IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.
D/B/A ST. JOSEPH'S HOSPITAL,**

RESPONDENT BELOW, PETITIONER,

vs. **No. 23-ICA-265**

**STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY
AND THE WEST VIRGINIA HEALTH CARE AUTHORITY**

PETITIONER BELOW, RESPONDENT

AND

WEST VIRGINIA HEALTH CARE AUTHORITY,

RESPONDENT BELOW, RESPONDENT.

STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY'S RESPONSE TO BRIEF OF PETITIONER ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.

**From The West Virginia Health Care Authority
CON File #23-7-12659-X**

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STATEMENT OF THE CASE

In its Statement of the Case, Petitioner St. Joseph's Hospital of Buckhannon, Inc. ("St. Joseph's")[1] spends nearly half of its Statement discussing the facts of a previous Certificate of Need ("CON") matter involving the same parties and a similar project, the relocation of Respondent Stonewall Jackson Memorial Hospital Company's ("Stonewall") hospital. The CON matter is not on appeal at this time; instead, a second matter, Stonewall's application for the total relocation of the hospital as a Determination for Reviewability ("DOR") under W. Va. Code § 16-2D-7 is now pending before this Court. To the extent that St. Joseph's Statement of the Case attempts to focus on the prior CON matter, it is erroneous and misleading. Although the facts of the two matters are similar, they are not factually or legally identical. The matters were filed under two different sections of the code and, for that reason, resulted in two different outcomes.

The first matter filed by Stonewall in 2021 was a CON application (HCA CON File No. 21-7-12157-H) filed under the provisions of W. Va. Code §§ 16-2D-8(a)(5) and 13 requesting a CON for the relocation of their hospital. As discussed herein, that matter was rejected by the West Virginia Health Care Authority ("Authority") (D.R. 0046-90) and that decision was upheld by this Court.[2] The second matter, that is the subject of this appeal, was filed by Stonewall in 2023 as a letter requesting a Determination for Reviewability ("DOR") under W. Va. Code § 16-2D-7. (D.R. 0002-40). That matter resulted in the opposite result, an Original and Amended DOR Decision by the Authority that each concluded that Stonewall's hospital total relocation was not subject to CON

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[1] It should be noted that, while St. Joseph's tries to depict itself as a small rural hospital, it is actually part of the largest health care provider in the State, West Virginia United Health System, that includes WVU Hospitals. (D.R. 0036-37).

[2] The case was docketed as *Stonewall Jackson Memorial Hospital Company v. St. Joseph's Hospital of Buckhannon, Inc.,* No. 22-ICA-147. A memorandum decision upholding the Authority's CON decision was issued by this Court on June 27, 2023, 2023 W. Va. App. LEXIS 202 (2023).

review and, therefore, construction of the new hospital could proceed. (D.R. 0469-78 and D.R. 0600-10). From these DOR decisions by the Authority, St. Joseph's now appeals.

The reason that Stonewall was able to make the new DOR letter request that was approved by the Authority is based on the undisputed fact that, in 2023, while the first 2021 CON matter was pending before this Court, the legislature enacted Senate Bill 613[3] that made a significant change to the CON expenditure minimum in W. Va. Code § 16-2D-2(15), raising that amount from under $6 million to $100 million.[4] Since Stonewall's expenditure for the total relocation of the hospital was under $100 million, after the enactment of Senate Bill 613, it no longer needed a CON and Stonewall was able to send a letter requesting a DOR for the total relocation of the hospital under W. Va. Code § 16-2D-7. (D.R. 0002-40). Stonewall makes this statement because, contrary to the arguments of St. Joseph's, the Authority has always interpreted W. Va. Code § 16-2D-8(a)(1) and (5) to mean that a CON is not required for the total relocation of an existing health care facility, beds[5] or services. Such a relocation is only subject to CON review when the relocation is not total or when the capital expenditures for a project exceeds the expenditure minimum.

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[3] It is noted that Senate Bill 613 was sponsored by Senator Maroney, a member of the legislature who has full-time employment as radiologist at another hospital in the West Virginia United Health System. It is also noted that Senate Bill 613 was voted for by Senate Majority Leader Dr. Tom Takubo, executive vice president for provider relations for the West Virginia University Health System, another part of United Health System.

[4] In 2017, the West Virginia Legislature last amended W. Va. Code § 16-2D-2(15) and they set the expenditure minimum at $5.0 million. Thereafter, pursuant to W. Va. Code 16-2D-3(a)(3), a CPI adjustment was made each year to adjust the expenditure minimum up each year. In 2021, when Stonewall applied for its CON to relocate the hospital, the expenditure minimum was just under $6 million.

[5] In footnote 6, the Authority erroneously noted in the original DOR decision that Stonewall was proposing a reduction of hospital beds as a part of the 2023 letter requesting a DOR. (D.R. 0475). A review of that letter indicates that this is an incorrect statement. (D.R. 0002-40). This statement was corrected in the Amended DOR with the statement at paragraph seven that "Stonewall proposes no such reduction [of beds] in the RDOR." (D.R. 0606). Stonewall argues in this Response Brief that both statements in paragraph seven are accurate and that only the statements in footnote 6 are inaccurate. On this basis, this Court can uphold either the original or Amended DOR Decision of the Authority.

With regard to the first CON matter filed by Stonewall in 2021, CON applications are subject to the requirements set forth in W. Va. Code § 16-2D-12, including the specific provisions of W. Va. Code § 16-2D-12(b)(1). That section requires that applicants prove that the proposed project is the superior alternative in terms of cost, efficiency, and appropriateness. Since Stonewall had to apply for a CON based on a capital expenditure, well in excess of the then expenditure minimum, it had to reduce the number of hospital beds in the proposed new facility under Section III(B) of the applicable CON Standards that applied to that application.[6] With regard to Stonewall's 2021 CON application, the Authority ruled that Stonewall's proposed new hospital was needed, was consistent with the State Health Plan, was financially feasible and would serve a medically underserved population. The Authority found that Stonewall's 2021 CON application did not comply with the requirement of W. Va. Code § 16-2D-12, "Minimum criteria for certificate of need reviews", specifically W. Va. Code § 16-2D-12(b)(1), and the application was denied because it did not meet the superior alternative requirements. (D.R. 0046-90). This Court upheld that ruling.

The instant case was not filed under the provisions of W. Va. Code § 16-2D-13. It was filed under the provisions of W. Va. Code § 16-2D-7. The CON Standards and requirements in W. Va. Code § 16-2D-12, including the specific provisions of W. Va. Code § 16-2D-12(b)(1), do not apply to filings made under W. Va. Code § 16-2D-7. Further, unlike in Stonewall's 2021 CON matter, in 2023, Stonewall did not have to reduce the number of hospital beds to comply with the CON

[6] The applicable chapter of the CON Standard in the 2021 matter was "Renovation-Replacement of Acute Care Facilities and Services." Section III(B) of the West Virginia State Health Plan, approved by the Governor June 2, 2010. That precluded the Authority from approving Stonewall's 2021 CON application where, after completion of the project, the number of licensed beds will equal or exceed 160% of the average daily census of the hospital for the past twelve (12) months. The standards require an applicant to remove acute care beds from its license to meet the 160% requirement. Stonewall proposed doing so in the 2021 CON application and that resulted in an application for fewer beds.

Standards because it no longer needed a CON based on the statutory increase in the expenditure minimum. As will be further discussed herein, this Court may review and confirm for itself that Stonewall's March 29, 2023 letter requesting a DOR makes no mention of any reduction in the hospital beds, notwithstanding St. Joseph's arguments to the contrary. Further, as discussed in the DOR request letter, Stonewall made it clear that, under the Authority's precedents, an existing health care facility did not need a CON to entirely relocate its health care facility within its service area. (D.R. 0002-40).

