

IN THE SUPREME COURT OF MISSISSIPPI

DIALYSIS SOLUTION, LLC

APPELLANT

VS.

NO. 2008-CA-02073

MISSISSIPPI STATE DEPARTMENT OF  
HEALTH, et al.

APPELLEES

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

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JOINT BRIEF OF APPELLEES  
MISSISSIPPI STATE DEPARTMENT OF HEALTH,  
ED THOMPSON, IN HIS OFFICIAL CAPACITY AS  
STATE HEALTH OFFICER, STATE OF MISSISSIPPI AND  
RCG-MONTGOMERY COUNTY, LLC

***ORAL ARGUMENT NOT REQUESTED***

Bea M. Tolsdorf (MSB # [REDACTED])  
Special Assistant Attorney General  
Mississippi State Department of Health  
P. O. Box 1700  
Jackson, MS 39215-1700  
(601) 576-7458

*Counsel for Mississippi State Department  
of Health, Dr. Ed Thompson and  
State of Mississippi*

Barry K. Cockrell (MSB # [REDACTED])  
BAKER, DONELSON, BEARMAN,  
CALDWELL & BERKOWITZ, PC  
P. O. Box 14167  
Jackson, MS 39236  
(601) 351-2426

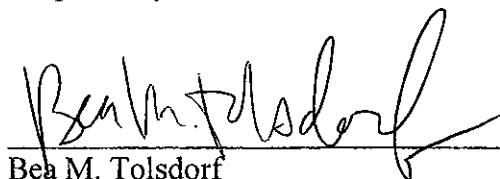
*Counsel for RCG-Montgomery County, LLC*

## 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. Mississippi State Department of Health (Appellee)
2. Dr. Ed Thompson, State Health Officer (Appellee)
3. State of Mississippi (Appellee)
4. RCG-Montgomery County, LLC (Appellee)
5. Dialysis Solution, LLC (Appellant)
6. Barry K. Cockrell, Esq. of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel for RCG-Montgomery County, LLC
7. Bryant Clark, Esq. of Clark & Clark, PLLC, counsel for Appellant
8. Renal Care Group, Inc., parent company of RCG-Montgomery County, LLC
9. Fresenius Medical Care Holdings, Inc., parent company of Renal Care Group, Inc.
10. Honorable J. Dewayne Thomas, Chancellor of Hinds County


Respectfully submitted,



Bea M. Tolsdorf  
Special Assistant Attorney General

*Counsel for Mississippi State Department  
of Health, Dr. Ed Thompson and State  
of Mississippi*

Respectfully submitted,



Barry K. Cockrell  
Baker, Donelson, Bearman, Caldwell &  
Berkowitz, PC

*Counsel for RCG-Montgomery County, LLC*

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## **I. STATEMENT OF ISSUES**

The following issues are presented in this appeal:

1. Whether the Mississippi State Department of Health properly extended the certificate of need for a dialysis facility issued to RCG-Montgomery County, LLC, pursuant to regulations adopted in accordance with the administrative agency's rule-making authority?
2. Whether the Mississippi State Department of Health had the statutory and regulatory authority to extend the certificate of need?
3. Whether the Chancellor below abused his discretion in his findings of fact and correctly applied the law in his conclusions of law?

## **II. INTRODUCTION**

This appeal involves a Certificate of Need ("CON") which was issued to RCG-Montgomery County, LLC ("RCG") by the Mississippi State Department of Health ("MSDH"). The CON authorized RCG to construct and operate a kidney disease treatment facility in Winona, Mississippi. This facility, which has been operational for nearly a year, is allowing patients with end-stage renal disease ("ESRD") to receive life-sustaining treatments closer to their homes.

On October 23, 2007, Dialysis Solution, LLC ("Dialysis Solution") commenced this action in the Chancery Court of the First Judicial District of Hinds County, Mississippi, with the filing of a Complaint for declaratory and injunctive relief against the MSDH, Dr. Ed Thompson, in his official capacity as the Executive Director of the MSDH ("Dr. Thompson"), and the State of Mississippi (collectively, the "State Defendants"), and RCG. In the suit, Dialysis Solution sought an injunction in an effort to stop construction of the dialysis treatment center, which was

already well under construction at the time. In its Motion for Temporary Restraining Order and/or Preliminary Injunction, Dialysis Solution contended that the MSDH did not have the authority to extend the CON for the dialysis facility. Counsel for the parties briefed and argued the Motion to the Chancery Court.

In a Memorandum Opinion filed on March 27, 2008 (R.175-197; R.E. Tab 7), the Chancery Court denied Dialysis Solution's request for a temporary restraining order and/or preliminary injunction. In its Opinion, the Chancellor also addressed the merits of the case, and concluded, in pertinent part, as follows:

There is no question that the MSDH had the lawful authority to adopt these [CON extension] rules. The Supreme Court of Mississippi has consistently recognized the broad authority and discretion given to the MSDH in matters concerning certificates of need.

