IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 24-ICA-97

PUTNAM COUNTY AGING PROGRAM, INC.
and FAYETTE COUNTY SENIOR PROGRAMS,

***Petitioners*,**

v.

A SPECIAL TOUCH IN HOME CARE, LLC,

Respondent,

and

WEST VIRGINIA HEALTH CARE AUTHORITY,

Respondent.

BRIEF OF RESPONDENT
WEST VIRGINIA HEALTH CARE AUTHORITY

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INTRODUCTION

The Legislature tasked West Virginia's Health Care Authority with overseeing the standards to project healthcare-service needs statewide—both present and future. In fall 2022, the Authority took up that task by amending the standards for in-home personal services that assist West Virginia's elderly residents with daily life tasks. By summer's end, the Authority concluded that additional providers could address service gaps in 51 of West Virginia's 55 counties.

A Special Touch In Home Care, LLC, wants to help fill that gap by expanding its current Medicaid services to include in-home personal services. So it applied for a certificate of need to begin offering those services in counties where the Authority's Need Methodology showed need. And—consistent with that methodology and a detailed evidentiary record further confirming that Special Touch could add real value to the healthcare market—the Authority said yes.

The Authority's decision "demonstrates consideration of each of the parties' positions [and] the evidence, and sufficiently sets forth the reasoning and analysis underpinning the Authority's conclusions." *Minnie Hamilton Health Care Ctr., Inc. v. Hosp. Dev. Co.*, 2023 WL 2424614, at *5 (W. Va. Ct. App. Mar. 9, 2023). That's enough for this Court to affirm. The analysis's fact-bound nature means that this Court's review is particularly deferential. So it's not enough that "Petitioners have actually proffered evidence" going the other way. Pet'rs' Br. 14. They must show that the Authority's findings were clearly wrong and that it acted beyond its considerable discretionary bounds when measured against the entire record. Disagreeing with the Authority's Need Methodology showing unmet need in the counties Special Touch will serve (and picking at evidence beyond the methodology itself) is inadequate. The same goes for nonspecific fears that competition might cost Petitioners clients or revenues. And critiquing the hearing officer's demeanor—who didn't make the decision on appeal—neither invalidates the Authority's

order nor changes the standard of review. The Court should affirm and let Special Touch get to work.

ASSIGNMENTS OF ERROR

1. Was the Authority clearly wrong in finding that Special Touch's new services will meet unmet need in the counties the certificate of need covers? And did the Authority appropriately rely on its statutorily authorized and Governor-approved Health Care Need Methodology as part of this assessment—or should the Court strike down that methodology instead? *See* Pet'rs' Br. 1 (first, second, and fifth assignments of error).

2. Was the Authority clearly wrong in finding that Special Touch's new services will not negatively affect the communities the certificate of need covers? *See* Pet'rs' Br. 1 (third assignment of error).

3. Does the hearing examiner's alleged bias change the standard of review for the Authority's separate decision to grant a certificate of need? *See* Pet'rs' Br. 1 (fourth assignment of error).

STATEMENT OF THE CASE

1. West Virginia's certificate-of-need laws ensure that new entrants in the healthcare markets "contain or reduce increases in the cost of delivering health services" and "avoid unnecessary duplication of services." W. VA. CODE § 16-2D-1(1)-(2). The Legislature did this by requiring pre-approval before "certain health services … may be offered to the public in the first instance or expanded into a new area." *Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.*, 245 W. Va. 398, 408-09, 859 S.E.2d 341, 351-52 (2021). And the Legislature tasked the West Virginia Health Care Authority with administering that program. W. VA. CODE § 16-2D-3.

The Authority may issue a certificate of need only if the proposed new service is "[f]ound to be needed" and "[c]onsistent with the state health plan, unless there are emergency circumstances that pose a threat to public health." W. VA. CODE § 16-2D-12(a)(1)-(2). While the Authority must also make several other findings before granting a certificate, its review "may vary according to the purpose for which a particular review is being conducted." *Id.* § 16-2D-12(g).

Part of the Authority's role includes reviewing the state health plan applicants follow. W. VA. CODE § 16-2D-3(a)(2). That plan includes various standards that the Authority develops or revises, and then the Governor approves. *Amedisys*, 245 W. Va. at 408-09, 859 S.E.2d at 351-52. The standards, in turn, provide "different criteria" that "[d]ifferent types of health services" must meet to quality for a certificate of need. *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *3. When changing the standards, the Authority must form a "task force[] to assist it in satisfying its review and reporting obligations." W. VA. CODE § 16-2D-6(c). It must also submit proposed changes to the State Register for "general public comment," and otherwise "coordinate the collection of information" to help inform its decisionmaking. *Id.* § 16-2D-6(a), (d). The Legislature ensured that the Authority could use diverse information when amending the standards, including standards of care and best practices, recommendations from patients and everyone in the healthcare sector, and the Authority's "own developed expertise in health planning." *Id.* § 16-2D-6(e).

The current standards for in-home personal care services took effect on April 27, 2023. D.R.625. These "services for Medicaid residents" "are available to assist an eligible member to perform activities of daily living" like mobility and personal hygiene. D.R.625. The Authority had held a task force meeting the prior September that was "open to representatives of consumers, businesses, providers, payers, and state agencies, as well as those interested in developing and

offering Medicaid personal care services." Op.15. After incorporating the task force's input, the Authority published its proposed rule for public comment in November 2022. Op.15. The Authority reviewed these comments before finalizing its proposal for the Governor's approval. Op.16.

The standards' core is its "Need Methodology," which requires applicants to "demonstrate with specificity" both "an unmet need for the proposed service" and that the service "will not have a negative effect on the community by significantly limiting the availability and viability of other services or providers." D.R.627. In assessing unmet need, the Need Methodology starts with the "average number of Medicaid residents per county for the most recent fiscal year," then multiplies that number by 3%—a multiplier "represent[ing] the projected number of Medicaid residents who are currently receiving or may be eligible to receive" in-home personal care services. D.R.627. Next, the Need Methodology subtracts the "average number of residents" in the county who in fact receive those services. D.R.627. The resulting number estimates how many residents might be in the market for in-home personal services but are not yet receiving them. In other words, this number reflects the county's unmet need. D.R.627-28; *see also id.* (explaining that the Authority subtracts another 25 if it approved a new provider "within the previous 12 months"). If the unmet need number is "25 or more then the County is considered open to additional providers." D.R.627.

