.

5. Baptist Memorial Hospital-DeSoto, Inc. and DeSoto Diagnostic Imaging, LLC, d/b/a Carvel Imaging (Appellees).

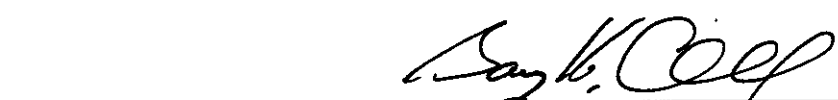
6. Barry K. Cockrell, Esq. of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, counsel for Baptist Memorial Hospital-DeSoto, Inc.

7. Kathryn R. Gilchrist, Esq. and David W. Donnell, Esq. of Adams & Reese, LLP, counsel for DeSoto Diagnostics Imaging, LLC.

8. Ricky Lee Boggan, Esq. (Hearing Officer).

9. The Honorable Patricia D. Wise, Chancellor.

Respectfully submitted,



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STATEMENT OF THE ISSUES

The following issues are presented in this appeal:

1. Whether the Mississippi State Department of Health committed reversible error in approving a CON proposal which had not been subjected to statutorily mandated procedural and review requirements?

2. Whether the administrative decision of the Mississippi State Department of Health was supported by substantial evidence?

I. STATEMENT OF THE CASE

A. Summary of Proceedings

1. The CON Application

This appeal involves a certificate of need ("CON") application submitted by DeSoto Imaging & Diagnostics, LLC ("DID") for the establishment of mobile resonance imaging ("MRI") services in Southaven, DeSoto County, Mississippi. Under this proposal, DID would join a mobile MRI route operated by Alliance Imaging, Inc. ("Alliance"). The route also would include two other facilities: Gilmore Memorial Hospital in Amory, Mississippi, and Mission Primary Care Clinic in Vicksburg. DID proposed to receive MRI services from Alliance two (2) days a week. On the other days of the week, the MRI unit would be driven to Gilmore Memorial and to Mission Primary Care Clinic in order to furnish MRI services at those locations.[1]

2. MSDH Staff Analysis and Recommendation

The Mississippi State Department of Health ("MSDH") staff conducted a review and analysis of the DID application, and **recommended disapproval of the application for several reasons.** (Ex.3; R.E.3).[2] First, the staff concluded that the proposal was not in compliance with *State Health Plan* ("SHP") Criterion 1 and General Review ("GR") Criterion 5, both of which require an applicant for MRI services to demonstrate the need for the project. After analyzing existing and authorized MRI units in General Hospital Service Area ("GHSA") 2, as well as in DeSoto County, the staff found that those units were not operating at optimum capacity.

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[1] As discussed below, this proposed route was never a feasible arrangement. It became obvious during the administrative hearing that a single MRI unit could not possibly serve all three locations. Moreover, it appeared very doubtful, based on the evidence, that Gilmore would continue to participate on the route at all. As it turned out, that is precisely what happened. Gilmore decided to drop off the route and, as a result, DID's application became completely unraveled.

[2] In this Brief, references to a hearing exhibit will be cited as "Ex. ___," references to hearing testimony will be cited as "T.___," and references to other parts of the administrative record will be cited to the binder number.

Specifically, operational and approved units in GHSA 2 averaged 1,273 procedures per unit in FY 2004, while the four operating/authorized MRI units in DeSoto County performed an average of 1,977 procedures in 2004. Thus, the utilization in both GHSA 2 and DeSoto County was below the optimum range of annual MRI utilization, which is between 2,000 and 2,500 procedures. (Ex.3; R.E.3).

Additionally, the MSDH staff determined that the application contained insufficient documentation that the proposed facility will meet the projections without encroaching on the ability of existing providers to provide MRI services. One of the primary concerns expressed by the staff was that, in order to achieve its projected utilization, the DID facility would adversely impact existing MRI providers, which are currently not operating at optimum levels of service utilization. (Ex.3; R.E.3).

Finally, the MSDH staff concluded that the DID application did not comply with GR Criterion 8, regarding relationship with the existing health care system. In that regard, the staff found that given the number of MRI units present in the service area, and their less-than-optimum utilization, the project cannot be viable without causing an adverse impact on these existing providers.

3. Administrative Hearing

Following the issuance of the MSDH staff analysis recommending disapproval of the project, an administrative hearing was conducted on the application. The parties participating in the hearing included the applicant, DID, as well as two health care facilities which opposed the project: Baptist Memorial Hospital-DeSoto, Inc., d/b/a Baptist Memorial Hospital-DeSoto ("BMH-DeSoto") and DeSoto Diagnostic Imaging, LLC, d/b/a Carvel Imaging ("Carvel

Imaging"). BMH-DeSoto is an acute care hospital located in Southaven, and offers MRI services. Carvel Imaging is a freestanding MRI facility also located in Southaven.

During his testimony at the hearing, Mr. Sam Dawkins, the chief of health planning at the MSDH, further elaborated on the MSDH's determination that the DID application was not in compliance with the criteria and standards contained in the *State Health Plan* and the *Certificate of Need Review Manual.* Mr. Dawkins testified that the primary concern of the MSDH is that existing providers are not operating at sufficiently high levels to warrant the approval of another MRI unit in DeSoto County. He noted that 2,500 procedures per year is a reasonable optimum threshold for MRI units. (T.99-100). Based on MRI equipment operating 250 day a year, this translates into only 10 procedures a day. (T.99). An MRI unit is capable of performing many more procedures than 10 a day, as evidenced by the fact that many MRI units in the State of Mississippi routinely exceed that volume. (T.100). Thus, it is reasonable to expect existing MRI units in a given area to perform at least 2,500 annual procedures before new units are approved. (T.100).

Mr. Dawkins testified that in its evaluation of the DID proposal, the MSDH staff looked at utilization of existing providers in both GHSA 2, as well as in DeSoto County itself. (T.97-98). He cited the fact that GR Criterion 5 requires the MSDH to look at need in the community to be served. (T.107-108). In this instance, the community proposed to be served by DID is DeSoto County.

