IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Putnam County Aging Program, Inc.,
Affected Party Below, Petitioner,

vs.) No. 24-ICA-123

Southern Home Care Services, Inc.,
d/b/a All Ways Caring HomeCare
Applicant Below, Respondent

and

West Virginia Health Care Authority,
Respondent

BRIEF OF RESPONDENT SOUTHERN HOME CARE SERVICES, INC.

From The West Virginia Health Care Authority
CON File #23-2/3/4/5-12699-PC

Alaina N. Crislip (WVSB #9525)[1]
Colton Koontz (WVSB #13845)
JACKSON KELLY PLLC
1600 Laidley Tower
Post Office Box 553
Charleston, WV 25322
Phone: (304) 340-1372
alaina.crislip@jacksonkelly.com
colton.koontz@jacksonkelly.com
Counsel for Southern Home Care Services, Inc.

[1] Counsel of Record.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE

The West Virginia Certificate of Need ("CON") program exists by virtue of W. Va. Code § 16-2D-1, *et seq.*, and jurisdiction over this program is vested in the West Virginia Health Care Authority (the "Authority"). *See* W. Va. Code § 16-2D-3(a)(1). The CON program requires that certain proposed health services must be reviewed and approved by the Authority prior to the offering or development of the service. These services include Medicaid In-Home Personal Care Services ("PC Services") such as those offered by the Respondent, Southern Home Care Services, Inc. d/b/a All Ways Caring HomeCare ("Southern").

The CON law defines "Personal care services" as "personal hygiene; dressing; feeding; nutrition; environmental support and health-related tasks provided by a personal care agency." W. Va. Code § 16-2D-2(33). An entity providing in-home personal care services under the Medicaid program must be approved by the West Virginia Bureau of Medical Services ("BMS"). *See* W. Va. Code § 16-2D-2(32). BMS manages West Virginia's Medicaid program and is responsible for reimbursing providers for PC Services rendered to eligible Medicaid recipients. Pursuant to W. Va. Code § 16-2D-8(b)(22), a CON is required for "[p]roviding [Medicaid approved] personal care services." A CON is not required to offer in-home personal care services reimbursed by private payors.

"In making the determination of whether a CON may be issued, the Authority utilizes Standards which were approved by the Governor[.]" *Amedisys W. Virginia, LLC v. Pers. Touch Home Care of W.Va., Inc*., 245 W. Va. 398, 408, 859 S.E.2d 341, 351 (2021). These standards are similar to legislative rules and have the force and effect of law. *Id*. Pursuant to W. Va. Code §16-2D-6, the Authority may propose changes to the standards. In doing so, the Authority is required to publish notice of the proposed changes in the State Register and solicit comments from the

public. It is also required to form a task force composed of various stakeholders (*i.e.* consumers, business, providers, payers and state agencies) to assist it in satisfying its review and reporting requirements. Once finalized, the Authority presents the proposed changes to the CON standards to the Governor with a record of the documents received pursuant to the public comment period, and if the proposed standards receive the Governor's approval, the Authority prepares and submits a report to the Legislative Oversight Commission on Health and Human Resources Accountability briefing it on the new standards. On April 27, 2023 the Governor approved new CON standards for PC Services (hereinafter, the "2023 PC Standards" or "PC Standards").[2]

Southern is a multi-state provider of in-home services and has been previously approved to offer PC Services in Kanawha, Mercer, and Wood Counties, West Virginia. (D.R. 0035). Following the adoption of the 2023 PC Standards, Southern applied to the Authority to obtain a CON to expand its Kanawha County PC Services (the "Project") to cover Boone, Clay, Logan, Nicholas, Putnam, and Roane Counties, West Virginia (the "Service Area"). (D.R. 0035). The objective of the Project is to improve the availability of PC Services to Medicaid beneficiaries in the proposed Service Area, which have an unmet need for PC Services pursuant to the need methodology prescribed by the 2023 PC Standards. According to this methodology, 986 Service Area residents, including 286 Putnam County residents, are eligible for PC Services but are not receiving them. (D.R. 0062).

Petitioner, Putnam County Aging Program ("PCAP"), offers PC Services in West Virginia and intervened to oppose Southern's application. The vast majority of PCAP's PC Services clients, 194 out of 227, do not reside in the proposed Service Area. (D.R. 1561-D.R. 1563). Of the 14.5%

[2] The 2023 PC Standards are available on the Authority's website: https://hca.wv.gov/certificateofneed/Documents/CON_Standards/In_Home_Personal_Care_Services.pdf

of PCAP's clients residing in the Service Area, most (22) reside in Putnam County.[3] (D.R. 1561-D.R. 1563). Over 80% of PCAP's PC Services clients are served by its for-profit[4] subcontractor, Loved Ones In Home Care, LLC. (D.R. 1561-D.R. 1563).

Before the Authority, PCAP argued that the 2023 PC Standards were invalidly adopted, that the need methodology prescribed by the 2023 Standards is arbitrary and capricious, and that Southern has not shown any "actual unmet need." (D.R. 2375-2390). And while PCAP submits that it needs the revenue generated by its PC Services to subsidize various non-medical services, such as its nutrition and transportation services, it neglects to inform the Court that it netted seven-figure returns in financial years 2020 through 2022 and is holding millions of dollars that it could use to subsidize these services for many years to come. (*See* D.R.0929 -D.R. 0931, D.R. 0958-D.R. 0961, D.R. 0989-D.R. 0991).

On February 21, 2024, the Authority issued a detailed, 42-page decision approving Southern's application (the "Decision"). (D.R. 2531-D.R. 2573). The Authority found, among other things, that "the PC Standards' need methodology is rationally based and must be upheld" (D.R. 2539-D.R. 2544); that "the PC Standards promote the public policy and legislative findings of the CON law" (D.R. 2545-D.R. 2546); and that the Authority "properly considered the comments it received from task force members and other interested members of the public" (D.R. 2550-D.R. 2551). The Authority further found that "Southern established an unmet need pursuant

[3] Indeed, in an e-mail dated July 14, 2023, Jenni Sutherland, PCAP's Executive Director, stated that she told the Authority that she/PCAP "would only be opposing applications that specifically asked for Putnam and/or Fayette Counties[.]" (D.R. 1218). Similarly, Ms. Sutherland's testimony related solely to Putnam and Fayette Counties. (*See, e.g.*, D.R. 2130, 89:20-23 ("Q. Are you aware of any need in Putnam or Fayette County for in-home personal care services that you cannot provide? A: No.")). Ms. Sutherland never mentioned Nicholas, Roane, Clay, or Boone Counties during her testimony.

[4] The West Virginia Secretary of State's website shows that Loved Ones In Home Care, LLC, operates for profit. (available at https://apps.sos.wv.gov/business/corporations/organization.aspx?org=184747).

to the PC Standards' need methodology" (D.R. 2553-2554) and that "the Project will not have a negative effect on the community by significantly limiting the availability and viability of services offered by PCAP or other Service Area providers" (D.R. 2555). The Authority explained that "PCAP's transportation and nutrition programs are not relevant to Southern's application and, even if they were, there is simply no reason to believe that Southern's Project will so impact PCAP's profitability as to substantially limit PCAP's ability to offer these services given PCAP's financial vitality, the minimal overlap between the Service Area and PCAP's current client base, and the unmet need for PC Services in the proposed Service Area" (D.R. 2560).

SUMMARY OF ARGUMENT

Pursuant to the 2023 PC Standards, the Authority determines need on a county-by-county basis, taking the average number of Medicaid recipients in each county in the most recent fiscal year times a multiplier of 3.0% to estimate the number of county residents eligible to receive PC Services. PC Standards, Section III. Unmet need is then calculated by subtracting the average number of residents receiving PC Services from the estimated number of residents eligible to receive these services. *Id*. The 2023 PC Standards are substantially similar to the previous 2016 PC Standards, except that the 2016 Standards used a multiplier of 1.25%. PCAP argues that the increased 3.0% multiplier used by the 2023 PC Standards overestimates the unmet need for PC Services and was based principally upon a "rumor" that BMS intended to cease reimbursing approved providers for PC Services provided through subcontractors, such as PCAP's for-profit subcontractor Loved Ones In Home Care, LLC. PCAP's Brief, pp. 10-13.

Contrary to PCAP's assertions, the Authority's recommendation to use a 3.0% multiplier was reasonable and the 2023 PC Standards should be applied as written. As explained by the Authority in its Decision, the 2016 Standards' 1.25% multiplier reflected the budgetary constraints

of the Medicaid program, not the actual need for PC Services, which the Authority's research found to be around 2.5% at that time. As the State's population has continued to age since 2016, it is reasonable to presume that the current need for PC Services exceeds 2.5%. (D.R. 2538-D.R. 2544). This is further corroborated by BMS' enrollment data, which showed that roughly 2.0% of West Virginia's Medicaid recipients are already receiving PC Services. (D.R. 2046, 32:9-19). The Authority sought BMS' feedback before settling on the 3.0% multiplier, and BMS never suggested that 3.0% was too high. (D.R. 1234, 35:14-22). In fact, BMS has said that it intends to disallow subcontracting and, therefore, more approved providers will be needed. (D.R. 1234, 35:14-22).

PCAP further claims that the 2023 PC Standards were improperly promulgated because the Authority failed to use a task force and did not consider the comments submitted by task force members. PCAP's Brief, pp. 13-22. These contentions lack merit. The Authority convened a task force meeting on September 29, 2022, and PCAP participated in that meeting. (D.R. 2032-2033, 18:20-19:10; *see also* D.R. 2138, 119:13-14). The Authority also allowed task force members to submit written comments. The record shows that the Authority did in fact consider the comments it received from taskforce members, and PCAP itself was able to obtain meaningful concessions from the Authority at the September 29, 2022, task force meeting. (*See* D.R. 1324-D.R. 1325; D.R. 2032-2033, 18:20-19:10). PCAP's assertions that the task force was a sham are baseless.