A key change in the new standards was increasing the multiplier from 1.25% to 3%. The Authority knew that 1.25% was already too low when it started the revision process because it had decided not to increase the percentage to 2.5% several years prior in response to a reported Medicaid funding crisis. D.R.895. Beyond that, the West Virginia Bureau for Medical Services told the Authority it planned to remove subcontracting as an option in the in-home personal

services space—which meant meeting client needs going forward would very likely require approving more providers. *E.g.*, D.R.894, 897, 973.

When the Authority applied the Need Methodology for fiscal year 2023, it showed unmet need at or above the 25 threshold in each of the Service Area counties that Special Touch applied to provide services in. Op.16.

2. Special Touch is a Medicaid-certified provider with the Medicaid Aged and Disabled Waiver Program that "provides unskilled home care services to seniors and disabled individuals in West Virginia." Op.2. It currently provides services in Kanawha, Putnam, Cabell, Wayne, Fayette, and Boone County. Op.2. On June 12, 2023, it filed a certificate of need application proposing to provide Medicaid In-Home Personal Care services in Kanawha, Cabell, Fayette, Putnam, and Wayne County. Op.2-3; *see also* D.R.20-95.

Some existing providers, including Petitioners Putnam County Aging Program, Inc. and Fayette County Senior Programs, objected to the CON application and filed for affected party status to participate in the Authority's proceedings. Op.3. The parties then engaged in discovery, and the Authority set a hearing for Timothy Adkins, the Authority's Interim Director of the Certificate of Need Division, to testify about the revised Need Methodology's rationale and the process behind it. Op.4, 11-12. Several similar certificate-of-need proceedings were pending at the same time as Special Touch, so Adkins testified once with the idea that his testimony could be used in each of those separate dockets. Pet'rs' Br. 3. The Authority also held an evidentiary hearing specific to this matter on October 5, 2023. D.R.1539-88. One of the Authority's lawyers served as the hearing examiner for both hearings. Consistent with that role, W. VA. CODE § 29A-5-1(d), she presided over the hearings but did not render a decision on Special Touch's application.

3. The Authority did: On February 21, 2024, its board of review voted to grant a certificate of need and issued the certificate. Op.27. The Authority concluded that Special Touch met the statutory requirements to show the services it seeks to offer are "needed" and "[c]onsistent with the state health plan" (and that it met the statute's other prerequisites). W. VA. CODE § 16-2D-12(a)(1)-(2).

Starting with unmet need, "[a]fter carefully considering the evidence and arguments of the parties," the Authority concluded "that the evidence in the record supports a determination that an unmet need exists." Op.9. It applied the Need Methodology to find unmet need in each county where Special Touch wants to operate. Op.25. It also explained that many other applicants have relied successfully on the Need Methodology, and Special Touch was "permitted to demonstrate unmet need by using the need methodology" just like them. Op.10.

The Authority also considered Petitioners' argument that the revised standards "artificially inflated the unmet need" and was built on a faulty process. Op.10. The Authority first addressed the promulgation progress, where it looked at Adkins's "detailed, first-hand account lasting several hours" describing the steps and input that had gone into the new standards. Op.12. The Authority then looked to Adkins's testimony explaining how the change to a 3% multiplier "was at least partially intended to guard against Medicaid's expected move to eliminate the use of subcontractors for providing future primary care services." Op.13. All told, the record let the Authority find that the "Standards under which A Special Touch's application is being reviewed were lawfully promulgated and appropriately applied by the Authority." Op.13.

The Authority next concluded that letting Special Touch enter the market would not negatively affect the relevant communities by significantly limiting other services. Op.14. Looking again to the full record, "including extensive hearing testimony on the subject of negative

effects," the Authority concluded that Petitioners' fears they would face severe revenue cuts from a new competitor were "speculative and unproven." Op.14. It also explained that Petitioners' worries about its continued ability to provide non-personal care services—meals and transportation help—were "not services covered by A Special Touch's application, nor are they services the Authority exercises any jurisdiction over whatsoever." Op.14. Nevertheless, it examined the record and explained how it did not substantiate Petitioners' fears on that score, especially given Petitioners were "well-funded with a healthy amount of cash in their coffers." Op.14.

Finally, the Authority considered whether Special Touch's application would result in the unnecessary duplication of services. Op.14-15. While the Authority agreed that one of its duties is a factor it needed to consider, it also "must do so considering other factors such as cost, quality, and access." Op.15. And those other factors "counterbalance[d] any risk of duplication of services. Op.15.

SUMMARY OF THE ARGUMENT

I.A. The Authority reasonably concluded, based on its Need Methodology and independent record evidence, that granting Special Touch's application would meet legitimate need for in-home personal care services across West Virginia. The Authority relied on hours of testimony showing that most counties could benefit from additional providers and revised its Need Methodology accordingly. Petitioners would have the Court second-guess the Authority's finding by picking at isolated parts of the record, forgetting that the Court defers to the Authority's factual findings unless clearly wrong and to evaluate its overall conclusion against the entire record. And with the Need Methodology showing unmet need in every county Special Touch wants to serve, this is not a close case. The Supreme Court of Appeals has already blessed similar Authority standards and held that applicants can rely on them to show unmet need.

I.B. Petitioners give no reason to strike down the standards themselves. Even assuming the Court concludes that this is the right venue for that challenge, the Authority followed the statutorily prescribed process when amending the standards last year. It held a task force meeting with representatives from a wide set of interested parties. It revised its proposal based on that input and submitted the draft standards for public comment, then revised again and sent to the Governor for approval—which he gave. The Authority's substantive decisions are also sound. The Authority knew the 1.25% multiplier was too low because it had reason to raise it on its last go-round revising the standards but chose not to for other policy reasons. The Authority also fairly considered the upcoming loss of subcontractor services, which upped the urgency for additional in-home personal services providers.

