IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SINGING RIVER HEALTH SYSTEM, consisting of SINGING RIVER HOSPITAL and OCEAN SPRINGS HOSPITAL; MEMORIAL HOSPITAL AT GULFPORT; and GARDEN PARK MEDICAL CENTER	**APPELLANTS**
VS.	**NO. 2013-SA-00790**
MISSISSIPPI STATE DEPARTMENT OF HEALTH and HARRISON HMA, LLC, d/b/a GULF COAST MEDICAL CENTER	**APPELLEES**

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

JOINT REPLY BRIEF OF APPELLANTS SINGING RIVER HEALTH SYSTEM, CONSISTING OF SINGING RIVER HOSPITAL AND OCEAN SPRINGS HOSPITAL, AND MEMORIAL HOSPITAL AT GULFPORT

Oral Argument Requested

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The Court's decision in this appeal will have far-reaching implications with respect to the interpretation and enforcement of the Mississippi Certificate of Need Law. As demonstrated by the arguments in the principal Briefs, the parties disagree on fundamental and significant aspects of the CON Law, and the Court's resolution of those issues will impact hospitals and other health care providers in the planning and implementation of new health services and facilities throughout the State. For these reasons, Singing River Health System and Memorial Hospital at Gulfport respectfully submit that oral argument may be helpful to the Court in addressing the contested issues in this important case.

INTRODUCTION

The Joint Brief submitted by the Appellees, Harrison HMA, LLC, d/b/a Gulf Coast Medical Center ("Harrison HMA") and the Mississippi State Department of Health (the "Department") boils down to four basic arguments. First, this case merely involves the routine "replacement and relocation" of an existing hospital and should be treated the same as Madison HMA's CON application to replace and relocate the hospital in Madison County, as addressed by this Court in *St. Dominic-Jackson Memorial Hospital v. Mississippi State Department of Health*, 954 So.2d 505 (Miss. Ct. App. 2007). Second, in evaluating the Harrison HMA CON Application, the Department was required to consider *only* Need Criterion 3(a) in the State Health Plan, and did not have to assess the *community* need for the proposed hospital, or the current condition of the hospital market on the Gulf Coast. Third, the fact that the Coast admittedly has an excessive number of hospital beds is a "policy question," and should be of no concern to the Court. Finally, Harrison HMA and the Department contend that the hospitals opposing this project failed to show that the new hospital would have a significant financial impact on them because "their analysis focused solely upon Gulf Coast's projected population base and ignored that the Competitors draw patients from additional areas." *Brief of Appellees*, p.5.

These arguments all attempt to sidestep the Mississippi Supreme Court's admonition about hospital beds under the CON Law:

> Given the abundance of surplus licensed capacity possessed by hospitals throughout the State, this interpretation of the law [presumption of need] has the potential to render the CON requirements a nullity. Implicit in the Department's rationale is the assumption that, merely because a hospital is licensed to provide a certain number of beds, it necessarily follows that there is a need for these beds. **The fact remains, however, that the excess licensed capacity enjoyed by many hospitals has never had to withstand CON scrutiny, and any implied presumption of need in this regard is erroneous**.

St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't. of Health, 728 So.2d 81, 91 (Miss. 1998) (Emphasis added). This principle was recently reaffirmed by the Supreme Court in *St. Dominic-Jackson Memorial Hospital v. Mississippi State Department of Health*, 87 So.3d 1040, 1046 (Miss. 2012). Thus, it is readily apparent that contrary to the wishful thinking of Harrison HMA, the need for hospital beds, including *licensed* beds, is of paramount concern to the courts in CON appeals. When this appeal is considered in light of that established legal standard, Harrison HMA's entire case falls apart.

ARGUMENT

A. This is Not a Routine "Replacement and Relocation" Project.

In reviewing CON decisions, the Mississippi Supreme Court has emphasized that "the showing of need must be commensurate to what the project actually is . . . ." *St. Dominic-Jackson Memorial Hospital v. Mississippi Department of Health*, 87 So.3d 1040, 1046 (Miss. 2012). Thus, the starting point in this appeal is to determine what Harrison HMA's proposal "actually is."

Harrison HMA submits that this is a routine relocation and replacement of an existing hospital, very similar to Madison HMA's CON application to replace the Madison County Medical Center. According to Harrison HMA, this means that the showing of need in this case involves only a presentation of proof that the former Gulf Coast Medical Center building needs to be relocated and replaced. There are several fatal flaws in this argument.