Moreover, Southern has demonstrated an unmet need for the Project. According to the need methodology prescribed by the 2023 PC Standards, 986 Service Area residents that are eligible for PC Services are not receiving them and 286 of these individuals reside in Putnam County. (D.R. 0062). The PC Standards' need methodology is not arbitrary or capricious, and Southern was not required to show independent evidence of unmet need. The Court must reject PCAP's attempts to substitute its own need methodology for that prescribed by the Standards.

Southern's Project will not negatively affect the community by significantly limiting the viability or availability of other services. The transportation and nutrition services PCAP opines on are not even health services subject to the Authority's jurisdiction and have no relevance to Southern's application. They are not "other services" within the meaning of the 2023 PC Standards. And, PCAP's claims that it is dependent on revenue generated from its PC Services to fund transportation and nutrition programs and that allowing Southern into the Service Area will significantly impact those revenues are specious at best. *See* PCAP's Brief, pp. 22-25. Between 2020 and 2022, PCAP took in millions in surplus cash that could be used to supplement the grants it uses to fund its nutrition and transportation services well into the future. (*See* D.R.0929 -D.R. 0931, D.R. 0958-D.R. 0961, D.R. 0989-D.R. 0991). Additionally, the large unmet need in the Service Area and the fact that the vast majority of PCAP's clients do not reside in the Service Area belie PCAP's assumption that allowing Southern into the Service Area will significantly impact PCAP's revenues. (*See* D.R. 1561-D.R. 1563). Southern does not have to show that its Project will have absolutely no impact on existing providers. The CON law is not intended to act as a bulwark against competition, but to improve the accessibility and affordability of health services. PCAP's suggestions to the contrary betray the protectionist motivations underlying its opposition.

Perhaps realizing the weakness of its position, PCAP argues that the Authority's hearing examiner, Heather Connolly, was biased against it and that the Authority should therefore be stripped of its discretion. Southern submits that PCAP has waived this issue because, despite having ample opportunity to raise it before the Authority, PCAP failed to do so. Southern further submits that Ms. Connolly is entitled to a presumption of honesty and integrity and that PCAP has failed to provide sufficient evidence of bias. Additionally, it was the Authority's Board, not Ms. Connolly, that ultimately decided this case, and there is no legal basis for PCAP's call to strip the

Authority of its discretion. PCAP's delay in asserting Ms. Connolly's alleged bias and failure to bring a single assignment of error challenging an evidentiary or other ruling made by Ms. Connolly in this case casts serious doubt on the sincerity of PCAP's assertion of bias.

Finally, in addition to seeking to reverse the Authority's Decision, PCAP asks this Court to invalidate the 2023 PC Standards. The Court cannot do that. Even PCAP "does not believe it to be proper for this Court to strike down the validity of the WVHCA standards at issue in this proceeding." PCAP's Brief, p. 29. The Court has appellate jurisdiction over "a final decision in a certificate of need review[.]" W. Va. Code § 16-2D-16a(a)(2); W. Va. Code § 29A-5-4(g). The Court does not, however, have jurisdiction to invalidate the PC Standards themselves.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Southern submits that "the dispositive issue or issues have been authoritatively decided" and that the "facts and legal arguments are adequately presented in the briefs and record on appeal[.]" W. Va. R. App. P. 18(3)-(4). Accordingly, "the decisional process would not be significantly aided by oral argument." *Id*.

ARGUMENT

I. STANDARD OF REVIEW.

Pursuant to W. Va. Code § 16-2D-16a(a)(2), "[a]n appeal of a final decision in a certificate of need review . . . 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*." The applicable standard is set forth in W.Va. Code § 29A-5-4, which provides as follows:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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, decision or order are:
>
> (1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;
(3) Made upon unlawful procedures;
(4) Affected by other error of law;
(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.

W. Va. Code § 29A-5-4(g).

Under this standard, "findings of fact by the administrative [agency] are accorded deference unless the reviewing court believes the findings to be clearly wrong." *Muscatell v. Cline*, 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996). So long as "the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact." *Bd. of Educ. of Cnty. of Mercer v. Wirt*, 192 W. Va. 568, 579, 453 S.E.2d 402, 413 (1994).

Similarly, "an agency's determination of matters within its area of expertise is entitled to substantial weight." *Princeton Cmty. Hosp. v. State Health Plan*., 174 W. Va. 558, 564, 328 S.E.2d 164, 171 (1985); *Davisson v. Lewis Cnty. Bd. of Educ*., No. 23-ICA-344, 2024 WL 3251598, at *4 (W. Va. Ct. App. July 1, 2024) (same). CON standards, such as the 2023 PC Standards, are akin to "legislative rule[s and are] entitled to substantial deference by the reviewing court." Syl. Pt. 3, in part, *Amedisys*, 245 W. Va. at 398, 859 S.E.2d at 345. "As a properly promulgated legislative rule, the [Standards] can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious." *Id*.

As explained below, the Authority's Decision must be affirmed because its findings were not "clearly wrong" and its application of the law was reasonable.

II. THE 2023 PC STANDARDS WERE PROPERLY PROMULGATED AND ARE NOT ARBITRARY OR CAPRICIOUS.[5]

PCAP argues that the need methodology prescribed by the 2023 PC Standards is arbitrary and capricious and overstates the unmet need in the Service Area. PCAP's Brief, pp. 13-22. As explained above, PCAP takes particular issue with the Authority's decision to increase the multiplier from 1.25% to 3.0%, arguing that the Authority's selection of the 3.0% multiplier was arbitrary and capricious and overestimates the need for PC Services. *See* PCAP's Brief, pp. 15-19. PCAP contends that the methodology's use of the 3.0% multiplier will result in the duplication of health services, undermining the Legislative purpose of the CON-law. PCAP's Brief, pp. 19-20. PCAP also argues that the Standards were improperly adopted because the Authority failed to comply with the task force requirement of W. Va. Code § 16-2D-6(c), and that the Authority failed to consider information it received through written comments. PCAP's Brief, pp. 20-22. As explained in the subsections that follow, PCAP's arguments lack merit.

i. The 2023 PC Standards' Need Methodology Is Not Arbitrary Or Capricious.

In *Amedisys*, the Supreme Court of Appeals of West Virginia held that the CON standards are similar to legislative rules and have the force and effect of law. *See* 245 W. Va. at 408, 859 S.E.2d at 351. They can '"be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary and capricious.'" *Id*. at 354 (quoting Syl. Pt. 6, in part, *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 827 S.E.2d 417 (2019)); *see also Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 588, 466 S.E.2d 424, 439 (1995) ("[w]e will not set aside a legislative rule without clearcut evidence of an inconsistency between the rule and the authorizing statute."). '"[I]t is only where an administrative rule or regulation is completely

[5] Because Southern relies principally upon the need methodology prescribed by the 2023 PC Standards to establish unmet need, Southern will first address PCAP's attack on the 2023 Standards (PCAP's Brief, pp. 13-22). PCAP's argument that the Authority improperly found that there was an unmet need in the proposed Service Area is addressed in Section III., *infra*.

without a rational basis, or where it is wholly, clearly, or palpably arbitrary, that the court will say that it is invalid[.]'" *Appalachian Power*, 195 W. Va. at 589, 466 S.E.2d at 440 (quoting 73 C.J.S. Public Administrative Bodies and Procedure § 104).[6]

The 2023 PC Standards' need methodology is not arbitrary or capricious. As the Director of the CON Program Timothy Adkins explained, the previous multiplier, 1.25%, was selected due to the budgetary constraints of the Medicaid program at the time, not the actual need for PC Services, which the Authority's research found to be around 2.5% in 2016:

> The 1.25 percent, initially when we wrote these standards in 2016, that was to be 2.5 percent, and that was after the research that was done, they said, we really think it needs to be 2.5 percent. However, just about the time that happened and we were getting ready to present these for comment, Medicaid went through a crisis. Well, there was something in the paper that said that Medicaid was going to lose $40 million, and we had different ones coming and calling us saying we can't do that. The 2.5 is too much. So that's where the 1.25 came from.

(D.R. 2046, 32:9-19). Mr. Adkins further testified that:

> initially, it was going to be 2.5. We did not --- when we [were] getting ready to submit these standards for public comment, there was an article back in 2016 that Medicaid was going to be under about $40 million. And the board made a decision then, well, we're not going to raise to 2.5, lets do it 1.25. That's how the 1.25 was developed.

(D.R. 1234, 34:12-18). So, the 2016 multiplier should have been at 2.5% to accurately reflect the need for PC Services at that time, much closer to the 2023 PC Standards' 3.0% multiplier than the previous standards 1.25% multiplier.

[6] While this Court has jurisdiction to review the Authority's Decision in this matter, Southern submits that it does not have jurisdiction to invalidate the 2023 PC Standards themselves. *See* Section VI, *infra*.

As explained by the Authority, "West Virginia's population has continued to age since 2016, and the need for PC Services has therefore increased over time."[7] (D.R. 2540). Indeed, at the September 29, 2022, task force meeting Mr. Adkins recognized the prevailing need for PC Services throughout West Virginia in light of the State's changing demographics:

> I almost think that in a State as West Virginia, as old as we are, and as unhealthy as we are, that there's probably an existing need in every county. I don't think any county could say that they're not exempt from not needing in-home personal care services in some way, shape or form.

(D.R. 2044, 30:8-13). Mr. Adkins further testified that he reviewed enrollment numbers from BMS and determined that approximately 2% of West Virginia's Medicaid recipients are already receiving PC Services:

> Q. Two percent of the population was receiving Medicaid?
>
> A. Two percent of the population that was receiving Medicaid were receiving in home personal care.
>
> Q. Where did you get those numbers?
>
> A. I got them from Kepro and the Bureau of Medical Services, which Kepro I think works for BMS.