II. The Authority reasonably concluded that Special Touch would not negatively affect Kanawha, Cabell, Fayette, Putnam, and Wayne Counties by significantly limiting other providers' (read: Petitioners') viability. Despite extensive testimony on this part of the analysis, Petitioners offer little beyond generalized concerns that increased competition will harm their bottom line to some degree. The Authority acted within its statutory discretion in finding that those allegations of unspecified harm did not show significant detriment to the community.

III. Petitioners' disagreement with the hearing examiner does not get them the win, either. The hearing examiner was not the decisionmaker—the Authority was. So at most, any bias would warrant a new hearing, not (as Petitioners request) to turn the standard of review on its head by erasing deference to the Authority's findings. Regardless, Petitioners cannot overcome the presumption of regularity and make out a case for bias. The law sees nothing untoward with someone associated with the Authority serving as its hearing examiner. And disliking some of the

examiner's calls and claiming hostility without showing where and how the hearing examiner overstepped does not establish bias. The Court should affirm.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because the Authority applied settled law to the record's plain facts, and the briefs fully present the issues on appeal.

STANDARD OF REVIEW

This Court may set aside the Authority's decision only if it violates "constitutional or statutory provisions," exceeds the Authority's "statutory authority or jurisdiction," follows from "unlawful procedures," is "[a]ffected by other error of law," is "[c]learly wrong" when viewed against "the whole record," or is "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Syl. pt. 1, *Amedisys*, 245 W. Va. 398, 859 S.E.2d 341 (2021) (quoting W. VA. CODE § 29A-5-4(g)(1)-(6)). For fact-bound decisions like this one, that deferential standard also means the Court will not upset the Authority's "factfinding determinations" "unless clearly wrong." *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *2.

ARGUMENT

I. The Authority Reasonably Found That Letting Special Touch Enter The Market Will Address Unmet Medical Needs.

Petitioners' main argument is that the record doesn't show unmet need in all the counties the certificate of need covers. They're right that showing need is a statutory prerequisite: The Authority may issue a certificate only "if the proposed health service is" "[f]ound to be needed." W. VA. CODE § 16-2D-12. And the Authority's in-home personal care services standards similarly require applicants to show "an unmet need for the proposed service." D.R.627. But Petitioners are wrong that the Authority's decision fails on this score. Applying the right standard of review—

and setting aside unfounded attacks on the Authority's Need Methodology—the certificate of need stands.

A. Sufficient evidence supports the Authority's decision.

The Authority found that "evidence in the record supports a determination that an unmet need exists, both under the Authority's own Need Methodology that was properly promulgated and signed into law by the Governor." Op.9.

The Authority relied largely on Adkins's detailed testimony, Op.12, to support its conclusion "that there was an unmet need for Medicaid personal care services" in the proposed services areas, Op.16. Petitioners say that some of Adkins's testimony renders that finding arbitrary and capricious. But in over a hundred pages of testimony, D.R.882-990, Petitioners object to just six lines, Pet'rs' Br. 12-13. And in them, Adkins simply agreed he did not have data showing Medicaid-eligible "individuals out there who could not receive services," and that he did not know if "there's a waiting list" for personal care services. D.R.904-05. In other words, he said he lacked two specific types of data that could show unmet need. And for the second, he wasn't even saying that—not knowing if the State keeps a waiting list for in-home personal services as an administrative matter is not the definitive statement that no one is looking for those services Petitioners make it out to be. So Adkins did not testify "he was unaware of any" unmet need. Pet'rs' Br. 13. Quite the contrary: right after the waiting list exchange, Adkins testified that the Authority "continually" got "questions, calls about in home personal care." D.R.905. He later gave more detail, explaining he had received a call "[a]sking about services" just the "[l]ast week." D.R.937. And the calls from individuals seeking these services were common enough he could explain the Authority's ordinary process to "send a call like that to one of the analysts," who know

"that we refer everything to the Bureau of Senior Services to say who are and who are not providers in their county." D.R.938.

Petitioners next point to an email from a BMS program manager saying that there "never has been or ever will be a 'wait list' for the Personal Care Services program." Pet'rs' Br. 13 (quoting D.R.756). But the email's "adamant[]" tone, Pet'rs' Br. 13, shows only (consistent with Adkins's testimony) that the writer was correcting a misapprehension that BMS kept a waiting list, not that no one in West Virginia was waiting for care. Otherwise, how could she have known there "never" "will be" a list even if need conditions change in the future? Petitioners would have the Court ignore additional testimony in the record showing that Special Touch *also* got calls from potential personal care services clients. D.R.1566; Op.9. They say that Special Touch does not provide any "evidence that these calls are due to an inability to find services and cannot prove that these calls are not from individuals who are ineligible or may just want to transfer." Pet'rs' Br. 13. But calling around for a new provider is evidence you're in the market for one—the certificate-of-need statute is not a straitjacket requiring the Authority to ignore evidence of patient dissatisfaction simply because other providers operate, too. And though Petitioners may not have turned away any new clients, Pet'rs' Br. 13-14, that evidence doesn't prove other providers haven't or that all eligible West Virginians have a good option for services.

More to the point, these quibbles risk losing the thread that reviewing courts do not pick apart individual pieces of the record to see "whether the court would have reached a different conclusion." Syl. pt. 2, *W. Va. Med. Imaging & Radiation Therapy Tech. Bd. of Exam'rs v. Harrison*, 227 W. Va. 438, 711 S.E.2d 260 (2011). Here, the "evidence on the record as a whole support[s] the agency's decision." *Id.*

And all *that* evidence has yet to account for the strongest: the Authority's Need Methodology conclusively shows unmet need in every county Special Touch seeks to serve.

Remember what the Need Methodology does—it estimates how many residents could benefit from Medicaid in-home services by applying a set multiplier to a county's Medicaid-eligible population, subtracting the residents already receiving services, and then finding unmet need if the remainder is 25 or more people. Applied here, the Need Methodology directly shows "Need for [Personal Care] Services" over 25 in all 51 counties at issue except for Brooke County. Op.10. And Brooke County's data also showed unmet need when correcting the combined-county math. D.R.1357.

