BEFORE THE SUPREME COURT OF MISSISSIPPI

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL	**APPELLANT**
VS.	**CASE NO. 2011-SA-7**
MISSISSIPPI STATE DEPARTMENT OF HEALTH AND MADISON HMA, INC. D/B/A MADISON RIVER OAKS HOSPITAL	**APPELLEES**

REPLY BRIEF OF APPELLANT, ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

Appeal from the Madison County Chancery Court

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, St. Dominic-Jackson Memorial Hospital ("St. Dominic") respectfully requests oral argument in this matter. This case meets the standards in Rule 34(a) for oral argument in that (a) this appeal is not frivolous, (b) the dispositive issues raised in this appeal have not been recently and authoritatively decided, and (c) the decisional process would be significantly aided by oral argument.

As demonstrated in its original Brief and now in its Reply Brief, St. Dominic's appeal is not frivolous. St. Dominic has presented, with substantial supporting evidence, that the Mississippi State Department of Health ("Department") acted in an arbitrary and capricious manner. Furthermore, although the Court recently affirmed the decision of the Hinds County Chancery Court regarding the CON application of Forrest General Hospital ("FGH"), this appeal raises issues that have not been recently and authoritatively decided. As evidenced by their brief, Appellees question the validity of this affirmance. Finally, since this appeal presents multiple complex issues of law dealing with previous Mississippi Supreme Court opinions, the decisional process would be significantly aided by oral argument. As this Court is very aware, there have been multiple opinions over the years regarding the Certificate of Need laws and an oral overview and history of these decisions will aid the Court in reaching its decision.

ARGUMENT

I. INTRODUCTION.

The main question for this Court to determine is whether St. Dominic is proposing a relocation of a portion of its hospital or an establishment of a new hospital. Mississippi law is clear and succinct: an applicant can request certificate of need ("CON") authority for "[t]he relocation of a health care facility or portion thereof . . . ." *See* Miss. Code Ann. § 41-7-191(1)(b) (Hrg. Ex. 5). In its brief, Madison HMA, LLC d/b/a Madison River Oaks Hospital ("Madison HMA"), however, attempts to render this statutory language meaningless by arguing that any relocation project that results in two separate freestanding health care facilities is not a true relocation, but is actually the establishment of a new health care facility. Stated differently, the relocated portion of the health care facility, says Madison HMA, can no longer be like the original health care facility. Of course, Madison HMA ultimately fails to explain how a portion of a health care facility can be relocated without being like the original health care facility. For this reason, Madison HMA's argument is without merit and should be disregarded by this Court.

Since Mississippi law does permit the relocation of a portion of a health care facility, the result of such a relocation project can result in two separate health care facilities. This is exactly what is proposed by St. Dominic. St. Dominic is requesting CON authority to relocate up to seventy-one existing licensed and operational general acute care beds and related ancillary and support services associated with general acute care services to a new satellite campus in Madison County ("Application"). And unlike previous attempts to relocate a portion of a hospital, St. Dominic does not propose to relocate "phantom" beds (*i.e.*, beds that a hospital is licensed to utilize, but are not in actual operation), but instead, St. Dominic proposes to relocate existing licensed and operational general acute care beds. (Tr. 232-33). St. Dominic also proposes to relocate existing employees and equipment to the Madison County satellite campus. (Tr. 233).

Three years prior to St. Dominic's Application, FGH filed a similar CON application to establish a new freestanding satellite facility through the relocation of existing licensed and operational general acute care beds. As explained in greater detail hereinafter, FGH's project is similar to St. Dominic's Application in virtually every aspect. Despite these similarities, the same Hearing Officer that approved FGH's CON application as a "true relocation" disapproved St. Dominic's Application as a "new hospital." Thus, Madison HMA spent a considerable portion of its brief crafting multiple distinctions between St. Dominic and FGH's CON applications to justify the Hearing Officer's decision. These "dissimilarities," however, are not based in Mississippi law. Since the Department neither conformed to its prior norm when examining St. Dominic's Application nor explained the reason for its departure from such precedent, the Department committed reversible error.

II. ST. DOMINIC PROPOSES A TRUE RELOCATION PROJECT.

Unless certain exceptions are met, section 41-7-191 of the Mississippi Code requires a certificate of need for "[t]he relocation of a health care facility or portion thereof . . . ." Miss. Code Ann. § 41-7-191(1)(b). (Hrg. Ex. 5). The application of this statute is quite simple. A portion of a health care facility can be relocated[1] from one physical location to another.[2] Logically speaking, a relocation project will inevitably result in two health care facilities: (1) the relocated portion of the health care facility in a new physical location; and (2) the remaining portion of the health care facility at the original physical location. Madison HMA argues throughout its brief in effect that a relocation project cannot result in two separate freestanding health care facilities. According to Madison HMA, any relocation project that results in a second

[1] The Department has defined the relocation of a health care facility "as the relocation of a health care facility from one physical location or site to another." (Hrg. Ex 6).

[2] In addition, an entire health care facility can be relocated from one physical location to another. Madison HMA previously relocated its entire hospital to a new location. *See St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 954 So. 2d 505 (Miss. Ct. App. 2007).

health care facility must be considered an "establishment of a new health care facility" (pursuant to section 41-7-191(1)(a)) and not a relocation project. Such an interpretation renders the language of section 41-7-191(1)(b) meaningless, which should be avoided by this Court. *See State ex rel. Pair v. Burroughs*, 487 So. 2d 220, 226 (Miss. 1986)(holding "[a] construction which will render any part of a statute inoperative, superfluous, or meaningless is to be avoided.").

Although section 41-7-191(1)(b) does not define a "portion of a health care facility," the Department through its statutorily-given authority[3] has defined a portion of a health care facility "to be a wing, unit, ***service(s) or beds***." (Hrg. Ex. 6)(emphasis added). Here, St. Dominic proposes to relocate a portion of its hospital (more specifically, up to seventy-one beds) from Hinds County, Mississippi (one physical location) to Madison County, Mississippi (to another physical location). The proposed relocation will necessarily result in two hospitals. The main campus in Hinds County, Mississippi will still be a hospital and the relocated portion of the main campus in Madison County, Mississippi will also be a hospital. As previously noted, St. Dominic's Application cannot be condemned because it will result in two separate hospitals.

As this Court is well aware, the Mississippi Supreme Court has previously considered attempts by health care providers (including St. Dominic) to relocate a portion of their hospital. *See St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 728 So. 2d 81, 95 (Miss. 1998) (the "*Methodist* Opinion"); *St. Dominic-Madison Co. Med. Ctr. v. Madison Co. Med. Ctr.*, 928 So. 2d 822, 829 (Miss. 2006) (the "*St. Catherine's* Opinion"). The Mississippi Supreme Court in the past has criticized previous relocation projects for their attempt to relocate licensed but unused beds, which are also known as "phantom beds." *St. Catherine's*, 928 So. 2d at 928. Phantom beds have been described as beds that are "***not currently used, have never been***

[3] *See* Miss. Code Ann. § 41-7-185(c). Madison HMA does not dispute the Department's authority to define a "portion of a health care facility."

staffed, and will not actually be physically relocated anywhere." *Methodist*, 728 So. 2d at 95 (emphasis added). St. Dominic's Application proposes to relocate 71 *licensed and operational* beds (and not phantom beds) to the new facility in Madison Campus. (Hrg. Ex. 2, CON App., pp. 8-10; Tr. 232-33 & 234; Brief, pp. 10-12).

Madison HMA argues that St. Dominic is not relocating licensed and operational beds merely because St. Dominic has not identified the exact beds to be relocated. (Madison HMA Brief, pp. 4, 20). Practically, it would be very difficult for St. Dominic to identify the exact beds to be relocated when it originally filed the Application. As shown by the need to adjust its Master Facility Plan, hospitals like St. Dominic are always renovating, adjusting and increasing services.[4] (Tr. 235, 906-07). It would be very difficult (if not impossible) for St. Dominic to identify the precise 71 beds to be relocated to a facility to be built four or more years in the future. (Tr. 235). Regardless, this does not change St. Dominic's commitment to relocate licensed and operational beds to the new facility. (Tr. 234-37, Brief, pp. 11-12).

The Mississippi Supreme Court also criticized previous relocation projects because they were to be staffed with new employees and new equipment, rather than transferred employees and equipment. *See Methodist*, 728 So. 2d at 81; *St. Catherine's*, 928 So. 2d at 826. Here, St. Dominic is relocating existing staff and equipment to the new facility in Madison County. (Tr. 233, 237-38, 240). Madison HMA, however, erroneously argues that since St. Dominic has not identified the staff members[5] by name to be relocated, then St. Dominic must not be relocating

[4] Mr. Crook reviewed St. Dominic's bed location in September of 2007 and again on January 19, 2010. (Hrg. Ex. 59). Mr. Crook's review confirmed that St. Dominic's beds are constantly shifting. (Hrg. Ex. 59, Tr. 947-50). For example, in September of 2007, there were zero beds located on 4 East and by January 19, 2010, there were twenty-seven beds on 4 East. (Hrg. Ex. 59). Again, there were twenty-six beds located on 5 North in September of 2007, but by January 19, 2010, there were zero beds located on 5 North and the space was being used for office and support space. *Id.*

[5] Madison HMA also argues that since St. Dominic will have to hire some new employees, it is not a true relocation. (Madison HMA Brief, p. 11). There is no prohibition under Mississippi law against St. Dominic hiring some new employees for the propsed project. More importantly, the Department recently approved FGH's Application which also proposed to hire some new employees. (Hrg. Ex. 44, p.

any staff. (Madison HMA Brief, p. 11). This argument is without merit. There is no practical way for St. Dominic to identify individual staff members to be relocated to a facility that will not be complete until 2013 or 2014 (the Application was filed on December 1, 2008). Madison HMA is simply attempting to include an additional unreasonable burden on St. Dominic.

Similarly, Madison HMA criticizes St. Dominic's Application because St. Dominic proposes to purchase "*all-new* equipment." (Madison HMA Brief, p. 11)(emphasis in original). In support, Madison HMA misconstrues statements from St. Dominic's Application. St. Dominic has thoroughly responded to this assertion in its Brief. (Brief, pp. 13-14). Additionally, St. Dominic clarified all of these statements during the hearing. *Id.* Madison HMA should not be allowed to continue to misconstrue St. Dominic's own CON Application; St. Dominic is nevertheless committed to relocating equipment[6] to the new facility. (Tr. 240).

According to Madison HMA, "[t]here is no material difference" between St. Dominic's current Application and the application considered by the Mississippi Supreme Court in the *St. Catherine's* Opinion. (Madison HMA Brief, p. 16). Thus, this Court should treat them the same and affirm the Department's disapproval of St. Dominic's Application. This is exactly how the Department treated St. Dominic's Application – as if St. Dominic is proposing the same project as it did in *St. Catherine's*. This assertion, however, is absurd and not based in reality. This assertion is only true if you completely ignore the foregoing facts. To the contrary, St. Dominic presented to the Department a materially different Application than previously filed (St. Dominic is now proposing to relocate licensed and operational beds with existing employees and existing

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8-9). As discussed further below, FGH never identified its employees or positions that it planned to relocate to the new facility and the Department never condemned FGH for not doing so. (Hrg. Ex. 44, p. 8). To hold FGH to one standard and St. Dominic to another standard is arbitrary and capricious.

[6] Similar to the staff, it is impossible for St. Dominic to identify the specific pieces of equipment to be relocated for a facility to be built four or more years in the future. (Tr. 727). In addition, the Department should not require St. Dominic to identify specific pieces of equipment equipment when it did not likewise require FGH to do so.

equipment), but the Department instead chose to ignore those differences and disapprove the Application. Accordingly, the Department's actions were arbitrary and capricious and should be reversed as a matter of law.

Madison HMA also argues that St. Dominic's Application should not be considered a relocation project because a completely new building is being built. (Madison HMA Brief, p. 12-13). There is no question that in order for St. Dominic to relocate a portion of its beds to Madison County, such a relocation will necessarily require a structure to house the relocated beds. Nothing in the statute, the State Health Plan ("SHP") or the CON Review Manual prohibits[7] the construction of a new facility or limits the size of such a facility.

Madison HMA also argues that St. Dominic's Application is not a true relocation because there is not a decrease[8] in the number of services provided at its main campus in Hinds County, Mississippi. (Madison HMA Brief, p. 19). In this case, St. Dominic is relocating a portion of its main campus hospital to a new campus in Madison County, resulting in two separate hospitals.[9] Since both facilities are hospitals, then the facilities must both be able to offer the same health services as a hospital. Otherwise, it is not a true relocation. Acute care beds cannot exist in a vacuum, *i.e.*, without supporting services.

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[7] The Department did not impose this requirement on FGH. Like St. Dominic, FGH proposed to construct a new freestanding building to house the thirty relocated beds. (Hrg. Ex. 44, p. 2).

[8] Once again, this ignores the fact that FGH did not propose to eliminate any services at its main campus. As the Department acknowledged in its Staff Analysis, "Forrest General Hospital contends that the proposed project entails no licensed bed increases or decreases and ***no change in the range or types of services offered at the hospital.***" (Hrg. Ex. 43, p. 2)(emphasis added).

[9] Although St. Dominic intends to operate the proposed facility under the same numbered license as it main campus, it does not mean that St. Dominic can avoid obtaining a CON as suggested by Madison HMA. (Madison HMA Brief, p. 14). Additionally, it does not mean as originally suggested by the Department in its Staff Analysis that because the proposed campus must have a separate physical license (even if the licenses are numbered the same) it is not a true relocation. (Hrg. Ex. 3, p. 5). Nowhere in the Mississippi law, the SHP or the CON Review Manual is the requirement for a separate physical license to be considered a factor in the approval of a relocation application.

III. DEPARTMENT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO CONFORM TO ITS PREVIOUS DECISIONS.

On December 1, 2005, FGH filed an application requesting CON authority to relocate thirty existing licensed and operational "orthopedic" beds from its main campus to a new freestanding satellite facility in Forrest County, Mississippi. (Hrg. Ex. 44, p. 2). FGH proposed to locate the facility on a site adjacent to a building owned by Southern Bone and Joint Specialists, P.A.[10] ("SBJ"). (Hrg. Ex. 44, p. 2). The Department approved, and the Hinds County Chancery Court and the Mississippi Supreme Court affirmed, FGH's CON application. (Hrg. Exs. 44, 47, 49). On December 1, 2008, St. Dominic filed a similar Application requesting CON authority to relocate up to seventy-one existing licensed and operational general acute care beds to a new freestanding satellite facility in Madison County, Mississippi. (Hrg. Ex. 2). The Department, without any reference or discussion of its prior approval of FGH's CON application, or any attempt to distinguish the two applications, disapproved St. Dominic's Application. (R.E. 3). As a result, the Department committed reversible error.

The Department, as a state agency, must "either conform to its prior norms and decisions or explain the reason for its departure from such precedent." *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid, Inc.*, 21 So. 3d 600, 609 (Miss. 2009)(citation omitted); *see also Miss. Public Svc. Comm'n v. Miss. Power Co.*, 429 So. 2d 883, 900 (Miss. 1983). According to the Mississippi Supreme Court, "[t]he proper exercise of [an agency's] sound discretion permits differing treatment of similar issues in different . . . cases." *Miss. Public Svc. Comm'n*, 429 So. 2d at 900. An agency, however, cannot treat similar issues differently without "a clearly enunciated factual basis for making such a distinction . . . ." *Id.* If the agency does not

[10] SBJ is a professional association of physicians who specialize in orthopaedic surgery, arthritic joint replacement surgery, arthroscopy and sports medicine, trauma management, physical medicine and rehab, hand and microvascular surgery, and disorders of the spine. SBJ Home Page, http://www.southernboneandjoint.com (last visited September 30, 2011).

set forth such a distinction in its order, then "such different treatment clearly constitutes arbitrary and capricious action by the [agency]." *Id.* In this case, it is without dispute that the Department did not mention FGH's CON application[11] in its decision disapproving St. Dominic's Application. Since St. Dominic and FGH's CON applications are similar and the Department treated them differently without enunciating a factual basis for making such a distinction, the Department acted in an arbitrary and capricious manner and its decision must be reversed as a matter of law.

