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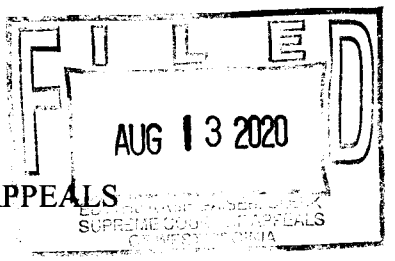

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 20-0308

FILE COPY

Amedisys West Virginia, LLC
d/b/a Amedisys Home Health
Of West Virginia, St. Mary's
Medical Center Home
Health Services, LLC,
and LHC Group, Inc.
Petitioners

v.

Personal-Touch Home Care
of W.Va., Inc. and the West
Virginia Health Care Authority
Respondents

PERSONAL-TOUCH HOME CARE OF W.VA., INC.'S RESPONSE BRIEF

Submitted by:
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I. INTRODUCTION

This case involves an appeal from a decision by the West Virginia Health Care Authority ("the Authority") approving the application for a Certificate of Need filed by Respondent, Personal-Touch Home Care Of W. Va. Inc. ("Personal-Touch" or "Respondent") under the provisions of W. Va. Code § 16-2D-1 *et seq.* Personal-Touch applied for and was granted a Certificate of Need ("CON") to provide home health care services in Cabell and Wayne Counties. St. Mary's Medical Center Home Health Services, LLC, LHC Group, Inc. and Amedisys West Virginia, LLC d/b/a Amedisys Home Health of West Virginia ("Petitioners"), were designated by the West Virginia Health Care Authority as affected persons in the matter and participated in a hearing held before the Authority on December 12, 2018. On April 4, 2019, the Authority issued its decision approving the CON ("the HCA Decision"). Petitioners filed an appeal of the HCA Decision before the Office of Judges/Health Care Authority, the designated appeal agency, pursuant to the provisions of W. Va. Code § 16-2D-16. On September 26, 2019 the Office of Judges/Health Care Authority issued a Decision upholding the HCA Decision granting the CON ("the OOJ Decision"). Thereafter, pursuant to the terms of W.Va. Code § 16-2D-16(f), the Petitioners filed an administrative appeal with the Circuit Court of Kanawha County. On February 28, 2020 the Honorable Tod J. Kaufman, Circuit Judge for Kanawha County, issued an Order upholding the HCA Decision as well as the OOJ Decision ("the Circuit Court Decision"). The Petitioners timely filed an appeal to this Court. On June 15, 2020, this Court set a briefing schedule. On June 29, 2020, Petitioners filed a brief ("Petitioners' Brief"). This Brief is submitted in response to the Petitioners' Brief and pursuant to that schedule.

II. BACKGROUND

To fully understand this matter, first you must understand the history of the Authority because this matter is about the Authority's ability to write the State Health Plan and the CON Standards and to interpret those CON Standards. The Authority is an administrative agency created by statute, W.Va. Code § 16-29B-1 *et seq.* The power to author the CON Standards is established in W.Va. Code §§ 16-2D-3 and W.Va. Code §16-2D-6 provides the method that must be followed by the Authority to adopt the CON Standards. It further provides that "[t]he certificate of need standards in effect on July 1, 2016, and all prior versions promulgated and adopted in accordance with the provisions of this section are and have been in full force and effect from each of their respective dates of approval by the Governor." W.Va. Code §16-2D-6(g). The reason the CON Standards are important to the process is that "[a] certificate of need may only be issued if the proposed health service is: (1) Found to be needed; and (2) Consistent with the state health plan, unless there are emergency circumstances that pose a threat to public health." W.Va. Code §16-2D-12(a). The CON Standards are a part of the State Health Plan. Thus, while the CON Standards are not legislative rules, the legislature provided a process for them to be adopted and further required, in part, that a CON application must be found to be consistent with the State Health Plan and the CON Standards before the Authority can grant the CON. Also, most of the CON Standards contain the method that is required to be used to show that the proposal contained therein is needed.

Each set of CON Standards deals with a specific service and outlines, either generally or specifically, what an applicant for that specific service must prove before the Authority can grant a CON that allows the applicant to develop the service in question. Matters such as the need for the service, requirements regarding costs and quality are also normally addressed in the CON Standards for each service. In most of the Chapters of the CON Standards, the Authority outlines

a method or methods that must be used by an applicant for a CON to demonstrate that the service is needed, or that there is an unmet need for the service. The method usually involves a demonstration of how many people in a specified service area would need the service being proposed and then a method to subtract the number of people who are already being served.

