IN THE SUPREME COURT OF MISSISSIPPI

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

V. — **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 DECISION OF THE HINDS CHANCERY COURT, FIRST JUDICIAL DIVISION

BRIEF FOR APPELLANTS

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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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. DeSoto Imaging & Diagnostics, LLC and Mississippi State Department of Health (Appellants).
2. Kevin Blackwell, President and CEO 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 Department.
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, P.C., counsel for Baptist Memorial Hospital-DeSoto, Inc.
7. Kathryn R. Gilchrist, Esq. and David W. Donnell, Esq. of Adams & Reese, LLP, counsel for DeSoto Diagnostic Imaging, LLC.
8. Ricky Lee Boggan, Esq. (hearing officer).
9. The Honorable Patricia D. Wise, chancellor.

Respectfully submitted,

Thomas L. Kirkland, Jr.
Attorney of record for DeSoto Imaging & Diagnostics, LLC

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STATEMENT OF THE FACTS

I. Course of Proceedings Below

On September 8, 2005, DeSoto Imaging & Diagnostics, LLC ("DeSoto") filed its Certificate of Need ("CON") application with the Mississippi State Department of Health (the "Department") for the provision of mobile magnetic resonance imaging ("MRI") services in DeSoto County. The application was deemed complete by the Department on October 7, 2005.

In November 2005, the Department's Division of Health Planning and Resource Development rendered its staff analysis recommending disapproval of DeSoto's application. R.E. 3 (Staff Analysis). On December 5, 2005, the present Appellees, Baptist Memorial Hospital-DeSoto, Inc. ("Baptist") and DeSoto Diagnostic Imaging, LLC, d/b/a Carvel Imaging ("Carvel"), as well as DeSoto, requested a hearing during the course of review. This hearing began on March 22, 2006, and concluded on March 24, 2006.

On July 6, 2006, the hearing officer submitted his proposed findings of fact and conclusions of law to the State Health Officer, disagreeing with the staff analysis and recommending approval of the application, based on the evidence and testimony from all parties at the hearing. R.E. 4 (opinion of hearing officer & cover letter).

Baptist and Carvel filed a joint motion on July 24, 2006 (R.E. 5), seeking to reopen and supplement the record and to obtain the hearing officer's reconsideration of the record in light of alleged new evidence. DeSoto opposed the joint motion (R.E. 6; *see also* R.E. 8, rebuttal by Appellees). The Department filed its own motion on the subject. R.E. 7. The hearing officer conducted a new hearing on August 11, 2006, to hear the motion and consider his authority to do so. R.E. 9 (complete transcript). On August 17, 2006, he issued his findings and conclusions on the motion, wherein he accepted jurisdiction over the motion but denied it on the merits. R.E. 10

(opinion denying motion). The hearing officer expressly stated that he would forward the pleadings, hearing transcript, and opinion on the motion to the State Health Officer for consideration and inclusion in the record. R.E. 10 at 6.

On August 31, 2006, the State Health Officer, after considering the record, issued his Final Order, concurring with and adopting the hearing officer's findings and recommendations as his own and issuing the CON. R.E. 11.

Feeling aggrieved by the State Health Officer's decision, Baptist and Carvel filed their joint notice of appeal in the Hinds Chancery Court, First Judicial Division, on September 19, 2006. In its Opinion and Order of December 29, 2006, the chancery court reversed the Final Order of the State Health Officer, but stayed its decision pending the outcome of any appeal to this Court.[1] R.E. 2.

The present appeal is from the December 29, 2006 order of the chancery court.

II. Relevant Facts

A. The Need Criterion and the Application

This is a case about DeSoto's application for a CON to offer mobile MRI services at its facility in DeSoto County, Mississippi. Unlike a fixed MRI, which is permanently installed at a single location, a mobile MRI is hauled from place to place via tractor-trailer. To obtain a CON for MRI services (fixed or mobile), a provider must show need under the applicable criterion of the State Health Plan, to wit:

> 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

[1]Carvel nonetheless moved to enjoin the continued operation of the MRI unit by DeSoto, but this motion was denied by the chancery court on May 2, 2007, which recognized that it lacked further jurisdiction over the matter, as DeSoto and the Department had timely filed their Notice of Appeal to this Court on January 3, 2007. R.E. 12.

> 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 hospitals [sic] 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 12-month period may be used instead of the formula projections**.

(emphasis altered). The last paragraph, addressing how "a particular MRI unit may be utilized by more than one provider of MRI services," has particular application to a mobile MRI.

DeSoto submitted a CON application after consultation with the mobile MRI's owner, Alliance Imaging ("Alliance"), on a route that would include DeSoto, Gilmore Memorial Hospital ("Gilmore") in Amory, and Mission Primary Care Clinic ("Mission") in Vicksburg. R.E. 4 at 3-4. The application stated that, because DeSoto already had a facility and because the MRI was owned by Alliance, no capital costs were needed, only operational costs. R.E. 4 at 5.

B. The Staff Analysis and the Hearing Officer's Recommendations

CON applications follow a three-step process: first, the application is submitted to the Department's staff for their analysis; second, if the application or the staff analysis is opposed, a hearing during the course of review is conducted at which evidence outside the application may be submitted; and third, the State Health Officer makes the final decision as to whether to award the CON, in which he may accept or reject the recommendations of the staff and of the hearing officer.

The staff analysis recommended disapproval of the CON application, on the alleged grounds of insufficient need and financial viability. R.E. 4 at 6-7. However, the staff did not apply the 1,700-procedure minimum of the State Health Plan's need criterion in determining need, but rather applied

an "optimum" of 2,000 to 2,500 procedures per year to the MRI units already operating as well as to the proposed unit. R.E. 4 at 7. As for financial viability, the staff based its analysis not on any financial shortfall in DeSoto's projected revenues, but rather on the alleged adverse impact that DeSoto's project would have upon rival MRI providers, namely the present Appellees, Baptist and Carvel. R.E. 4 at 7.

