NO. COA10-1129
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

Wake Radiology Services LLC, Wake Radiology Diagnostic Imaging Inc., Wake Radiology Consultants PA, Smithfield Radiology Inc., and Raleigh MR Imaging LP,
Petitioners-Appellants,

v.

NC Dept. of Health & Human Services
No. 09 DHR 3473

North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section,
Respondent-Appellee,

and

Pinnacle Health Services of North Carolina, LLC, d/b/a Raleigh Radiology at Cedarhurst,
Respondent-Intervenor-Appellee.

Appeal by petitioners from a final agency decision entered 3 June 2010 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 8 March 2011.

Kirschbaum, Nanney, Keenan & Griffin, P.A., by Frank S. Kirschbaum and Chad Lorenz Halliday, for Petitioner-Appellants.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for Respondent-Appellee.

Williams Mullen, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for Respondent-Intervenor-Appellee.

ERVIN, Judge.

Petitioners Wake Radiology Services, LLC; Wake Radiology Diagnostic Imaging, Inc.; Wake Radiology Consultants, P.A.; Smithfield Radiology, Inc.; and Raleigh MR Imaging, LP (collectively "Wake") appeal a final agency decision by the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section affirming the award of a Certificate of Need (CON) to Pinnacle Health Services of North Carolina, LLC. On appeal, Wake argues that the Department improperly upheld the decision to award the requested CON to Pinnacle on the grounds that the Department's decision was inconsistent with N.C. Gen. Stat. § 131E-183(a). We do not reach the merits of Wake's challenges to the Department's decision, however, given our conclusion that the Department correctly determined that Wake had failed to establish that it was "substantially prejudiced" by the Department's decision to award the requested CON to Pinnacle. As a result, after careful consideration of Wake's challenges to the Department's decision in light of the record and the applicable law, we conclude that the Department's decision should be affirmed.

I. Factual Background

Pinnacle is a wholly owned subsidiary of Outpatient Imaging Affiliates, LLC, which has provided magnetic resonance imaging (MRI) services at three sites in Wake and Johnston Counties since 2007: Raleigh Radiology at Cedarhurst, Raleigh Radiology at Wake Forest, and Raleigh Radiology at Clayton. In order to provide this service, Pinnacle contracted with Alliance Imaging, Inc., for the use of a mobile MRI scanner. Pinnacle was not required to have a CON in order to provide mobile MRI services using an Alliance scanner and is not subject to any limitations as to the number of locations at which it is entitled to use the Alliance scanner.

On 17 November 2008, Pinnacle submitted an application seeking the issuance of a CON authorizing the purchase and operation of a mobile MRI scanner for use in Wake and Johnston Counties pursuant to N.C. Gen. Stat. § 131E-182. In accordance with N.C. Gen. Stat. § 131E-185, the Department began its review of Pinnacle's application on 1 December 2008. The Department completed its review of Pinnacle's application on 29 April 2009 and issued the required findings on 6 May 2009. In its decision, the Department determined that Pinnacle had satisfied all applicable statutory and regulatory review criteria and approved Pinnacle's application.

On 29 May 2009, Wake appealed the approval of Pinnacle's application by filing a petition for a contested case hearing with the Office of Administrative Hearings in accordance with N.C. Gen. Stat. §§ 131E-188(a) and 150B-23. In its petition, Wake alleged that the Department had erred by concluding that Pinnacle's application satisfied the review criteria listed in N.C. Gen. Stat. § 131E-183(a). On 22 February 2010, Administrative Law Judge Beecher R. Gray entered a recommended decision concluding that the Department's decision to approve Pinnacle's application should be affirmed. The parties filed written exceptions to and arguments addressing the merits of ALJ Gray's recommended decision and submitted proposed final agency decisions to the Department. On 3 June 2010, Jeff Horton, Acting Director of the Division of Health Service Regulation, entered a final agency decision accepting ALJ Gray's recommendation and affirming the Department's decision to approve Pinnacle's application. Wake noted an appeal from the final agency decision to this Court on 2 July 2010.

