IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI STATE DEPARTMENT OF HEALTH and DVA HEALTHCARE RENAL CARE, INC. d/b/a OCEAN SPRINGS DIALYSIS — **APPELLANTS**

V. — **NO. 2009-SA-02020**

BIO-MEDICAL APPLICATIONS OF MISSISSIPPI, INC. d/b/a SOUTH MISSISSIPPI KIDNEY CENTER - D'IBERVILLE and BIO-MEDICAL APPLICATIONS OF MISSISSIPPI, INC. d/b/a SOUTH MISSISSIPPI KIDNEY CENTER - BILOXI — **APPELLEES**

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

BRIEF FOR APPELLEES

OF COUNSEL:

Thomas L. Kirkland, Jr. (MSB [redacted]
Allison C. Simpson (MSB [redacted]
Andy Lowry (MSB [redacted]
Copeland, Cook, Taylor & Bush, P.A.
600 Concourse, Suite 100
1076 Highland Colony Parkway (39157)
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-8242

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. Bio-Medical Applications of Mississippi, Inc. d/b/a South Mississippi Kidney Center - D'Iberville and Bio-Medical Applications of Mississippi, Inc. d/b/a South Mississippi Kidney Center - Biloxi (Appellees).

2. DVA Healthcare Renal Care, Inc. d/b/a Ocean Springs Dialysis (Appellant).

3. Mississippi State Department of Health (Appellant).

4. Thomas L. Kirkland, Jr., Allison C. Simpson, and Andy Lowry of Copeland, Cook, Taylor & Bush, P.A. (counsel for Appellees).

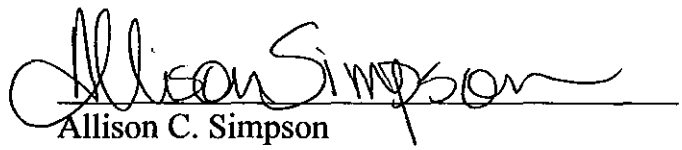
5. Mark W. Garriga, Esq. and Donna Brown Jacobs, Esq. of Butler, Snow, O'Mara, Stevens & Cannada, PLLC (counsel for DVA).

6. Bea M. Tolsdorf, Esq. (counsel for Department).

7. The Honorable Cassandra Walter (hearing officer).

8. The Honorable Denise Owens (chancery judge).

Respectfully submitted,



Allison C. Simpson
Attorney of record for Appellees

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STATEMENT OF THE ISSUES

I. In Certificate of Need ("CON") cases, the Department must apply the standard of need commensurate with what a project actually is. DVA's project met the definition for the "establishment" of a dialysis facility, but it could not meet that standard. Did the Department err in giving DVA a CON anyway, based on the notion that DVA was only "relocating" its facility?

II. An emergency CON can be granted only where patient care is jeopardized. DVA gave the Department the false impression that its facility was destroyed, and then obtained an emergency CON almost a whole year after Hurricane Katrina, when there was no jeopardy to patient care. Did the Department err in granting this emergency CON?

III. The CON Law forbids capital expenditures on a facility before a CON has been granted and any appeals exhausted. DVA had its new facility well underway before troubling to apply even for an emergency CON, and then began operating it while proceedings were still pending. Did DVA violate the CON Law?

IV. Judicial estoppel bars the same party from making contrary avowals of fact in different proceedings. DVA contends that a dialysis facility not involved in this suit advanced a different interpretation of the State Health Plan in a prior administrative matter. Does "administrative estoppel" bar the courts from requiring the Department to follow the law in this case?

STATEMENT OF THE CASE

This is a Certificate of Need ("CON") case in which, not for the first time, the Mississippi State Department of Health ("the Department") has applied a standard of need more lenient than what the law allows. The Department granted an "emergency" CON and then a regular CON, both times on the theory that the applicant was "relocating" a dialysis facility, when in fact the governing authorities required the Department to treat the application as being for a new facility, and to reject it given the facts of the case. The chancery court properly reversed the Department for acting contrary to law, and this Court should affirm the chancery court's judgment.

I. Course of Proceedings Below

On August 7, 2006, DVA Healthcare Renal Care, Inc. d/b/a Ocean Springs Dialysis ("DVA") submitted an emergency Certificate of Need (CON") application (the "Emergency Application") for the replacement and relocation of an End Stage Renal Disease ("ESRD") dialysis facility in Ocean Springs, Jackson County, Mississippi. This Emergency Application was recommended for approval in an October 2006 Staff Analysis, and on October 6, 2006, the Department issued an Emergency CON[1] which expired by its own terms ninety (90) days after its issuance on January 6, 2007.

On November 6, 2006, DVA submitted a regular CON application (the "Application") for the relocation and re-establishment of the same ESRD facility in

[1] This emergency CON was issued to DVA without affected persons, such as Appellees, having the opportunity to contest its issuance. The emergency CON process is discussed further below at Issue II.

Ocean Springs, Jackson County. Deemed complete on December 12, 2006, the Application was again recommended for approval in a Staff Analysis, based upon the same alleged facts reviewed to approve the emergency CON. At this point, Bio-Medical Applications of Mississippi, Inc. d/b/a South Mississippi Kidney Center - D'Iberville and Bio-Medical Applications of Mississippi, Inc. d/b/a South Mississippi Kidney Center - Biloxi ("D'Iberville" and "Biloxi" respectively, or "Contestants" collectively), both affected persons under the terms of the CON Manual, requested a hearing during the course of review. This administrative hearing was held January 27, 2009, through January 29, 2009, and on February 27, 2009 (the "Hearing"). The Hearing was concluded on March 23, 2009.[2]

On June 4, 2009, the administrative hearing officer submitted her proposed findings of fact and conclusions of law to the State Health Officer. The hearing officer found DVA violated the emergency CON process but that the Application complied with the State Health Plan (the "Plan"), the CON Manual[3] ("Manual") and with the

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[2] The Hearing record was held open to allow DVA an opportunity to submit documents or testimony in response to testimony given by Douglas Lanier, M.D. concerning Network 8's quality data for the DVA's facility. No rebuttal documents or testimony were received, and the Hearing record was closed.

[3] The 2007 State Health Plan and the 2006 CON Manual were in effect at the time of the Application's filing. The 2006 State Health Plan and the 2000 CON Manual were in effect at the time of the Emergency Application's filing. However, no changes were made to the ESRD need criteria between the 2006 and 2007 State Health Plan and while some changes were made to the CON Manual between the two versions, there are no changes applicable to the issues subject to the Hearing. Thus, references to the "Plan" or "State Health Plan" include both the 2006 and 2007 State Health Plan and references to the "CON Manual" or "Manual" include both the 2000 and 2006 versions, unless otherwise noted.

Department's applicable rules and regulations. Thus, she recommended approval of the Application in her Hearing Officer's Findings of Fact and Conclusions of Law (the "Opinion"). R.E. 16. On June 25, 2009, the State Health Officer, who is the head of the Department, issued his Final Order, concurring with and adopting the hearing officer's Opinion as his own and issuing the CON.