Petitioners brush this explanation aside as nothing more than "rumors," insisting that this shows that the "numbers are flawed." Pet'rs' Br. 19-20. But whether a reporting error happened is a factual question—and Petitioners cannot show the Authority was clearly wrong by finding that the Need Methodology was properly promulgated. They say only that Adkins testified that he didn't "know the problem," and that Adkins testified the combined-county math was "just one of the rumors they gave me." Pet'rs' Br. 19 (cleaned up). But in context, Adkins explained he was "not the one" responsible for the data. D.R.916. Later, he testified about a conversation where he learned how the Brooke and Hancock numbers had been combined for "at least a year or more," an email he had sent about "the numbers being skewed," and his view that (apart from an explanation like the two counties being combined) the raw numbers for Hancock were too high. D.R.965-67. For their part, Petitioners do not try to explain why else Brooke County would have an average of 10 Medicaid recipients but neighboring Hancock County would have 13,155. Especially when faced with a puzzle like that, the Authority's choice to credit the clerical error

explanation neither "ran counter to the evidence" nor "was so implausible" to be believed. Syl. pt. 2, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

So if the Authority can rely on the Need Methodology, that's enough to show unmet need. And it can. The Supreme Court of Appeals relied on very similar standards before in *Amedisys*, where it upheld the Authority's "longstanding, consistent" interpretation of its home health care services need methodology that (as here) the Authority issued "pursuant to a legislative grant of authority" and that was "authorized by the Governor." 245 W. Va. at 415, 859 S.E.2d at 358. Yes, the Authority's 3% multiplier is not "longstanding." But if the Authority is entitled to rely on potentially ambiguous standards, *id.*, it can trust in *Amedisys*'s baseline principle that the standards constitute sound evidence even more when their meaning is plain. And the more the Authority uses the standards "consistently" in prior applications, the more reasonable it becomes to apply that same methodology to the next one. *Id.* at 413, 859 S.E.2d at 356 (explaining that "consisten[cy]" is a mark in favor of deferring to the Authority's interpretation of the standards); *cf. Minnie Hamilton Health Care Ctr.*, 2023 2424614, at *4 ("[T]he Authority cited three past [certificate of need] applications where it had approved [certain data], highlighting it as an accepted practice" to rely on that data).

Amedisys also held that the Authority can grant applications built on the "most current methodology" even if more recent data suggests the standards might be outdated. 245 W. Va. at 415, 859 S.E.2d at 358. But as in *Amedisys*, "Petitioners point to no statute, regulation, or case … requiring an applicant to use available raw data rather than the data contained in the Authority's most current [Need Methodology]." *Id.* *Amedisys* also shows the Need Methodology is sufficient to prove need but doesn't hold it is the only possible evidence. "[A]ccepting the calculations contained in [an] application" from the then-current Need Methodology "cannot be said to have

exceeded [the Authority's] constitutional or statutory authority or to be arbitrary or capricious." *Id.*

B. The Need Methodology is valid.

Petitioners next attack the Need Methodology itself. But Petitioners fail to show that the Authority acted outside of its judgment. The Court should reject this argument.

To begin, Petitioners "do not believe it to be proper for this Court to strike down the validity of the [Authority] standards at issue in this proceeding"—they think their separate (now-dismissed, D.R.1031 n.6) challenge in circuit court was the better venue. Pet'rs' Br. 31. The Authority agrees. It did below, too. *See* D.R.1278, 1280 (explaining that when the Authority "pled in the alternative" in the circuit court action that Petitioners "had failed to exhaust [their] administrative remedies," it did not mean those "administrative remedies" allowed for taking up "issues that would overturn matters that the governor has put in place"). Petitioners did not meet the pre-suit notice requirements for filing an action against government agencies and their officials, so the circuit court was compelled to dismiss their challenge there. *See* Final Order, *Aging & Family Servs. of Mineral Cnty. v. W. Va. Dep't of Health & Human Servs.*, No. 23-C-766 (W. Va. Cir. Ct. Sept. 19, 2023). Petitioners should not get a second shot merely because they failed to fulfill certain minimal requirements on the first go around. Rather, consistent with *Amedisys*, this Court should apply the standards as sound evidence and affirm.

Setting that aside, the Need Methodology is well-reasoned and succeeds on the merits. West Virginia Code Section 16-2D-6 lays out how the Authority may amend the certificate of need standards: The Authority must "identify" and "apply" the relevant statutory criteria, open the proposed change for public comment, and "form task forces" and "coordinate the collection of information" to assist in its review. W. VA. CODE § 16-2D-6(a)-(d). It may also "consult with or

rely upon" a variety of expert sources—as well as its "own developed expertise in health planning." *Id.* § 16-2D-6(e). Then the Governor "shall either approve or disapprove all or part of" the changes before they become official. *Id.* § 16-2D-6(f).

The Authority found that the Standards "were lawfully promulgated and appropriately applied." Op.13. It relied heavily on Adkins's "detailed, first-hand account lasting several hours of the process undertaken by the Authority to amend the Standards in 2023," including the substantive considerations the Authority considered before making its final decision. Op.12. That included Medicaid's "expected move to eliminate the use of subcontractors for providing future primary care services." Op.13.

Petitioners do not meet their burden to override the Authority's judgment. For one thing, their footnote-only argument that the Authority did not revise the standards often enough, Pet'rs' Br. 15 n.4, can be set aside as quickly as they made it: though "the Authority has statutory *authority* to revise and upgrade the Standards," Petitioners give no precedent showing "it has a statutory *mandate* to do so, or that this Court either could or should force the Authority to act." *Amedisys*, 245 W. Va. at 409 n.13, 859 S.E.2d at 352, n.13.

Petitioners next object to the task force, complaining that meeting once wasn't good enough. Pet'rs' Br. 21-22. But the statute says that the Authority "shall form task forces to assist it in satisfying its review and reporting requirements. The task forces shall be comprised of representatives of consumers, business, providers, payers and state agencies." W. VA. CODE § 16-2D-6(c). That's it. The Legislature did not direct task forces to meet any number of times or to discuss proposed revisions in any specified depth. While Petitioners point to the hospice task force meeting more frequently, *see* Pet'rs' Br. 21, the statute does not say that all Authority task forces need to operate the same. And Petitioners do not give any law suggesting otherwise.