To its credit, Madison HMA understands the importance of this issue. This is why Madison HMA goes to great lengths to argue that the "two projects are *not* the same" and that there are "significant dissimilarities between the two projects . . . ." (Madison HMA Brief, p. 24)(emphasis in original). Unfortunately for Madison HMA, it cannot back up any of supposed "dissimilarities" with any substance. In fact, most of its "dissimilarities" are crafted by Madison HMA misconstruing FGH's CON application to support its position against St. Dominic.

As previously mentioned, FGH proposed to relocate thirty existing licensed and operational "orthopedic" beds to a new freestanding health care facility. (Hrg. Ex. 44, p. 4). Although FGH's CON application proposed to relocate "orthopedic" beds, there is no such category of hospital beds; FGH, in effect, proposed to relocate thirty general acute care beds (or general medical/surgical beds). Mr. Don Eicher on behalf of the Department testified:

> Q. ***There's no such thing***, as I appreciate it, ***as an orthopaedic bed***, whether it's elective or not elective surgery that's associated with that. Those are considered to be med/surg beds, right?
> A. ***They were med/surg beds.***
> Q. They're med/surg beds. ***And they are considered to be acute care beds; is that correct?***
> A. ***Right.***

[11] In fact, the Hearing Officer severely limited St. Dominic's ability to question the Department about its previous decision (including its decision regarding FGH's CON application) or to rely on the Department's previous decisions. (Tr. 106-125, 555-59, 624-26, 681-97).

(Tr. 130-31)(emphasis added). In the Staff Analysis of FGH's CON application, the Department repeatedly referred to the beds as licensed acute care (or medical surgical) beds:

> The transfer of ***30 licensed acute care inpatient beds from FGH*** to the orthopedic institute will be coming out of the older wing of the hospital.
>
> * * * *
>
> The proposed relocation/transfer of ***30 existing medical surgical beds*** will reduce the bed capacity at the main campus by 30 beds.

(Hrg. Ex. 43, p. 1-2)(emphasis added). Despite these assertions in the Staff Analysis, Madison HMA continues to propagate the "orthopedic" label as a true distinction: "Forrest General proposed to relocate/transfer dedicated, existing *orthopedic* beds from a designated wing and to construct a new satellite *orthopedic* institute campus . . . ." (Madison HMA Brief, p. 20)(emphasis in original). Since this is not a true distinction, it should be disregarded by this Court. Instead, it further demonstrates the Department's failure to conform to its prior norms by treating St. Dominic and FGH's CON application differently although both St. Dominic and FGH proposed to relocate a certain number of licensed and operational general acute care beds.

Madison HMA argues that FGH "proposed to relocate its orthopedic services" while "St. Dominic is not proposing to relocate *any* service line . . . ." (Madison HMA Brief, p. 20)(emphasis in original). Elsewhere, Madison HMA argues that "in [FGH]'s case, the only relocation was of orthopedic services and their designated beds, used beds, *not* of a *general* acute-care service and some beds to go along with it." (HMA Brief, p. 19)(emphasis in original). Once again, like an "orthopedic" bed, an "orthopedic" service line or service is just a label placed on it by FGH. It is irrelevant how FGH labels the services provided at its main campus or at the proposed satellite campus. The CON law only defines a health service.[12]

[12] According to section 41-7-173(k) of the Mississippi Code, "health services" means "clinically related (i.e., diagnostic, treatment or rehabilitative) services and includes alcohol, drug abuse, mental health and home health care services."

Furthermore, FGH, like St. Dominic, did not propose to transfer a health service, but a relocation of a portion of a health care facility. Specifically, FGH proposed to relocate thirty general acute care beds (not "orthopedic" beds) to the new satellite campus[13] along with the general health services[14] (not "orthopedic" services) that accompany the beds. Finally, Madison HMA cannot point to any authority requiring FGH or St. Dominic to relocate a particular "service line" as part of its relocation request.

Even if there was a requirement to relocate an entire "service line" as proposed by Madison HMA,[15] then FGH's project would fail to meet that criterion. As noted by the Hearing Officer, FGH "acknowledged that ***a certain level of orthopedic surgery services would be retained*** on the main campus." (Hrg. Ex. 44, pp. 8)(emphasis added). All of FGH's trauma orthopedic cases would continue to be performed at the main campus. (Hrg. Ex. 44, p. 8). In addition, all of the non-trauma orthopedic cases performed by non-SBJ physicians would

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[13] Madison HMA crafted an additional distinction by noting that "[t]he proposed new St. Dominic hospital wouldn't be adjacent to any specialized group servicing those specific type beds/services . . . ." (Madison HMA Brief, p. 20). In typical fashion, Madison HMA fails to cite any law or regulation in support of its assertion that such a distinction is relevant to the CON laws. As discussed further below, the location of FGH's proposed facility next to SBJ is simply another institution specific reason for FGH's relocation application.

[14] As previously noted, a relocated portion of a health care facility is just like the original health care facility. (Brief, p. 15-16). Thus, the relocated health care facility should likewise be able to provide the same general health services as the original health care facility. As Dr. Luke testified, health services are "implicit in the -- if you have licensed acute care beds, you are -- you are authorized under the CON law, or you require no further authorization to provide inpatient acute care services." (T. 551).

[15] Don Eicher testified during the hearing that "[r]elocation is not the transfer of a part of a service; it is a transfer of the entire service. . . . After the authority to provide a service has been relocated, the transferring facility will no longer have the authority to provide the same service." (T. 25). The Hearing Officer in her recommendation to the Department, made a similar statement: "[i]n discussing the term 'relocation' as the transfer of a health service, the Court held that the transfer of a health services required the transfer of the entire health service." (Hrg. Off. Op., p. 6, 14-15)(emphasis added). Both of these statements by Mr. Eicher and the Hearing Officer are completely contradictory to the position of the Department regarding FGH's CON application. The Department emphatically argued that Mississippi law does not require the relocation of an entire service: "[c]ontrary to Wesley's creative but flawed theory, there ***is absolutely nothing in the Mississippi Certificate of Need Law which remotely suggests that a hospital cannot relocate a portion of its acute care beds or services*** . . . . This statute does not state or even imply that a hospital must relocate 'all' of a particular type of health service in order to obtain a CON. This 'all or nothing' interpretation was created out of thin air . . . and there is no basis for that interpretation in the language of the statue itself." (Hrg. Ex. 48, p. 22) (emphasis added). The Department's action cannot be any more arbitrary and capricious.

continue to be at the main campus.[16] (Hrg. Ex. 44, p. 8-9). FGH did not even propose to transfer an entire "service line" and thus, this is not a "true" distinction between the projects.

Madison HMA attempts to contrast the two projects by arguing that FGH's proposed facility will "not offer the same range of services as" FGH's main hospital, but that St. Dominic proposes to provide the same health services as its main hospital. (Madison HMA Brief, p. 19-20)(emphasis in original). But this statement is not correct, St. Dominic will not provide the same range of health services at the proposed facility. Like FGH, the main hospital will continue to provide tertiary services, such as heart surgery and total joint replacement, but the proposed facility will provide lower acuity health services. (Hrg. Ex. 2, CON App., pp. 42-43, Tr. 818). Once again, this is just another "distinction" created by Madison HMA out of whole cloth.

Madison HMA argues that since St. Dominic is not decreasing its services, then it is "offer[ing] new, duplicated services in Madison . . . ." As previously demonstrated, FGH also did not plan to decrease any of its services at the hospital and thus, under Madison HMA's analysis, FGH should also be offering duplicated services at its new proposed facility. But this is exactly the opposite of what the Hearing Officer found. Although FGH did not decrease any of the services offered at its main hospital, the Hearing Officer nevertheless concluded that the FGH project did not involve any duplication of health services:

> [FGH] is not adding any orthopedic beds or services with this project. The proposal is for a relocation of existing, operational orthopedic beds. The mere fact that the beds are being moved to a freestanding building does not mean that services are being duplicated. [FGH's] licensed and operational orthopedic bed capacity will remain the same.

(Hrg. Ex. 44, p. 25). However, the same Hearing Officer concluded, St. Dominic's project "will unquestionably bring about an unnecessary duplication of services . . . ." (R.E. 3, p. 2). The

[15] According to FGH, physicians with SBJ only account for 67% of the non-trauma orthopedic cases. (Hrg. Ex. 44, p. 9). Thus, approximately 33% of the non-trauma orthopedic cases would still be performed at the main campus.

Hearing Officer failed to explain how the relocation of beds to a new facility is an unnecessary duplication of services in one case, but is not a necessary duplication of services in another case. This is further evidence that the Department applied a different standard to St. Dominic's Application and thus, the Department's decision should be reversed as a matter of law.

As previously stated, a relocation project will necessarily result in two hospitals providing the same health services. Inevitably, there will be some duplication of services. But since the statute allows for the relocation of a portion of a health care facility, then a relocation that results in two health care facilities is not result in *unnecessary* duplication of services. Otherwise, a relocation of hospital could not take place if it always resulted in two hospitals providing the same health services and would again render the statute regarding relocations meaningless, which is to be avoided.

Madison HMA further attempts to distinguish the FGH CON application based upon FGH's institutional specific reasons for its relocation project. (Madison HMA Brief, p. 21-22). For example, according to Madison HMA, FGH is relocating a portion of its orthopedic service line[17] "to maintain its trauma designation" on the main campus. (Madison HMA Brief, p. 21). Additionally, FGH is relocating a portion of its orthopedic service line because it is "not a practical investment" to renovate its older wings of the hospital. (Madison HMA Brief, p. 21-22). Finally, FGH's proposed facility is adjacent to a specialized physician group. (Madison HMA Brief, p. 20). So, according to Madison HMA, since St. Dominic is not proposing its relocation "to ensure it has space to continue to serve a high level of trauma cases", "to maintain its trauma designation", to be adjacent to a specialized physician group, or provide larger rooms

[17] Madison HMA misconstrues FGH's application by stating that FGH is "leaving ***only*** the required minimum of some certain service at its main campus to maintain its trauma designation." (Madison HMA Brief, p. 21)(emphasis added). FGH did not propose to only maintain the trauma cases at its main hospital for its trauma designation, but it also proposed to maintain all of the non-trauma cases performed by non-SBJ physicians (up to 33% of the non-trauma orthopedic cases). (Hrg. Ex. 44, p. 8-9).

to replace its older wings of the hospital, then the Department had every reason to deny St. Dominic's CON Application. Such a conclusion is absurd and without merit.

The "distinctions" identified by Madison HMA were FGH's attempt to satisfy the Need Criterion 1(a) – requiring an applicant to document the specific institutional need for the relocation. (Hrg. Ex. 7). It is irrelevant that FGH's reasons for its relocation project are different than St. Dominic's reasons. That is exactly why the Need Criterion 1(a) is characterized as "institution specific." (Tr. 548-49; Hrg. Ex. 44, p. 12).

Madison HMA attempts to distinguish FGH's CON application from St. Dominic by pointing out that the proposed facility "was located in the *same* city as the parent hospital and would only be five minutes from it." (Madison HMA Brief, p. 20)(emphasis in original). This is just another distinction created by Madison HMA. Nowhere in the SHP, CON Review Manual, or the CON law does it state a health care provider can only relocate beds within the same city or within a five minutes distance. How much more arbitrary and capricious could it be for the Department to approve a relocation project because the beds traveled only five miles from their original location, but not approve the same project if the beds traveled ten miles away? That is the definition of arbitrary and capricious.

Madison HMA attempts to distinguish St. Dominic's CON Application from FGH application by arguing that FGH "demonstrated it would transfer existing staff and equipment to the orthopedic campus." (Madison HMA Brief, p. 20). This is a half-truth. FGH does not plan to transfer all of its existing staff and equipment to the new facility. FGH acknowledged in its application that "that the project would require the ***hiring of certain new staff and the purchase of certain new equipment*** . . . ." (Hrg. Ex. 44, p. 8)(emphasis added). In fact, according to the FGH Staff Analysis, the FGH project involved "an addition of 51.6 full-time equivalent personnel at an estimated annual cost of $1,549,660." (Hrg. Ex. 43, p. 8).

Both FGH and St. Dominic proposed to relocate staff and equipment to the new satellite facilities. Both FGH and St. Dominic proposed to hire some new staff and purchase some new equipment. (Hrg. Ex. 44, p. 8-9). Despite these similarities, the Department acted in an arbitrary and capricious manner in treating these applications differently.

Madison HMA repeatedly condemns St. Dominic's CON Application because it did not identify the staff and equipment to be relocated to the new facility. (Madison HMA Brief, pp. 11-12). But not surprisingly, this distinction crafted by Madison HMA is once again not met by FGH. Madison HMA cannot point to any evidence that FGH identified the actual staff members by name or the specific pieces of equipment to be relocated. Thus, it would be arbitrary and capricious for the Department to require St. Dominic to identify the staff by name and specific pieces of equipment to be relocated but not require FGH to do likewise. But this is exactly what the Department did and thus, its decision should be reversed as a matter of law. [18]

Madison HMA attempts to distinguish St. Dominic's Application from FGH's CON application by arguing that the proposed FGH facility is not a "stand-alone general acute care hospital, but is dependent on the main hospital for support services, including janitorial, laundry, food services and pharmacy." (Madison HMA Brief, p. 23). Throughout its brief, Madison HMA avoids referring to FGH's proposed facility as a hospital, but refers to it, among other things, as an "orthopedic institute." A "hospital" is defined as

> an institution which is primarily engaged in providing to inpatients, by or under the supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment and care of injured, disabled or sick persons, or rehabilitation services for the rehabilitation of injured, disabled or sick persons. Such term does not include psychiatric hospitals.

[18] The Hearing Officer criticized St. Dominic's Application because it did not identify which employees or specific pieces of equipment that would be moved to the Madison campus, but yet did not criticize FGH when it also did not do so. (R.E. 3, p. 10; Hrg. Ex. 44, p. 8).

Miss. Code. Ann. § 41-7-173(h)(i). Nowhere in this definition does it make such distinction between a dependent or independent hospital (or a specialty hospital). It is either a hospital or it is not. It does not matter whether the hospital does its own laundry or sends it out each day. It does not matter under the definition whether the hospital has its own janitorial staff or contracts with a third party to perform it. Interestingly, neither the Hearing Officer in her recommendation to the State Health Officer nor the Department in its Staff Analysis mentioned this all-important distinction regarding the FGH CON application. (Hrg. Exs. 43, 44). The reason it is not in there is simple: it would be arbitrary and capricious for the Department to make such a distinction.

Despite Madison HMA's many attempts to distinguish the two CON projects, St. Dominic and FGH's project are very similar. Both projects proposed the partial relocation of a health care facility. The Department correctly determined that FGH proposed the relocation of a portion of a hospital. The Department determined that St. Dominic proposed the establishment of new hospital without enunciating any reason for treating its project differently. Accordingly, the Department acted in an arbitrary and capricious manner and its decision should be reversed.

IV. ST. DOMINIC'S APPLICATION COMPLIES WITH THE SPECIFIC NEED CRITERIA OF THE SHP.

A. Component I Complies With Specific Need Criteria of the SHP.

CON applications must also be reviewed by the Department for compliance with any specific need criteria of the SHP which are applicable to the application under consideration. Madison HMA argues that chapter 11, section 108.02 of the SHP applies to St. Dominic's CON Application because the Application "proposed the establishment of a new hospital . . . ." (Madison HMA Brief, p. 26). St. Dominic does not dispute that the relocation of a portion of its hospital will result in a new "hospital" as defined by section 41-7-173(h)(i), but the new

hospital[19] is a result of St. Dominic relocating a portion of its facility, which is permitted under section 41-7-191(1)(b), to a new facility in Madison County. Thus, the criteria for the establishment of a new hospital are not applicable to St. Dominic's Application.

Since St. Dominic is proposing a true relocation of a portion of the health care facility (*i.e.*, 71 licensed and operational general acute care beds), it must comply with chapter 11, section 108.03[20] of the SHP (the "CON Construction and Relocation Criteria") . Section 108.03 applies to "[t]he construction, development, or other establishment of a new health care facility, the replacement and/or *relocation of a health care facility or portion*[21] thereof . . . ." (Hrg. Ex. 7)(emphasis added). Like the Department determined in FGH,[22] section 108.03 applies to a relocation of a hospital as proposed by St. Dominic's CON Application. Accordingly, the Department erred in applying section 108.02 to St. Dominic's Application.