Contestants timely filed their notice of appeal in Hinds Chancery Court on July 14, 2009. After briefing and a hearing, the chancery court on October 20, 2009 issued its opinion and order reversing the Final Order. R.E. 2. Apparently because this opinion did not expressly tell DVA to shut down its facility, DVA filed a motion for clarification, which was granted on December 15, 2009, in an order directing DVA to shut down its facility within 90 days. R.E. 3. Displeased with so much clarity, DVA noticed its appeal to this Court on December 18, and without seeking a stay in the chancery court, went first to this Court requesting a stay pending resolution of this appeal. This Court granted same on February 22, 2010. DVA has thus been operating its dialysis facility without a valid CON since November 2006 – almost four years at the time of this brief's filing, and likely *over* four years by the time this case is submitted to the Court.

II. Relevant Facts

Contestants assert that DVA's relocation of its ESRD station four miles from its old location and within 4.3 miles of the D'Iberville facility violated the CON Law and did not comply with the State Health Plan and the CON Manual.

DVA's actions in commencing construction of a new facility *without* a CON, obtaining an emergency CON one year *after* Hurricane Katrina, and filing for a permanent CON *after* completion and operation of the new facility, caused an odd situation to develop. DVA's ESRD facility, a healthcare facility subject to the CON law, was replaced with a new ESRD facility only 4.3 miles from D'Iberville's facility. This new facility was constructed *prior* to a hearing on the Application; *prior* to a hearing officer's recommendation on the project; *prior* to a final order from the State Health Officer; and without a final, non-appealable CON. (For ease of reference, a time line setting forth pertinent events involving the timing of actions taken by DVA related to both the "old" facility at 12 Marks Road and the "new" facility located at 13150 Ponce de Leon, and to the Emergency Application and actual Application, is attached hereto as Appendix.)

Hurricane Katrina made landfall on the Mississippi Gulf Coast on August 29, 2005. Most of the damage to the Gulf Coast was from Gulfport to the west, with the eye of the hurricane passing between Gulfport and Bay St. Louis. T. 800. In Ocean Springs, the damage from the hurricane was along the waterfront and around the bayou area, not the area near Ocean Springs Hospital where DVA's facility was located. T. 258, 739,

746, 800. Partial electricity was restored at Ocean Springs Hospital within the first week after the Hurricane; within two weeks in east Ocean Springs there was water, electricity and cable; and approximately a week after the Hurricane telephone service was restored. T. 258, 259, 261, 746. At the time of the CON hearing, Dr. Tracy Pittman[5] ("Pittman")'s medical office was still located at 12 Marks Road adjacent to the old facility, now identified as 14 Marks Road. T. 246. Pittman admitted there was no storm surge at the old facility and flood water did not enter the building, though rain water came through the roof. T. 249, 310. In fact, DVA's dialysis equipment, supplies and patient records were not damaged, although located in the old facility during the Hurricane. T. 313, 510-11. There was no testimony that any type of dangerous mold was growing in the old facility, and the "black mold" alluded to by DVA in the chancery court was simply the type of mold that is removed by ripping out the affected areas, as no mold abatement was undertaken. T. 308.

The evidence is that DVA did not seriously contemplate renovating the facility. Sometime before or after the hurricane, DVA decided to close its ESRD facility at 12 Marks Road and build another in a more advantageous location. Pittman, DVA's medical director and landlord, admitted under oath that he had discussed relocating and moving the Ocean Springs dialysis facility *prior* to the hurricane. T. 313. On August 6, 2006,

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[5] Pittman serves as the medical director for DVA's Ocean Springs Dialysis facility and its Lucedale facility; was the landlord of the old facility; and is the landlord of the new facility. T. 244-45, 253, 335

two weeks shy of the one year anniversary of Katrina, DVA filed its Emergency Application (R.E. 6) *after* it had taken the following actions:

- DVA prepared a proforma for a new 16 station ESRD facility on September 26, 2005 (R.E. 44);
- Pittman, DVA's landlord at both the old and new facility entered into a real estate contract for the new facility's site on October 10, 2005 (R.E. 45);
- a Warranty Deed conveying the new facility's site to Pittman was executed on November 17, 2005 (R.E. 46);
- DVA entered into an Agreement to Design and Engineer the new facility with TerMac Construction ("TerMac") on October 28, 2005 (R.E. 47);
- schematic plans for the new facility were finalized on or about January 20, 2006 (R.E. 48);
- Pittman received his insurance estimate for repairing the property including both his clinic and the ESRD facility on February 13, 2006 (R.E. 49);
- a Construction Agreement for the new facility between DVA and TerMac was executed on March 14, 2006 (R.E. 50);
- and a Lease Agreement between Pittman and DVA for rent three times more than that at the old facility was executed on April 1 or 5, 2006[6] (R.E. 51).

Then, shortly after the filing of the Emergency Application, a Certificate of Substantial Completion — meaning 90-95% of the work on the building was complete — was issued

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[6] This Lease Agreement became effective on November 17, 2006. R.E. 51, 55.

by the Contractor on October 9, 2006, only three days after the Emergency CON was issued (R.E. 52). A Certificate of Occupancy, giving the owner the right to occupy the building per the City's approval was issued in early to mid-October (T. 358-59, 389; R.E. 53). The new facility opened on November 17, 2006, forty-two days after the issuance of the Emergency CON that gave DVA authority to *begin* the alleged emergency relocation and three days *before* the regular Application was filed. T. 205, 317; R.E. 51, 54.

The Emergency Application told the Department that the old facility was *completely* destroyed; included photographs of roof damage; and stated that DVA could not find any other acceptable site for the facility. R.E. 6. In fact, the facility was *not* completely destroyed. The building is currently occupied by Pittman and used for the treatment of ESRD patients. The filing of the Emergency Application certifying that the facility was *completely* destroyed was filed *after* the insurance estimate for repairing the old facility and Pittman's private clinic at a total cost of $136,884.79 was given on February 13, 2006, almost six (6) months *prior* to the Emergency Application filing. R.E. 49. Daniel J. Sullivan ("Sullivan"), an expert in healthcare planning and healthcare finance (T. 830) who testified on behalf of Contestants, stated a determination whether the facility was "completely" destroyed was important because

> a fundamental premise of this application is we had to replace the facility. And I believe the application also discussed that the only available suitable land that [DVA] could find was located this four point something miles away. But if indeed the existing facility could have been rehabilitated to

> accommodate ESRD services, then that would have obviated the need to relocate.

T. 851. Don Eicher ("Eicher"), the Department's Director of Health Planning and Resource Development (the CON division of the Department), testified the Emergency Application was approved in the belief that DVA's old facility was "either totally destroyed or rendered useless by Hurricane Katrina." T. 33.