Similar problems plague Petitioners' claim that it is "clear" "the meeting that was held was nothing more than a formality." Pet'rs' Br. 22. Petitioners don't challenge the Authority's finding that the September 29, 2022 task force meeting complied with the only thing the statute *does* require—representation across the spectrum of interested parties, including Petitioners. *See* Op.15 ("Julian Irving, Director of A Special Touch, and Jennifer Sutherland, Executive Director of PCAP, were both in attendance at the September 29, 2022 task force meeting."). Rather, Petitioners' argument boils down (again) to only one task force meeting and that the Authority did not abandon its change to 3%. Pet'rs' Br. 21-22. But Petitioners overstate Adkins's belief that "more than one meeting was going to be needed." Pet'rs' Br. 22. Instead, he proposed revising the standards in response to the task force's discussion, then "send[ing] it out to you all. And then maybe we need to have another meeting." D.R.1118. The Authority ultimately didn't convene a second meeting, but it did incorporate feedback into the new standards—the standards "presented for the 30 day comment period" had "changed" and became "better defined" from the draft "of standards at that meeting." D.R.909. That's not unusual—the hospice task force Petitioners point out "was the *only* one … [that] had to go to that extent." D.R.1078-79. And though Petitioners object that ditching the change to 3% was not one of those post-meeting changes, they don't explain how not getting the outcome they wanted means that the task force failed in its information-gathering role.

Finally, Petitioners say the Authority "failed to utilize the information" it gathered in other parts of the process because many public comments "criticiz[ed] the increase from 1.25% to 3%." Pet'rs' Br. 23. But here again, Petitioners don't engage with the statutory text. The Authority must make the "text of all proposed changes" available for "public comment" and otherwise "coordinate the collection of information" to help it develop "recommended modifications." W.

VA. CODE § 16-2D-6(a), (d). Stakeholder input is supposed to solicit a variety of views, so it is unsurprising that existing providers might balk at a proposed change that would open the market to additional competition while others might welcome it. The point is that all those views are recommendations, not dictates. General administrative-law principles reiterate that agencies "have discretion to rely on [their own] reasonable opinions" even "[w]hen specialists express conflicting views." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). Even more here where the Legislature went out of its way to say that the Authority "may consult with or rely" on a host of expert materials and recommendations beyond what comes in through the task force and public comment routes—including the Authority's "own developed expertise in health planning." W. VA. CODE § 16-2D-6(e). And Petitioners do not dispute that the Authority considered the input it received and revised its draft standards multiple times before finalizing for the Governor's approval. While Petitioners may wish that the Authority went a different way based on "the majority of … comments," Pet'rs' Br. 23, the statute does not command that result. The Authority considered appropriate information and used its expertise to make a judgment call on the best path forward.

Failing on procedural grounds, Petitioners attack the substance of the Need Methodology by claiming that changing the multiplier from 1.25% to 3% was arbitrary and capricious. Pet'rs' Br. 16-20. They think the Authority made that change for "the sole purpose of reacting to regulations that may or may not be implemented"—BMS's planned policy change to "eliminate subcontracting" in the personal services space. Pet'rs' Br. 17.

Yet the record contradicts this claim. Adkins testified, for instance, that 1.25% was an artificially low starting point: The Authority had planned to up the percentage to 2.5% in 2016 but backed off around reports that "Medicaid was going to be $40 million in debt" because they did

"not want to be a further burden to the system." D.R.975. Also supporting the Authority's conclusion that 1.25% was too low, Adkins explained that the Authority compared in-home personal care services both to the ".299 of the population" figure for the related category of home health services and to BMS numbers showing "[t]wo percent of the population that was receiving Medicaid were receiving in home personal care." D.R.891, 893. This Court looks for "substantial evidence" from the "*whole* record," even if Petitioners will not. *Ruby v. Ins. Comm'n of W. Va.*, 197 W. Va. 27, 36, 475 S.E.2d 27, 36 (1996) (emphasis added).

And even if the Authority only looked at the anticipated subcontractor change, its decision would still not be unreasonable. Petitioners don't dispute that in a subcontractor-free world, either existing providers would need to absorb all "those additional patients, or there's going to be individuals that go without services." D.R.895. So everyone agrees this is a relevant factor in the Authority's analysis. Petitioners simply object that the Authority acted before BMS made the change. But the Authority may adjust the standards proactively: The nature of the standards-setting task requires making "an educated projection of what we think is going to be needed currently *and for the next two to three years*." D.R.885 (emphasis added). And the Authority had good reason to factor in the likely subcontractor change. Adkins explained how the Authority knew, through "multiple telephone calls," D.R.896, "that BMS was wanting to eliminate subcontractors"—and that "BMS actually had said, we need more providers … to do this," D.R.1073. Indeed, the week before he testified in October 2023, Adkins had another call with BMS, who explained that the plan was still to eliminate subcontractors. D.R.939.

Petitioners think that the Authority should have waited for BMS to finalize the change before amending the Need Methodology, or else chosen a different policy path, like "grandfather[ing] in the current subcontractors." Pet'rs' Br. 19. But Petitioners have once again

failed to provide any law explaining how the policy the Authority settled on was an illegal choice. The Authority wasn't required to make the same call Petitioners (or more to the point, this Court, *see Harrison*, 227 W. Va. at 440, 711 S.E.2d at 262) might have made looking at the same record, but only a non-arbitrary choice supported by the whole record. Courts review the Authority's decisions with deferential eyes because the standard of review requires it, and to avoid "becom[ing] a superagency" that ignores the actual agency's "own developed expertise." *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357. In any event, Petitioners provide no "empirical evidence in the appendix record" to support their claim that the move to 3% in fact "allows for the unnecessary duplication of home health services." *Id.* at 413, 859 S.E.2d at 356. So though Petitioners may *fear* unnecessary duplication by acting "early," the Authority reasonably concluded that the better path was not to walk knowingly into a provider shortage by acting too late.

II. The Authority Reasonably Found That Allowing Special Touch To Enter The Market Would Not Significantly Limit Other Community Services.