At the hearing, where Baptist and Carvel challenged the application, the hearing officer heard testimony from a dozen witnesses and considered twenty-four exhibits. R.E. 4 at 6. Based on that evidence, the hearing officer disagreed with the staff analysis, and he recommended approval of the CON for DeSoto. He noted that the need criterion in question was 1,700 procedures *per route* per year, and that the two providers whose route DeSoto would join, between them, had themselves accounted for 2,034 procedures in 2005. R.E. 4 at 12. Moreover, DeSoto had presented affidavits from eight local physicians estimating that they would refer 336 patients to DeSoto, on the basis of which it projected 520 procedures in its first year due to population growth and there being many more physicians than eight in DeSoto County. R.E. 4 at 13. Thus, with or without the additional procedures contributed by DeSoto, the hearing officer found substantial evidence that at least the 1,700 procedures required by the State Health Plan would be performed by the three providers. In fact, he found that experts for both sides agreed that the number of procedures in DeSoto County would meet the *optimum* range set by the staff, even though that optimum was in no way controlling as to the applicable need criterion. R.E. 4 at 13-15.

The hearing officer also rejected the Appellees' challenge to the nature of the mobile route that DeSoto would join. Although they argued that the route in question would alter the number of days at which MRI services would be offered at Gilmore and Mission, the hearing officer found credible the testimony of Alliance's officer Gordon Smith, who testified that revisions to MRI routes

are common in the industry and that the proposed route would afford Gilmore and Mission sufficient access to a mobile MRI unit while also including DeSoto. R.E. 4 at 15-17.

The hearing officer rejected the staff's analysis of financial viability, finding "no specific evidence from either Baptist-DeSoto or Carvel Imaging that they will suffer any sort of adverse impact, financial or otherwise, from the approval of this Application." R.E. 4 at 26.

On June 30, 2006, the hearing officer transmitted to the State Health Officer his recommendation that the CON be issued to DeSoto. Seeing which way the wind was blowing, the Appellees returned in a mere three weeks with a joint motion to reopen the record, Gilmore having *just so happened* to terminate its arrangement with Alliance on July 14, two weeks after the hearing officer's opinion came out. It is undisputed that this change was in no way caused by DeSoto. The Appellees asked the hearing officer to reconsider whether DeSoto's project would meet the 1,700 minimum procedures for a mobile route, and to reject the application. They did *not* ask for a new hearing in which evidence could be presented by both sides. R.E. 5 at 3-4.

DeSoto responded to the joint motion by providing the sworn affidavit of Alliance's officer, Cindy Smith, who attested (in accordance with the hearing officer's previous findings) that "[i]n the mobile MRI industry it is common for mobile MRI routes to be altered and/or for contracts for mobile MRI services to be amended or be cancelled"; that Alliance would simply place DeSoto on a different route with two other providers who were presently performing 2,323 procedures a year (over 600 more than the 1,700 minimum); and that it would be easy to accommodate DeSoto "as the MRI unit currently sits idle two days a week."[2] R.E. 6 at 5-6; *see* Ex. A to R.E. 6 (affidavit). The

[2]The fact that Alliance's new route includes Tennessee providers is of no moment, as the MRI need criterion in the State Health Plan (quoted above at 3-4) expressly "recognize[s] 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."

SUMMARY OF THE ARGUMENT

The chancery court impermissibly reweighed the evidence as to the original route proposed in the CON application and at the hearing. The hearing officer found that the evidence was not overwhelming in either direction, but made a deliberative and informed choice to find that substantial evidence supported the original route. Substantial evidence was indeed presented at the hearing that the more powerful 1.5T unit would allow the existing providers to offer the same number of procedures in fewer days, and a reasonable person could have found for DeSoto on the basis of that evidence. The chancery court's fact-finding should be reversed.

As for the issue of the new route, the Department is the best arbiter of how to interpret both its own regulations and the statutes which it is empowered to fulfill. The Department made a considered recommendation, based on its knowledge of the healthcare field and the nature of mobile MRI services, that an unforeseen change in the providers on the route *after* the application is filed — indeed, after the *hearing* in the matter — should not require the applicant to start over from scratch, given that such changes routinely occur and that they do not require a new CON when they happen after the CON is issued. The chancery court improperly second-guessed the Department's expertise and the requirements of the CON laws, and should be reversed on that basis as well.

Thus, the Department's decision was based on substantial evidence and should be affirmed.

ARGUMENT

Standard of Review

This case, like every CON case, must be decided by a standard of review which favors affirming the Department's decision. Insofar as this appeal concerns questions of law, those ordinarily are reviewed de novo by the courts. Miss. Code Ann. § 41-7-201(f); *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 976 (Miss. 1999).

However, the courts extend "great deference to the agency's interpretation of its own rules and statutes which govern its operation." *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So. 2d 1192, 1202 (Miss. 2003). Just such interpretations are at issue in the present case. "Notwithstanding this Court's ordinarily de novo review of questions of law, this Court has 'accepted an obligation of deference to agency interpretation and practice in areas of administration by law committed to their responsibility.' " *Buelow v. Glidewell*, 757 So. 2d 216, 219 (Miss. 2000) (quoting *Gill v. Miss. Dep't of Wildlife Conserv.*, 574 So. 2d 586, 593 (Miss. 1990)).

More generally, the Department's decision likewise "is afforded great deference upon judicial review." *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health,* 728 So. 2d 81, 83 (Miss. 1998) (quoting *Miss. Dep't of Health v. S.W. Miss. Reg'l. Hosp.,* 580 So. 2d 1238, 1240 (Miss. 1991)). This "great deference" creates a presumption in favor of the Department's decision. *Miss. State Dep't of Health v. Miss. Baptist Med. Ctr.*, 663 So. 2d 563, 579 (Miss. 1995). It is the challenging party's burden to establish that the Department's conduct is arbitrary and capricious. *Jackson HMA, Inc. v. Miss. State Dep't of Health*, 822 So. 2d 968, 970 (Miss. 2002). A decision which is "fairly debatable" as to its correctness is not arbitrary and capricious. *Falco Lime, Inc. v. Mayor & Aldermen of City of Vicksburg*, 836 So. 2d 711, 721 (Miss. 2002).

The courts may not substitute their judgment for that of the Department. *Melody Manor Convalescent Ctr. v. Miss. State Dep't of Health*, 546 So. 2d 972, 974 (Miss. 1989). Nor may a court reviewing an administrative agency's decision engage in reweighing the facts of the case. *Pub. Employees' Ret. Sys. v. Ross*, 829 So. 2d 1238, 1240 (Miss. 2002). "Therefore, if the evidence is there, the decision stands even though the Chancellor or this Court might have made a different decision." *United Cement Co. v. Safe Air for the Envir., Inc.*, 558 So. 2d 840, 842 (Miss. 1990). The Department's decision need only have relied upon "substantial" evidence, i.e., "more than a scintilla or a suspicion." *Natchez Cmty.*, 743 So. 2d at 977. It need only be "such relevant evidence as reasonable minds *might* accept as adequate to support a conclusion." *Pub. Employees' Ret. Sys. v. Dearman*, 846 So. 2d 1014, 1017 (Miss. 2003) (emphasis added).