Unaware that all the above actions had been undertaken by DVA to construct a new facility (T. 190, 206-07, 872; see App.), the Department's staff analysis recommended approval of the Emergency Application, and the Department issued the Emergency CON.[7] In essence, DVA simply used the Hurricane as an excuse to move its ESRD facility from what it considered an inadequate facility and as an excuse to build a new facility in what it considered a more desirable location. As will be discussed herein, this course of action was taken without regard for the CON Law, and the Department allowed the project without ever comparing it to the applicable provisions of the Plan and CON Manual.

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[7]DVA's witnesses attempted to justify DVA's violation of the CON law by saying they talked to Steve Egger ("Egger"), with the Department's Bureau of Health Facilities Licensure and Certification division ("Licensure"). T. 515, 556-58, 568-69, 578. But DVA admitted it knew there was a difference between the CON division and Licensure division at the Department and that it talked only to Egger. T. 584-85.

Egger, however, testified he never talked to anyone from DVA regarding whether it needed a CON to rebuild or to relocate an ESRD facility, and that he did not, and would not, play any role in awarding a CON since that was not under the Licensure division. T. 652-53. Only the State Health Officer can make a final decision regarding the issuance of a CON. Miss. Code Ann. § 41-7-197(2).

SUMMARY OF THE ARGUMENT

DVA was required by the State Health Plan to meet the Need Criterion applicable to the "establishment" of a dialysis facility, because it was moving all of its licensed stations from one location to another. It did not meet that requirement, but the Department granted it a CON anyway, accepting a lesser showing of need on the theory that DVA was applying for a "relocation," not an "establishment." With any luck, this will be the last time this Court has to explain to the Department that the law does not allow the Department to apply a lessened standard of need for a "relocation" in contradiction of the State Health Plan. The chancery court correctly held that the Department erred as a matter of law.

The Department also erred in granting DVA an emergency CON where no emergency existed and where the law did not provide for *moving* one's facility to a sweeter spot under the guise of "emergency." DVA's abuse of this process should not have been allowed by the Department.

Even more egregiously, the Department permitted DVA to violate the legal prohibition against making capital expenditures on building a facility without having a CON in hand. The present case offers a breathtaking example of a provider's utter disregard for the CON Law, a disregard rewarded by the Department. The chancery court held correctly that DVA violated the law.

Finally, the chancery court did not err in disregarding DVA's misguided "administrative estoppel" argument. Even if judicial estoppel could apply to

> **41-7-193 mandates that, absent demonstrated substantial compliance with the criteria determined applicable to CON application of the type in question**, the Health Officer must deny the CON.

Baptist, 663 So. 2d at 574 (emphasis added).

As will be discussed herein and as demonstrated by the record in this case, DVA failed to demonstrate that it complied with the Plan's and Manual's need criteria, and the Department's approval of the Application without substantial evidence and by applying a lesser standard of need was arbitrary and capricious and justifies the Court's review and reversal of the CON.

I. The Department Erred in Finding a Need for the Project.

A. The Department May Not Apply a "Lesser Standard of Need."

In the leading decision on applicable standards of need, this Court held that the Department, by "electing to apply a severely lessened standard of need to the ... project based upon a conclusion that relocation was taking place," committed a "most serious error ... requiring reversal" of the order granting the CON. *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health* ("*St. Dominic*"), 728 So. 2d 81, 85 (Miss. 1998). Nearly eight years later, this Court relied on *St. Dominic* to hold that the showing of need and need criteria utilized by the Department "must be commensurate to what the project actually is and the impact which it actually has on the ... health care market." *St. Dominic-Madison Co. Med. Ctr. v. Madison Co. Med. Ctr.* ("*St. Dominic-Madison*"), 928 So.2d 822, 827 (Miss. 2006) (quoting *St. Dominic*, 728 So. 2d at 89). As will be discussed herein, DVA failed to demonstrate its compliance with the Plan's criteria for the

establishment of a facility in a different service area, and the Department simply allowed minimal compliance with a lesser standard based upon its classification of DVA's Application as a re-establishment/relocation project.

B. The State Health Plan Sets the Applicable Need Criterion.

Under the State Health Plan, DVA's transfer of its dialysis facility into a different ESRD service area from where it previously provided ESRD services constituted the establishment of a new dialysis facility. The Plan, under its "Certificate of Need Criteria and Standards for End Stage Renal Disease (ESRD) Facilities," provides:

> When a provider proposes to offer ESRD services in an ESRD facility service area where he does not currently provide services or proposes to transfer an existing ESRD unit(s) *from a current location into a different ESRD facility service area, it will constitute the establishment of a new ESRD health care facility*. . . .

R.E. 29 (emphasis added). Unlike service areas for most other healthcare facilities or services controlled by the CON law, where the Plan generally sets out predetermined geographic boundaries, the "ESRD Facility Service Area" is facility-specific, radiating from the site of a given ESRD facility. The Plan defines an ESRD Facility Service Area as:

> the area within thirty (30) highway miles of an existing or proposed ESRD facility. ESRD Facility Service Areas, including the Service Areas of existing facilities which overlap with the proposed Service Area, shall be used for planning purposes.

R.E. 29. Since an ESRD Facility Service Area ("Service Area") is facility-specific, it necessarily changes with the movement of an ESRD facility; therefore, while a portion

of its Service Area remained the same, DVA's Service Area shifted 4.3 miles with the construction of the new facility, and a new and different 30-mile-radius Service Area was established for DVA's new facility. Eicher for the Department admitted that DVA, by moving to its new location, created a different Service Area.

> Q: ... I think you said that every - every [ESRD] facility on the Coast has a different service area because it's located - - they're located in different places?
> A: Correct.
> Q: ... And would you agree with me that when you move a facility ... or it locates five miles down the road, it now has a different service area?
> A: Its highway miles would change to another facility's.
> Q: It would have a different service area?
> A: To the extent of that distance, yes. ... Under this criteria, it would have a different service area.

T. 146-48.

Since the Plan sets forth two instances that apply to DVA's project and that "constitute" the establishment of an ESRD facility under the Plan's criteria – (1) a provider proposing to offer ESRD services in a different Service Area from where it currently provides services, and (2) a provider proposing to transfer existing ESRD unit(s) from a current location into a different Service Area – the Plan's Need Criterion for the Establishment of an ESRD Facility applies. In *St. Dominic-Madison*, this Court quoted with approval the chancery court's summary of the law:

> [p]ursuant to statute, the controlling question in every CON review is whether the project substantially complies with the Plan's projection of need, not any other lesser standard of need. **If [the Department] strays from applying the Plan's projection of need, it commits legal error**, and acts arbitrarily and capriciously. ...

