

ORDER ADOPTING RULE

TO: (a) Legislative Counsel – State of Georgia
(b) All Parties on the Certificate of Need Appeal Panel’s Rulemaking Mailing List

FROM: Certificate of Need Appeal Panel
2 Peachtree Street, NW
5th Floor
Atlanta, Georgia 30303

Notice of Proposed Rulemaking to Amend Certificate of Need Appeal Panel Rules

274-1-.01 Administration,

274-1-.02 Definitions

274-1-.03 Request for Initial Administrative Appeal Hearing or Intervention

274-1-.06 Scheduling and Notice of Administrative Hearing

274-1-.10 Conduct of Initial Administrative Appeal Hearing

274-1-.11 Decision of Hearing Officer

274-1-.12 Finality of Hearing Officer’s Decision; Optional Review of Hearing Officer’s Decision by Department Commissioner

All interested parties are hereby notified pursuant to Ga. Laws 1964, pp. 338, 342, as amended (Official Code of Georgia Annotated (“O.C.G.A.”) § 50-13-4) that the Certificate of Need Appeal Panel (“CON Appeal Panel”) has considered and adopted amendments to rules regarding procedural, and scheduling issues regarding appeals to and from the CON Appeal Panel, the composition of the Panel, and the conduct of evidentiary hearings before the CON Appeal Panel. These rules, as amended, that were adopted at the CON Appeal Panel’s June 23, 2022 meeting shall become effective as provided by law twenty days after the rule is filed in the office of the Secretary of State.

BY THE CON APPEAL PANEL:

Whereas, during its June 23, 2022 meeting, the CON Appeal Panel approved the adoption of amendments to Panel Rules 274-1-.01, 274-1-.02, 274-1-.03, 274-1-.06, 274-1-.10, 274-1-.11 and 274-1-.12.

Whereas, copies of written notices of the proposed rule previously were mailed to all interested persons on the mailing list of the Panel pursuant to O.C.G.A. § 50-13-4(a)(1); and

Whereas, a copy of said notice was furnished to the Legislative Counsel of the State of Georgia, pursuant to O.C.G.A. § 50-13-4(e); and

Whereas, the CON Appeal Panel provided parties with the opportunity to provide written comments and to request a hearing to present oral comments on the proposed amendments to the rule;

WHEREFORE IT IS ORDERED, that CON Appeal Panel Rules 274-1-.01, 274-1-.02, 274-1-.03, 274-1-.06, 274-1-.10, 274-1-.11 and 274-1-.12., as amended, are hereby approved and adopted as shown below:

RULES OF THE CERTIFICATE OF NEED APPEAL PANEL

Title 274: Certificate of Need Appeal Panel

Chapter 274-1 Administration

Rule 274-1-.01 Administration

- (1) These Rules shall apply to and govern appeals under O.C.G.A. § 31-6-44. Effective July 1, 2008, there is created the Certificate of Need Appeal Panel, which shall be an agency separate and apart from the department and shall consist of a panel of independent hearing officers. The purpose of the Appeal Panel shall be to serve as a panel of independent hearing officers to review the Department's initial decision to grant or deny a certificate of need application. The Health Planning Review Board which existed on June 30, 2008, shall cease to exist after that date and the Certificate of Need Appeal Panel shall be constituted effective July 1, 2008.
- (2) On and after July 1, 2008, the Appeal Panel shall be composed of members appointed by the Governor for a term of up to four (4) years each. The Governor shall appoint to the Appeal Panel attorneys who practice law in this state and who are familiar with the health care industry but who do not have a financial interest in or represent or have any compensation arrangement with any health care facility. Each member of the Appeal Panel shall be an active member of the State Bar of Georgia in good standing, and each attorney shall have maintained such active status for the five (5) years immediately preceding such person's appointment. The Governor shall name from among such members a Chairperson and a Vice Chairperson of the Appeal Panel. The Vice Chairperson shall have the same authority as the Chairperson; provided, however, the Vice Chairperson shall not exercise such authority unless expressly delegated by the Chairperson or in the event the Chairperson becomes incapacitated, as determined by the Governor. Vacancies on the Appeal Panel caused by resignation, death, or any other cause shall be filled for the unexpired term in the same manner as the original appointment. No person required to register with the Secretary

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of State as a lobbyist or registered agent shall be eligible for appointment by the Governor to the Appeal Panel.