Petitioners next challenge the Authority's conclusion that the certificate of need will not negatively affect the communities Special Touch will serve. Petitioners limit this claim to Putnam and Fayette Counties. Pet'rs' Br. 24. So at most Petitioners' arguments could call for "modify[ing]" the certificate of need, W. VA. CODE § 29A-5-4(g), to exclude authority to operate in those two counties. But once again, Petitioners' claim falls even on its own terms.

Reminder: the statute says that "the proposed health service" must be "[c]onsistent with the state health plan." W. VA. CODE § 16-2D-12(a)(2). The "state health plan" is the same in-home personal services standards Petitioners challenge above. But here they agree that the second prong of its Need Methodology is valid—that "the proposed service will not have a negative effect

on the community by significantly limiting the availability and viability of other services or providers." Pet'rs' Br. 23 (citing D.R.627). The Authority reasonably found that prong satisfied.

In its decision, the Authority explained that it had considered the full record and had determined that a certificate of need was justified and that the project would "not have a negative effect on the community by significantly limiting the availability and viability of other services or providers." Op.7. Part of that record included Special Touch's explanation that in areas with clear "unmet need," increasing provider options would have "limited to no impact on existing providers." D.R.49. Special Touch also attached letters from the community to show community support for the certificate of need. D.R.94-95. The Authority also weighed the "extensive hearing testimony on the subject of negative effects"—and found that Petitioners' concerns about drastic revenue loss were "speculative and unproven." Op.14. And it addressed Petitioners' fears about indirect budgetary cuts to the *other* services Petitioners provide. It reasoned that transportation and meals services "are not services covered by A Special Touch's application, nor are they services the Authority exercises any jurisdiction over whatsoever." Op.14. Regardless, it also explained that the record has no evidence showing "the negative effects on PCAP's meal delivery and transportation services that would happen if A Special Touch were allowed to offer personal care services in the proposed counties, much less that such services offered by PCAP would be shuttered." Op.14. In short, the Authority considered "each of the parties' positions, the evidence, and sufficiently set forth the reasoning and analysis" for its decision. *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *5.

Petitioners face a heavy burden convincing the Court to overturn that judgment. Again, this Court applies a "deferential" standard of review to an agency's factual findings and will only reverse if they are clearly wrong or that it reached an arbitrary or capricious conclusion. *Lilly v.*

Stump, 217 W. Va. 313, 317, 617 S.E.2d 860, 864 (2005). This is especially true in "matters involving public health," where reviewing courts approach their task "with conscientious awareness of [their review's] limited nature"—asking "*solely*" whether the decision "was rational and based on consideration of the relevant factors." *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357. Add on top of all that, this question involves the Authority's standards (not the statutory text itself), which can give even more reason to hesitate before "second-guess[ing]" how the agency interprets that policy. *Id.* And remember that parties challenging the Authority's findings need more than generalized critiques to prevail—they need "empirical data to support [their] contentions." *Id.* Against these standards, both of Petitioners' arguments fall short.

First, the Authority reasonably found that any clients or employees Petitioners might lose when Special Touch enters the market are not sufficient "negative effect[s] on the community." Op.7; *contra* Pet'rs' Br. 23-27. Petitioners point to no evidence of its own that they think the Authority overlooked. Instead, they merely argue that granting a certificate of need to Special Touch will "result in lost resources, clients, and employees," which would prevent it from providing "nutritional and transportation services to its clients." Pet'rs' Br. 23. But other than raising a specter of doom, Petitioners do not substantiate their claims. Petitioners do not explain how many clients or employees they might lose. Nor do they identify any other "empirical data" the Authority missed in evaluating this claim.

What's more, the result does not change even assuming Petitioners are right that "[c]learly" they "will lose clients." Pet'rs' Br. 24. Petitioners ask the Court to follow the "inherent principle that additional competition in an area of business will result in the competitors fighting over employees in the workforce, clients, and resources." Pet'rs' Br. 24. But they point to nothing suggesting the certificate-of-need statute is meant to preserve monopoly power. And remember

that the specific question here is not whether a certificate will lead to *some* "negative effect on the community"; it's whether Special Touch's proposed services will "*significantly* limit[] the availability and viability of other services or providers." D.R.627 (emphasis added). Petitioners could have introduced evidence that the certificate of need would have a negative effect on existing services, but the only thing it conjures up is that they may lose clients "[p]otentially to the point [they] are ousted from providing services." Pet'rs' Br. 24. But "potentially" is a hedge, and, anyway, "representations in an appellate brief do *not* constitute a part of the record." *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357.

But accepting for a moment that Petitioners showed that the proposed service would have a negative effect on the community, that's still not enough. "Significantly" does real work in this part of the certificate-of-need inquiry. The "ordinary meaning of 'significantly' is 'of a noticeably or measurably large amount." *Koito Mfg. Co. v. Turn-Key-Tech, LLC*, 234 F. Supp. 2d 1139, 1154 (S.D. Cal. 2002); *see also*, *e.g.*, *Evans v. United States*, 978 F. Supp. 2d 148, 165-66 (E.D.N.Y. 2013) ("significant" means "more than minor, mild or slight"); *DBW Partners, LLC v. U.S. Postal Serv.*, No. 18-3127, 2019 WL 5549623, at *4 (D.D.C. Oct. 28, 2019) ("more than *de minimis*"). And not giving the term meaning would invite odd results. For a statute concerned with "contain[ing] or reduc[ing] increases in the cost of delivering health services," W. VA. CODE § 16-2D-1(1), at least some competition—with the price-lowering benefits it can bring—can be a boon. But Petitioners' approach that even some client loss is enough under this prong would mean that the Authority might have to deny a certificate of need any time other providers are already in the market. This Court recently distanced itself from a similar argument when addressing the "superior alternative" requirement, disavowing a "preference of the needs of one [provider] over the needs of another" because the law doesn't let one provider exert an effective "veto" on

increased competition. *Stonewall Jackson Mem'l Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc.*, 2023 WL 4197305, at *6 (W. Va. Ct. App. June 27, 2023). It should stay that course here.

