IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-ICA-98

PUTNAM COUNTY AGING PROGRAM, INC.,

Affected Party Below, Petitioner,

vs. CON File No. 23-2/3-12689-PC

PANHANDLE SUPPORT SERVICES, INC.,

Applicant Below, Respondent,

and

WEST VIRGINIA HEALTH CARE AUTHORITY,

Respondent.

BRIEF OF RESPONDENT PANHANDLE SUPPORT SERVICES, INC.

BROCK M. MALCOLM (WVSB No. 7994)
bmalcolm@bowlesrice.com / (304) 285-2516
MICHAEL C. CARDI (WVSB No. 12228)
mcardi@bowlesrice.com / (304) 285-2561
BOWLES RICE LLP
125 Granville Square, Suite 400
Morgantown, WV 26501
Counsel of Record for Respondent, Panhandle Support Services, Inc.

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I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On April 27, 2023, Governor Jim Justice approved new standards for determining the need for Personal Care Services (the "2023 PC Standards"). These 2023 PC Standards apply to services available to assist eligible Medicaid recipients in activities of daily living in the recipient's home, place of employment, or community ("PC Services"). On June 1, 2023, Respondent Panhandle Support Services, Inc. ("Panhandle") submitted a Letter of Intent to the West Virginia Health Care Authority ("WVHCA") to provide PC Services in Mason, Putnam, Cabell, Wayne, and Lincoln Counties, each of which was deemed to have existing need for PC Services based on the need methodology outlined by the approved 2023 PC Standards. *See* D.R.0002. On June 12, 2023, the Certificate of Need ("CON") Application and appropriate filing fee were received by the WVHCA. *See* D.R.0016-D.R.0159. The CON Application ("Application") was deemed complete on June 15, 2023, and a Notice of Review was issued on June 16, 2023.

On or about July 13, 2023, the WVHCA received a letter from the Petitioner, requesting it be afforded affected party status and that an administrative hearing be held in the matter. *See* D.R.0014. An initial scheduling conference was held on August 6, 2023, and the Petitioner was given notice of that hearing. *See* D.R.0178-D.R.0181. During that scheduling conference, a public hearing on the Application was scheduled for October 16, 2023. A prehearing conference was scheduled for October 6, 2023, for the hearing of dispositive and preliminary motions. *See* D.R.0178-D.R.0179. During that same scheduling conference, the WVHCA issued other deadlines relating to this matter, including the dates upon which discover requests were due (September 1, 2023) and upon which discovery would be completed (September 21, 2023). *See* D.R.0178.

On October 2, 2023, Panhandle filed its "Motion for Summary Judgment on Behalf of Applicant, Panhandle Support Services, Inc." *See* D.R.0261-D.R.0269. Petitioner hand delivered a response to

Panhandle's Motion for Summary Judgment on October 6, prior to the commencement of the pre-hearing conference. See D.R.0275-D.R.0282. The motion was argued by the parties at the prehearing conference on October 6, 2023, before Hearing Examiner Heather Connolly. *See* D.R.0972-D.R.0997. Following arguments on the motion, Ms. Connolly granted Panhandle's Motion for Summary Judgment. *See* D.R.0995-D.R.0996. The Order reflecting the granting of summary judgment was entered on February 8, 2024. *See* D.R.1004-D.R.1009.

In addition to the procedural event of the matter before this Court, it should be noted that, on October 13, 2023, an evidentiary deposition was taken of Timothy Adkins, Director of the CON Program within the WVHCA. Although contrary to the historical practices of the WVHCA, CON Director Adkins was made available for deposition in this case for purposes of allowing the Petitioner the opportunity to build its record relating to its attack on the promulgation of the 2023 PC Standards. A consolidated deposition was permitted to allow for Director Adkins to be deposed just a single time, rather than at each individual hearing. From a procedural perspective, Panhandle argued that this separate deposition was irrelevant to its Application and the hearing on the merits of that Application, as a successful challenge to the underlying PC Standards could undermine any CON that might be granted.

On March 7, 2024, Petitioner noticed its appeal of the underlying decision made by the WVHCA. The WVHCA filed the Designated Record for this appeal on April 10, 2024, and Petitioner perfected its appeal by filing its brief in support of its appeal on June 10, 2024. In accordance with this Court's scheduling order, Panhandle now files its brief in opposition, asserting that the WVHCA was correct in its handling of Panhandle's Application and in its granting of the requested CON in this case.