- (3) Members of the Appeal Panel shall serve as hearing officers for appeals that are assigned to them on a random basis by the Chairperson of the Appeal Panel. The members of the Appeal Panel shall receive no salary but shall be reimbursed for their expenses in attending meetings and for transportation costs as authorized by O.C.G.A. § 45-7-21., which provides for compensation and allowances of certain state officials; provided, however, that the Chairperson and Vice Chairperson of the Appeal Panel shall also be compensated for their services rendered to the Appeal Panel outside of attendance at an Appeal Panel meeting, such as for time spent assigning hearing officers, the amount of which compensation shall be determined according to regulations of the Department of Administrative Services. Appeal Panel members shall receive compensation for the administration of the cases assigned to them, including pre-hearing, hearing, and post-hearing work, in an amount determined to be appropriate and reasonable by the Department of Administrative Services. Such compensation to the members of the Appeal Panel shall be made by the Department of Administrative Services.
- (4) To the extent not inconsistent with these Rules, the Rules of the Department of Community Health relating to certificate of need and health planning (including review considerations and standards), as amended from time to time, shall apply to and govern the decisions of the Appeal Panel.
- (5) All documents filed with either the Appeal Panel or a hearing officer to whom a case has been assigned by any person (including any correspondence, motion, request for discovery, brief or other document) shall be filed via the Department's web portal and sent to each attorney of record (or directly to any party not represented by an attorney). The date of receipt by the Appeal Panel or assigned hearing officer shall be the official date and timestamp stated on the electronic mail receipt confirmation for the web portal submission.

Authority: O.C.G.A. §§ 31-6, 31-6-44

Rule 274-1-.02 Definitions

- (1) "Appeal Panel" means the panel of attorneys appointed by the Governor to review the Department's initial decision to grant or deny a certificate of need application.
- (2) "Appellant" means the person who files an appeal with the Appeal Panel.
- (3) "Applicant" means the person who files an application for review of a project with the Department.
- (4) "Chairperson" means the Chairperson of the Appeal Panel appointed by the Governor or the Vice Chairperson acting as Chairperson at the direction of either the appointed Chairperson or the Governor.
- (5) "Commissioner" means the commissioner of the Department of Community Health as provided for in O.C.G.A. § 31-5A2-6.
- (6) "Department" means the Department of Community Health established under O.C.G.A. § 31-2-4.
- (7) "Hearing Officer" means the attorney from the Appeal Panel to whom a case has been assigned by the Chairperson.

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Authority: O.C.G.A. §§ 31-6, 31-6-44

Rule 274-1-.03 Request for Initial Administrative Appeal Hearing or Intervention

- (1) Any Applicant for a project, and any party that is permitted to oppose an application pursuant to paragraph (2) of subsection (d) of O.C.G.A. § 31-6-43 and has timely notified the Department, as required by the applicable certificate of need rules, prior to its decision that such party is opposed to the application before the Department, shall have the right to an initial administrative appeal hearing before an appeal panel hearing officer or to intervene in such hearing.
- (2) Such request for hearing or intervention shall be filed with the Chairperson of the Appeal Panel within thirty (30) days of the date the Department decision is issued, pursuant to O.C.G.A. § 31-6-43, or within thirty (30) days after the date the application is deemed to have been approved, if no decision is issued. A request for intervention shall be filed with the Chairperson of the Appeal Panel within ten (10) days of any request for hearing. Without exception to the status of the party, the request shall state with specificity which Certificate of Need application(s) is being appealed. Unless agreed otherwise by all of the parties or determined otherwise by the hearing officer to whom the case is assigned, an appeal of one application which was joined with one or more other applications by the Department, or an application which was reviewed concurrently in a batching review cycle by the Department, shall serve as an appeal of all of the joined or batched applications.
- (3) A request for an initial administrative appeal hearing before a hearing officer or to intervene in such a hearing shall be in writing and filed via the Department's web portal within the applicable thirty (30) day period. If the thirtieth (30th) day falls on a weekend or a federal or state holiday, the time for requesting an appeal or intervention shall be extended to the next business day. The date of receipt shall be the official date and timestamp stated on the electronic mail receipt confirmation for the web portal submission.