Second, the Authority reasonably rejected Petitioners' concern that less Medicaid income from in-home personal care services might mean Petitioners can spend less on transportation and nutrition services. Pet'rs' Br. 25-27. On the legal side, the Authority concluded that these services are not ones "the Authority exercises any jurisdiction over whatsoever." Op.14. Again, the Court gives some weight to an agency's assessment of what its own rules mean. *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357. And this particular assessment makes good sense: agencies "can only exercise such powers as those granted by the legislature," *State ex rel. State Farm Mut. Auto. Ins. v. Marks*, 230 W. Va. 517, 529, 741 S.E.2d 75, 87 (2012), so it's reasonable to interpret the standards as reaching only the "health services" the statute contemplates, W. VA. CODE § 16-2D-1(1); *id.* § 16-2D-2(18) ("'Health services' means clinically related preventative, diagnostic, treatment or rehabilitative services."). All Petitioners say in response is that an Authority employee might hold a different view. Pet'rs' Br. 25-27. Their reading of the few transcript lines they cite is questionable—wanting to avoid "a situation where you're robbing Peter to pay Paul," for instance, D.R.933, likely means taking from a provider already offering the same services, not reducing a single provider's ability to offer multiple services. But this is all beside the point: Petitioners have zero authority for the idea that what one of the Authority's employees thinks can trump the Authority's own judgment. The Authority's construction of the statute was a reasonable one.

On the factual side, Petitioners (again) do not substantiate their fears that additional competition will leave them with "less and less" to spend on non-personal care services. Pet'rs' Br. 25. Indeed, they admit ten providers already compete with them "in Putnam County alone."

Pet'rs' Br. 25. And Petitioners do not try to explain how adding an additional provider would lead to the dire consequences that have not come from the other ten providers already there. Thus, the Authority was not "clearly wrong" to find that granting a certificate of need to Special Touch would not create a significant negative impact. *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *2.

In certificate-of-need cases, the interests of the "applicant, affected parties, and citizens of West Virginia" often "do not fully coincide." *Stonewall Jackson Mem'l Hosp.*, 2023 WL 4197305, at *5. Just as in other parts of the statutory inquiry, when assessing potential community effects, it's up to the Authority to "reasonably weigh the evidence as to each and balance their conflicting interests." *Id.* The Authority did just that—and Petitioners haven't met their burden to set that judgment aside.

III. The Evidentiary Hearing Is No Reason To Invalidate The Authority's Order.

Lastly, Petitioners accuse the hearing examiner of being biased and say that the Authority's "discretion should be stripped, or at least diminished," Pet'rs' Br. 31. But (again) they cite to no authority for this remedy. And none exists. So even if Petitioners were right on the substance of their charge against the *examiner* (and they aren't) the Court should not throw out the ordinary and long-standing standards of review for the *Authority's* decision.

Start with the Authority's and hearing examiner's roles. The Authority, not the hearing examiner, "shall render a final decision on an application for a certificate of need." W. VA. CODE § 16-2D-15(a). That's what happened here: The Authority's board voted and then the chairman issued the decision on the full Authority's behalf. Op.26-28. For their part, hearing examiners help get the record to a place where the Authority can make its decision. They "regulate the course of [a] hearing," hold settlement conferences, and "dispose of procedural requests or similar

matters." W. VA. CODE § 29A-5-1(d); *see also id.* § 16-2D-13(g)(3) (explaining that certificate of need hearings must follow Section 29A-5-1's requirements). Indeed, Section 29A-5-1 is Petitioners' *only* legal authority in the section of its brief supporting this assignment of error—so it knows a "hearing examiner's powers are limited." Pet'rs' Br. 29. Here, for instance, the hearing ended when the last witness left the stand—no findings of fact, conclusions of law, or hints about the Authority's ultimate outcome. D.R.1586-87 (establishing briefing deadlines to the Authority at the end of the fourth and final hearing). So in a real sense, it would be irrelevant if Petitioners' arguments *had* fallen "on deaf ears" at the hearing, Pet'rs' Br. 31—the Authority's decision is what counts.

This framework shows the proper scope of a remedy that bias could warrant. The only potential source of authority for the Court to take on a non-decisionmaker's bias (Petitioners offer none) is the requirement that "hearings shall be conducted in an impartial manner." W. VA. CODE § 29A-5-1(d). That is "*all* that the statute clearly mandates." *Varney v. Hechler*, 189 W. Va. 655, 660, 434 S.E.2d 15, 20 (1993) (emphasis added). So if Petitioners are right about the purported bias, the Court could direct "remand" for the Authority to try again because it made its decision "upon unlawful procedures." Syl. pt. 1, *Amedisys*, 245 W. Va. 398, 859 S.E.2d 341. But no precedent supports Petitioners' request that the Court should reach the merits anyway—and just give the Authority's findings no or little deference along the way. That approach would toss aside the limited, statute-set scope of review for agency decisions in contested cases. *See* W. VA. CODE § 29A-5-4(g). The statute's "clearly wrong" and "arbitrary and capricious" standards are highly "deferential," and "a court is not to substitute its judgment" in the agency's stead. *Lilly*, 217 W. Va. at 317, 617 S.E.2d at 864. So Petitioners are wrong that this Court could look at the evidence

on a blank slate and direct the Authority to reach a different substantive result. Remand is the most Petitioners could get.

Yet Petitioners haven't made out the case for even that. Even when a hearing officer *is* the decisionmaker, showing bias "is an exacting" standard. *Keith v. Barnhart*, 473 F.3d 782, 788 (7th Cir. 2007). Courts extend administrative law judges "a presumption of honesty and integrity." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Overcoming it requires "some substantial countervailing reason," *Harline v. DEA*, 148 F.3d 1199, 1204 (10th Cir. 1998), along the lines of "deep-seated and unequivocal antagonism that would render fair judgment impossible," *Barnhart*, 473 F.3d at 788 (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Petitioners' examples of alleged bias come nowhere close.