Interestingly, Madison HMA repeatedly argues that the Department rightfully ignored its own criteria for the relocation of health care facility or portion thereof and applied the criteria for an establishment of new hospital. (Madison HMA Brief, pp. 31-32). Madison HMA's sole basis for the reason why the Department can ignore its own rules is because the proposed relocation will result in a new hospital: "The State Health Officer also had substantial evidence from which to conclude that it would be unwise to apply Section 100.03 to any 'partial relocation' that effectively sets up a new hospital." (Madison HMA Brief, pp. 31-32). Whether it is unwise or

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[19] Likewise, FGH's CON application resulted in a new "hospital" by definition, but the Department correctly recognized that the new hospital was accomplished by relocating a portion of its main campus to a new freestanding facility in Forrest County, Mississippi. Thus, the Department did not apply the criteria for the establishment of a new hospital to FGH's CON application. (Hrg. Ex. 44, p. 11).

[20] In its Brief, St. Dominic detailed how it substantially complied with the applicable Need Criterion 1(a) of the CON Construction and Relocation Criteria. (Brief, pp. 24-36).

[21] Madison HMA correctly notes that section 41-7-191(1)(b) of the Mississippi Code does not define what constitutes a portion of a health care facility. But the Department through its statutorily-given authority has defined "[a] portion of a health care facility . . . to be a wing, unit, service(s), or beds." (Hrg. Ex. 6). Therefore, under the Department's definition, section 108.03 applies to an application for the relocation of beds from one facility to another.

[22] The Hearing Officer found that "the Department staff properly applied the CON Construction [and Relocation] Criteria to the Forrest General Application." (Hrg. Ex. 44, p. 11).

not, logic dictates that when a portion of a health care facility is relocated, then two health care facilities will result. There is no other conclusion. In effect, Madison HMA's argument completely undermines the authority for the partial relocation of a health care facility: if a partial relocation of a hospital results in two hospitals, then, according to Madison HMA, it is not a relocation of a portion of hospital, but the establishment of a new hospital.[23] This is not what the statute says and renders a portion of the statute meaningless. *See Pair*, 487 So. 2d at 226.

Section 41-7-191 (1)(b) of the Mississippi Code provides that a CON must be obtained for "[t]he relocation of a health care facility or portion thereof . . . ." (Hrg. Ex. 5). The Construction and Relocation Criteria (Section 108.03 of the SHP) apply to "[t]he construction, development, or other establishment of a new health care facility, the replacement and/or relocation of a health care facility or portion thereof . . . ." (Hrg. Ex. 7). The Department has defined a portion of a health care facility as "a wing, unit, unit, service(s), or beds." (Hrg. Ex. 6). St. Dominic is proposing to relocate 71 licensed and operational beds (*i.e.*, a portion of a health care facility) to a new facility in Madison County. Thus, the Department should have without question applied the Construction and Relocation Criteria. Since the Department failed to apply the Construction and Relocation Criteria, the Department's decision should be reversed.

B. Component IV Complies With Specific Need Criteria of the SHP.

Component IV of the Application involves the relocation of six licensed and operational general acute care beds to the Madison campus for the provision of Level 1 obstetrical and neonatal services. (Hrg. Ex. 2, CON App., pp. 9-10). Chapter 10, Section 103 of the SHP sets forth the appropriate service-specific need criteria for Component IV of the proposed project.

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[23] Madison HMA's argument clearly fails when applied to the FGH CON application. Clearly, FGH's CON application resulted in a new freestanding separate hospital. Under Madison HMA's logic, this should be considered by the Department as the establishment of a new hospital. The Department, at the time, rightly rejected that argument and reviewed FGH's application as a relocation of a portion of a health care facility; unfortunately, the Department failed to follow its previous decision when reviewing St. Dominic's CON Application.

(Hrg. Ex. 12). Need Criterion 1(a) of this section of the SHP requires an applicant to "demonstrate how the applicant can reasonably expect to deliver a minimum of 150 babies the first full year of operation and 250 babies by the second full year . . . ." (Hrg. Ex. 12).

Madison HMA argues that "St. Dominic's own evidence at the hearing" demonstrated that it would have 93 obstetric discharges in the first year. (Madison HMA Brief, p. 35). But yet like many of Madison HMA's arguments, this not the complete truth; St. Dominic's own evidence demonstrates that it fully complies with this criterion. St. Dominic does not dispute that its CON Application states, "[t]he applicant projects that increased obstetrical market share alone will account for 93 deliveries between the Madison and Jackson Campus in the first year of operation and for 115 deliveries in the second year of operation." Increase of obstetrical market share, however, is only half of St. Dominic's analysis found in its Application. St. Dominic also demonstrated compliance with this Need Criterion by documenting the number of babies from Madison County and the surrounding areas that were delivered at the main campus that would be appropriate to be delivered at the proposed new facility in Madison Campus. (Hrg. Ex. 2, CON App., p. 36; Hrg. Ex. 40, p. 21; Tr. 637). These deliveries, coupled with the number of deliveries from the increase in market share, total 362 deliveries at the new Madison Campus in year one and 384 deliveries in year two. (Tr. 637-38). For whatever reason, Madison HMA, like the Department, simply ignored St. Dominic's own evidence on this matter. (Tr. 636-38). Thus, the Department erred in not finding that substantially complied with Need Criterion 1(a).

For the first time on appeal, Madison HMA argues that St. Dominic additional evidence which was ignored by the Department is not "reasonable." (Madison HMA Brief, p. 36). Madison HMA argues that St. Dominic lacked "evidence as to why the Madison hospital would take over nearly all the Jackson hospital's patients . . . ." *Id.* Conveniently, Madison HMA forgets that this is exactly what it did when it projected market share for the new hospital in

Canton, Mississippi. (Hrg. Ex. 42, p. 28-29). For example, in Canton, Mississippi, all of the HMA hospitals combined at the time had a Canton market share of 47.2% and the then-current Madison County Medical Center only had a 35.2% market share. (Hrg. Ex. 42, p. 28). Like St. Dominic, Madison HMA projected that by the third year of operation for the new hospital that it would have a 47.2% market share in Canton, Mississippi (the exact same market share of all of the HMA hospitals combined). (Hrg. Ex. 42, p. 29). This process is repeated for the cities of Camden, Pickens, Carthage, Sharon, and Lexington. (Hrg. Ex. 42, p. 29). At the time, Madison HMA thought it was "reasonable" that patients would use the closer and newer hospital located in Canton, Mississippi. Similarly, Dr. Luke on behalf of St. Dominic testified:

> it's my opinion that because of the preference of folks to deliver babies close to home, and the amenities that the new campus would offer in terms of LDR and a more accessible smaller scale facility that -- and I have no difficultly being of the opinion that out of that patient population that 150 of those folks would choose to deliver at the Madison campus the first year it opened.

(Tr. 638). Clearly, what is "reasonable" for Madison HMA is defined by what matches Madison HMA's interest at the time and thus, its argument should be disregarded as baseless.

Need Criterion 1(b) of the SHP requires an applicant to demonstrate "that all existing OB beds within the proposed Prenatal Planning Area have maintained an optimum utilization rate of 60 percent for the most recent 12-month reporting period." (Hrg. Ex. 12). Madison HMA argues that St. Dominic "*now* complains that the 2009 State Health Plan did not publish data to assist it in calculating its compliance with 1(b) . . . ." (Madison HMA Brief, p. 36)(emphasis added). And once again, this is not true. St. Dominic noted in its Application that the 2009 SHP does not provide the necessary data to calculate compliance with Need Criterion 1(b). (CON App., p. 36-37). Furthermore, the Department admitted in the Staff Analysis that the SHP did not contain the appropriate data. (Hrg. Ex. 3, p. 9; Tr. 29-30, 638-39). How can St. Dominic be held to a standard that the Department admits it cannot analyze? Presumably, Madison HMA is

suggesting that St. Dominic should have performed the job of the Department and went around to every hospital in the applicable General Hospital Service Area to count the number of beds designated as obstetric.[24] Such a suggestion is absurd. Also, there is no standard definition of obstetric beds that all hospitals use. Consequently, even if St. Dominic asked every hospital, as suggested by Madison HMA, St. Dominic would not obtain the appropriate data, which is exactly why the Department does not have the data in the first place. St. Dominic should not be held to standard that the Department cannot analyze. Accordingly, Component IV of the Application complies with the applicable Need Criteria as set forth in the SHP.

V. ST. DOMINIC'S APPLICATION COMPLIES WITH THE FOUR GENERAL GOALS OF THE SHP.

The SHP provides that the purposes and policies underlying Mississippi's CON laws include: (1) improvement of the health of Mississippi residents; (2) the increase of accessibility and quality of health services in Mississippi; (3) the prevention of unnecessary duplication of health resources; and (4) the provision of some cost containment. (Hrg. Ex. 18). In addition, CON applications must "substantially comply" with these policies. (Hrg. Ex. 18).

The first two policies, which are interrelated, are to promote the improvement in the health of Mississippi residents and to increase the accessibility and quality of health services in Mississippi. Geographic access to health care by the citizens of Madison County and surrounding areas will be vastly improved with the location of a hospital in southern Madison County. (Hrg. Ex. 2, CON App., pp. 13-14). Madison County has one of the lowest beds per thousand population ratio of any county in Mississippi. (Tr. 614; Hrg. Ex. 40, pp. 11-12). The proposed Madison Campus will address the maldistribution of beds in General Hospital Service Area III. (Tr. 613-614, 680). Currently, most residents in Madison County are leaving the

[24] Similar to orthopedic beds, obstetric beds are general acute care beds that a healthcare facility has labeled as obstetric. This is supported by the fact that many healthcare providers, like Madison HMA and St. Dominic, reported zero obstetric beds to the Department. (Hrg. Ex. 2, CON App., p. 37).

county to obtain needed medical care at St. Dominic. (Tr. 607-08). Thus, the proposed facility allows St. Dominic to better serve its current patients. (Tr. 607-08). St. Dominic's proposed Madison campus will also make health care services much more readily available to all of the citizens of Madison County. (Tr. 460). Finally, the construction of a satellite campus will enhance patient quality and safety as it will not be as disruptive to patient care at its main hospital and increase patient access. (Tr. 941-42).

The third policy prohibits the "unnecessary duplication of health resources." St. Dominic's CON Application, like FHG's CON application, complies with this policy because it does not involve any duplication of health services. (Hrg. Ex. 43, p. 24-25). St. Dominic's proposes the relocation of portion of its existing general acute care beds to a new facility in Madison County, Mississippi. (Hrg. Ex. 2, CON App., p. 8-9). Relocation by its very nature is not a duplication. St. Dominic is not adding any additional beds or services with the proposed application. (Hrg. Ex. 2, , CON App., p. 19). The Hearing Officer erred in finding that St. Dominic's project is an unnecessary duplication of health resources.

The fourth policy requires the applicant to provide some cost containment. It should be noted that the goal only requires the applicant to provide *some* cost containment. St. Dominic's Application provides some cost containment in several ways. First, as testified by St. Dominic's expert in health facility planning, Kevin Crook, it reduces total needed capital expenditures by St. Dominic compared to meeting all needs on its main campus. (Tr. 962; Hrg. Exs. 60-61). Second, the construction cost of the facility is reasonable. (Brief, pp. 46-47). Third, the projected cost per patient day is less expensive with the proposed Madison campus than without the Madison campus. (Brief, p. 46).

VI. ST. DOMINIC'S APPLICATION SATISFIES THE GR CRITERIA SET FORTH IN THE CON REVIEW MANUAL.

In addition to the specific need criteria, every CON application must be reviewed to determine if it is in substantial compliance with the sixteen General Review Criteria ("GRC") set forth in the CON Review Manual. (Hrg. Ex. 16). St. Dominic submitted evidence that its CON Application is in substantial compliance with each GRC. (Brief, pp. 36-47). The Hearing Officer, however, concluded that GRC 1, 3-6, 8 & 14 did not weigh in favor of St. Dominic's Application. Her analysis is flawed throughout and lacking in many respects.

For example, GRC-3 requires the identification of alternatives to the proposed project and a description why these alternatives were not chosen. (Hrg. Ex. 16). St. Dominic did just that. (Brief, pp. 37-38). It considered whether to build a new facility in Madison County or not – even the Department's Staff Analysis recognizes this. (Hrg. Ex. 3, p. 11). But yet the Hearing Officer complained that St. Dominic did not satisfy this criterion because St. Dominic "only considered this specific Madison County location[25] . . . ." (R.E. 3, p. 26) Another example, GRC-6 requires an applicant demonstrate how the proposed project meets the health related needs of members of medically underserved groups which have traditionally experienced difficulties in obtaining equal access to health services. (Hrg. Ex. 16). The Hearing Officer alleges that St. Dominic's "failed to comply with this criterion as it proposes to build the new hospital in close proximity to its current facility . . . ." Of course, the same Hearing Officer never critiqued FGH's proposed facility, which was approximately five minutes from the main hospital. (Hrg. Ex. 43, p. 1; Hrg. Ex. 44). In addition, the Hearing Officer wholly failed to consider the fact that St. Dominic was relocating a portion of its hospital to Madison County and

[25] Not surprisingly, there is nothing in the Hearing Officer's recommendation requiring FGH to consider multiple locations for its proposed facility. (Hrg. Ex. 44). In fact, FGH performed the same analysis as St. Dominic. FGH considered whether to expand its service line on its current campus (through renovation or construction of a new pavilion) or to relocate it to another location. (Hrg. Ex. 43).

by its very nature, it will increase the access to medically underserved groups. Final example, GRC-14 requires that all construction projects be designed and constructed with the objective of maximizing cost containment, protection of the environment, and conservation of energy along with the impact of the construction costs on the cost of providing health care. (Hrg. Ex. 16). St. Dominic complied with all of the necessary requirements of this criterion (Brief, pp. 45-47), but yet the Hearing Officer without any analysis states, "[f]or the reasons set forth throughout this Hearing Officer's opinion, I find that an analysis of GR-14[26] does not weigh substantially in favor of St. Dominic's Application." (R.E., p. 43). This amount of analysis is insufficient and supports St. Dominic's request for the Department's ruling to be reversed.

In addition, most of her analysis is based upon her finding that St. Dominic is proposing an establishment of a new hospital and not the relocation of a portion of a hospital. Finally, the Hearing Officer clearly adopted Madison HMA's proposed findings of fact and conclusions of law verbatim regarding GRC 3-6, 8. (Ex. 1 to Reply Brief). When an administrative officer, like the Hearing Officer in this case, "adopts a party's proposed findings verbatim, the usual deference to fact findings is somewhat lessened . . . ." *Open MRI, LLC v. Miss. State Dep't of Health*, 939 So. 2d 813, 816 (Miss. Ct. App. 2006)(citing *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1264-65 (Miss. 1987)). In such a case, the Supreme Court must review the findings "with a more critical eye to ensure that the [Department] has adequately performed its judicial function." *Open MRI, LLC*, 939 So. 2d at 816 (citation omitted). St. Dominic presented substantial evidence in its brief to demonstrate how it complied with all of these criteria and how

[26] Once again, if the cost of FGH's proposed facility is compared with St. Dominic's proposed facility, it is further evidence that the Department acted in arbitrary and capricious manner. According to the respective Staff Analyses, FGH proposed a construction cost of $404.97 per square foot for the hospital and St. Dominic proposed a cost of $410.54 per square foot for the hospital. (Hrg. Ex. 3, p. 19; Hrg. Ex. 43, p. 8; Brief, pp. 45-47).

her analysis was insufficient and one-sided. (Brief, pp. 36-47). Accordingly, the Department's decision should be reversed.

VII. DEPARTMENT'S POLICY IS INCONSISTENT AND MERITS NO DEFERENCE WHATSOEVER.

Madison HMA finally points out the utter confusion of the Department. As already discussed in great detail, the Department approved FGH's CON application for the relocation of thirty general acute care beds to a freestanding facility in Forrest County, Mississippi. In her decision, the Hearing Officer recommended that similar hospitals should be developed:

> On a more fundamental level, hospitals such as Forrest General ***should be encouraged*** to develop high quality, specialty campuses[27] dedicated to clinically efficient care. There is ***certainly nothing in the law that can be interpreted to prohibit Forrest General from developing this type of project,*** as long as the proposal is in compliance with the relevant CON criteria and standards in the State Health Plan.