\* \* \*

In recognition of its authority and responsibility for overseeing the health care needs of the citizens of Mississippi, the MSDH took reasonable and appropriate action in order to develop a fair, logical and enforceable system for the monitoring and extending of CON projects. In promulgating the regulations governing the extension of CONs, the MSDH expressly found that CONs "have been issued to serve unmet healthcare needs of the state and that compliance with the Attorney General's Opinion of October 12, 2007, may prevent the completion of outstanding CONs that were issued to address such needs." The MSDH further found that "[c]hanges in the CON Rules regarding extensions of valid CONs are necessary to comply with the Attorney General's Opinion, to modify requirements for six-month extensions, to clarify the status of incomplete CONs, and to provide transition of incomplete CONs."

\* \* \*

In short, the MSDH has properly exercised its rule-making and administrative authority and responsibilities in the promulgation of these regulations, and in reviewing requests for CON extensions submitted by RCG and other health care providers. There is nothing arbitrary or capricious about this process. Moreover, RCG

has properly complied with the duly promulgated rules and regulations of the MSDH and has worked closely with the MSDH in the development and implementation of this project. The CON extensions granted to RCG were based directly on the lawful authority of the MSDH.

*Memorandum Opinion of the Court* at pp. 8-12. (R.182-186; R.E. Tab 7). The Chancery Court also ruled that (1) an injunction was not necessary to prevent irreparable injury to Dialysis Solution and, in fact, would cause substantial injury to RCG and innocent dialysis patients, (2) the threatened injury to Dialysis Solution did not outweigh the harm an injunction might do to the Defendants, and (3) the entry of a Temporary Restraining Order or Preliminary Injunction was not consistent with the public interest and, in fact, would be directly contrary to the public interest by causing “patients and their families unnecessary suffering and economic costs,” and by creating “significant and unnecessary chaos in the health planning process throughout Mississippi” by disrupting a legal, “fair and orderly process for developing CON projects.” *Memorandum Opinion of the Court* at pp. 14-21. (R.188-195; R.E. Tab 7).<sup>1</sup>

Following the issuance of the Court’s Opinion denying Dialysis Solution’s Motion for a TRO or Preliminary Injunction, counsel for the parties met with the Court and agreed to prepare and file a Joint Stipulation of Facts (the “Joint Stipulation”). (R.303-364; R.E. Tab 8). Additionally, the parties agreed to submit briefs on the merits of the case to the Court for final decision.

Subsequent to the filing of the Joint Stipulation and the briefs of the parties, the Chancery Court entered a Final Judgment in the case on December 8, 2008. (R.365-371; R.E. Tab 9). The Final Judgment included the Chancery Court’s detailed and well-reasoned findings of fact and

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<sup>1</sup> In this appeal, Dialysis Solution has not raised any challenge or issue regarding the Chancery Court’s denial of Dialysis Solution’s request for injunctive relief. Consequently, the Department and RCG have not addressed that area in this Joint Brief. In any event, the Chancellor below certainly did not abuse his discretion in denying Dialysis Solution’s Motion for a TRO and/or Preliminary Injunction. *See, e.g., City of Durant v. Humphreys County Mem’l Hosp.*, 587 So.2d 244 (Miss. 1991).

conclusions of law. The Chancellor determined that there was “no legal basis to determine that the granting of the CON extension by MSDH to RCG was arbitrary or capricious or otherwise illegal or improper.” (R.370-371; R.E. Tab 9). Specifically, the Chancery Court stated as follows:

Our Mississippi state legislature has specifically given the MSDH the statutory authority to “[p]rescribe and promulgate such reasonable rules and regulations as may be necessary to the implementation of the purposes” of the Mississippi CON Law. *See* Mississippi Code Annotated § 41-7-185(c). Pursuant to that rule-making authority, and in an effort to effectively address the medical needs of all Mississippians, the MSDH has promulgated both temporary and permanent rules governing the granting, validity, duration and extensions of CONs. These regulations are reasonable and rational and provide a fair and logical process for the monitoring and enforcement of CONs issued to Mississippi health care providers. Since the implementation of these rules, the MSDH has reviewed numerous CON extension requests, and has either granted or denied those requests, based upon a review of the facts and circumstances in each instance.

It is clear from a careful review of the relevant CON statutes that MSDH has the lawful authority to adopt these necessary rules. Further, our own Mississippi Supreme Court has consistently recognized the broad authority and liberal discretion given to the MSDH in matters concerning CONs. . . .

The Mississippi Supreme Court has also emphasized the deference accorded an administrative agency with respect to its rule-making functions. . . .

MSDH properly exercised its rule-making and administrative authority and responsibilities in the promulgation of these regulations, and in reviewing requests for CON extensions submitted by RCG and other health care providers. There is absolutely no proof that the process was either arbitrary or capricious. In fact, the MSDH promulgated the subject regulations to avoid the possibility of arbitrary or capricious decisions. Further, RCG has properly complied with the duly promulgated rules and regulations of the MSDH and has worked closely with the MSDH in the development and implementation of this project.

*Final Judgment* at pp. 3-6. (R.367-370; R.E. Tab 9). Based on its findings of fact and conclusions of law, the Chancery Court found that Dialysis Solution's Complaint was not well taken and should be dismissed with prejudice. (R.371; R.E. Tab 9).