The Department, as finder of fact, is free to choose between two conflicting positions, each of which is supported by substantial, credible evidence. *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224-25 (Miss. 1997). Findings of credibility are for the Department, not for the appellate courts, to make, where substantial evidence appears in the record. *Boyles v. Miss. State Oil & Gas Bd.*, 794 So. 2d 149, 156-57 (Miss. 2001).

I. THE ORIGINAL ROUTE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

As we saw in the Relevant Facts, one of the two grounds for the chancery court's reversal of the CON award was the supposed lack of substantial evidence for the DeSoto-Gilmore-Mission route. That finding by the chancery court simply reweighed the evidence. In fact, looking at the hearing officer's findings (which were adopted by the State Health Officer) and at the record, this Court can readily determine that evidence for the proposed route was more than the "mere scintilla" upon which an agency's decision can be reversed. At most, Baptist and Carvel showed that there was substantial evidence to support a finding either way, and that showing will not suffice to reverse

the Department's decision. *Where substantial evidence supports the Department's ruling, that ruling may not be reversed merely because there is also substantial evidence to the contrary.* It is for the Department, not the courts, to evaluate and weigh the evidence, and when the chancery court reweighs the evidence, it must be reversed.

Testimony at the hearing demonstrated that the providers on the proposed route DeSoto would join are already performing over the required 1,700 procedures annually. Gordon Smith, Area Sales Manager with Alliance, testified that DeSoto would join a route served by a 1.5T magnet, on with two other providers, Gilmore and Mission, who had performed 2,034 procedures in 2005. R.E. 14 at 240-41. This route therefore was already performing well above the 1,700 required procedures without even counting the added procedures projected by DeSoto. R.E. 14 at 244-46.

Alliance had already obtained a declaratory ruling from the Department concerning the proposed route which included the DeSoto location. R.E. 14 at 244-46; Ex. 13. This declaratory ruling gave Alliance the Department's permission to provide the services at the DeSoto location as soon as DeSoto obtained CON approval to offer MRI services. R.E. 14 at 244-47; Ex. 13. Thus, the Department had independently examined the proposed route apart from DeSoto's application.

We ask this Court to note that the State Health Plan's need criterion for MRI services (quoted under the Relevant Facts, above) does not say *anything* about a "route." The word does not even appear in the criterion. Whether or not the route was an *existing* route at the time of the application, therefore, is not relevant.

Rather, the State Health Plan requires only that a mobile MRI application show that "all existing *or* proposed providers ... 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. (Of course, one would still have to show financial feasibility; and as we will see, a mobile MRI unit's owner wishes to maximize the number of scans performed. But strictly insofar as the *need criterion* is concerned, the 1,700 procedures are what must be shown.)

Although Carvel argued exactly the contrary in its brief to the chancery court (at 9), that argument disregards the disjunctive "or" in the need criterion. If "historical performance of the route before the new location" were "meaningless," as Carvel asserted, then why would the need criterion in the Plan say this:

> 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.

(emphasis added)? Carvel quoted *that very language* at page 9 of its brief, and then went on a paragraph later to say "historical performance of the route before the new location is meaningless."

In any event, DeSoto did indeed make a showing that it would add procedures to the route. The Department had that proof before it when considering the arguments by Appellees that the existing route would have to change in order to include DeSoto, since the existing providers were already using the equipment "five or six days a week" (Baptist chancery brief at 8). This is an example of how the Appellees sought to defeat each element of the Department's decision in isolation, without regarding the elements together as a whole; but this Court must consider the entire record. The Department could reasonably find that, even if there were to be any diminution in services at Gilmore or Mission, those would be compensated for by the additional services which DeSoto would bring to the route.

To the extent that the chancery court's reasoning can be comprehended, it took exception to the proposal that Gilmore and Mission might accept having the MRI unit for fewer days of the week. However, there is no requirement in the need criterion, or anywhere else, that other providers on a

route sign off on a CON application. Alliance, the owner of the MRI, was clear in its testimony that *it* intended to offer the MRI to Gilmore and Mission for fewer days than previously, and it was undisputed that they were presently being served by Alliance. There was no record evidence that Gilmore or Mission would *not* accept that arrangement, and thus it was speculative at best that entities already doing business with Alliance would cease to do so. *See Freeman v. Huseman Oil Int'l, Inc.*, 717 So. 2d 742, 745 (Miss. 1998) ("pure speculation" and "conjecture" not substantial evidence). The chancery court was thus in error to substitute speculation for the substantial evidence before the Department.

For some reason, the chancery court took particular exception to the evidence that Alliance would compensate by its "operational efficiency" for spending fewer days at Gilmore and Mission. But the chancery court's explanation showed its failure to grasp the evidence:

> The Court finds that the Hearing Officer's reliance on the notion of "operational efficiency" to address the problems with this route was in error. The suggestion that Gilmore Memorial Hospital or Mission Primary might be convinced to take fewer days of service was pure speculation, and no evidence was presented to show that Gilmore or Mission Primary would accept reduced days of coverage on the MRI route. Additionally, there was no specific and substantial evidence to support the theory that "operational efficiency" could make the route workable.

R.E. 2 at 3. With all due respect to the chancery court, the above statements are not consistent with the record. The Department had before it the testimony of Alliance that it would increase "operational efficiency," and thus perform more procedures in less time, by using a 1.5T magnet at Gilmore and Mission instead of the 1.0T magnet currently in use. R.E. 14 at 255-56. Alliance testified that "obviously in the time period that you can do one patient on a 1.0, you can basically do one-and-a-half patients on a 1.5, because of the gradient and speed difference in the units." R.E. 14 at 255. That was "specific and substantial evidence," attested to by someone who may be presumed to know more about MRI units than does the chancery court. The more powerful unit was already

purchased by Alliance, approved by the Department, and ready to serve DeSoto as soon as the CON issued. R.E. 14 at 246-47.

Neither of the Appellees offered any rebuttal to the record evidence that the 1.5T magnet would allow Alliance to perform the same number of procedures at Gilmore and Mission in less time. The 1.5T magnet "can easily perform 15 procedures a day." R.E. 14 at 256-57. Alliance conducted 1,384 procedures at Gilmore in 2005, and 650 procedures at Mission in 2005. R.E. 14 at 241-42.