St. Dominic-Madison, 928 So. 2d at 826 (emphasis added). The Plan's applicable ESRD Need Criterion provides:

> 1. Need Criterion: An applicant proposing the **establishment** of a limited care renal dialysis facility **or the relocation of a portion** of an existing ESRD facility's dialysis stations to another location shall demonstrate, subject to verification by the Mississippi Department of Health, that each individual existing ESRD facility in the proposed ESRD Facility Service Area has **(a)** maintained a minimum annual utilization rate of eighty (80) percent, **or (b)** that the location of the proposed ESRD facility is in a county which does not currently have an existing ESRD facility but whose ESRD relative risk score using current ESRD Network 8 data is 1.5 or higher.

R.E. 29 (boldfacing altered). The terms "establishment" and "relocation of a portion" might seem to leave a gap for DVA to relocate the entirety of its facility without being required to prove (a) or (b).[8] However, as the chancery court correctly observed, the Plan defines "establishment" to include a 100% "relocation":

> When a provider proposes to offer ESRD services in an ESRD facility service area where he does not currently provide services **or proposes to transfer an existing ESRD unit(s) from a current location into a different ESRD facility service area,** it will **constitute the establishment of a new ESRD health care facility** . . . .

R.E. 2 at 5-6 (quoting Plan) (emphasis added). While this Court will defer to an agency's interpretation of its governing statutes and rules, it will not do so where that interpretation is contrary to the plain language thereof. *BellSouth Telecomm., Inc. v. Miss. Pub. Serv. Comm'n*, 18 So. 3d 199, 202 (Miss. 2009). The language of the Need Criterion is clear and unambiguous, and the Department's misinterpretations of it do not

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[8] There is no contested issue as to the applicability of criterion (b) as there are other ESRD facilities in the county.

merit deference, as that would merely frustrate the intent behind the State Health Plan and the CON Law.

C. DVA Did Not Meet the Applicable Need Criterion.

Once again, the Department's classification of a project as one type versus another in an attempt to apply a lesser standard of need and approve a project is at issue, despite this Court's rulings to the contrary. DVA and the Department labeled DVA's ESRD project a *relocation* instead of the *establishment* of an ESRD facility in order to apply a lesser standard of need. DVA, prior to Hurricane Katrina in August 2005, operated its old dialysis facility at 12 Marks Road in Ocean Springs, Mississippi, and in November 2006,[9] it opened its new dialysis facility, 4.3 miles away (and approximately four miles from the Appellants' D'Iberville facility), at 13150 Ponce de Leon, Ocean Springs. R.E. 56. Instead of classifying the DVA project as a CON application for the establishment of an ESRD facility under the State Health Plan's provisions, the Department incorrectly classified the DVA project as the relocation and re-establishment of an ESRD facility. This classification led the Department to allow and require compliance with a lesser standard of need than the project actually required under the Plan.

1. DVA Did Not Meet the 80% Threshold.

Similar to applicants in past cases where the Department approved a CON application based on a lesser standard of need, DVA made no attempt to comply (and

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[9] As discussed in more detail below, DVA's new ESRD facility continues to operate at the new site even during the pendency of this appeal, in violation of the statutory stay.

cannot comply) with the applicable 80% threshold. *See St. Dominic-Madison*, 928 So.2d at 825; *Singing River Hosp. Sys. v. Biloxi Reg'l Med. Ctr.*, 928 So.2d 810, 815 (Miss. 2006) (both stating that if appropriate standard of need was applied respective applicants could not comply with need criteria applicable to their projects). DVA cannot demonstrate compliance with the 80% threshold, as Contestants' facilities, located in the Service Area, do not have an 80% utilization rate. Testimony and evidence at the Hearing demonstrated D'Iberville's utilization rate was 40%, and Biloxi's utilization rate was 53%. T. 672, 678; R.E. 29, 62, 63.

DVA complains in its brief that "the net effect will be that an ESRD facility will never be able to move as long as another facility within 30 miles keeps its utilization levels below 80%." DVA Brief at 25. Well, yes, that is what the State Health Plan says. DVA and the Department may not like it, but the Plan controls nonetheless.

2. DVA Transferred Its Unit into a Different Service Area.

DVA moved its ESRD facility to its new site, and this relocation established a new 30-mile radius Service Area for DVA, triggering the application of the Plan's Need Criterion to the project. As Eicher testified, the movement of an ESRD facility 4.3 miles shifts the Service Area of the facility. T. 146-48. So while by definition DVA's new location has a new applicable 30-mile radius Service Area, and though the Plan states that a provider who either proposes to offer ESRD services in a different Service Area or proposes to transfer existing ESRD unit(s) into a different Service Area constitutes "the

establishment of a new ESRD healthcare facility," the Department refused to consider DVA's project as the establishment of an ESRD facility.

The Department reasoned that, since the old DVA facility existed in Contestants' respective Service Areas, there was no need to review compliance with the Need Criterion. That was erroneous, because the Need Criterion does not discuss *other* facilities' Service Areas, but discusses the Service Area of the *proposed* facility. R.E. 16 at 16. Instead of considering the Plan's criteria, the Department, in adopting the hearing officer's recommendation, simply held that *no* ESRD criteria applied (as if the Plan had not anticipated such a situation) and that the project simply needed a CON because it was a relocation of a healthcare facility. R.E. 16 at 14-15. However, the Department required no compliance with any relocation criteria, as there are none related to ESRD facilities. *See St. Dominic-Madison*, 928 So. 2d at 826 (stating chancery court held "there is no specific 'relocation criteria' located in any part of the Plan or applicable statutes'"). This application of a lesser standard of need rendered the Need Criterion provisions of the Plan inapplicable, and found, presumably, that only the CON Manual's general review criteria applied. R.E. 16 at 14.

Though the hearing officer tried to explain why the Need Criterion did not apply to DVA's application, she *never* discussed the definition of an ESRD Facility Service Area, and she *never* discussed the fact that DVA's relocation created a new Service Area for the new DVA facility. Instead, to justify the decision that *no* Plan criteria applied, she

(and the Department in adopting her opinion) discussed the policy section of the Plan concerning ESRD facilities and cites the definition of Need Threshold which states,

> for planning and CON purposes a need for an additional ESRD facility may exist when each individual operational ESRD station within a given ESRD Facility Service Area has maintained an annual utilization rate of 80 percent, i.e. an average of 749 dialyses per station per year.

R.E. 16 at 15-16. From here the Opinion made the leap that the 80% requirement of the Need Criterion is intended only to prevent " 'additional' ESRD facilities within 30 miles of existing facilities that already might be underutilized. This policy must guide and determine the Department's decision in this case." R.E. 16 at 16 (quotations in original). However, the Need Threshold definition simply reinforces the Need Criterion, which states that an ESRD facility cannot be placed in a Service Area if *all* facilities within the proposed Service Area have not maintained an 80% utilization rate. The Department's interpretation disregards the actual, plain language of the Plan's Need Criterion which clearly set forth the two instances which are to be considered the establishment of an ESRD facility and which will thus trigger the application of the Need Criterion.