### **III. STATEMENT OF THE CASE**

#### **A. Statement of Facts**

##### **1. The Mississippi CON Program**

This case involves a CON issued to RCG pursuant to the Mississippi CON Program. The Mississippi Health Care Certificate of Need Law of 1979 (*Miss. Code Ann.* §§ 41-7-173 through 41-7-209) established a statutory process for health planning in Mississippi. The law requires health care providers to obtain a CON from the MSDH prior to constructing certain health care facilities or offering designated health services. *Joint Stipulation*, ¶ 3. (R.303-304; R.E. Tab 8). According to the *Mississippi State Health Plan*, the goals of the Mississippi CON Program are (1) to prevent unnecessary duplication of health resources; (2) to provide cost containment; (3) to improve the health of Mississippi residents; and (4) to increase the accessibility, acceptability, continuity and quality of health services. *Joint Stipulation*, ¶ 2. (R.303; R.E. Tab 8).

The Mississippi CON Law designates the MSDH as the sole and official agency to administer and supervise all health planning responsibilities for the State. *Miss. Code Ann.* §§ 41-7-183, 41-7-185 and 41-7-187. *Joint Stipulation*, ¶ 1. (R.303; R.E. Tab 8). Section 41-7-185(c) of the Mississippi CON Law expressly empowers the MSDH to “[p]rescribe and promulgate such reasonable rules and regulations as may be necessary to the implementation of the purposes” of the Mississippi CON Law. This Court has consistently recognized and deferred to the MSDH as the agency responsible for the administration and enforcement of the

Mississippi CON Program. In *Mississippi State Department of Health v. Southwest Mississippi Regional Medical Center*, 480 So.2d 1238 (Miss. 1991), the Court stated as follows:

The [CON] program is a constitutionally permissible stratagem for addressing the health care needs of the people. . . . It was on our statute books at all times relevant and remains so. We have faithfully enforced it in the past. . . . We will continue to do so until the Legislature directs otherwise.

\* \* \*

Read together, these [CON] statutes authorize the Department both to establish criteria for Certificates of Need and objectively review information tendered in applications. The Department's power is limited only in that its actions may not be arbitrary and capricious.

*Id.* at 1240 (citations omitted).

Pursuant to this statutory authority, the MSDH routinely promulgates rules and regulations necessary for the administration and enforcement of the Mississippi CON Program. *Joint Stipulation*, ¶ 4. (R.304; R.E. Tab 8). On an annual basis, the MSDH, with the approval of the Mississippi State Board of Health, publishes the *Mississippi State Health Plan*, which contains the criteria and standards which must be met by applicants for a CON. Additionally, the MSDH has promulgated, and amends from time to time, the *Mississippi Certificate of Need Review Manual*, which sets forth the rules and regulations governing CON applications, review and proceedings.

## **2. CON Regulations Promulgated by the MSDH**

This appeal concerns certain regulations which were promulgated and adopted by the MSDH, pursuant to its statutory rule-making authority. On October 26, 2007, the MSDH issued an official notice that it had received an Attorney General's Opinion (issued October 12, 2007), regarding an interpretation of *Miss. Code Ann.* § 41-7-195, governing the validity and duration of a CON. *Joint Stipulation*, ¶ 17. (R.306; R.E. Tab 8). In response to this Attorney General's

Opinion, the MSDH adopted a Temporary Rule in order to develop a clear and consistent process for the review and extension of outstanding CONs. *Joint Stipulation*, ¶ 17. (R.306; R.E. Tab 8). According to its filing with the Mississippi Secretary of State, the reasons for this Temporary Rule were as follows:

The Department of Health finds that Certificates of Need ("CONs") have been issued to serve unmet healthcare needs of the state and that compliance with the Attorney General's Opinion of October 12, 2007, may prevent the completion of outstanding CONs that were issued to address such needs. Changes in the CON Rules regarding extensions of valid CONs are necessary to comply with the Attorney General's Opinion, to modify requirements for six-month extensions, to clarify the status of incomplete CONs, and to provide transition of incomplete CONs.

*Joint Stipulation*, ¶ 17. (R.306; R.E. Tab 8).

Under the Temporary Rule, in order to continue authority for a CON following the initial twelve (12) month issuance period, the CON holder is required to document substantial progress toward completion of the CON and be granted a six-month extension. *Joint Stipulation*, ¶ 18. (R.306; R.E. Tab 8). If the CON project is incomplete, the CON holder must file a request for a six-month extension (and submit appropriate documentation) at least 30 days prior to the expiration of the original CON or any extended period of the CON. *Joint Stipulation*, ¶ 18. (R.306; R.E. Tab 8). The Temporary Rule further provided as follows:

For currently approved projects that are incomplete as of the effective date of this rule, and where the original CON has expired, or an extension of the CON has expired, or where the CON will expire 30 days from the effective date of this rule, the CON holder has 15 business days from the effective date of this rule to submit a progress report documenting project completion, or submit a request for a six-month extension. **If the Department has not received an extension request within 15 working days of the effective date of this rule, the CON will be deemed void.**

*Joint Stipulation*, ¶ 18 (emphasis in original). (R.306-307; R.E. Tab 8). The MSDH notified all parties holding outstanding CONs of this Temporary Rule, and advised the parties that they must

request a CON extension by the designated deadline. *Joint Stipulation*, ¶ 19. (R.307; R.E. Tab 8). As a result, CON holders from all over the State filed requests for CON extensions, in response to the requirements of the Temporary Rule. *Joint Stipulation*, ¶ 19. (R.307; R.E. Tab 8). The MSDH reviewed and considered those extension requests, and granted or denied the requests, as determined by the MSDH. *Joint Stipulation*, ¶ 19. (R.307; R.E. Tab 8).