If a five-day week could yield 3,750 procedures annually during normal working hours (15 scans per day, times 5 days per week, times 50 weeks per year), then why should Gilmore require four days out of the week for its 1,400 or so procedures per year? Two out of five days is 40% of the working week, and 40% of 3,750 procedures annually is 1,500 procedures — the upper range of what Gilmore was in fact already doing. Alliance also testified that it was "a regular practice of Alliance to scan on Saturday," to keep the units operating (and generating revenue) six days a week. R.E. 14 at 250. And in fact, Alliance was offering Gilmore a *third* day on Saturday, a day on which it already serviced Gilmore as demand required. R.E. 14 at 250. That was *substantial evidence* that the greater operational efficiency would in fact make it possible to carry three providers on the route. These facts were presented to the chancery court, which for some reason completely disregarded them.

Thus, the undisputed facts are that substantial evidence *did* support the claim that greater "operational efficiency" would have led to Gilmore's needs being handled in fewer days. The Department had substantial evidence from which to conclude that there need not be *any* diminution of the existing number of procedures on the route — let alone a reduction that would fall below the 1,700 minimum from the existing 2,034 per year.

Because Alliance would be able to provide the same number of procedures in fewer days, it was reasonable to infer that Gilmore and Mission would accept fewer days. Remember, "substantial evidence" is such evidence as a reasonable person might accept as a basis for the conclusion drawn. Substantial evidence "provides an adequate basis of fact from which the fact in issue can be reasonably inferred." *Pub. Employees' Ret. Sys. v. Dishmon*, 797 So. 2d 888, 892 (Miss. 2001). There was no statement by anyone from Gilmore or Mission that they would, like dogs in a manger, insist on having the 1.5T unit at their facilities for extra days when it would sit idle much of the time. Alliance was quite clear that it could not afford to allow that, R.E. 14 at 260, and that Gilmore did not need the equipment for more than three days a week:

> Obviously every site you go to wants the maximum amount of time at the lowest price. I mean that's just inherent in the business.
>
> They [Gilmore] are actually requesting a parked unit. They absolutely do not have the volume to park a unit there full-time. If you look at the numbers on a 1.5 magnet, three days a week is the time they actually need it.

R.E. 14 at 259. It was thus reasonable to infer that, with no reduction in the number of scans performed, Gilmore and Mission would continue to have their needs met — and that reasonable inference was substantial evidence that the proposed route would work.

Moreover, the fact that negotiations with Gilmore were ongoing (R.E. 14 at 258) did not govern the Department's decision. The Department is expected to apply its special knowledge of the healthcare field in making its decisions; that expertise is a primary basis for judicial deference to the Department's decisions. *Dunn v. Miss. State Dep't of Health,* 708 So. 2d 67, 72 (Miss. 1998) ("This duty of deference derives from our realization that the everyday experience of the administrative agency gives it *familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate.*") (quoting *Gill v. Miss. Dep't of Wildlife Conserv.*, 574 So. 2d 586, 593 (Miss. 1990)) (emphasis added). The Department found credible

Alliance's evidence that "it is not uncommon to alter routes or lose contracts" in the mobile MRI field. R.E. 2 at 17.

Similarly, Alliance was "losing money every day we go" to Mission because, with the 1.5T unit, they were averaging only six patients per day. R.E. 14 at 264. Thus, Alliance planned to reduce Mission to one day a week. R.E. 14 at 265-66. Doubling 6 scans per day to 12 would remain well within the 1.5T magnet's 15 scans per day, so that Mission would not lose any capacity.

The Appellees wanted the chancery court to believe that, because it was "uncertain" whether or not Gilmore would remain on the proposed route, therefore the Department did not have substantial evidence to support its opinion. Carvel chancery brief at 5. But obviously, that would mistake what "substantial evidence" is — less than a preponderance, much less than clear and convincing, far less than beyond a reasonable doubt — and even the last-named standard does not amount to "certainty." As this Court has held in a different context, where "substantial evidence" is required, that does *not* mean that "proof with certainty" must be offered. *Casey v. Texgas Corp.*, 361 So. 2d 498, 499 (Miss. 1978) (quoting 25A C.J.S. *Damages* § 162(8)(b)) (discussing claims for lost earning capacity). If the Department could only issue a CON where the facts were *certain*, there might be no healthcare facilities in this State — certainly, there would be no mobile MRI units.

However "troublesome" some of the evidentiary decisions before it, the Department could and did find that the Appellees' snipes at the evidence were insufficiently "concrete" to overcome the substantial evidence presented by DeSoto. R.E. 2 at 17. The chancery court failed to consider the evidence in detail, but instead substituted its own judgment for that of the Department. This Court should bear in mind the standard of review: even where substantial evidence would support the Department's ruling one way or the other, once the Department comes down on one side, the courts may not reweigh the evidence. *Hale*, 687 So. 2d at 1224-25.

The chancery court was wrong to reverse on the issue of substantial evidence for the proposed route, and this Court should reverse the chancery court's holding on this issue and affirm the Department's ruling.

II. THE DEPARTMENT DID NOT ACT CONTRARY TO LAW IN ITS TREATMENT OF THE POST-HEARING CHANGE IN ROUTE.

A. The Department's Interpretation of Its Own Rules Was Reasonable and Deserving of Deference.

As was shown in the Relevant Facts, above, Gilmore severed its contract with Alliance after the hearing officer had recommended that the CON be issued, but before the State Health Officer had ruled. After Baptist and Carvel sought to introduce this change into the record, the hearing officer considered their submissions, conducted a hearing, and correctly held that the Department "is in the best position to interpret the statutes and regulations that it enforces on a daily basis." R.E. 10 at 6. Therefore, he chose to adopt the Department's stance on the last-minute route change, treating it as a routine occurrence that provided no bar to the CON's approval, given that the MRI's owner demonstrated that it could place the applicant on a new route.

Although the chancery court called this "a new proposal which did not go through the regulatory and public notice process dictated by the statutes," R.E. 2 at 4, it was nothing of the kind. Nothing changed in DeSoto's application except for the identities of the other two providers on the route. The CON laws require that a hearing be afforded to challengers of a CON application or a staff analysis, *and a hearing was provided.* The laws do *not* require that an application be rejected, or that a new hearing be held, if any facts in the application change after that hearing. The chancery court cited to Miss. Code Ann. § 41-7-197 for the proposition that "the CON statute" somehow "mandated" that the Department analyze the new route and prepare a new staff analysis, but there is no such requirement in that statute. Nor did the chancery court identify any regulation requiring

a new analysis under the facts of this case, despite claiming that "the CON regulations" required it. R.E. 2 at 4.