Authority: O.C.G.A. §§ 31-6, 31-6-44

Rule 274-1-.06 Scheduling and Notice of Administrative Hearing

- (1) Within fourteen (14) days after the appointment of the hearing officer, such hearing officer shall confer with the parties and set the date or dates for the hearing. The hearing officer shall provide the parties with written notice sent regular mail or electronic mail at least fourteen (14) days before the date of commencement of the hearing. Notification shall include, at a minimum, the information required in the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-13.
- (2) The hearing officer shall make all arrangements for scheduling the hearing, providing for the making of a record, the transcription thereof, and any other arrangements necessary to convene the hearing. However, the hearing officer shall be authorized to request the assistance of the General Counsel of the Department as necessary in the discharge of these duties.

Authority: O.C.G.A. §§ 31-6, 31-6-44

Rule 274-1-.10 Conduct of Initial Administrative Appeal Hearing

- (1) The initial administrative hearing shall be conducted as a full evidentiary hearing in accordance with Chapter 13 of Title 50, the Georgia Administrative Procedure Act, relating to contested cases, except as otherwise specified in O.C.G.A. § 31-6-44, or these Rules. In addition to being filed via the Department's web portal where required by Rule 274-1-.01(5), all documents submitted to the hearing officer, another party or an attorney of record pursuant to this rule may be submitted via either regular mail or electronic mail, unless otherwise directed by the hearing officer.
- (2) Subject to the prior approval of the hearing officer, all files, working papers, studies, notes and other writings or information used by the Department in making its decision shall be public records and available to the parties, and the hearing officer may permit each party to exercise such reasonable rights of pre-hearing discovery of such information used by the parties as will expedite the hearing. Answers to such a request for discovery shall be served within ten (10) business days of the date the request was received. A request for discovery of information not included in items (a) through (f) below shall be made to the hearing officer. Any party may, upon written request to another party, discover the following items as a matter of right:
 - (a) a list of considerations and standards that are deemed applicable and as to which evidence will be presented;
 - (b) the names and addresses of all witnesses who will be present for the hearing;
 - (c) the names and addresses of all witnesses who may be present for the hearing;
 - (d) the resume of any expert witness who will or may be present for the hearing;
 - (e) a list of each documentary or demonstrative item to be used at the hearing and known at the time the request for discovery is answered; and
 - (f) any updates of studies or data previously submitted to the Department.
- (3) At least ten (10) business days prior to commencement of the initial administrative hearing, each party shall submit to the hearing officer and to each attorney of record or party not represented by an attorney a brief summary of the facts and legal contentions on which the party's case is based. The summary shall not exceed eight (8) double-spaced pages in length.
- (4) At the discretion of the Hearing Officer, each party to an initial administrative hearing may be required to submit, along with and at the time of the summary of facts and legal contentions referenced in subsection (3) above, the written direct testimony of the primary health planning expert witness it intends to present at the hearing along with any exhibits which correspond to the direct expert witness testimony. This written material shall be submitted to the hearing officer and to each attorney of record or party not represented by an attorney. This written material shall be used by the Department as an official copy for the administrative hearing record. The written direct testimony of any expert witness and the corresponding exhibits submitted pursuant to this rule shall be tendered in lieu of direct live testimony of a party's expert witness at the initial administrative hearing. The expert witness of any party shall be subject to live cross examination and redirect examination at the initial administrative hearing. The expert witness shall be tendered as an expert by the party who

submitted written direct testimony of the expert witness prior to any cross-examination. An expert witness may also be subject to voir dire with regard to their qualification as an expert by any party at the discretion of the hearing officer. The written direct testimony and corresponding exhibits are not subject to the eight (8) double-spaced page limit referenced in subsection (3) above.