The CON Standards that are specific to this matter are entitled "Home Health Services Standards." These specific standards were authored by the Authority in 1996 and presented to the Governor for approval. The Governor approved the Home Health Services Standards on November 13, 1996. Like other provisions in the CON Standards, the Home Health Services Standards outline the requirements for proof before a CON can be granted. Section V(C) of the Home Health Services Standards, entitled "Need Methodology", deals with the mathematical calculation to assess the need, termed the unmet need, for the services. The Authority's interpretation of this section is the major issue in this matter. Unlike other chapters in the CON Standards, the Home Health Services Standards require the actual calculation of the unmet need for home health services to be performed by the Authority, updated periodically, and published. Thus, the numbers resulting from the calculation are not subject to dispute. The dispute in this matter is the meaning of the final numbers.

The need methodology is performed by the Authority for each of the 55 counties. It contains four steps. The first three steps involve calculations that determine whether there is an unmet need for the service in each of the 55 counties. Generally, the steps provide for the calculation of the number of people in each county that are projected to need home health services and the number of people in each county that are already using home health services, the existing utilization. Then, the existing utilization is subtracted from the projected utilization. If the resulting figure is a negative number, meaning the number of people actually utilizing home health services

exceeds the number of those projected to need the services, then there is no unmet need as is required to be shown in W.Va. Code §16-2D-12(a). If the resulting figure is positive, meaning the number of people utilizing home health services is less than the number of those projected to need the services, then there is an unmet need in that county for home health services as required by the statute. In this matter, there was a positive need shown in both counties.

The fourth and last step in the calculation is designed to be applied "only if there are agencies in the proposed county which received CON approval in the previous 12 months." Standards, §V(C)(4). If a new agency has been approved in the last twelve months, the figure of 229 projected home health recipients is subtracted from the need figure described above to "allow for the development of agencies approved for CON in the previous 12 months." Standards §V(A). For example, if the first three steps of the calculation result in a positive need of 200 **and** a new agency had been approved in the previous twelve months, the 229 projected home health recipients would be subtracted from 200 and would result in the positive need number of 200 being a negative number of 29. That would result in a finding that there would be no unmet need in the county. At the end of the year-long period to allow for the development, the 229 figure no longer applies. In this matter, there were no CON approvals in either Cabell or Wayne County within the 12 months prior to the application. Because there was no new CON approval in the last 12 months, pursuant to the terms of the Home Health Services Standards the fourth step of the calculation was not applicable to this matter.

Every CON application filed since 1996 seeking a CON to develop home health services has been decided by the Authority in accordance with the Home Health Services Standards. Decisions regarding whether to approve or deny a CON application are made by the Authority's Board. As discussed more fully below, the various members of the Authority's Board have issued

at least fifteen decisions approving CON applications under the exact same circumstances as those that exist in this case. Of those many decisions, at least three have been appealed on the same issue as is argued in this case to the Office of Judges/Health Care Authority, the designated administrative appeal body. Those cases have all been upheld. At least two have been appealed to the Kanawha County Circuit Court, the Court now designated by statute to hear such appeals. One of those cases in the instant case. The other decision was upheld by Judge Webster of the Kanawha County Circuit Court and has since been appealed to this Court.

A third case was appealed from the Office of Judges to the Circuit Court of Mason County. The statute at the time allowed appeals to be made to the Circuit Court of the appealing party. The Court in that matter overturned the Authority's decision and the Office of Judges decision upholding it.[1] That case is cited by the Petitioners here. It must be noted that the Mason County decision was not appealed to this Court by either the Authority or the home health agency that had been granted the overturned CON. However, the Authority disagreed with the Mason County decision and, aside from cases subject to that Court's jurisdiction, has never changed its interpretation of the Home Health Services Standards. In fact, the Mason County decision was specifically addressed in the HCA Decision and again rejected by the Authority. Finally, circuit court decisions in and of themselves have no precedential value in this Court. *See Hupp v. W. Va. Consol. Pub. Ret. Bd.*, 2014 W. Va. LEXIS 753, 14 (citing *State ex rel. Miller v. Stone*, 216 W. Va. 379, 382, 607 S.E.2d 485, 488 (2004))

[1] Pleasant Valley Hospital v. West Virginia Health Care Authority, et al., Civil Action No. 06-AA-20, Circuit Court of Mason County.

