

No Harm, No Foul in CON Challenges

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The North Carolina Court of Appeals recently issued a decision making crystal clear that in order to successfully challenge the approval of a non-competitive certificate of need application, a petitioner must show how its rights have been substantially prejudiced by the CON approval. Wake Radiology Services LLC et al. v. N.C. Department of Health and Human Services et al. (N.C. Court of Appeals Case No. COA10-1129, Sept. 6, 2011) involved an appeal from a decision to award Pinnacle Health Services of North Carolina, LLC a CON to purchase a mobile MRI scanner for use in Wake and Johnston Counties. Pinnacle essentially proposed to acquire its own mobile MRI scanner to replace the leased MRI scanner it had been using to provide services at three sites in Wake and Johnston. Wake Radiology Services, LLC and affiliated entities challenged the approval of Pinnacle's non-competitive application. In upholding the decision to award the CON to Pinnacle, the Court of Appeals focused on the statutory requirement that a party appealing a decision to approve a CON application must demonstrate how the decision "substantially prejudiced" its rights.

The court rejected Wake Radiology's theory that its status, under the CON Law, as an entity that could challenge the Pinnacle decision automatically established the substantial prejudice component of its case. The court concluded that Wake Radiology's standing to appeal the CON decision in no way obviated the need to prove that its rights were substantially prejudiced by the decision.

After reviewing DHHS's findings regarding the testimony of Wake Radiology's president concerning a past decline in Wake Radiology's MRI volumes and an increase in the percentage



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of lower paying patient groups (Medicare, Medicaid, and self-pay patients) after Pinnacle first began offering mobile MRI services in Wake and Johnston Counties, the Court of Appeals agreed with the department that this evidence failed to demonstrate substantial prejudice resulting from the CON decision. The court noted that because Wake Radiology's evidence of harm was based exclusively on its own internal data, it left open many possible causes from other market conditions for the changes in MRI volume and patient mix. The court also pointed to the fact that Wake Radiology's testimony focused on past events that pre-dated the CON decision at issue, and noted the absence of any evidence other than speculation by the company's president regarding how Wake Radiology would be harmed by the award of the CON to Pinnacle. The Wake Radiology decision is the strongest articulation to date of the Court of Appeals' position, reflected in earlier opinions, that a petitioner challenging the approval of another provider's non-competitive CON application must show substantial prejudice through proof which must amount to something more than existing market conditions and competitive impact.



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