



Recommendations of the CON Review Panel September 12, 2012

The following recommendations are made by the CON review panel:

1. The capital threshold is too low.

Recommendation:

Raise capital threshold to \$5million, and apply it only to capital costs associated with patient care activities, or an increase in square footage of greater than ten percent. For items that otherwise do not require CON, the threshold does not apply.

2. The existing equipment threshold should be eliminated, but the Department should ensure quality for medical equipment through processes in the Bureau of Radiological Health. New and emerging technology (NET) with a total project cost of greater than \$1.5 million should be reviewed, with the threshold being revised annually according to the Medical Care Consumer Price Index inflation rate.

Recommendation:

- a. Eliminate the monetary threshold on equipment used for diagnosis or treatment;*
- b. Establish a \$1.5 million threshold, revised annually, for new and emerging technology (NET), based on the Medical Care Consumer Price Index. NET is defined as equipment not having received approval by the Food and Drug Administration (FDA) at the time of the SC Health Plan approval; and*
- c. The Department should require accreditation for CT and MRI units by CMS accepted accreditation programs. This accreditation should occur as a condition of registration by the Bureau of Radiological Health. The Department should pursue authority to register MRI units for the sole purpose of ensuring quality through accreditation.*

3. The reference to CON decisions should be removed from the Revenue Bond Act (§44-7-1590.C) to eliminate appeals directly to the Circuit Court.

Recommendation:

Amend 44-7-1590 (C) of the Hospital Revenue Bond Act, as follows, to eliminate language that allows any interested party to appeal the Department's CON approval to Circuit Court.

existing law;

(b) a reasonable person in the same circumstances would believe that the procurement, initiation, or continuation of the contested case or subsequent appeal was intended merely to harass or injure the other party; or

(c) a reasonable person in the same circumstances would believe that the contested case or subsequent appeal was not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery or adjudication of the claim upon which the proceedings are based.

~~(a) taken solely for purposes of delay or harassment;~~

~~(b) where no question of law is involved;~~

~~(c) where the contested case or judicial review is without merit.~~

This provision shall not be construed to prohibit any party from seeking sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, under Section 15-36-10.

(D) In no event shall attorney's fees or costs be assessed against the Department in any contested case or appeal involving a Certificate of Need application, an exemption request under Section 44-7-170, or a request for a determination as to the applicability of Section 44-7-160.

5. Create more transparency. Eliminate the requirement to public notice CON intent in the local newspaper, as this is an antiquated requirement.

Recommendation:

- a. DHEC should pursue removing the statutory requirement for newspaper postings, replacing it with a requirement to provide a letter of intent to be filed with DHEC.
- b. DHEC should develop a method of posting letters of intent on the DHEC web page.
- c. DHEC should pursue an online process for CON applications, that includes the ability of affected persons to submit comments and/or express opposition.

6. No regulatory deadline exists for submitting Final Completion Reports.

Recommendation:

- a. DHEC should better define Total Project Cost and tie the total project cost to a finite period. DHEC should change the definitions of cost overrun and substantial change to better define these terms.
- b. DHEC should establish a timeline for final completion reports and tie it back to the newly defined Total Project Cost. Deadlines should be flexible for large projects.
- c. DHEC should simplify the final completion report requirements and require reporting only on items relevant to the project.

7. There should be no time limit for implementation for NAs or exempted projects.

13. Develop categories of projects eligible for “Expedited Review.”

Recommendation: DHEC should develop an expedited review process for some types of CON projects. A list of projects eligible for expedited review should be developed in this process.

14. The Final Review Conference process at the DHEC Board for CON decisions lengthens the appeals process.

Recommendation: Amend §44-1-60 and §44-7-210 to remove the final review conference process at the DHEC Board for CON decisions.

15. Project Review Criteria is in need of change.

Recommendation: DHEC should pursue revised Project Review Criteria. Criteria should be narrowed down to 10 to 12 items for consideration.

16. Revise Appeals Process for Non-Applicability Determinations (NAD’s) and Exemptions.

Recommendation:
Revise §44-7-170 as follows:

§ 44-7-170. Institutions and transactions not subject to review.

(A) This article does not apply to:

(1) an expenditure by or on behalf of a health care facility for nonmedical projects for services such as refinancing existing debt, parking garages, laundries, roof replacements, computer systems, telephone systems, heating and air conditioning systems, upgrading facilities which do not involve additional square feet or additional health services, replacement of like equipment with similar capabilities for which a Certificate of Need was not issued, or similar projects as described in regulations;

(2) facilities owned and operated by the South Carolina Department of Mental Health and the South Carolina Department of Disabilities and Special Needs, except an addition of one or more beds to the total number of beds of the departments' health care facilities existing on July 1, 1988;

(3) educational and penal institutions maintaining infirmaries for the exclusive use of student bodies and inmate populations;

(4) any federal health care facility sponsored and operated by this State;

Recommendation:

Amend the definition of affected person in §44-7-130(1) as follows:

(1) "Affected person" means the applicant, a person residing within the geographic area served or to be served by the applicant, persons who provide similar services to the proposed project in the health service area in which the project is to be located, persons who before receipt by the department of the proposal being reviewed have formally indicated an intention to provide in the future similar services to the proposed project in the health service area in which the project is to be located, persons who pay for health services in the health service area in which the project is to be located and who have notified the department of their interest in Certificate of Need applications, the State Consumer Advocate, and the State Ombudsman. A person operating a health care facility or providing a health service in a state other than South Carolina who does not operate a health care facility in the proposed service area which provides similar services or provides a health service similar to that being sought by the applicant is not deemed to be an affected person.

18. Shorten the appeals process by limiting discovery.

Recommendation:

Reduce the discovery limits to those provided for in the Rules of the Administrative Law Court (RPALC 21(A)) by the addition of Section 44-7-210(G) as follows:

(G) Notwithstanding any other provision of law, including Section 1-23-650(C), in a contested case arising from the department's decision to grant or deny a Certificate of Need application under Section 44-7-160(3) – (6), grant or deny a request for exemption under Section 44-7-170(B), or the issuance of a determination regarding the applicability of Section 44-7-160(3) or (6), the following apply:

- (1) each party shall conduct no more than three depositions of persons identified as witnesses who may testify at the contested case hearing, unless otherwise provided for by the Administrative Law Court;
- (2) each party is permitted to take only the deposition of a person listed as a witness who may testify at the contested case hearing, unless otherwise provided for by the Administrative Law Court;
- (3) each party is permitted to serve only ten interrogatories pursuant to Rule 33 of the South Carolina Rules of Civil Procedure; and
- (4) each party is permitted to serve only ten requests for admission, including subparts.

The limitations provided for in this subsection are intended to make the contested case process more efficient, less burdensome, and less costly to the parties in Certificate of Need cases. Because substantial information is contained in applications, requests for determinations of non-applicability, and requests for exemptions as well as supplemental submissions made by the applicant or requestor and affected persons during application or request review, a party requesting additional discovery bears the burden of demonstrating that (1) the probative value of additional information obtained through more extensive discovery outweighs the accompanying burdens of time and expense, and (2) failure to allow for additional discovery would cause substantial prejudice to the requesting party. Upon making this showing, the Administrative Law Court may, by court order, lift these limitations beyond the parameters set forth in this