Though this Court has held repeatedly that "'no lesser showing of need will be required by this Court based on the notion that a "relocation" has taken place,'" the Department acted as though those holdings were confined to the specific facts of those cases. The Department actually found it distinguishable that DVA was not a provider using unused capacity to build a new facility and enter a new service area, such as the hospital in the *St. Dominic* case. However, this reasoning fails to address the primary

holding from the *St. Dominic* case – the Department cannot apply a lesser standard of need to a project based on its or an applicant's mischaracterization of a proposed project. This Court was quite clear:

> the most serious error committed by the Health Officer, and the error requiring reversal, was **not** in defining "relocation," **but rather** in electing to apply a severely lessened standard of need to the North Campus project based upon a conclusion that a relocation was taking place.

St. Dominic, 728 So.2d at 85 (emphasis added). Not the definition of "relocation," but the abuse of that definition to rationalize "a severely lessened standard of need," was "the most serious error." In the present case, of course, the Department's contrived "definition" not only disregarded the Plan, but led it to conclude that *no* Need Criterion applied. *St. Dominic* could not be more on point.

Indeed, the reasoning adopted by the Department in this matter and the reversed decision from the Department in the *St. Dominic* case are remarkably similar. This Court noted the Department's flawed reasoning in *St. Dominic*:

> Since this is a relocation of already licensed ... authority within the same ... Service Area, the issue of need doesn't revolve around whether or not there is a need for additional beds in this ... Service Area, because the proposed relocation won't increase the number of licensed beds. ...

St. Dominic, 728 So. 2d at 85. Likewise, in the present case, the Department reasoned that since DVA's dialysis facility was already licensed and the relocation was within its existing Service Area, the project didn't have to be reviewed under the Plan's need criteria because DVA's relocation would not increase the number of dialysis facilities in the Service Area. R.E. 16 at 16. This Court found in *St. Dominic* that this reasoning

would allow any hospital with surplus beds to build a new hospital wherever it desired under the "relocation" criteria as long as there was "any specific advantage" to the relocation. *St. Dominic*, 728 So. 2d at 85. Similarly, the Department's adopted findings would also allow any licensed dialysis facility to relocate *anywhere* within its original 30-mile radius, regardless of any other facilities' Service Areas. Simply counting facilities overlooks the "key health planning issue," that "where a facility is located makes as much difference as how many facilities there are," as was testified to by Sullivan.

The failure of the Department to apply the Need Criterion's requirement that an existing facility, such as DVA, that either (i) proposes to offer services in a Service Area within which it does not currently provide services or (ii) that proposes the transfer of ESRD units from a location to a new Service Area, constitutes the establishment of an ESRD facility and thus requires compliance with the Need Criterion resulted in the approval of a CON based on a lesser standard of need, a standard that doesn't require compliance with the Plan's requirements. This disregard of the Plan's requirements is a violation of the CON law and was an arbitrary and capricious application of the Plan and CON law. The failure of the Department to base its decision on reason and judgment and instead make a decision which demonstrates "either a lack of understanding of or disregard for the surrounding facts and settled controlling principles," is arbitrary and capricious. *Ricks v. Miss. State Dep't of Health*, 719 So. 2d 173, 177 (Miss. 1998).

Again, DVA complains that the State Health Plan is bad policy. DVA Brief at 25. But that is not a matter for DVA or the Department to decide. Moreover, it may well be

that the Plan's objective of controlling unnecessary cost expenditures is not served by making it particularly easy for a dialysis facility to shed one facility and move to another at its whim, like a Walmart that sheds its skin and rebuilds down the road. DVA is not the first provider to chafe at the CON Law's existence, but that is an argument to be lodged with the Legislature, not the courts.

3. DVA Could Not Even Meet a "Relocation" Standard.

Even if DVA's moving its entire facility were a "relocation" not an "establishment," that would not have helped. The Need Criterion refers to "the establishment of a limited care renal dialysis facility *or* the *relocation* of a portion of an existing ESRD facility's dialysis locations to another location" (emphasis added). As our italics indicate, leaving aside that we have just shown that a transfer into a new service area is defined as an "establishment" by the Plan, the Need Criterion applies equally to an "establishment" *and* to a "relocation of a portion of" existing stations to "another location." The portion in the present case happens to be 100%, but if the Need Criterion would apply to the relocation of 5% of the stations, or 50%, or 95%, then it would defy all logic – and not be the "best reading" of the Plan – for the Need Criterion to be discarded where the relocating facility chooses to move *all* of its stations.

Thus, whatever the Department may have chosen to imagine about the policy behind the Plan, the plain language of the Plan does not allow the "intention" which DVA would foist upon it. Again analogizing the Plan to a statute, we submit that the best rule is this Court's rule that "this Court will not engage in statutory interpretation if a statute

is plain and unambiguous" and that this Court "accepts the text of the statute as the best evidence of legislative intent." *Division of Medicaid v. Miss. Indep. Pharmacies' Ass'n*, 20 So. 3d 1236, 1240 (Miss. 2009). The Plan is clear that a transfer of stations into a new service area is an "establishment," and furthermore that the same Need Criterion applies whether one is "establishing" a facility or "relocating a portion" of a facility's stations. Only on the absurd supposition that all the stations *but one* would equal a "portion," whereas moving *all* the stations would *not* be a "portion," could DVA successfully argue that the "relocation" section of the criterion does not apply. And regardless, the chancery court properly relied on the text of the criterion that says a transfer to a new service area is an "establishment."

As the chancery court rightly held, the service area of an ESRD facility is its 30-mile radius around it, so that when DVA moved its facility closer to its competitors' facilities, the "bubble" of the service area moved with it. R.E. 2 at 6. Thus, there was no question that the relocated facility was transferred into a different service area and thus constituted an "establishment" for purposes of the Need Criterion.

The chancery court was thus exactly right when it reversed the Department.

D. There Was No Substantial Evidence for the Department's Decision.

As stated above, the Supreme Court has found that Miss. Code Ann. § 41-7-193(1) prohibits the approval of a CON application if "there is no demonstrated substantial compliance with the criteria determined applicable and where no evidence of need under those criteria is found to exist ... absent demonstrated substantial compliance with the

criteria determined applicable to CON application of the type in question, the Health Officer must deny the CON." *Baptist*, 663 So. 2d at 574. This holding simply echoes the Plan's requirement that

> the [Department] intends to approve an application for CON if it substantially complies with the projected need and with the applicable criteria and standards presented in this *Plan*, and to disapprove all CON application which do not substantially comply with the projected need or with applicable criteria and standards presented in this *Plan*. ... Finally, it is the intent of the [Department] to strictly adhere to the criteria set forth in the [Plan] and to ensure that any provider desiring to offer healthcare services covered by the Certificate of Need statutes undergoes review and is issued a Certificate of Need prior to offering such services.

R.E. 59.