B. STATEMENT OF FACTS

On or about June 12, 2023, following Governor Jim Justice's approval of the 2023 PC Standards, Panhandle filed its Application for a CON for the provision of PC Services within the proposed Service Area. For purposes of this Application, the proposed Service Area included

Mason, Putnam, Cabell, Wayne, and Lincoln Counties. Utilizing the Governor-approved 2023 PC Standards and the need methodology adopted by the WVHCA, Panhandle asserted that there were additional Medicaid recipients, residing within Mason County (161.00), Putnam County (286.00), Cabell County (678.00), Wayne County (142.00), and Lincoln County (114.00), who had an unmet need for the PC Services proposed its Application. For many years, Panhandle has been a provider of PC Services within these counties, albeit as a subcontractor of an approved provider of PC Services and not as a direct CON holder. Given the opportunity to seek its own CON under the new 2023 PC Standards, Panhandle sought to gain business independence and eliminate the need for the existing subcontracts.

As asserted in the Petitioner's brief, the WVHCA took judicial notice of some of the evidence and arguments previously presented by the Petitioner in an earlier scheduled CON hearing. Although all of these facts are not entirely contained in this case's record, the Petitioner has attempted to incorporate them into its brief. In essence, the Petitioner's assertation of the critical evidence and arguments distills down to two key points: (1) the Petitioner believes the WVHCA improperly promulgated the 2023 PC Standards and need methodology, and (2) the Petitioner believes that Panhandle's Application should be denied because it might have a negative effect on the community because the loss of Petitioner's historic monopoly within the PC Services market could reduce its ability to fund its Meals on Wheels program.

Petitioner provides PC Services in Putnam County. It also provides a variety of other services that are not regulated by the WVHCA, at least in part because they are not health care services. These services include but are not limited to food delivery and transportation services. At the previous public hearing, Jennifer Sutherland, Executive Director for Putnam County Aging Program, testified at length regarding those other programs for which the Petitioner receives no, or at least inadequate, funding. The Petitioner utilizes its PC Services monopoly to supplement these other programs. In some instances, the Petitioner does not directly provide the PC Services at issue here. Ms. Sutherland previously testified that the Petitioner utilizes a

subcontractor (namely, Loved Ones In-Home Care) to provide the services, with the Petitioner collecting an administrative fee in return for allowing the subcontractor to operate in its service area. This administrative fee is far from insignificant, with Ms. Sutherland testifying that the Petitioner would receive $423,214 from its subcontractor agreement with Loved Ones In-Home Care. These are PC Services that the Petitioner could not otherwise provide itself. Instead, the Petitioner acts as a gatekeeper, controlling what organization will be permitted to provide those PC Services, and it collects a handsome fee in exchange for the privilege of doing so.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary for this appeal because (i) the dispositive issue or issues have been authoritatively decided by the Supreme Court of Appeals of West Virginia, (ii) the facts and legal arguments are adequately presented in the briefs and the record on appeal, and (iii) oral argument would not significantly aid this Court's decision.

III. SUMMARY OF ARGUMENT

The Petitioner raises numerous alleged errors, and Panhandle will respond to each one briefly in the order they were raised. First, the Petitioner asserts that the WVHCA, and Heather Connolly in her capacity as a Hearing Examiner, erred in granting Panhandle's Motion for Summary Judgment. Specifically, the Petitioner asserts that Ms. Connolly did not have the authority to entertain dispositive motions under the Administrative Procedures Act ("APA"), W.Va. Code § 29A-5-1, et. seq. *See also* D.R. 995:12-16. In response, Panhandle asserts that the WVHCA not only had the authority to address a motion for summary judgment but that the WVHCA was correct in granting such a motion under the facts of this case.

Second, the Petitioner asserts that the WVHCA erred when it "prematurely" granted Panhandle's Motion for Summary Judgment while "a substantial portion of discovery was left unfinished." Panhandle asserts that this argument is patently wrong. Discovery had been completed as of September 21. 2023 (*See*

D.R. 178), and the remaining public hearing was meant to serve as a de facto trial of the case. Given that the Petitioner, even when directly questioned, could not state any material issues of disputed fact it hoped to present at the hearing. Panhandle filed its Motion for Summary Judgment for the purpose of preventing Petitioner from wasting valuable resources on a fishing expedition that was not reasonably likely to elicit any new information that was not already presented through the discovery procedures and/or the previous public hearing involving the Petitioner. The fact that summary judgment was granted prior to the deposition of CON Director Adkins is a red herring, as the WVHCA had already stated that it was allowing the deposition solely for the purposes of allowing the Petitioner to make its record for purposes of its attack on the way the 2023 PC Standards were approved. That issue was not one that would have been decided in the Petitioner's favor at a public hearing, based on the clear statements of the WVHCA, and the granting of Panhandle's Motion for Summary Judgment did not prevent the Petitioner from questioning Mr. Adkins.