II. Legal Analysis

A. Applicable Law & Standards of Review

A person seeking to obtain the issuance of a CON must make "application . . . on forms provided by the Department." N.C. Gen. Stat. § 131E-182(b). After compliance with the procedural

requirements specified in N.C. Gen. Stat. § 131E-185 and utilizing the criteria outlined in N.C. Gen. Stat. § 131E-183(a), "the Department shall issue a decision to 'approve,' 'approve with conditions,' or 'deny,' an application for a new institutional health service." N.C. Gen. Stat. § 131E-186(a). "Within five business days after it makes a decision on an application, the Department shall provide written notice of all the findings and conclusions upon which it based its decision, including the criteria used by the Department in making its decision, to the applicant." N.C. Gen. Stat. § 131E-186(b). The Department's decision to grant or deny a request for the issuance of a CON hinges upon the extent, if any, to which the applicant has complied with the statutory review criteria set out in N.C. Gen. Stat. § 131E-183(a), with the applicant bearing the burden of demonstrating compliance with those review criteria. *See Presbyterian-Orthopaedic Hosp. v. N.C. Dept. of Human Resources*, 122 N.C. App. 529, 534, 470 S.E.2d 831, 834 (1996), *disc. review improvidently allowed*, 346 N.C. 267, 485 S.E.2d 294 (1997).

After the issuance of the Department's decision, "any affected person," including:

> the applicant; any individual residing within the service area or the geographic area served or to be served by the applicant; any individual who regularly uses

> health service facilities within that geographic area or the service area; any person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant; any person who, prior to receipt by the agency of the proposal being reviewed, has provided written notice to the agency of an intention to provide similar services in the future to individuals residing within the service area or the geographic area to be served by the applicant; third party payers who reimburse health service facilities for services in the service area in which the project is proposed to be located; and any agency which establishes rates for health service facilities or HMOs located in the service area in which the project is proposed to be located,

"shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 131E-188. In order to challenge a decision concerning the issuance of a requested CON, an "affected person" must file a petition stating facts

> tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil liability penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:
>
> (1) Exceeded its authority or jurisdiction;
>
> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;

> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-23(a). Any person seeking to challenge a Departmental decision relating to the issuance of a CON has the burden of establishing that the Department's decision substantially prejudiced its rights and is subject to reversal for one of the reasons enunciated in N.C. Gen. Stat. § 150B-23(a). *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). A party seeking to challenge the issuance of a CON is provided with an opportunity to present evidence and cross-examine witnesses during an adjudicatory hearing held before an administrative law judge. *Id.* (citing N.C. Gen. Stat. § 150B-23(a) and N.C. Gen. Stat. §§ 150B-25(c) and (d)). At the conclusion of the contested case hearing, "the [administrative law judge] shall make a recommended decision or order that contains findings of fact and conclusions of law[,]" N.C. Gen. Stat. § 150B-34(c), determining "whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or

failed to act as required by law or rule." *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (citing N.C. Gen. Stat. § 150B-23(a)) (emphasis omitted). In view of the fact that the purpose of the statutorily-authorized contested case hearing is to review the correctness of the Department's decision under N.C. Gen. Stat. § 150B-23(a), the administrative law judge does not engage in a *de novo* review of the evidentiary record. *Id.* (rejecting a litigant's contention that the initiation of a contested case hearing "commenced a *de novo* proceeding by the [administrative law judge] intended to lead to a formulation of the final decision" and explaining that the role of the administrative law judge under the applicable statutory provisions involved determining "whether the petitioner has met its burden" of demonstrating substantial prejudice and the commission of an error of the nature listed in N.C. Gen. Stat. § 150B-23(a)).