(D.R. 1233, 32:1-7). Accordingly, the 2016 standards' 1.25% multiplier needed to be raised to accurately reflect the need for PC Services.

PCAP continues to ignore this evidence, dismissively stating that Mr. Adkins "identified an issue with how the [Authority] arrived at 1.25%, but not how it reached a conclusion of 3.0%." PCAP's Brief, p. 16. PCAP avers that the Authority's decision to increase the multiplier to 3.0%

[7] In footnote 2 of its Decision, The Authority explains that "'[t]he share of the [West Virginia] population that is 65 and older **increased** from **18.8%** in **2016** to **21.2%** in **2022**.'" (D.R. 2540 (quoting USAFACTS.org (*available at* https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population/state/west-virginia/?endDate=2022-01-01&startDate=2016-01-01)). Similarly, the Authority noted that "in Putnam County, '[t]he share of the population that is 65 and older **increased** from **17.3%** in **2016** to **20%** in **2022**.'" *Id.*

was based solely on "a rumor that the West Virginia Bureau for Medical Services (BMS) was going to eliminate subcontracting for Medicaid In-Home Personal Care services." PCAP's Brief, p. 14. PCAP's argument misstates the record; Mr. Adkins clearly testified that the primary basis for increasing the multiplier was BMS' enrollment data:

> Q. So BMS is able to give you the number of Medicaid individuals that are receiving in home health personal care?
>
> A. That are receiving in home personal care, yes. And the need methodology, the new need methodology is based on that.

(D.R. 1233, 32:8-13). Mr. Adkins further testified that he sought feedback from BMS concerning the 3.0% multiplier and that "BMS did not protest against the three precent." (D.R. 2404, 36:23-24). Thus, while the Authority did consider the subcontracting issue, that was not, as PCAP suggests, the sole or even the primary basis for the Authority's decision to increase the multiplier.

Even so, there was nothing improper or unsound about the Authority's reliance on BMS' representations that it would be eliminating subcontractors. The Authority was not, as PCAP contends, working off of rumors. BMS clearly conveyed its intent to eliminate subcontractors to Mr. Adkins in "multiple telephone calls." (D.R. 1234, 35:14-22). That is, BMS itself informed the Authority that it would be doing away with subcontractors, and, once subcontractors are eliminated, it follows that more providers will be needed just to maintain existing levels of service. It was not irrational for the Authority to consider BMS' plans in developing its standards. In fact, the law expressly encourages the Authority to do so:

> The authority may consult with or rely upon learned treatises in health planning, **recommendations and practices of other health planning agencies and organizations**, recommendations from consumers, recommendations from health care providers, **recommendations from third-party payors**, materials reflecting the standard of care, the authority's own developed expertise in health planning, data accumulated by the authority or other local, state or federal agency or organization and any other source deemed relevant to the certificate of need standards proposed for change.

W. Va. Code § 16-2D-6(e) (emphasis added). W. Va. Code § 16-2D-6(e) clearly provides that the Authority's consideration of BMS' statements was justified. As was the Authority's reliance on its "own developed expertise in health planning" and "data accumulated by the authority or other local, state or federal agency", such as BMS. *See id*.

PCAP's argument that "there are much better ways to address this change while still complying with the Certificate of Need Statute" is not credible. PCAP's Brief, p. 18. PCAP's self-serving alternatives completely ignore BMS' enrollment data, which puts current utilization at 2.0%, and Mr. Adkins' testimony that, even back in 2016, an estimated 2.5% of Medicaid recipients were eligible to receive PC Services. (D.R. 1233, 32:1-7). And, even if PCAP's suggestions were somehow "better" than the methodology developed by the Authority (they are not), the Authority's methodology remains controlling: "[T]he agency need not employ the 'best' or 'most logical' methodology, but rather one which is rationally based on the enabling statute." *Murray Energy*, 241 W. Va. at 640, 827 S.E.2d at 428.

It is the Authority, not PCAP, that is in charge of developing the Standards, and "the court must give due deference to the agency's ability to rely on its own developed expertise." *See Princeton*, 174 W. Va. at 564, 328 S.E.2d at 171. The 3.0% multiplier was rationally calculated to ensure adequate access to PC Services while avoiding unnecessary duplication. *See id*. The question is not whether the 3.0% multiplier is the best choice, only whether it is a reasonable choice. "After all, 'the line[] had to be drawn somewhere,' and it is not this Court's province . . . to 'redraw the line[] according to [its] own notions of what might be best.'"*Ass'n of Priv. Sector Colleges & Universities v. Duncan*, 110 F. Supp. 3d 176, 194 (D.D.C. 2015) (quoting *Process Gas Consumers Grp. v. FERC*, 712 F.2d 483, 488 (D.C. Cir. 1983)). The Court is not "a superagency that can supplant the agency's expert decision-maker" and the Court's review must be "designed

solely to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors." *Princeton*, 174 W. Va. at 564-65, 328 S.E.2d at 17 (quoting *Ethyl Corp. v. Env't Prot. Agency*, 541 F.2d 1, 36 (D.C. Cir. 1976)).

Finally, concerns raised by PCAP regarding the Authority's need calculation for Brooke and Hancock Counties are a red herring. *See* PCAP's Brief, pp. 18-19. Neither Brooke nor Hancock County is at issue in this matter. They are not in the proposed Service Area. Moreover, these errors in the Brooke and Hancock County calculations stem from a problem in the underlying data for those Counties, not the need methodology itself:

West Virginia Health Care Authority
In-Home Personal Care Services
FY 2023 Need Methodology
For July 2022 - December 2022
Effective June 1, 2023

** Average Personal Care (PC) Recipients by County as Reported by*
the West Virginia Department of Health and Human Resources, Bureau for Medical Services, May 2023.

Region 1 County	6 Month Medicaid Recipient Average	3% Medicaid County Population	Potential In-Home PC Services Recipients	*6 Month Medicaid PC Services Recipients Average	Need for PC Services
Brooke	10.00	0.29	1.00	27.00	-26.00
Calhoun	2,802.00	84.06	84.00	41.00	43.00
Clay	4,242.00	127.26	127.00	81.00	46.00
Doddridge	2,213.00	66.39	66.00	31.00	35.00
Gilmer	2,145.00	64.35	64.00	15.00	49.00
Hancock	13,155.00	394.65	395.00	21.00	374.00
Jackson	9,321.00	279.63	280.00	60.00	220.00
Marion	17,406.00	522.18	522.00	162.00	359.00

Brooke County, which has a population of approximately 22,500 individuals, could not possibly have a six-month Medicaid recipient average of "10.00." For example, the next county on the list, Calhoun County, has a population of approximately 6,229 individuals and has a six-month Medicaid recipient average of 2,802. An average of 10.00 is not plausible.

As Mr. Adkins explained, Kepro/BMS combined Brooke's Medicaid recipients with those reported for Hancock. (D.R. 1251-D.R. 1252). That is why Hancock appears to have an anomalously high (~46%) six-month Medicaid recipient average. (*See* D.R. 1251, 105:11-12 ("I,

that's what I think. I think 13,000 for Hancock seems like a lot of --- lot of people.")).[8] This error has nothing to do with the Authority's selection of the 3.0% multiplier and there is no reason to believe that the six-month Medicaid recipient averages reported for the Service Area Counties are inaccurate. Neither Brooke nor Hancock are within the proposed Service Area, and even PCAP's Executive Director, Ms. Sutherland, agreed that there was not a similar error in Putnam County's need calculation. (*See* D.R. 2140, 129:10-15 ("Q. Were there errors? Did Mr. Walters ask you about questions about errors in the need calculation for Putnam, Cabell, Wayne and Fayette? A. There were no blatant standout anything, but I have no records of who actually is receiving services versus how many Medicaid recipients there are.").

In sum, the Authority considered multiple factors when it selected the 3.0% multiplier, including BMS' enrollment data and the Authority's own research. The Authority's selection of the 3.0% multiplier was reasonable, and the 2023 PC Standards must be applied as written.

ii. The PC Standards' Need Methodology Promotes the Public Policy and Legislative Findings of The CON Law.

PCAP next argues that the Authority "erred in granting the application because it has resulted in a duplication of services." PCAP's Brief, pp. 19-20. PCAP submits that "[c]ompetition by its very definition creates duplication of services and waste of resources" and that this "is a direct contradiction of the legislative intent of the CON program." PCAP's Brief, p. 19. Not so.

[8] As a basis for comparison, Marshall County has a population of about 30,100 and a six-month Medicaid recipient average of 8,406 (28%). Similarly, Ohio County has a population of about 41,700 and six-month Medicaid recipient average of 12,001 (29%). Brooke County has a population of about 22,100 and we would therefore expect about 28% or 6,188 individuals to be the six-month Medicaid recipient average for Brooke County. Ten ("10.00") is obviously wrong. Hancock County, on the other hand, has a population about 28,700 and a reported six-month Medicaid recipient average of 13,155 (46%). This suggests that Brooke's missing Medicaid recipients have, as BMS/Kepro reported, been combined with those residing in Hancock County. Subtracting 6,188 from 13,155 provides 8,155, which is more in line with what would expect for Hancock County's six-month Medicaid recipient average (24%).

As explained above, the PC Standards' need methodology is rationally based, and indisputably shows an unmet need for PC Services in the Service Area. Using this methodology, the Authority has estimated that more than 900 Service Area residents qualified to receive PC Services are not receiving them. The PC Standards, therefore, allow for the "effective development of necessary and adequate means of providing for the health services of the people of this state" and will not cause "the unnecessary duplication of health services." W. Va. Code § 16-2D-1.