With regard to the need for additional MRI services in DeSoto County, Mr. Dawkins noted that there are currently four MRI units in that county: BMH-DeSoto (with two units); Carvel Imaging in Olive Branch; and Carvel Imaging in Southaven. (T.15-16; 17-18). He stated that the Carvel Imaging/Southaven unit was recently approved to convert from a mobile

operation to a fixed unit, and thereby offer MRI services on a full-time basis. (T.131-132). Mr. Dawkins testified that since these four, existing MRI units in DeSoto County are not operating at the optimum threshold level of 2,500 annual procedures, there is not a need to approve another unit in the county. (T.17-18; 104-105).

Mr. Dawkins further testified that according to the *State Health Plan*, one of the highest priorities of health planning in Mississippi is to avoid the unnecessary duplication of health care resources. (T.111). In order to determine whether the DID proposal was in compliance with this requirement, the MSDH staff looked at existing capacity of MRI providers in DeSoto County as well as in GHSA 2. (T.111-112). Since existing providers in both DeSoto County and in GHSA 2 are not operating at optimum utilization of 2,000 to 2,500 procedures per year, the DID proposal, if approved, would necessarily result in an unnecessary duplication of healthcare resources. (T.117).

Another area of concern noted by Mr. Dawkins was the financial viability of the proposed project. He testified that the number of MRI procedures projected in the financial section of the application exceeded the number of procedures estimated by local physicians, in their affidavits submitted in support of the application. (T.125-126). Accordingly, there was insufficient support presented for the projected volume of MRI procedures contained in the financial pro forma in the application. (T.125-126). This obviously impacts the financial feasibility of the proposed project, since the number of procedures to be performed is an important component of economic viability. (T.125).

In conclusion, Mr. Dawkins testified that the MSDH staff recommended disapproval of the DID application, because it was not in substantial compliance with the applicable CON criteria and standards, primarily those addressing the need for the facility. (T.15-19).

During the administrative hearing, evidence was also offered by the applicant and the opponents. This evidence included expert testimony as well as testimony from representatives of the parties.

Following the completion of the hearing, the Hearing Officer issued his Findings of Fact and Conclusions of Law, in which he recommended approval of the DID application (the "Hearing Officer's Report"). Although the Hearing Officer recommended approval, he noted the following concerns:

> There was a great deal of testimony offered for and against this Application. All sides were represented by able counsel and a complete administrative record was made, including all exhibits and testimony. Ultimately, however, the determination of need, defined by the *State Health Plan* as 1,700 scans per year, is controlling. **That said, however, this Application is troublesome in several ways. The route of which this new service will be 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.**

Hearing Officer's Report at p. 2. (Admin. Rec., Binder No. 1; R.E.4). (Emphasis added). Despite these reservations, the Hearing Officer ultimately decided to recommend approval of the application.

After the release of the Hearing Officer's Report, the DID application was placed on the monthly CON Review Meeting agenda for a final decision by the State Health Officer. However, between the date on which the Hearing Officer issued his recommendation and the date on which the State Health Officer was to make the final administrative decision, **Gilmore Memorial, a key participant on the proposed MRI route, decided to terminate its MRI service agreement with Alliance Imaging, thereby completely eliminating the mobile MRI route on which the DID proposal was based.** (Admin. Rec., Binder No. 1; R.E.5).

The significance of this development is abundantly clear. The linchpin of DID's entire proposal was Gilmore Memorial's participation on the proposed MRI route. The evidence at the hearing was undisputed that, without Gilmore Memorial's participation, DID would not be able to show that the route would perform in excess of 1,700 MRI procedures per year, as required by the *State Health Plan*. Consequently, Gilmore's decision to terminate the route went to the heart of this proceeding.

On the basis of this development, BMH-DeSoto and Carvel Imaging filed a Joint Motion to Reopen and Supplement Record and for a Reconsideration of the Hearing Officer's Findings of Fact and Conclusions of Law. (Admin. Rec., Binder No. 1; R.E.5). On August 17, 2006, the Hearing Officer issued a ruling denying the Motion to Reopen. *Id.* (R.E.10). In his ruling, the Hearing Officer determined that he had the authority and jurisdiction to consider the new post-hearing evidence. However, the Hearing Officer denied the Motion to Reopen and stated as follows:

> According to the Department, the facts as presented by the Contestants clearly established that the change in route is new evidence that was not available to any party prior to July 14, 2006, the date of the termination letter from Gilmore to the MRI vendor. As pointed out by the Department, the Applicant has responded to the Joint Motion by providing evidence that it has entered into a new route by contract with the same vendor that it had during the application and hearing. **The substitution of one route for another because of the termination of a contract by a third party on the proposed route would not change the result or the recommendation of the hearing officer, because both routes meet the State Health Plan Requirement of 1,700 MRI sum total procedures during the last reported year.**

Hearing Officer's Findings and Conclusions on Motion to Reopen Record at p. 5. *Id.* (R.E.10). (Emphasis added).

Subsequent to the Hearing Officer's decision to deny the Motion to Reopen, this matter was submitted to the State Health Officer for a final decision. On August 31, 2006, the State Health Officer announced his final decision, in which he concurred with the Hearing Officer's findings and conclusions in all respects. (Admin. Rec., Binder No. 1; R.E.11). Consequently, in a Final Order issued on August 31, 2006, the DID CON application for mobile MRI services was approved. *Id.*

4. Chancery Court Appeal

Pursuant to *Miss. Code Ann.* §41-7-201, BMH-DeSoto and Carvel Imaging jointly appealed the Final Order of the MSDH to the Chancery Court of the First Judicial District of Hinds County, Mississippi. In an Opinion and Order issued on December 29, 2006, the Chancery Court reversed and vacated the MSDH's Final Order, and remanded the proceeding to the MSDH. (R.E.2). The Chancery Court reversed the Final Order on two primary grounds. First, the Court determined that the MSDH committed reversible error by not requiring DID to file a new CON application for a new route, in order to be properly reviewed under the *State Health Plan*'s requirements. Second, the Chancery Court concluded that DID did not meet its burden of establishing, through substantial evidence, that it would be part of a viable MRI route that would generate 1,700 procedures per year, as mandated by the *State Health Plan.* Accordingly, the Chancery Court reversed and vacated the administrative decision of the MSDH.