As discussed above, the Plan's Need Criterion for DVA's project requires compliance with the following standard: each individual existing ESRD facility in the proposed ESRD Facility Service Area must have maintained a minimum annual utilization rate of eighty (80) percent. R.E. 29. The Staff Analysis erroneously found only five ESRD facilities in DVA's proposed Service Area:

- South Mississippi Kidney Center - Biloxi (one of Contestants);
- South Mississippi Kidney Center, Orange Grove;
- South Mississippi Kidney Center - North Gulfport;
- South Mississippi Kidney Center - Gulfport; and
- "a facility operated by the applicant."

R.E. 21. Surprisingly, the Staff Analysis failed to consider the ESRD facility *closest* to the then-proposed DVA facility, namely D'Iberville (the other Contestant). R.E. 21.

Eicher attempted to correct this mistake by adding D'Iberville through his testimony, though the Staff Analysis clearly lists four providers on page 2 and discusses five providers ("includ[ing] a facility operated by the applicant") on page 4 of the Staff Analysis. T. 7, 159-60; R.E. 21.

In order to comply with the Plan's Need Criterion, DVA must demonstrate that the existing providers within a 30-mile radius of its new location (i.e., in its Service Area) have maintained an annual utilization rate of 80%. The evidence submitted at the hearing left no doubt that this threshold was not met, since Contestants' utilization rate is below 80%: D'Iberville's utilization rate is 40%, and Biloxi's utilization rate is 53%. T. 672, 678; R.E. 29, 57, 58.

Though DVA argued that Contestants' utilization is increasing, a projected increase does not suffice to comply with the State Health Plan. R.E. 59; *Baptist*, 663 So. 2d at 574. Clearly, since existing providers in the new Service Area were not operating at 80%, DVA's Application failed to comply with the Plan's Need Criterion and should have been disapproved by the Department. Instead, because of its mischaracterization of the project and its refusal to apply the Plan's provision, the Department failed to consider Contestants' utilization at all, but simply determined that "DVA did not have to satisfy the 80 percent need threshold." R.E. 16 at 15.

Because DVA failed to provide *any* evidence that the facilities in the new Service Area had maintained an annual utilization rate of 80% as required by the Need Criterion, in accordance with the Plan, the Department should have disapproved the Application

since it did not substantially comply with the projected need or with applicable criteria and standards presented in this Plan. There was no substantial evidence of compliance, and for this reason as well, reversal of the Final Order was proper, and the chancery court's judgment should be affirmed.

II. The Department Erred in Granting the Emergency CON.

A. DVA and the Department Abused the Emergency CON Process to Relocate DVA's Facility.

Does every hurricane have a silver lining? As shown in the Facts at the beginning of this brief, DVA used Hurricane Katrina as a convenient excuse to file its Emergency Application nearly one year *after* the hurricane in an attempt to justify all of the actions it had *already* taken to relocate its ESRD facility. App.. This was a flagrant abuse of the emergency CON process, and the Department acted arbitrarily, capriciously, and contrary to law in tolerating and ratifying such an abuse.

The emergency application process allows providers to receive a CON valid only for 90 days,[10] for an emergency project *without* undergoing review under the applicable Plan criteria and CON rules when the "health and safety of patients would be immediately jeopardized" without the operation of the healthcare facility. Miss. Code Ann. § 41-7-

[10]The CON Law states that a CON "shall be valid for the period of time specified therein," and that CON shall be issued for the period of time as specified by the Department. Miss. Code Ann. § 41-7-195(1)(2). This Court recently explained to the Department that such time limits are not discretionary. *Dialysis Solution, LLC v. Miss. State Dep't of Health*, 31 So. 3d 1204, 1212-13 (Miss. 2010).

207; R.E. 60. The emergency CON statute is entitled "Emergency *replacements*," and states that

> Notwithstanding any other provisions of Sections 41-7-171 to 41-7-209, when the need for any emergency *replacement* occurs, the certificate of need process may be expedited by promulgation of administrative procedures for expenditures necessary to alleviate an *emergency* condition. Emergency *replacement* means *replacement* of *partial* facilities or equipment the replacement of which is not exempt from certificate of need review pursuant to the medical equipment replacement exemption provided in Section 41-7-191(1)(f), without which the operation of the facility and the health and safety of patients would be *immediately* jeopardized.

R.E. 60 (emphasis added). Neither the statute nor the regulations promulgated under its authority contemplate "relocation" of a healthcare facility. R.E. 60. The statute refers to emergency "replacements" and contemplates only the "replacement of *partial* facilities or equipment." Miss. Code Ann. § 41-7-207 (emphasis added). This limitation is crucial since emergency CON applications are not subject to regular CON review procedures (T. 140; R.E. 24); no other healthcare provider is entitled to notice of the filing or granting of an emergency CON (T. 142); affected persons are not entitled to request a hearing on the project[11] (T. 56, 142; R.E. 24); and the project is not subject to review under the usual State Health Plan criteria and CON regulations (T.140;).

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[11] DVA attempted to argue at the Hearing that if the Contestants were aggrieved by the granting of the emergency CON they should have appealed the decision to the chancery court. However, there is no hearing process on emergency CONs at the Department and given the limitation on appeals from the Department under Mississippi Code Section 41-7-201, any appeal would be limited to the emergency application, emergency staff analysis, and emergency CON since there are no proceedings at the Department and the chancellor's review would be limited to the administrative record. Miss. Code Ann. § 41-7-201; T. 142-43.

The Department's interpretation of the emergency *replacement* statute as allowing a complete relocation of a facility is not supported by a plain reading of the statute. While generally the courts will give deference to an agency's interpretation and practice in the area of law committed to its responsibility by the legislature, this deference "*has no material force where agency action is contrary to the statutory language.*" *Miss. Ethics Comm'n v. Grisham*, 957 So. 2d 997, 1002 (Miss. 2007) (emphasis in original) (*citing Gill v. Miss. Dep't of Wildlife Conserv.*, 574 So. 2d 586, 593 (Miss. 1990)). Here, the language of the statute is plain and unambiguous, and since the statute "conveys a *clear and definite meaning* ... the Court will have *no* occasion to resort to the rules of *statutory interpretation.*" *Grisham*, 957 So. 2d at 1001(emphasis in original) (*citing Marx v. Broom*, 632 So. 2d 1315, 1318 (Miss. 1994)); *Gill*, 957 So. 2d at 1002 (stating agency erred by engaging in statutory interpretation when statute contained "plain and unambiguous" language).

The Department's interpretation and granting of the Emergency CON allowing a relocation and complete replacement expands the statutory language which is "plain and unambiguous." While sometimes relocations are replacements, not all replacements require relocation – the two are not interchangeable. The Department's approval of a complete relocation under the emergency CON law was erroneous as it violated the emergency CON statute and provisions of the CON Manual.

reopened on May 15, 2006. T. 685-87, 689-90, 796-97; R.E. 61. These units treated every patient that came to the facility. T. 690 692, 744.