Third, the Petitioner has argued that the WVHCA erred in finding that there was no genuine dispute of material fact in the record. More specifically, the Petitioner argues that there is: (a) dispute regarding unmet need; (b) dispute regarding improper reliance on the 2023 Need Methodology calculation; and (c) dispute regarding the potential negative impact of Panhandle's Application. In response, Panhandle asserts that these disputes are not with Panhandle's Application but with the opening up of the CON process. The Petitioner is aggrieved that its historic stranglehold within the PC Services market is being broken. While Panhandle will address each of the Petitioner's points of error in greater detail below, there simply is no genuine question of fact as to whether Panhandle properly utilized the 2023 PC Standards as they were promulgated and approved by Governor Justice. Nor is there any question as to whether Panhandle was already present and providing PC Services, through a subcontractor agreement, throughout the proposed Services Area, including Putnam County. As such, all the Petitioner could have offered was its same arguments that had already been rejected by the WVHCA as not relevant or appropriate to be raised at the public hearing.

Fourth, the Petitioner again alleges that the 2023 PC Standards and need methodology promulgated by the WVHCA is arbitrary and capricious. Surprisingly, the Petitioner states that it is not proper for this Court to strike down the validity of the 2023 PC Standards. However, virtually every argument posed by the Petitioner in this appeal is predicated on its assertion that the 2023 PC Standards were promulgated in violation of West Virginia law and thus are invalid. The Petitioner has asked this Court to strike down the 2023 PC Standards, so Panhandle will argue that this Court should uphold those standards by finding that the WVHCA followed all required rules in promulgating the 2023 PC Standards. The mere fact that the Petitioner's historic monopoly may be adversely affected by these new standards does not make them statutorily invalid.

IV. ARGUMENT

A. STANDARD OF REVIEW

Pursuant to West Virginia Code §§ 16-2D-16a (2021) and 29A-5-4(g) (2021), this Court's standard of review is as follows:

> 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 jurisdictions 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.

See Minnie Hamilton Health Care Ctr., Inc. v. Hosp. Dev. Co., 2023 WL 2424614 (W.Va. Ct. App. Mar. 9, 2023). "Further, the factfinding determinations of an agency are entitled to deference unless clearly wrong." *Id.*

B. THE HEARING EXAMINER CORRECTLY GRANTED PANHANDLE'S MOTION FOR SUMMARY JUDGMENT BECAUSE, AFTER AFFORDING THE PETITIONER THE OPPORTUNITY TO DEVELOP ITS CASE, THERE WAS NO GENUINE ISSUE OF DISPUTE AS TO ANY MATERIAL FACT JUSTIFYING THE HOLDING OF THE ADMINISTRATIVE HEARING.

With regard to the granting of a Motion for Summary Judgment, the standard is well established. Rule 56 of the West Virginia Rules of Civil Procedure provides, in part, that:

> [Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of its pleadings, but as a response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

W. Va. R. Civ. P. 56 (c) and (e).

The Court strengthened its summary judgment jurisprudence with its decision in *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994), where the Court stated:

> To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message is hereby modified. When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the non-moving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.

Id. at n.5, 192, 758. Since the *Painter* decision, the Court has stated that the "circuit court cannot try issues of fact; it can only determine whether there are issues to be tried." *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995). When a party fails to make a sufficient showing on an essential element of its case, summary judgment is appropriate. See *Varney et al. v. Gibson,* syl. pt. 1, 202 W. Va. 573, 505 S.E.2d 636 (1998) (quoting *Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 459 S.E.2d 329 (1995)); *McGraw v. St. Joseph's Hospital*, 200 W. Va. 114, 488 S.E.2d

389 (1997); *St. Peter v. AmPak-Division of Gatewood Products, Inc.,* 199 W. Va. 365, 484 S.E.2d 481 (1997).

In fact, "[s]ummary judgment is mandated if the record, when reviewed most favorably to the nonmoving party, discloses 'that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'" *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995). Essentially, summary judgment is appropriate where the non-movant fails to present evidence sufficient to allow a reasonable juror to conclude that his position, more likely than not, is true. See *Gentry*, 195 W. Va. at 518-19, 466 S.E.2d at 177-78 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993)).