DID and the MSDH have appealed the Chancery Court's Opinion and Order to this Court.

B. Statement of Facts

The *State Health Plan* requires a mobile MRI route to perform a minimum of 1,700 annual procedures. If an applicant proposes to join an existing or proposed route, the applicant

must demonstrate that the entire route will meet this standard. During the course of the hearing, it became clear that there was not substantial evidence to support the MRI route proposed by DID.

Most of the evidence in support of the route came from the testimony of Mr. Gordon Smith, who testified on behalf of Alliance Imaging, the proposed vendor of the mobile MRI equipment. According to Mr. Smith, the proposed new Southaven MRI unit would join a route that includes Gilmore Memorial Hospital in Amory, and Mission Primary Clinic (a/k/a Vicksburg Diagnostic Imaging) in Vicksburg. (T.241). Mr. Smith testified that in 2005, 1,440 MRI procedures were performed at Gilmore, and 560 MRI procedures were performed at Mission Primary Clinic. (T.249-251). However, Gilmore Memorial achieved that annual volume based on having the MRI available four days a week. (T.249). He stated that the Mission Primary Clinic achieved 560 MRI procedures based on operating either one or two days a week. (T.254-255). Consequently, when you add together the number of procedures historically performed at Gilmore Memorial Hospital and Mission Primary Clinic, the MRI equipment was already occupied five or six days a week. (T.255). This raised the obvious question: How could Alliance propose to add two more days of service to this route?

Mr. Smith attempted to answer this by noting that "operational efficiency" at Gilmore would be enhanced by using a 1.5 magnet, rather than the 1.0 magnet currently used at that hospital. (T.255-256). However, the fact remained that, in view of the historical utilization of both current sites—in Amory and in Vicksburg—the proposal to add two more days a week at a new location was neither reasonable nor feasible.

To make matters worse, Mr. Smith testified that his current contract with Gilmore Memorial Hospital was a month-to-month arrangement. (T.271). He acknowledged that Health

Management Associates, the new owner of Gilmore, has requested *expanded* MRI coverage and more days of service per week. (T.258-260). He further admitted that Gilmore had not yet agreed to his proposal for *reduced* MRI coverage, and it was possible that the hospital may not accept those terms. (T.261).

As it turned out, Gilmore Memorial did not, in fact, accept Alliance's unrealistic proposal for reduced MRI coverage. In a letter dated July 14, 2006, Mr. Montey Bostwick, the Administrator of Gilmore Memorial, notified Gordon Smith of Alliance that the MRI service agreement would be terminated, effective August 25, 2006. (Affidavit in Support of Motion to Reopen, Admin. Rec., Binder No. 1; R.E.5). As a result, Gilmore Memorial would not participate on the Alliance MRI route, and DID's CON application, in effect, evaporated.

Although these events arose subsequent to the completion of the initial administrative hearing, they were still ripe for consideration by the MSDH because a final decision had not yet been made on the DID proposal. In order to bring this new and critical evidence to the attention of the Hearing Officer, BMH-DeSoto and Carvel Imaging filed a Joint Motion to Reopen the Record, and for a Reconsideration of the Hearing Officer's Findings of Fact and Conclusions of Law. (Admin. Rec., Binder No. 1; R.E.5). In the Joint Motion to Reopen, BMH-DeSoto and Carvel Imaging stressed that this new evidence was not merely important; it went to the heart of the entire case. It was, in fact, outcome-determinative. Under the Mississippi CON Law, the applicant has the burden of proving the validity of its mobile MRI route through substantial evidence. Even though the proposed route was highly speculative to begin with, the new evidence demonstrated, without question, that there would be no mobile MRI route on which DID could base its application. In short, DID's entire proposal collapsed once Gilmore Memorial pulled out of the route.

In its response to the Motion to Reopen, DID admitted that Gilmore had terminated its participation on the MRI route. (Admin. Rec., Binder No. 1; R.E.6). However, DID announced that it would enter into a new and improved route through another arrangement with Alliance. *Id.* In rebuttal, BMH-DeSoto and Carvel Imaging pointed out the obvious problems with this proposal:

> As an alternative argument, DeSoto Imaging attempts to amend its application after the closure of the hearing by presenting an entirely new route. Obviously, it is completely inappropriate and contrary to the CON Manual for DeSoto Imaging to propose this. Neither the Department of Health staff nor the opponents have had any opportunity to evaluate this new proposed route, to subpoena documents relating to the route, or to cross-examine witnesses concerning the route. If DeSoto Imaging is genuinely interested in proposing a new route, the solution is for DeSoto Imaging to withdraw its current application, and to file a new application with the Department of Health. It would constitute obvious error for DeSoto Imaging to be allowed to propose a new mobile route at this time.

Rebuttal Brief at pp. 2-3. (Admin. Rec., Binder No. 1).

In addressing the Joint Motion to Reopen, the Hearing Officer found that he had the authority and jurisdiction to reopen the administrative record based on new evidence under appropriate circumstances. (R.E.10). Nevertheless, the Hearing Officer accepted DID's argument that a new route could be substituted for the old, displaced route, even though the opponents had no opportunity to challenge or even question the new route through fundamental due process, including the discovery of documents and the cross-examination of witnesses in an administrative hearing. *Id.* Subsequently, the State Health Officer adopted the Hearing Officer's findings, and the MSDH's approval of the DID application became final.

II. SUMMARY OF THE ARGUMENT

The Chancery Court correctly reversed and vacated the MSDH's decision to issue a CON to DID for the establishment of mobile MRI services. The Chancery Court's decision was based on two primary grounds, both of which are fully supported by the administrative record and well-established statutory and case law.