Even with the availability of these facilities and available capacity, DVA continued to have its patients drive to its Pascagoula and Lucedale facilities for dialysis. T. 517-19, 744, 798, 801. Sullivan testified he didn't believe at the time the Emergency Application was filed in August 2006 that an emergency existed related to ESRD services, because other ESRD facilities in the area were up and running and there was existing capacity within the area to service ESRD patients. T. 849-50.

The emergency CON process exists to protect patients, not profits. Without an emergency where the "health and safety of patients [was] immediately jeopardized," the Emergency CON should not have been issued. Miss. Code Ann. § 41-7-207; R.E. 60. As there was available capacity in the area to treat all ESRD patients well within one year of the hurricane, the issuance of the Emergency CON more than a year after the hurricane was an error and violated the purpose of the emergency process – to alleviate issues that immediately jeopardize the health and safety of patients.

III. DVA Violated the CON Law by Building and Operating Its Facility Without a Valid CON.

As stated above, DVA's actions circumventing the CON Law allowed a healthcare facility to be relocated and begin providing services *prior* to a hearing on the Application; *prior* to a hearing officer's recommendation on the project; *prior* to a final order from the State Health Officer on the Application; and without a final, non-appealable CON. This

complete disregard of the CON Law and the Department's continued acceptance of that disregard, allowed DVA to build a new healthcare facility[12] and make capital expenditures for that healthcare facility *without* first obtaining a CON. Why have a CON Law at all, if that is how the Department is going to enforce it?

Mississippi Code Annotated Section 41-7-193(1) states,

> No person may enter into **any** financial arrangement or commitment for financing[13] a new institutional health service or **any other project requiring a certificate of need** unless such certificate has been granted for such purpose. A certificate of need **shall not** be granted or issued to any person for any proposal, cause or reason, unless the proposal has been reviewed for consistency with the specifications and the criteria established by the State Department of Health and substantially complies with the projection of need as reported in the state health plan in effect at the time the application for the proposal was submitted.

Miss. Code Ann. § 41-7-193(1). (emphasis added). Similarly, the CON Manual states,

> [N]o person shall engage in any of the following activities without obtaining a CON from the Department [including] any capital expenditure that exceeds the expenditure threshold;[14] [or for the] construction, development, or establishment of a new health care facility; [or for] the relocation of a health care facility or portion thereof ... unless such relocation of a healthcare facility or portion thereof .. which does not involve a capital expenditure by or on behalf of health care facility, is

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[12] An ESRD facility is considered a healthcare facility, not a healthcare service. Miss. Code Ann. § 41-7-173; T. 134-35.

[13] This statute does not contemplate a capital expenditure or a certain expenditure amount but is for *any* financing or arrangement for a new institutional health service or project requiring a CON. T. 925.

[14] A "capital expenditure is considered to be incurred when a contract enforceable under state law is entered into for the construction, acquisition, leasing or financing of a capital asset, or when the governing board of a healthcare facility takes formal action to commit its own funds for the construction of projects undertaken by personnel of the healthcare facility..." R.E. 24; T. 188-89.

within five thousand two hundred eighty (5,280) feet[15] from the main entrance of the health care facility.

T. 187-89; R.E. 24.

In flagrant disregard of these laws and rules, DVA entered into financial arrangements, made capital expenditures, and began and nearly completed construction for its new facility *prior* even to filing the Emergency Application, though it represented to the Department, in both its Emergency Application and regular CON Application, that these actions *had yet to be taken.* T. 190; R.E. 6, 9. And until the chancery court ruled, DVA had gotten away with it. While the stay on the chancery court's December 15 order remains in place, DVA continues to get away with it.

Thus, the Application was based upon a project *already substantially complete* at the time of the Emergency Application's filing, and the Department relied upon its erroneous granting of an Emergency CON in rubber-stamping its approval of the Application. The chancery court was completely correct in holding that "DVA is in violation of § 41-7-201(2)(a)," and this Court should affirm that holding.

It's an old saying that one would rather ask forgiveness than permission. But that is no way to administer the CON Law, as this Court stated in *St. Dominic*: it is "unwise for any litigant to take costly [construction] steps in anticipation of a favorable ruling ... [and] [t]he fact that a litigant has taken such costly steps in anticipation of a ruling by

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[15] This is one of the differences between the 2000 and 2006 CON Manual. The 2000 version allows relocation without CON review within 1,320 feet, and the 2006 version extends this distance to 5,280 feet. R.E. 24, 25.

this Court should not, of course, affect the course of this Court's deliberations." *St. Dominic*, 728 So. 2d at 92. Similarly, the fact that DVA chose to incur costs in constructing and operating a new facility prior to final CON approval should not stop this Court from reversing the CON and forcing DVA to close its facility.

DVA, by circumventing the CON law and abusing the emergency CON process, continues to enjoy the benefits of having a new healthcare facility built in violation of the CON Law. Under normal circumstances, an applicant for a new healthcare facility could not even begin construction of the new healthcare facility or enter into a financing arrangement, let alone offer services at the new location, without a non-appealable CON. The CON statute regarding the "stay of proceedings" pending CON appeals is clear, stating,

> There **shall be a "stay of proceedings" of any final order issued by the State Department of Health pertaining to the issuance of a certificate of need for the establishment, construction, expansion or replacement of a healthcare facility** for a period of thirty (30) days from the date of the order, if an existing provider located in the same service area where the health care facility is or will be located has requested a hearing during the course of review in opposition to the issuance of the certificate of need. The stay of proceedings shall expire at the termination of thirty (30) days; however, **no construction, renovation or other capital expenditure that is the subject of the order shall be undertaken,** no license to operate any facility that participate in the Title XVIII or Title XIX programs of the Social Security Act shall be granted, **until all statutory appeals have been exhausted** or the time for such appeals has expired. Notwithstanding the foregoing, the filing of an appeal from a final order of the State Department of Health or the chancery court for the issuance of a certificate of need shall not prevent the purchase of medical equipment or development or offering of institutional health services granted in a certificate of need issued by the State Department of Health.

Miss. Code Ann. § 41-7-201(2)(a) (emphasis added). DVA's project is subject to this "stay of proceedings" because Contestants appealed the Final Order pursuant to statute. Since an ESRD facility is defined as a "health care facility" and not as a service under the CON Manual and by statute, DVA's project is subject to the stay, until all statutory appeals have been exhausted. Miss. Code Ann. § 41-7-173(h); T. 134-35.

As described in detail above, DVA's circumvention of the CON law by the misuse of the emergency CON process allowed it to construct and make capital expenditures prior to obtaining a CON without the application of this statutory requirement. The Department's continued disregard of the statutes applicable to DVA's project have enabled DVA to escape appropriate CON review as discussed above and allow DVA to continue to operate to this day. The chancery court's judgment should be affirmed, and DVA's facility should be closed pursuant to that court's order.

IV. DVA's "Administrative Estoppel" Argument Lacks Merit.

DVA sought to convince the Department that it should violate its written hearing procedures in order to consider an extraneous CON matter not involving a party to this case. The Department's refusal to do so was not error, and there is no issue here of judicial or "administrative" estoppel.