The arguments raised by St. Joseph's in its Statement of the Case are specifically addressed below. Suffice it to say that St. Joseph's arguments regarding the total relocation of the hospital and a reduction in hospital beds in this DOR proceeding are not supported factually or legally. W. Va. Code § 16-2D-8 (a)(5) requires a CON when there will be a substantial change to the bed capacity of a health care facility that is accompanied by a capital expenditure. Stonewall's 2023 letter requesting a DOR contained no language whatsoever about a change in the bed capacity by Stonewall when the hospital is totally relocated. (D.R. 0002-40). St. Joseph's raised that issue in its filings before the Authority and the Authority discussed it in the original Decision, (D.R. 0469-78), but a change in the bed capacity, substantial or otherwise, was neither proposed by Stonewall nor discussed in the DOR. This is a non-issue, totally fabricated by St. Joseph's and this Court should uphold either the original or Amended DOR decision and dismiss the appeal. (D.R. 0469-78 and D.R. 0600-10).

This Court should further conclude that both of the Authority's DOR decisions permitting Stonewall to totally relocate its existing hospital to a new location without a CON are a proper interpretation of the statutory provisions in W. Va. Code § 16-2D-8(a)(1) and (5). St. Joseph's goes to great lengths to argue that the Authority's decisions in the original and Amended DOR are

incorrect and this Court should review those arguments and reject the same as a matter of law. The Authority made a proper interpretation that Stonewall did not need a CON within its expertise and this Court should defer to that interpretation.

SUMMARY OF ARGUMENT

St. Joseph's has appealed to this Court the Authority's decisions under W. Va. Code § 16-2D-7 in the original and Amended DOR arguing that a CON is required for Stonewall to totally relocate its hospital. This Court should review the decisions of the Authority and determine that the Authority has expertise in health care law and that it properly interpreted W. Va. Code § 16-2D-8(a)(1) and (5) in deciding that Stonewall did not need a CON in this instance. Further, this Court should examine St. Joseph's argument that Stonewall is reducing the number of beds at its hospital and find, as a matter of fact, that allegation is not supported based on a review of Stonewall's letter requesting a DOR. (D.R. 0002-40). For these reasons, as more fully discussed herein, this Court should uphold the Authority's decisions to find that Stonewall is not required to obtain a CON to totally relocate its hospital at this time.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is not necessary in this appeal to aid the Court's decision. Accordingly, Stonewall does not request oral argument and it suggests to the Court that a memorandum decision affirming the Authority's original or Amended Decision on Request for Ruling on Reviewability, Exhibits 9 and 12 (D.R. 0469-79 and 0600-10), would be sufficient to resolve this case.

STANDARD OF REVIEW

Appeal to this Court from a final decision of the Authority is authorized by W. Va. Code § 16-2D-16a(a)(2) which provides as follows:

> An appeal of a final decision in a certificate of need review, issued by the authority after June 30, 2022, shall be made to the West Virginia Intermediate Court of Appeals, pursuant to the provisions governing the judicial review of contested administrative cases in §29A-5-1 et seq. of this code.

In *Amedisys West Virginia, LLC v. Personal Touch Home Care of West Virginia, Inc.,* 245 W.Va. 398, 859 S.E.2d 341 (2021), the Supreme Court recently set forth the standard of review for the Authority's decisions in the following four syllabus points:

> 1. """Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: '(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law, or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.' Syllabus point 2, *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983)." Syllabus, *Berlow v. West Virginia Board of Medicine*, 193 W.Va. 666, 458 S.E.2d 469 (1995).' Syl. Pt. 1, *Modi v. West Virginia Bd. of Medicine*, 195 W.Va. 230, 465 S.E.2d 230 (1995)." Syl. Pt. 1*, W. Va. Med. Imaging & Radiation Therapy Tech. Bd. of Exam'rs v. Harrison*, 227 W. Va. 438, 711 S.E.2d 260 (2011).
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> 3. "'If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).' Syl. Pt. 4, *Appalachian Power Co. v. State Tax Dep't of W. Va.,* 195 W. Va. 573, 466 S.E.2d 424 (1995)." Syl. Pt. 6, *Murray*

> *Energy Corp. v. Steager*, 241 W. Va. 629, 827 S.E.2d 417 (2019).
> 4. "'Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.' Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995)." Syl. Pt. 2, *Steager v. Consol. Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019).
> 5. Where the State Health Plan Home Health Services Standards were promulgated by the West Virginia Health Care Authority (formerly the West Virginia Health Care Cost Review Authority) pursuant to a legislative grant of authority, West Virginia Code §§ 16-2D-1 to -20 (2016 & Supp. 2020), authorized by the Governor, and formally adopted and given full force and effect by the Legislature, see id. § 16-2D-6(g), the longstanding, consistent interpretation of those Standards by the West Virginia Health Care Authority, being neither arbitrary nor capricious, is entitled to judicial deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

This Court should apply this standard of review in this case and determine as a matter of law that the Authority's original or Amended DOR Decision in this matter are not in error and one or both should be summarily affirmed as a matter of law.

FACTUAL AND LEGAL BACKGROUND

In 2021, Stonewall originally filed a CON (HCA CON File No. 21-7-12157-H) to relocate its hospital to a new location in Weston, Lewis County, West Virginia. At that time, under W. Va. Code 16-2D-2(15), the capital expenditure minimum was just under $6.0 million and Stonewall's expenditure of $55,950,000 to relocate its hospital exceeded that minimum. (D.R. 0048). Since it had to file a CON application, Stonewall was also required by the CON Standards to drastically reduce its bed complement to 29 beds. The matter was litigated pursuant to the provisions of W. Va. Code 16-2D-13, "Procedures for Certificate of Need Reviews." On June 13, 2022, the Authority issued a decision denying the CON ("CON Decision") (D.R. 0046-90). That matter was

appealed to this Court which denied the appeal, upholding the CON Decision and denying Stonewall's application.[7]

Further, the CON application was required to comply with the rules set forth in the Authority's Legislative Rules, W.Va. CSR § 65-32-1 *et seq.* Those rules require an applicant to identify the specific costs associated with the proposal in the application. See W.Va. CSR § 65-32-8.1. When an application is approved, the proposed cost is part of the approval. That approved cost must be met in the final implementation of the project or be consistent with the provisions of W.Va. CSR § 65-32-14.1.h. There are no such cost requirements in matters that do not require a certificate of need.

While the CON Decision appeal was pending before this Court, the West Virginia Legislature made a series of amendments in 2023 to Chapter 16, Article 2D. One of the significant changes was to W. Va. Code 16-2D-2(15). That change increased the expenditure minimum from just under $6.0 million to $100 million. The purpose of the expenditure minimum is to allow the review of projects that are not otherwise subject to CON review solely because of the capital expenditure made. For example, the total relocation of a hospital is not otherwise subject to a CON review, but an expenditure of more than $6.0 million meant that it was subject to review. That is why Stonewall filed its original 2021 CON application. After the 2023 legislative change, that threshold was significantly increased to $100 million. The result of the huge increase in the expenditure minimum means that many projects that had been subject to CON review in the past were no longer subject to review. One such project is the total relocation of Stonewall's hospital.

[7] The matter was directly appealed to Office of Judges/ Health Care Authority, but was transferred to the Intermediate Court of Appeals prior to any proceedings and prior to a decision. The case was docketed as *Stonewall Jackson Memorial Hospital Company v. St. Joseph's Hospital of Buckhannon, Inc.,* No. 22-ICA-147. A memorandum decision was issued on June 27, 2023, 2023 W. Va. App. LEXIS 202 (2023).