In the first place, the facts in this case are completely different than the facts and circumstances before this Court in the Madison County Medical Center appeal, *St. Dominic-Jackson Memorial Hospital v. Mississippi State Department of Health*, 954 So.2d 505 (Miss. Ct. App. 2007). Madison HMA involved the relocation and replacement of Madison County Medical Center, an existing, operational hospital with equipment, patients, employees and physicians. Madison County Medical Center was (and is) the only hospital in Madison County. The CON standards on community need, utilization of existing facilities, and adverse impact on other hospitals, were not raised as issues in that appeal because Madison HMA was not proposing to add hospital services or additional hospital bed capacity in Madison County. Instead, the proposal was merely to construct a replacement hospital at a new location and to relocate the existing, operational beds, along with existing health services, patients, and medical staff.

This case is entirely different. Gulf Coast Medical Center has been closed for more than five years. The old Gulf Coast Medical Center building has been sold. There are no patients, employees, or medical staff. If the proposed Cedar Lake Hospital is constructed, it will have new medical equipment, new employees, and a new medical staff. Thus, for all intents and purposes, Cedar Lake is certainly more like a "new hospital" than an operational facility that merely proposes to relocate its existing facilities and staff.

Moreover, the approval of Cedar Lake Hospital would add 144 acute care beds to the health care system on the Gulf Coast. Since those beds have not been operational for more than five years, they are "new beds" to the local health care system, as a matter of reality. The addition of those beds will have a tremendous impact on the existing health system and facilities. Unlike the situation in Madison County, there are four existing hospitals in the immediate area proposed to be served by the new Cedar Lake facility, and all of those hospitals are grossly underutilized, and financially struggling.

These factual distinctions demonstrate that the Cedar Lake Hospital proposal is far from a routine relocation and replacement project. **In fact, Harrison HMA does not even have a hospital to replace, because it sold the former Gulf Coast Medical Center building back in 2010, before the CON application was even filed.** In spite of this, Harrison HMA clings to the notion that it has the absolute right to "rebuild" Gulf Coast Medical Center because that hospital's acute care beds were placed in "abeyance" with the Department of Health when the hospital closed in 2008.

We have acknowledged from the outset that a closed hospital remains a technically existing facility *on paper* for a period of five years. However, we strongly differ with Harrison HMA on the legal implications of Gulf Coast Medical Center's current status. Harrison HMA maintains that Gulf Coast Medical Center should be considered an existing facility, standing in

the same shoes as any licensed and operating hospital that needs to be replaced. Based on that theory, Harrison HMA insists that it does not have to worry about showing community need for the Cedar Lake Hospital beds, because the beds are already in the Gulf Coast health care market, as a technical matter.

These arguments completely ignore the Supreme Court's mandate that the showing of need in each CON case must be commensurate to what the project actually is. Although we agree that Cedar Lake Hospital is not legally required to meet the State Health Plan's specific **formula** for a "new hospital" (because it is technically a facility on paper), **it is equally clear that Harrison HMA must demonstrate community need for the reestablishment of a hospital that has been closed for five years.** Harrison HMA cannot escape this regulatory scrutiny by claiming that the Cedar Lake proposal is the same as Madison HMA.

In summary, it is readily apparent what the Cedar Lake Hospital project "actually is." As a matter of fact and reality, it is an "existing facility" only on paper, and, if constructed, will be a new hospital in all other respects, with new physicians, new employees, new equipment, and a new patient base. Those are the undeniable facts. Consequently, although Harrison HMA may be excused from complying with the State Health Plan formula for a "new hospital," it cannot be excused from complying with the CON standards on community need. Since Harrison HMA did not show and cannot show any community need for this Cedar Lake Hospital, the project must be disapproved.

B. The Mississippi Supreme Court Has Established a Legal Standard of "Need," Consistent With the CON Law, and This Project Does Not Meet That Standard.

Harrison HMA does not want to talk about the need for hospital services on the Gulf Coast, and it is easy to understand why. If community need is considered, there is no way for this project to be approved. During the administrative hearing below, there was undisputed evidence that the Gulf Coast does not need the proposed Cedar Lake Hospital, as demonstrated

by the average occupancy rate of area hospitals (less than 50%), the continuing decline in inpatient utilization of hospitals on the Coast, the very low population growth (around 1% annually) and the excess capacity of hospital beds in the region (including, in particular, Harrison HMA's sister facility, Biloxi Regional, which is operating at just 49% occupancy only a few miles from the proposed site of Cedar Lake). In fact, Harrison HMA did not even address community health needs at the hearing, because by every statistical measure, there is no need to build another $133 million dollar hospital in Biloxi.