III. ARGUMENT

A. Legal Standard

In another case involving a review of the interpretation of the State Health Plan Standards this Court provided the legal standard that is applicable here.

> As we recently stated in Syllabus Point 1 of *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995): 'Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.' We further said "[a]n inquiring court — even a court empowered to conduct *de novo* review — must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." 195 W. Va. at 582, 466 S.E.2d at 433. However, deference only should be given to an agency's construction of a statute or legislative rule if the legislative intent is not clear. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-43, 104 S.Ct. at 2781, 81 L.Ed.2d at 703; *Sniffin v. Cline*, 193 W. Va. 370, 374, 456 S.E.2d 451, 455 (1995).
>
> Our review of HCCRA's legislative rules is limited to asking (1) whether they were enacted pursuant to the procedures required by law; and (2) whether HCCRA's interpretation and application of the rules were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. An agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference.

West Virginia Health Care Cost Review Authority v. Boone Mem. Hospital, 196 W. Va. 326, 335, 472 S.E.2d 411 (1996). The ultimate scope of review of agency decisions is narrow and the reviewing court is not empowered to substitute its judgment for that of the agency. *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982). "If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power v. State Tax Dept.*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). See also *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 517, 112 S. Ct. 1394, 1401, 118 L. Ed. 2d 52, 66 (1992) (deference is due so long as "the agency interpretation is not in conflict with the plain language of the statute").

B. Argument

The Decision made by the Authority, upheld by both the Office of Judges/ Health Care Authority and the Circuit Court, was that Respondent satisfied the requirements of the Need Methodology in Section V(C) of the Home Health Services Standards. That Decision is based upon the plain language of the Home Health Services Standards. The Home Health Services Standards were enacted pursuant to the procedures required by statute at the time they were drafted and approved and they were subsequently again approved pursuant to the provisions of W.Va. Code §16-2D-6(g). The Authority's interpretation and application of the Home Health Services Standards were not arbitrary, capricious, or an abuse of discretion, and otherwise were in accordance with law. The Authority's interpretation and application of the Home Health Services Standards has been consistent for two decades and is a reasonable and permissible construction of the plain language of the Home Health Services Standards.

Petitioners argument is based on a novel interpretation of the Home Health Services Standards. It is that all four steps of the methodology set forth in Section C of the Home Health Services Standards must be applied and that a proper finding of need can only be made if the unmet need figure resulting from the four step calculation is in excess of 229 projected patients, whether a new provider has been approved in the previous twelve months or not. That novel interpretation runs counter to the plain language of the Home Health Services Standards and the Authority's consistent interpretation of the Home Health Services Standards in cases decided since at least 2000.

In at least fifteen other cases decided by the Authority, the theory that the calculation of the need performed by the Authority must be in excess of 229 unserved patients in a county of application has been repeatedly denied. In fact, the Petitioner's position has been argued in at least

four cases before the Authority in the last few years and has been specifically rejected each time. The Authority's interpretation of the Home Health Services Standards in the four recent cases as well as others decided since 2000 is permissible, rational, and a persuasive construction of the Home Health Services Standards as the Authority wrote them. See *In re: United Hospital Center, Inc.*, CON File No. 17-6-11131-Z, affirmed by the Office of Judges/Health Care Authority in Ap. Doc. No. 18-HC-01, affirmed by the Kanawha County Circuit Court and appealed to this Court (a February 2018 Decision in which an unmet need of 44 patients in Preston County resulted in CON approval); *In re: Three Rivers Home Care*, CON File No. 00-2-7110-X/Z (a February 26, 2002 Decision in which an unmet need of 69 patients in Wayne County resulted in CON approval); *In re: Pleasant Valley Hospital d/b/a Pleasant Valley Home Health and Pleasant Valley Private Duty*, CON File No. 01-2/3/5-7206-Z (a May 2, 2002 Decision in which an unmet need of 75 patients in Wayne County, 127 patients in Jackson County, 386 patients in Putnam County, and 97 patients in Lincoln County all resulted in CON approval); *In re: Memorial Hospital Home Health d/b/a Mingo Wayne Home Health and Preferred Home Health*, CON File No. 02-1/2/3-7399-Z (a July 3, 2003 Decision in which an unmet need of 75 patients in Wayne County, 127 patients in Jackson County, 386 patients in Putnam County, and 97 patients in Lincoln County all resulted in CON approval); *In re: Memorial Hospital Home Health d/b/a Mingo Wayne Home Health and Preferred Home Health*, CON File No. 02-1/2/3-7399-Z (a July 3, 2003 decision in which an unmet need of 125 patients in Boone County, 5 patients in Cabell County, 98 patients in Lincoln County, 180 patients in Logan County, and 212 patients in Wyoming County resulted in CON approval); *In re: Jefferson Memorial Home Care*, CON File No. 03-9-7597-X/Z (a January 9, 2004 Decision in which an unmet need of 195 patients in Berkeley County resulted in CON approval); *In re: Elite Health Care, Inc.*, CON File No. 04-1-7801-Z (a June 22, 2004 Decision in