After the issuance of the administrative law judge's recommendation, "[a] final decision shall be made by the agency in writing after review of the official record as defined in [N.C. Gen. Stat. §] 150B-37(a)[, which] shall include findings of fact and conclusions of law [and] recite and address all of the facts set forth in the recommended decision." N.C. Gen. Stat. § 150B-34(c). "Any affected person who was a party in a

contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department" by means of an appeal to this Court pursuant to N.C. Gen. Stat. § 7A-29(a). N.C. Gen. Stat. § 131E-188(b).

> "In reviewing a CON determination:
>
> [m]odification or reversal of the Agency decision is controlled by the grounds enumerated in [N.C. Gen. Stat. § 150B-51(b); the decision, findings, or conclusions must be:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary and capricious.

Parkway Urology v. N.C. Dept. of Health & Human Serv., __ N.C. App. __, __, 696 S.E.2d 187, 192 (2010), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 739 (2011) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep't. of Health & Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005));[1] *see also Dialysis Care of*

[1] The previous decisions of this Court have clearly established that the 1999 version of N.C. Gen. Stat. § 150B-51

N.C., LLC v. N.C. Dep't. of Health & Human Servs., 137 N.C. App. 638, 645, 529 S.E.2d 257, 261, *aff'd per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000).[2] In the event that an appealing party contends that a final agency decision is in violation of constitutional provisions, in excess of the statutory authority or the agency, made upon unlawful proceedings, or affected by other error of law, we conduct a *de novo* review of the agency's decision. *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 543, 659 S.E.2d 456, 462, *aff'd per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008). On the other hand, assertions that the evidence was insufficient to support a particular finding of fact or that a particular decision was arbitrary or capricious are reviewed using the "whole record" test. *Dialysis Care*, 137 N.C. App. at 646, 529 S.E.2d at 261. Under the "whole record" test, "the reviewing court is required to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is

---

controls our review of Department decisions granting or denying CON applications. *Total Renal Care*, 171 N.C. App. at 738, 615 S.E.2d at 83-84.

[2] In addition to the standard of review issues discussed in the text of this opinion, we are also required "to determine whether the [Department] relied on new evidence in making its decision." *Total Renal Care*, 171 N.C. App. at 738, 615 S.E.2d at 84 (citations omitted). However, given our decision that the Department did not err by determining that Wake had failed to make the necessary showing of "substantial prejudice," we need not address the "new evidence" issue in order to properly decide this case.

supported by 'substantial evidence,'" with "[s]ubstantial evidence [consisting of] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal citations and quotation marks omitted). The "whole record" test does not operate as a tool of judicial intrusion into the administrative decision-making process; instead, it gives a reviewing court the capability to determine whether an administrative decision is rationally based in the evidence. *Hospital Group of Western N.C. v. N.C. Dept. of Human Resources*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985) (quoting *In re Rogers*, 297 N.C. 49, 65, 253 S.E.2d 912, 922 (1979)). Thus, under the "whole record" test, this Court "[will] not replace the agency's judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter were before us *de novo*." *Dialysis Care*, 137 N.C. App. at 646, 529 S.E.2d at 261. We will now examine Wake's challenges to the Department's decision utilizing the applicable standard of review.

B. Substantial Prejudice

1. Necessity for Proof of Substantial Prejudice

According to the express language of N.C. Gen. Stat. § 150B-23(a), Wake was required to demonstrate that the decision to approve Pinnacle's CON application for authorization to

purchase and operate a mobile MRI scanner "substantially prejudiced" its rights in order to mount a successful challenge to the Department's decision. Even so, Wake contends that it was not required to make such a showing in order to receive relief under N.C. Gen. Stat. § 150B-23(a). As we understand Wake's argument, entities seeking to challenge the issuance of a CON are not required to prove facts demonstrating substantial prejudice in addition to establishing that they qualify as "affected persons" for purposes of N.C. Gen. Stat. § 131E-188(c) on the grounds that both requirements relate to the issue of standing to commence a contested case proceeding and are synonymous. Acceptance of Wake's argument would be tantamount to a determination that all "affected persons" are also "substantially prejudiced."