Harrison HMA obviously recognized that it would never be able to prove the need for another hospital on the Coast based on the hard, objective statistics. Consequently, Harrison HMA adopted a strategy of maintaining that evidence concerning the occupancy rates of other hospitals and other local health system factors was not relevant. Consistent with that strategy, Harrison HMA alleges that community need is a "novel addition to the State Health Plan's need criteria which, were it to be endorsed by the Court, would transform the Certificate of Need Law." *Brief of Appellees*, p.vi.

Unfortunately for Harrison HMA, the Mississippi Supreme Court does not agree with this contention. The Court has consistently held that a proposed hospital project must comply with all of the General Review Criteria in the Certificate of Need Review Manual. A number of these General Review standards require an evaluation of community need for the proposed project, as well as the impact of the project on the existing health care system. Since Harrison HMA has downplayed the importance of community need, we have reproduced some of the relevant standards verbatim below:

Need for the Project: One or more of the following items may be considered in determining whether a need for the project exists.

a. **The need that the population served or to be served has for the services proposed to be offered or expanded** and the extent to which all residents of the area - in particular low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly - are likely to have access to those services.

b. In the case of the relocation of a facility or service, **the need that the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation or by alternative arrangements,** and the effect of the relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly, to obtain needed healthcare.

c. **The current and projected utilization of like facilities or services within the proposed service area will be considered in determining the need for additional facilities or services.** Unless clearly shown otherwise, data where available from the Division of Health Planning and Resource Development shall be considered to be the most reliable data available.

d. **The probable effect of the proposed facility or service on existing facilities providing similar services to those proposed will be considered.** When the service area of the proposed facility or service overlaps the service area of an existing facility or service, then the effect on the existing facility or service may be considered. The applicant or interested party must clearly present the methodologies and assumptions upon which any proposed project's impact on utilization in affected facilities or services is calculated. Also, the appropriate and efficient use of existing facilities/services may be considered.

*** * ***

Relationship to Existing Health Care System: The relationship of the services proposed to be provided to the existing health care system of the area in which the services are proposed to be provided.

General Review Criteria 5 and 8, CON Review Manual, (Exh. 11) (Emphasis added).

Clearly, there is no merit in Harrison HMA's assertion that the community need for hospital beds is irrelevant in this case. The standards set forth above plainly require an evaluation of (1) the need for the proposed project in the particular area to be served by the project, and (2) the current and projected utilization of existing facilities in that same area, as well as the impact of the proposed project on those facilities. Moreover, as stated above, the Mississippi Supreme Court has consistently recognized that there is no implied presumption of need for hospital beds merely because they exist. Rather, a CON applicant must prove the need for those beds in the specific area proposed to be served. As the Supreme Court has stated, "[t]he fact that a hospital will have some positive advantages by no means indicates . . . that its construction is necessary and beneficial in the scheme of the area health care network as a whole." *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of* Health, 728 So.2d at 91. Nevertheless, Harrison HMA still tries to evade these community need standards by suggesting that the standards are merely permissive, and not mandatory. *Brief of Appellees* at p.28. This argument is also without merit.

In *Mississippi State Department of Health v. Baptist Memorial Hospital-DeSoto, Inc.*, 984 So. 2d 967 (Miss. 2008), the Court noted that the use of the term "may" in General Review Criterion 5 grants discretion to the Department of Health as to *how to apply* that criterion. *Id.* at 980. **The Department of Health still has to make a finding regarding compliance with that criterion, and there still must be substantial evidence to support that finding on appeal.** Thus, in the *Baptist Memorial Hospital-DeSoto* case, the Court found that there was substantial evidence of compliance with the community need standards in the General Review Criteria, including the explosive population growth of DeSoto County, the growing medical community in the area, and other factors.

Conversely, in this case, there is **not** substantial evidence to support the Department of Health's finding that the proposed Cedar Lake Hospital project complied with the community need standards set forth in the General Review Criteria 5 and 8. **The Department's legal error was in finding compliance, without substantial evidence to support that decision.** To demonstrate this clear error, we have listed below a side-by-side comparison of a summary of the evidence of "need" vs. "no need" for the proposed project:

"No Need"	**"Need"**
–Average hospital occupancy rate is less than 50%.	–The area surrounding the proposed Cedar Lake Hospital site is experiencing population growth.
–The occupancy rate of every hospital in the three Coast counties declined from 2005 to 2011.	–The number of residents who are 65 and older is expected to grow.
–A glut of unoccupied hospital beds on the Coast are available to patients.	
–Inpatient hospital utilization continues to decline.	
–Average daily census of patients in Coast hospitals plummeted from 639 in FY 2005 to 512 in FY 2011, a decline of 20%.	
–Population growth rate of these coastal counties is only 1.1%.	
–Residents of the Coast already have access to a variety of different hospitals, including one in Biloxi that is owned by HMA.	