At the outset of this matter, a scheduling conference was held, and certain critical procedural dates and deadlines were established by the WVHCA. The establishment of such procedures is clearly within the authority of the WVHCA, consistent with the APA, which states, "[e]ach agency shall adopt appropriate rules of procedure for hearing in contested cases." *See* W.Va. Code § 29A-5-1(a). Accordingly, the WVHCA set the following dates and deadlines for this case: (i) filing of replacement pages due by August 18, 2023; (ii) discovery requests due by September 1, 2023; (iii) discovery was to be completed by September 21, 2023; (iv) filing of dispositive motions and subpoenas by October 2, 2023; (v) a prehearing date (upon which motions could be heard) was set for October 6. 2023; and (vi) the final public hearing was set for October 16, 2023. *See* D.R.0178.

As of September 21, 2023, discovery in this matter was concluded. While the Petitioner would suggest that discovery continues through the date of the final hearing, this is inconsistent with the WVHCA's scheduling order (*see* D.R. 178) – and with general litigation practice within West Virginia. Discovery must have some end point, and, if a party has not either sought an extension of the discovery period or filed a motion to compel alleging the other party has failed to adequately respond to discovery requests, then the participants are entitled to assume that the Petitioner has received what it needs to make its case, and the

matter becomes ripe for a motion for summary judgment. In this case, Panhandle answered all of the discovery requests, which included requests for admission, interrogatories, and requests for the production of documents. The Petitioner did not file any request to extend the discovery deadline, it made no attempt to file supplemental discovery requests, and it presented no motion to compel. As such, this Court should agree that the WVHCA was correct in determining that discovery had been concluded.

The Petitioner asserts that Hearing Examiner Connolly improperly granted Panhandle's Motion for Summary Judgment at the pre-hearing conference, but the Petitioner points to no authority that suggests the consideration of such a motion was improper. To the contrary, Rule 1 of the West Virginia Rules of Civil Procedure explicitly states that:

> These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

See W.Va. R.C.P. Rule 1. Furthermore, Rule 81 goes on to state specifically that the Rules of Civil Procedure apply to administrative hearings such as the one before this Court. Similarly, the APA, to which the Petitioner cites, says that a hearing examiner has the authority to regulate the course of a hearing and to dispose of procedural requests or similar matters. *See* W.Va. Code § 29A-5-1(d). While the Petitioner's brief argues that "[n]owhere in the list of explicit statutory powers does it allow the hearing examiner to rule on a dispositive motion," Panhandle would point out that the rule does not prohibit such action, and, where the totality of the application rules of procedure, including the administrative procedure established by the WVHCA at the outset of this case, all suggest that such a ruling is within the hearing examiner's power, this Court should not find that Ms. Connolly was clearly wrong in the exercise of her power.

As noted by the Petitioner, the WVHCA was required by law to approve Panhandle's Application for CON upon its making of several specific findings. 65 C.S.R. 32-10 et. seq. In this case, the WVHCA made all of the necessary factual findings, and Panhandle was entitled to judgment as a matter of law. At

the prehearing conference (again, set for the express purpose of addressing dispositive motions), the Petitioner was given the opportunity to proffer what evidence it could elicit that would defeat a motion for summary judgment, and the response was that the Petitioner did not know what the facts were. *See* D.R.0991. Again, the Petitioner wanted to waste everyone's time using the public hearing as discovery, despite discovery in this matter being completed on September 21, 2023. *See* D.R.0178.

Clearly, in light of all its other filings and arguments, the Petitioner would simply have reiterated its same arguments that the 2023 PC Standards were improperly promulgated and that the granting of Panhandle's Application for CON would adversely impact its food delivery program and other programs unrelated to health care or the purview of the WVHCA. In light of the Petitioner's incapability of stating even a single genuine issue of material fact that it could dispute, the WVHCA was not clearly wrong in granting Panhandle's Motion for Summary Judgment. To the contrary, it acted in a fashion that is entirely consistent with the intent of Rule 56 and the guidance of the appropriate case law.

C. EVEN IF THE HEALTH CARE AUTHORITY HAD DENIED THE MOTION FOR SUMMARY JUDGMENT, THE PETITIONER COULD NOT HAVE CREATED ANY MATERIAL ISSUE OF DISPUTED FACT TO JUSTIFY A DECISION DENYING PANHANDLE'S APPLICATION FOR CERTIFICATE OF NEED.