First, the Chancery Court properly concluded that it was reversible error for the MSDH to allow DID to substitute, post-hearing, a new proposal for a new MRI route, without requiring that proposal to go through the statutorily mandated CON review process, in accordance with the Mississippi Certificate of Need Law. As a result of this action by the MSDH, the new proposal was never fully evaluated by the MSDH staff. Affected parties have never been notified that this proposed new route was even being considered by the MSDH. The opponents in the present case, BMH-DeSoto and Carvel Imaging, have never had the opportunity to challenge this route through subpoenas of documents and questioning of witnesses. The MSDH, in effect, approved an application based on an MRI route which has never been subjected to administrative nor public scrutiny. This is a plain violation of the provisions of the Mississippi Certificate of Need Law.

Second, the Chancery Court properly reversed the MSDH decision because there was no substantial evidence to support that decision. DID, as the applicant, had the burden of introducing substantial evidence in order to demonstrate that its proposal was in compliance with the applicable criteria in the *Mississippi State Health Plan*. More specifically, the Need Criterion for MRI services in the *State Health Plan* required DID to prove that it would be part of a mobile MRI route, through which the MRI equipment would be shared by multiple MRI providers having a combined production of 1,700 MRI procedures per year. DID completely failed to

show that this route was established, or even that the route existed. Instead, DID offered theories and possibilities, but never introduced evidence to document the agreement of other MRI providers to participate in a sharing of the MRI equipment, based on the schedule suggested by DID in its application and at the hearing. In fact, the evidence at the hearing showed precisely the opposite: That the route proposed by DID was neither valid nor feasible. The speculative testimony offered by DID on this issue does not constitute substantial evidence to demonstrate compliance with the Need Criterion. As a result, the MSDH improperly approved the DID application, and the Chancery Court was correct in reversing that administrative decision.

III. ARGUMENT

A. The MSDH Committed Reversible Error by Not Properly Addressing DID's Proposed MRI Route.

Clearly, the decision of the MSDH to approve the DID application violated fundamental requirements of due process, as well as the express requirements of the CON Law itself. *Miss. Code Ann.* § 41-7-197 mandates that the MSDH adopt and comply with specific procedures for the review and consideration of CON applications. *See Appendix.* These requirements include notice to the public and to other affected parties, as well as the right of interested parties to "conduct reasonable questioning of persons who make relevant factual allegations concerning the proposal." *Miss. Code Ann.* § 41-7-197(2).

Notwithstanding this statutory mandate, the new MRI route proposed by DID has never been subjected to these procedural requirements. The proposed route was brought up for the first time after the completion of the administrative hearing, and only in response to DID's being confronted with the undeniable fact that its initial route – as proposed in its application – had collapsed. The new route proposed by DID has never been part of any CON application. It has

never been reviewed by the MSDH staff. It has never been disclosed to the public. Affected parties have never been notified that this proposed route was even being considered by the MSDH. The opponents in the present case, BMH-DeSoto and Carvel Imaging, have never had the opportunity to challenge this route through subpoenas of documents and questioning of witnesses. Despite all of this, the MSDH has, in effect, approved an application based on an MRI route which has never been subjected to administrative nor public scrutiny.

Under the express terms of the Mississippi CON Law, parties which stand to be affected by a CON proposal have the statutory right to receive notice of the proposal and the opportunity to be heard. In this instance, a CON project was approved without notice to affected parties or any opportunity to challenge the merits of the new proposal. This is clear and reversible legal error. The Supreme Court of Mississippi has held that "[d]ue process always stands as a constitutionally grounded procedural safety net in administrative hearings." *McGowan v. Miss. State Oil & Gas Board,* 605 So.2d 312, 318 (Miss. 1992). Any party which stands to be affected by the new MRI proposal, including BMH-DeSoto, Carvel Imaging and any other interested parties or member of the public, have the absolute statutory right to contest that proposal in a public administrative proceeding. This cannot be accomplished unless and until DID is compelled to follow the statutory and administrative requirements for obtaining a CON.

The administrative decision of the MSDH in this instance cannot be allowed to stand. Under these circumstances, the appropriate judicial remedy is to vacate the CON issued to DID, and to mandate that the MSDH require DID to submit a new CON proposal for its new route, subject to all of the statutory and regulatory requirements and safeguards governing the review and consideration of CON proposals, including notice to affected parties and the public, and the right of interested parties to be heard in an administrative proceeding. This remedy would insure

that the new DID proposal would receive appropriate regulatory scrutiny, with the rights and interests of affected parties being preserved.

B. The Administrative Decision Was Not Supported by Substantial Evidence.

BMH-DeSoto readily acknowledges that decisions of the MSDH on CON applications are entitled to deference. However, this principle of deference is not without limitation. When it comes to the judicial review of the MSDH's CON decisions, this Court has stated that "although there is a presumption of regularity, and while the 'arbitrary and capricious' standard of review is highly deferential, it is by no means a 'rubber stamp.'" *Mississippi State Department of Health v. Mississippi Baptist Medical Center,* 663 So.2d 563, 579 (Miss. 1995), *quoting Mississippi State Board of Nursing v. Wilson*, 624 So.2d at 489. In the same opinion, the Court emphasized another important point regarding CON review:

> [O]ur reading of Section 41-7-193(1) leaves no doubt that there can be no approval of any CON application where there is no demonstrated substantial compliance with the criteria determined applicable and where no evidence of need under those criteria is found to exist.
>
> Section 41-7-193 mandates that, absent demonstrated substantial compliance with the criteria determined applicable to CON applications of the type in question, the Health Officer must deny the CON.

663 So.2d at 574.

In this proceeding, there was not substantial evidence to support the MSDH's decision to approve the mobile MRI route proposed by DID. Although DID and the MSDH attempt to downplay the significance of establishing a specific and viable MRI route, two key points are abundantly clear. First, the MRI Need Criterion in the *State Health Plan* expressly requires the applicant to demonstrate a specific route:

> 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 12-month period may be used instead of the formula projections.

Ex. 4 (Emphasis added). Thus, the *State Health Plan* mandates an applicant to identify the specific MRI providers on a proposed route as well the number of MRI procedures performed on the route.