which an unmet need of 76 patients in Wyoming County resulted in CON approval); *In re: Medi Home Health Agency, Inc.*, CON File No. 07-2-8644-Z (a November 14, 2008 Decision on Request for Reconsideration that determined an unmet need of 30 patients in Lincoln County and 19 patients in Wayne County was sufficient for CON approval in both counties); *In re: Caring Angels Home Health, LLC*, CON File No. 14-8/9-10231-Z 9 (an October 30, 2015 Decision in which an unmet need of 961 in Berkeley County, 203 patients in Hampshire County, 606 patients in Jefferson County, 116 patients in Morgan County, and 130 patients in Mineral County all resulted in CON approval); *In re: Stonerise Reliable Healthcare, LLC,* CON file No. 17-5-11187-Z (a December 11, 2017 Decision determining that an unmet need of 8 patients in Pleasants County and 6 patients in Tyler County was sufficient for CON approval in both counties); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 18-7/8-11305-Z (a May 2018 Decision in which an unmet need of 46 patients in Grant County and 14 in Tucker County resulted in CON approval in both counties); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 18-8/9-11510-Z (an April 2018 Decision in which an unmet need of 42 patients in Hardy County and 64 in Morgan County resulted in CON approval in both counties); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 18-8-11511-Z (an April 2018 Decision in which an unmet need of 165 patients in Hampshire County and 166 in Mineral County resulted in CON approval in both counties); and, *In re: Personal-Touch Home Care of WV*, CON File No. 19-6/7-11595-Z (a November, 2019 Decision in which an unmet need of 76 patients in Barbour County and 34 in Taylor County resulted in CON approval in both counties). In the most recent case, also involving Personal-Touch, the Authority once again dealt with this same issue and ruled that "[w]ith regard to the fourth calculation in the Standards, the Authority upholds its long line of precedents and reiterates that an unmet need of 229 patients is

not required for all home health applications. *In re: Personal-Touch Home Care of WV*, CON File No. 19-6/7-11595-Z P, Decision, p. 12.

The Home Health Services Standards plainly and unambiguously provide that the 229 patient adjustment and the resulting requirement of a need finding in excess of 229 applies to Step 4 and is intended to account for new providers that are not otherwise accounted for in the need methodology calculations and to allow any new provider a period of 12 months to start their business. In fact, the Home Health Services Standards specifically provide that Step 4 and the 229 projected patient addition applies "only if there are agencies in the proposed county which received CON approval in the previous 12 months." *See* Home Health Services Standards § V(C)(4). As demonstrated by the multitude of cases cited above, the Authority has not waivered on this interpretation. The Authority is composed of experts entrusted by statute with creating and enforcing their own CON Standards. Therefore, the Authority should be entrusted with its interpretations and, absent a finding that is arbitrary, capricious, or manifestly contrary to the Home Health Services Standards, must be given appropriate deference to agency expertise and discretion. *See Appalachian Power Co.* 466 S.E.2d at 433.