This Court held in *Parkway Urology*, __ N.C. App. at __, 696 S.E.2d at 195, that the "affected person" and "substantial prejudice" requirements were distinct and that establishing that one was an "affected person" did not establish that one was "substantially prejudiced." In reaching that conclusion, we stated that:

> As previously noted, Rex qualified as an affected person because it provided similar services to individuals residing within the service area of CCNC's proposed LINAC. Obtaining the status of an affected person does not satisfy the *prima facie* requirement

> of a showing of substantial prejudice. Rex was required to provide specific evidence of harm resulting from the award of the CON to CCNC that went beyond any harm that necessarily resulted from additional LINAC competition in Area 20, and NCDHHS concluded that it failed to do so.

Id.; see also Bio-Medical Applications of N.C., Inc. v. N.C. Dept. of Health & Human Serv., 173 N.C. App. 641, 619 S.E.2d 593 (2005) (unpublished). In light of our decision in *Parkway Urology,* which we find to be controlling, we conclude that Wake's status as an "affected person" pursuant to N.C. Gen. Stat. § 131E-188(c) in no way obviated the necessity for Wake to demonstrate that it was "substantially prejudiced" by the Department's decision as required by N.C. Gen. Stat. § 150B-23(a). As a result, Wake was, in fact, required to prove "substantial prejudice" in order to successfully challenge the issuance of the CON to Pinnacle.

2. Sufficiency of the Evidence to Establish "Substantial Prejudice"

Having concluded that Wake was, in fact, required to prove that it suffered "substantial prejudice" as a result of the Department's decision to award the requested CON to Pinnacle, we must now examine the present record to determine whether the Department erred by concluding that Wake had failed to make the necessary showing of "substantial prejudice." In light of the

applicable standard of review, we believe that the Department did not commit any error of law in making that determination.

The Department made the following findings of fact relating to the "substantial prejudice" issue:

> 49. Wake Radiology provides the professional interpretation of MRI scans performed at Johnston Memorial Hospital.
>
> 50. Wake Radiology's president, Robert E. Schaaf, M.D. testified that he observed a decline in the volume of MRI procedures performed at Johnston Memorial Hospital and Wake Radiology's Garner office (located in Wake County) since Pinnacle began offering mobile MRI services at its Clayton office using the Alliance Mobile MRI in late 2007.
>
> 51. Dr. Schaaf also testified that he had observed a change in Johnston Memorial Hospital's and Wake Radiology's payor mixes since Pinnacle began offering mobile MRI services at its Clayton office on the Alliance Mobile MRI in 2007. . . . Dr. Schaaf observed that Johnston Memorial Hospital and Wake Radiology's Garner site have seen higher percentages of lower paying groups (Medicare, Medicaid and self-pay patients) relative to commercially insured patients since Pinnacle initiated mobile MRI services at its Clayton office in 2007.
>
> 52. However, Dr. Schaaf relied entirely on Wake Radiology's own volume and payor mix data for the five-year period from 2005-2009. . . . No data or evidence was offered to identify the causes of any decline in MRI volumes or payor mix at Wake Radiology or at Johnston Memorial Hospital or to attribute any such declines to Pinnacle's entrance into the market.

53. Moreover, the declines in payor mix and MRI volume in and near Johnston County identified by Dr. Schaaf all took place during the period since 2007 in which Pinnacle already offered mobile MRI service using the Alliance Mobile MRI at its Clayton location. . . . Thus, even if any such trends could be attributed to Pinnacle, they occurred before the Agency's decision and could not be a result of the Agency's decision.

. . . .