Contrary to PCAP's assertion, competition does not "by its very definition create[ ] duplication of services and waste of resources." PCAP's Brief, p. 19. The CON law is intended to protect consumers, not providers. *See* W. Va. Code §§ 16-2D-1. To the extent that competition increases access and/or reduces the costs of services, it is beneficial to consumers. The CON law is not meant to be a bulwark against competition and does not proscribe any and all duplication of services, only "unnecessary" duplication. PCAP's suggestion to the contrary betrays the protectionist motivation behind its opposition. The purpose of the CON program is not to preserve the market share of existing providers, nor is it to safeguard the profit margins of Affected Persons. Instead, it is to ensure needed health services are made available to West Virginians while also protecting against unnecessary cost increases to consumers. *See* W. Va. Code §§ 16-2D-1(1)-(2).

Accordingly, there is no "clearcut" inconsistency between the PC Standards and the CON statute, and therefore, the Standards must be applied as written. *See Appalachian Power*, 195 W. Va. at 588, 466 S.E.2d at 439 (A court "will not set aside a formally adopted legislative rule without clearcut evidence of an inconsistency between the rule and the authorizing statute."); *see also Princeton*, 174 W. Va. at 564, 328 S.E.2d at 171 ("the court must give due deference to the agency's ability to rely on its own developed expertise.").

iii. The Authority Established and Utilized a Task Force.

PCAP further complains that the September, 29, 2022, task force meeting held by the Authority to discuss proposed changes to the PC Standards "fails to meet the statutory requirement" and "the meeting that was held was nothing more than a formality[.]" PCAP's Brief, pp. 20-21. PCAP further opines that "the efforts to meet this task force requirement falls significantly short compared to the efforts made when modifying [the] hospice standard." *Id*.

Notwithstanding PCAP's assertions, W. Va. Code § 16-2D-6(c) only requires "[t]he authority [to] form task forces to assist it in satisfying its review and reporting requirements." The Authority need not hold task force meetings. *See id*. Meetings are merely one way to satisfy the task force requirement. As the Supreme Court of the United States has explained, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 524 (1978); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'").

In this case, the Authority has clearly met the statutory requirements. Not only did the Authority hold the September 29, 2022, task force meeting, it also received and reviewed written comments submitted by the task force members. *See* Section II.iv, *infra*. Mr. Adkins detailed the Authority's review process in an e-mail dated September 29, 2022:

> When the Authority begins the Revision process, generally we will look at the current Standards. Then we will look at other CON states Standards for the same services. We will revise the Standards in a Draft and then hold the Task Force Meeting. The members of the Task Force are Providers, Payors, State Employees within the Department that have involvement with the service. We will then allow a week to 10 days after the Task Force Meeting for those who

> attended the Task Force Meeting to provide written comments regarding the Draft of the Proposed Standards. After the comments have been received, the CON staff will review each comment. We also work with the State Department throughout this process. Once it has been completed, the Authority Board will then approve to have the Revised Standards placed on the Secretary of State Website for a 30 day public comment period. At the end of that period, The Authority will then review any additional comments from the public and make any necessary additional revisions. Once the final changes have been made, the Board will then send them to the Secretary of DHHR for their review and they will then forward to the Governor for his review and approval. The Governor has 30 days from the date of receipt to approve or not approve the Revised Standards. The Revision process takes a minimum of 90 days from start to finish.

(D.R. 1301). The Authority properly found that its review process meets W. Va. Code § 16-2D-6(c)'s task force requirement (D.R. 2546), and the Authority's interpretation must be accorded great weight. *See* Syl. Pt. 4, *Sec. Nat. Bank & Tr. Co. v. First W. Va. Bancorp., Inc.*, 166 W. Va. 775, 776, 277 S.E.2d 613, 614 (1981) ("Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous."); *see also* Syl. Pt. 2, *Keener v. Irby*, 245 W. Va. 777, 865 S.E.2d 519, 520 (2021). Whether or not the Authority held more task force meetings in its evaluation of the hospice standard is irrelevant.

PCAP's contention that "no reasonable person could find that this short meeting could have any effective impact on . . . the CON standards" (*See* PCAP's Brief, p. 21) is contradicted by the record. For example, PCAP's Executive Director, Jenny Sutherland, offered comments at the September 29th meeting and obtained a concession from the Authority modifying the language of the proposed Standard:

> MS. SUTHERLAND: I would personally feel more comfortable if there was some language referring to senior centers being --- not needing that certificate of need. Because I get what you're saying, but 20 years from now, when we're all not sitting at the table and somebody's looking at this and they're like, you've been doing personal care without a CON and it says you have to have one, like, that could fall back on us.

> AUDIENCE MEMBER: There needs to be some written protections other than just the language.
>
> MS. SUTHERLAND: I want something ---.
>
> MR. ADKINS: Okay. We'll just put this back in there. We'll just put the same language back in there. That's not a problem.
>
> MS. SUTHERLAND: Okay. We're good.

(D.R. 2032-2033, 18:20-19:10; *see also* D.R. 2138, 119:13-14 ("I was sitting in the room, yes, And I did make comments. Yes.")). PCAP's argument that the taskforce meeting was merely a "formality" that could not have had "any effective impact" is therefore demonstrably false.

Finally, PCAP's suggestions that the decision to increase from 1.25% to 3.0% was made prior to the task force meeting is not true. The proposed Standard presented at the task force meeting was a draft. The Standard was not final and effective until it was approved by the Governor on April 27, 2023. The purpose of the task force meeting and accompanying comment period was to allow PCAP and other stakeholders to submit their feedback. Accordingly, PCAP was given an opportunity to comment on the 3.0% multiplier before finalizing the Standard.

"Stakeholder involvement in development of the methodology casts a pronounced pall over a subsequent legal challenge, absent some misapplication or misinterpretation of the regulation." *Murray*, 241 W. Va. at 641, 827 S.E.2d at 429. Similarly, "'[d]eference to the [agency's] interpretation 'is especially appropriate where [as here] the rule was adopted only after all interest [sic] persons were given notice and opportunity to comment[.]'" *Appalachian Power*, 195 W. Va. at 592, 466 S.E.2d at 443. PCAP and other stakeholders[9] were allowed to comment on the 3.0% multiplier before the Standards were finalized, and therefore, PCAP's contentions lack merit.

[9] In addition to the September 29, 2022, task force meeting and accompanying comment period, the Authority also allowed the general public to submit written comments. (*See* D.R. 1407-D.R. 1408, D.R. 1479-D.R. 1471; D.R. 1510-1511 (Newsletters published by the Authority)). Legal notice of the public comment period was published periodically in the West Virginia Register. (D.R. 1338-D.R. 1368; D.R. 1380-D.R. 1405; D.R. 1411-D.R. 1443; D.R. 1445- D.R. 1467; D.R. 1478- D.R. 1504).

iv. The Authority Considered the Comments It Received.

PCAP next argues that the comment period held by the Authority "was nothing more than a formality as the comments, and accompanying logic, fell on deaf ears." PCAP's Brief, p. 22. Contrary to PCAP's assertions, the Authority reviewed and made changes to the proposed Standards based on the stakeholder's comments. (*See* D.R. 1324-D.R. 1325). For example, the Authority reinserted the pre-existing grandfathering language and removed language requiring physician approvals in response to stakeholder comments. (*See* D.R. 1324-D.R. 1325). Indeed, Ms. Sutherland, PCAP's Executive Director, herself obtained meaningful concessions from the Authority. (*See* D.R. 2033; D.R. 2138). Additionally, the written comments were provided to the Governor for his review prior to his approval of the Standards. *See* W. Va. Code § 16-2D-6(f). The comment period was not a sham.

Furthermore, the fact that PCAP and other providers, which have an interest in keeping new providers out of their respective service areas, balked at the 3.0% multiplier is not unexpected and hardly constitutes "overwhelming evidence" that the multiplier should remain at 1.25%. The Authority considered the stakeholders' comments. Relying on other evidence, *See* Section II.i., *supra*, the Authority determined that a 3.0% multiplier was needed to accurately reflect the need for PC Services. "[W]e are loathe to engage in the arduous task of rewriting legislation, regulations, and agency structure simply on the whims of a few who have expressed dissatisfaction with an agency's action." *Appalachian Power*, 195 W. Va. at 588, 466 S.E.2d at 439.

III. THE AUTHORITY'S FINDING THAT THERE WAS AN UNMET NEED IN THE PROPOSED SERVICE AREA WAS NOT CLEARLY WRONG.

First, contrary to PCAP's contentions, Southern was not "unable to provide any evidence of an unmet need in Putnam County, as well as other counties in its proposed service area." PCAP's Brief, p. 6. Southern demonstrated need using the need methodology prescribed by the applicable

State Health Plan Standards, the 2023 PC Standards. Southern was not required to specifically "identify any eligible participant that has been denied Medicaid In-Home Personal Care services" or provide other "independent evidence of unmet need[.]" PCAP's Brief, pp. 6, 13. It is the need methodology provided for by law that governs here.

The applicable state health planning review criteria for the Project are contained in the PC Standards approved by the Governor on April 27, 2023. Southern used the methodology prescribed by the 2023 PC Standards to establish need.[10] Exhibit E-2 to Southern's application shows that, pursuant to the PC Standards' need methodology, each of the Counties in the proposed Service Area have an unmet need greater than 25 (see right-most column titled "Need for PC Services"):

West Virginia Health Care Authority
In-Home Personal Care Services
FY 2023 Need Methodology
For July 2022 - December 2022
Effective June 1, 2023
** Average Personal Care (PC) Recipients by County as Reported by*
the West Virginia Department of Health and Human Resources, Bureau for Medical Services, May 2023.