The Decision in this case, as well as the many decisions cited above, are not arbitrary or capricious. In fact, they are remarkably consistent. Further, they are not manifestly contrary to the Home Health Services Standards. They are perfectly consistent with the plain wording of the Home Health Services Standards. There was no new provider in the two counties, so Step 4 does not apply. Petitioners contend that the final part of Step 4 that requires a total of unserved 229 patients before an unmet need can found is not a part of Step 4, but of the entire process. This contention is addressed in the assumptions to the methodology that are contained in Section V(A) of the Home Health Services Standards. One of the assumptions provides that "[t]he unmet need for home

health services in a county is determined by a process that compares current county-to-state utilization data." *See* Home Health Services Standards, Section V(A). That assumptions mentions nothing about a specific figure that must be demonstrated before an unmet need is proven. The next assumption provides that:

> An adjustment of 229 home health recipients has been added to the formula to allow for the development of agencies approved for CON in the previous 12 months. An unmet need will exist if the need methodology yields a threshold of at least 229 projected home health recipients. The threshold/adjustment factor of 229 is the median number of home health recipients receiving care from an agency identified in the 1995 West Virginia Health Care Cost Review Authority Home Health Services Survey Summary. The HCCRA shall consider adjusting the threshold/adjustment factor at the time it updates the need calculations.

Home Health Services Standards, Section V(A). The 229 figure is clearly paired with the development of a new agency in the previous twelve months, the calculations contained in Step 4. The Authority wrote the Home Health Services Standards and has applied the 229 figure to Step 4 only, as the assumptions clearly provide. Both the Circuit Court and the Office of Judges/ Health Care Authority deferred to this interpretation of its Standards made by the Authority in this case. This Court should do the same.

As noted above, the Authority has addressed this issue many times before, but again specifically addressed it in the HCA Decision. In discussing the fourth step in the calculation, the Authority noted that:

> The fourth and final calculation provides for the "Calculation of the Threshold (Adjustment Factor)." This calculation is only performed if there are agencies in the proposed county which received CON approval in the previous 12 months. Where an agency in the proposed county received CON approval in the previous 12 months, an "adjustment factor" of 229 projected home health recipients is applied to the unmet need and the calculation operates to determine if there is an unmet need above the 229 adjustment threshold. The "conclusion" of the calculation provides that if "the threshold is at least 229 projected home health recipients, an unmet need exists." The Standards provide that in instances where a CON has been issued to another agency in the county within the last 12 months, "[a]n unmet need or threshold of at least 229 projected home health recipients must

> occur in the county before consideration will be given to issuing another Certificate of Need for the county."

HCA Decision, page 13. The Authority went on to a long and detailed discussion regarding the application of the methodology and the fourth step (see *HCA Decision* pages 17-23), stating that "[w]ith regard to the fourth calculation in the Home Health Services Standards, the Authority upholds its long line of precedents, and reiterates that an unmet need of 229 patients is not required for all home health applications." See *HCA Decision*, page 17-18. Even more specifically, the Authority concluded that "[t]he Authority rejects the Affected Persons' contention that the "Conclusion" statement found at the end of calculation applies to the entirety of the need calculations, thus requiring an unmet need of 229 projected home health recipients before the Authority may issue an additional CON. This interpretation is clearly wrong and ignores the plain language of the Home Health Standards." See *HCA Decision* page 17-18. Finally, the Authority mentioned the Circuit Court decision that is cited by the Petitioners, noting that:

> [it] finds that the inclusion of the 229 recipients as a threshold is not applicable in this proposal. This decision is consistent with a long line of precedent on this issue, See, supra, With regard to Judge Nibert's Decision issued in *Pleasant Valley Hospital v. West Virginia Health Care Authority et al*, Civil Action No. 06-AA-20 on March 27, 2007, this decision is not precedential outside of the circuit in which it was decided. Secondly, Pleasant Valley is wrongly decided, and the Mason County Circuit Court committed error by ignoring the plain language of the Horne Health Standards and substituting its own interpretation of the Horne Health Standards for those of the Agency charged with developing and applying them. The Authority has consistently maintained that Pleasant Valley is wrongly decided and declines to adopt this faulty interpretation.

HCA Decision, pages 22-23.

The HCA Decision in this matter was made in a manner consistent with the plain language of the Home Health Services Standards and consistent with the overwhelming history of decisions in similar cases made since the Home Health Services Standards were first approved in 1996. Given that the Authority's interpretation of its own CON Standards should be given a high degree

of deference, the Respondent has therefore complied with the Need Methodology set forth in the Home Health Services Standards. The Authority's calculation of the need at the time the applications were filed was positive for both Cabell and Wayne County. There were no new agencies that received CON approval in the previous twelve months in either county. Thus, the HCA Decision "that Personal Touch has demonstrated that an unmet need exists for home health services in Cabell and Wayne counties" should not be disturbed by this Court. See *HCA Decision*, page 23.