54. Although Wake Radiology argued that Pinnacle's current provision of mobile MRI services using the Alliance Mobile MRI is harmful to other providers, Pinnacle's current service is not the result of the Agency decision at issue in this contested case. Prior to the Application, the Agency recognized that Pinnacle already was an existing provider of MRI services in Wake and Johnston Counties using the Alliance Mobile MRI[.]

55. Further, since the Alliance Mobile MRI was a "grandfathered" mobile MRI scanner, Pinnacle was free to continue and expand its service using the Alliance Mobile MRI or similar contract arrangement without obtaining a CON[.]

56. Wake Radiology's witnesses identified no contractual or legal limitation under the Alliance MRI Service Contract in effect at the time of the Application that would have prevented Pinnacle from adding more hours and/or days of service, adding more sites, or even additional contracted MRI scanners[.]

57. Pinnacle's application proposed to serve only the same three sites at which it already provided MRI services, and proposed to terminate the Alliance MRI Service

Contract prior to starting service with its own mobile MRI scanner. Consequently, the approval of the Application would result in no change in the number of MRI scanners operated by Pinnacle or the locations at which service is provided[.]

58. Despite its dissatisfaction with Pinnacle's existing MRI services, Wake Radiology failed to offer any evidence other than speculation as to how it would be harmed by the award of a CON to Pinnacle to replace the Alliance Mobile MRI with its own mobile MRI scanner. If Pinnacle received a CON for its own mobile MRI, Wake Radiology's President testified that he expects "more of the same."

59. Neither Dr. Schaaf nor Wake Radiology's expert witness offered any prospective analysis or projections of any kind to demonstrate any harm expected as a result of Pinnacle's obtaining its own mobile MRI scanner, compared with the continuation of Pinnacle's existing MRI service using the Alliance Mobile MRI[.]

60. Instead, Dr. Schaaf testified that his basis for believing Wake Radiology would suffer harm as a result of Pinnacle's acquiring its own mobile MRI was Wake Radiology's own experience at Wake Radiology in moving from a leased MRI to a purchased MRI.

61. Dr. Schaaf also testified that Pinnacle projected a payor mix lower in Medicare, Medicaid and self-pay patients than the payor mix of MRI procedures performed at Johnston Memorial Hospital[.] However, Pinnacle's projected payor mix was identical to its historical payor mix at all three of its proposed sites, and therefore would not constitute any change to the status quo[.]

Based on these findings of fact, the Department concluded as a matter of law that:

> 24. Wake Radiology failed to demonstrate substantial prejudice to its legal rights as required by N.C. Gen. Stat. § 150B-23. Wake Radiology's allegations regarding potential harm were speculative and/or were based on conditions that predated the Agency's decision.
>
> 25. Wake Radiology offered no competent evidence that any decline in MRI procedure volumes it may have experienced was caused by the Agency's decision to approve Pinnacle's Application for a CON.
>
> 26. Wake Radiology offered no competent evidence that any deterioration in its payor mix was caused by the Agency's decision to approve Pinnacle's Application for a CON.
>
> 27. Wake Radiology instead relied on conclusory and speculative assumptions that deterioration of its MRI procedure volumes and payor mix were caused by Pinnacle's provision of services ***prior*** to the Agency's decision, and that Wake Radiology expects "more of the same" following the grant of the CON to Pinnacle. However, before the Application was filed, Pinnacle already provided MRI services at the same sites proposed in its Application. The conditions complained of by Wake Radiology thus did not result from the Agency decision, but were instead the status quo prior to the decision.
>
> 28. Wake Radiology failed to present any evidence that the Agency decision would result in any change to Pinnacle's MRI scanner capacity, to the sites at which Pinnacle provides service, or to Pinnacle's payor mix. Wake Radiology indeed failed to

offer any competent evidence or testimony to show how the acquisition of Pinnacle's own mobile MRI scanner to replace the Alliance Mobile would affect Wake Radiology in any way. Consequently, Wake Radiology failed to offer any competent evidence to meet its burden to show that the agency decision at issue substantially prejudiced its rights. *See Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459; *Presbyterian Hosp.*, 177 N.C. App. at 785, 630 S.E.2d at 216 []; *Bio-Medical Applications v. NC. Dep't of Health & Human Servs.*, No. COA04-1644, 2005 N.C. App. LEXIS 2090, at *13[.]