On January 23, 2008, the Mississippi State Board of Health approved Final Adoption of changes to the *Mississippi Certificate of Need Review Manual*, in order to make the Temporary Rule a permanent regulation. *Joint Stipulation*, ¶ 22. (R.307; R.E. Tab 8). This rule change was filed with the Mississippi Secretary of State on January 24, 2008, and became effective on February 23, 2008. *Joint Stipulation*, ¶ 22. (R.307; R.E. Tab 8). Accordingly, the MSDH has promulgated and adopted a definitive set of rules and regulations governing the validity and duration of CONs in Mississippi.

### **3. The RCG Dialysis Facility Project**

On December 16, 2004, the MSDH issued a CON to RCG for the establishment of a six-station ESRD (end stage renal disease) treatment center in Winona, Mississippi. *Joint Stipulation*, ¶ 8. (R.304; 310; R.E. Tab 8). Subsequent to the issuance of the CON, certain extenuating circumstances hampered the development of the project. First, approximately eight months after the issuance of the CON, Hurricane Katrina devastated the Mississippi Gulf Coast. *Joint Stipulation*, ¶ 9. (R.304; R.E. Tab 8). The hurricane had a significant impact on health care facilities in South Mississippi, including ESRD centers operated by Renal Care Group, the parent company of RCG. *Id.* Consequently, Renal Care Group devoted all of its resources to recovery efforts on the Gulf Coast. *Id.* Those efforts were necessary in order to insure that ESRD patients in that area had access to life-sustaining dialysis treatment. *Id.*

Additionally, in 2005, Renal Care Group and Fresenius Medical Care Holdings, Inc. (“Fresenius”) commenced negotiations regarding the potential acquisition of Renal Care Group by Fresenius. *Joint Stipulation*, ¶ 10. (R.305; R.E. Tab 8). On May 4, 2005, Renal Care Group announced that it had executed a definitive agreement to be acquired by Fresenius. *Id.* Once the definitive agreement was executed, it was not feasible for RCG to move forward with the development of the ESRD facility in Winona, until federal regulatory approvals were secured with respect to the transaction. *Id.* More particularly, the Federal Trade Commission conducted an extensive analysis of the operations of Renal Care Group and Fresenius in Mississippi, in order to evaluate whether either or both companies would have to sell assets and/or facilities in order to address antitrust concerns. *Id.* Until this federal review was completed, there was no way to know whether the Winona facility project could be retained and developed. *Id.*

After FTC approval was finally obtained on July 5, 2006, and following the recovery from Hurricane Katrina, RCG turned its attention back to the development of the Winona project. *Joint Stipulation*, ¶ 10. (R.305; R.E. Tab 8). In response to a request from the MSDH, RCG filed an application for a six-month extension of the CON. *Joint Stipulation*, ¶ 13. (R.305; R.E. Tab 8).

On January 18, 2007, the MSDH granted a six-month extension of the CON. *Joint Stipulation*, ¶ 13. (R.305; 311-318; R.E. Tab 8). In approving the extension, the MSDH recognized and accepted the extenuating circumstances that delayed the project. Six months later, the MSDH requested RCG to file an additional request for a six-month extension, in order to keep the CON in good standing. In response, RCG submitted a progress report and request for six-month extension of the CON in August of 2007. On August 30, 2007, the MSDH granted the six-month extension of the CON. *Joint Stipulation*, ¶ 14. (R.305; 319; R.E. Tab 8). This

approval specified that the extension period would terminate January 18, 2008, at which time a progress report would be due on the project. *Joint Stipulation*, ¶ 14. (R.305; 319; R.E. Tab 8).

In late October of 2007, RCG, like all other CON holders in the State, received notice from the MSDH regarding the Temporary Rule on CON extensions. Pursuant to the Temporary Rule and the MSDH's notice, RCG timely filed a request for a six-month extension of the CON on November 16, 2007. *Joint Stipulation*, ¶ 20. (R.307; 331-336; R.E. Tab 8). Subsequently, on December 18, 2007, RCG submitted to the MSDH a detailed progress report and documentation of commencement of construction of the project. *Id.* (R.307; 337-338; R.E. Tab 8).

On January 14, 2008, the MSDH granted RCG's request for a six-month extension. *Joint Stipulation*, ¶ 21. (R.307; 339-340; R.E. Tab 8). This letter granting the extension stated that the extension period would terminate on June 16, 2008, and that the next progress report and six-month extension request would be due on or before May 16, 2008. *Id.*

On May 16, 2008, RCG filed with the MSDH a Progress Report and Six-Month Extension Request on the CON. *Joint Stipulation*, ¶ 24. (R.308; 358-362; R.E. Tab 8). On May 20, 2008, the State Health Officer granted RCG's request for a six-month extension of the CON. *Joint Stipulation*, ¶ 25. (R.308; 363; R.E. Tab 8). The May 20, 2008 letter granting the CON extension stated that the extension period will terminate December 16, 2008, and that the next progress report or six-month extension request will be due on or before November 16, 2008. *Joint Stipulation*, ¶ 25. (R.308; 363; R.E. Tab 8).