Southern Home Care Services, Inc. d/b/a All Ways Caring HomeCare - Mercer County personal care service area

County	6 Month Medicaid Recipient Average	3% Medicaid County Population	Potential In-Home PC Services Recipients	*6 Month Medicaid PC Services Recipients Average	Need for PC Services
Clay	4,242.00	127.26	127.00	81.00	46.00
Roane	5,290.00	158.70	159.00	55.00	104.00
Boone	9,669.00	290.07	290.00	158.00	132.00
Logan	15,438.00	463.14	463.00	216.00	247.00
Putnam	12,758.00	382.74	383.00	97.00	286.00
Nicholas	9,098.00	272.94	273.00	102.00	171.00

"If there is an unmet need of 25 or more then the County is considered open to additional providers." PC Standards, Section III., p. 4. Since there is an unmet need of 25 or greater in each of the Service Area Counties, Southern has established that a sufficient unmet need exists.

The PC Standards' need methodology is evidence of an unmet need in each of the Service Area Counties, especially Putnam County, which has the highest unmet need of all the Service Area Counties. The Applicant was not required to adduce "independent evidence" of need merely

[10] The 2023 Need Methodology can also be found online at: https://hca.wv.gov/certificateofneed/Documents/In-Home_Personal_Care_Need_Methodology.pdf.

because PCAP dislikes the need methodology prescribed by the Standards. Indeed, contrary to PCAP's assertions, Southern not only can, but **MUST** rely on the need methodology provided for by the PC Standards to establish unmet need. *See* W. Va. Code § 16-2D-6(g); *see also Amedisys*, 245 W. Va. at 408, 859 S.E.2d at 351 ("In making the determination of whether a CON may be issued, the Authority utilizes Standards which were approved by the Governor and were thereafter in full force and effect from the date of the Governor's approval."). As the Authority explained, "[t]he PC Standards' need methodology is the methodology required under the law" and "is both necessary and sufficient to establish unmet need." (D.R. 2554).

Additionally, PCAP contends that the Authority "incorrectly found that '[p]atients will continue to experience serious problems in obtaining care of the type proposed in the absence of the proposed project."' PCAP's Brief, p. 12 (citing D.R. 2570); *see also* W. Va. Code § 16-2D-12 ("The authority may not grant a certificate of need unless . . . the authority makes each of the following findings in writing: . . . (4) That patients will experience serious problems in obtaining care within this state of the type proposed in the absence of the proposed health service.").

PCAP did not make this argument below,[11] and therefore it has been waived. *See Hecker v. McIntire*, No. 22-ICA-15, 2023 WL 152889, at *3 (W. Va. Ct. App. Jan. 10, 2023) ("Appellate courts will not decide nonjurisdictional questions raised for the first time on appeal."); *Davisson*, 2024 WL 3251598, at *4 ("[W]e find Mr. Davisson has waived this issue on appeal. Aside from Mr. Davisson citing no authority to support his position, the Board's Decision does not address

[11] In an "Agreed Order Regarding [Southern's] Motion to Compel", PCAP stipulated that it would be challenging Southern's application on two grounds "1) Whether or not there is an unmet need for the proposed service area; and 2) That the proposed services will have a negative effect on the community by significantly limiting the availability and viability of other services or providers." (D.R. 1740). While Southern specifically asked PCAP "whether [it] intend[ed] to oppose the Project based upon [its] belief that patients will not experience serious problems in obtaining PC services in the absence of the project" (D.R. 0742), PCAP did not raise this issue in the Agreed Order resolving Southern's Motion to Compel and did not address the issue in its briefing before the Authority. (D.R. 1740; D.R. 2372-D.R.2390).

this argument and Mr. Davisson fails to cite to any portion of the record to establish this argument was made below to preserve it for appeal."). Accordingly, PCAP's argument has not been preserved for appeal.

Moreover, the Authority's finding that patients will continue to experience serious problems in obtaining care of the type proposed in the absence of the proposed project is not clearly wrong. Again, the 2023 PC Standards' need methodology shows a substantial unmet need in each of the Service Area Counties, particularly Putnam County, in which there are approximately 286 residents that are qualified for PC Services and yet are not receiving them.

Contrary to PCAP's assertions, Mr. Adkins never testified that "he was unaware of any unmet need." *See* PCAP's Brief, p. 13. He merely said that he was not aware of a waitlist. (D.R. 1784:23-24). That does not mean that there is no unmet need. BMS simply does not maintain a wait list for PC Services like it does for waiver program services. BMS maintains waitlists for waiver program services because Medicaid limits the number of individuals that can receive these services to contain costs. Conversely, PC Services are available through West Virginia's Regular State Plan Medicaid program and are an entitlement. This means that meeting the state's Medicaid eligibility requirements guarantees one that Medicaid will pay for them to receive this type of assistance; there is never a waiting list for program participation. (*See* D.R. 1038 ("Unlike the state's Waiver programs, there is no slot system or cap on the number of people who can receive Medicaid Personal Care services. Therefore, there is no limit to the number of people who can be added to the program, as long as they meet the eligibility criteria.")). That is why BMS' Program Manager, Teresa McDonough, said that there "never has been [n]or ever will be a 'wait list' for the Personal Care Services Program." (D.R. 887). PCAP has improperly concluded that, because there is no wait list for PC Services, there is no unmet need for these services.

In fact, Mr. Adkins testified that the Authority has "continually" received calls inquiring about obtaining PC Services for loved ones. (D.R. 1236, 44:4-13). And, at the September 29, 2022, task force meeting Mr. Adkins commented on the prevailing need for PC Services throughout West Virginia. (D.R. 2044, 30:8-13). PCAP has grossly mischaracterized Mr. Adkins' testimony.

In sum, PCAP does not and cannot dispute that Southern has established an unmet need pursuant to the PC Standards' need methodology. While PCAP may believe that the PC Standards' need methodology is flawed, it is the methodology prescribed by law, and is therefore both necessary and sufficient to establish need.

IV. THE AUTHORITY'S FINDING THAT THE PROJECT WOULD NOT HAVE A NEGATIVE EFFECT ON THE COMMUNITY BY SIGNIFICANTLY LIMITING THE AVAILABILITY AND VIABILITY OF OTHER SERVICES OR PROVIDERS WAS NOT CLEARLY WRONG.

i. PCAP Has Failed To Provide Any Evidence That Granting This CON would Negatively Affect PCAP's Services By Taking Clients And Employees Away From PCAP.

PCAP asserts that, if the Project is approved, it will "negatively affect [PCAP's] services by taking clients and employees away from [PCAP]." PCAP's Brief, p. 23. Again, the CON law is intended to protect consumers, not providers. It does not require an applicant to demonstrate that they will have no impact on existing providers. *See* W. Va. Code §16-2D-12(b)(2). Such a demonstration would be practically impossible. The proper inquiry is whether the Project will "negatively impact the ***community*** by ***significantly*** limiting the ***availability*** and ***viability***" of other providers' PC Services. PC Standards, Section III (emphasis added).

PCAP's claim that the Project "would negatively affect [PCAP's] services by taking clients and employees" misses the mark. PCAP's Brief, p. 23. The key is whether consumers will be able to access the PC Services they need, not whether PCAP will be able to maintain its market share. In other words, increased competition for clients and employees does not, in itself, suggest that the

Project will significantly limit the availability or viability of PCAP's services because, as the Authority explained, "there is simply no reason to believe that Southern's Project will so impact PCAP's profitability as to substantially limit PCAP's ability to offer these services given PCAP's financial vitality, the minimal overlap between the Service Area and PCAP's current client base, and the unmet need for PC Services in the proposed Service Area" (D.R. 2560).

Additionally, PCAP's claims that allowing Southern into the Service Area will cause PCAP to lose clients and employees are not supported by the record. PCAP's Executive Director, Ms. Sutherland, did not testify about any concern over losing employees. Instead, PCAP argues that "[i]t is an inherent principle that additional competition in an area of business will result in the competitors fighting over employees in the workforce, clients, and resources." PCAP Brief, p. 23. This cannot be a legitimate objection. If that were the case, existing service area providers would effectively be granted a veto power over pending applications because allowing additional providers into their service area would inevitably raise the possibility of increased competition. As this Court has explained, affected parties do not have '"veto' power over a proposed project and related CON application." *Stonewall Jackson Mem'l Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc.*, No. 22-ICA-147, 2023 WL 4197305, at *5 (W. Va. Ct. App. June 27, 2023).

Additionally, PCAP's claim that Southern's objection to the production of "competitively sensitive and proprietary information" somehow proves that the Project will negatively affect PCAP's services by taking clients and employees away from PCAP is nonsense. Southern merely objected to the production of proprietary information. A "lawyer's objections are not evidence." *United States v. Barsoum*, 763 F.3d 1321, 1340 (11th Cir. 2014).

Moreover, Southern already has direct care staff that it can use to serve Putnam County.[12]

[12] Southern currently offers Medicaid aged & disabled waiver services, Medicaid traumatic brain injury services, Veterans Choice Program services, Workers' Compensation in-home service, and Private Duty

While Southern does not provide PC Services in Putnam County, it does provide similar in-home services in Putnam County and is already in competition with PCAP for direct care staff. Nonetheless, PCAP's Executive Director, Ms. Sutherland, testified that PCAP has never turned down a referral for PC Services due to a lack of staffing. (D.R. 2130, 89:18-19 ("I'm not going to say we've never turned down a case, but it has not been for lack of staffing.")). Accordingly, there is no reason to believe that allowing Southern to provide PC Services in the Service Area will prevent PCAP from being able to staff its services.

In sum, the record provides sufficient support for the Authority's finding that the Project will not significantly limit the accessibility or viability of PCAP's services. The Authority's Decision is not clearly wrong, and the Authority properly rejected PCAP's attempts to rewrite the PC Standards in a way that would prohibit any competition whatsoever.

ii. Other Services Does Not Include Non-PC Services.