It was reasonable for the Department to base its decision on the "snapshot" state of affairs at the time of the application's being filed: "the fact remains that Alliance has been and continues to serve these two facilities [Gilmore and Mission] with mobile MRI service." R.E. 4 at 17. Any other approach would encourage gamesmanship by opponents after the filing of the application.[4] The Department has good reasons for wanting its decisions to be based on the state of affairs when the application is filed, and not on the state of affairs which opponents might manage to bring into play after the filing. Thus, it is not arbitrary and capricious for the Department to prefer the current facts to mere speculations about what might or might not happen, and to reject the Appellees' demands to reopen the application process due to potential changes after filing the application, which would defeat any finality in that process. At some point, the train must leave the station.

The better reasoning for the chancery court would have been *the same judge's reasoning in a previous CON case*. A challenger to a CON application argued that the application failed to take into account changes in Medicaid reimbursement in its cost factors — changes that had been announced before the application was filed, but that took effect only after the application was filed. In rejecting that argument, the chancery court reasoned as follows:

> Perhaps many cost factors have changed since the applications were originally filed in 2002. We agree with the Department, **it would not be proper to reopen the application process due to changes which occur subsequently to the date of**

[4]Hypothetically, for instance, an opponent might — after the hearing but before the State Health Officer's final decision — persuade a provider on a route to break off a contract and thus diminish the number of procedures on a route, which on Appellees' theory would cause the CON application instantly to crash and burn. It's a competitive environment out there, and the Department has discretion to take that fact into account in its application of the rules. There is, however, no record evidence to prove that anything of the sort happened in this case.

> **filing the applications**. If Appellee [i.e., the Department] were required to continuously re-evaluate the applications, it would be impossible to cite a beginning and an ending period. Thus, no finality to the application process could be achieved.

HTC Healthcare II, Inc. v. Miss. State Dep't of Health, No. G-2005-524 W/4 (slip op.) at 3-4 (Hinds Ch. Ct. 1st Jud. Div., June 20, 2005) (Wise, J.) (emphasis added) (attached to this Brief as Appendix A).[5] Why was *this* good law for that case, but not for the present case? If anyone is behaving "arbitrarily and capriciously," it is the chancery court, not the Department.

Regardless, the correct standard of review would have been for the chancery court to carefully consider the Department's interpretation of the applicable laws and rules, before substituting its own judgment for that of the agency. This case involved an unusual circumstance not foreseen by the CON statutes or by the Department's regulations. Therefore, it was exactly the kind of case in which the Department's expertise should have been afforded great deference as it decided how to handle the situation before it, under the applicable standard of review at Mississippi law.

That deference to an administrative agency, as the United States Supreme Court has observed, "is a product both of the awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency *as it encounters new and unforeseen problems over time*." *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979) (emphasis added). Courts defer to the legislature, and the deference due to an administrative agency's decisions is "a strong form of deference attributable to the fact that the

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[5]The facts of *HTC* are distinguishable, as the impending change in cost factors was allegedly known to the applicant *before* it filed the application, whereas in the present case, DeSoto had no advance knowledge before it filed that Gilmore would withdraw from the route. So the chancery court could have held that the rule in question — no re-evaluation based on a post-filing change — did not apply in *HTC*. However, that issue does not have any effect in the present case; we are concerned strictly with whether the rule in question is the proper one.

agency is exercising legislative power." *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 79 P.3d 297, 306 (N.M. 2003) (quoting 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 334 (4th ed. 2002)).

The Department is certainly entitled to deference in deciding how to handle a situation not expressly addressed in the CON Manual's rules, and in its finding a middle ground between (1) refusing to consider any new evidence after the hearing and (2) requiring the inefficiency, expense, and delay of a new application or hearing where last-minute evidence pops up. It is reasonable for the Department to consider new, *post-hearing* evidence summarily, if at all.

It would be proper for the chancery court to reverse the Department's interpretation of its rules only if that interpretation were patently unreasonable. But in fact, the Department submitted its views on the subject to the hearing officer, and those views were perfectly reasonable. In his finding and conclusions denying the joint motion, on August 17, 2006, the hearing officer chose to rely upon the Department's statement at the hearing on the motion:

> The fact that the change happened during the perfect window of time between the Hearing Officer's recommendation and the decision of the State Health Officer is irrelevant, but rather perhaps just circumstantial timing, because **had the CON been issued the change in route would not have been a change in scope** under the *Certificate of Need manual, revision 2000.* **Under this analysis of the probable changes in mobile MRI routes that happen as a matter of course and business practice, [the Department] would assert that no change in the mobile MRI route would be a change in scope** and would only be material from the standpoint of the staff at [the Department] if the change would result in the criteria for need under the *State Health Plan* not being satisfied, **a fact that [the Department] asserts is not the case in the facts as presented.**

R.E. 10 at 6 (quoting R.E. 7 at 6) (boldfacing added).

This Court should note that the "change in scope" language above refers to the circumstances under which a CON is voided and a new application must be filed:

> Applicants for a CON should clearly understand that if an approved project is **changed substantially in scope — in construction, services, or capital expenditure** [—]the existing CON is void, and a new CON application is required before the proponent can lawfully proceed further.

CON Review Manual at § 100.01 (emphasis added) (see Appendix B to this Brief). What the Appellees sought, the voiding of DeSoto's application, and the requirement to submit a new application, is clearly similar to the consequences of a change in scope. But the substitution of a new route made no difference to "construction" — there was no construction, either way — to "services" — DeSoto would offer the same MRI service, either way — or to "capital expenditure" — there was none, either way. On the facts of this case, the Department plainly was reasonable to compare the change in providers on the route to the kind of change that does not equal a change in scope.