(Hrg. Ex. 44, p. 10)(emphasis added). But yet, when St. Dominic's proposed a similar project (*i.e.*, relocation of up to seventy-one general acute care beds to a freestanding primary care facility in Madison County, Mississippi) as encouraged by the Hearing Officer, the Department disapproved St. Dominic's Application. Instead of being in favor of these types of hospitals, the Hearing Officer, completely contrary to her previous language regarding FGH's CON application, now stated regarding St. Dominic's Application, "[a]pproval of a project of this magnitude, under the circumstances that exist is simply not good health planning and is not good policy for the Department." The Department cannot have it both ways. This is just further evidence of the Department's arbitrary and capricious behavior in this case and thus, its decision requires reversal.

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[27] Once again, like orthopedic or obstetric beds, there is no such thing as a "specialty hospital" under Mississippi law.

VIII. CONCLUSION

Madison HMA condemns St. Dominic's Application as a new hospital and not a true relocation because St. Dominic "proposes constructing a new building . . . . [to] hold general acute care beds and be entitled to provide [health] services . . . ." (Madison HMA Brief, p. 12). Inexplicably, using its same analysis, Madison HMA argues that the proposed FGH facility "did not even begin to resemble a new hospital . . . ." (Madison HMA Brief, p. 24). Based upon this assertion, one would assume that FGH did not propose to construct a new building to hold general acute care beds and provide health services as its main hospital campus. But as previously discussed, this conclusion is far from true. FGH proposed exactly what St. Dominic is proposing in its Application and what Madison HMA now condemns.[28] The only conclusion that can be drawn is that Madison HMA's conclusions are simply wishful thinking.

What is clear is that Mississippi law permits applicants, such as St. Dominic and FGH, to relocate a portion of its health care facility to a new facility as long as there is a need. Size and scope are not limited in any way by the CON law, the SHP or the CON Review Manual. This is exactly why the Department previously approved FGH's CON application to relocate a portion of its health care facility (*i.e.*, 30 general acute care beds) to a new facility. This is exactly why FGH's CON application was upheld by the Hinds County Chancery Court and ultimately, by the Mississippi Supreme Court. Unfortunately, the Department elected to ignore Mississippi law and its previous approval of FGH's CON application in disapproving St. Dominic's Application. Accordingly, the Department was arbitrary and capricious in its disapproval of St. Dominic's Application and its decision must be reversed.

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[28] For instance, the FGH satellite facility, at that location, must provide everything to its orthopedic patients that are provided at its main campus. It must have registration, laboratory services, anesthesia, pathology, inpatient rehabilitation, inpatient physical therapy, x-ray, CT, clean sheets, a drug dispenser, a clean environment and every other support service necessary for the operation of a hospital. (Hrg. Ex. 43, p. 2).

This the 6th day of October, 2011.

Respectfully submitted,

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of this Reply Brief of Appellant by United States mail with postage prepaid on the following persons at these addresses:

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This the 6th day of October, 2011.

_____
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July 19, 2010

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Via Email & U. S. Mail

Re: Proposed Findings of Fact and Conclusions of Law
CON Review: HG-RLS-1208-045
St. Dominic-Jackson Memorial Hospital, Inc. v. Madison HMA, LLC

Dear Cassandra:

Enclosed please find Madison HMA's Proposed Findings of Fact and Conclusions of Law for the above-referenced CON matter. Please contact me if you have any questions or need any additional information.

With best regards,

Sincerely,
Copeland, Cook, Taylor & Bush P.A.

Allison C. Simpson

cc: Bea Tolsdorf
Ed Brunini
Don Eicher (for filing – U. S. Mail only)

BEFORE THE MISSISSIPPI STATE DEPARTMENT OF HEALTH
DIVISION OF HEALTH PLANNING AND RESOURCE DEVELOPMENT

CON REVIEW: # HG-RLS-1208-045

RE: ST. DOMINIC-JACKSON MEMORIAL HOSPITAL, INC.
RELOCATION OF 71 ACUTE CARE HOSPITAL BEDS AND CONSTRUCTION OF A HEALTH CARE FACILITY AND MEDICAL OFFICE BUILDING IN MADISON COUNTY
CAPITAL EXPENDITURE: $121,590,696.00
LOCATION: MADISON, MADISON COUNTY, MISSISSIPPI

V.

MADISON HMA, LLC D/B/A MADISON RIVER OAKS HOSPITAL

HEARING OFFICER'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

On December 1, 2008, St. Dominic - Jackson Memorial Hospital, Inc. ("St. Dominic" or the "Applicant") submitted a Certificate of Need ("CON") application titled the Relocation of 71 Acute Care Hospital Beds and Construction of a Health Care Facility and Medical Office Building in Madison County (the "Application"). The Application was deemed complete on or about January 5, 2009, and was recommended for disapproval in a February 2009 Staff Analysis. St. Dominic and Madison HMA, LLC d/b/a Madison River Oaks Hospital ("HMA" or the "Contestant") properly requested a hearing during the course of review. The "Hearing" began on February 4, 2010, and after each party was afforded the opportunity to present evidence and testimony to support its position and members of the public were invited to voice their support or non-support for St. Dominic's Application, the Hearing was concluded on February 25, 2009.

After careful review and consideration of the Application and testimony presented at the Hearing, it is evident St. Dominic's Application was not in substantial compliance with the 2009 State Health Plan (the "Plan" or "SHP"), the CON Manual, revised February 23, 2008 ("Manual"),

the controlling Mississippi statutes, or the adopted procedures and rules of the Department. Therefore, I find the Department's Staff Analysis was correct in its findings, and St. Dominic's CON Application for the relocation of 71 acute care beds and construction of a health care facility and medical office building should be disapproved by the State Health Officer based upon the following findings of fact and conclusions of law.

I. FACTS

St. Dominic has made numerous attempts to shape a CON application that would comply with the SHP's criteria, CON Manual and controlling CON law in this State and allow it to build a new hospital in southern Madison County. For the reasons discussed herein, St. Dominic's latest attempt also fails to comply with the CON law and applicable criteria and regulations.

St. Dominic proposes to relocate 63 general acute care beds and 8 acute care beds designated for obstetrics (a total of 71 general acute care beds) to a yet-to-be constructed building in southern Madison County, just north of the Madison city limits. Tr. 21-22; Ex. 2. The Application proposes four components:

- Component I - the new hospital
- Component II - medical office building ("MOB")
- Component III - mobile magnetic resonance imaging ("MRI") services; and
- Component IV - obstetric services.

St. Dominic stated in its Application, and affirmed through testimony at the Hearing, that Components II-IV would not be implemented without approval of Component I, the new hospital. Lester Diamond ("Diamond"), St. Dominic's Executive Vice-President of Operations, reiterated that if St. Dominic was "not awarded the decision for the hospital, there would be no need to do the other components." Tr. 330.

Madison HMA currently operates what is known as Madison County Medical Center, east of downtown Canton. In October 2005, the Department awarded Madison HMA a CON to relocate its entire hospital to a new location off Nissan Parkway, and the mandate finally approving the relocation was issued by the Mississippi Court of Appeals in May 2007. The new Madison HMA hospital will be known as Madison River Oaks Hospital, and is currently under construction with an anticipated opening date in Fall 2011.

II. ST. DOMINIC'S APPLICATION PROPOSES THE ESTABLISHMENT OF A NEW GENERAL ACUTE CARE HOSPITAL, NOT THE RELOCATION OF A HOSPITAL OR A PORTION OF A HOSPITAL.

The first consideration regarding the Application is whether or not St. Dominic proposes to establish a new general acute care hospital since that determination impacts which of the SHP criteria are applicable. Based on the following discussion, I believe the Application does propose the establishment of a new general acute care hospital in Madison County.

A. Mississippi Case Law Distinguishes Relocation Projects Versus Projects for New Healthcare Facilities.

The Mississippi Supreme Court in *St. Dominic* demonstrated how to determine when a proposed healthcare facility is a new facility versus a relocated one. Regarding the proposed new hospital in *St. Dominic*, the Court stated,

> The North Campus project [(the new hospital)] does not constitute a 'relocation' in any ordinary sense of the word. The record is clear that a completely new building was constructed in northeast Jackson, and this building has been staffed with new medical workers and new equipment. There was no corresponding decrease in services at the main hospital in south Jackson . . . the facility is, for all practical purposes, a new hospital.

St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health, 728 So. 2d 81, 85 (Miss. 1998). The Mississippi Supreme Court reiterated this conclusion in St. Dominic's attempt to relocate beds

to St. Catherine's Village in Madison. *St. Dominic-Madison Co. Med. Ctr. v. Madison Co. Med. Ctr.*, 928 So. 2d 822 (Miss. 2006). In affirming the chancellor, the Court quoted part of the chancellor's holding regarding that application.

> As in *St. Dominic*, a completely new building is proposed for construction in Madison County, in fact, the project contemplated in this case is contemplated to cost nine million dollars more than the project at issue in *St. Dominic*. Further, this new building will be staffed with new medical workers and new equipment, rather than transferred employees and equipment from the Jackson facility. Also, there will be no corresponding decrease in services at the Jackson hospital. **Therefore, this Court can only find that the proposed St. Dominic hospital in Madison is, for all practical purposes, a new hospital. ... [And] our Supreme Court has previously [stated] that "the showing of need must be commensurate to what the project actually is and the impact which it actually has on the Jackson health care market["].**

St. Dominic-Madison, 928 So. 2d at 826 (quoting chancery court, bold in original, internal citations omitted). Also supporting the conclusion that a new hospital was proposed at St. Catherine's, the Court found that not only would a new building be constructed, with new medical workers and new equipment, but also the new facility would offer surgery, high-level imaging services, full time nursing care, rehabilitation and physical therapy, pharmacy, laboratories and Level IV emergency services. *St. Dominic-Madison*, 928 So. 2d at 829. All services which the Application proposes to provide. Exs. 2, 75.

In discussing the term "relocation" as the transfer of a health service, the Court held that the transfer of a health service required the transfer of the entire health service. *St. Dominic-Madison*, 928 So. 2d at 829. The Court stated that a reasonable inference from the Department's definition of "relocation" as the "moving of authority to provide a service from one location to another," "is that, after the authority to provide a service has been relocated, the transferring facility would no longer have the authority to provide the same service." *St. Dominic-Madison*, 928 So. 2d at 829.

Similar to St. Dominic's current Application, there was nothing in the St. Catherine's application to demonstrate that St. Dominic would not continue to provide the same services at the main campus. *St. Dominic-Madison*, 928 So. 2d at 829. Given all the characteristics of that application, the *St. Dominic-Madison* Court stated it "would question a proposal which sought to build what is, for all practical purposes, a new hospital ... under the guise of a 'relocation.'" *St. Dominic-Madison*, 928 So. 2d at 8230 (internal citations omitted).

The duplication of services also suggests that a project is not a relocation, but a new facility. *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health and Madison HMA, Inc.*, 954 So. 2d 505, 507. (Miss. Ct. App. 2007). In that case, the Mississippi Court of Appeals stated the following regarding Madison HMA's proposed replacement hospital at Nissan Parkway,

> Unlike other recent applications for relocation that were determined to be expansions, Madison HMA is seeking a true relocation. No services will be duplicated. It will move its entire hospital to the Nissan Parkway and close the current location.

Madison HMA, 954 So. 2d at 507. St. Dominic's Application is not relocating its hospital or a portion of that hospital, but it is creating a second, new hospital, similar to that proposed by Methodist in *St. Dominic* and similar to that proposed by St. Dominic in *St. Dominic-Madison.* The *St. Dominic-Madison* Court concluded, "clearly" St. Dominic's application should have been considered under the SHP's criteria for a new general acute care hospital instead of the criteria for construction, renovation, expansion, capital improvement, replacement of health care facilities, and addition of hospital beds (*St. Dominic-Madison*, 928 So. 2d at 829-30), and likewise this Application should be reviewed under the same criteria.

B. St. Dominic's Application and the Testimony at the Hearing Demonstrate that St. Dominic Is Proposing a New Hospital, Not a Relocation.

1. There Will Be No Reduction in Services at St. Dominic's Main Campus.

The Application states that the proposed project "does not reduce the scope of services available at the Jackson campus," and Ronald Luke, Ph.D. ("Luke"), St. Dominic's expert in the field of CON and health planning, agreed, stating, "[f]rom a categorical standpoint, *there is no service that is currently provided*, and specifically CON reviewable services *that's provided now in Jackson that won't be provided there after the relocation of the 71 beds*." Tr. 704 (italics added); Ex. 2, pg. 3. Madison HMA's expert in health care planning and CON in Mississippi, Noel Falls ("Falls"), testified that if the Application proposed a true relocation, he would expect a "relocation of beds and services, not only a reduction in beds, but a reduction or a termination of services [at] the main campus." Tr. 1292. The Mississippi Supreme Court would expect a reduction of services at the main campus too, if in fact, services were being relocated. *See St. Dominic*, 728 So. 2d at 85; *St. Dominic-Madison*, 928 So. 2d at 829.

2. Since St. Dominic Has Not Identified the Beds That Will Be Relocated, There Is No Basis for Determining If the "Relocated" Beds Are Actually Operational.

Diamond testified that St. Dominic would not decide which of the 71 proposed beds to take out of operation until the new facility is built in Madison, and Luke agreed that the Application does not identify beds that will be taken out of service at St. Dominic. Tr. 235-36, 809. If un-utilized beds are relocated to the new Madison hospital, that "relocation" amounts to the creation of additional beds. The Supreme Court stated that "the designation or label of a bed as "relocated" or as "newly-licensed" is irrelevant when determining, under the Need Criteria for Hospital

Construction, whether a bed is additional or not." *Singing R. Hosp. Sys. v. Biloxi Reg'l Med. Ctr.*, 928 So. 2d 810, 814 (Miss. 2006). The *Singing River* Court continued, "The statute only uses the word "relocation" when speaking of the relocation of an entire or a portion of a health care facility, or of health services, not of beds. The Need Criteria for Hospital Construction does not contain the words "relocate, relocated or relocation." *Singing R.*, 928 So. 2d at 814. Therefore, the "'relocation' of unused, licensed beds from Singing River to Ocean Springs will result in the *addition* of sixty beds to Ocean Springs. ... There will be an additional sixty beds at Ocean Springs, whether those beds are "relocated" beds or newly-licensed beds." *Singing R.*, 928 So. 2d at 813 (italics in original). Likewise, there will be additional beds in Madison County at a new hospital under St. Dominic's proposal. Further, both *St. Dominic* and *St. Dominic-Madison* concerned the "'relocation' of licensed but currently unused beds from one physical location to another." *St. Dominic-Madison*, 928 So. 2d at 828.

Much testimony was given about the number of beds St. Dominic currently has licensed, versus how many beds are operational, and also versus how many beds it has set up and staffed. This is because a primary assumption in St. Dominic's Application is that it will relocate beds that are in use. Tr. 564, 565.

Determining whether the proposed, to be relocated beds are really licensed *and* operational is not clear from the Application or the evidence and testimony presented at the Hearing. "[N]one of [the documentation produced], from one document to another, is the same [and] none of that information complies with what [St. Dominic] filed with the Department [and] none of that information complies with anything that Dr. Luke produced, as historic data for 2007, 2008 and 2009," Falls testified. Tr. 1315. Furthermore, St. Dominic staffs to patient census so though the

Annual Reports stated that St. Dominic had 357 beds set-up in 2007 and 2008, Diamond acknowledged that a set up bed could be different than a set up *and* staffed bed. Tr. 323, 327; Exs. 24, 25.

Depending on which documents are reviewed, St. Dominic had between 190-203 empty beds in 2006; between 140-162 empty beds in 2007; between 138-164 empty beds in 2008; between 140-163 empty beds in 2009; and approximately 105 empty beds in January 2010.[1] Diamond testified for years 2007-2009 the average daily census at St. Dominic for the south campus, less newborns was "pretty close to constant." Tr. 320; Exs. 29-31. Diamond also testified that the census information reported to Licensure included total hospital bed utilization, including med-surg beds and psychiatric and chemical dependency beds. Tr. 294. Regardless, of which documentation is actually the correct documentation, all scenarios result in St. Dominic having more than 71 beds available at its hospital.

