No. 24-347

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.
PETITIONER,

vs.

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

STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY'S BRIEF

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

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STATEMENT OF THE CASE

In its Statement of the Case, Petitioner St. Joseph's Hospital of Buckhannon, Inc. ("SJH") foremost tries to depict itself as a small rural hospital. The reality is that SJH is part of the largest health care provider in the State, West Virginia United Health System ("WVUHS"), that includes West Virginia University and United Hospitals. (JA 0004). SJH nonetheless argues that it would be crippled by the loss of its critical access hospital ("CAH") status by the relocation of Respondent Stonewall Jackson Memorial Hospital Company's ("Stonewall") hospital. SJH then dedicates a paragraph of its Statement of the Case to Stonewall's 2021 Certificate of Need ("CON") application (the "CON matter") to build a replacement acute care health care facility by moving its hospital campus to Staunton Drive in Lewis County, West Virginia. The CON matter is not the basis of SJH's instant appeal. Instead, a second matter, Stonewall's Determination for Reviewability ("DOR") application for the total relocation of the hospital under W. Va. Code § 16-2D-7, is now pending before this Court. To the extent that SJH's Statement of the Case attempts to focus on the prior CON matter, it is erroneous and misleading. Although the two matters involve the same total hospital relocation project, the CON matter and the instant DOR appeal are not factually or legally identical. The two matters were filed under two different sections of the Code and, for that reason, resulted in two different outcomes.

Stonewall's 2021 CON matter began when an application was filed (HCA CON File No. 21-7-12157-H) under the provisions of W. Va. Code § 16-2D-8(a)(5) and W. Va. Code § 16-2D-13 for the aforementioned total relocation of Stonewall's hospital. At that time, under W. Va. Code § 16-2D-2(15), the capital expenditure minimum for CON review was just under $6 million. Stonewall filed for a CON application in 2021 because its proposed total hospital relocation project carried a capital expenditure of approximately $56 million, which was above the then-applicable

expenditure minimum.[1] Since it had to file a CON application, Stonewall was also required by the CON Standards to drastically reduce its proposed bed complement to 29 beds. The CON matter was litigated pursuant to the provisions of W. Va. Code § 16-2D-13, "Procedures for Certificate of Need Reviews." Further, the CON application was required to comply with the requirements of W. Va. Code § 156-2B-12(b)(1). That section only applies to matters requiring a CON, and it was the section the Health Care Authority ("Authority") based the denial of the previous CON on. That section does not apply to the instant matter.

On June 13, 2022, Stonewall's request for a CON was denied by the Authority (JA 0217-0261) and that decision was upheld on June 27, 2023, by the Intermediate Court of Appeals ("ICA").[2] The ICA decision was initially appealed to this Court, but the appeal was withdrawn after the West Virginia Legislature (the "Legislature") enacted Senate Bill 613 that made significant changes to the CON statutes, W. Va. Code §§ 16-2D-1*et seq.*[3] One of the significant changes under Senate Bill 613 was to increase the expenditure minimum for CON review from just under $6 million to $100 million. The purpose of the expenditure minimum is to exempt from CON review projects that are not otherwise subject to CON review but for the capital expenditure.[4] For example, the total relocation of a hospital is not otherwise subject to a CON review, but would

[1] In 2021, the capital expenditure of Stonewall's proposed total hospital relocation project was $55,950,000. (JA 0219).

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

[3] As discussed below, Senate Bill 613 has strong roots with SJH's parent company West Virginia United Health System ("WVUHS"). Senate Bill 613 was sponsored by Senator Dr. Michael J. Maroney and voted on by Senate Majority Leader Dr. Tom Takubo. Both are employed full-time by WVUHS, Dr. Maroney is employed full-time as a radiologist and Dr. Takubo is the executive vice president for provider relations.

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

be reviewable if it resulted in an expenditure of more than $6.0 million.[5] Senate Bill 613 inflated the expenditure minimum from just under $6.0 million to a whopping $100 million. The result of the $94 million increase in the expenditure minimum is that more proposed projects, which would have previously been subject to CON review, were no longer reviewable.[6] One such project was the total relocation of Stonewall's hospital, which had a capital expenditure of roughly $56 million.