In other words, the Department was well aware that MRI routes change all the time; it would not have yanked the CON, once issued, on the mere basis of a change in routes; and it considered that, for the interval between the hearing officer's recommendation and the State Health Officer's decision, the need criteria were not affected if "the facts as presented" satisfy those criteria

The Department correctly found that MRI routes are naturally subject to sudden changes and revisions, and that a post-hearing change is not such a remarkable event that a whole new application should be required. In so finding, the Department acted with the discretion afforded it by the courts. *Before* the hearing officer ruled against them on the joint motion, the Appellees were devout believers in the following statement of this Court as regards another administrative agency, and in its direct applicability to the Department:

> We emphasize that the Commission is **an administrative agency, not a court**. It has **broad discretionary authority to establish procedures** for the administration of compensation claims. It has **like authority to relax and import flexibility to those procedures where in its judgment such is necessary** to implement and effect its charge under the Mississippi Workers' Compensation Act. **It is a rare day when we will reverse the Commission for an action taken in the**

> **implementation and enforcement of its own procedural rules. Today is not such a day.**

Delta Drilling Co. v. Cannette, 489 So. 2d 1378, 1380-81 (Miss. 1986) (refusing to reverse agency for "certain procedural indulgences" afforded claimant) (emphasis added). *See* R.E. 5 at 3 (quoting above from *Cannette* to support Appellees). As it turns out, the Appellees don't care so much for the Department's "authority to relax and import flexibility to [its] procedures" in the name of an efficient CON process, when that flexibility works against them. Their feeling aggrieved, however, is not a sufficient basis for this Court to substitute itself for the Department as finder of fact and interpreter of the Department's procedures.

B. The Department Did Not Violate Any Right to Due Process.

The chancery court casually averred that the Department's taking the new route into consideration, and awarding the CON on that basis, "violate[d] fundamental notions of due process, as well as the requirements of the CON statutes themselves," R.E.. 2 at 4, but without engaging in any analysis of the law of due process, or citing a single case. We have already seen that the chancery court was mistaken as to what the law requires: the Department acted reasonably and properly to interpret the statutes and regulations under the novel circumstances of this case. The chancery court was likewise mistaken as to any due-process violation's having occurred.

The procedural due process guaranteed as regards a state agency's actions is simply "(1) notice, and (2) an opportunity to be heard." *State Oil & Gas Bd. v. McGowan*, 542 So. 2d 244, 248 (Miss. 1989). A majority of this Court has acknowledged that "there can be differences in construing what does and does not violate due process, according to the circumstances." *Miss. Power Co. v. Goudy*, 459 So. 2d 257, 272-73 (Miss. 1984). The *Goudy* majority went on to state that

> [t]he very nature of due process **negates any concept of inflexible procedures universally applicable to every imaginable situation**. ... Due process, unlike some

> legal rules, is **not a technical conception with a fixed content unrelated to time, place and circumstances**. It is compounded of history, reason, the past course of decisions ....

Id. at 273 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)) (emphasis added).

In the present case, the Department made its position known, as regards the negligible effect of the new route on DeSoto's CON application, in its motion of August 9, 2005. The details of the new route had been made available to the Appellees even earlier, on July 26, when DeSoto provided the Cindy Smith affidavit. The hearing officer heard the motion on August 11, 2005. Thus, Appellees cannot maintain that they were not afforded "notice, and an opportunity to be heard." Under the unusual circumstances, and given the flexibility afforded the Department, that sufficed for due process. (There is no indication that Appellees even sought to subpoena Cindy Smith for the August 11 hearing, so that they cannot now complain of being unable to ask questions of her.)

Even assuming for the sake of argument that the Department did not follow its ordinary procedures, that is "not per se a denial of procedural due process." *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1245 (5th Cir. 1984). Even if an agency departs from its own rules and regulations, "not every violation by an agency of rules rises to the level of a due process claim," and "there is no reason why an administrative body cannot change its procedures, even without notice, so long as there is *no due process loss of substantive rights.*" *Garrett v. Matthews*, 625 F.2d 658, 660 (5th Cir. 1980) (emphasis added); *see also Woodard*, 732 F.2d at 1244 (stating "every deviation from a state agency regulation does not constitute denial of due process"). No such loss of substantive rights occurred here.

First, there is no violation of procedural due process where the alleged procedural violation could have made no difference to the outcome. *Tabaku v. Gonzales*, 425 F.3d 417, 420 (7th Cir. 2005); *Crismore v. Montana Bd. of Outfitters*, 111 P.3d 681, 684 (Mont. 2005) (where procedural

> appropriate to allow the Applicant to attempt to amend its application by proposing a new route at this juncture.

R.E. 9 at 6. "New evidence for me, but not for thee" would appear to be the position in which the Appellees sought to stand.[6] It is remarkable that they took this argument to a court of equity after it failed with the Department, and even more remarkable that the chancery court bought it.

We have seen that, faced with a novel procedural situation, and deliberating about the relevant issues, the hearing officer and the Department made a considered, reasonable decision about how to proceed: is a change in the route, when it happens after the hearing, more like a completely new application, or is it more like the kind of change that the Department routinely approves once a CON has been issued? They decided it was more like the latter, and it was error for the chancery court to substitute its own interpretation of the statutes and regulations — i.e., of rules with which it has little familiarity, but with which the Department works on a daily basis — for that of the Department.

Therefore, the decision of the chancery court was in error and should be reversed.

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[6]The Appellees might contend that, in supposed contrast to Alliance's affidavit regarding the new route, there was no factual background to explore regarding Gilmore's affidavit. But there may have been good reasons for the Appellees to wish to avoid a hearing at which Gilmore's representative might be subpoenaed to testify under oath about how, when, and why Gilmore came to the decision to withdraw from the route at that particular time. That is of course speculation; but then, so is it speculation to imagine that a hearing might have uncovered some problem with the new route, as the Appellees would have it.

CONCLUSION

For the reasons stated above, the decision of the Hinds Chancery Court should be reversed, and the Department's award of the CON to DeSoto should be affirmed.

Respectfully submitted, this the *2d* day of July, 2007.

DESOTO IMAGING & DIAGNOSTICS, LLC

By: _____
Thomas L. Kirkland, Jr.

MISSISSIPPI STATE DEPARTMENT OF HEALTH

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IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

ATTEST A TRUE COPY
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ELNORA JEAN CARR, CHANCERY CLERK
By: D.C.

HTC HEALTHCARE II, INC. d/b/a
HTC HEALTHCARE II, LUCEDALE — APPELLANT

V. — CAUSE NO. G-2005-524 W/4

MISSISSIPPI STATE DEPARTMENT OF
HEALTH and GEORGE COUNTY HOSPITAL — APPELLEES

ORDER AND OPINION OF THE COURT

THIS MATTER is before the Court based on the Application Of Appeal filed by HTC Healthcare II, Inc. d/b/a HTC Healthcare II, Lucedale from the decision rendered by the Mississippi Department of Health. Having heard testimony on the matter and all premises considered, this Court finds that the Appellant's Application Of Appeal is partially well taken and as such, certain relief requested shall be GRANTED. The Court further finds as follows:

Statement of the Facts

During the Mississippi 1999 Legislative Session, Senate Bill 2679 was approved and adopted. Senate Bill 2679 authorized the establishment of a sixty (60) bed nursing facility in Lucedale, George County, Mississippi.