A. The Department Properly Did Not Consider Extraneous Evidence.

DVA complains that the hearing officer refused to consider evidence offered by it with regard to an emergency CON application filed by a facility not involved in this case, a dialysis facility in Bay St. Louis.

DVA's argument is that the Department may have misapprehended the State Health Plan in Bay St. Louis's case as well as in the present case, which would somehow "judicially estop" Contestants from challenging the Department's error in the present case. One distinguishing fact is that no capital expenditures were made on the Bay St. Louis project until a regular CON had issued and the requirements of § 41-7-201(2)(a) were met. T. 624-25. Another is that neither DVA nor anyone else contested the Bay St. Louis application, so that there was no hearing and no challenge to the Department's understanding of the law.

However, the controlling fact here is that the CON Manual expressly requires each CON hearing to be conducted solely on the merits of the case, as each CON matter has its own facts and circumstances. The Manual requires that the hearing officer state the following at the beginning of each CON hearing:

> "This hearing is being conducted to discuss the merits of the application under consideration; please refrain from discussing or offering evidence concerning any other pending or yet to be offered application that is not relevant to the matter in issue."

Manual at 45. Therefore, the hearing officer was simply adhering to the Department's own regulation. Administrative agencies are not bound by the same procedural or evidentiary rules as are courts, and have wide latitude to govern their own proceedings within the broad confines of minimum due process. *McGowan v. Miss. State Oil & Gas Bd.* (*McGowan II*), 604 So. 2d 312, 318 (Miss. 1992).

B. Judicial or "Administrative" Estoppel Does Not Apply.

DVA argues that "judicial estoppel" should apply against Contestants, who supposedly took advantage of one interpretation of the State Health Plan in one matter and then advanced a different interpretation in the present case. DVA cites no authority for its implicit proposition that *judicial* estoppel applies to *administrative* proceedings — and in particular, to non-adversarial agency proceedings such as the Bay St. Louis facility's application. "We apply the doctrine of judicial estoppel where 'there is multiple *litigation* between the *same parties* and one party knowingly asserts a position inconsistent with the position in the prior litigation.' " *Rankin v. Am. Gen. Fin., Inc.*, 912 So. 2d 725, 728 (Miss. 2005) (quoting *In re Mun. Boundaries of City of Southaven*, 864 So. 2d 912, 918 (Miss. 2003)) (emphasis added). There was no "litigation" in that case, or any adversarial relationship between the Bay St. Louis facility and the Department. Even if *judicial* estoppel were to be imported into administrative proceedings, it would be inappropriate to do so where, as here, there was no adversarial relationship.

Most importantly, the allegedly inconsistent positions have to do with a pure question of law: the interpretation of the State Health Plan's Need Criterion. "The *fundamental concept* of judicial estoppel is that a party in a judicial proceeding is barred from denying or contradicting *sworn statements* made therein." *Franklin v. Thompson*, 722 So. 2d 688, 695 (Miss. 1998) (emphasis added); *accord, Banes v. Thompson*, 352 So. 2d 812, 815 (Miss. 1977). *See also O'Briant v. Hull*, 208 So. 2d 784, 787 (Miss. 1968):

> In cases where two or more inconsistent remedies are given, **which depend upon inconsistent facts**, and which must result in the suitor assuming a position inconsistent with the position which he must afterwards assume to prosecute the alternative remedy, an election, deliberately made with full knowledge of the facts and without fraud or imposition upon the part of his adversary, works a judicial estoppel whether the adversary has been injured thereby or not. The rationale of the doctrine is that courts will not permit suitors to solemnly affirm that a **given state of facts exists** from which they are entitled to particular relief.

(quoting *Clarke v. Ripley Sav. Bank & Trust Co.*, 181 S.W.2d 386, 389-90 (Tenn. Ct. App. 1943)) (emphasis added). While the contents of a CON application are indeed submitted under oath, interpretations of law therein are not the kind of "sworn statements" that the rule of judicial estoppel is meant to bar.[16] It is for the courts and the agencies, not for the parties, to decide what the law is, and a party's swearing on a stack of Bibles that (for instance) the speed limit on the interstate is 200 m.p.h. does not in any way tend to make it more likely than not that such is actually the law.

And it would indeed be a very strange rule that forbade a party to ask that *the law be correctly applied*, merely because the law might have been incorrectly applied in a prior matter. The Department at all times has the duty to apply the law. As this Court recently held, this Department in particular "has only legislation [sic] granted authority, there is not inherent authority.' " *Dialysis Solution*, 31 So. 3d at 1214 ("*sic*" in original) (quoting *Miss. Pub. Serv. Comm'n v. Miss. Power & Light Co.*, 593 So. 2d 997, 999

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[16]The federal courts hold that an agency is not barred by judicial estoppel from changing its position on legal issues. *Heitzman v. Comm'r of Int. Rev.*, 859 F.2d 783, 786 (9th Cir. 1988) (citing *Dickman v. Comm'r of Int. Rev.*, 465 U.S. 330, 343 (1984)). It would be unfair then to impose such a requirement on parties to agency proceedings.

(Miss. 1991)). The Legislature requires the Department to issue CONs only for applications that conform to the State Health Plan. Miss. Code Ann. § 41-7-193(1).

The "fundamental concept" of judicial estoppel is not applicable to this case, and it would be a travesty to pervert that doctrine into a rationalization for an agency's violation of the law. DVA's assignment of error here is without merit.

CONCLUSION

For the reasons stated above, the Department's award of the CON to DVA should be reversed and rendered, and the stay on the chancery court's order closing DVA's facility should be lifted; or in the alternative, the CON should be vacated, and the matter remanded to the Department for further proceedings.

Respectfully submitted, this the *1st* day of October, 2010.

Bio-Medical Applications of Mississippi, Inc. d/b/a South Mississippi Kidney Center - D'Iberville and Bio-Medical Applications of Mississippi, Inc. d/b/a South Mississippi Kidney Center - Biloxi

By: Allison C. Simpson
Allison C. Simpson

OF COUNSEL:

Thomas L. Kirkland, Jr. (MS [redacted]
Allison C. Simpson (MSB [redacted]52)
Andy Lowry (MSB [redacted])
Copeland, Cook, Taylor & Bush, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-8242

Counsel for Contestants-Appellees

CERTIFICATE OF SERVICE

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

The Honorable Denise Owens
Hinds Chancery Court
Post Office Box 686
Jackson, Mississippi 39205-0686

Mark W. Garriga, Esq.
Donna Brown Jacobs, Esq.
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
Post Office Box 6010
Ridgeland, Mississippi 39158-6010

Bea Tolsdorf, Esq.
Mississippi State Department of Health
570 East Woodrow Wilson Drive
Jackson, Mississippi 39216

So certified, this the *1st* day of October, 2010.

Allison C. Simpson