Second, this Court has made it clear, on numerous occasions, that a CON decision must be supported by substantial evidence. DID and the MSDH suggest that under this standard, a "scintilla" of evidence, or even reasonable inferences, may suffice. However, in this proceeding, DID failed to produce **any** substantial evidence to substantiate its proposed MRI route.

The deficiencies in DID's evidence have been previously discussed. In short, DID wholly failed to introduce evidence to substantiate the existence of a true MRI route, with committed MRI providers and a documented volume of MRI procedures by those providers. In their Brief, DID and the MSDH contend that this evidence may be "reasonably inferred" from the testimony introduced at the hearing. This argument is merely a maneuver to avoid the fundamental and obvious question: Why didn't DID simply introduce evidence to substantiate a group of existing MRI providers, with a common commitment to share the MRI equipment on a route that would allow days to be available for servicing DID's site, with a combined total of 1,700 annual procedures? It would have been very simple to prepare and submit this evidence at the hearing. DID failed to introduce this evidence because the proposed route really does not exist. It is complete fiction, with absolutely no evidence to substantiate the agreement of either

Gilmore Memorial or Mission Primary Care Clinic to share the MRI equipment with DID and, on the whole, to generate 1,700 annual MRI procedures.

A CON decision may not stand if there is no substantial evidence to support the MSDH's approval of a CON application. That is precisely the case here. Consequently, the MSDH's Final Order was properly reversed by the Chancery Court.

C. The Arguments Advanced by DID and the MSDH Do Not Refute the Fact That the MSDH Committed Reversible Error in Approving DID's Application.

In order to receive a CON for mobile MRI services, the applicant is required to demonstrate that the mobile MRI route will perform at least 1,700 procedures annually. To meet this requirement of the *State Health Plan*, the applicant must show not only that the route will perform the minimum number of procedures, but also that the route can accommodate the new MRI site proposed by the applicant. This should not be a complicated or controversial task. The applicant simply has to identify the other locations on the route, and explain how the schedule on the route will allow for the provision of MRI services at the applicant's proposed new location. This is fundamental to meeting the Need Criterion.

Nevertheless, as discussed above, the route proposed by DID in its CON application was riddled with significant problems. First, it was obvious that there was no room on the route for another MRI provider seeking two days of service per week. The existing providers on the route already were using the equipment for five or six days of service a week, and there was no way to accommodate DID's request for two additional days. Moreover, the evidence at the hearing showed that Gilmore Memorial Hospital's continued participation on the route was speculative at best. In fact, it was subsequently shown that Gilmore decided to pull out of the route altogether, leaving the remaining providers well below the 1,700 minimum threshold.

In their Brief, DID and the MSDH maintain that the subsequent events regarding Gilmore's decision should be disregarded, and that the application should be viewed as a "snapshot"; i.e., the MRI route should be reviewed and assessed as of the date of the hearing. We will address the issue of Gilmore's withdrawal from the route shortly. But even if we were to give DID the benefit of the doubt, and ignore the reality of subsequent developments, the fact remains that DID did not meet its burden of showing a viable MRI route at the CON hearing, through the introduction of substantial evidence.[3]

In response, DID asserts that its proposed route did not have to be proven as a matter of certainty. We agree that the legal standard is not one of "certainty" but one of "substantial evidence." However, DID refuses to acknowledge that under the substantial evidence standard, its application could not be properly approved, because it never demonstrated a viable and feasible MRI route, as required by the *State Health Plan.*

In order to achieve this, all DID had to do was to show that the proposed route had the required number of procedures, the agreement of the MRI providers to share the equipment, and

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[3] In support of this "snapshot" theory, DID and the MSDH cite the Chancery Court's decision in *HTC Healthcare II, Inc. v. Mississippi State Department of Health, et al.*, Cause No. G-2005-524 W/4. However, there is a material distinction between the facts in that case and the facts in the present appeal. The *HTC* case involved competing CON applications for a nursing home in George County, Mississippi. Since the applications were competing against one another for the award of a single CON, the proposals had to be reviewed and evaluated on a level playing field, i.e., based on the facts and information contained in the applications as of the date that they were deemed complete. For example, the criteria used to evaluate the applications were based on construction costs, Medicaid reimbursement and other factors existing as of the time that the applications were accepted as complete and entered into comparative review. It would have completely undermined the competitive review process if the applications could be constantly revised to reflect updated construction costs, Medicaid costs, etc. The applications had to be compared and evaluated based on the cost information in existence when the proposals were filed.

In contrast, this case involves completely different facts and circumstances. Here, the applicant failed to introduce substantial evidence to demonstrate its proposed MRI route. Then, when evidence was introduced that confirmed the non-participation of one of the proposed providers on the route, the MSDH simply allowed the applicant to substitute a new route without requiring that new proposal to be subjected to the CON regulatory process. The end result was a denial of the statutory and due process rights of the opponents to the proposal.

that scheduling time was available to accommodate another location. DID failed to do this. Instead, it presented a route which obviously was not workable from a scheduling standpoint.

At the hearing, DID offered various "theories," an in effort to explain how a route currently servicing two existing providers five or six days a week could accommodate another provider for an additional two days. These theories were presented by Mr. Gordon Smith, who testified on behalf of Alliance Imaging, the MRI equipment vendor. The first involved Mr. Smith's suggestion that he could convince Gilmore to take *fewer* days of service. Clearly, such a belief was pure speculation. DID presented absolutely no evidence to show that Gilmore would accept reduced days of coverage on the MRI route. In fact, as it later turned out, Gilmore terminated its involvement on the route, rather than agree to reduced days of coverage.

Additionally, Mr. Smith offered that additional days of coverage on the route could be accomplished through increased "operational efficiency," by using a more sophisticated MRI magnet. The problem with this theory is that it ignores an important fact. Regardless of how much more efficient the new unit might be, the existing providers on the route expected, and were entitled to, certain designated days of MRI coverage. Mr. Smith's suggestion that he could convince the other two parties on the route to accept reduced coverage based on "operational efficiency" was pure conjecture.