On June 1, 2002, HTC Healthcare II, Inc., HTC, George County Hospital, GCH, and Delco,

Inc. d/b/a Glen Oaks, Delco, filed competing Certificate of Need Applications seeking approval from the Mississippi Department of Health, Department, to establish a sixty (60) bed nursing facility in Lucedale, George County, Mississippi. The applications were deemed completed on July 1, 2002 and entered into the July thru September 2002, review cycle as competing applications.

In August 2002, the Department's Division of Health Planning and Resource Development rendered its analysis and recommendation to approve GCH's application. Following the issuance of the Staff Analysis for all three (3) competing applications, HTC requested a Hearing During the Course of Review. The Hearing took place before the Honorable David Scott, Esq., an independent Hearing Officer. The Hearing was conducted on September 28, 2004, and continued on October 18, 2004 and October 22, 2004.

On February 14, 2005, the Hearing Officer, the Honorable David Scott, Esq., adopted verbatim GCH's findings and issued his Findings of Fact and Conclusions of Law and Recommendations recommending approval of GCH's Application. On February 24, 2005, the Department's Officer, Brian W. Amy, M.D., MHA, MPH, adopted the Hearing Officer's recommendation and issued the Certificate Of Need to GCH. On March 16, 2005, HTC filed a Petition For And Notice Of Appeal Of Final Order Of The Mississippi State Department Of Health.

Standard of Review

The scope of review of an appeal of a final order of the Department is set forth in Mississippi Code Annotated § 41-7-201. Specifically, Section 41-7-201 reads, in pertinent part, that

> (1) The provisions of this subsection (1) shall apply to any party appealing any final order of the State Department of Health pertaining to a certificate of need for a home health agency . . .

(f) The court may dispose of the appeal in term time or vacation and may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part and may make an award of costs, fees, expenses and attorney's fees, as the case may be; but in case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the State Department of Health for such further proceedings, not inconsistent with the court's order, as, in the opinion of the court, justice may require. The court, as part of the final order, shall make an award of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) should the court affirm the order of the State Department of Health. The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal. Provided, however, an order of the chancery court reversing the denial of a certificate of need by the State Department of Health shall not entitle the applicant to effectuate the certificate of need until either:
(i) Such order of the chancery court has become final and has not been appealed to the Supreme Court; or
(ii) The Supreme Court has entered a final order affirming the chancery court.

Legal Analysis

Medicaid Per Diem

At trial, Paul Gardner testified that, at the time the certificate of need applications were submitted, the Medicaid UPL (Upper Payment Limits), program was not in place. As a result, GCH did not address Medicaid UPL reimbursement in its per diem rate, and should not be penalized for subsequent regulatory changes which became effective after the date the CON application was submitted. The Appellant contends that GCH should be held liable, for it should have known that the UPL was in effect and would affect its application for the CON.

Perhaps many cost factors have changed since the applications were originally filed in 2002. We agree with the Department, it would not be proper to reopen the application process due to

changes which occur subsequently to the date of filing the applications. If Appellee were required to continuously re-evaluate the applications, it would be impossible to cite a beginning and an ending period. Thus, no finality to the application process could be achieved.

In their calculation of the per diem cost to Medicaid, the Department consulted with the Mississippi State Division of Medicaid ("DOM"), the official agency charged with administering the State Medicaid Program, in calculating the Medicaid per diem cost. DOM itself projected the Medicaid per diem for each of the three (3) applicants. According to the Mississippi State Division of Medicaid, GCH had a lower Medicaid per diem rate then HTC. The Court finds that the decision of the State Department of Health to allocate the lower point to GCH was neither arbitrary nor capricious. The Court is mindful that an administrative agency's decision is not arbitrary when done according to reason and judgment.

Cost to Medicaid (One year)

HTC contends that several factors are used to determine the cost to Medicaid. One such factor to be considered is the cost of personnel. HTC argues that GCH used varying numbers for its personnel costs. In one instance it stated its personnel costs would be $931,892.00 and in another it stated its personnel costs would be $1,025,081.00.

Ms. Rachel Pittman, Chief, Division of Health Planning and Resource Development, testified that, at the time the staff analysis was conducted, the amount of $931,892.00 was used to indicate the cost to personnel. When asked "should the number utilized there for the personnel cost also have included the benefits? Should that number really have been the $1,025,081.00 number? Ms. Pittman replied "I believe so." T. 97. Because the personnel cost affects the cost to Medicaid and the per diem cost to Medicaid, and since the Staff Analysis failed to utilize consistent figures, the Department

could not say with certainty whether GCH should have received two (2) points or three (3) points. The figures used to conclude that GCH should receive the lower point seems to have been based on inconsistent dollar amounts. The conclusion that GCH should have received the lower point, in this Court's opinion, was arbitrary and capricious. The State Department of Health shall determine the accurate dollar amount and assess points accordingly.

Capital Expenditure Construction
Size Per Square Feet and Cost Per Bed

HTC argues that GCH failed to follow the formula related to its construction costs thus skewing its capital numbers and cost per square foot. Specifically, HTC contends that the Department staff did not properly calculate the cost per square foot in reviewing the applications. HTC contends that the formula used by the Department was not the formula specified in the CON Manual and the Department's use of this formula was arbitrary and capricious.

Alternatively, the Department asserts that the comparative review criteria developed by the Department of Health staff for the comparative review of nursing facility applications simply states that one of the factors to be considered is "cost per square foot." It does not designate the particular formula to be used for calculating cost per square foot during the comparative review of competing nursing home applications. Further,

> ". . . the entity approved is the most appropriate applicant for providing the proposed health care facility . . . Such determination may be established from the material submitted as to the ability of the person . . . to render adequate service to the public . . .Additional consideration may be given to how well the proposed provider can meet the criteria of need, access, relationship to existing health care system, availability of resources, and financial feasibility. In addition, the Department may use a variety of statistical methodology . . ."

CON Manual page 62.

> The methodology used in any given case should not be carved in granite; instead, some flexibility is required. It is prudent to utilize a methodology that will accommodate the various and sundry circumstances found in each individual case.