On August 1, 2008, construction of the RCG Winona ESRD facility was completed, and a Certificate of Occupancy for the facility was issued by the City of Winona, Mississippi. *Joint Stipulation*, ¶ 26. (R.308; 364; R.E. Tab 8). On August 25, 2008, the RCG Winona ESRD

facility commenced operations with the treatment of a dialysis patient. *Joint Stipulation*, ¶ 27. (R.308; R.E. Tab 8).

On September 15, 2008, the Winona ESRD facility was officially surveyed by the MSDH, and was approved for Medicare Certification. *Affidavit of Jeff McPherson* (R.301-302). As of that date, the facility was serving thirty-nine (39) dialysis patients. *Id.*

#### **4. The Dialysis Solution CON Application**

In December of 2006, Dialysis Solution filed with the MSDH a CON application for its own ESRD facility in Winona. *Joint Stipulation*, ¶ 12. (R.305; R.E. Tab 8). Dialysis Solution failed to submit all necessary information in order to have the application deemed complete. As a result, the Dialysis Solution CON application was not deemed complete until October 1, 2007, nearly a year after the initial filing.

In November of 2007, the MSDH issued a staff analysis report on the Dialysis Solution CON application. In that report, the MSDH recommended **disapproval** of the Dialysis Solution application. The MSDH staff concluded that the Dialysis Solution application was not in compliance with the applicable CON criteria and standards, and recommended that the proposal not be approved.

#### **B. Course of Proceedings Below**

On October 23, 2007, Dialysis Solution filed a Complaint for Declaratory Judgment and Injunctive Relief in the Chancery Court for the First Judicial District of Hinds County, Mississippi. (R.1-16; R.E. Tab 2). In this Complaint, Dialysis Solution sought to have the CON issued to RCG declared invalid, on the grounds that the MSDH did not have the authority to grant more than one (1) six-month extension of the CON. Additionally, the Complaint sought a declaratory judgment that a CON is valid only for a maximum of eighteen (18) months.

On February 20, 2008, Dialysis Solution filed a Motion for Temporary Restraining Order and/or Preliminary Injunction. (R.66-70; R.E. Tab 5). The Motion sought to enjoin the MSDH from granting an additional extension to RCG for an ESRD facility in Winona and also to enjoin the MSDH from issuing a license to RCG for that facility. Additionally, the Motion requested the Chancery Court to prohibit RCG from continuing any construction on its facility.

Following briefing and argument by counsel for all parties, the Chancery Court entered an Opinion denying Dialysis Solution's Motion for TRO and/or Preliminary Injunction on March 27, 2008. (R.175-197; R.E. Tab 7).

Subsequently, counsel for the parties met with the Chancellor and agreed to prepare and file a Joint Stipulation of facts and exhibits. (R.303-364; R.E. Tab 8). Additionally, the parties agreed to submit briefs on the merits of the case to the Court for final decision.

On December 8, 2008, the Chancery Court, having considered all briefs and arguments of the parties, as well as all relevant case and statutory law, entered a Final Judgment, with detailed findings of fact and conclusions of law, in favor of the Defendants. (R.365-371; R.E. Tab 9).

On December 11, 2008, Dialysis Solution appealed the Chancery Court's Final Judgment to this Court. (R.372-373; R.E. Tab 10).

#### **IV. SUMMARY OF THE ARGUMENT**

The MSDH properly extended the CON issued to RCG, pursuant to valid regulations adopted in accordance with the agency's rule-making authority. The Mississippi Certificate of Need Law grants the MSDH the express statutory authority to "[p]rescribe and promulgate such reasonable rules and regulations as may be necessary to the implementation of the purposes" of that law. Consistent with its legislatively-delegated authority, the MSDH promulgated temporary and permanent rules to address the validity, duration and extensions of CONs.

This Court has consistently recognized the broad authority and discretion given to the MSDH in matters concerning certificates of need. The Court's decisions have long emphasized that great deference is accorded to an administrative agency's construction of its own rules and regulations, and the statutes under which it operates. This deference is the product of a judicial awareness that administrative agencies should be accorded some measure of flexibility in responding to new and unforeseen problems they encounter over time. Further, this Court has stressed the deference given to an agency with respect to its rule-making functions.

Contrary to Dialysis Solution's contentions, the Mississippi CON Law does **not** provide that a CON may be extended only one time. Rather, the statute in question simply provides that CONs may not be extended for a period in excess of six (6) months. The statute in no way prohibits the MSDH from granting more than one extension. It merely sets a maximum time-frame for each CON extension period. This is the MSDH's interpretation of the CON statute and that interpretation is reasonable, consistent with the statute, and is entitled to great deference.