In short, DID did not meet its burden, through substantial evidence, of demonstrating a legitimate and viable MRI route. Since the *State Health Plan* requires an applicant for mobile MRI services to present an acceptable MRI route with at least 1,700 procedures, it is not too much to ask DID to present credible and specific evidence concerning a workable arrangement for such a route. In any event, DID failed completely to meet this standard. Instead of a concrete route, with specific dates and a schedule, all that DID presented was theory and

conjecture about how DID might be added to the route. All DID had to do was to submit evidence which showed that the route would work because the other participants would be willing to accept reduced days of coverage. DID submitted absolutely no evidence in that regard. The reason for this omission became obvious later, when Gilmore announced its decision to withdraw from the route entirely.

D. Administrative Discretion Does Not Extend to Denial of Due Process or Violation of Statutory Mandates.

We now turn to the legal problems associated with the route proposed by DID *after* the hearing. In their Brief, DID and the MSDH spend many pages attempting to defend the MSDH's decision to accept a new, post-hearing route without providing the opponents, or other potentially interested parties, with an opportunity to contest it. **Regardless of the arguments and rationalizations advanced by DID, the fundamental point remains that the legal requirement of due process, under any definition, cannot be satisfied unless and until affected parties have the right to confront witnesses and present contrary evidence.**

This due process right is embodied in the CON statute itself, which expressly provides that parties affected by a CON application have the right to receive notice of the proposal, as well as the right to request and participate in an administrative hearing, at which time cross-examination may be conducted and evidence may be presented. *Miss. Code Ann.* § 41-7-197. It is a fundamental violation of this statute for the MSDH to approve a CON proposal which has not been subject to public notice and the opportunity for a hearing. Yet that is precisely what happened in this proceeding. The new MRI route proposed by DID is materially different than the one proposed in the initial application. As a result, no affected party, including the Appellees, have had an opportunity to contest this new proposal. In fact, the MSDH staff itself

has never reviewed or analyzed the new route, nor issued a staff analysis recommendation on the application, as mandated by the CON statute and regulations. *Miss. Code Ann.* § 41-7-197.

In their Brief, DID and the MSDH attempt to rationalize this obvious due process problem by advancing several creative, but flawed arguments. First, they invoke the broad cloak of "administrative discretion," and argue that it was within the MSDH's discretion to accept the new route, even if it occurred after the close of the administrative hearing. The problem with this argument is that administrative discretion certainly does not extend to decision-making which violates fundamental notions of due process, as well as the requirements of the CON statutes themselves. An opponent to a CON proposal is entitled to notice and an opportunity to be heard. After its initial MRI route fell apart, DID responded with an entirely new proposal. This route, as proposed in a single affidavit presented by a representative of Alliance Imaging, had entirely new participants, new procedures, new numbers and new assumptions.

In short, DID proposed an entirely new application, but did not submit any financial or other information that is required for a CON proposal. Under these circumstances, how can anyone possibly know if the application meets all regulatory requirements? The MSDH is not authorized by the CON statute, and certainly does not have the administrative discretion, to allow a CON applicant to accomplish an end-run around the CON process by approving a proposal which has never been subjected to public scrutiny or the hearing process itself. We agree that administrative discretion is vested in the MSDH, but it clearly does not rise to the level suggested by the Appellees under this set of facts.

Another argument advanced by DID and the MSDH is that the opponents should not complain because none of their "substantive" or "property" rights were affected when the MSDH decided to accept a new proposal from DID. Presumably, under this curious theory, the

opponents would not be able to have any due process arguments unless something occurred directly to them, such as a revocation of their licenses, or some other event which had a direct impact on the property interests of the opponents themselves.

Once again, this argument flies in the face of the CON statute itself. The statute grants express legal rights to parties affected by a CON proposal, including the right to request and participate in a public hearing. These rights cannot be waived or eliminated by "administrative discretion." The CON statutes do not remotely suggest that an opponent may cite a due process argument only if its proper rights or interests are adversely impacted. The right of an affected party to request a hearing on a CON proposal, and offer arguments and evidence against it, is absolute and unconditional in the law.

In their Brief, DID and the MSDH also point out that it is very common for MRI routes to change from time to time and that this case is no exception. The problem with this contention is that, regardless of what may or may not happen on a given route in the future, **an applicant for a CON is required to demonstrate a specific, concrete route having a minimum number of procedures before a CON can be awarded.** An MRI route cannot be a moving target in a CON proceeding. At some point, the applicant must bite the bullet and take a position on the route that is proposed to be offered. Otherwise, the project could never be subject to serious CON review. Here, DID proposed two different routes, but both were legally insufficient for entirely different reasons. The first route was not supported by substantial evidence. The second route was proposed after-the-fact, and has never been subjected to MSDH staff review or a public hearing.

DID and MSDH suggest that it is inconsistent for the opponents to have attempted to supplement the record with an affidavit concerning Gilmore's withdrawal from the route, while

arguing against DID's right to submit a new route through its own post-hearing affidavit. It is clear, however, that the two situations are materially different. When the opponents became aware that DID's MRI route no longer existed, due to the withdrawal of Gilmore, they filed a motion to supplement the administrative record, so that the record could be complete and accurate. In response, DID admitted that Gilmore had withdrawn from the route. Consequently, there was no other evidence or arguments which needed to be presented on that point. It is undisputed that the MRI route proposed in DID's application no longer exists. What else needs to be said?

In contrast, DID did not have the legal authority to propose a new route in a post-hearing affidavit format, without submitting a full, new substantive application and subjecting it to regulatory and public scrutiny. Obviously, there would be a significant amount of issues and testimony to be offered concerning the new route, including new expert testimony, an examination of documents obtained in response to subpoenas, cross-examination of witnesses concerning the new route, and other relevant evidence. It was not proper for DID to propose a new route in a mere affidavit, and then attempt to prevent the opponents from having a right to challenge it.