These changes, as discussed below, opened a new path forward for Stonewall's total hospital relocation and Stonewall submitted its DOR on March 29, 2023, under W. Va. Code § 16-2D-7. (JA 0595-0597). A DOR filed pursuant to the provisions of W. Va. Code § 16-2D-7 is simply a standard, verified letter, requesting the Authority find a proposed total hospital relocation project can proceed without obtaining a CON. The DOR in this matter proposed a similar total hospital relocation project to the one proposed in the original 2021 CON application and stated that no CON was required because the project was below the statutory minimum expenditure for CON review. (JA 0595-0597). Also, because no CON was required, Stonewall was not required to reduce its bed complement to 29 beds and Stonewall made no such proposal in its 2023 letter requesting a DOR. In fact, the Stonewall letter requesting a DOR contains no discussion at all about the number of beds Stonewall proposes to build at the new facility. (JA 0595-0597).

In the 2023 DOR letter, Stonewall stated the legal reasons why its request was proper. (JA 0595-0597). This paragraph from the DOR letter request best summarizes Stonewall's legal basis for its request:

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

[5] W. Va. Code § 16-2D-8(a)(3)(A) provides that "[a]n obligation for a capital expenditure incurred by or on behalf of a health care facility in excess of the expenditure minimum" is subject to certificate of need review.

[6] This change is consistent with the Legislature's trend of shrinking the pool of projects subject to CON approval. Since at least 2017, the Legislature has amended the provisions W. Va. Code § 16-2D-1 *et seq*. reflecting an intention to reduce CON regulations in West Virginia.

> 8(a)(1) provides that a certificate of need is required for "[t]he construction, development, acquisition, or other establishment of a health care facility." This project does not involve the construction, development, acquisition, or other establishment of a health care facility. The health care facility, Stonewall Jackson Memorial Hospital, already exists. This simply involves the total replacement and relocation of that existing health care facility. The complete relocation of existing health care facilities has never been subject to certificate of need review unless the relocation would cost more than the expenditure minimum. There are numerous decisions issued by this agency finding that a total relocation project is not subject to certificate of need review. One recent case making that finding is *In re: Charleston Area Medical Center*, CON File No. 23-3-12610-X. See *Attachment 1*, attached and made a part hereof by reference. In fact, in a case that preceded that CAMC decision, the Authority found that the construction of a new health care facility to house existing services which would be relocated from their present location to the new facility, was subject to certificate of need review solely because the capital expenditure exceeded the then expenditure minimum of approximately $5.4 million. *In re: Charleston Area Medical Center*, CON File No. 19-3-11722-X. See *Attachment 2*, attached and made a part hereof by reference. Thus, the construction of a new health care facility to house existing services that are being totally relocated is not subject to review absent the costs of the project being in excess of the expenditure minimum. A small sample of other decisions relevant to this matter are attached hereto as *Attachment 3 A-D*.

Several prior Authority decisions were also attached to Stonewall's March 29, 2023, DOR letter illustrating the point that the total relocation of an existing health care facility did not require a CON if the associated capital expenditure was less than the statutory minimum.

In various filings before the Authority, SJH raised several arguments against the DOR. (JA 0593, JA 0208-0216; JA 0189-0195). On April 26, 2023, the Authority found that, because of the change to the expenditure minimum under Senate Bill 613, the total hospital relocation project was now exempt from CON review and issued the Decision on Request for Ruling on Reviewability that is the subject of this appeal. (JA 0178-0188). Since Stonewall's expenditure for the total relocation of the hospital was under $100 million, the enactment and immediate enforcement of

Senate Bill 613 resulted in Stonewall no longer needing a CON. SJH argued that even though Stonewall's proposed total hospital relocation project was well below the new capital expenditure minimum, it contemplates the "construction" of a new Stonewall hospital and that alone required a CON. (JA 0209). Stonewall has never disputed that the total hospital relocation project involves "construction." (JA 0202; JA 0026-27). A CON is required when a health care facility is established. It is undisputed that Stonewall, as a health care facility, has existed for over 50 years. (JA 0202). The Authority has recognized that the current facility is outdated. (JA 0218). As such, Stonewall was permitted by law to send a letter requesting a DOR for the total relocation of the hospital under W. Va. Code § 16-2D-7, and no CON is needed. (JA 0595-597).