As the Authority explained, "the PC Standards' reference to 'other services' does not include the nutrition and other non-PC Services offered by PCAP because the Authority does not regulate these services." (D.R. 2558). These services are not "health services" as defined by the CON law. *See* W. Va. Code § 16-2D-2(18) ("'Health services' means clinically related preventive, diagnostic, treatment or rehabilitative services"). The Authority's construction of the PC Standards is rational, and therefore must be upheld. *See Amedisys*, 245 W. Va. at 398, 859 S.E.2d at 344; *see also Princeton*, 174 W. Va. at 564, 328 S.E.2d at 171.

The purpose of the CON law is to ensure "[t]hat the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the

---

care in a number of counties throughout West Virginia, including Putnam County. (D.R. 0035.) "By using existing home care staff and offices, adding personal care services to its current array of in-home services, [Southern's] proposal provides for efficient and cost effective delivery of services." (D.R. 0049). Southern intends to hire and train additional staff as needed to meet demand in the Service Area.

effective development of necessary and adequate means of providing for the health services of the people of this state", "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. Because PCAP's nutrition and transportation programs are not "health services" under W. Va. Code § 16-2D-2(18), they are not within the Authority's jurisdiction. Indeed, "[a]dministrative agencies and their executive officers are creatures of statute" and "[t]heir power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim." *Reed v. Thompson*, 235 W. Va. 211, 214, 772 S.E.2d 617, 620 (2015) (quoting Syl. Pt. 2, *Mountaineer Disposal Serv., Inc. v. Dyer,* 156 W.Va. 766, 197 S.E.2d 111 (1973)).

While PCAP argues that Mr. Adkins testified that "other services" includes PCAP's transportation and nutrition services, PCAP's Brief pp. 24-25, the Authority found that "Mr. Adkins simply repeated the language of the Standards without explaining which services it is referring to." (D.R. 2559, n.7). Mr. Adkins never said that "other services" includes nutrition and transportation services. (*See* D.R. 1257). Most importantly, Mr. Adkins testified that he "has no power to make a decision and approve it without --- the Board has to be, the Board is the ultimate Authority." (D.R. 1257, 129:11-13). Mr. Adkins is not, as PCAP argues, "the proper person to interpret these standards." PCAP's Brief, p. 25. That is the Board's responsibility.

iii. Even If PCAP's Transportation and Nutrition Services Were Relevant To The Application, The Authority's Finding That The Project Would Not Significantly Limit PCAP's Ability to Provide These Services Is Not Clearly Wrong.

PCAP's own financial statements belie its contention that it is dependent upon revenue generated by PC Services to fund its transportation and nutrition services. *See* PCAP's Brief, p. 23. PCAP is holding millions of dollars in cash and has earned millions more year over year, despite any re-investments it has made in its nutrition program and other services. For example,

despite spending $300,000 to $500,000 a year on "Food and Disposables" and $50,000 to $81,000 on "Transportation" in financial years 2020 through 2022, PCAP netted a surplus of more than $1,300,000 annually. (D.R.0929 -D.R. 0931, D.R. 0958-D.R. 0961, D.R. 0989-D.R. 0991). Accordingly, PCAP has the financial resources to continue to supplement the grant funds it receives for its transportation and nutrition services for many years to come.

Additionally, the available evidence shows that the Project will not significantly impact PCAP's revenues. A majority of PCAP's PC Services clients, 194 out of 227, do not even reside in the proposed Service Area. (D.R. 1561-D.R. 1563). Of the 14.5% of PCAP's clients residing in the Service Area, most (22) reside in Putnam County. (D.R. 1561-D.R. 1563). To put those numbers in perspective, the Authority estimates that 986 Service Area residents, including 286 Putnam County residents, that are eligible for PC Services are not receiving them. (D.R. 0062).

PCAP cannot meet the unmet need in the Service Area. Over 80% of PCAP's PC Services clients are served by its subcontractor, Loved Ones In Home Care, LLC. (D.R. 1561-D.R. 1563). PCAP, therefore, does not even have the manpower or resources to service the 227 clients it currently has, most (>85%) of which do not even reside in the proposed Service Area. (*See* D.R. 1561-D.R. 1563). And, the imbalance between PCAP's head count and unmet need is particularly pronounced in Putnam County, a county with an unmet need of 286 in which PCAP and its subcontractor serve 22 clients. Comparing the unmet need to PCAP's headcounts dispels any notion that PCAP is capable of meeting unmet need in the Service Area or that opening the Service Area up to Southern will significantly limit the availability or viability of PCAP's services. At the very least, the Authority's finding that Southern's Project would not significantly affect PCAP's service offerings is not clearly wrong.

V. PCAP'S CLAIM THAT THE AUTHORITY WAS BIASED LACKS ANY MERIT.

PCAP claims that the Authority's hearing examiner,[13] Heather Connolly, was biased against it. PCAP's Brief, p. 25. As explained in the subsections below, PCAP's claim of bias fails for two independent reasons. First, PCAP failed to raise this issue below and has therefore waived its right to appeal it. Second, Ms. Connolly is entitled to a presumption of honesty and integrity and PCAP cannot establish that Ms. Connolly was biased.

i. PCAP Has Waived Any Claim That The Hearing Examiner Was Biased Because It Did Not Raise This Issue Before The Authority.

"Appellate courts will not decide nonjurisdictional questions raised for the first time on appeal." *Hecker*, No. 22-ICA-15, 2023 WL 152889, at *3.[14] A failure to timely raise the issue below will result in waiver of the matter on appeal. *See e.g., Davisson*, 2024 WL 3251598, at *4. *In re R.T.*, No. 23-ICA-115, 2023 WL 6290594, at *3 (W. Va. Ct. App. Sept. 26, 2023); *Deras v. Prime Capitol Properties*, No. 20-0946, 2021 WL 4936971, at *3 (W. Va. Oct. 13, 2021); *State v. J.S.*, 233 W. Va. 198, 207, 757 S.E.2d 622, 631 (2014).

Here, PCAP never moved to disqualify or recuse Ms. Connolly before the Authority and, therefore, has waived any challenge that Ms. Connolly was biased. Syl. Pt. 1, *State v. Simmons*, 117 W. Va. 326, 185 S.E. 417, 417 (1936) ("The question of the alleged disqualification of a justice of the peace because of interest cannot be raised for the first time on appeal, where the

[13] "Any hearing may be conducted by members of the board or by a hearing examiner appointed by the board for such purpose." W. Va. Code 16-29B-12(c). "By its express terms, West Virginia Code § 29A–5–1(d) (1993) permits an administrative agency to designate any member within the agency to preside as a hearing examiner . . . . No inherent conflict of interest is created simply because such agency member serves as a hearing examiner." Syl, Pt. 2, in part, *Varney v. Hechler*, 189 W. Va. 655, 657, 434 S.E.2d 15, 17 (1993).

[14] *See also, e.g.,* Syl. Pt. 7, *In re Michael Ray T.*, 206 W. Va. 434, 436, 525 S.E.2d 315, 317 (1999); Syl. Pt. 3, *Voelker v. Frederick Business Properties Co.,* 195 W.Va. 246, 465 S.E.2d 246 (1995); Syl. Pt. 1, *Shackleford v. Catlett,* 161 W.Va. 568, 244 S.E.2d 327 (1978); Syl. Pt. 1, *Mowery v. Hitt,* 155 W.Va. 103, 181 S.E.2d 334 (1971).

disqualification, if arising under special circumstances, was known, or, if arising under general law, was presumed to be known."); Syl. Pt. 2, *McCormick v. McCormick*, 118 W. Va. 568, 191 S.E. 207, 208 (1937) ("The legal competency of a commissioner may not be raised by the exceptor to an adverse report, who knowingly permitted the reference to proceed and voluntarily took the chance of success."). Indeed, PCAP fails to cite to where this argument can be found in the record. *Davisson*, 2024 WL 3251598, at *4 ("[W]e find Mr. Davisson has waived this issue on appeal. Aside from Mr. Davisson citing no authority to support his position, the Board's Decision does not address this argument and Mr. Davisson fails to cite to any portion of the record to establish this argument was made below to preserve it for appeal.").

"One is not entitled to wait and raise the issue [of recusal] for the first time on appeal, after having an opportunity to determine whether or not [they are] satisfied with the presiding officer's decision." A. Neely, *Administrative Law in West Virginia* § 5.28 (1982). Rather, "[i]f a party is convinced that the presiding officer is incapable of conducting a hearing impartially, it is necessary that a motion to recuse be addressed to the presiding officer as soon as the party becomes aware of the facts in support of his motion." *Id.*[15] Generally, "[a] request for disqualification based on a claim of bias or prejudgment must be first presented to the agency." 7 West's Fed. Admin. Prac. § 8304; *see also United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) ("orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction in order to raise issues reviewable by

[15] *See also, e.g., New River Grocery Co. v. Neely*, 106 W. Va. 96, 144 S.E. 874 (1928) ("Objection to a commissioner because of disqualifying interest, of which the objector has notice, must be promptly made."); *Capitol Transp., Inc. v. United States*, 612 F.2d 1312, 1325 (1st Cir. 1979) ("Contentions of bias should be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist."); *Satterfield v. Edenton-Chowan Bd. of Ed.*, 530 F.2d 567, 574 (4th Cir. 1975) ("One must raise the disqualification of the trier, whether he be a judge, an administrator, or an arbitrator, at the earliest moment after knowledge of the facts.").

the courts."). As the D.C. Circuit has explained:

> The general rule governing disqualification, normally applicable to the federal judiciary and administrative agencies alike, requires that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. It will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process. The APA-mandated procedures afford every party ample opportunity to enforce and preserve its due process rights. Under the present circumstances, however, petitioner must be deemed to have waived his claim.