There is no legal basis whatsoever for Dialysis Solution's claim that the MSDH did not have the authority to extend a CON when it has purportedly "expired." This contention is based solely on an Attorney General's Opinion, which can neither validate nor invalidate a past action of a State officer or agency, and operates prospectively only. In response to this Opinion, the MSDH adopted regulations to govern the review, monitoring and extension of CON projects. However, the Attorney General Opinion itself is not some type of binding, retroactive legal finding and precedent that invalidates the CON issued to RCG.

The MSDH's regulations on CON extensions have been in full force and effect since October of 2007, and continue to govern all CON projects in the State. Dialysis Solution did not comment on or otherwise challenge these regulations in any respect, despite having the right to do so under both the Mississippi CON Law and the Mississippi Administrative Procedures Law.

These rules are legal and valid, have served and continue to serve the MSDH, health care providers and the public well, and should not be set aside.

The Chancellor below did not abuse his discretion in his findings of fact, as set forth in the Final Judgment. The Chancellor's factual findings are based on the parties' Joint Stipulation of Facts, and there is no basis for any suggestion that the Chancellor abused his discretion in making those findings. It is equally clear that the Chancellor correctly applied the law in his conclusions of law. The Chancellor's Final Judgment is firmly grounded in long-standing Mississippi case law, as pronounced by this Court.

## **V. ARGUMENT**

### **A. The MSDH Properly Extended the CON Pursuant to Valid and Binding Regulations Adopted in Accordance with the Agency's Rule-Making Authority.**

The MSDH has the express statutory authority to "[p]rescribe and promulgate such reasonable rules and regulations as may be necessary to the implementation of the purposes" of the Mississippi CON Law. *Miss. Code Ann.* § 41-7-185(c). Pursuant to that rule-making authority, the MSDH promulgated temporary and permanent rules to address the validity, duration and extensions of CONs. As previously discussed, these regulations set forth a fair and logical process for the monitoring and enforcement of CONs issued to Mississippi health care providers. Since these rules were issued, the MSDH has reviewed numerous CON extension requests, and has either granted or denied those requests, based on a review of the facts and circumstances in each instance.

There is no question that the MSDH had the lawful authority to adopt these rules. This Court has consistently recognized the broad authority and discretion given to the MSDH in

matters concerning certificates of need. In *Grant Center Hospital of Mississippi, Inc. v. Health Group of Jackson, Mississippi, Inc.*, 528 So.2d 804 (Miss. 1988), the Court stated as follows:

The administrative agency which has by law been charged with interpretation and enforcement of the CON procedure has read the statute as in effect, meaning that the application must refer to the state health plan in effect when the application was submitted. The agency that works with a statute frequently, if not daily, that sees it in relation to other law in the field, necessarily develops a level of insight and expertise likely beyond our kin. When such agencies speak, courts listen.

*Id.* at 810. Similarly, in *Melody Manor Convalescent Center v. Mississippi State Department of Health*, 546 So.2d 972 (Miss. 1989), the Supreme Court stated:

Great deference is accorded to an administrative agency's construction of its own rules and regulations and the statutes under which it operates. . . . The burden of proof rests with the party challenging the actions of an administrative agency. . . . We have also held that we will not substitute our judgment for the judgment of an administrative agency when the action of agency is not arbitrary or unreasonable, and when it is supported by substantial evidence.

*Id.* at 974 (citations omitted).

In the recent case of *Mississippi State Department of Health v. Baptist Memorial Hospital-DeSoto, Inc.*, 984 So.2d 967 (Miss. 2008), this Court examined the statutory and regulatory authority and actions of the MSDH in a CON proceeding. There, the Court emphasized, once again, the limited scope of judicial review in such proceedings, and noted that a "presumption of validity" attaches to the MSDH's administrative decisions. *Id.* at 975. In upholding the MSDH's decision and actions, this Court also stressed the importance of deference to administrative agencies:

"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." *Dunn*, 708 So.2d at 72, *See also Int'l Bd. of Teamsters v. Daniel*,

439 U.S. 551, 566, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979) (administrative agency deference “is a product both of an 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.” (emphasis added).

984 So.2d at 981 (quoting *Dunn v. Miss. State Dep’t of Health*, 708 So.2d 67 (Miss. 1998), and *Int’l Bd. of Teamsters v. Daniel*, 439 U.S. 551, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979)).

This Court also has emphasized the deference accorded an administrative agency with respect to its rule-making functions. In *Mississippi Public Service Commission v. Mississippi Power and Light Company*, 593 So.2d 997 (Miss. 1991), the Court stated “[u]nderstandably, the court refrains from interfering with duly delegated authority to an administrative agency, particularly where the rule making power of the agency is involved due to its legislative function.” *Id.* at 1000.

In recognition of its authority and responsibility for overseeing the health care needs of the citizens of Mississippi, the MSDH took reasonable and appropriate action in order to develop a fair, logical and enforceable system for the monitoring and extending of CON projects. In promulgating the regulations governing the extension of CONs, the MSDH expressly found that CONs “have been issued to serve unmet healthcare needs of the state and that compliance with the Attorney General’s Opinion of October 12, 2007, may prevent the completion of outstanding CONs that were issued to address such needs.” The MSDH further found that “[c]hanges in the CON Rules regarding extensions of valid CONs are necessary to comply with the Attorney General’s Opinion, to modify requirements for six-month extensions, to clarify the status of incomplete CONs, and to provide transition of incomplete CONs.”