On March 29, 2023, while the original 2021 CON matter was still pending before this Court, Stonewall filed a DOR letter request pursuant to the provisions of W. Va. Code § 16-2D-7, "Determination of Reviewability." Exhibit 1 (D.R. 0002-40). A Determination of Reviewability filed pursuant to the provisions of W. Va. Code § 16-2D-7 is simply a verified letter requesting that the Authority find a proposed project can be pursued without a certificate of need. The DOR in this matter proposed a similar hospital relocation project to the one proposed in the originally filed 2021 CON application and contained arguments about why a certificate of need was not required. Like the 2021 CON application, the proposed project involves the total relocation of the hospital to a new location in Weston, the same one proposed in the 2021 CON application. The two main differences in the two projects involve costs and the bed complement of the new hospital. First, the new project is not subject to the requirements in the W.Va. CSR § 65-32-1 *et. seq.* The only requirement for the approximate $56 million in capital costs of Stonewall's new hospital proposed is that the total costs cannot exceed $100 million. Second, as noted above, in the original 2021 CON Application, Stonewall was required by the provisions of the CON Standards to drastically reduce its bed complement to 29 beds. Since the CON Standards do not apply to a DOR, Stonewall made no such proposal in its 2023 letter requesting a DOR. In fact, the Stonewall letter requesting a DOR contains no discussion at all about the number of beds Stonewall proposes to build at the new facility. (D.R. 0002-40).

In the 2023 letter requesting a DOR, Stonewall stated the legal reasons why the request was proper. Exhibits 1 (D.R. 0002-40) and 7 (D.R. 0457-68)). This paragraph from the DOR letter request best summarizes Stonewall's legal basis for its request:

> W. Va. Code § 16-2D-8 lists the services that require a certificate of need. The only two sections that have any relevancy to this project are W. Va. Code § 16-2D-8(a)(1) and (3). W. Va. Code § 16-2D-8(a)(1) provides that a certificate of need is required for "[t]he

> construction, development, acquisition, or other establishment of a health care facility." This project does not involve the construction, development, acquisition, or other establishment of a health care facility. The health care facility, Stonewall Jackson Memorial Hospital, already exists. This simply involves the total replacement and relocation of that existing health care facility. The complete relocation of existing health care facilities has never been subject to certificate of need review unless the relocation would cost more than the expenditure minimum. There are numerous decisions issued by this agency finding that a total relocation project is not subject to certificate of need review. One recent case making that finding is *In re: Charleston Area Medical Center*, CON File No. 23-3-12610-X. See *Attachment 1*, attached and made a part hereof by reference. In fact, in a case that preceded that CAMC decision, the Authority found that the construction of a new health care facility to house existing services which would be relocated from their present location to the new facility, was subject to certificate of need review solely because the capital expenditure exceeded the then expenditure minimum of approximately $5.4 million. *In re: Charleston Area Medical Center*, CON File No. 19-3-11722-X. See *Attachment 2*, attached and made a part hereof by reference. Thus, the construction of a new health care facility to house existing services that are being totally relocated is not subject to review absent the costs of the project being in excess of the expenditure minimum. A small sample of other decisions relevant to this matter are attached hereto as *Attachment 3 A-D*.

Several prior Authority decisions were attached to the March 29, 2023 letter illustrating the point that the total relocation of an existing health care facility did not require a CON if the expenditure minimum was not met.

In various filings before the Authority, St. Joseph's raised several arguments against the DOR. Exhibits 3 (D.R. 0043), 6 (D.R. 0441-49 and D.R. 0046-440), and 8 (D.R. 0450-55). On April 26, 2023, the Authority found that, because of the change to the expenditure minimum, the project was not now subject to CON review, and issued the Decision on Request for Ruling on Reviewability that is the subject of this appeal, Exhibit 9 (D.R. 0469-78). On June 21, 2023, St. Joseph's filed its Notice of Appeal with this Court. After the appeal was filed and docketed, the Authority, on July 12, 2023, issued an Amended Decision on Request for Ruling on Reviewability,

Exhibit 12 (D.R. 0600-10). The Amended Decision on Request for Ruling on Reviewability corrected some clerical and factual errors that had been made in the original decision but did not change the final decision finding that the project was not subject to CON review.

Thereafter, there were numerous motions filed before this Court by the parties including: Respondent Stonewall's Motion to Dismiss; Petitioner St. Joseph's Motion to Strike the Amended DOR Decision, a Motion to File an Amended Notice of Appeal and a Motion for Stay. By an Omnibus Order, dated September 6, 2023, this Court denied Respondent Stonewall's Motion to Dismiss and Petitioner St. Joseph's Motion to Strike. This Court granted Petitioner St. Joseph's Motion for Stay and Motion to File an Amended Notice of Appeal to challenge the Amended DOR Decision. This matter is now ripe for a decision on the merits of this appeal.

ARGUMENT

A. The Authority Properly Determined that the Stonewall Project is Not Subject to a CON Under W. Va. Code § 16-2D-8 (a)(5) Because the Stonewall Project Does Not Propose a Change in Hospital Bed Capacity and Does Not Meet the Minimum Capital Expenditure Threshold.

B. The Authority Properly Determined that the Stonewall Project is Not Subject to a CON Under W. Va. Code § 16-2D-8 (a)(5) Because the Project Does Not Entail the Reduction of Hospital Beds.[8]

St. Joeseph's main argument in this appeal rests on the fiction that Stonewall proposes to change the hospital bed capacity when it totally relocates the facility. There was no representation or proposal in anything submitted by Stonewall to the Authority which stated that to be the case.

[8] St. Joseph's has asserted two errors, number one and four, alleging that the Authority erred under W. Va. Code § 16-2D-8 (a)(5) by rendering the DOR decisions despite the fact that Stonewall was reducing its hospital bed capacity. As discussed herein, Stonewall does not agree with either alleged error. Further, Stonewall contends that errors number one and four are completely interrelated and it discusses both alleged in this section herein.

Exhibit 1 (D.R. 0002-40). In fact, in a Reply Brief filed before the Authority in this matter, Stonewall argued that:

> "…SJH assumes in its argument that Stonewall will be reducing the number of beds it will be constructing, but that assumption is based upon the previous matter where the bed capacity was required to be reduced as a result of the requirements in the Certificate of Need Standards. That requirement is not applicable to this DOR. SJH's argument on this matter is based on assumptions that it has no idea to be factually accurate." Exhibit 7 (D.R. 0462).

Stonewall did not propose reducing the hospital bed capacity in any filing in this DOR matter. St. Joseph's arguments that Stonewall does so propose are not based on the facts in the record of this case.[9]

Contrary to the arguments of St. Joseph's, the Authority did not err by not requiring Stonewall to apply for a CON under W. Va. Code § 16-2D-8 (a)(5). In 2021, Stonewall originally filed a CON Application (HCA CON File No. 21-7-12157-H) to relocate its hospital to a new location in Weston, Lewis County, and it proposed to drastically reduce its hospital bed complement to 29 hospital beds as required under the provisions of Section III(B) of the CON

[9] At page 33 of its brief, St. Joseph's further argues to this Court that it must be that Stonewall is reducing the number of hospital beds because the 2021 CON proposal and the 2023 DOR letter request both state the project will cost approximately $56 million. There are several problems with this speculation on the part of St. Joseph. First, the 2023 DOR letter request makes no such statement regarding the number of hospital beds to be relocated, so the record is completely silent on this point. As explained herein, the original 2021 CON required a reduction in hospital beds to meet the CON Standards and this DOR letter request is not required to meet the CON Standards or reduce the number of hospital beds. Finally, this Court may take notice that one of the costs for hospital construction is for hospital rooms, not hospital beds. The 2021 CON proposal was based on 29 rooms with single hospital beds in each room. If Stonewall wants, it can easily re-configure its hospital to have 29 rooms each with two hospital beds and it would immediately have a hospital with 58 hospital beds with no additional expense. It can also add rooms to the extent that it does not exceed its expenditure minimum. In a certificate of need matter, the Authority approves a capital expenditure, and the applicant must abide by that approved figure as provided for by the statute, except for the minor cost increases allowed by W.Va. CSR § 65-32-14.1.h. There is no approved expenditure in this matter and no limit except the $100 million expenditure minimum. What is important here is that under the DOR Decision by the Authority, Stonewall will be required to totally move whatever number of hospital beds it has on its existing hospital license to its new hospital location. Stonewall will be able to meet this requirement and not exceed the existing expenditure minimum at this time and, therefore, this Court should reject all of St. Joseph's speculation on a reduction of hospital beds.