As the Petitioner correctly states, Summary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Similarly, the Petitioner is correct in stating that summary judgment prior to the completion of discovery is "precipitous." *See Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995), quoting *Board of Educ. of the County of Ohio v. Van Buren and Firestone, Arch., Inc.,* 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (1980). The problem facing the Petitioner here is that discovery was over. The Petitioner had been given the full opportunity to avail itself of the discovery process, and Panhandle provided responses to the Petitioner's requests, without the Petitioner objecting or seeking any remedy from the Hearing Examiner. Accordingly, as set forth above, it was entirely reasonable for all parties to understand that discovery

was over – especially in light of the WVHCA's scheduling order which set the prehearing conference for the hearing of any dispositive motions.

In arguing that the granting of Panhandle's Motion for Summary Judgment was premature, the Petitioner continues to raise the red herring issue of the Tim Adkins deposition. The Petitioner asserts that its purpose for holding the deposition of CON Director Adkins was to attack the WVHCA's establishment of its 2023 need methodology and, ultimately, the 2023 PC Standards. Again, there is a major problem with this argument that the Petitioner cannot overcome. The final hearing in this matter, had it been held, would have been to determine only whether Panhandle's Application met the legal standard for approval.

"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." *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); *see also* W. Va. Code § 16-2D-6. Here, it is undisputed that the Governor had already approved the 2023 PC Standards. Those standards affirmative state that there was unmet need for PC Services existing in Panhandle's proposed Service Area. Accordingly, the Petitioner's entire line of argument that there was not any unmet need, or that some other standard not adopted by the Governor should have been applied, is completely irrelevant.

Moreover, the granting of summary judgment in this matter did nothing whatsoever to prevent the Petitioner from making its record for some potential attack on the underlying 2023 PC Standards. Mr. Adkins was deposed. The only actual impact of the WVHCA's action in this case was that counsel for Panhandle was barred from asking Mr. Adkins any questions at the deposition. Clearly, the WVHCA does not agree that it acted arbitrarily or capriciously in establishing the 2023 PC Standards approved by the Governor. It makes no difference how many times the Petitioner asserts this argument, it is entirely reasonable that the WVHCA would not arbitrarily and capriciously reverse its

previous stance and suddenly agree that all its work in establishing the 2023 PC Standards was improper and thus invalid.

Indeed, Panhandle argued that the Petitioner's chief arguments in this matter had already been addressed by the WVHCA. *See* D.R. 1005. The Petitioner asserts that "[w]ithout a doubt, making a ruling on evidence not in the record is clearly wrong. Not only is it improper to make this kind of reliance, but it is impossible for the WVHCA to predict what evidence Petitioner would enter and rely on in the underlying matter." However, the Petitioner's argument ignores two important facts. First, the chief arguments referenced by Panhandle are not relevant evidence for the reasons set forth above. As such, Panhandle would have repeatedly objected to the introduction of any of this irrelevant information, and it is clear from the prior hearing that the WVHCA was inclined to sustain such objections.

Second, it is not at all impossible to predict what evidence Petitioner would enter. Had the public hearing occurred, Panhandle would have simply rested its case on its Application. It would have presented no witnesses or additional evidence, as it did not need to do so based on the 2023 PC Standards and need methodology. The Petitioner failed to subpoena any witnesses from Panhandle, so Panhandle would not have had any witnesses at the hearing to be called by the Petitioner. Accordingly, the only evidence the Petitioner would have had to provide is the same testimony that it previously presented, including the testimony of Petitioner Executive Director. She would have repeated her assertions that there was no unmet need in Putnam County, that the WVHCA improperly promulgated the 2023 PC Standards, and that the granting of Panhandle's Application could have an adverse impact of Petitioner's other services, including its Meals on Wheels program. This Court can predict this result because when, at the prehearing conference, it was asked what other evidence it would be able to present, the Petitioner was unable to point to anything.

Given all of these facts, the WVHCA properly found that "pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, there were no issues of material fact to be decided at the public hearing and that, even taking the facts in a light most favorable to Petitioners, Panhandle was entitled to judgment as a matter of law." *See* D.R. 1005. While the Petitioner clings to its argument that it would have raised a genuine dispute of material fact at the public hearing, the reality is that it was virtually powerless to do so. In its brief, the Petitioner suggests it could have argued that (1) Panhandle would have been unable to show an actual unmet need; (2) Panhandle relied solely on the 2023 Need Methodology which was in error as the Methodology was arbitrary and capricious; and (3) Panhandle would be unable prove that the granting of a CON would not have a negative effect on "other service."