The argument above addresses the Petitioner's legal arguments, but it does not address the practical argument and response. The Home Health Services Standards that provide the need methodology that is required to be used were written by the Health Care Authority and approved by the Governor in 1996. Since that time, those Home Health Services Standards have been interpreted and applied consistently by the Authority. That interpretation and application is consistent with the decision in this matter and totally inconsistent with the Petitioner's position. The Authority's decisions cited above include cases decided in 2000 all the way up to 2019. Two and a half decades after the Home Health Services Standards were written and after nearly two decades of consistent application, the Petitioner argues that the Authority is incorrect and the support for the argument is one Circuit Court case that the Authority disagrees with and does not enforce outside of that Court's jurisdiction. Thus, the Petitioner's argument is that the Authority, the entity that wrote the Home Health Services Standards, is wrong. Further, they argue that the two decades of decisions issued by the Authority mean nothing. This means that the Respondent and other applicants for CON cannot rely on that two-decade line of cases and that the Respondent should be denied a CON under the exact same circumstances where many other providers were granted a CON. That practical position is simply unfair and, as noted above, it is legally unfounded.

The Authority's interpretation of the Home Health Services Standards and the final decision in the case approving Personal-Touch's CON for home health services in Cabell and Wayne Counties must be given deference and weight by this court and, therefore, upheld.

Finally, the Petitioner raises an additional argument that is factually and legally incorrect. They argue that, because the need calculation for Cabell County changed from a positive number, (+29) to a negative number during the pendency of the hearing, there is no unmet need for the project. The need calculation performed by the Authority did change, but it changed after the filing of the application in August 2018. In fact, it changed well after the last date set by the Authority to amend the Application as well as the last date a party can submit documents into the record. The new need calculation was not publicly available until four (4) days before the hearing. The Petitioner's argument is that, because the Authority had gathered the utilization data from existing providers and that data was available to perform the calculation, the Respondent should have performed its own calculation based upon this data. There are several problems with that argument.

First, the Authority is constantly collecting data from multiple sources regarding many different types of services. If the Appellee's argument is to be followed, an Applicant for any new service would be completely unable to prepare an application or prepare for a hearing as the data underlying its calculations changes daily. Assuming arguendo this was allowed, an Applicant would be required to subpoena the data that the Authority has regarding that service, somehow determine whether it is accurate and then apply it to a need methodology. This is to be done while more data is being submitted to the Authority. The data is constantly changing so the results of any calculation would never be final. This puts an applicant in an untenable position and is a complete waste of judicial resources.

Secondly, the Home Health Services Standards deal directly with this issue. Section V(C) of the Home Health Services Standards provides that "[t]hese calculations performed by the HCCRA shall be used to determine unmet need; this is the only demonstration of need that the HCCRA [now HCA] shall consider..." *See* Home Health Services Standards § V(C) (emphasis added). Should the Petitioner's request be approved, an applicant for a CON would be required to use a methodology that is not the one performed by the Authority. That means the Petitioner is asking that Personal-Touch and future applicants be required to calculate and use a methodology to show the unmet need for the project that, by the express terms of the Home Health Services Standards, cannot be considered by the Authority. The Petitioner's solution is not only contrary to the requirement set forth in the Home Health Services Standards, it would lead to chaos for any applicant.

IV. CONCLUSION

The Authority's interpretation of the CON Standards in this matter is not arbitrary or capricious and did not constitute an abuse of discretion. The Authority's interpretation was instead based upon the plain language of the CON Standards and is a "permissible construction" of the CON Standards entitled to great deference and weight to agency expertise. Accordingly, this Court should affirm the Authority and Office of Judges Decisions approving Personal-Touch's applications for home health services in Cabell and Wayne Counties.

Respectfully submitted,

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By Counsel

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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OF WEST VIRGINIA, et al
Petitioners

v. **No. 20-0308**

PERSONAL-TOUCH HOME CARE
OF W.VA., INC. et al
Respondents

CERTIFICATE OF SERVICE

I, Thomas G. Casto, do hereby certify that I have served the foregoing *Respondent's Brief Filed on Behalf of Personal-Touch Home Care of W. Va. Inc.* by delivering a true and exact copy thereof this 13th day of August, 2020 via the U.S. Mail, postage prepaid, to:

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