Under the regulations now in effect, the MSDH requires CON holders to request extensions every six months until the project is complete. In order to obtain an extension, the

CON holder must demonstrate adequate progress has been made on the project. Consistent with the authority granted to the MSDH under the Mississippi CON Law, the MSDH will review and evaluate extension requests, and will exercise its decision-making discretion, taking into account the facts and circumstances of each case and the needs of the population to be served by a CON.

RCG, like numerous other CON holders throughout the State of Mississippi, properly complied with the regulations promulgated by the MSDH. RCG filed a timely request for a six-month extension, and demonstrated adequate progress on the development of the project. The MSDH granted the extension of the CON, and took into account the facts and circumstances as well as the need of the population to be served by the proposed facility.

In its Brief, Dialysis Solution cites various Mississippi Supreme Court decisions which hold that an administrative agency may not exceed the authority prescribed by legislative enactment, and that such agencies may not act contrary to statutory provisions. The Defendants certainly have no issue with these well-established principles. However, in this instance, the MSDH did not act contrary to state law. Indeed, as discussed above, the MSDH's actions and rule-making were in full compliance with the Mississippi CON statutes.

It is noteworthy that in one of the primary cases cited by Dialysis Solution, *Gill v. Mississippi Department of Wildlife Conservation*, 574 So.2d 586 (Miss. 1990), this Court actually upheld the administrative agency's action, and stated as follows:

[W]e stay our hand in the face of SPB's [State Personnel Board's] regulatory interpretations of the state civil service statutes proscribing political interference and, as well, EAB's [Employee Appeals Board's] interpretation of both the statutes and SPB's rules in the context of today's case. By a reasonable reading of Sections 25-9-103(e) and (f), plus Section 25-9-145(1), in the setting of Section 25-9-115(c)'s grant of rule-making power, SPB held the power to interpret state employees' right to be secure from the sort of political interference practiced here. SPB has in fact promulgated rules accepting and interpreting these rights.

*Id.* at 595. The Chancery Court below followed the same reasoning in its Final Judgment, by “staying its hand” in the face of the MSDH’s regulatory interpretations of the CON statutes, as well as the MSDH’s statutory rule-making authority.

Additionally, contrary to Dialysis Solution’s contentions, the statute in question does **not** provide that a CON may be extended only one time. Rather, the statute simply provides that CONs may not be extended for a period in excess of six (6) months. The statute in no way prohibits the MSDH from granting more than one extension. It merely sets a maximum time-frame for each CON extension period. This is the MSDH’s interpretation of the CON statute, and that interpretation is reasonable, consistent with the statute, and is entitled to great deference. The MSDH, acting within its legislatively-delegated rule-making authority, adopted regulations perfectly consistent with, and in furtherance of, the CON statute.

As previously mentioned, it is significant to note that Dialysis Solution never contested the CON extension regulations adopted by the MSDH. Dialysis Solution had the right to do so under the Mississippi Administrative Procedures Law, as well as pursuant to the administrative rule-making process followed by the MSDH in enacting the CON regulations.<sup>2</sup> Nevertheless, Dialysis Solution did not contest the rules, and is now precluded from challenging their legality.

In short, the MSDH properly exercised its rule-making and administrative authority and responsibilities in the promulgation of these regulations, and in reviewing requests for CON extensions submitted by RCG and other health care providers. There is nothing arbitrary or capricious about this process. Moreover, RCG properly complied with the duly promulgated rules and regulations of the MSDH and worked closely with the MSDH in the development and

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<sup>2</sup> The Mississippi Administrative Procedures Law, Miss. Code Ann. §§25-43-1.101, et seq., sets forth detailed procedures for administrative agency rule-making, and public participation in that process.

implementation of this project. The CON extensions granted to RCG were based directly on the lawful authority of the MSDH.

**B. There is no Legal Basis for Dialysis Solution's Claim that the CON is Invalid.**

Dialysis Solution contends that the MSDH did not have the authority to extend a CON when it has purportedly "expired." In support of this contention, Dialysis Solution cites the Attorney General's Opinion issued on October 12, 2007. There are several fundamental flaws with Dialysis Solution's argument on this point.

First, it is critical to put into proper context the scope and limitations of an Attorney General's Opinion. It is clear that "opinions of the Attorney General are issued on questions of state law for future guidance of those entitled to receive them; an Attorney General's Opinion can neither validate nor invalidate a past action of an officer or agency, and operates prospectively only." *Att'y Gen. Op. #02-0662*, issued November 15, 2002. *See also Att'y Gen. Op. 2007-00408*, issued August 17, 2007; and *Att'y Gen. Op. 03-0263*, issued June 6, 2003.