Based on the numbers above concerning St. Dominic's bed usage and based on Diamond's testimony that St. Dominic staffs to census, I believe St. Dominic has empty, unused beds at its hospital. Therefore, without identifying the beds that are proposed to be relocated, it is impossible to tell whether the beds that will be relocated are actually utilized.

3. St. Dominic Has Not Identified Staff that Will Be Relocated, and Acknowledges New Personnel Will Be Hired to Staff the New Hospital.

Diamond testified he did not know which positions would be needed at the new hospital, and he did not know which employees would move to Madison. Tr. 238-39. Luke testified "there's no

[1] 2006 Information - Tr. 292-94, 314; Exs. 23, 28; 2007 Information - Tr. 300-01, 315, 590-91; Exs. 24, 29, 40; 2008 Information - Tr. 304, 316, 601, 754; Exs. 25, 30, 40; 2009 Information - Tr. 308, 317, 601; Exs. 26, 31, 40; 2010 Information - Tr. 318, 322.

doubt" that some number of additional positions will be added due to the new hospital. Tr. 561. The addition of staff at a proposed new hospital was yet another factor considered by the Supreme Court to demonstrate a new hospital was being constructed. *See St. Dominic*, 728 So. 2d at 85; *St. Dominic-Madison*, 928 So. 2d at 826.

4. St. Dominic's Application Contemplates the Purchase of New Equipment for the New Hospital.

Diamond testified St. Dominic would try to move equipment to the new facility as appropriate, but that the hospital has not identified any pieces of equipment to move. Tr. 240, 332. The Application, however, proposes *all new* equipment at the Madison hospital, stating that "*Relatively little* existing equipment will be available to be moved from the Jackson campus to the Madison campus. Regardless of whether new or existing furniture or equipment is placed at the Madison campus from the Jackson campus, a *substantial amount* of new furniture and equipment will be purchased." Ex. 2, pg. 12 (italics added). Further the Application states that "New beds and related equipment will ultimately have to be purchased whether they are placed at the Madison or Jackson campuses." Ex. 2, pg. 25. Luke's email to Dan Isengole, the person in charge of projecting equipment needs at the new hospital, and Paul Arrington with St. Dominic, stated that Isengole was to "assume acquisition of all required furniture and equipment" without "F&E relocated from the Main Campus." Tr. 708-09; Ex. 51. Again, the purchase of new equipment for the to-be-constructed facility was one of the factors the Supreme Court considered in determining a new hospital was being constructed. *St. Dominic*, 728 So. 2d at 85; *St. Dominic-Madison*, 928 So. 2d at 826.

5. St. Dominic Proposes to Construct a New Building Which, Regardless of Licensure Classification, Will Be a Separate Hospital.

The CON Manual and statute define a hospital as "an institution which is primarily engaged in providing [services] to inpatients, by or under the supervision of physicians, diagnostic services and therapeutic services of medical diagnosis, treatment and care of injured, disabled or sick persons."[2] Exs. 15, 52. Though the proposed project is a hospital under this definition, Luke would agree only that the proposed project was an "additional campus for its existing hospital..." Tr. 713. Scott Eddy ("Eddy"), an architect with Barlow Eddy Jenkins who designed and projected the cost for the Madison hospital and who testified as an expert in health care architecture regarding the project, also did not want to admit the project proposed a new hospital. Tr. 1032-33, 1036-37.

> Q: Would you agree with me that what you have designed [for Madison] is a new hospital?
>
> A: I would agree it's a building to put relocated beds in.

Tr. 1084. Eddy admitted he would not have drawn the facility differently if it was a hospital, that it has an emergency room, administration, admissions, medical records, surgery, recovery, pre-op, imaging - all which would be in a new hospital. Tr. 1084-86.

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[2] Likewise, the Department's Minimum Standards of Operation for Mississippi Hospitals defines "hospital,"

> as a place devoted primarily to the maintenance and operations of facilities for the diagnosis, treatment and care of individuals suffering from physical or mental infirmity, illness, disease, injury or deformity, or a place devoted primarily to providing obstetrical or other medical, surgical or nursing care of individuals . . . [it does not include] offices or clinics where patients are not regularly kept as bed patients.

Tr. 1263-64; Ex. 83, pg. 2. Based on this definition, Falls testified the Application proposed a general acute care hospital. Tr. 1264.

Q: Is there anything that you would have to add to [Component I]'s list here by description if you were not building a new hospital?

A: Not that I'm aware of.

Tr. 1086. Luke agreed the new building, which would have a cost comparable to a new hospital, would hold general acute care beds and be entitled to provide the services listed in 41-7-173(I), diagnostic services, therapeutic services and care under the supervision of physicians with "many of the same capabilities of any acute care inpatient facility that's providing a comparable range of -- or treating a comparable range of patients." Tr. 564, 713-14, 734. Luke's and Eddy's description of the services to be offered at the new hospital are similar to those found by the *St. Dominic-Madison* Court to lead to the conclusion that a new hospital was being proposed. *St. Dominic-Madison*, 928 So. 2d at 829. Falls testified that under the CON law and based on the testimony of St. Dominic's witnesses, the proposal in the Application is "clearly a health care facility, separate, freestanding health care facility, with all of the components of a general acute care hospital," and that he would not "know what else to call it. It's a -- it's a hospital." Tr. 1262, 1267.

Though St. Dominic's witnesses implied that the new hospital would operate under the same license as the main campus, there was no testimony to support that suggestion. In fact the person who testified he works with Licensure and Certification to ensure compliance with the State's minimum standards, Eddy, testified he was not aware of whether the new hospital would have to have a separate license. Tr. 1032-33, 1036-37, 1058-59. Regardless, how the new hospital is licensed has nothing to do with the CON law. Falls testified that the idea that a hospital can obtain a CON for a new facility just because it is under the same license as another facility is

> kind of an absurd proposition. [While it] is not unusual for hospitals to operate under the same license ... *from a health planning perspective, those facilities are always*

> *counted separately as hospitals*. And they always have been, and are to this day in Mississippi counted as separate hospitals.

Tr. 1268 (emphasis added); *See also* Tr. 1269; Ex. 83, pg. 3. Falls concluded that even if St. Dominic were successful in convincing the Department to put both hospitals under one license, the Madison hospital would still be counted as a separate hospital which requires a CON. Tr. 1274.

6 Summary of St. Dominic's Proposed Relocation Project.

Falls summarized St. Dominic's proposal to relocate beds from the Jackson campus to the new Madison hospital with no reduction in services at the Jackson campus as follows:

> To me, that says very plainly and very succinctly that it's not a relocation of services; it's a relocation of beds ... [and] ... the only way [you can provide services in those beds] is ... either to relocate them or to have it licensed as a general acute care hospital. If it is licensed as a general acute care hospital, the next question is: Is it a new general acute care hospital? And the obvious answer, of course, is yes, it is a new general acute care hospital. ... which then takes it under the provision in the State Health Plan, and the methodology that requires them to be reviewed as [a] new additional hospital in a county with a hospital.

Tr. 1280-81.

Luke testified that St. Dominic is "going to move 71 licensed acute care beds, and – and that's the - - the portion of the health care facility that we've committed to move." Tr. 809. Falls testified,

> I heard the testimony, and I just think they're wrong. I mean ... it's a nonsensical argument that if you are relocating beds and you're not relocating services, and you're not constructing or establishing a new hospital, that you can provide the same services [you] were providing from the place where you relocated the beds. And their Certificate of Need application specifically says there was not going to be any reduction in services. They never claimed to be relocating services. They claimed that because they're relocating the beds, the services automatically go with them. Dr. Luke defined those services as separately reviewable services. But the ... Certificate of Need Review Manual defines health services as any clinically-related service. And has in parenthesis, for example, diagnostic, rehabilitative, or therapeutic . . [I]t doesn't say anything about separately reviewable. ... [I]t's all of those other services

like nursing, inpatient nursing care, respiratory therapy, physical therapy, laboratory, diagnostic imaging. All of those clinically-related services that generally when you get approval and licensed for an acute care hospital you are automatically awarded the hospital. They don't get to provide those other services, those separately reviewable services. But if you have a Certificate of Need for a new general acute care hospital, then you'll automatically get a license to operate those services. *But if you're locating just beds, and you're not locating services, you have nothing but a building with beds in it.* And until you get it licensed as new general acute care hospital, you can't provide services, in my opinion.

Tr. 1277-78 (emphasis added); *See also* 1297.

Jerry Cotton ("Cotton"), Executive Vice President of Regional Networks for Baptist Medical Center ("Baptist") and retired CEO at Baptist suggested that St. Dominic's latest attempt was trying "to fit a square peg into a round hole," and trying to "manipulate [the Department's] formulas to get what you want." Tr. 1182-83. That is what I believe St. Dominic's has attempted with the Application. For the reasons stated above and for the reasons given by the Mississippi Supreme Court and Court of Appeals, I find that the Application does not propose a "relocation" but the establishment of a new general acute care hospital in Madison County.

III. UNDER THE APPLICABLE PROVISIONS OF THE STATE HEALTH PLAN & CON MANUAL, ST. DOMINIC'S APPLICATION MUST BE DISAPPROVED.

A. St. Dominic's Application Fails to Comply with the Applicable SHP Criteria.

Which SHP methodology St. Dominic's Application must comply with was an issue debated at the Hearing. The SHP has two criteria and standard sections concerning hospitals. The first is Section 108.02 entitled CON Criteria and Standards for the "Establishment of a General Acute Care Hospital," which refers to the applicable methodology contained in Policy Statement 108.01(1). Ex. 7. Policy Statement 108.01(1) contains the methodology for "Counties Without a Hospital" in 1(a) and for "Counties With Existing Hospitals" in 1(b). Tr. 1297; Ex. 7. Both Falls and Don Eicher

("Eicher"), the Director of the Division of Health Policy and Planning which oversees the CON Division, testified that since the Application proposed the establishment of a new hospital, this methodology and criteria for "Counties with Existing Hospitals" applies. Tr. 1252-53; Ex. 7. The second option is Section 108.03 entitled CON Criteria and Standards for "Construction, Renovation, Expansion, Capital Improvements, Replacement of Health Care Facilities, and Addition of Hospital Beds." For the reasons discussed above, I believe that St. Dominic's Application proposes the establishment of a general acute care hospital. Thus, Section 108.02(1), CON Criteria and Standards for the Establishment of a General Acute Care Hospital should govern the Application's review. While St. Dominic's argued it does not have to comply with Criterion 108.02 since it does not propose the addition of any beds, the criterion is for the "Establishment of a General Acute Care Hospital" regardless of the beds. Tr. 1301. Therefore the applicable methodology is as follows:

> **108.02 Certificate of Need Criteria and Standards for the Establishment of a General Acute Care Hospital**
>
> The [Department] will review applications for [CON] to construct, develop, or otherwise establish a new hospital under the applicable statutory requires of Sections 41-7-173, 41-7-191, and 41-7-193, Mississippi Code of 1972, as amended. The [Department] will also review applications for [CON] according to the general criteria listed in the [Manual]; all adopted rules, procedures, and plans of the [Department]; and the specific criteria and standards listed below.
>
> **1. Need Criterion: The applicant shall document a need for a general acute care hospital using the appropriate need methodology as presented in this section of the Plan. In addition, the applicant must meet the other conditions set forth in the need methodology.**

Ex. 7 (bold in original). The "appropriate need methodology as presented in this section of the Plan," referenced above is the Acute Care Hospital Need Methodology, Criterion 1(b), Counties with

Existing Hospitals.[3] Ex. 7. Section 1(b) provides the following regarding CON applications for general acute care hospitals,

> 1. Acute Care Hospital Need Methodology: With the exception of psychiatric, chemical dependency, and rehabilitation hospitals, the [Department] will use the following methodologies to project the *need for general acute care hospitals*:
>
> b. **Counties with Existing Hospitals** - The MSDH shall use the following formula to determine the *need for an additional hospital* in a county with an existing hospital:
>
> **ADC + K(√ADC)**
> **Where: ADC = Average Daily Census**
> **K = Confidence Factor of 2.57**
>
> The formula is calculated for each facility *within a given General Hospital Service Area (GHSA)*; then beds available and beds needed under the statistical application of the formula are totaled and subtracted to determine bed need or excess within each GHSA. Map 11-2 delineates the GHSAs. The MSDH may consider approval of a hospital with a maximum of 100 beds if: (a) the number of beds needed is 100 or more; (b) there is strong community support for a hospital; and (c) a hospital can be determined to be economically feasible.

Ex. 7 (bold and underline in the original, italics added). St. Dominic argued that Criterion 1(b) was not applicable to its project since it was not proposing to add any additional acute care beds to General Hospital Service Area 3 (the "Service Area"). Tr. 710. However, as demonstrated above, this methodology is to determine the "need for an additional hospital" in the county, not necessarily the addition of acute care beds. The calculation above results in an excess of 34 beds in Madison County and an excess of 1,300 beds in the Service Area. Tr. 1298-99. Therefore, St. Dominic's Application does not comply with the applicable need methodology for general acute care hospitals as 100 or more beds are not needed in the County or the Service Area.

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[3] Subpart (a), Counties Without a Hospital, is inapplicable as there is a hospital in Madison County. Tr. 1298-99.

The other option, which St. Dominic's wants the Department to apply to its Application, is Section 108.03, CON Criteria and Standards for Construction, Renovation, Expansion, Capital Improvements, Replacement of Health Care Facilities, and Addition of Hospital Beds, subsection (1)(a), Projects which do not involve the addition of any acute care beds.[4] Tr. 541, 584. This Section states:

> **108.03 Certificate of Need Criteria and Standards for Construction, Renovation, Expansion, Capital Improvements, Replacement of Health Care Facilities, and Addition of Hospital Beds**
>
> The [Department] will review applications for a [CON] for the addition of beds to a health care facility and projects for construction, renovation, expansion or capital improvement involving a capital expenditure in excess of $2,000,000 under the applicable statutory requirements of Sections 41-7-173, 41-7-191, and 41-7-193, Mississippi Code of 1972, as amended. The MSDH will also review applications for [CON] according to the general criteria listed in the [CON Manual]; all adopted rules, procedures and plans of the MSDH; and the specific criteria and standards listed below.
>
> The construction, development, or other establishment of a new health care facility, the replacement and/or relocation of a health care facility or portion thereof, and changes of ownership of existing health care facilities are reviewable regardless of capital expenditure.

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[4] Mississippi case law requires the Department to consider the applicable SHP criteria and forbids it from applying a less stringent review. As I have found that St. Dominic's Application proposes the establishment of a new general acute care hospital and not a relocation, the case law requires that the appropriate level of review be applied to the Application. The Supreme Court stated that the application of "a severely lessened standard of need to [a] . . . project based upon a conclusion that a relocation was taking place," is a "most serious error" and an "error requiring reversal." *St. Dominic*, 728 So. 2d at 85. The Supreme Court also stated that in review of CON applications 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*, 928 So.2d 822, 827 (Miss. 2006) (quotations in original, emphasis added), *St. Dominic*, 728 So. 2d at 89. Therefore, the State Health Officer is prohibited from applying a lesser standard of need "based upon a conclusion that a relocation was taking place." *St. Dominic*, 728 So. 2d at 85. Thus, the applicable SHP criteria must be applied to the Application, and those criteria are for the establishment of a general acute hospital.

1. Need Criterion:

a. **Projects which do not involve the addition of any acute care beds:** The applicant shall document the need for the proposed project. Documentation may consist of, but is not limited to, citing of licensure or regulatory code deficiencies, institutional long-term plans (duly adopted by the governing board), recommendations made by consultant firms, and deficiencies cited by accreditation agencies (JCAHO, CAP, etc.). In addition, for projects which involve construction, renovation, or expansion of emergency department facilities, the applicant shall include a statement indicating whether the hospital will participate in the statewide trauma system and describe the level of participation, if any.