Standards. The hospital bed reduction proposed under Stonewall's previous 2021 CON application, was required under Section III(B) that provides:

> Renovation-Replacement of Acute Care Facilities and Services, Section III(B):
> 1. The Authority will not approve any renovation or replacement to a patient care area of a hospital where the number of licensed acute care beds, after completion of the renovation or replacement project, will equal or exceed 160% of the average daily census of the hospital for the past twelve (12) months. The Authority may consider an adjustment by the hospital to its average daily census for observation equivalent days and swing bed days. The Authority may also consider the impact of a distinct part unit on the hospital's average daily census.
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> 2. An applicant must remove acute care beds from its license to meet the 160% requirement. The applicant must submit an amended license to demonstrate the reduction in acute care beds during substantial compliance review.

To comply with the CON Standards for Renovation-Replacement of Acute Care Facilities and Services, Section III(B), Stonewall had originally included a hospital bed reduction from 70 beds to 29 beds.

After Senate Bill 613 was enacted with an inflated $100 million expenditure minimum, Stonewall no longer needed to apply for a CON. After that 2023 amendment, Stonewall sent its letter request for a DOR allowing it to construct a new hospital without it being subject to a CON review. The DOR letter request was filed under W. Va. Code § 16-2D-7 which provides:

> A person may make a written request to the authority for it to determine whether a proposed health service is subject to the certificate of need or exemption process. The authority may require that a person submit certain information in order to make this determination. A person shall pay a $100 fee to the authority to obtain this determination. A person is not required to obtain this determination before filing an application for a certificate of need or an exemption.

A DOR Decision pursuant to the provisions of W. Va. Code § 16-2D-7 is a different process than the CON process. There is no CON application, no Certificate of Need Standards to comply with, no discovery, and no hearing as those are not provided for in W. Va. Code § 16-2D-7. W. Va. Code § 16-2D-7 provides the sole statutory authority for the issuance of Determinations on Reviewability and was included in Article 2D with the 2016 legislative amendments.

St. Joseph's arguments regarding the hospital beds at Stonewall rest upon two sections of the code. W. Va. Code § 16-2D-8 (a)(5) provides as follows:

> (a) Except as provided in §16-2D-9, §16-2D-10, and §16-2D-11 of this code, the following proposed health services may not be acquired, offered, or developed within this state except upon approval of and receipt of a certificate of need as provided by this article:
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> * * *
>
> (5) A substantial change to the bed capacity of a health care facility with which a capital expenditure is associated;

In addition, W. Va. Code § 16-2D-2(45) provides as follows:

> (45) "Substantial change to the bed capacity" of a health care facility means any change, associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, but does not include a change by which a health care facility reassigns existing beds.

For W. Va. Code § 16-2D-8 (a)(5) to be implicated and relevant to this matter, one of two things need to occur. First, there must be "change, associated with a capital expenditure, that increases or decreases the bed capacity…" St. Joseph's argument on this issue rests on the fiction that Stonewall proposes to change the hospital bed capacity when it totally relocates the facility. There was no representation or proposal in anything submitted by Stonewall to the Authority which stated that to be the case. Stonewall did not propose reducing the hospital bed capacity in any filing in this matter. St. Joseph's arguments are not based on the facts in the record of this case. As a

result, St. Joseph's arguments that a reduction of hospital beds causes this matter to be subject to CON review are simply false.

St. Joseph's second argument regarding the hospital bed issue is that the project requires a CON because Stonewall's proposal ". . . relocates beds from one physical facility or site to another. . ." W. Va. Code § 16-2D-2(45). St. Joseph's request in this appeal is that this Court reinterpret this section, discounting the Authority's long-time, reasonable interpretation. St. Joseph's request woefully misinterprets the plain meaning and clear intent of this section. The issue that is addressed in this definition is the relocation of beds from one licensed hospital to another one, or from one licensed hospital to a new site, both of which change the number of licensed beds at the original hospital. This is made clear by a few decisions issued by the Authority that are referenced in the record. First, St. Joseph's references *In re: Columbia Raleigh General Hospital*, CON File No. 97-1-6128-X.[10] In that matter, the Authority found that the proposal made by Raleigh General Hospital to relocate some of its licensed beds, 17 psychiatric beds, from one of its licensed hospitals to another licensed hospital was subject to CON review as it implicated the provisions of W. Va. Code § 16-2D-2(45). The partial relocation changed the bed complement at two facilities, Raleigh General Hospital and Beckley Hospital, referred to as the Beckley campus.

Perhaps the more relevant case involving the same parties was a case decided a year later. In that matter, Raleigh General Hospital decided to close Beckley Hospital and transfer all 102 licensed beds at Beckley Hospital to Raleigh General. Unlike the previous case, this relocation of beds was a total relocation of all beds. The Authority found that this total relocation of the beds

[10] It is noted that Stonewall filed some Authority decisions with its application but there are many more cited herein, both by St. Joseph's and Stonewall, that reflect the Authority's prior decisions on the total relocation of existing services and capital expenditure minimum as exempt from the CON process. These decisions are all public record and available through the YODA portal at the Authority's web site. http://www.hcawv.org/vs5FileNet/ Alternatively, if the Court prefers, Stonewall is willing to download these prior decisions and provide them to the Court as a supplemental appendix.

from one facility to another "does not constitute a substantial change to the bed capacity of the facilities as defined in W. Va. Code § 16-2D-2(ff) and does not constitute a new institutional health service as defined in West Virginia Code § 16-2D-3." *In re: Raleigh General Hospital*, CON File No. 98-1-6531-X, see page 1.

This case involves the total relocation of a health care facility, including all beds and services. That total relocation does not change the bed capacity of Stonewall. The number of beds on the license the day before the relocation will be the same number of beds on the license of the new facility on the first day of operation there. That is why, under the Authority's interpretation of the statute, no CON is needed in this matter.

In the first cited Raleigh General Hospital case, some beds were moved and that changed the number of beds at two facilities. In the second one, all beds were relocated. Two other cases cited in this matter below show the difference between that fact situation involving partial relocations and the present one involving total relocations. Select Specialty Hospital of Charleston was awarded a CON for a 32-bed long term acute care hospital in 2000. See *In re: Select Specialty Hospital – Charleston, Inc.,* CON File No. 00-3-6996-H, Decision. The hospital was and is licensed as a 32-bed hospital and was located within CAMC General Hospital. See Decision, page 41. In 2006, the hospital totally relocated all 32 beds from CAMC General to St. Francis Hospital. *See*, *In re: Select Specialty Hospital – Charleston,* CON File No. 06-3-8441-X. The Authority ruled that "…that the proposal by SSH - Charleston for the complete relocation from CAMC - General to St. Francis Hospital would not constitute a new institutional health service as defined in W. Va. Code § 16-2D-3."[11] *See* Decision on Request for Ruling on Reviewability, pages 1-2.

[11] Then, W.Va. Code § 16-2D-3 defined and listed the matters that required CON review. Included in that listing was W.Va. Code § 16-2D-3(b)(4), which contained the same language regarding beds as is now contained in W.Va. Code § 16-2D-8(a)(5).

The difference between the *Selected Specialty Hospital* decision, the second *Raleigh General Hospital* decision and the first *Raleigh General Hospital* decision is the issue of the relocation of some beds versus the relocation of all of the beds. Raleigh General Hospital proposed moving some beds to another facility. That was reviewable. Later it proposed moving all beds and it was not reviewable. Select Specialty Hospital proposed moving all of its 32 licensed beds. Again, that was not reviewable. Thus, the intent is clear. The Authority regulates the relocation of beds when that relocation changes either the number of licensed beds at one or more facilities or the nature of the bed complement at the facilities. When there is a total relocation of all beds, the provisions of W. Va. Code § 16-2D-2(45) are not implicated. There is nothing to review. This is supported again by another Select Specialty Hospital case. In 2022, Select Specialty Hospital again relocated, this time from St. Francis to CAMC Memorial Hospital. Again, the relocation was a total relocation of all 32 licensed beds. Again, the Authority found that the total relocation was not subject to CON review, specifically finding that "the proposal does not constitute a reviewable health service as defined in W. Va. Code § 16-2D-8." *In re: Select Specialty Hospital – Charleston,* CON File No. 22-3-12456-X, at page 3.