29. Further, the evidence demonstrated that Wake Radiology's primary concern is the effect of competition. The fact that some patients have chosen or may choose to receive services at a Pinnacle facility rather than a facility staffed by Wake Radiology does not support or define any legal right that is substantially prejudiced by the Agency's decision to grant Pinnacle a CON to obtain its own mobile MRI scanner. "Everyone [has] the right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition." *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 655 (1945). Wake Radiology "is not being prevented from benefiting from 'the fruits and advantages of [its] own enterprise, industry, skill, and credit,' but merely is being required to compete for such benefit." *Bio-Medical Applications v. N.C. Dep't of Health & Human Servs.*, 179 N.C. App. 483, 491-92, 634 S.E.2d 572, 578 (2006) (quoting *Coleman*, 225 N.C. at 506, 35 S.E.2d at 665).

30. Because Wake Radiology has failed to establish that substantial prejudice to its legal rights resulted or will result from the Agency's decision, it has failed to prove an essential element of its case and

> therefore its case is subject to dismissal without regard to whether it proved agency error.

On appeal, Wake points to the testimony of Dr. Schaaf and contends that his testimony, standing alone, sufficed to establish the necessary "substantial prejudice." We are not persuaded by this argument, which is tantamount to a request that we overturn a factual decision that is committed to the Department rather than the appellate courts.

At the contested case hearing, Dr. Schaaf testified that Wake had been adversely affected by Pinnacle's entry into the mobile MRI market in Johnston County in 2007 based upon what Dr. Schaaf considered to be Pinnacle's "practice" of maintaining an unreasonably low percentage of Medicare, Medicaid, and self-pay patients, while absorbing higher paying patients from Wake. More specifically, Dr. Schaaf testified that, since Pinnacle began offering mobile MRI scanning services in Johnston County, Wake's overall volume had declined and its service to "the Medicare[,] Medicaid[, and] . . . self-pay populations" had increased. Based on his personal observation of this change in patient demographics and the fact that Pinnacle and Wake are the only providers of MRI services in Johnston County, Dr. Schaaf testified that these changes were directly and conclusively attributable to Pinnacle's entrance into the market.

As the Department noted, Dr. Schaaf's testimony leaves numerous possible explanations for the changes in Wake's patient demographics unaddressed. For example, neither Dr. Schaaf nor any other Wake witness appears to have considered the impact that changes in the percentage of insured patients, the extent to which patients were seeking MRI services outside Johnston County, or the extent to which patients had become dissatisfied with Wake's services might have had on Wake's patient demographics. In addition, Dr. Schaaf's testimony rests exclusively on numbers derived from an analysis of Wake's own internal statistics, which would reasonably be deemed an insufficient basis for evaluating market conditions as a whole. As a result, the record provides ample evidentiary support for the Department's determination that Wake had failed to adequately explain the reasons underlying the changes in Wake's patient demographics described in Dr. Schaaf's testimony.

Moreover, even if Wake had successfully demonstrated that Pinnacle's entry into the relevant market was responsible for the change in patient demographics described in Dr. Schaaf's testimony, Wake has failed to establish how, or to what extent, the service that Pinnacle would be authorized to provide under the CON would result in additional harm to Wake over and above that inherent in existing market conditions. As Wake

acknowledges, a showing of past harm does not suffice to prove "substantial prejudice." Instead, Wake claims that "[i]t is the projected increase in already damaging practices that comprises the substantial prejudice to Wake." Wake based this contention on Dr. Schaaf's testimony that, given Pinnacle's projection of an enhanced presence in the relevant service area combined with a continuation of the existing payor mix, the adverse effect on Wake would necessarily be compounded, thereby creating substantial prejudice to Wake as a result of the issuance of the requested CON. According to Wake, testimony such as that provided by Dr. Schaaf is the "only means of demonstrating substantial prejudice [in this context] and cannot be dismissed as mere speculation." We do not find Wake's reasoning persuasive.