Marcus v. Dir., Off. of Workers' Comp. Programs, U. S. Dep't of Lab., 548 F.2d 1044, 1051 (D.C. Cir. 1976); *id*. at 1050 ("when a party voices its misgivings in tardy or dilatory fashion, not only may time and effort be wasted in the event that disqualification is ultimately required, but the good faith of the claimant will quite naturally be placed in some doubt.").

PCAP complains about events that occurred at hearings on October 4th[16] and 13th, 2023. Accordingly, PCAP should have been aware of any potential bias by October 13th. Indeed, PCAP protests that "Ms. Connolly was the attorney that argued against [PCAP's] circuit court filing challenging the legitimacy of the Health Care Standards" in September, 2023, and that "[i]t was clear from the beginning that no matter what evidence [PCAP] proffered throughout this process, the decision was already made to grant [Southern's] application." PCAP's Brief, pp. 8, 25. Nonetheless, PCAP never moved to disqualify Ms. Connolly.

PCAP's circuit court action was dismissed on September 19, 2023.[17] If PCAP believed that

[16] The October 4, 2023 hearing was held in a separate CON matter, *In re: Elder Aide Services LLC d/b/a Right at Home*, CON File # 23-2/3/4-12697-PC. As PCAP explains, "[d]ue to the similarity of issues in CON File # 23-2/3/4-12697-PC and this CON application, the parties agreed to use the prior testimony of Jennifer Sutherland, Executive Director for Putnam County Aging Program, in this matter to avoid unnecessary duplication." PCAP's Brief, p. 2.

[17] *See Putnam County Aging Program, Inc v. W. Va. Dep't of Health & Human Servs*., No. 23-C-775 (W. Va. Cir. Ct. Sept. 19, 2023).

Ms. Connolly's representation of the Authority in that matter was grounds for her disqualification (it is not), then PCAP should have moved to disqualify Ms. Connolly before the October 13, 2023, hearing where Timothy Adkins testified. Moreover, PCAP has had numerous opportunities to raise the issue of Ms. Connolly's alleged bias since the October 13, 2023, hearing and has failed to do so. For example, PCAP could have raised the issue of Ms. Connolly's alleged bias at the prehearing conference on October 19, 2023, the evidentiary hearing on October 25, 2023, in its response brief filed on January 11, 2024, or in its proposed findings of fact and conclusions of law filed on January 25, 2024. Because PCAP failed to raise this issue before the Authority, it has been waived.

ii. PCAP Has Failed To Establish Bias.

PCAP's claim that Ms. Connolly was biased is without merit. It appears to be primarily based on certain comments/evidentiary rulings[18] that she made with regard to the testimony of Jennifer Sutherland and Tim Adkins. However, an "ALJ's trial rulings do not normally constitute grounds for recusal because such rulings can be corrected by reversal on appeal" and "[t]he fact that an ALJ's rulings may be wrong does not establish bias." Modjeska, Administrative Law Practice and Procedure, § 4:16; *see also, e.g.*, *N.L.R.B. v. Honaker Mills, Div. of Top Form Mills, Inc*., 789 F.2d 262, 266 (4th Cir. 1986) ("Even assuming that these rulings were incorrect, Sanmark may not establish a sufficient case of bias merely by questioning the correctness of an ALJ's evidentiary rulings. . . . Rather, Sanmark must make a showing of bias stemming from sources outside the decisional process."); *Hedison Mfg. Co. v. N.L.R.B*., 643 F.2d 32, 35 (1st Cir. 1981)

[18] PCAP further asserts that "[t]he severity of [Ms. Connolly's] misconduct comes more from the constant little acts throughout every interaction" and "implores this Court to read the transcripts and pay close attention to Ms. Connolly's input." PCAP's Brief, p. 28. As our Supreme Court of Appeals has stated, "[j]udges are not like pigs, hunting for truffles buried in briefs . . . and the same observation may be made with respect to appendix records." *Multiplex, Inc. v. Town of Clay*, 231 W. Va. 728, 731 n.1, 749 S.E.2d 621, 624 n.1 (2013).

("Its charge that his rulings are 'evidence of a state of mind which had gone far beyond dislike of a party and had become an advocate of the Union' is not only baseless; it is offensive. . . . Even had the ALJ's rulings in fact been erroneous, a judicial ruling made in the ordinary course is not to be translated into bias by disappointed counsel."); *Marcus*, 548 F.2d at 1051 ("The mere fact that a decision was reached contrary to a particular party's interest cannot justify a claim of bias, no matter how tenaciously the loser gropes for ways to reverse his misfortune.").

PCAP's good faith in raising this issue is further called into question because it has not independently appealed the actual evidentiary rulings made by the hearing examiner.[19] The first of Ms. Connolly's comments it complains of was not even an evidentiary ruling. *See* PCAP's Brief, p. 26 (citing D.R. 2136, 111:13-16). Ms. Connolly simply stated that "[w]e are going far afield. We're going far afield" after Ms. Sutherland testified concerning PCAP's advertising budget. (D.R. 2136, 111:13-14). PCAP's counsel then immediately said "we're done with the other services." (D.R. 2136, 111:15-16). While PCAP asserts that Ms. Connolly ruled that this topic was irrelevant, it does not identify where Ms. Connolly made that ruling. *See* PCAP's Brief, p. 26. In fact, PCAP put on extensive evidence through Ms. Sutherland concerning its programs and finances. (*See* D.R. 2128-D.R. 2138).

PCAP next claims that it was unfair for Ms. Connolly to permit opposing counsel, Robert Coffield, to cross-examine Ms. Sutherland concerning PCAP's finances. PCAP's Brief, p. 26 (citing D.R. 2143, 139:9-15). Specifically, Mr. Coffield was asking Ms. Sutherland to verify PCAP's financial statements, which show that PCAP was holding $3.6 million in cash by the end

[19] Certain rulings PCAP takes issue with were made in other cases, such as those relating to granting summary judgment and not permitting questions about another applicant being sued by DHHR for Medicaid fraud. PCAP's Brief, pp. 26-27. These rulings are not in the record and therefore should not be considered. *See* W. Va. Code § 29A-5-4(f). Moreover, as explained above, an ALJ's trial rulings do not constitute grounds for recusal, even if erroneous.

of financial year 2019, growing to $4,151,909 by September 30th, 2022. (D.R. 2143 139:3-140:7). PCAP's cash holdings are relevant because PCAP contends that it is dependent on revenue generated from its PC Services to fund other programs and services. *See* PCAP's Brief, pp. 23-25. The fact that PCAP has millions of dollars in cash reserves which can be used to fund these programs for many years to come therefore goes to the heart of PCAP's argument. In short, PCAP opened the door by having Ms. Sutherland testify about PCAP's finances and arguing that PCAP needs the revenue generated by its PC Services to subsidize other programs. It was both necessary and appropriate for Ms. Connolly to allow cross-examination on this subject. *See* W. Va. Code § 29A-5-2(c) ("[e]very party [in a contested case] shall have the right of cross-examination of witnesses who testify[.]"); *McKenzie v. Carroll Int'l Corp.*, 216 W. Va. 686, 693, 610 S.E.2d 341, 348 (2004) ("'[S]auce for the goose' is also 'sauce for the gander.'") (quoting *In re Burks*, 206 W. Va. 429, 432 n.1, 525 S.E.2d 310, 313 n.1 (1999)).

PCAP further complains because Ms. Connolly asked clarifying questions about Ms. Sutherland's testimony. PCAP's Brief, p. 26 (citing D.R. 2136-2137). W.Va. Code § 16-2D-13(g)(3) provides that the Authority shall conduct CON hearings "in accordance with administrative hearing requirements in section twelve article twenty-nine b of this chapter and article five, chapter twenty-nine-a of this code." Pursuant to W. Va. Code § 29A-5-2(a), "[t]he rules of evidence as applied in civil cases in the circuit courts of this state shall be followed." And, under West Virginia Rule of Evidence 614(b), "[t]he court may examine a witness regardless of who calls the witness." *See also* 1 Palmer, Jr., *Handbook on Evidence for West Virginia Lawyers,* p. 1026 (7th ed. 2021) ("Authorities have characterized this power to ask questions or call witnesses as a very broad one which courts should not hesitate to exercise."). There was nothing improper about Ms. Connolly asking a few questions of Ms. Sutherland. *See id.*, pp. 1026-1027

("Obviously, calling a witness or interrogation of a witness by the court alone does not make a judge biased.").

PCAP also claims that Ms. Connolly independently decided that Mr. Adkins' testimony would have no bearing on the Authority's decision on the application. PCAP's Brief, pp. 27-28. This is not true. When asked by Southern's counsel if Mr. Adkins' testimony would be considered by the Authority in making its decision, Ms. Connolly quickly clarified that it would be:

> ATTORNEY CRISLIP: Okay.
> And then, Ms. Hearing Examiner, one other point of clarification. You --- you noted that Mr. Adkins was here to vouch the record. But I'd like to clarify whether or not you're going to make findings of fact and conclusions of law on this testimony today that Mr. Adkins is going to provide.
>
> HEARING EXAMINER: We are.
>
> ATTORNEY CRISLIP: Okay.
>
> HEARING EXAMINER: In --- in as much as we need that information to make it an appealable issue, I think that that's something that needs to have happen and give both sides the ability to weigh in, in writing.

(D.R. 1750, 9:4-15; *see also* D.R. 1756-D.R. 1758, 15:20-16:14).