Ex. 7 (bold and underline in original). Luke based his rationale for arriving at the conclusion that Section 108.03(1)(a) was applicable on Section 100.03 of the CON Manual concerning the scope of the CON law. Ex. 6. That section states that the following requires a CON:

> 100.03 The relocation of a health care facility or portion thereof, or major medical equipment unless such relocation of a healthcare facility or portion thereof, or major medical equipment, which does not involve a capital expenditure by or on behalf of a health care facility, is within five thousand two hundred eight (5,280) feet from the main entrance of the health care facility.
>
> NOTE: The relocation of a health care facility is defined as the relocation of a health care facility from one physical location or site to another.
>
> A portion of a health care facility is considered to be a wing, unit, service(s), or beds.
>
> The relocation of major medical equipment shall include, but is not limited to, the relocation of major medical equipment from one physical facility to another physical facility.

Ex. 6. However, it should be noted that the statute does not mention relocation of beds. *Singing Rvr.*, 928 So. 2d at 814. The statute only states,

> (1) No person shall engage in any of the following activities without obtaining the required [CON]:

> (b) The relocation of a health care facility or portion thereof, or major medical equipment, unless such relocation of a health care facility or portion thereof, or major medical equipment, which does not involve a capital expenditure by or on behalf of a health care facility, is withing five thousand two hundred eighty (5,280) feet from the main entrance of the health care facility.

Miss. Code Ann. § 41-7-191(1)(b). Regardless, from this section of the CON Manual, Luke concluded that because the Note above includes a portion of a health care facility as beds, the Application was not for a general acute care hospital but the relocation of beds, a portion of a health care facility, and thus, it only had to comply with the portion of the SHP regarding construction of a health care facility without the addition of new beds. Tr. 550-51, 553, 1285-86. St. Dominic's Application makes no attempt to comply with the Section 108.02(1). Tr. 710. Falls testified Luke's conclusion was incorrect since while a relocation may be partial, that partial relocation *cannot* create a new health care facility, or a new general acute care hospital. "If that's the case, then it is separately reviewable under the [SHP's] criteria for a new hospital in a county with a hospital ..." Tr. 1286-87. Falls testified that Luke's application of the Manual's language would have an absurd result since

> [Y]ou could build hospitals all over the state under this theory without going through the [CON] Review Manual. Any hospital with capacity that they feel that they can define as operational ... that wants to build a new hospital somewhere, can just simply seek to relocate [those operational beds] and build a new health care facility, have it licensed under the same license, and build it without respect to the need criteria for ... new general acute care hospitals... *[That] would be terrible health care planning.*

Tr. 1288-89 (emphasis added). The construction of a new hospital and addition of general acute care services is reviewable because first there is a newly constructed hospital, and second, those general acute care beds, relocated or new, create new and additional acute care services that must be reviewed under the criteria for a new hospital.

For the reasons discussed above, I believe the applicable criteria is Section 108.02(1) for Counties with Existing Hospitals and that St. Dominic's Application does not comply with the SHP.

B. Even Assuming the Application Was for a Relocation and Section 108.03(1)(a) of the SHP Was the Applicable Methodology, St. Dominic's Application Still Would Not Comply with the SHP.

Again, the SHP section St. Dominic wants to comply with is Section 108.03(1)(a), Projects which do not involve the addition of any acute care beds. As set forth above, this Section requires the following:

> The applicant shall document the need for the proposed project. Documentation may consist of, but is not limited to:
>
> (a) citing of licensure or regulatory code deficiencies,
> (b) institutional long-term plans (duly adopted by the governing board),
> (c) recommendations made by consultant firms, and
> (d) deficiencies cited by accreditation agencies (JCAHO, CAP, etc.).
> (e) In addition, for projects which involve construction of emergency department facilities, the applicant shall include a statement indicating whether the hospital will participate in the statewide trauma system and describe the level of participation, if any.

Ex. 7, paraphrased.

1. Under Subsection (a) and (d) Above, St. Dominic Does Not Have Any Citations Related to Licensure or Regulatory Code Deficiencies, and St. Dominic Does Not have any Deficiencies Cited by Accreditation Agencies.

Diamond testified that he did not recall the hospital having any surveys that showed a violation of licensure requirements or life safety code regulations or any citations from JCAHO. Tr. 346-47. No evidence demonstrating such deficiencies was presented at the Hearing.

2. Under Subsection (b) Above, the Validity of St. Dominic's Institutional Long-Term Plans Is Debatable.

While undoubtedly St. Dominic has had an interest in building a hospital in Madison County for years, the evidence demonstrating that plan and the formal acceptance of the Master Facility Plans, discussed further below, is questionable.

Diamond testified he did not know "offhand" the date St. Dominic's board adopted the Master Facility Plan. Tr. 340. In November of 2008 (less than a month before the Application was filed) Luke emailed Paul Arrington and Diamond stating, "I understand there is some uncertainty on whether the Hammes [(the Master Facility Plan)] is final or draft. As we are basing a central argument in the CON on this document, I need to know its status and I need a copy ASAP." Ex. 32. Further, while the Application contained a "5 year strategic plan" which included "continued pursuit of the CON application for the satellite facility in Madison County," (dated November 20, 2008), a draft executive plan for 2009 strategy (dated October 16, 2008) did *not* include the Madison County facility as a goal. Tr. 347-49; Exs. 33, 34.

3. Testimony at the Hearing Demonstrated That the Basis for the Application, a Recommendation from a Consultant Firm Under Subsection (c) , Had Several Incorrect Assumptions.

Though it was evident at the Hearing that St. Dominic has tried for years to build a hospital in Madison County, the starting point for *this* Application is two Master Facility Plans (the "Plans").

These Plans were put forth in attempt to comply with the documentation required in Section 108.03(1)(a) related to "recommendations made by consultant firms." Kevin Crook ("Crook"), who testified as an expert in health care facility planning, who was with the Hammes Company

("Hammes") at the time of the Application's filing,[5] prepared the Plans[6] for St. Dominic, one considering a Madison hospital being built and one assuming no Madison hospital. Tr. 897, 899. Crook testified in developing the Plans he considered the following "deficiencies": locating as many outpatient services to the north campus from the south campus (to free more space for patient care); congestion at the main entrance; visual entrance; an old parking garage on the south campus; delivery service; emergency room entrance; and parking. Tr. 911-12. None of these "deficiencies" rise to the level contemplated by Section 108.03(1)(a) of regulatory or licensure deficiencies or deficiencies cited by accreditation agencies.

Roy Holland ("Holland"), Vice-President of Preconstruction at M.J. Harris, which focuses nearly 100% on medical construction, testified as an expert in the field of pre-hospital construction and planning regarding his observations about St. Dominic's main campus and the Plans. Tr. 1091, 1094. Holland toured St. Dominic's south campus in January 2010, in summary he testified, "I thought it was a nice facility. Very well maintained. Easy to get around in." Tr. 1095, 1096. Overall Holland testified the hospital had good signage and circulation. Tr. 1102-03, 1105. Jackie McGowan ("McGowan"), Vice-President of Facilities Management and Planning for River Oaks Hospital and Woman's Hospital, echoed Holland's observations, the hospital "was nice...it's evident

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[5] Hammes was originally retained in early September 2007, after St. Dominic had filed a CON application for a hospital in Madison County, to help testify in a previous CON hearing related to St. Dominic's Madison Hospital. Tr. 964-196; Ex. 62.

[6] The Plans were finalized for St. Dominic in the Fall of 2008, though there was final date of August 7, 2008, a revision in December 2008, another revision in August 2009, and revisions in preparation for the Hearing. Tr. 899-900, 907. The differences between the first three revisions, according to Crook, were "minimal" - including correction of bed locations, revising dates, and fixing graphics. Tr. 909.

that they spend a lot of time and money on maintaining their finishes. ... The signage is abundant... and is prevalent everywhere." Tr. 1135-37.

Based on Crook's calculations in the Plans, St. Dominic would need all of its licensed beds, considering a 75% target occupancy rate, in service between 2016-2017, *if* observation beds were included. Tr. 926-28. Based on a 70% occupancy number, Luke testified that St. Dominic would need all of its licensed beds in use by the end of 2016, though he acknowledged that an occupancy rate of 76.65% at certain times was not "unmanageably high." Tr. 603-04, 747-48, 755. To project the growth rate, both Crook and Luke kept the market share and average length of stay constant, with Luke using an average length of stay of 5.22. Tr. 928, 1424. Crook considered only "fairly modest" growth in St. Dominic's service area, instead relying on the aging of patients as the main basis for the increase in bed utilization. Tr. 928. Simply by reducing St. Dominic's average length of stay from 5.22 to 5.0 days consistent with St. Dominic's Strategic Plan,[7] and projecting a decrease in St. Dominic's market share,[8] Falls testified St. Dominic would not need all of its licensed beds at the time projected by Luke and Crook.[9] Tr. 1319-21, 1414-15. 1420; Ex. 34.

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[7] Projecting a decrease in average length of stay is appropriate not only as it was one of St. Dominic's goals but as length of stays nationally are going down. Tr. 1416.

[8] Falls testified a decrease in market share at St. Dominic is reasonable to assume based on the increase of beds at River Oaks in Rankin and the replacement hospital at Nissan Parkway. Tr. 1424. Falls also testified that St. Dominic's overall market share has trended down since 2007. Tr. 1485.

[9] Also neither Crook nor Luke considered that currently, 36 of St. Dominic's licensed acute care beds are leased to Regency, a long term acute care hospital located within St. Dominic. Tr. 286-87. In 2015, St. Dominic's lease of 36 acute care beds to Regency ends, and these 36 acute care beds could go back on St. Dominic's license. Tr. 749-50.

The options presented by the Plans are "very similar as far as the components, other than those two variations - - with or without the Madison campus," Crook testified. Tr. 934. If the Madison hospital is built, Crook testified there would be less construction on St. Dominic's main campus.[10] Tr. 934. According to Crook, the best alternative is the Plan with the Madison campus. Tr. 940-41.

Holland testified that the Plans identify "those things which are probably going to have to be done whether they do ... the Madison hospital or not." Tr. 1107-08. In comparing what will be done "with the Madison campus," St. Dominic proposes to add an emergency department, imaging and observation on the first floor, a heart center on the second floor and surgery space on the third floor - *all projects that will be done with or without the Madison hospital.* Tr. 1110-11; Ex. 58, pg. 46. "Without the Madison campus," St. Dominic also proposes to add a thirty bed unit on the fourth floor, a women's unit on the fifth floor, and another thirty-bed unit on the sixth floor. Tr. 1111; Ex. 58, pg. 47. The only two differences between the original Plans were two levels of underground parking[11] below the emergency department (which Crook testified would not be undertaken until *after* 2017), a new 30-bed unit, and 10 labor and delivery rooms. Tr. 983-84. In Crook's revised

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[10] Though Crook testified that some of the main hospital was older, he acknowledged that St. Dominic performs renovations every year and estimated that the hospital would spend *$15-20 million dollars a year* in renovation. Tr. 914-15. Eddy agreed that almost all of the hospital has had significant renovations over the years. Tr. 1077. Crook testified that "[r]egardless of Madison Campus expansion, in the next 3-10 years major expansion/renovation projects... will be required on the Jackson Campuses to provide buildings that ... maintain St. Dominic's high quality of care." Tr. 969; Ex. 2.

[11] Eddy testified that underground parking would cost more to build than above ground parking because of the Yazoo clay in the area. Tr. 1081-82. Holland testified building underground parking with Yazoo clay is "not a very good idea" and "would be very expensive." Tr. 1109.

Plans, the 30 bed unit would be in the tower addition (*after* 2017) and there would be underground parking at the main campus *regardless* of the Madison hospital. Tr. 984, 989.

The need for the proposed bed tower is questionable based upon the bed utilization discussed above and based upon Holland's and McGowan's observations. Both Holland and McGowan testified there was space being used for services other than acute care services at the main hospital, including patient rooms where offices were set up without the removal of " any of the head walls, or of the other things in a typical hospital room" storage, shelled space, and pre-admit areas. Tr. 1099-1100, 1103, 1105, 1127, 1142-44, 1146.

Based on these observations Holland testified "most definitely" St. Dominic had additional space on the South Campus that was not being used for acute care services in which it could "definitely" add additional acute care beds as the hospital currently exists. Tr. 1106. "From what I could see, the rooms we went in, if it was indicative of all the rooms, on the fifth floor there would be - - that whole wing would - - could be made into acute care beds," Holland testified. Tr. 1106; *See also* Tr. 1147 (McGowan's testimony that north end of building and center core contained rooms that could be used as acute care).

Perhaps most telling of the real purpose behind the Plans was Crook's testimony:

> Q: Have you had any discussion with anyone at St. Dominic's as to whether or not they will implement the Master Facility Plan without the Madison Campus if this CON is denied?
>
> A: No, we haven't - - **there's no schedule to move forward with that in the near future**. ... I think they're **waiting to find out what happens** with this first before they do anything.

Tr. 998 (bold added). Therefore, while there was a recommendation made by a consultant firm, there has been no indication that St. Dominic really intends to follow the Master Facility Plan if this

Application is approved, or that it will follow the Master Facility Plan Without the Madison Campus if this Application is disapproved.

4. St. Dominic's Proposes That the New Hospital Will be a Level IV Hospital in the Trauma System under Subsection (e), the Same as the Main Campus.

At time of filing Application, St. Dominic's did not participate in the trauma system, and the proposal was that the Madison hospital would not either. Tr. 245-46, 302, 307; Exs 25; 26. However, since filing the Application, St. Dominic has applied to participate in the trauma system as a Level IV hospital (though it was assessed as a Level II since it has neurosurgeons and orthopaedic surgeons on staff), and therefore, it plans for the Madison hospital to also be a Level IV hospital[12] in the trauma system. Tr. 245-46, 279.

For these reasons, even if for the sake of argument Section 108.03(1)(a) was applicable and the Application should have been reviewed as a project not involving the addition of any acute care beds, St. Dominic failed to demonstrate compliance with that criterion.

IV. THE APPROVAL OF ST. DOMINIC'S APPLICATION WOULD VIOLATE THE STATE HEALTH PLAN'S GENERAL CON REVIEW CRITERIA.

The SHP contains four general CON policies with which each CON application must comply as follows:

> Mississippi's health planning and health regulatory activities have the following purposes:

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[12] A Level IV hospital is the lowest level in the trauma system. Tr. 175. The Department's Trauma Plan dictates where a patient having a medical emergency, such as a heart attack, would go to receive the highest and most appropriate level of care, not the lowest level. Tr. 1340,1342. David Mullohand, M.D. ("Mullohand"), a cardiologist who sees most of his patients at St. Dominic's, testified that someone in an emergency condition that needed a stent or angioplasty would not be able to have that service at the new Madison hospital but would have to come into Jackson. Tr. 1608.

- To improve the health of Mississippi residents
- To increase the accessibility, acceptability, continuity, and quality of health services
- To prevent unnecessary duplication of health resources
- To provide some cost containment

Ex. 18. As will be discussed below under the general review criteria, the evidence presented at the Hearing did not demonstrate that the new hospital was necessary to improve the health of Mississippi residents or to increase the accessibility, acceptability, continuity, and quality of health services. As for unnecessary duplication, Luke agreed that there would be a duplication of services with the addition of the new St. Dominic's hospital. Tr. 761. As for cost containment, the testimony presented at the Hearing demonstrated that based on the Plans, St. Dominic was actually going to expend more capital to construct the new Madison hospital.

Crook prepared two new exhibits comparing the cost between the two options, Exhibit 60 (with Madison) and Exhibit 61 (without Madison). Tr. 957. Crook's explanation for the changes included some projects within the hospital already being completed, updating current cost information, and the spreading out of projects/phasing for cash flow. Tr. 960-61. Crook's comparison of the two estimates concluded that if St. Dominic built a new hospital in Madison, *and did all the proposed projects in the Plan,* the cost would be *$3 million* less than the 'without Madison campus' option. Tr. 962, 1007. However, in order to reach the real difference in cost between the two Plans the Exhibits must be compared. Exhibit 60 for "With the Madison hospital" shows the emergency department will cost $23 million and the heart institute and surgery will cost $80 million, a total of $103 million for these two projects which are proposed regardless of the Madison campus. Tr. 1113-14. With no explanation given, in the calculation for the "without the Madison hospital," these two projects total $120 million, a $17 million dollar difference. Tr. 1114-

15. Subtracting this extra $17 million dollar difference from the amount of the proposed cost "without the Madison campus" would result in a cost of $219 million which is less than what St. Dominic projects its cost to be for the "with Madison campus" option. Tr. 1115. Based on Holland's testimony that there is available space in the current hospital for the proposed 60 new beds in the tower addition, another approximately $50 million could be subtracted from the project, leaving the 'without Madison campus' with a total at $170 million (compared to the proposed $232,979,000 for the 'with Madison' opinion). Holland testified,

> Q: [W]hat's your opinion there as to whether or not, based on their own projections here, from a cost standpoint, whether or not building a hospital in Madison County is cost effective or not?
>
> A: It would be my opinion that it wouldn't be very cost effective.