This comparison demonstrates that there is no need for Cedar Lake Hospital, based on the substantial evidence presented at the hearing. The only evidence cited by Harrison HMA on this issue is that there is some population growth in the Cedar Lake area, and that there is expected to be an increase in senior citizens in coming years. Clearly, this is insufficient to show that the area needs a new $133 million, 144-bed hospital, when the hospital occupancy rate in the immediate area is less than 50%, and there is a glut of unoccupied beds. As discussed in our initial Brief, the Opponents offered undisputed testimony that the overall population growth in

the area was not adequate to generate enough hospital admissions to support the new Cedar Lake facility. This testimony took into account the population of the entire area, as well as the "graying" of the population. In short, there is no substance to Harrison HMA's claim that a slight shift in population to the north supports the establishment of another hospital.[1]

In its Brief, Harrison HMA also mentions that Don Eicher testified that the Department of Health Staff reviewed the Application for compliance with General Review Criterion 5 "by reviewing the discharges for the service area, Gulf Coast's historical utilization, the area hospitals' historical utilization, projected utilization, population projections, proposed services, proposed location, projected patient mixes, and the likelihood that the population would utilize the hospital." *Brief of Appellees* at p.28. However, in this testimony, Mr. Eicher did not cite any evidence, data or statistics. He merely made a statement without any factual support. (T.83-84). As previously discussed, all of the statistics and data show that hospital utilization is down, and that there is not sufficient population growth to support another hospital in Harrison County. The Mississippi Supreme Court has held that conclusory statements without factual support do not constitute substantial evidence in a CON case. *See Mississippi Baptist*, 663 So. 2d at 578; *Mississippi State Department of Health v. Natchez Community Hospital*, 743 So. 2d 973, 978 (Miss. 1999).

The record of evidence in this case is very similar to the situation in *Mississippi State Department of Health v. Mississippi Baptist Medical Center*, 663 So. 2d 563 (Miss. 1995), in which the Court held that the Department of Health erred in approving a CON proposal for obstetrical beds at River Oaks Hospital, when there was not substantial evidence to support

[1] Although the population growth in the Cedar Lake area of Biloxi is not sufficient to justify another hospital, those residents can be easily accommodated at HMA's existing hospital in that city. Biloxi Regional Medical Center is in the same area, and has plenty of capacity.

compliance with General Review Criteria 5, 7 and 18[2]. In that case, as here, there was substantial evidence that existing hospitals were underutilized (with an overall occupancy rate of just above 50%), and there was an excess of available beds in the area. The Court concluded that the Department's decision "lacks substantial evidence because the overwhelming factual evidence shows that there are enough O.B. beds *in existence and available* to all patients at our area hospitals." *Id.* at 579 (emphasis in original). The Court concluded as follows:

> The Court finds that this is not a case where the Health Officer faced with conflicting evidence, chose to credit that evidence favoring approval of the CON. Rather, it appears to this Court a situation where the Health Officer simply chose to dismiss the overwhelming evidence indicating that criteria of need were not met and the CON as a result should have been denied.

Id. at 579.

This is precisely the situation before this Court. The State Health Officer chose to dismiss the overwhelming (and largely undisputed) evidence showing that the General Review Criteria of need were not met. Consequently, as in the *Mississippi Baptist* case, this CON should have been denied. The State Health Officer committed legal error by making an "implied presumption of need," based on the fact that the Gulf Coast Medical Center beds exist on paper. *See St. Dominic*, 87 So. 3d at 1046.

C. The Surplus of Hospital Beds on the Coast is not Merely a "Policy" Concern, but a Paramount Issue in CON Appeals.

Harrison HMA suggests that the problem of hospital overbedding in the State is a "policy" concern that should be left to the Mississippi Legislature or the Department of Health, and is outside the purview of judicial review. *Brief of Appellees*, p.10. This is yet another attempt to circumvent the central issue of whether a new, 144-bed hospital is needed on the Gulf Coast. The truth of the matter is that the Mississippi Legislature has, in fact, responded to the

[2] The former General Review Criterion 7 is now General Review Criterion 8. They are the same regulation. Criterion 7 was simply renumbered after this *Mississippi Baptist* decision.

problem of an oversupply of hospital beds by establishing the Mississippi CON program, *Miss. Code Ann.* §§ 41-7-171, *et seq.*, and through that program, has mandated the Department of Health to consider and evaluate existing health facilities and resources before approving new projects that would add unnecessary services and costs. This is accomplished through the CON administrative review, hearing and appeal process.