On June 21, 2023, SJH filed its Notice of Appeal with the ICA. After the appeal was filed and docketed, the Authority, on July 12, 2023, issued an Amended Decision on Request for Ruling on Reviewability. (JA 0025-0035). The Amended Decision on Request for Ruling on Reviewability corrected some clerical and factual errors that had been made in the original decision but did not change the final decision finding that the total hospital relocation project was not subject to CON review. The matter was briefed and argued before the ICA. On May 23, 2024, the ICA upheld the Authority's DOR, cited the *Chevron* decision and applied its deference requirements. (JA 0001-0024). Thereafter, SJH filed a petition for appeal with this Court.

The arguments raised by SJH's in its Statement of the Case are specifically addressed below. Suffice it to say that SJH's arguments regarding the total relocation of the hospital and a substantial change to the bed capacity in this DOR proceeding are not supported factually or legally. Abandoning its previous argument that the reduction in beds from the CON matter is somehow relevant to the instant proceedings, SJH continues to grasp at straws. SJH reasons that W. Va. Code § 16-2D-8(a)(5) still requires Stonewall to obtain a CON because a substantial change

to the bed capacity will occur in the instant DOR proceedings when the beds are relocated from the old facility to the new facility. As discussed herein, that argument is nonsensical and unsupported by any interpretation of the law.

The Authority has historically ruled that the requirement of W. Va. Code § 16-2D-8 (a)(5) requiring a CON when there will be a substantial change to the bed capacity of a health care facility that is accompanied by a capital expenditure does not apply when the relocation of the beds is a total relocation and the licensee of the beds or the license do not change. The bed argument is a non-issue, totally fabricated by SJH, and this Court should affirm the Amended DOR decision and the ICA decision and deny the instant appeal. (JA 0025-0035).

This Court should further conclude that the Authority's DOR decisions, as upheld by the ICA, permitting Stonewall to totally relocate its existing hospital to a new location without a CON are a proper interpretation of the statutory provisions in W. Va. Code §§ 16-2D-8(a)(1) and (5). SJH goes to great lengths to argue out of both sides of its mouth. On one hand, SJH asserts this Court should exercise independent judgment as directed by the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L.Ed.2d 832 (2024). However, SJH is actually requesting that this Court alter the Authority's decades-long interpretations of W. Va. Code §§ 16-2D-8(a)(1) and (5) in complete violation of *Loper*. On the other hand, SJH argues that reversal is warranted because the ICA improperly exercised independent judgment over the Authority's interpretation of W. Va. Code §§ 16-2D-8(a)(1) and (5) in the instant DOR matter. This Court should review these incompatible arguments and reject the same as a matter of law. The ICA correctly determined the Authority made a proper interpretation that Stonewall did not need a CON as it upheld the Authority's issuance of a DOR to Stonewall. The ICA applied the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.

2d 694 (1984) deference standard, and it acknowledged that the Authority's decision was based upon decades of similar decisions. (JA 0011 and 0020). In light of the Authority's longstanding uniform application of the law, consistent with the Legislature's written intention, this Court should affirm the ICA's May 23, 2024, decision.

SUMMARY OF ARGUMENT

SJH has appealed to this Court the Authority's DOR decisions under W. Va. Code § 16-2D-7 in the original and Amended DOR, as upheld by the ICA, arguing that a CON is required for Stonewall to totally relocate its hospital. This Court should review the findings of the ICA and the DOR decisions of the Authority and determine that *stare decisis,* based on the Authority's longstanding interpretations of W. Va. Code §§ 16-2D-8(a)(1) and (5), support and require a finding that Stonewall did not need a CON in this instance. For these reasons, as more fully discussed herein, this Court should uphold the ICA and the Authority's DOR decisions concluding that Stonewall is not required to obtain a CON to totally relocate its hospital.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is not necessary to aid the Court's decision. Accordingly, Stonewall does not request oral argument, and it suggests to the Court that a memorandum decision affirming the ICA's Opinion affirming the Amended Decision on Request for Ruling on Reviewability, (JA 0025-35, JA 0001-0024), would be sufficient to resolve this case.

STANDARD OF REVIEW

This Court has yet to set forth the standard of review on an appeal from the ICA relating to a decision by the Authority. In *Duff v. Kanawha County Commission*, 905 S.E.2d 528, 2024 W.