First, the hearing examiner's role and association with the Authority are not enough. Petitioners are wrong that the examiner—who made no findings or legal judgments—operated as "judge, jury, and executioner." Pet'rs' Br. 27. Regardless, combining the "investigative and adjudicative functions" does not "creat[e] an unconstitutional risk of bias." *Marfork Coal Co. v. Callaghan*, 215 W. Va. 735, 744, 601 S.E.2d 55, 64 (2004) (cleaned up). Nor does it matter that the hearing examiner represented the Authority in related matters. Pet'rs' Br. 27. The agency itself—or "any member of the body which comprises the agency"—may serve as a hearing examiner. W. VA. CODE § 29A-5-1(d). Following that statutory path "does not on its own constitute, or even indicate, a proceeding that lacks the necessary impartiality." Syl. pt. 2, *Marfork*, 215 W. Va. 735, 601 S.E.2d 55; *see also Varney*, 189 W. Va. at 660, 434 S.E.2d at 20 ("No inherent conflict of interest is created simply because [an] agency member serves as a hearing examiner."). The same holds when the hearing examiner merely works for the agency—the Supreme Court of Appeals called an argument "untenable" as it would mean hearings could never "be conducted by

an administrative law judge employed by the same agency as the case is before." *McDonald v. Cline*, 193 W. Va. 189, 191, 455 S.E.2d 558, 560 (1995); *see also Harline*, 148 F.3d at 1204 (fact hearing officer worked for the agency, had an office in its building, and was "subject to threats of removal, reprimand, … and other reprisal" if the agency disliked its work did not show bias). Even having "preexisting knowledge" or participating in a case's earlier stages does not "tend to suggest that [the hearing officer] had necessarily prejudged the issues." *Marfork*, 215 W. Va. at 743, 601 S.E.2d at 63 (discussing *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984)).

Second, nothing that happened at the hearing meets the heavy standard for showing bias. For one thing, some of Petitioners' critiques involve *different* cases. Petitioners, for instance, object to one relevancy decision during testimony in another matter that wasn't incorporated into this one. Pet'rs' Br. 27-28 (citing D.R.1305) (citing an example where Petitioners "were questioning another applicant"). Whatever the hearing examiner might think about "another applicant," Pet'rs' Br. 27, says nothing about purported partiality against these parties. Similarly, even Petitioners know that decisions about summary judgment motions in other matters are "not on record in this case." Pet'rs' Br. 28. Petitioners are challenging those separate decisions in separate appeals; this Court should address them there. Regardless, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"—"[a]lmost invariably, they are proper grounds for appeal, not recusal." *Liteky*, 510 U.S. at 555. And here again, Petitioners conflate the hearing examiner's (alleged) views with the Authority's: the examiner's case-management decisions in other matters are not "clear evidence" that *the Authority* had prejudged this matter "far before any evidence was ever entered into the record." Pet'rs' Br. 29.

The actual record here is little help, either. Asking a witness "clarifying questions" is part of a hearing examiner's ordinary role, *W. Va. State Police v. Walker*, 246 W. Va. 77, 86, 866

S.E.2d 142, 151 (2021), not evidence of bias, *contra* Pet'rs' Br. 27-28. In fact, courts review even judges' questions to witnesses at criminal jury trials—which (unlike here) can risk prejudicing lay jurors' impartiality—under the deferential abuse of discretion standard. Syl. pts. 1, 3, 4-7, *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007).

The rest of Petitioners' examples are how the examiner handled a few relevancy objections. Pet'rs' Br. 28-30. But discretionary calls like those are "simply attempt[s] to focus the hearing on the precise issue at hand"; without more, they "cannot sustain a claim of bias." *Barnhart*, 473 F.3d at 790. In any event, Petitioners overreach in their "isolated," *id.* at 788, examples. The hearing examiner allowed four transcript pages' worth of testimony about the non-personal care services Petitioners offer before "restrict[ing]" more, Pet'rs' Br. 28—and at that point counsel was "done with the other services" point anyway. D.R.1114. Those pages of testimony then made it reasonable to allow cross-examination questions that went "directly to" Petitioners' argument that it "does not have enough money to sustain all of these other programs." D.R.1390; *contra* Pet'rs' Br. 28-29. And the hearing examiner focused Tim Adkins's testimony away from "hypothetical questions about things that aren't there," D.R.922; *see also* Pet'rs' Br. 30, only after allowing him to answer several related questions, D.R.919-922. So Petitioners do not make good on their claim that the hearing examiner "prevented [them] from developing the record" "many times," Pet'rs' Br. 31—much less show how (if they had) disagreeing with the examiner's evidentiary calls would prove "deep-seated favoritism or antagonism," *Liteky*, 510 U.S. at 555.

Third, and finally, general allegations of "hostility" do not satisfy Petitioners' burden. Petitioners concede "it is difficult" to prove their case from the record, so they "implore this Court to read the transcripts" with an eye toward what may be between the lines. Pet'rs' Br. 30. Even if outsourcing their burden of proof in this way was appropriate, at most Petitioners seem to suggest

"remarks during the course of a [hearing] that are critical or disapproving of, or even hostile to, counsel [or] the parties." *Liteky*, 510 U.S. at 555. But comments in that vein "ordinarily do not support a bias or partiality challenge"—"expressions of impatience, dissatisfaction, annoyance, and even anger" are "within the bounds" of "ordinary efforts at courtroom administration." *Id.* at 555-56. All the more when what *is* on the page shows a hearing examiner trying to manage a complex docket of cases carefully. *E.g.*, D.R.873 ("I'm trying to be as accommodating as I can for everybody here."); D.R.880-81 (offering Petitioners chance to swap seats). Especially where "the record as a whole demonstrate[s] fundamental fairness," the bar to clear the presumption of impartiality remains high. *Barnhart*, 473 F.3d at 788. Petitioners haven't cleared it. So the Court should reject this assignment of error, too.

CONCLUSION

This Court should affirm the Authority's decision.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 24-ICA-97

PUTNAM COUNTY AGING PROGRAM, INC.
and FAYETTE COUNTY SENIOR PROGRAMS,

***Petitioners*,**

v.

A SPECIAL TOUCH IN HOME CARE, LLC,

Respondent,

and

WEST VIRGINIA HEALTH CARE AUTHORITY,

Respondent.

CERTIFICATE OF SERVICE

I, Michael R. Williams, certify that this Brief of Respondent West Virginia Health Care Authority is being served on counsel of record by File & Serve Xpress this the 5th day of August, 2024.

/s/ Michael R. Williams
Michael R. Williams