Finally, DID and MSDH contend that there will be no finality to CON proceedings if opponents are able to present evidence following the completion of the administrative hearing. As emphasized above, we certainly agree that the circumstances in which post-hearing evidence may be considered should be rare and limited. However, it is hard to imagine a more appropriate case for consideration of new evidence than the present case, since the evidence is outcome-determinative, and goes to the heart of the central issue in the hearing. At the time the new evidence was discovered, the proceeding was still before the Mississippi State Department of

Health, as the State Health Officer had not rendered a final decision. The appropriate course of action was to accept the new evidence and reconsider the Hearing Officer's findings in light of that proof. Although the Hearing Officer found that he had the authority to re-open the record in order to receive the new evidence, he, in effect, determined that such an exercise would be academic, because DID proposed a new route which would satisfy the *State Health Plan* in any event. The problem with that approach, as already discussed, is that there is no way to know whether the new route would be in compliance with the *State Health Plan* without a complete administrative review and public hearing.

E. An Applicant For a CON Must Demonstrate Need.

In their Brief, DID and the MSDH state the following:

> Rather, the State Health Plan requires only that a mobile MRI application show that "all existing *or* proposed providers must jointly meet the required service volume of 1,700 procedures annually." (emphasis added). Thus, the fact that the existing providers total over 1,700 procedures, eliminates any requirement that the *proposed* provider make *any* showing, for purposes of the need criterion.

Brief of Appellants at pp.11-12. In other words, DID and the MSDH are suggesting that if DID can come up with a route having more than 1,700 procedures, DID does not have to show any other need for the new service at all.

This argument is flatly contrary to numerous holdings of this Court. In *St. Dominic-Jackson Memorial Hospital v. Mississippi State Department of Health*, 728 So.2d 81 (Miss. 1998), the Court found that the MSDH committed legal error in not applying a "full scale CON review" to the North Campus project. *Id.* at 85. In reaching this decision, the Court stated, in pertinent part, as follows:

> It is thus apparent that the Health Officer's selective discussion of *some* of the CON factors was, like the rest of his ruling, tainted by

> his erroneous conclusion that the "issue of need does not revolve around whether or not there is a need for additional beds in the Hospital Service Area." This conclusion by the Health Officer is the central error of the present appeal, and this Court would be doing a disservice to the citizens of this State by ignoring this error based on notions of deference to administrative agencies.
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> * * *
>
> The starting point for our consideration of the North Campus project is our conclusion that the showing of need must be commensurate to what the project actually is and the impact which it actually has on the Jackson healthcare market. No lesser showing of need will be required by this Court based on the notion that a "relocation" has taken place.

Id. at 87, 89. Although the Supreme Court decision in that case involved a proposed relocation of services, as opposed to an MRI route, the holding is very instructive in the present appeal in two significant respects. First, this Court rejected the notion that an applicant does not have to demonstrate that a CON project is *needed.* In every instance, the applicant must demonstrate need. In this case, it is not sufficient for DID simply to show that an MRI route, located in other areas of the State, or even out-of-state, is performing 1,700 procedures. DID still must show that there is a *local need* for this project, and in that regard, consideration must be given to the impact of the project on that market, including impact on other providers. Otherwise, MRI services could be offered anywhere in the State, regardless of the true need for such services in a particular area, as long as the applicant can come up with a mobile route having 1,700 procedures *somewhere.* Clearly, DID cannot circumvent the requirement of showing local need for its project, merely by invoking the volume of procedures performed on the route as a whole.

The second respect in which the Supreme Court decision is instructive concerns the Court's conclusion that the MSDH erred in not conducting a "full scale CON review" of the proposal in question. That is precisely what happened in the present action. In fact, this

situation is even worse than in the *North Campus* proceeding. At least in the *North Campus* case, the Department of Health applied *some standard of review* to the North Campus application, albeit a reduced standard of review. **In this proceeding, the MSDH staff has applied no review at all to the new proposal offered by DID, because it has never been through the administrative process.**

F. The Chancery Court Was Correct in Reversing the MSDH's Decision.

This Brief has addressed why the Chancery Court was correct in reversing the MSDH's decision to approve the DID application. In closing, a few final points should be made in response to certain arguments advanced by DID and the MSDH regarding the Chancellor's Opinion.

First, DID and the MSDH accuse the Chancery Court of improperly reweighing the evidence in the administrative proceeding. In reversing the MSDH's Final Order, the Chancery Court did not reweigh the evidence. In fact, the Chancellor did what reviewing courts are supposed to do. The Court reviewed the administrative record in order to determine whether there was substantial evidence to support the administrative decision. The Chancery Court determined that there was not. Obviously, a reviewing court must consider the evidence introduced in an administrative hearing, in order to determine whether there was substantial evidence to support the agency's decision. This does not mean that the Court reweighed the evidence, thereby acting as a fact-finder. Rather, the Chancery Court properly reviewed the administrative evidence under the well-established judicial standard of review.

Along these same lines, DID and the MSDH contend that the Chancery Court improperly substituted its judgment for that of the MSDH by selecting between conflicting evidence, to the benefit of the opponents and the detriment of the applicant. The fact of the matter is that there

was no "conflicting evidence" with respect to the proposed MRI route. As previously discussed, the "evidence" introduced by DID concerning the proposed route was speculative and conjectural. The testimony offered by DID never reached the level of "substantial evidence" as far as the establishment of the MRI route was concerned. This was not a matter of the Chancellor making a decision on conflicting evidence. It is simply a case of the applicant failing to provide substantial evidence in support of its application in the first place.

Finally, DID and the MSDH characterize the Chancery Court Opinion as confusing. There is nothing confusing about the Chancery Court decision. The Chancellor determined that the MSDH violated the CON Law by approving a proposal which had not been subjected to the statutorily mandated review process. Further, the Chancery Court concluded that there was not substantial evidence to support DID's proposed MRI route in any event, due to the speculative nature of the testimony presented in support of the proposal. The administrative record and the case law fully support the Chancery Court's decision on both points.

IV. CONCLUSION

On the basis of the arguments and authorities advanced herein, BMH-DeSoto respectfully requests the Court to affirm the Opinion and Order of the Chancery Court.