Miss. Code Ann. § 41-7-193(1) of the CON Law mandates that a "certificate of need shall not be granted or issued to any person for any proposal, cause or reason, unless the proposal has been reviewed for consistency with the specifications and the criteria established by the State Department of Health and substantially complies with the projection of need as reported in the state health plan in effect at the time the application for the proposal was submitted." The State Department of Health responded to this statutory mandate by promulgating the Mississippi State Health Plan and the Mississippi Certificate of Need Review Manual, both of which contain specific standards and criteria that must be met by any health care provider that desires to construct new health care facilities or offer certain new health services to the residents of a particular geographic area. In developing and enforcing these CON standards, the Department of Health has established, as one of the highest priorities, the prevention of the unnecessary duplication of health resources. (RE 7; Exh.10) Obviously, this goal cannot be achieved unless the Department of Health conducts an extensive analysis of the particular health care market proposed to be served by the CON applicant.

Consistent with the statutory mandate, this Court and the Mississippi Supreme Court have repeatedly emphasized the importance of considering the local health care market, including particularly the existence of other hospitals and available beds, in the CON review process. Those cases are cited throughout our principal brief and this Reply Brief, and will not

be repeated here. The bottom line is that there is no merit whatsoever in Harrison HMA's contention that the issue of overbedding on the Coast should be ignored by the Court.

D. If This Unneeded Hospital is Built, the Financial Impact on the Gulf Coast Safety Net Hospitals Will Be Real and Severe.

A specific CON regulation, General Review Criteria 5(d), requires a CON applicant to "clearly present the methodologies and assumptions upon which any proposed project's impact on utilization and affected facilities or services is calculated," and directs the Department of Health to assess the probable effect of the proposed project on existing facilities. (Exh.11, at pp.64-65) There is not substantial evidence in the administrative record to support the Department's conclusory finding that the new Cedar Lake Hospital will not have an adverse impact on existing hospitals.[3]

As discussed in detail in our principal Brief, the Opponents introduced extensive expert testimony and evidence to demonstrate that the new Cedar Lake Hospital would have a devastating final impact on existing hospitals in Harrison and Jackson Counties. In its rebuttal case, Harrison HMA attempted to challenge the financial impact methodologies used by the Opponents' experts, Mr. Davidson in particular. Noel Falls contended that Mr. Davidson's analysis did not consider growth from outside of the Service Area. (T.1173) Additionally, he suggested that the relevant year for assessing financial impact should no longer be 2017, because "by the time it gets through the appeals process, it gets through the design process, and the construction process, the third year will be about the middle of 2020." He presented a new analysis (Exh.64) which purported to take into account adjusted patient days in all three counties

[3] All parties agree that in issuing the final administrative order in this case, the State Health Officer declined to adopt the Hearing Officer's findings of fact and conclusions of law, but instead, adopted only the Department of Health's staff findings. *Brief of Appellees*, p.8 (RE 3; Exh.2 Dept. Correspondence) This is particularly significant because the staff made only a conclusory finding that the new hospital would have no adverse impact on other hospitals, without providing any reasons or basis for that conclusion. (RE 6; Exh.3, p.23) Such a cursory finding is legally insufficient, and subject to reversal, in and of itself, because it usurps from the reviewing court the power of intelligent judicial review. *See, e.g., McGowan v. Miss. State Oil and Gas Board*, 604 So.2d 312, 324 (Miss. 1992).

on the Mississippi Gulf Coast, using population growth between 2010 and 2020. (T.1176) Based on these new assumptions, Mr. Falls concluded that in the year 2020, only 913 adjusted patient days will be taken away from existing hospitals by Cedar Lake. (T.1177-1178) However, for several reasons, Mr. Falls' attempt to mitigate the financial damage to existing hospitals was shown to be factually and legally flawed.

First and foremost, Mr. Falls' rebuttal testimony not only contradicts his own testimony in Harrison HMA's case-in-chief, but also is contrary to all other evidence regarding hospital utilization and projected growth. In his initial testimony, Mr. Falls assessed impact on other providers in terms of a five-year period within the designated service area. (T.416-417) It was only after the Opponents presented their experts' evidence, showing significant adverse impact on existing hospitals (which Harrison HMA's other expert, Dan Sullivan, admitted was accurate for Cedar Lake Hospital's designated service area (T.1207-1208), that Mr. Falls suddenly decided to use an entirely different method, that stretched the analysis to the year 2020 (well beyond the universally accepted five-year planning horizon) and expanded the analysis beyond the service area.