St. Joseph's argues that the Select Specialty decisions are not applicable as the beds at the two Select Specialty Hospital locations did not belong to Select Specialty Hospital, arguing that "[t]he Select Specialty Cases are distinguishable because when an LTACH moves from one host hospital to another it does not bring beds with it." St. Joseph's Brief, page 19. This argument seems to be based on the presumption that a moving van is moving actual beds from one location to another. That is clearly not accurate. Hospitals have beds because those beds are on the hospital's license, not because they have some specific number of mattresses. W. Va. Code § 16-2D-2(6) defines "bed capacity" as "the number of beds licensed to a health care facility…" Select Specialty

Hospital has a licensed bed complement of 32 beds. If half of the licensed beds had been relocated and half left at the previous location, the license would have changed, and the partial move would have been subject to CON review. That is not what occurred. In each of the relocations, the total 32 licensed bed complement was relocated. St. Joseph's attempt to distinguish these decisions is based on a false narrative of what constitutes a bed under the provisions of state law.

In the end, the Authority has interpreted the provisions of W. Va. Code § 16-2D-8 (a)(5) and W. Va. Code § 16-2D-2(45) to not include the total relocation of existing beds. That is in keeping with both the intent and language of the provisions, as well as with its overall mandate to the Authority contained in W. Va. Code § 16-2D-1. In that section "[i]t is declared to be the public policy of this state:

> (1) That the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state and to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services.

The total relocation of Stonewall's hospital proposed in this matter does not duplicate services. The hospital, the beds, and the services already exist. The hospital, beds and services are simply being totally relocated a few miles down the road, in the same town, in the same county. Further, this total relocation does not change the bed complement of Stonewall or the area it serves. Relocating some beds from one licensed hospital to another hospital changes both of those hospitals as they would each have a different total for beds on their license. Moving some beds from one hospital to an entirely new site both changes the original hospital and also creates an entirely new site, a new location for beds when the old location still exists. The relocation of the beds in the first *Raleigh General Hospital* matter did just that by changing the bed complement in

two hospitals. That relocation was subject to review. The second *Raleigh General Hospital* case and the two *Select Specialty Hospital* cases proposed total relocations that changed nothing but the location of all of the beds. Neither of those matters was subject to review.

The Authority's interpretation of W. Va. Code § 16-2D-8 (a)(5) and W. Va. Code § 16-2D-2(45) to not include the total relocation of existing beds is reasonable and consistent with the legislative findings mandating that the Authority avoid unnecessary duplication of health services. Changing two facilities or creating a new one when the old one still exists can cause the unnecessary duplication of health services. Further, moving some beds from one facility to another facility or site involves a change in the bed capacity and license of two health care facilities, the issue then being whether such a change was substantial or not. There is no such issue with a total relocation of the beds. There is no change in the bed capacity at all.

The Supreme Court ruled in *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573, 591, 466 S.E.2d 424, 442 (1995), that the Courts must respect the discretion granted to the Tax Department by the Legislature in performing its duties under the tax statutes.

> Under *Chevron*, we may not impose our own construction of the statute. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the Tax Commissioner's answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782, 81 L.Ed.2d at 703. Given the competing policy concerns behind the statute and the industries affected, the language of the statute suggests the Legislature intended the Tax Commissioner to strike the appropriate balance of the goals of the statute in defining "net generation available for sale."

See also Syl. Pt. 5, *In re Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000) (The exercise of discretion granted to the Tax Commissioner will not be disturbed upon judicial review absent a showing of abuse of discretion). The Supreme Court buttressed this respect for the use of an agency's discretion with the requirement that ". . . the

critical concern of the reviewing court is that the agency provide a coherent and reasonable explanation of its exercise of discretion. . ." *Appalachian Power* at 589, 440 (quoting *MCI Telecommunications Corp. v. Federal Communications Comm'n*, 675 F.2d 408, 413 (D.C. Cir. 1982)).

Chevron analysis and the *Appalachian Power* decision have also been applied by this Court and the Supreme Court to decisions of the Authority and its predecessor, the Health Care Cost Review Authority*, see e.g. Stonewall Jackson Memorial Hospital Co. v. St. Joseph's Hospital of Buckhannon, Inc.,* 2023 W. Va. App. LEXIS 202 (2023); *Amedisys W. Va., LLC v. Personal Touch Home Care of W. Va., Inc.,* 245 W. Va. 398, 859 S.E.2d 341 (2021); and, *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W. Va. 326, 472 S.E.2d 411 (1996). In *Amedisys,* 245 W. Va. at 413, 859 S.E.2d at 356, the Supreme Court quoted from *Appalachian Power*, 195 W. Va. at 591 n.24, 466 S.E.2d at 442 n.24 and it stated:

> [i]nconsistency is only one of many circumstances that this Court should consider in determining deference. The factors most often recognized by courts as to whether to defer to administrative interpretations were set out by Colin S. Diver in *Statutory Interpretation in the Administrative State*, *133 U. Pa. L. Rev. 549, 562 n. 95 (1985)*. He lists them as
>
> > "(1) whether the agency construction was rendered contemporaneously with the statute's passage, ... (2) whether the agency's construction is of longstanding application, ... (3) whether the agency has maintained its position consistently (even if infrequently), ... (4) whether the public has relied on the agency's interpretation, ... (5) whether the interpretation involves a matter of 'public controversy, ... (6) whether the interpretation is based on 'expertise' or involves a 'technical and complex' subject, ... (7) whether the agency has rulemaking authority, ... (8) whether agency action is necessary to set the statute in motion, ... (9) whether ... [the Legislature] was aware of the agency['s] interpretation and failed to repudiate it, ... and (10) whether the agency has

> expressly addressed the application of the statute to its proposed action[.]" (Citations omitted).

It is clear from St. Joseph's brief that it is aware of the Authority's longstanding interpretation of W. Va. Code § 16-2D-8 (a)(5) and W. Va. Code § 16-2D-2(45) to not include the total relocation of existing hospital beds. While it may disagree with this interpretation, it offers no evidence to refute Stonewall's argument that the Authority has long held this interpretation of the CON provisions. More importantly, St. Joseph's cannot articulate why or how the Authority's long-term interpretation is unreasonable, much less arbitrary and capricious. It can only disagree with it. On this basis, this Court should recognize the Authority's expertise in health care matters and accept the Authority's long held interpretation and find that it is a reasonable interpretation of these statutory provisions. This Court should uphold either the original or Amended DOR Decision finding that Stonewall is not required to obtain a CON to totally relocate its hospital under the current statutory provisions.

C. The Authority Properly Determined That the Stonewall Project is Not Subject to a CON Under W. Va. Code § 16-2D-8(a)(1) Because it Involves the Total Relocation of an Existing Health Care Facility.

W. Va. Code § 16-2D-8(a)(1) provides as follows:

> (a) Except as provided in §16-2D-9, §16-2D-10, and §16-2D-11 of this code, the following proposed health services may not be acquired, offered, or developed within this state except upon approval of and receipt of a certificate of need as provided by this article:
>
> (1) The construction, development, acquisition, or other establishment of a health care facility;

Like the above issue, the Authority has a decades long history of interpreting this provision to conclude that the total relocation of an existing health care facility from one site to another does not constitute the construction, development, acquisition, or other establishment of a health care

facility because the health care facility already exists. Unlike the above issue, there are numerous decisions supporting this position. A total relocation of what already exists does not change that fact. Again, the polar star in all of the CON provisions is "to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." W. Va. Code § 16-2D-1(1). The relocation of an existing health care facility does not unnecessarily duplicate services. The facility, services, location, and the beds already exist. They are simply being relocated.