Respectfully submitted,

BAPTIST MEMORIAL HOSPITAL-DESOTO, INC.,
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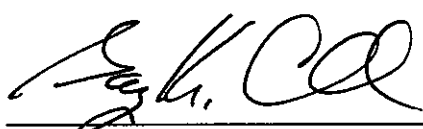
CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief to Donald W. Eicher, Esq., counsel for the Mississippi State Department of Health; Thomas L. Kirkland, Jr., Esq., counsel for DeSoto Imaging & Diagnostics, LLC, and Kathryn R. Gilchrist, Esq., counsel for DeSoto Diagnostic Imaging, LLC, d/b/a Carvel Imaging, at their usual business mailing addresses. I further certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Brief to Honorable Patricia D. Wise, Chancellor of Hinds County, Mississippi, at her usual business mailing address.

DATED: September 5, 2007.



Barry K. Cockrell

APPENDIX

Department of Health. A certificate of need shall be valid for the period of time specified therein.

(2) A certificate of need shall be issued for a period of twelve (12) months, or such other lesser period as specified by the State Department of Health.

(3) The State Department of Health may define by regulation, not to exceed six (6) months, the time for which a certificate of need may be extended.

(4) If commencement of construction or other preparation is not substantially undertaken during a valid certificate of need period or the State Department of Health determines the applicant is not making a good faith effort to obligate such approved expenditure, the State Department of Health shall have the right to withdraw, revoke or rescind the certificate.

(5) The State Department of Health may approve or disapprove a proposal for a certificate of need as originally presented in final form, or it may approve a certificate of need by a modification, by reduction only, of such proposal provided the proponent agrees to such modification.

SOURCES: Laws, 1979, ch. 451, § 13; Laws, 1980, ch. 493, § 7; Laws, 1982, ch. 482, § 4; Laws, 1986, ch. 437, § 42, eff from and after July 1, 1986.

§ 41-7-197. Certificate of need; hearing before hearing officer; review.

(1) The State Department of Health shall adopt and utilize procedures for conducting certificate of need reviews. Such procedures shall include, inter alia, the following: (a) written notification to the applicant; (b) written notification to health care facilities in the same health service area as the proposed service; (c) written notification to other persons who prior to the receipt of the application have filed a formal notice of intent to provide the proposed services in the same service area; and (d) notification to members of the public who reside in the service area where the service is proposed, which may be provided through newspapers or public information channels.

(2) All notices provided shall include, inter alia, the following: (a) the proposed schedule for the review; (b) written notification of the period within which a public hearing during the course of the review may be requested in writing by one or more affected persons, such request to be made within twenty (20) days of said notification; and (c) the manner in which notification will be provided of the time and place of any hearing so requested. Any such hearing shall be conducted by a hearing officer designated by the State Department of Health. At such hearing, the hearing officer and any person affected by the proposal being reviewed may conduct reasonable questioning of persons who make relevant factual allegations concerning the proposal. The hearing officer shall require that all persons be sworn before they may offer any testimony at the hearing, and the hearing officer is authorized to administer oaths. Any person so choosing may be represented by counsel at the hearing. A record of the hearing shall be made, which shall consist of a transcript of all testimony received, all documents and other material introduced by any interested person, the staff report and recommendation and such other material as the

hearing officer considers relevant, including his own recommendation, which he shall make within a reasonable period of time after the hearing is closed and after he has had an opportunity to review, study and analyze the evidence presented during the hearing. The completed record shall be certified to the State Health Officer, who shall consider only the record in making his decision, and shall not consider any evidence or material which is not included therein. All final decisions regarding the issuance of a certificate of need shall be made by the State Health Officer. The State Health Officer shall make his written findings and issue his order after reviewing said record. The findings and decision of the State Health Officer shall not be deferred to any later date, and any deferral shall result in an automatic order of disapproval.

(3) If review by the State Department of Health concerning the issuance of a certificate of need is not complete within the time specified by rule or regulation, which shall not, to the extent practicable, exceed ninety (90) days, the certificate of need shall not be granted. The proponent of the proposal may, within thirty (30) days, after the expiration of the specified time for review, commence such legal action as is necessary, in the Chancery Court of the First Judicial District of Hinds County or in the chancery court of the county in which the new institutional health service is proposed to be provided, to compel the State Health Officer to issue written findings and written order approving or disapproving the proposal in question.

SOURCES: Laws, 1979, ch. 451, § 14; Laws, 1980, ch. 493, § 8; Laws, 1982, ch. 482, § 5; Laws, 1983, ch. 484, § 7; Laws, 1984, ch. 492, § 2; Laws, 1985, ch. 534, § 10; Laws, 1986, ch. 437, § 43; Laws, 1988, ch. 421, § 2; Laws, 1993, ch. 467, § 2, eff from and after passage (approved March 29, 1993).

Editor's Note — Laws, 1982, ch. 482, § 8, provides as follows:

"*SECTION 8. In the event Part 123 of Title 42 of the Code of Federal Regulations* (CFR) which pertains to the United States Public Service Act is amended so as to permit states to impose fees or assess costs to those defined persons, permitted to and requesting hearings during the course of a review as provided for in Section 41-7-197(1), the commission, or its successor, may, by its rulemaking authority, impose or assess such fees and/or costs as determined to be reasonable by the Secretary upon such persons requesting the herein stated hearings, payable to the commission, or its successor, prior to any such hearing. Such charges, fees and/or costs must be applicable to all persons requesting these hearings and uniform in all cases." (Amended by Laws, 1983, ch. 484, § 10; Laws, 1986, ch. 437, § 49; Laws, 1986, ch. 500, § 32).

Cross References — Conduct of hearings other than those provided for in this section by the State Department of Health in carrying out its functions under the Health Care Certificate of Need Law of 1979, see § 41-7-185.

Federal Aspects — Provisions of the United States Public [Health] Service Act, see 42 USCS §§ 201 et seq.

JUDICIAL DECISIONS

1. In general.

The Mississippi State Health Department's use of market share analysis to determine a healthcare provider's population base in reviewing an application for a certificate of need to establish a cardiac catheterization service was not arbitrary or capricious; the market share analysis is