Va. LEXIS 175 (April 22, 2024), this Court addressed an appeal from the ICA of a Workers' Compensation Board of Review decision, and it stated at Syllabus Point 3 as follows:

> On appeal of a decision of the West Virginia Workers' Compensation Board of Review from the Intermediate Court of Appeals of West Virginia to the Supreme Court of Appeals of West Virginia, the Supreme Court of Appeals is bound by the statutory standards contained in West Virginia Code § 23-5-12a(b) (eff. Jan. 13, 2022). Questions of law are reviewed de novo, while findings of fact made by the Board of Review are accorded deference unless the reviewing court believes the findings to be clearly wrong.

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

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

> answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).' Syl. Pt. 4, *Appalachian Power Co. v. State Tax Dep't of W. Va.,* 195 W. Va. 573, 466 S.E.2d 424 (1995)." Syl. Pt. 6, *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 827 S.E.2d 417 (2019).
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> 4. "'Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.' Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995)." Syl. Pt. 2, *Steager v. Consol. Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019).
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> 5. Where the State Health Plan Home Health Services Standards were promulgated by the West Virginia Health Care Authority (formerly the West Virginia Health Care Cost Review Authority) pursuant to a legislative grant of authority, West Virginia Code §§ 16-2D-1 to -20 (2016 & Supp. 2020), authorized by the Governor, and formally adopted and given full force and effect by the Legislature, see id. § 16-2D-6(g), the longstanding, consistent interpretation of those Standards by the West Virginia Health Care Authority, being neither arbitrary nor capricious, is entitled to judicial deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

This Court should apply this standard of review in this case and determine as a matter of law that the Authority's DOR Decisions, as affirmed by the ICA in this matter, are not in error, and they should be summarily affirmed as a matter of law.

ARGUMENT

I. SJH HAS WAIVED ANY ARGUMENT UNDER *LOPER* BECAUSE IT FAILED TO PROPERLY PRESERVE THIS ISSUE BELOW AND, FURTHER, *LOPER* DOES NOT REQUIRE THIS COURT TO OVERRULE ANY PRIOR DECISIONS.

On or about July 3, 2024, SJH filed a Motion to Amend its Notice of Appeal to raise for the first time an additional assignment of error "based upon the Supreme Court of the United States['] recent decision in *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360, at *1 (U.S. June 28, 2024), which overruled *Chevron, U.S.A., Inc. v. Nat. Res. Def.*

Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 2778–79, 81 L. Ed. 2d 694 (1984)." This Court permitted the amended notice of appeal in its scheduling order entered July 22, 2024. SJH argued in its first assignment of error that the Supreme Court's *Loper* decision requires this Court to "overrule syllabus points two through four of *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 579, 466 S.E.2d 424, 430 (1995) and its progeny and hold that a reviewing court must exercise independent judgment in deciding whether an agency has acted within its statutory authority."

Stonewall disagrees with SJH's first assignment of error for two reasons: first and foremost, SJH has not properly preserved this issue under *Loper* before the Authority or the ICA, and this Court should not consider this issue for the first time on appeal; and, second, even if this Court decides to consider the *Loper* issue, the Supreme Court in *Loper* recognized two critical points that are missed by counsel for SJH: a) the Supreme Court specifically recognized in *Loper* that prior case law need not be overruled; and b) the Supreme Court specifically recognized in *Loper* that longstanding decisions of an administrative agency may continue to be entitled to deference.

A. This Court has long recognized that issues must be raised in the tribunal below and that it may not consider nonjurisdictional issues raised for the first time before this Court on appeal.

This Court may take notice that the Petition for Certiorari was filed with the United States Supreme Court in the *Loper* case on November 10, 2022, Docket No. 22-451, and the Petition was granted by the Supreme Court on May 1, 2023. This Court may further take notice that the demise of *Chevron* was openly discussed, even in advance of the Supreme Court accepting the *Loper* Petition, in light of the filing in *Loper*. *See e.g., Response: Chevron's Ghost Rides Again, An Invited Response to Gary S. Lawson, The Ghosts of Chevron Present and Future*, 103 B.U. L. Rev. 1647 (Jan. 1, 2023). Thus, it can be said that the potential for the overruling of *Chevron* was something

that was generally expected in legal circles well in advance of the Supreme Court's ultimate *Loper* decision on June 28, 2024.[7]

This background is important since Stonewall's request for a DOR was filed with the Authority on March 29, 2023, (JA 0595-0597), after the *Loper* Petition for Certiorari had been filed. SJH's filings before the Authority in April 2023, indicate that at no time did SJH raise any *Chevron* issue before the Authority. (JA 0208-0589). After the Authority issued its DOR Decision, SJH appealed the case to the ICA. SJH never raised an issue before the ICA that *Chevron* deference should not apply. In fact, at page 8 of its Brief filed with the ICA, it recognized the *Chevron* standard of deference, citing this Court's decision in *Appalachian Power Co., supra*. (JA 0145). Based upon the foregoing, it is clear that this first assignment of error was not raised below, and it is now raised for the first time before this Court.