It is easy to see why Mr. Falls felt compelled to rebut himself. In his initial testimony, Mr. Falls acknowledged that there would be only 350 additional hospital discharges in the service area by 2016. (T.416-417) This anemic growth is consistent with all of the other evidence showing a decline in hospital use rates and occupancy rates, and slow population growth. (T.95; 481-483; 1080-1086; Exh.60, pp. 5-8 and 12-13) It also supports the opposing experts' opinions that further growth will not be sufficient to mitigate substantial adverse impact on existing providers.

Mr. Falls' rebuttal was to suggest, for the first time, that hospital use rates, which have been in steady decline since 2005, will suddenly and dramatically begin to experience rapid

growth commencing in 2013 and continuing in a steady upward trajectory until 2020, his new target year for assessing adverse impact. However, based on all of the other evidence presented, including Mr. Falls' own initial testimony, it is highly improbable that the basic premise of his new methodology will be realized. To accept Mr. Falls' rebuttal analysis would require a blind acceptance of a set of heroic growth assumptions that are flatly repudiated by all of the events and trends in the service area from 2005 to the present day. Surely, the viability of four existing, struggling hospitals cannot be jeopardized on the basis of heroic assumptions for which no credible predicate exists.

Another fundamental problem with Mr. Falls' rebuttal analysis is that it violates health planning principles by attempting to predict health care financial events more than five years into the future. All of the health planning experts at the hearing, including one of Harrison HMA's own experts, Dan Sullivan, agreed that five years is the appropriate and maximum planning horizon. In fact, Mr. Falls himself, in the Cedar Lake CON Application, flatly stated that "[t]he uncertainty of the future of the Affordable Care Act (ACA) makes projections beyond 2014 rather difficult." (Application at p. 94)

The fact that a five-year planning horizon is appropriate was even recognized by counsel for Harrison HMA during the following cross-examination of Tom Davidson:

> Q. Would you agree with me that, generally speaking, healthcare planners don't make projections more than about five years out?
>
> A. Absolutely.
>
> Q. And the reason for that is because there's so many unknown factors that change over long periods of time, correct?
>
> A. Yes.
>
> Q. Okay. And we don't know what the reimbursement rate's going to be. We don't know a lot of things about the availability and the advancements in technology or other things

> that might affect the playing field for healthcare areas such as this particular hospital Service Area?
>
> A. That's true.
>
> Q. So it would be a fair statement to conclude really after you get out past about five years, it's really hard to show whether or not the growth is going to be 2 percent, 1 percent, or 3 percent?
>
> A. Or negative.
>
> Q. That's right.
>
> A. That is simply to illustrate that if the growth were a sustained upward 2 percent over a sustained period of time, it would be a very long time before you got to 60 percent occupancy.

(T.786-787) Thus, **all** parties and experts agreed that once you go beyond a five-year planning period, you are entering the realm of speculation. Yet that is the method used by Mr. Falls in his rebuttal analysis.

Yet another basic methodological flaw in Mr. Falls' approach is that it obviously underestimates adverse impact by erroneously assuming that all of the existing hospitals will have equal access to all of the "other" patients outside the service area. The rebuttal testimony of the Applicant's experts is based on the theory that growth outside the designated service area will reduce the impact within the service area. However, on cross-examination, Dan Sullivan acknowledged that the majority of projected admissions outside the service area (approximately 11,000 out of 19,203) come from Hancock Medical Center in Hancock County, and Singing River Hospital, in the eastern portion of Jackson County. (T.1210-1212) This makes sense, since Hancock and Singing River are located the greatest distance from the designated service area of Cedar Lake. Clearly, the fact that Hancock and Singing River have so much of the "other" utilization outside the service area means that those patient admissions are unavailable to Ocean Springs Hospital, Garden Park and Memorial. Although these additional admissions at Singing River Hospital may ameliorate, to some extent, the pain at Ocean Springs (since they are

in the same hospital system) it certainly does not eliminate the extensive adverse impact. Moreover, since Singing River Health System is operating on very thin financial margins, any of this alleged growth outside the service area is not enough to prevent significant adverse impact if this project is approved.

It is also significant that on cross-examination, **Dan Sullivan, Harrison HMA's expert, admitted that Tom Davidson's methodology was accurate in assessing adverse impact in the service area**. (T.1207-1208) Mr. Sullivan's only contention was that the adverse impact within the service area would be mitigated by growth from outside the service area. (T.1208) However, as noted above, Harrison HMA's experts did not present a credible rebuttal with respect to adverse impact, in light of other evidence presented during the hearing.