Tr. 1116. Holland concluded his testimony by saying that while the Plans offered lots of scenarios that could solve St. Dominic's problems, none of those problems would be resolved by building a Madison hospital. Tr. 1116-17. Also, some of the projects proposed in the Plans would require a separate CON, for which an application has not been submitted. Tr. 997.

Eddy also tried to modify the Application's cost estimates to be in line with the project cost set forth in the Staff Analysis. Exs. 3, 75. To do this, Eddy reduced the cost by 13 ½% to be nearly exactly in line with the concerns raised by the Staff. Tr. 1038-39. Also, while Eddy proposed a different method for calculating the cost per square foot of the Components than that contained in the Staff Analysis, the formula for calculating construction cost per square foot is set forth in the CON Manual and was followed by the Staff. Tr. 1045-48, 1052; Exs. 3, 16, 76.

Even if one assumed St. Dominic will undertake all the construction at its main campus on the schedule set forth by Eddy and Crook, it would result in a conclusion that St. Dominic was

saving $3 million dollars to duplicate services and build a new hospital in close proximity to its existing facility. Taking into account Holland's observations about the change in cost between Exhibits 60 and 61 for seemingly the same projects and assuming St. Dominic has space to add additional beds at its current hospital after 2017, the Plan for "Without the Madison Campus" results in substantially less of a capital expenditure than the one "With the Madison Campus." These findings, coupled with the lack of increase in access discussed below, lead me to reach a conclusion that the Application also fails to comply with the SHP's general CON policies.

V. THE APPLICATION FAILS TO COMPLY WITH A NUMBER OF THE CON MANUAL'S GENERAL REVIEW CRITERIA.

All CON applications are required to comply with the General Review Criteria of the CON Manual as well as the SHP provisions. For the reasons discussed below, St. Dominic's Application failed to so comply with the General Review ("GR") Criteria found in Chapter 8 of the Manual.

A. General Review Criterion 1 - State Health Plan

For the reasons discussed in detail above, this project fails to comply with the SHP.

B. General Review Criterion 3 - Availability of Alternatives

I do not believe the Applicant considered any other alternatives other than a new hospital in Madison County. Rick Thomas ("Thomas"), another of St. Dominic's experts discussed further below, testified that when he was retained to provide testimony in a June or July proceeding for the most recent prior application by St. Dominic in August 2008 for a similar project, St. Dominic had already selected the location for the new hospital. Tr. 466. Luke testified that he was retained in August or September of 2008, though his letter of engagement was dated November 6, 2008. Tr. 699-701. Luke agreed with Thomas that the decision to have a Madison County hospital was made

before St. Dominic retained him to testify at the hearing, and that St. Dominic has had "an interest in this project ... that goes back many years." Tr. 701, 719. Because the Applicant only considered this specific Madison County location, I believe the Applicant failed to comply with this criterion.

C. General Review Criterion 4 - Economic Viability

This criterion requires the Department to consider the immediate and long-term financial feasibility of the project. Ex. 16. Martin Brown ("Brown") testified on behalf of St. Dominic as an expert in health care accounting and finance. Tr. 837. Brown testified,

> our job was to prepare some financial projections and analyze the feasibility of both of [the] Master Facility Plans [with and without the Madison hospital]. This report lays out the work that we performed, and we determined that the project with the Madison campus is financially feasible and is a superior alternative to just the Jackson campus' Master Facility Plan.

Tr. 840. Brown testified both Master Facility Plans were financially viable, and that if St. Dominic did not build the new hospital in Madison, the main hospital would still be financially viable. Tr. 856. Brown did not do any financial projections for St. Dominic if it does not implement either Master Facility Plan. Tr. 870. Brown revised his financial feasibility study for the Hearing.[13] Tr. 843-44; Exs. 55, 56.

[13] Without any explanation or basis in Brown's revised financials he: reduced the bad debt percentage from 4.2 or 4.3 to 3.5% of gross charges; increased his charity care from 2.3% of gross charges to 2.4% of gross charges; decreased the original Application's capitalized interest amount of $9,281,000 to $6,435,000, a decrease of $3 million dollars; and increased the number of FTEs for Madison. Tr. 886-87, 890, 892; Ex. 56. In considering the patient volume (to generate the patient revenue) at each campus, St. Dominic did not give him the volume at the Jackson hospital and a separate number for the volume at the Madison hospital. Tr. 872. Instead, he reviewed information for each Master Facility Plan in total, with no separation between the two facilities, so he did *not* know what the total patient days would be just at the Madison campus. Tr. 872, 883.

In comparing how much money St. Dominic projects to generate with the addition of the Madison Campus, in 2013, Brown projected a total operating revenue of $436 million with the Madison Campus and $426 million if the Madison hospital is not built - a $10 million dollar difference in 2013. Tr. 862-63; Ex. 55. For 2014, Brown testified there is a difference of $14 million generated if the Madison hospital is built. Tr. 864. However, when questioned about this additional revenue, Brown admitted $14 million in additional revenue from a 71-bed hospital was a low amount.

> Q: Based on your experience with regard to health care finance, do you expect a fully functional 71-bed hospital to only generate $14 million in revenue?
>
> A: No, it would not. I mean it would generate much more than that. ... [I]f you're trying to infer that the 14 million is related to the new hospital, that's not the case. ... It's included therein, but these 71 beds are being relocated . . . [T]his is not a Master Facility Plan to do a new hospital with a new license, et. cetera. So some of the revenues that are currently being generated at only the Jackson campus would be generated at the Madison campus.
>
> Q: So with the Madison campus in the first full year of operation, the increase in total revenue that the hospital would - - would generate for the St. Dominic's system would be about $14 million?
>
> A: The - - for the system - - for - - I shouldn't say system, for just the hospital, the same license number, it would be a $14 million increase.

Tr. 865. In 2015, there would be an additional $17 million generated in revenue from the new hospital but "... the 17 million [in revenue] is not a reflection of only the 71-bed hospital. ... It's a reflection of all the services that St. Dominic offers." Tr. 866. By the end of 2017, there would be little less than $1.6 million in net income generated with the Madison hospital. Tr. 875.

While Brown testified the inclusion or exclusion of any of the Madison hospital's four components did not affect the financial feasability of the project, he testified he had not reviewed the financial viability of the Madison hospital alone. Tr. 841-42, 883-85.

> Q: Have you actually done any type of independent analysis of what the financial feasibility is of just the Madison campus without being part of what y'all described as the system, under the same license number?
>
> A: I personally have not. I've reviewed some calculations that were done previously, and so I've looked at it that way. . . . Our job was to perform the calculations on the Master Facility Plans.
>
> Q: ... Nobody has asked you to say, "Take these patient days of 359," if they're even patient days for the Madison campus, and said, "Do me a set of financial predictions, projections, to see whether or not a 71-bed hospital in Madison County operating based on its own cost and its own revenue would be financially feasible?
>
> A: **Right.** Our charge was to develop the financial projections that are consistent with the application. **And so we haven't done that for the Madison campus;** we haven't done that for the cancer center upgrades; we haven't done it for the dialysis, et cetera. We've looked at all of the volume as provided to us under both scenarios to see if St. Dominic would be financially feasible.
>
> Q: **As a combinations; existing facility and the Madison campus?**
>
> A: **Right.**
>
> Q: I want you to assume for me, just for the moment, that this idea of having them under the same license is not possible, so this hospital in Madison County would be a stand-alone hospital. . . . It's just got to pay its own way. Get its own patients, pay its own way. Okay. **You haven't done any study to determine whether or not under that scenario the hospital would be financially feasible?**
>
> A: **I have not done any study, no.**

Tr. 883-85 (bold added).

"A project is financially feasible if the applicant can withstand a loss and become profitable by its second or third year of operation." *Madison HMA*, 954 So. 2d at 511. Based on Brown's testimony, there is no demonstration that the new hospital alone, the only project for which there is an Application, would be profitable by its second or third year of operation. Therefore, I do not believe St. Dominic has demonstrated the Application is financially feasible.

D. General Review Criterion 5 - Need for the Project

1. GR Criterion 5(a)(b)

General Review Criteria 5(a)(b) both concern the need the population served or to be served has for the services proposed to be offered, considering in particluar the access to such services by low income persons, racial and ethnic minorities, women, handicapped persons, elderly and other underserved groups. Ex. 16.

The location proposed for the new hospital is in an area with a "relatively young, wealthy population," so that if St. Dominic was trying to locate their hospital in a very wealthy and affluent location, "they're doing an excellent job," Falls testified. Tr. 1348. Thomas testified regarding the payor mix at the new hospital, that "you can make assumptions that the population in that area, the south is going to be fairly-well insured." Tr. 526. The Supreme Court recognized in *St. Dominic*, that it was "difficult to accept that increasing services to the 'low income and minority population' was a significant motivating factor in the hospital's construction," and accepted "that the construction of the new hospital in northeast Jackson was motivated by a desire to expand into this affluent area of Jackson ..." *St. Dominic*, 728 So. 2d at 87. Likewise, the motivation for this Application is not to improve access to the low income, minority population and underserved groups

as Madison County ranks 7th out of 81 counties and Hinds ranks 32nd out of 81 in health. Tr. 1350; Ex. 83, pgs. 15-17.

St. Dominic attempted to demonstrate that because the population of Madison County was growing, there was a need for the new hospital. For this proposition Richard Thomas, Ph.D. ("Thomas") testified for St. Dominic as an expert in health care planning, but not in the SHP. Tr. 411. In order to estimate the population growth in Madison County, Thomas utilized three methods: a housing unit methodology that looks at building permits from 2000 to 2009; electrical hookups in 2009; and active postal units in 2009. Tr. 424, 426, 427-28. These calculations resulted in the following population estimates for the end of 2009: Building permits equaled 99,729[14]; electrical hook-ups equaled 117,901[15]; and postal units equaled 106,358 - an average of 108,000. Tr. 432. Thomas agreed that an 18,000 population difference between building permits and electrical hook-

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[14] Thomas did not obtain actual copies of building permits but just a total number, and he "thinks" he requested information for new residential units, not renovations. Tr. 506. Thomas did not have copies of those numbers or any documents from the respective permit offices; instead he "went to the City Hall and spoke directly to them and got the information," and "I wrote down the number" they gave him. Tr. 507. Thomas assumed that if a project was issued a permit it was built within a certain time frame, but there was no way to actually determine that, he testified. Tr. 507.

Thomas also did not apply a foreclosure rate to his building permit methodology though he acknowledged the impact economic conditions have had on the housing market, and Thomas did not determine the number of houses that were for sale in Madison County. Tr. 468-69, 471.

[15] To obtain the electrical hook-ups, Thomas went to Canton Municipal Utility and Entergy and spoke with the person there. Tr. 509. That person "went to a spreadsheet and looked up the numbers and gave them to me. You know, he did not give me anything in writing," Thomas testified. Tr. 509.

ups was significant, stating "Yes, I think that's a significant deviation."[16] Tr. 512, 513. To resolve this significant deviation, Thomas simply averaged the numbers. Tr. 514.

Thomas concluded that the population of Ridgeland/Madison was increasing and that the concentration of people is moving northward as the center of the population is moving north. Tr. 439. However, Thomas' conclusion showed that after 2014, the population growth in Madison County would be a normal situation without a huge, boom-type growth. Tr. 519. Luke agreed the growth was not significant. Luke projected a population growth of 5,791 for Madison County in eight years, from 2007-2015, which he acknowledged was not explosive growth. Tr. 774. Assuming there was a population increase of 5,791 compared to the state average bed rate per county of 1.75, Luke testified "you would need to - - I believe that would be about a **little over ten beds**" needed to serve that population increase. Tr. 775 (emphasis added).

2. GR Criterion 5(c)

General Review Criterion 5(c) concerns the current and projected utilization of like facilities or services within the proposed service area for determining the need for additional facilities or services. Ex. 16. This is discussed under GR Criteria 5(d) and 8.

3. GR Criterion 5(d)

General Review Criterion 5(d) concerns the probable effect of the proposed facility on existing facilities providing similar services to those proposed.

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[16] Thomas acknowledged that "active residential hookups" could include sites where a house was being constructed without any residents. Tr. 510.

Though Luke recognized Madison HMA was "not a terribly competitive[17] or attractive facility," he testified that in order to determine if the new hospital proposed by St. Dominic would have an impact on Madison HMA, he considered, without any basis, HMA as a system, not as individual hospitals and determined that HMA, as a whole, received 31% of the market share from Madison County. Tr. 582-83, 608; Ex. 40, pg. 8. Luke testified he did not try to determine what percentage of patients Madison HMA would lose as a result of the new St. Dominic's Madison hospital, instead grouping all the HMA facilities together. Tr. 740, 744. Luke also relied on Madison HMA's previous 2004 CON application to determine if St. Dominic's Application would have an impact on Madison HMA. Tr. 583. Luke testified St. Dominic's current market share from Madison County was 29%. Tr. 737; Ex. 40, pg. 8. Luke testified that St. Dominic would gain 3-6% market share with its new hospital, and gain 4.5 to 6 points from Madison County. Tr. 611, 738. Luke did not review the impact the new Madison hospital would have on existing hospitals located in St. Dominic's proposed service area (in Leake, Yazoo and Attala counties), though Luke admitted there would be some effect. Tr. 765, 767-68.

Cotton testified regarding Baptist's services and plans for Madison County. Tr. 1161. Madison County is in Baptist's primary service area, and Baptist put together a Madison County strategy in 2002 when they obtained the property at the corner of Highland Colony Parkway and Highway 463 in Madison. Tr. 1162. When Baptist acquired that property, Baptist "understood and felt and was confident that eventually that Madison County would have a need, documented by the rules and regulations that are there, to support multiple health care facilities." Tr. 1165. In light of

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[17] Luke testified in 2004, Madison County Medical Center's net income was negative $523,000; in 2005 positive $835,000; in 2006 positive $1,396,000; in 2007 negative $1,443,000; and in 2008 negative $2,396,000. Tr. 807.

this recognition, Baptist built a multi-specialty office building with outpatient diagnostic services and an ambulatory surgery center. Tr. 1165; Ex. 80. Baptist's long range plan is to add another office building and as the population grows to support a CON "under the ordinary circumstances of granting CONs" to apply for building a hospital. Tr. 1166.

> [Baptist] want[s] to be in a position to be - - be able to compete for that CON when that time comes. And under the circumstances we are in right now, we're - - we're - - we're sort of going to be in a very uncompetitive position. So we support the State Health Plan and its identification of need and processes that are in place to - - to meet those needs,

Cotton testified. Tr. 1166-67. Baptist's current building is still not completely occupied, and while Cotton recognized that there is growth in Madison County, "it's not growing at a rate that all of a sudden, our capacity is going to be fully stretched." Tr. 1167. Cotton testified that he was concerned about the impact the new St. Dominic hospital would have on Baptist.

> Q: [Is Baptist] concerned that if St. Dominic's builds a hospital at - - on Reunion Parkway, that that would have an adverse effect on Baptist?
>
> A: We believe that it would.
>
> Q: And how would you describe that? What do you anticipate would happen?
>
> A: It's hard to predict the numbers, but for sure we would lose market share. And health care these days is - - it's like any other business. It's impacted by the economy, and a loss of any level of market share impacts your ability - - your ability to have capital to grow and replace capital and recruit staff and keep staff. So we - - we're not real excited about having to compete with a hospital that's there that hasn't followed the guidelines and the rules that are in place. Now, the State Health Plan identifies the need. Baptist and St. Dominic, for sure, is going to apply to compete for that CON, right along with several others. And if we are not chosen, then we - - we'll feel pretty - - at least like we had a chance.

Tr. 1169-70. Cotton testified the payor mix from Madison was a little better than the hospital's normal payor mix. Tr. 1170. The loss of commercial insurance payments would impact the ability of Baptist to prove charity or uncompensated care. Tr. 1171.