PCAP further complains because Ms. Connolly prevented it from asking Mr. Adkins certain hypothetical questions about how a subcontractor providing PC Services could use its existing head counts to establish need in a CON application. PCAP's Brief, p. 28. That is not what happened here. Southern does not provide PC Services in the proposed Service Area as a subcontractor and is not using its existing head counts to establish need. This issue was not relevant and it was not an abuse of discretion for Ms. Connolly to prohibit PCAP from asking Mr. Adkins hypothetical questions about it. And, even if it were, evidentiary rulings cannot establish bias.

PCAP also argues that Ms. Connolly determined that '"other services' do not encompass the meals and transportation services discussed above, despite Mr. Adkins later testifying it did."

PCAP's Brief, p. 27. PCAP does not say where in the record Ms. Connolly made this ruling. The Authority's Board, not Ms. Connolly, made the final Decision on the CON application. (*See* D.R. 2573); *see also* W. Va. Code § 16-29B-12(e) ("After any hearing, . . . the board shall render a decision in writing."); W.Va. Code § 16-2D-15(a) ("The authority shall render a final decision . . ."). The Board determined that Mr. Adkins' testimony as to what "other services" means was unclear, and that the Board, not Mr. Adkins, is ultimately responsible for interpreting the PC Standards. (D.R. 2558-D.R. 2559, n.7). Ms. Connolly's statements did not harm PCAP, and cannot undermine the Authority's Decision.

PCAP baldly asserts that the Authority's "bias throughout the administrative proceedings is clear evidence that the relevant facts and law were not taken into consideration." PCAP's Brief, p. 29. Not so. PCAP's claim is belied by the careful and detailed 42-page Decision issued by the Authority. (D.R. 2531-D.R.2573). The Decision deals comprehensively with all the issues in the case, including those raised by PCAP's opposition. As the D.C. Circuit Court of Appeals has noted, "[a] party's claim of bias must not be made lightly" and "[s]uch a charge, unfairly made, not only impugns without warrant the integrity of the government official publicly entrusted with responsibility for properly deciding a given dispute, but it also unnecessarily tarnishes our beneficent traditions of legal due process." *Marcus*, 548 F.2d at 1050.

"Administrative decisionmakers, like judicial ones, are entitled to a 'presumption of honesty and integrity,' . . . and absent a showing of bias stemming from an 'extrajudicial source,' they are not constitutionally precluded from making the determination that they are directed to make by their employer." *Marfork Coal Co. v. Callaghan*, 215 W. Va. 735, 743, 601 S.E.2d 55, 63 (2004) (quoting *Morris v. City of Danville, Va.*, 744 F.2d 1041, 1044 (4th Cir. 1984)); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) ("The alleged bias and prejudice to be

disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."); *Bowens v. N.C. Dep't of Hum. Res*., 710 F.2d 1015, 1020 (4th Cir. 1983) ("To be disqualifying, personal bias must stem from a source other than knowledge a decision maker acquires from participating in a case.").

Here, PCAP has failed to submit any evidence of an extrajudicial source for Ms. Connolly's alleged bias, and she is therefore entitled to a presumption of honesty and integrity. Moreover, PCAP had numerous opportunities to raise the issue of Ms. Connolly's alleged bias before the Authority, but failed to do so. PCAP's delay in raising the issue of bias until appeal "quite naturally" places its "good faith" in "some doubt." *See Marcus*, 548 F.2d at 1050. PCAP's good faith is further brought into question by its contentions that the remedy for this alleged bias is to "strip [the Authority] of its discretion in this matter." PCAP's Brief, p. 30. PCAP does not explain what this might mean or cite any legal support for it. In fact, there is no support for such a proposition. Affording parties the opportunity to gain a more favorable standard of review by raising the issue of bias on appeal would invite unfounded *ad hominem* attacks on administrative and judicial officers and frustrate the orderly administration of justice.

VI. THE 2023 PC STANDARDS' NEED METHODOLOGY IS NOT ARBITRARY OR CAPRICIOUS, AND THE COURT DOES NOT HAVE JURISDICTION TO STRIKE THE STANDARDS.

In addition to reversing the Authority's Decision, PCAP asks that the Court "strike the 2023 Need Methodology Standards promulgated by the WVHCA as statutorily invalid." PCAP's Brief, p. 30. As explained above, the 2023 PC Standards were properly promulgated and are not arbitrary or capricious. *See* Sections II.i-iv, *supra*. More importantly, this Court does not have jurisdiction to strike the 2023 PC Standards.

PCAP itself acknowledged as much, stating that PCAP "does not believe it to be proper for this Court to strike down the validity of the WVHCA standards at issue in this proceeding."

PCAP's Brief, p. 29. Nonetheless, PCAP explains that it has asked the Court to strike the PC Standards because, in a separate action it brought challenging the 2023 PC Standards in the Circuit Court of Kanawha County, the Authority argued that PCAP had not exhausted its administrative remedies. PCAP's Brief, pp. 29-30. In that case, the circuit court conducted a hearing on September 13, 2023, and Judge Ballard subsequently dismissed the case because PCAP failed to comply with the notice requirements of W. Va. Code § 55-17-1, not due to PCAP's alleged failure to exhaust administrative remedies. *See Putnam County Aging Program, Inc v. W. Va. Dep't of Health & Human Servs*., No. 23-C-775 (W. Va. Cir. Ct. Sept. 19, 2023).

At any rate, the proceedings before the Circuit Court are not part of the record on appeal and have no impact on the type of relief available to PCAP in this case. '"[S]ubject matter jurisdiction cannot be conferred by consent or waiver[.]"' *SWN Prod. Co., LLC v. City of Weirton Bd. of Zoning Appeals*, No. 23-ICA-405, 2024 WL 1730044, at *3 (W. Va. Ct. App. Apr. 22, 2024) (quoting *Hansbarger v. Cook*, 177 W. Va. 152, 157, 351 S.E.2d 65, 70 (1986)). The scope of the Court's jurisdiction is circumscribed by West Virginia Code § 51-11-4, which states that "[t]he Intermediate Court of Appeals has no original jurisdiction." And, while the Court has jurisdiction to hear "[a]n appeal of a final decision in a certificate of need review", it does not have jurisdiction to invalidate the CON standards. *See* W. Va. Code § 16-2D-16a(a)(2). An appeal of a final decision in a CON review is governed by W. Va. Code § 29A-5-4(g), which provides, in pertinent part, that "[t]he [C]ourt may affirm the order or decision of the agency or remand the case for further proceedings" and "shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced . . . ."

Invalidating the Standards would be a form of extraordinary relief and, "just as W. Va. Code § 29A–5–4 does not authorize relief by way of an extraordinary writ, neither does it authorize

a circuit court to *sua sponte* order what is essentially extraordinary relief in its final order disposing of an administrative appeal." *State ex rel. Cicchirillo v. Alsop*, 218 W. Va. 674, 679, 629 S.E.2d 733, 738 (2006). Moreover, unlike a circuit court, this Court does not even have jurisdiction to hear matters involving extraordinary remedies such as mandamus. *See* W.Va. Code 51-11-4(d) ("The Intermediate Court of Appeals does not have appellate jurisdiction over . . . (10) Judgments or final orders issued in proceedings where the relief sought is one or more of the following extraordinary remedies: writ of prohibition, writ of mandamus, writ of quo warranto, writ of certiorari . . ."); *see also SWN Prod. Co., LLC v*, No. 23-ICA-405, 2024 WL 1730044, at *1.

The Court cannot order the Authority to stop using the 2023 PC Standards or to adopt new standards. *See* Syl. Pt. 4, *Alsop*, 218 W. Va. at 675, 629 S.E.2d at 734 ("In a circuit court's final disposition of an administrative appeal pursuant to W. Va. Code § 29A–5–4 (1998) of the Administrative Procedures Act, the circuit court is not authorized to order a State administrative agency to cease the use of certain procedures and to direct the State agency to draft and implement new procedures[.]"). Rather, "a circuit court's disposition of an administrative appeal is limited to affirming, remanding, reversing, vacating, or modifying the agency's disposition of a contested case." *Id*. at 678-79; 629 S.E.2d at 737–38.

Since the establishment of this Court in 2022, it has assumed responsibility for administrative appeals previously heard by the Office of Judges and reviewed by the Circuit Court of Kanawha County. *See* W. Va. Code § 16-2D-16. Thus, *Alsop* applies here.

CONCLUSION

Pursuant to the need methodology prescribed by the 2023 PC Standards, the Service Area lacks adequate access to PC Services. The PC Standards are the law. They were validly adopted and are not arbitrary or capricious. There is no reason that PCAP will be seriously affected by the Project in light of this substantial unmet need in the Service Area, and Southern's trusted

experience in personal care makes the proposed Project an ideal solution to the problems that Service Area residents currently endure. Accordingly, Southern respectfully requests that the Court affirm the Authority's Decision granting Southern's Certificate of Need application for the identified Service Area.

Respectfully submitted,

SOUTHERN HOME CARE SERVICES, INC.
By Counsel

/s/ Alaina N. Crislip
Alaina N. Crislip (WVSB #9525)
Colton J. Koontz (WVSB #13845)
JACKSON KELLY PLLC
500 Lee St., E., Suite 1600
Post Office Box 553
Charleston, WV 25322
(304) 340-1372

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Putnam County Aging Program, Inc.,
Affected Party Below, Petitioner,

vs.) No. 24-ICA-123

Southern Home Care Services, Inc.,
d/b/a All Ways Caring HomeCare
Applicant Below, Respondent

and

West Virginia Health Care Authority,
Respondent

CERTIFICATE OF SERVICE

I, Alaina N. Crislip, do hereby certify that I have served the foregoing ***Brief of Respondent Southern Home Care, Inc.*** on this 1st day of August, 2024, via the Court's electronic filing system, which caused a true and exact copy of the same to be served upon counsel of record via File & Serve Xpress.

/s/ Alaina N. Crislip
ALAINA N. CRISLIP (WVSB #9525)