The bottom line is that when four hospitals are located in the same small area, and 70%-80% of their patient admissions comes from that area, the addition of a new hospital in that same area is certain to have a significant impact on the existing providers. Because there is little population growth in the area, Cedar Lake Hospital will have to take a substantial number of patients away from existing facilities in order to achieve its very high projections of inpatient utilization. In view of the fragile economic condition of the Coast's safety net hospitals, it would not take much financial impact to cause irreparable harm to those health systems.

Additionally, the Mississippi Supreme Court has recognized that adverse impact upon the existing health care system can be shown through evidence of a significant shift in patients from existing hospitals to a proposed new hospital program. *Mississippi State Department of Health v. Mississippi Baptist Medical Center*, 663 So.2d 563, 578 (Miss. 1995). The administrative record in this appeal contains compelling and credible evidence that a substantial number of patients will have to be shifted from existing Coast hospitals to Cedar Lake Hospital, in order for

Cedar Lake to meet its financial projections. The resulting adverse impact to the current, underutilized health system is clear.

E. Other Arguments Advanced by Harrison HMA Are Legally and/or Factually Incorrect.

Having addressed the problems with Harrison HMA's primary arguments in this appeal, we now turn to its more specific arguments that warrant a response.

1. The Supreme Court Decisions Cited by Harrison HMA Do Not Support Its Position in this Appeal.

Harrison HMA contends that the Opponents improperly rely upon the 1998 *St. Dominic* case, because in that case, "the decisive error which required reversal was the application of a made-up standard, the 'any specific advantage' standard," whereas in the present case, need was evaluated under Need Criterion 3(a) of the State Health Plan. *Brief of Appellees*, p.20. Actually, the *St. Dominic* opinion does not address whether the CON application was evaluated under Need Criterion 3(a) because that was beside the point. Instead, the Court clearly focused on the need (or absence of need) for hospital beds in the area:

> It is thus apparent that the Health Officer's selective discussion of *some* of the CON factors was, like the rest of his ruling, tainted by his erroneous conclusion that the "issue of need does not revolve around whether or not there is a need for additional beds in the Hospital Service Area." **This conclusion by the Health Officer is the central error of the present appeal, and this Court would be doing a disservice to the citizens of this State by ignoring this error based on notions of deference to administrative agencies.**

728 So.2d at 87 (Emphasis added). Similarly, the State Health Officer's decision in this case was tainted by the erroneous conclusion that the issue of need does not revolve around whether there is a need for additional beds on the Gulf Coast, despite the fact that the applicant is a hospital that has been closed for five years, and was sold before the application was even filed with the Department of Health.

The truth is that the facts and circumstances in *St. Dominic* and the present case are remarkably similar. The beds proposed to be relocated in the *St. Dominic* cases, and the beds proposed to be relocated by Harrison HMA, are **all** "paper beds." They are not staffed and do not hold patients. They exist only on paper. Additionally, in both cases, the Department of Health erroneously applied a "specific advantage" test, in lieu of a full-scale needs assessment, in improperly approving the CON applications. With respect to the *St. Dominic* case, the specific advantage was "increasing access to primary care and access for low income and minority populations" through the relocation of beds to a North Campus. *St. Dominic*, 728 So.2d at 86. In the present case, the specific advantage was the purported benefit of relocating a closed hospital away from the beach.

Harrison HMA is also incorrect in asserting that the construction of Cedar Lake Hospital will not "add" acute care beds to the Gulf Coast. Those beds have been closed for more than five years. It is obvious that reopening the beds would add acute care bed capacity to an area that has not had, or needed, that capacity for many years. Obviously, there would be an increase of 144 beds in operation on the Gulf Coast if this project is approved, just like there would have been a substantial increase in operational beds in Madison County, if the projects addressed in the *St. Dominic* cases had been approved. We cannot ignore this reality.

The bottom line is that "paper" or "phantom" beds are not the same as staffed, operational beds, and that distinction has been recognized by the Mississippi Supreme Court as significant for purposes of the CON Law. Under Supreme Court precedent, paper beds cannot be constructed or reestablished unless they are needed in the community, based on substantial evidence. On the other hand, beds which are licensed, operational and staffed obviously have little, if any, impact on the community or other facilities, because they do not add bed capacity to the area.

Harrison HMA also cites two Supreme Court cases that involved closed nursing homes, *Queen City* and *CLC of Biloxi*. However, those opinions actually support the position of the Opponents because in both cases, the CON applicants demonstrated a clear community need for the facilities to be reconstructed. In *Queen City*, the applicant showed that there was a greater community need for nursing home beds in Lauderdale County (the location of the proposed replacement facility) than in Kemper County (the site of the closed nursing home). In *CLC of Biloxi*, the applicant showed that Harrison County, the location of both the closed facility and replacement facility, had one of the highest statistical needs for additional nursing home beds of any county in the State. Moreover, in that case, the opponents actually stipulated that the proposed replacement facility would not have adverse financial impact on their operations.