For these reasons, I believe that the new hospital will have a negative impact on both Madison HMA and Baptist's market share and ability to provide care.

4. GR Criterion 5(e)

General Review Criterion 5(e) considers the community reaction to the facility. Ex. 16. While an applicant is allowed to present endorsements from those in support of the project, "[i]f significant opposition to the proposal is expressed in writing or at a public hearing, the opposition may be considered an adverse factor and weighed against endorsements received." Ex. 16. Both St. Dominic and Madison HMA had significant support for each of their positions, with one day of the Hearing being devoted to accepting comments from both those in support of the Application and those opposed to the Application. St. Dominic also submitted electronic and handwritten petitions to support its Application. Ex. 73.

Cotton testified regarding Baptist's opposition to the new hospital.

> I'd have to say we oppose [the Application], but we - - we support the State Health Plan in its identification of need of which, on our interpretation and others' interpretation, there is no documented need [for the project] based on our current State Health Plan.

Tr. 1162. Cotton concluded that while it

> would want to have a hospital in Madison County, if it's not - - if it's not covered in the guidelines that are intended and put in place for the benefit of the state and the needs of the community, we've not proceeded, other than the same thing that St. Dominic has done initially is developed a strategic plan that identified a need in the community at some time in the future, talked about how we're going to meet that need, and - - But the current process that we're in right now is - - puts Baptist in a

> terrible competitive position. We've not - - we've not submitted a CON for a hospital because the guidelines do not call for it. A CON - - state CON law doesn't recognize a need. As soon as that happens, that the State Health Plan is changed or the documentation to support additional hospital beds in Madison County, we'll be applying and in competition with many, many other folks.

Tr. 1174.

Karl Banks ("Banks"), District 4 Supervisor for Madison County, also testified in opposition to the Application. Tr. 1215. Banks testified that he was concerned that if St. Dominic were allowed to build in the more affluent portion of Madison County, it would harm HMA's ability to serve the rest of the county. Tr. 1218-19. Banks testified the new Madison River Oaks is "very important" to the people in Madison County, and that

> HMA came in and solved the problem when we were about to lose health care in Madison County because the Board of Supervisors was - - we were spending over $200,000.00 a month just to try to keep their doors open until we could get somebody with expertise to come in and take over the hospital. HMA did that.

Tr. 1219-20. HMA offering to operate the hospital for Madison County was only after St. Dominic, the County's first choice, responded with a "No. I mean basically, we got a big, fat no," Banks testified. Tr. 1240-41.

St. Dominic's marketing campaign and petitions resulted in support for its project. However, as Banks stated the advertising is "misleading," "some people don't believe or don't know that the [Madison River Oaks] is even being built in Madison County." Tr. 1221. He added that in his opinion the advertising

> seems to imply that Madison County has - - there is no hospital in Madison County. And the fact that if St. Dominic's doesn't build, then the people of Madison County are going to be without a hospital. That's the implication that I am getting and I read when I see a - - - and I think I called [(Brunini)] about the ad because it really kind of upset me to see the ad for the first time I saw it. ... I thought the ads were totally misleading, and I felt that Reunion Interchange was going to allow for St. Dominic's

> to pull off that type of trickery on the citizens of Madison County. Yes, I did. I was - - I had - - was ready to pull my support of the Reunion Interchange right away.

Tr. 1226-27. Banks testified his

> constituents, for the most part, feel that [St. Dominic's] advertisements at this point have been misleading. ... They felt that, well, [St. Dominic's] is trying to be built - - St. Dominic's is trying to build a hospital in the southern part of the county around the rich white folks. That's what my constituents think. But, you know, the - - it's all about - - it was all about money. It's not about health care.

Tr. 1222. Banks added that both black and white constituents have told him that "St. Dominic's wanted to get the white folks" with the new location. Tr. 1225.

A sampling of others that testified during public comment at the Hearing stated the following:

- Steve Vassallo ("Vassallo"), an economic development consultant for the City of Madison, testified regarding his support for St. Dominic's Applications. Tr. 1544. Vassallo's resume listed his office address in Oxford, Mississippi. Tr. 1551-52. Not only is the City of Madison one of Vassallo's clients, St. Dominic's was too until ten days prior to the Hearing, and he did not "believe" St. Dominic was a client at the time of the Hearing. Tr. 1552. St. Dominic hired Vassallo and paid him $15,000.00 to solicit signatures on its petition for a new hospital. Tr. 1552-53.

- Dan Williams, M.D. ("Williams"), an emergency room physician at St. Dominic, testified in support of St. Dominic's. Tr. 1591. Williams also testified his practice group, Allied Emergency Physicians, has the contract to provide emergency services at St. Dominic. Tr. 1593. Williams also testified he was not opposed to Madison River Oaks building a new hospital in Madison County. Tr. 1594.

- Jennifer Hicks, M.D. ("Hicks"), the chief of OB-GYN services at Madison County Medical Center, testified she opposed the new St. Dominic's hospital since she believes it will impact the new Madison River Oaks. Tr. 1596.

- Rob Martin ("Martin") testified regarding his impression of healthcare in Madison County and his involvement on the Board for the Madison County Nursing Home. Tr. 1610. That same Board overlapped with the hospital during the transition period. Tr. 1610. Martin testified "HMA came to Canton and has done an outstanding job of providing health services to all of the people of Madison County, those who care to come," after the Board of Supervisors asked St. Dominic's to come to Canton. Tr. 1613. St. Dominic instead responded saying that it believed its ministry "can better serve your residents and citizens by maintaining our present facility and by offering our services to assist the new as such opportunities become available in the future." Tr. 1620; Ex.

86. Martin testified, "if you have two hospitals, in my opinion, there is no way two hospitals can exist [in Madison County]. Rightly or wrongly, whether we believe it or not, we have to pay the doctors, we have to pay the nurses. That costs money. And when you get to the point that you're trying to support two hospitals, it's difficult to do." Tr. 1614. Martin believes Madison River Oaks should be given a chance to prove whether it can serve the health care needs of the County. Tr. 1615. "If they can't do it, then, yes, let's bring someone else in. But you've got to give them the opportunity to show that they can provide the services for all the county. If you build another hospital on top of them before they get started, you automatically put them behind the eight ball." Tr. 1615.

- Leroy Walker ("Walker"), a resident of Canton and a member of St. Dominic's Board of Directors, testified regarding his support of St. Dominic's Application. Tr. 1628-30. Walker acknowledged that Madison County Medical Center is an important component of health care in the area and that he was not speaking against the Madison County Medical Center. Tr. 1631-32.

- Carl Crawford ("Crawford"), chairman of the Madison organization of Neighborhood Associations, testified in support of St. Dominic's Application. Tr. 1666. Crawford testified his association does not oppose the Madison River Oaks hospital. Tr. 1667, 1669. Part of Crawford's basis for his opposition was his mistaken belief that Baptist did not oppose the project. Tr. 1682, 1684.

- Tom Lariviere ("Lariviere"), Fire Chief of the City of Madison, testified regarding emergency services and his desire to have an emergency room closer to the City of Madison. Tr. 1684-85, 1688. Lariviere acknowledged that the new Madison River Oaks would also be a delivery point for residents. Tr. 1689. He agreed that the condition of the patient may dictate the level trauma center the patient would be transported to. Tr. 1690.

Also, in order to save time at the Hearing, the parties agreed to allow prior testimony from the previous CON hearing on the Reunion project into the record.

- Drs. Rebekah Moulder, M.D., an employee of St. Dominic, Clay Hays, M.D., who works at Jackson Heart at St. Dominic, Karl Hatten, M.D., an emergency room physician at St. Dominic, Malcolm Taylor, M.D, William Loper, III, M.D., a physician at MEA owned by St. Dominic, and David Waddell, M.D. all testified previously that they supported the prior application. Exs. 66-71.

- Mayor Mary Hawkins-Butler also testified in the previous hearing regarding her support for the prior application. Ex. 72.

Each party had proponents of their respective positions. The Manual allows significant opposition to be considered as a factor against an Application, and while there was significant

opposition, there is also significant support for this project. Whether that support or opposition is due to who employs the people that were present at the Hearing, the unverifiable signatures of people on online petitions, what prizes were given for signing petitions, or whether it was the result of aggressive marketing campaigns is difficult to ascertain. However, under General Review Criterion 5 and all of its subsections, I find that St. Dominic's Application does not comply with General Review Criterion 5 for these reasons stated herein.

5. General Review Criterion 6 - Access to the Facility and Service

For the reasons discussed above involving the Plan's general policy on improving access, St. Dominic failed to comply with this criterion as it proposes to build the new hospital in close proximity to its current facility and in the same vicinity of eight general acute care hospitals. Falls testified the residents in Madison County "have no accessibility issues, particularly in the southern half of the county. They are located within 30 minutes of eight general acute care hospitals, with almost 2,500 beds. And ... three of those are major medical centers, tertiary care medical centers. One of them is a trauma center." Tr. 1300; *see also* Ex. 83, pg. 10(b). Falls concluded that from a health care planning standpoint "there is no real change in accessibility of health care services for the residents of Madison County" with the addition of the new Madison hospital. Tr. Tr. 1337-38; Ex. 83, pg. 11. "[C]onvenience is not the standard from a health planning perspective. ... [I]t's not the standard by which we would determine whether or not a population was being served," Falls testified. Tr. 1342-43.

Both Falls and Thomas did drive time studies. Falls testified his drive time maps were done based on normal driving times, which is the standard that is used for considering access to care. Tr. 1455-56, 1466; Ex. 83, pg. 11. Thomas' drive time studies resulted in times between 15-26 minutes

to the main campus, and Falls' studies to the main campus averaged 9-24 miles and to the new hospital, 6-17 miles. Tr. 407, 495-98; Ex. 83, pg. 11. Whatever difference there is "doesn't create an - - an appreciable change in the distance or time, but certainly doesn't reach the point to where it would create an improvement in accessibility, or the lack of accessibility in its - - in its absence, when we're talking about the proposed Madison campus," Falls testified. Tr. 1465-66. Further, the presence of the proposed hospital "doesn't alleviate an access [problem] because there isn't an access problem," Falls added. Tr. 1469.

In addition to the lack of improved access, testimony at the Hearing demonstrated that funding for the Reunion Interchange, which would have given easier access to the new Madison hospital from Interstate 55, was lost. Banks testified that without the Reunion Interchange, getting to St. Dominic's propose location "would be very difficult." Tr. 1223. Tim Johnson ("Johnson"), a member of the Madison County Board of Supervisors, and Banks both testified regarding the lack of funds for the Reunion Interchange. Johnson admitted there was no money to build the interchange. Tr. 386-87. All the county money that was earmarked for the interchange, $28-30 million, was reallocated to other projects in the county. Tr. 387, 388, 1216-17. Currently, the only money earmarked for the interchange is federal, 1.5 million from Congress and $600,000 for an environmental study. Tr. 389. There is no county money appropriated to bring Reunion Parkway onto I-55 or to take Parkway East North to Highway 51. Tr. 390. Banks testified there was "nothing in the near future" regarding when the interchange would be built. Tr. 1218.

Based on the reasons stated above, I do not believe that the proposed project increases access for Madison County residents, and while it may be more convenient for some Madison County

residents, the standard is accessibility, not convenience. Therefore, I do not believe St. Dominic's Application complies with this General Review Criterion.

6. General Review Criterion 8 - Relationship to Existing Health Care System

This Criterion considers the relationship of the proposed services to the existing healthcare system. This Criterion also ties into GR 5(d) concerning the probable effect of the proposed facility on facilities providing similar services which has already been discussed.

For all of the reasons stated above, I do not believe St. Dominic's Application complies with the Manual's general review criteria and should therefore be disapproved.

VI. ST. DOMINIC'S OTHER COMPONENTS ALSO DO NOT COMPLY WITH THE APPLICABLE PORTIONS OF THE SHP OR CON MANUAL.

Though St. Dominic's Application and the testimony presented at the Hearing demonstrated that St. Dominic was not interested in implementing Components II-IV of the Application if Component I was not approved, and based on the discussion above, I believe Component I should be disapproved, and the other Components can be disapproved on their own basis.

1. The Proposed Mobile MRI Service Does Not Comply with the Applicable SHP MRI Criteria.

Component III seeks to offer mobile MRI services at the new hospital. The CON Criteria applicable to mobile MRI services provides in applicable part:

> *110.01.04 Certificate of Need Criteria and Standards for the Offering of Fixed or Mobile MRI Services*
>
> **1. Need Criterion: The entity desiring to offer MRI services must document that the equipment shall perform a minimum of 2,700 procedures by the end of the second year of operation. This criterion includes both fixed and mobile MRI equipment. . . .**

c. The applicant shall demonstrate that all existing units within its defined service area have performed an average of 1,700 procedures for the most recent 12-month period.

It is recognized that a particular MRI unit may be utilized by more than one provider of MRI services, some of which may be located outside of Mississippi. In such cases all existing or proposed provides of MRI services must jointly meet the required service volume of 2,700 procedures annually by the end of the second year of operation. If the MRI unit in question is presently utilized by other providers of MRI services, the actual number of procedures performed by them during the most recent 12-month period may be used instead of the formula projections.

Ex. 9 (bold in original). St. Dominic's 2008 licensure application demonstrates that St. Dominic had two fixed and one mobile unit which combined performed 14,480 MRIs. Tr. 303; Ex. 25. St. Dominic's 2009 licensure application also indicates two fixed and one mobile unit performing a total of 13,018 MRIs. Tr. 306-07; Ex. 26. Luke testified that the mobile unit at St. Dominic performed *1,970* procedures in 2007, *1,278* in 2008, and *less* in 2009. Tr. 634. The Application projected 540 scans in 2013 which results in a total below the required 2,700 scans. Ex. 2, pg. 31. As for how the mobile procedures "relate to the service specific standard, they are certainly in '08 and '09 below 1,700," Luke testified. Tr. 634. Luke added that while St. Dominic's average per unit mathematically results in a number above the 1,700 threshold, "in point of fact, [St. Dominic has] not distributed [the scans] evenly over the - - over the available machines." Tr. 636. Luke testified, "The specific mobile MRI probably today does *not* meet [the criteria for MRI services]." Tr. 784 (emphasis added); *See also* Tr. 786-87. Further, Luke testified that a MRI unit that is 100% utilized can perform 6,800-6,900 scans per unit, so that "5,000, 5,500 is – is a practical operating level." Tr. 790. Cotton testified Baptist's MRI at Highway 463 was operating at about 50-60% capacity. Tr. 1171.

For these reasons and the testimony given by St. Dominic's expert, I do not believe Component III for mobile MRI services meets the applicable SHP criteria. Further, I believe the

Plan does not track that information, he admitted he did not calculate the occupancy rate for OB beds at St. Dominic and admitted he did not even know how many beds St. Dominic was using for OB services. Tr. 797. Luke testified that for 2007, St. Dominic had 1,541 OB discharges and his projections for 2008 and 2009 were 1,548 and 1,555, respectively. Tr. 798. Luke projects that the new hospital will have 93 OB discharges, which is below the requirement of 150 babies in the first full year. Tr. 802-03.

For these reasons and the testimony given by St. Dominic's expert, I do not believe Component IV for obstetrical services meets the applicable SHP criteria. Further, I believe the findings above related to the General Review Criteria would also be applicable to the obstetric component. For these reasons, St. Dominic's Application as to Component IV should be disapproved.

VII. CONCLUSION & RECOMMENDATION

Based on my review and analysis of the Application, Staff Analysis, CON Manual, State Health Plan, controlling statutes, testimony and exhibits presented at the Hearing, I find that St. Dominic's Application fails to comply with the applicable criteria and standards found in the State Health Plan, the CON Manual and controlling statutes. For the reasons discussed herein, I recommend that St. Dominic's Application for the Relocation of 71 Acute Care Hospital Beds and Construction of a Health Care Facility and Medical Office Building in Madison County should be disapproved.

This the ____ day of _____, 2010.

_____
Administrative Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via electronic mail and United States mail, postage prepaid, a true and correct copy of the Contestants' Proposed Findings of Fact and Conclusions of Law to the following:

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This the 19th day of July, 2010.

Thomas L. Kirkland, Jr.