Further, as demonstrated by the multitude of cases cited herein, the Authority has not waivered on this interpretation. The Authority is composed of experts entrusted by statute with creating and enforcing the CON program. The Authority's Board members and employees have changed over the years, but the interpretation that a total relocation of a health care facility, services or beds does not implicate the provisions of W.Va. Code § 16-2D-8(a)(1), or its predecessor statutes, has not changed. The Authority should be entrusted with its interpretations and, absent a finding that is arbitrary, capricious, or manifestly contrary to the statute, appropriate deference must be given to agency expertise and discretion. *See Appalachian Power Co*., 195 W.Va. at 582, 466 S.E.2d at 433 and *Amedisys,* 245 W. Va. at 407-08, 859 S.E.2d at 350-51.

Stonewall cited numerous decisions in the record below and attached three to its DOR letter request in this matter that support the legal interpretation that the total relocation of existing services does not require a CON. D.R. 0014-40). Those three attached decisions provide:

1) An application from WVU Hospitals, Inc. to move Chestnut Ridge Center Day Hospital at a cost of $1.8 million. (CON File #19-6-11556-X). The Authority agreed stating: "The complete relocation is within the CON approved service area of Monongalia County, West Virginia. The Authority determines that the proposal does not constitute a reviewable health services as defined in W. Va. Code 16-2D-8." (D.R. 0018)

2) An application from Thomas Health Systems, Inc. to move a substance use disorder treatment services from its hospital to its related hospital St. Francis at a cost of $2.5 million. (CON File #18-3-11281-X). The Authority agreed stating: ". . . the capital expenditure is less than the capital expenditure minimum. The Authority determines that the proposal does not constitute a reviewable health service as defined in W. Va. Code § 16-2D-8." (D.R. 0025-26).

3) An application by United Hospital Center, Inc. for the relocation of its ambulatory health care facility in Lewis County at a cost of $5.1 million. The Authority agreed stating that: "The Authority determines that the proposal does not constitute a reviewable health service as defined in W. Va. Code § 16-2D-8." (D.R. 0030).

It is important to note that, in each of these instances, one involving a day hospital, one involving health care services and one involving an ambulatory care center, the Authority found that no CON was necessary when a CON applicant was requesting the total relocation of existing services or health care facilities and the cost to relocate was under the expenditure minimum.

As heretofore discussed, health care law went through a major change when Senate Bill 613 was enacted, because that inflated the threshold for expenditure minimum within W. Va. Code 16-2D-8(a)(3) from just under $6 million to a whopping $100 million. Prior to the change, among the numerous decisions finding that the total relocation of a health care facility is not subject to CON review were a few decisions approving the total relocation of health care facilities that also involved the construction of new facilities. In those cases where the cost of construction of a new health care facility was under the then expenditure minimum, the relocation and the construction was ruled to be not subject to review.[12] As cited below, there were also rulings where the total

[12] See *West Virginia Surgery Center, Inc*., CON File No. 96-3-5702-X, *Bio-Medical Applications of West Virginia, Inc*., CON File No. 00-7-7092-X, *Valley Health*, CON File No. 14-2-10286-X, W*ar Memorial Hospital,* CON File No. 19-9-11583-X, *Beckley Surgery Center*, CON File No. 21-1-9594-X, all finding that, a total relocation, also involving construction of a new health care facility, was not subject to CON review, if the project involved a total relocation of an existing health care facility to the newly constructed facility, and the cost of the construction did not exceed the then expenditure minimum.

relocations were subject to CON review because the capital expenditure involved with the construction of the new location was in excess of the minimum.[13]

As noted above, the Authority has a long history of interpreting W. Va. Code § 16-2D-8(a)(1) to conclude that the total relocation of a health care facility is not subject to CON review.[14] Most of these matters involve the relocation of an ambulatory care center, not a hospital. W. Va. Code § 16-2D-2(16) defines "health care facility" as "a publicly or privately owned facility, agency or entity that offers or provides health services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in whole or in part[.]" Under W. Va. Code §§ 16-2D-1 *et seq.*, both ambulatory care centers and hospitals are health care facilities. *See also* W. Va. Code §§ 16-2D-2(2) and 16-2D-2(21).

Prior to the recent large increase in the expenditure minimum, there were only two cases, both cited above, involving the relocation of a hospital. The simple reason is that, prior to the change in the statute, the cost of relocating a hospital far exceeded the previous expenditure minimum. That obviously changed with the 2023 significant increase in the statutory expenditure minimum. That change meant that if a hospital could totally relocate its facility for a cost that did

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[13] *See West Virginia University*, CON File No. 12-6-9574-X and *Charleston Area Medical Center, Inc*., CON File No. 19-3-11722-X. Both were found to be subject to CON review although each involved the total relocation of existing health care facilities because the Authority found the cost of the new construction exceeded the then expenditure minimum.

[14] *See* sample of HCA decisions approving total relocation of a health care facility: *Prestera Center for Mental Health Services, Inc*., CON File No. 92-2-3934-X-1, *Bio-Medical Applications of West Virginia d/b/a BMA of Morgantown, Inc*. CON File No. 94-6-4874-X, *Wheeling Hospital*, CON File No. 97-10-6196-X, *Saint Francis Hospital*, CON File No. 00-3-6920-X, *Thomas Memorial Hospital*, CON File No. 01-3-7133-X, *Camden-Clark Medical Center*, CON File No.14-5-10098-X, *Pleasant Valley Hospital*, CON File No. 08-5-8710-X, *Wetzel County Hospital*, CON File No. 09-10-9003-X, *Stonewall Jackson Memorial Hospital*, 10-7-9180-X, *West Virginia University Medical Corporation*, CON File No. 12-6-9628-X, *Jefferson Medical Center*, CON File No. 14-9-101109-X, *Valley Health Care, Inc*., CON File No. 17-7-11032-X, *Thomas Memorial Hospital*, CON File No. 18-3-11304-X, *Charleston Area Medical Center*, CON File No. 19-1-11651-X, *UPMC Children's Hospital of Pittsburgh*, CON File No. 20-10-11989-X, *St. Joseph's Hospital of Buckhannon*, CON File No. 22-7-12400-X, and *Wetzel County Hospital*, CON File No. 23-10-12613-X.

not exceed $100 million, the total relocation could occur without CON review. The capital costs involved with constructing the new Stonewall facility do not come close to the $100 million threshold, so Stonewall no longer needs to apply for a CON. After Senate Bill 613 was enacted, Stonewall sent the Authority its letter request for a DOR allowing it to construct a new hospital. The Authority determined that Stonewall's proposed capital expenditures were below the expenditure minimum and therefore no longer subject to CON review and issued its DOR Decision reflecting the same. The DOR Decision is consistent with all of the decisions cited herein and with numerous other decisions the Authority has issued since the 1990's.

Ultimately, St. Joseph's is challenging the legitimacy of those decisions and the Authority's interpretations. The Supreme Court has established that consistent interpretation of the Standards by the Authority is entitled to judicial deference when the interpretation is not arbitrary or capricious:

> Where the State Health Plan Home Health Services Standards were promulgated by the West Virginia Health Care Authority (formerly the West Virginia Health Care Cost Review Authority) pursuant to a legislative grant of authority, West Virginia Code §§ 16-2D-1 to - 20 (2016 & Supp. 2020), authorized by the Governor, and formally adopted and given full force and effect by the Legislature, *see id.* § 16-2D-6(g), the longstanding, consistent interpretation of those Standards by the West Virginia Health Care Authority, being neither arbitrary nor capricious, is entitled to judicial deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

Syl. Pt. 5, *Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va.*, Inc., 245 W. Va. 398, 402 (2021). Further, interpretation of statutes or rules and regulations by a court is only permitted when ambiguity exists:

> Interpretation of statutes or rules and regulations is proper only when an ambiguity exists. This Court has recently reiterated this point. Quoting syllabus point 3 of *Crockett v. Andrews,* 153 W Va.