In contrast, there is not a need for another hospital on the Gulf Coast, under any statistical measure or methodology. In *Queen City* and *CLC of Biloxi*, the nursing home replacement projects were approved, in part, because of clear community health needs. There is absolutely no community health need for the hospital proposed by Harrison HMA.

2. The Crux of Harrison HMA's "Need" Argument – That the Gulf Coast Medical Center Building Needs to Be Replaced – Is Irrelevant Because the Building Has Been Sold.

The linchpin of Harrison HMA's CON application is the alleged need to "replace" the old Gulf Coast Medical Center building. Harrison HMA presented testimony by an architect, who stated that the building was in need of extensive renovation, and that it would not make sense to incur the costs necessary to rehabilitate a building so close to the shoreline, in view of the threat of future storms.

The problem with this testimony is that the Gulf Coast Medical Center building was sold by the parent company of Harrison HMA before the CON application was filed, and prior to the time that the architect purported to inspect the building for potential rehabilitation. (T. 442-443; CON Application, p. 76) This is important in two respects. First, it shows that the architect's

"evaluation" of the Gulf Coast Medical Center building was not a sincere effort to evaluate a less costly alternative to constructing a new $133 million hospital. As discussed in our initial Brief, under the CON regulations, an applicant must show that it genuinely considered less costly alternatives to the proposed project. That did not happen in this case. Harrison HMA never seriously considered alternatives to the new Cedar Lake Hospital. Its architect went through the motions of inspecting a building that HMA no longer owned, in a belated effort to satisfy the CON criterion.

Second, the fact that Harrison HMA does not even own the Gulf Coast Medical Center building means that the stated purpose of the CON application – to replace an old hospital in need of repair and relocation – is fundamentally incorrect. This is not an application to replace an existing hospital building. It is an application to construct a new hospital from beds that exist only on paper in the State Health Plan. There is no building to replace, or even a physical site from which to relocate. The only remaining physical presence of Gulf Coast Medical Center is a page in the State Health Plan. This is why we have emphasized that Harrison HMA's proposal is not a routine replacement and relocation. It is much more akin to a new hospital, since the beds would not come from any existing facility or site. They would come only from the bed inventory in the State Health Plan.

3. Approval of this Unneeded Project Will Have an Adverse Impact on Existing Hospitals, Which are Clearly Underutilized.

Harrison HMA suggests that the current hospitals on the Coast are doing just fine, as evidenced by the fact that Singing River Health System is undertaking various capital projects and establishing clinic locations, and Memorial Hospital at Gulfport also owns and operates physician clinics on the Coast. *Brief of Appellees*, pp.31-32. Harrison HMA fails to mention that none of those projects involve the establishment or addition of licensed, acute care beds. In fact, the projects primarily focus on physical plant requirements and outpatient services. This

does not show, in any respect, that the hospitals' growth is so strong that they will not be hurt by the addition of 144 hospital beds in their market, as suggested by Harrison HMA.

When it comes to utilization of existing facilities, the previously cited statistics speak for themselves. On any given day, half of the hospital beds on the Coast are empty.

II. CONCLUSION

If the Mississippi CON program is to continue to serve any purpose, a company cannot be allowed to build a $133 Million, 144 bed hospital without showing need, "commensurate to what the project actually is and the impact which it actually has" on the Gulf Coast health care market. *St. Dominic*, 728 So.2d at 89. This is more than an academic concern. The construction of Cedar Lake Hospital will have a real and destructive impact on the Coast's safety net hospitals, their patients and employees. This can be prevented, through the enforcement of legal standards laid out by our Supreme Court.

Singing River Health System and Memorial Hospital at Gulfport respectfully request this Court to reverse the Final Judgment of the Chancery Court, and to mandate that the Department of Health's Final Order and the CON issued to Harrison HMA be reversed and vacated.

Respectfully submitted,

SINGING RIVER HEALTH SYSTEM, consisting of SINGING RIVER HOSPITAL and OCEAN SPRINGS HOSPITAL, and MEMORIAL HOSPITAL AT GULFPORT

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Joint Reply Brief with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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Further, I hereby certify that on this day I have mailed by United States Postal Service the foregoing Joint Reply Brief to the following non-MEC participant:

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This the 9th day of April, 2014.

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