With regard to the first two of these arguments, Panhandle need only remind this Court that the unmet need was established by the 2023 PC Standards and its need methodology. The 2023 PC Standards were approved by the Governor, so Panhandle had every right to rely on those standards in the filing of its Application. *See 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); *see also* W. Va. Code § 16-2D-6.

Regarding the Petitioner's third argument, Panhandle addressed this point utilizing the undisputed fact that Panhandle was already present in the proposed target area, including Putnam County, providing PC Services through a subcontractor agreement with another approved provider of PC Services. As Panhandle was not seeking to offer any new PC Services in the target area, there is no legitimate argument that the granting of Panhandle's CON is likely to have any impact, negative or otherwise, on the community or on the Petitioner's other services. In theory, the only party that could reasonably argue it would be adversely impacted by Panhandle receiving its own CON is the entity with which Panhandle was subcontracting; however, that entity did not object to Panhandle's application. So, even if the adverse impact on other programs outside the authority

of the WVHCA was an appropriate consideration, which it is not, the Petitioner would be unable to establish any adverse impact in this particular case.

Had it had any other relevant evidence or arguments to present, the Petitioner surely would have raised them at the prehearing conference when faced with Panhandle's dispositive motion. Because it failed to issue any subpoenas for any Panhandle employees or representatives, the Petitioner was not going to be able to undertake the kind of fishing expedition that it argues it was entitled to conduct. Accordingly, the WVHCA appropriately determined that it had the relevant facts before it, that there was no genuine dispute regarding those relevant facts, and that Panhandle was entitled to have its Application granted as a matter of law. This determination was not only not clearly wrong, but it was legally correct.

D. THE HEALTH CARE AUTHORITY PROPERLY FOUND THAT THERE WAS AN UNMET NEED WITHIN THE SERVICE AREA TARGETED BY PANHANDLE'S APPLICATION, BUT, REGARDLESS, EVEN IF THIS COURT WERE TO AGREE THAT THERE COULD BE NO UNMET NEED, THIS FACT IS ONLY TRUE BECAUSE PANHANDLE HAD ALREADY BEEN SERVING THE TARGET AREA FOR MANY YEARS.

The WVHCA governs a variety of health care services. Each of these specific services has its own standards that must be met in order for a CON application to be granted. In some instances, the applicant is charged with determining, explaining, and supporting its proposed need criteria. In other instances, including the PC Services at issue here, the need criteria are provided directly by the WVHCA. As such, it is entirely appropriate that Panhandle would have relied on the Governor-approved 2023 PC Standards when filing its Application. *See 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); *see also* W. Va. Code § 16-2D-6. Because Panhandle correctly relied on these Governor-approved need calculations, which established an unmet need in each of the five (5) counties covered by this Application, Panhandle's Application, on its face, established the unmet need.

The Petitioner seeks to undermine the 2023 PC Standards by suggesting that, in its own perception, there is no unmet need in those counties. The Petitioner, citing W.Va. Code § 16-2D-1, further argues that Panhandle was obligated to show that its Application would not result in the unnecessary duplication of services or the unnecessary waste of resources. While Panhandle would argue that these considerations are baked into the need methodology utilized for the Governor-approved 2023 PC Standards, Panhandle asserts that its historical presence as a PC Services provider within the targeted Service Area render the concerns about unnecessary duplication of services or the waste of resources moot. Panhandle has long provided the PC Services at issue in this case. The only change is that, by gaining its own CON, it has freed itself of the subcontractor relationship. If Panhandle was unable to obtain its own CON, another entity would have the power to control Panhandle's ability to provide the PC Services, exacting an administrative fee for the right to do so (just as the Petitioner does with its subcontractors) or entirely preventing Panhandle from providing the PC Services. It is appropriate that the WVHCA, and not those entities like the Petitioner (which was grandfathered in at the time the CON process for PC Services was established), should serve as the gatekeeper for entities seeking to enter the PC Services marketplace.

While the Petitioner suggests that Panhandle cannot establish any unmet need within the target Service Area without reliance on the disputed 2023 PC Standards, Panhandle asserts that its very presence as a PC Services provider affirmatively establishes that need. If Panhandle is denied its Application and rendered unable to provide the PC Services it currently provides, then there would instantly be a population with an unmet need for PC Services. To this point, the PC Services provided by Panhandle were considered when the WVHCA formulated its need calculations. In other words, without Panhandle's presence providing PC Services within these counties, the unmet calculation would have been even greater.