Attala County Bd. of Supervisors v. MS State Dept. of Health, 867 So. 2d at 1019, 1024 (Miss. 2004).

As stated by the Mississippi Supreme Court, a State Hearing Officers's CON order:

> shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the Court finds that the order . . . is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the . . . Department . . ., or violates any vested constitutional rights of any part involved in the appeal.

St. Dominic-Jackson Memorial Hospital v. MS State Dept. of Health, 728 So. 2d 81, 83 (Miss. 1998).

The Court finds that there is insufficient evidence to conclude that the methodology used by the Department staff in calculating the cost per square foot was arbitrary and capricious. Therefore, the methodology used to assess construction points shall not be disturbed by this Court.

The capital expenditure factor is related to the cost per bed and the cost per square foot. According to their applications, GCH projected its Total Capital Expenditure and Cost Per Bed to be $369,000.00, HTC projected $700,000.00, and Glen Oaks projected $766,162.00. HTC argues that GCH presented an inaccurate capital expenditure and cost per bed in its application. HTC asserts that the Department and Hearing Officer's failure to consider the discrepancies in GCH's application and to consider the evidence presented and calculate the actual capital expenditure, led to an arbitrary and capricious comparative review.

Specifically, HTC argues that GCH's projected capital expenditure of $369,000.00 was

unrealistic. According to HTC, the premise that GCH could simply begin using 12,276 square feet of current hospital space without any renovations is absurd. HTC asserts that, at trial Charles Gardner, GCH's architect, testified that the existing area would have to have sprinklers installed at a cost of approximately $20,000.00 - $25,000.00. Additionally, Ted Cain, owner of HTC, testified that GCH's project failed to identify special care rooms, an adequate number of activity rooms, or space for a social service office or administrator's office. Furthermore, Ted Cain testified that the call system and the fire system would have to be detached from the Hospital. He estimated that his fire alarm and nurse call system would cost approximately $75,000.00 - $80,000.00. Ted Cain also testified that the facility would have to have fire walls between the nursing home and Hospital which arguably may not have been included in GCH's proposal, as well as, double egress two-hour fire doors on the corridors.

At the hearing, Paul Gardner, administrator for GCH, addressed each point raised by HTC concerning the use of various areas in the hospital. He stated that two of the private rooms in the existing part of the Hospital would be dedicated for special care. He also stated that available rooms within the Hospital would be used as a utility room and for other purposes. The rooms would also be used for caring and treating the nursing home residents. Additionally, the Hospital has areas available to be used as a dedicated waiting area, lobby areas, activities and day room, and plenty of other space for patients and the members of their family to meet. Paul Gardner further testified that an administrator's office would be located within the hospital. In regard to the sprinkler system, Paul Gardner testified that, regardless of whether GCH receives a CON for the nursing facility, the Hospital plans to cover the expenses to sprinkle the remaining 30,000 square feet of the old existing hospital building.

In his testimony Paul Gardner discussed the nurse call system and the fire alarm system. Mr. Gardner confirmed that both the nurse call system and fire alarm system could be expanded into the new nursing facility area. Mr. Gardner also confirmed that GCH's application addressed all Life Safety Code issues, such as fire walls between the nursing home and hospital and double egress two-hour fire doors, and was in full compliance with the applicable regulations.

Again, the Court concludes that the Department conducted a comparative analysis and made a determination upon a ranking. The Court is mindful that it "cannot substitute its judgment for that of the agency or reweigh the facts of the case." *Attala County Bd. of Supervisors*, 867 So. 2d at 1023 (Miss. 2004).

In regard to the Hearing Officer adopting GCH's Proposed Findings of Fact and Conclusions of Law verbatim, HTC argues that by adopting these facts, Brian Scott, Esq. did not make an independent judgment or reasoning concerning the facts presented at the hearing. While this Court does not sanction this practice, in *Attala County Bd. of Supervisors* the Supreme Court recognized that the Hearing Officer also adopted verbatim the proposed findings of fact and conclusions of law and recommendation,

> and two days later, the State Health Officer (SHO) adopted verbatim the hearing officer's report. The chancery court stated in its memorandum opinion and judgment that it was aware that the findings of fact and conclusions of law signed by the Hearing Officer were adopted verbatim from those prepared by Hughes's Counsel. Therefore, the chancery court applied a 'heightened scrutiny' and 'analyzed such findings with greater care . . .' *Id.* at 1021.

In the case at bar, this Court has applied the same standard.

Conclusion

For the foregoing reasons, this Court finds that the Mississippi State Department of Health's decision to grant GCH a CON is affirmed with the exception of the cost to Medicaid (one year). The Court shall remand this factor for such further proceedings, not inconsistent with this Court's order.

SO ORDERED, ADJUDGED and DECREED this the 20th day of June 2005.

Patricia D. Wise
CHANCELLOR

CHAPTER 6 - SUBSEQUENT REVIEWS

100 Changes in Scope of Approved Project

100.01 Applicants for a CON should clearly understand that if an approved project is changed substantially in scope - in construction, services, or capital expenditure the existing CON is void, and a new CON application is required before the proponent can lawfully proceed further.

101 Re-Review of Prior Approved Projects

101.01 Extenuating circumstances may prevent an applicant from proceeding with the proposed project within the valid period of the approved CON.

The Department has adopted a format for "Prior Approved Projects" that is to be used by proponents of a project when the increase in capital expenditure does not exceed the rate of inflation and no change in the intent or scope of the project has occurred.

This application is to be submitted and reviewed under procedures and criteria set forth in this manual for CON review in compliance with state regulations. To be valid, requests for re-review must be received within 60 days following the expiration of a valid CON. Requests for re-review can be entered only once for the same project.

102 Six-Month Extension

102.01 Certificates of Need are valid for a period not to exceed one year and may be extended by the Department for an additional period not to exceed six months.

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

103 Cost Overrun

103.01 Changes in capital expenditure not associated with substantive construction or service changes require application for a cost overrun approval. It is expected that each applicant will accurately and completely represent the cost associated with the project, so that when a CON is issued, a maximum capital expenditure is authorized.

In those cases where the expenditure maximum established by the Certificate of Need is exceeded, the applicant is required to request cost overrun approval. The following procedures shall apply to cost overrun applications.

CERTIFICATE OF SERVICE

The undersigned counsel hereby attests that he has caused the foregoing document to be served via United States mail (postage prepaid) on the persons listed below:

The Honorable Patricia D. Wise
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So certified, this the ***2d*** day of July, 2007.

Thomas L. Kirkland, Jr.