> 714, 172 S.E.2d 384 (1970), we stated, in syllabus point 1 of *Ooten v. Faerber,* 181 W.Va. 592, 383 S.E.2d 774 (1989), that even a long-standing "interpretation" by an administrative agency of its own rules should be disregarded when such "interpretation" conflicts with the clear language of the rules: "'While long standing interpretation of its own rules by an administrative body is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous.'" In addition, an administrative "interpretation" developed, as here, during or shortly before the involved litigation is entitled to less weight than a long-standing administrative interpretation of administrative rules. *Ooten v. Faerber,* 181 W.Va. 592, …., 383 S.E.2d 774, 778 (1989).

Consumer Advocate Div. of Pub. Serv. Comm'n v. Public Serv. Comm'n, 182 W. Va. 152, 156 (1989).

The Authority's decades long interpretation of cases finding that a CON is unnecessary for the total relocation of a health care facility when the expenditure minimum is not met, is reasonable. The Authority's interpretation that the relocation of an existing health care facility is not a reviewable matter is a reasonable interpretation of the statute, made while taking all of the reasons why reviewing a proposal should be undertaken into account. When a total relocation occurs, nothing new is being created, constructed or established. The old services or facilities are simply moving from one location to another. There is nothing arbitrary or capricious about that finding. The fact that the statute could be read to lead to a different end does not change that fact, nor does it cause the Authority's long-time interpretation to suddenly be arbitrary and capricious.

Stonewall's original 2021 CON proposal, under the former CON requirements, was for the total relocation of a health care facility, which involved the construction of a new facility. Because the construction costs required exceeded the threshold of the expenditure minimum, the project was deemed subject to CON review based upon only the costs, consistent with other decisions made by the Authority. *See Charleston Area Medical Center, Inc*., CON File No. 19-3-11722-X (involving the total relocation of multiple ambulatory care center sites into a single new building

that was proposed to cost approximately $25 million), and *West Virginia University*, CON File No. 12-6-9574-X (involving the total relocation of multiple service sites into a single new building that was proposed to cost approximately $8.8 million). When the legislature increased the expenditure minimum, the issue of the CON reviewability by the Authority for the Stonewall relocation simply disappeared. At that point, Stonewall was simply involved with the total relocation of a health care facility with capital costs under the expenditure minimum. The Authority has consistently found such relocations to not be subject to CON review. That they did so in this matter is not in error. It is consistent with decades of decisions and is neither arbitrary nor capricious. On this basis, this Court should uphold either the original or the Amended DOR Decision finding that Stonewall did not need a CON to totally relocate its hospital.

D. The Authority's Amended Decision is Not Void and *Ultra Vires* Because it Was Issued to Correct Factual and Clerical Errors and Remains Consistent with Previous Authority Interpretations of State Law.

There are two decisions in this matter, the original DOR Decision and the Amended DOR Decision. Stonewall believes this Court can affirm either DOR Decision as both make the same ruling that no CON is needed by Stonewall to totally relocate its Hospital for the same reasons. Both DOR Decisions correctly rule that the total relocation of a health care facility, where the costs do not exceed the expenditure minimum, is not subject to CON review under W. Va. Code § 16-2D-8. The original DOR Decision states:

> 7. Unless the minimum capital expenditure has been met, the Authority will not look to a change in bed capacity when determining reviewability. (footnote omitted). (D.R. 0475).

The original DOR Decision also contains language in footnote 6 about the bed count in the proposed new facility that is neither accurate nor in the record of this matter. This Court can ignore the language, contained in footnote 6 in the DOR Decision, as surplusage and uphold the original

DOR Decision or make the same ruling on the Amended DOR Decision. Again, the outcomes and the legal reasoning for the outcomes are the same in each DOR Decision.

The Authority is authorized to correct clerical mistakes under W. Va. R. Civ. P. 60(a) through W. Va. Code §§ 16-2D-12(g) and 16-2D-13(b).West Virginia Code § 16-29B-12(g) provides that "[a] decision of the board is final unless reversed, vacated, or modified upon judicial review thereof, in accordance with the provisions of section thirteen of this article." *Id.* W. Va. Code § 16-29B-13(b) then directs the review agency, for the purposes of administrative review of board decisions, to conduct its proceedings "in conformance with the West Virginia Rules of Civil Procedure for Trial Courts of Record and the local rules for use in the civil courts of Kanawha County." *Id.*

A mechanism exists under the West Virginia Rules of Civil Procedure for a clerical error to be corrected by an issuing court. Rule 60(a) of the West Virginia Rules of Civil Procedure applies to clerical errors made through oversight or omission which are part of the record and is not intended to adversely affect the rights of the parties or alter the substance of the order, judgment or record beyond what was intended. See *Robinson v. McKinney*, 189 W. Va. 459, 461, 432 S.E.2d 543, 545 (1993), *Robinson*, 189 W.Va. at 461, 432 S.E.2d at 545; *Abbot v. Bonsall,* 164 W.Va. 17, 263 S.E.2d 78 (1979). Under W. Va. R. Civ. P. 60(a), West Virginia law permits a court to correct clerical mistakes in orders or other parts of a record and errors arising from oversight or omission to be corrected by a court ***at any time of its own initiative.*** Rule 60(a) provides, in pertinent part:

> Clerical mistakes - Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Id. Further, in *Robinson*, 189 W.Va. at 465, 432 S.E.2d at 543, the Supreme Court of Appeals of West Virginia noted that "the use of the term 'may' in Rule 60(a) indicates that the court's authority to correct errors is discretionary." Rule 60(a) permits a circuit court to enter, at any time, an order correcting "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission." *Kester v. Small*, 217 W. Va. 371, 377, 618 S.E.2d 380, 386 (2005). Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. The term "clerical mistake" refers to "a mistake or omission mechanical in nature and apparent on the record that does not involve a legal decision or judgement." *Stephenson v. Ashburn*, 137 W.Va. 141, 70 S.E.2d 585 (1952). As stated in *Savage v. Booth*, 196 W. Va. 65, 68, 468 S.E.2d 318, 321 (1996), citing from Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2854 (1973), "Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." However, ". . . if the intention to include a particular provision in the judgment was clear, but the judge neglected to include the provision, the rule authorizes correction of the judgment." *Id.* (*c.f.* Charles A. Wright, Arthur R. Miller and Mary Kay Kane, 11 *Federal Practice and Procedure* § 2854 (2004).

Under W. Va. R. Civ. P. 60(a) and through W. Va. Code §§ 16-2D-12(g) and W. Va. Code 16-2D-13(b), the Authority is the "issuing court" for both the original DOR Decision and Amended DOR Decision and should be entitled to exercise quasi-judicial powers to correct clerical mistakes within its own order. Pursuant to W. Va. Code §§ 16-2D-12(g) and 16-2D-13(b), the ability clearly exists for the Authority to amend its decision to correct a clerical mistake under Rule 60(a). Further,

the Fourth Circuit, as well as other jurisdictions, have held that administrative agencies are permitted to correct clerical mistake as long as the correction is made fairly. *See e.g. NLRB v. Baltimore Transit Co*., 140 F.2d 51, 55 (4th Cir. 1944) ("An administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past.") *Teen Challenge of Ky., Inc. v. Ky. Comm'n on Human Rights,* 2018 Ky. App. LEXIS 293 (2018) ("It is well settled that administrative agencies, as well as courts, have sufficient authority to correct obvious clerical errors in their orders, so long as the mistake is plainly shown in the record."); *Taylor v. Department of Professional Regulation, Bd. of Medical Examiners*, 520 So. 2d 557, 560 (Fla. 1988) ("This Court has previously established the principle that an administrative tribunal, exercising quasi-judicial powers, enjoys the inherent authority to correct its own orders which contain clerical errors and errors arising from mistake or inadvertence.").