To try to combat this fact, the Petitioner attempts to rely on the lack of a waiting list for PC Services. Here, though, the Petitioner has misinterpreted information provided by Teresa McDonough at the Bureau of Medical Services ("BMS"). Ms. McDonough is the Program Manager for TBI Waiver and Personal Care Services. While she may have stated in an email that there "never has been or ever will be a 'wait list' for the Personal Care Services program" (*See* D.R. 883), Panhandle asserts that this statement was made to distinguish PC Services from other BMS programs, like the Intellectual/Developmental Disabilities Waiver ("IDDW") program, which maintain a limited number of Medicaid-approved slots for eligible patients and, thus, tend to have a long wait list. In such programs, Medicaid has limited the number of eligible slots as a means of controlling costs, but the PC Services program has never had such a limitation or waitlist, as indicated by Ms. McDonough.

Ultimately, because the unmet need for PC Services was determined by the WVHCA (in conjunction with BMS), the Petitioner's arguments regarding waitlists is yet another red herring that should be disregarded by this Court. Instead, the Court should hold that the Governor-approved 2023 PC Standards established an unmet need within the proposed Service Area, that Panhandle correctly relied on the current Governor-approved standards when filing its Application, and that, even if there was no existing unmet need within the Service Area, the fact that Panhandle has been providing PC Services in those counties for many years established sufficient need for the PC Services sought to be provided by the Application.

E. THE HEALTH CARE AUTHORITY PROPERLY FOUND THAT IT WAS IMPROPER TO CONSIDER THE IMPACT OF GRANTING PANHANDLE'S APPLICATION ON OTHER UNRELATED SERVICES CLEARLY OUTSIDE THE SCOPE OF REVIEW BY THE HEALTH CARE AUTHORITY.

During the prehearing conference, Panhandle stipulated to the fact that the Petitioner provides other services, including a Meals on Wheels program, and that the Petitioner uses the income gained from its PC Services to supplement those services. While it is admirable that the Petitioner provides those other services,

the simple fact is that those services are not relevant to these proceedings. Panhandle has argued, and the WVHCA agreed, that there must be some reasonable limitation to what "other services" should be considered when analyzing whether the Application will have any adverse impact on the availability of other services. The WVHCA correctly determined that "other services" should be limited to those services and programs which are under the authority of the WVHCA. To decide otherwise would unnecessarily restrict any expansion of CON services and could easily be taken to ridiculous lengths. In this case, the Petitioner seeks to protect the income it uses to provide food delivery services. While it is easy to support the use of resources for the feeding of elderly shut-ins, allowing this sort of program to deny the approval of otherwise appropriate applications for CON is inappropriate. As the Petitioner noted, the purpose of the CON process is to avoid the unnecessary duplication of resources, not to protect a monopoly's use of profits for clearly unrelated services. If this sort of analysis was required, then any and all unrelated programs would necessarily become part of the WVHCA's consideration process, potentially leading to endless arguing over the negative impacts to even meaningless programs.

Rather than the nonsensical analysis proposed by the Petitioner, the WVHCA properly found that the potential impact of the Application on "other services" offered by the Petitioner must be limited to the services at issue in the Application, meaning Petitioner's PC Services and not to any and all other unrelated programs and services that the Petitioner may choose to offer. *See* D.R. 1005, 1007. This Court should uphold the WVHCA's interpretation of "other services" in this way, because to do otherwise would be to create a system of chaos.

F. THE IN-HOME PERSONAL CARE 2023 NEED METHODOLOGY WAS PROPERLY PROMULGATED, AND IT IS NEITHER ARBITRARY NOR CAPRICIOUS.

As noted above, the Petitioner strangely suggests that this Court is not an appropriate body to invalidate the 2023 PC Standards, and then asks this Court to do just that. Whether or not this Court has

the authority to invalidate agency promulgated standards that have been approved by the Governor, this Court does not need to make that determination in this case. Rather, this Court should find that there is simply no merit to the Petitioner's argument that the 2023 PC Standards were established in an arbitrary or capricious fashion outside of statutory guidelines.

Because the need calculations associated with the 2023 PC Standards clearly establish an unmet need within the Service Area, the Petitioner can only protect its stranglehold on the existing PC Services market by attacking the need methodology itself. This Court should reject this argument and hold that the Governor-approved 2023 PC Standards were validly promulgated.

The West Virginia Legislature set the process for amending the WVHCA's CON standards in West Virginia Code § 16-2D-6. 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. *See* W.Va. Code § 16-2D-6(a)-(d). The WVHCA also may 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).