- (5) Any party to an initial administrative hearing who intends to submit updates of studies previously submitted to the Department prior to its decision shall submit such updates, along with any supporting documentation, in written form at the same time as the summary of facts and legal contentions referenced in subsection (3) above. The updated studies, if any, shall be submitted to the hearing officer and to each attorney of record or party not represented by an attorney. The updates and supporting documentation are not subject to the eight (8) double-spaced page limit referenced in subsection (3) above.
- (6) In the event the Hearing Officer requires written direct testimony of a primary health planning expert to be filed pursuant to subsection (4) above, at least five (5) business days prior to commencement of the initial administrative hearing, each party shall submit to the hearing officer and to each attorney of record or party not represented by an attorney objections to the admissibility of proposed expert testimony, documents, exhibits, and updated studies referenced in subsections (3), (4), and (5) above.
- (7) Appellants or Applicants shall proceed first with their cases before the hearing officer in the order determined by the hearing officer; and the Department, if a party, shall proceed last. Any interveners shall proceed in an order determined by the hearing officer.
- (8) The burden of proof shall be on the Appellant.
- (9) All evidence shall be presented at the initial administrative appeal hearing conducted by the appointed hearing officer.
- (10) In addition to evidence submitted to the Department, a party may present any additional relevant evidence to the appeal panel hearing officer reviewing the decision of the Department if the evidence was not reasonably available to the party presenting the evidence at the time of the Department's review. The burden of proof as to whether the evidence was reasonably available shall be on the party attempting to introduce the new evidence.
- (11) A party or intervener may present any relevant evidence on all issues raised by the hearing officer or any party to the hearing or revealed during discovery and shall not be limited to evidence or information presented to the Department prior to its decision, except that an applicant may not present a new need study or analysis responsive to the general need consideration or service-specific need formula that is substantially different from any such study or analysis submitted to the Department prior to its decision and that could have reasonably been available for submission. The hearing officer shall consider the latest data available, including updates of studies previously submitted, in deciding whether an application is consistent with the applicable consideration or rules. The hearing officer shall consider the applicable considerations and rules in effect on the date the appeal is filed, even if the provisions of those considerations or rules were changed after the Department's decision.
- (12) Initial administrative appeal hearings shall be conducted in such a manner as to conclude in a reasonable period of time. Any continuance or delays should be as brief as possible and shall only be granted for good cause shown. The hearing officer shall be vested with the

authority to set reasonable time limits in advance of or during the hearing for the presentation of each party's case, subject to extension for good cause shown.

- (13) The hearing officer shall make such rulings as may be required for the conduct of the hearing and shall have the authority to do the following in addition to any other rights granted by O.C.G.A. § 50-13., the Georgia Administrative Procedure Act, which are not otherwise inconsistent with these Rules: administer oaths and affirmations; sign and issue subpoenas; rule upon offers of proof; regulate the course of the hearing; set the time and place for continued hearings; fix the time for filing motions and briefs; dispose of motions to dismiss for lack of jurisdiction over the subject matter or parties or for any other grounds; dispose of motions to amend or to intervene; provide for the taking of testimony by deposition or interrogatory; and reprimand or exclude from the hearing any person for any indecorous or improper conduct committed in the presence of the hearing officer. The hearing officer may order such conferences with counsel for the parties, or the parties themselves if they are not represented by counsel, either prior to or during the hearing, as may facilitate determination of questions of evidence and other questions of law and expedite the hearing.

Authority: O.C.G.A. §§ 31-6, 31-6-44

Rule 274-1-.11 Decision of Hearing Officer

- (1) Within thirty (30) days after the conclusion of the hearing, the hearing officer shall make written findings of fact and conclusions of law as to each consideration as set forth in O.C.G.A. § 31-6-42. and the Department's Rules, including a detailed statement of the reasons for the decision of the hearing officer. The hearing officer may, by order, extend the period in which the decision must be made upon a determination that the complexity of the issues and/or the length of a record requires such extension of the period, but in no event may such extension exceed an additional fifteen (15) days.
- (2) If any party has alleged that an appeal lacks substantial justification or was undertaken primarily for the purpose of delay or harassment, the decision of the hearing officer shall make findings of fact addressing the merits of the allegation pursuant to O.C.G.A. § 31-6-44.(i).
- (3) The conclusion of the hearing is deemed to be the last date for submission of written evidence, proposed findings and conclusions, written arguments, or other materials, as fixed by the hearing officer.
- (4) In the event of a consolidated hearing on applications which were joined for comparative review pursuant to O.C.G.A. § 31-6-43.(f), the hearing officer shall have the same powers specified for the Department in O.C.G.A. § 31-6-43.(f) to order the issuance of no Certificate of Need or one or more Certificates of Need.
- (5) Notice of the decision is deemed to be issued on the day that it is signed by the hearing officer and sent with a Certificate of Service to all parties via the method chosen by the hearing officer.
- (6) Immediately upon rendering a decision, the hearing officer shall file such decision, via regular or electronic mail, with the Chairperson of the Appeal Panel who shall serve such

decision upon all parties by regular or electronic mail, and shall transmit the administrative record to the Commissioner. The Chairperson shall have been deemed in receipt of the hearing officer's decision on the date that the decision is received.