As referenced above, the Amended DOR Decision merely corrected clerical mistakes and factual errors contained within the original DOR Decision. (D.R. 0600-10). The original DOR Decision contained improper references to bed numbers within footnote 6. (D.R. 0474). Neither beds nor any changes to bed numbers were discussed in the filings made by Stonewall. (D.R. 0004-D.R. 0005 and D.R. 0462). Further, discussion of bed numbers is not required for a DOR pursuant to W. Va. Code § 16-2D-7. The Authority went on to say, in Paragraph 7 of its Findings of Fact in the Original DOR Decision, that the Authority would not look to a change in bed capacity when determining reviewability. (D.R. 0474). Again, Stonewall did not propose any change to the bed count. Within the original DOR Decision, the Authority ultimately decided "[t]hat the proposal by Stonewall Jackson Memorial Hospital Company for the complete relocation of the hospital to a new location in its service area is NOT subject to Certificate of Need review because their project

is a replacement and relocation of the same services, in the same service area, and does not exceed the minimum capital expenditure." (D.R. 0475). Beds did not enter the decision, nor should they have. So any discussion of them is nothing but surplusage.

The change in Paragraph 7 of the Findings of Fact in the Amended DOR Decision was corrected to reflect the record:

> In the previous CON Matter, Stonewall proposed to reduce the number of licensed beds it was replacing in the new facility from 70 beds to 29 beds. The reason for the reduction was to comply with the requirements in the Certificate of Need Standards, Renovation-Replacement of Acute Care Facilities and Services, § III (B). Stonewall proposes no such reduction in the RDOR. (D.R. 0605).

This alteration of Paragraph 7 in the Amended DOR Decision more accurately reflects the errors in footnote 6 contained in the original DOR Decision:

> The Authority notes Stonewall proposes a reduction from 70 beds to 29 beds to align with the service area's unmet need calculations. St. Joseph's insists any change in bed count triggers CON review regardless of minimum expenditure. From a review of the record, bed capacity was not a focus at the earlier proceedings.

(D.R. 0475). The Amended DOR Decision simply corrects clerical mistakes contained in the original DOR Decision which did not reflect the record before the Authority in this matter. The Authority stood by its determination that the Stonewall project is not subject to a CON and the reasons for that decision. Cleckley, citing to *Pruzinsky v. Gianette (In re Walter),* 282 F.3d 434 (6th Cir. 2002), provides that:

> [t]he basic distinction between clerical mistakes and mistakes that cannot be corrected pursuant to Fed. R. Civ. P. 60(a) is that the former consist of blunders in execution whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination. Stated differently, a court properly acts under Rule 60(a) when it is necessary to correct mistakes or oversights that

> cause the judgment to fail to reflect what was intended at the time of trial. In that regard, when a court has undertaken to make the judgment or record speak the truth rather than something other than what was originally pronounced the court has not abused its discretion in granting relief under Rule 60(a).

Cleckley, Litigation Handbook, § 60(a), at 1291 (*c.f. Id.* at 436); *see also Blanton v. Anzalone*, 813 F.2d 1574 (9th Cir. 1987).

The outcome of the Amended DOR Decision remains the same as the original: "[t]hat the proposal by Stonewall Jackson Memorial Hospital Company for the complete relocation of the hospital to a new location in its service area is NOT subject to Certificate of Need review because their project is a replacement and relocation of the same services, in the same service area, and does not exceed the minimum capital expenditure." (D.R. 0607). The Authority did not alter its original determination and the final decision that the project was not subject to CON Review. In fact, nowhere in either decision does the Authority list a bed count as an element that must be considered to determine whether a project is subject to CON review (D.R. 0476; D.R. 0607). The Authority's determination instead focuses on (1) the project being the total relocation of a health care facility; (2) within the same service area; that (3) does not exceed the minimum capital expenditure. (D.R. 0476; D.R. 0607).

Contrary to St. Joseph's arguments, our Supreme Court's holding in *Reed v. Thompson*, 235 W. Va. 211, 772 S.E.2d 617 (2015) is unanalogous and inapplicable to the facts in the instant matter. The dispute in *Reed* arose from the Department of Motor Vehicles (DMV) revocation of a driver's license. The petitioner driver requested a hearing in front of the Office of Administrative Hearings (OAH). Following two hearings, OAH reversed the revocation of the license in its original final order. Nine days later, the DMV filed a motion for reconsideration and requested that the OAH revoke its final order. In doing so, the DMV "did not state any new facts or allege any

newly discovered evidence or fraud" during the OAH original hearing. The OAH ultimately granted the DMV's motion for reconsideration, changing the decision without conducting a second hearing and the petitioner driver claimed to not receive notice. A revised final order was issued, and the original order was revoked. The petitioner driver appealed OAH's revised final order to the circuit court. Rather than evaluating the factual determinations made by OAH, the circuit court reinstated the original decision issued by OAH. In doing so, the court focused entirely on the procedures following the entry of the revoked order and found that OAH had no authority to revoke its original order. The DMV appealed to our Supreme Court.

Ultimately, our Supreme Court found that the OAH had no implied authority to reconsider, revoke, or amend its original final order. Specifically, the Court reasoned that "an administrative agency may have authority to reconsider, revoke, or amend its own final order when authorized to do so by its administrative rules." *Reed*, 235 W. Va. at 215-216. St. Joseph's directs this Court, pursuant to the decision in *Reed*, to find that the Authority does not have power to reconsider, revoke, or amend its original Decision. However, as both stated above and within St. Joseph's brief, statutory authorization exists through W. Va. Code §§16-2D-12(g) and 16-2D-13(b) by incorporation of the West Virginia Rules of Civil Procedure Rule 60(a). Further, the issue in *Reed* was whether the procedural aspect leading up to the revocation and reissuance of the decision was proper because the OAH continued to adjudicate the revocation of petitioner driver's license after issuance of the original order. This ultimately changed the outcome of the revoked order. Here, there was no second adjudication of the original DOR Decision or any change in the final decision. Rather, the Authority corrected a clerical error and reissued the Amended DOR Decision reflecting the same.

As an alternative, this Court is authorized pursuant to Rule 60 to grant leave to the Authority to enter its Amended DOR Decision. Rule 60(a) provides that during the pendency of an appeal, clerical mistakes can be corrected either (1) before the appeal is docketed; or (2) while the appeal is pending with leave of the appellate court. As stated above, St. Joseph's filed its Notice of Appeal with this Court on June 21, 2023. After the appeal was filed and docketed, the Authority, on July 12, 2023, issued an Amended DOR Decision, (D.R. 0600-10). However, the Omnibus Order denying St. Joseph's Motion to Strike and granting its Motion to File an Amended Notice of Appeal to challenge the Amended DOR Decision was filed on September 6, 2023.

Stonewall maintains that the Amended DOR Decision was proper as St. Joseph's challenge to the Amended DOR Decision was not docketed with this Court until September 6, 2023, nearly two months after the Amended DOR Decision was issued. However, if this Court were to find that the appeal, including the Amended DOR Decision, was nonetheless docketed for purposes of Rule 60(a) prior to the issuance of the Amended DOR Decision, Stonewall requests leave under W. Va. R. Civ. P. 60(a) for the Authority to correct the clerical mistakes contained within the original DOR Decision through its Amended DOR Decision.

CONCLUSION

Based on the foregoing discussion, this Court should uphold the Health Care Authority's original DOR Decision and/or Amended DOR Decision that determined that Stonewall Jackson Memorial Hospital Company did not need a CON to relocate its hospital in Lewis County, West Virginia. This Court should award such further relief as the interests of justice require.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.
D/B/A ST. JOSEPH'S HOSPITAL,

RESPONDENT BELOW, PETITIONER,

vs. **No. 23-ICA-265**

STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY
AND THE WEST VIRGINIA HEALTH CARE AUTHORITY

PETITIONER BELOW, RESPONDENT

AND

WEST VIRGINIA HEALTH CARE AUTHORITY,

RESPONDENT BELOW, RESPONDENT.

CERTIFICATE OF SERVICE

I, Thomas G. Casto, do hereby certify that on November 30, 2023, I have caused service of the foregoing *Stonewall Jackson Memorial Hospital Company's Response to Brief of Petitioner St. Joseph's Hospital of Buckhannon, Inc.* to be made electronically upon the following counsel of record:

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