In this case, the WVHCA followed all the required steps. In his deposition, CON Director Adkins gave a detailed account of the process undertaken by the WVHCA to amend the PC Standards. While the Petitioner objects to the task force formed by the WVHCA, arguing that a single meeting was insufficient to meet the statutory requirements, the statute does not contain any requirements regarding the number of meetings. Instead, the statute states only that the WVHCA "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." *See* W.Va. Code § 162-D-6(c).

Based on the recording of the task force meeting produced by the WVHCA, it is clear that the appropriate parties, including the Petitioner itself, were included in the process. The Petitioner merely disagrees with the ultimate outcome reached following the task force meeting. However, the Petitioner's failure to get its way is far from a sufficient rationale for invalidating the entire process undertaken by the WVHCA prior to the Governor's approval of the 2023 PC Standards.

The Petitioner objects to the change in the need methodology's multiplier from 1.25% to 3%, calling the change arbitrary and capricious. The Petitioner makes this argument essentially only because a 3% multiplier results in there being additional unmet need within the Service Area, while the status quo means it would retain its lock on the PC Services market. The Petitioner does not seem to mind whether the 1.25% multiplier previously utilized was, itself, a seemingly arbitrary figure. As discussed above with the number of slots made available under the IDDW program, much of BMS's decision-making over the years has been undertaken with an eye on the financial bottom line. To this point, CON Director Adkins testified that the WVHCA knew the 1.25% multiplier was artificially low and had planned to raise it to 2.5% in 2016, ultimately declining to do so solely because it had been reported that the State's Medicaid program was going to be $40 million in debt.

In attacking the use of the 3% multiplier, the Petitioner ignores what the stature actually requires. The WVHCA 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 was properly solicited and considered. Inevitably, when a broad range of stakeholders are brought together in this fashion, it should be expected that disagreements will occur, regardless of what changes are proposed. Those who want the status quo will object to any changes, while those trying to open up a market will object if the changes are not great enough to allow them into a desired service area.

The mere fact that a particular party does not get its desired outcome does not serve to invalidate the procedure. Mr. Adkins offered detailed explanations for how the 3% multiplier was finalized, with the WVHCA creating multiple drafts of the standards before eventually sending them to BMS for review and on then the Governor for final approval. Part of this process is to identify trends and adjust the standards to avoid health care shortages down the road. West Virginia has one of the oldest populations in the United States, and it has among the highest rates of disability. While the Petitioner suggests the modification of the 1.25% multiplier to a more reasonable number was "premature," that argument is entirely self-serving and should have no bearing on the work of the WVHCA or the determination of this Court. Ultimately, this Court should agree that, while the Petitioner may not like the end result, the process of promulgating the new 2023 PC Standards was anything but arbitrary and capricious.

V. CONCLUSION

For all of the reasons set forth herein, this Court should conclude, first, that the 2023 PC Standards are not invalidly promulgated. Without this determination, the rest of the parties' arguments are rendered moot. From there, the Court should rule that the WVHCA did not err in its procedural handling of this case, including its granting of summary judgment, after the conclusion of discovery, where there was no genuine dispute of material fact to warrant the holding of the public hearing. These determinations having been made, this Court should affirm the decision of the WVHCA granting Panhandle's Application.

Respectfully submitted,

PANHANDLE SUPPORT SERVICES, INC.
Respondent, by counsel,

/s/ Brock M. Malcolm
BROCK M. MALCOLM (WVSB No. 7994)
bmalcolm@bowlesrice.com / (304) 285-2516
MICHAEL C. CARDI (WVSB No. 12228)
mcardi@bowlesrice.com / (304) 285-2561
BOWLES RICE LLP

125 Granville Square, Suite 400
Morgantown, WV 26501
Counsel of Record for Respondent,
Panhandle Support Services, Inc.

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-ICA-98

PUTNAM COUNTY AGING PROGRAM, INC.,

Affected Party Below, Petitioner,

vs. CON File No. 23-2/3-12689-PC

PANHANDLE SUPPORT SERVICES, INC.,

Applicant Below, Respondent,

and

WEST VIRGINIA HEALTH CARE AUTHORITY,

Respondent.

CERTIFICATE OF SERVICE

I, Brock M. Malcolm, do hereby certify that on this 25th day of July, 2024, I filed the forgoing *"Brief of Respondent, Panhandle Support Services. Inc."* to be served on counsel of record via File & ServeXpress.

/s/ Brock M. Malcolm
Brock M. Malcolm (WVSB No. 7994)