As we have already noted, Wake bears the burden of proving "substantial prejudice" as a prerequisite to successfully challenging the Department's decision. At the contested case hearing, Wake did not call a health planning expert to testify concerning the causal relationship, if any, between Pinnacle's entrance into the mobile MRI market in 2007 and the corresponding change in Wake's patient demographics or the likelihood that Pinnacle would expand its services following the issuance of the requested CON to a greater degree than would

have been possible under the Alliance contract. Instead, Wake relied exclusively on the testimony of its own president, Dr. Schaaf, who simply testified that "[he thought he knew] what the future [was and that] we'll see more of the same [from Pinnacle]." However, the Department found that Dr. Schaaf's testimony "relied entirely on Wake Radiology's own volume and payor data mix for the five-year period from 2005-2009;" that "the declines in payor mix and MRI volume in and near Johnston County . . . all took place during the period since 2007 in which Pinnacle already offered mobile MRI service using the Alliance Mobile MRI at its Clayton location;" and that, "even if any such trends could be attributed to Pinnacle, they occurred before the Agency's decision and could not be a result of the Agency's decision." Based on these findings, which have adequate record support, the Department concluded that Wake "failed to present any evidence that the Agency decision would result in any change to Pinnacle's MRI scanner capacity, to the sites at which Pinnacle provides service, or to Pinnacle's payor mix" or to "offer any competent evidence or testimony to show how the acquisition of Pinnacle's own mobile MRI scanner to replace the Alliance Mobile would affect Wake Radiology in any way." In light of these findings and conclusions, which provide ample justification for the Department's determination that a

decision to authorize Pinnacle to replace a leased mobile MRI scanner with Pinnacle-owned equipment would not adversely affect Wake more than maintenance of the status quo, we are unable to conclude that the Department erred by concluding that Wake failed to establish that it would be "substantially prejudiced" by the issuance of the requested CON.[3]

At bottom, the Department's determination that Dr. Schaaf's testimony was speculative, founded on flawed logic, and insufficient to require a finding in Wake's favor has ample record support. This determination, in turn, adequately supports the Department's conclusion that Wake failed to satisfy its burden of proof with respect to the "substantial prejudice" issue. Wake's argument to the contrary amounts to a request that we revisit the Department's factual determinations and reach a different result than that found appropriate by the relevant administrative agency. We are not at liberty to take such a step under the applicable standard of review. As a result, we conclude that the Department did not commit any error

[3] In fact, the record tends to suggest that the issuance of the CON, which conditioned approval of Pinnacle's request to purchase and operate a mobile MRI scanner on the retirement of the Alliance scanner and the provision of service at only the three existing locations, might constrain Pinnacle's ability to provide service in new locations in and around Johnston County or to add additional leased MRI scanners, thereby making it more difficult for Pinnacle to compete with Wake than would be the case in the event that the status quo were to be maintained.

of law by refusing to provide any relief to Wake given Wake's failure to establish the necessary "substantial prejudice." Since Wake has failed to establish that its rights were "substantially prejudiced" by the issuance of the requested CON, it cannot be entitled to relief under N.C. Gen. Stat. § 150B-23(a), obviating any necessity for us to address the remainder of Wake's challenges to the Department's decision.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Wake has failed to demonstrate that the Department erred by concluding that Wake had failed to demonstrate that it would be substantially prejudiced by the Department's decision to approve Pinnacle's application for the issuance of a CON authorizing Pinnacle to purchase and operate a mobile MRI scanner. As a result, the Department's decision should be, and hereby is, affirmed.

AFFIRMED.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).