Contrary to these firmly established principles, Dialysis Solution improperly seeks to cite the Attorney General's Opinion of October 2007 as some type of binding, retroactive legal finding and precedent. That Opinion was nothing of the kind. It was simply a response to a request by a public official, and offered future guidance regarding an interpretation of the Mississippi CON Law.<sup>3</sup>

In any event, the more important point is that, in response to the Attorney General's Opinion, the MSDH took legal and definitive administrative action in addressing questions and concerns on the validity and duration of CONs. As previously discussed, the MSDH adopted

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<sup>3</sup> In fact, the Attorney General's office is representing the MSDH in this appeal, and fully endorses the MSDH's legal position.

temporary and permanent rules to govern the review, monitoring and extension of CON projects. Many health care providers, including RCG, have complied with those regulations in requesting and obtaining a CON extension. Dialysis Solution took no action to oppose or challenge these MSDH regulations. Further, Dialysis Solution cannot cite any valid legal reason why the MSDH's proper exercise of its administrative discretion and rule-making authority should be rejected by this Court. Indeed, in this instance, the MSDH performed its administrative duties precisely as described by this Court in *Mississippi State Department of Health v. Baptist Memorial Hospital-DeSoto, Inc.*, *supra*. The agency encountered and responded to a "new and unforeseen problem" through the use of its "practical expertise" and the exercise of its statutory rule-making powers.

Dialysis Solution has the burden of proving that the MSDH's actions are arbitrary, capricious and/or illegal. There is no legal or factual basis for such an argument. Dialysis Solution's claims fail as a matter of law.

**C. The CON Has Been Fully Implemented and the Dialysis Facility is Currently Serving the Public Health Needs.**

In denying Dialysis Solution's Motion for a TRO and/or a Preliminary Injunction, the Chancery Court determined that it would not be in the public interest to delay construction and operation of the Winona ESRD facility because such a delay would only cause ESRD patients "to continue to seek treatment longer distances from home, thereby causing these patients and their families unnecessary suffering and economic cost." *Memorandum Opinion of the Court* at p.19. (R.193; R.E. Tab 8). Now that this facility has been operational for nearly a year, and is currently serving numerous dialysis patients, it would be an even graver injustice to the public, as well as to these patients and their families, to impede the lawful operation of this facility.

In summary, the State Defendants properly promulgated regulations governing the extensions of CONs, and RCG properly complied with those rules in the development of its dialysis facility. That facility is now serving an obvious community need, as evidenced by the high volume of dialysis patients receiving care at the center. This is how the health planning process is supposed to work, and that process should not be thwarted by the ambitions of a would-be competitor.

**D. The Chancellor Below Did Not Abuse His Discretion in His Findings of Fact, and Correctly Applied the Law in His Conclusions of Law.**

The Chancellor below did not abuse his discretion in making his findings of fact, as set forth in the Final Judgment. In reviewing a Chancellor's factual findings, this Court applies an abuse of discretion standard of review and will not overturn such findings unless the Court "can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." *Herring Gas Co., Inc. v. Pine Belt Gas, Inc.*, 2 So.3d 636, 638 (Miss. 2009); *Morgan v. West*, 812 So.2d 987,990 (Miss. 2002).

Here, the Chancellor based his findings of fact on the Joint Stipulation of Facts submitted by the parties. There is no basis for any suggestion that the Chancellor abused his discretion in making these findings.

Finally, it is clear that the Chancellor correctly applied the law in his conclusions of law. As discussed above, the Chancellor's Final Judgment is firmly grounded on long-standing Mississippi case law, as pronounced by this Court. In contrast, Dialysis Solution has not offered any case precedent which supports the reversal of the Chancellor's well-reasoned decision.

## VI. CONCLUSION

On the basis of the arguments and authorities set forth above, the State Defendants and RCG respectfully request this Court to affirm the Final Judgment of the Chancery Court.

DATED: July 17, 2009.

Respectfully submitted,

MISSISSIPPI STATE DEPARTMENT OF HEALTH;  
DR. ED THOMPSON AND STATE OF MISSISSIPPI

By: 


Bea M. Tolsdorf  
Special Assistant Attorney General

RCG-MONTGOMERY COUNTY, LLC


By Its Attorneys,  
BAKER, DONELSON, BEARMAN, CALDWELL &  
BERKOWITZ, PC

By: 

Barry K. Cockrell

Bea M. Tolsdorf (MSB )  
Special Assistant Attorney General  
P. O. Box 1700  
Jackson, MS 39215-1700  
(601) 576-8116

*Counsel for the Mississippi State Department  
of Health, Dr. Ed Thompson and State of Mississippi*

Barry K. Cockrell (MSB No )  
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC  
4268 I-55 North, Meadowbrook Office Park  
P. O. Box 14167  
Jackson, MS 39236  
(601) 351-2426

*Counsel for RCG-Montgomery County, LLC*

**CERTIFICATE OF SERVICE**


I hereby certify that I have this day served, by United States Mail, postage prepaid, a true and correct copy of the foregoing Joint Brief of Appellees to the following:

Honorable J. Dewayne Thomas  
Chancellor of Hinds County  
P. O. Box 686  
Jackson, MS 39205

Bryant Clark, Esq.  
Clark & Clark, PLLC  
Post Office Box 179  
Lexington, MS 39095

*Counsel for Dialysis Solution, LLC*

DATED: July 17, 2009.

  
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Barry K. Cockrell