- (7) The hearing officer may remand a matter to the Department if the hearing officer determines that it would be beneficial for the Department to consider new data, studies, or analyses that were not available before the decision or changes to the provisions of the applicable considerations or rules made after the Department's decision. The hearing officer shall establish the time deadlines for completion of the remand and shall retain jurisdiction of the matter throughout the completion of the remand.
- (8) Notice of the decision shall include, in addition to findings of fact and conclusions of law, instructions to the Department as to granting or denying a Certificate of Need.

Authority: O.C.G.A. §§ 31-6, 31-6-44

Rule 274-1-.12 Finality of Hearing Officer's Decision; Optional Review of Hearing Officer's Decision by Department Commissioner

- (1) The decision of the Appeal Panel hearing officer will become the final decision of the Department upon the sixty-first (61[st]) day following the date of the decision unless an objection thereto is filed with the Commissioner within the time limit established in subsection (2) of this rule.
- (2) Any party, including the Department, which disputes any finding of fact or conclusion of law rendered by the hearing officer in such hearing officer's decision and which wishes to appeal that decision may appeal to the Commissioner and shall file its specific objections with the Commissioner or his or her designee via the Department's web portal within thirty (30) days of the date of the hearing officer's decision.
- (3) Any objections filed in accordance with this rule shall specify in detail the errors allegedly committed by the hearing officer in the hearing officer's decision. Failure to specify such alleged errors in detail shall constitute a waiver of all available objections. Further, the party submitting such objections must specify the date upon which it received the hearing officer's decision.
- (4) All objections shall be in writing. A copy must be filed with the Department's Office of Health Planning via the Department's web portal and served on each attorney of record, or directly to any party not represented by an attorney at the time the objections are filed with the Commissioner or his or her designee. The objections must be received by the, Office of Health Planning, within the applicable thirty (30) day time period. If the thirtieth (30[th]) day falls on a weekend or a federal or state holiday, the time for submitting such objections shall be extended to the next business day. The date of receipt shall be the official date and timestamp stated on the electronic mail receipt confirmation for the web portal submission. Objections filed over the Department's web portal shall be deemed submitted on the date they are filed, up to 11:59 p.m.
- (5) The Commissioner, or his or her designee, shall determine whether a party complied with the provisions of this rule. In the event the Commissioner, or his or her designee, determines that the party failed to comply with the provisions of this Rule, such person shall have the authority to render written decisions on behalf of the Department with respect to such

determinations. A decision adverse to a party shall specify in detail the extent to which a party failed to comply.

Authority: O.C.G.A. §§ 31-6, 31-6-44

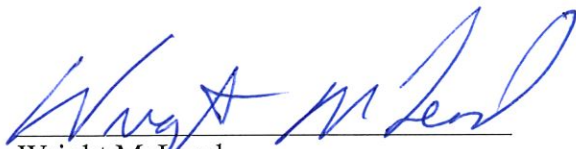
WHEREFORE IT IS ORDERED, that the CON Appeal Panel hereby adopts CON Appeal Panel Rules 274-1-.01, 274-1-.02, 274-1-.03, 274-1-.06, 274-1-.10, 274-1-.11 and 274-1-.12 as amended.

ORDERED FURTHER, that said adopted rule having been published as provided in O.C.G.A. § 50-13-3(b) shall be filed with the Administrative Procedure Act Division of the Secretary of State as provided in O.C.G.A. § 50-13-6(b).

ORDERED FURTHER, that any motion for reconsideration, rehearing, or oral argument or any other relief shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this matter is expressly retained for the purpose of entering such further Order or Orders as this CON Appeal Panel may deem just and proper.

The above by action of the CON Appeal Panel in its meeting on the 23rd day of June, 2022.


Wright McLeod
Chairperson
Certificate of Need Appeal Panel

JULY 8, 2022
Date