In *Berkeley County Council v. Government Properties Income Trust LLC*, 247 W. Va. 395, 406, 880 S.E.2d 487, 498 (2022), this Court discussed its general rule for considering nonjurisdictional issues that were not raised before the Circuit Court as follows:

> This Court's general rule is that nonjurisdictional questions not raised at the circuit court level will not be considered [for] the first time on appeal. *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993).
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> > The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

[7] SJH's Brief at page 12 implicitly recognizes this point as it discusses that *Chevron* has been under attack since 2016.

This Court has applied the same general rule for issues that were not raised before an administrative agency in *Noble v. West Virginia DMV*, 223 W. Va. 818, 821-22, 679 S.E.2d 650, 653-54 (2009) as follows:

> "Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered." *Shaffer v. Acme Limestone Co., Inc.,* 206 W.Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999). *See also, Whitlow v. Board of Education*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."); *Konchesky v. S.J. Groves & Sons Co., Inc*., 148 W.Va. 411, 414, 135 S.E.2d 299, 302 (1964) ("[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this Court will consider such matter on appeal."). Further, if a party fails to properly raise a nonjurisdictional "defense during [an] administrative proceeding, that party waives the defense and may not raise it on appeal." *Hoover v. West Virginia Bd. of Medicine*, 216 W.Va. 23, 26, 602 S.E.2d 466, 469 (2004), *quoting Fruehauf Trailer Corp. v. W.C.A.B*., 784 A.2d 874, 877 (Pa.Cmwlth. 2001).

In this case, the *Chevron* deference standard is a nonjurisdictional issue and, therefore, under the general rule, this Court should not consider SJH's first assignment of error because it was never raised below before either the Authority or the ICA. On this basis, this Court should deny the first assignment of error.

B. The Supreme Court recognized in *Loper* that prior case law under *Chevron* need not be overruled and that longstanding decisions of an administrative agency may continue to be entitled to deference.

SJH asks this Court in its first assignment of error to "overrule syllabus points two through four of *Appalachian Power Co. v. State Tax Dep't.*, 195 W. Va. 573, 579, 466 S.E.2d 424, 430 (1995) and its progeny and hold that a reviewing court must exercise independent judgment in deciding whether an agency has acted within its statutory authority." This is a complete misreading

of the Supreme Court's *Loper,* which decision specifically declined to overturn *Chevron*, 144 S. Ct. 2272-73:

> This is one of those cases. *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez v. Hillery*, 474 U. S. 254, 265, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986), is for us to leave Chevron behind.
>
> By doing so, however, we do not call into question prior cases that relied on the Chevron framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. *See CBOCS West, Inc. v. Humphries*, 553 U. S. 442, 457, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008). Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U. S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014) (*quoting Dickerson v. United States*, 530 U. S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)). That is not enough to justify overruling a statutory precedent.

Courts of Appeals have issued decisions since *Loper* and have recognized that *Loper* did not overrule *Chevron* and its progeny. *See e.g.*, *Tennessee v. Becerra*, 117 F.4th 348, at *21 (6th Cir. 2024) ("*Loper Bright* opens the door to new challenges based on *new* agency actions interpreting statutes, it forecloses new challenges based on specific agency actions that were already resolved via *Chevron* deference analysis." (emphasis in original)) and *Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024) ("the Supreme Court has instructed that *Loper Bright Enterprises* does not 'call into question prior cases that relied on the *Chevron* framework.' 144 S. Ct. at 2273."). Based on this holding and, as it has been applied by other courts, this Court should reject SJH's request to overrule *Appalachian Power Co.* and its progeny.

Further, the Supreme Court recognized in *Loper* that longstanding interpretation of agency matters within their expertise were still entitled to deference, 144 S.Ct. at 2262:

> Courts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA, may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. *See Skidmore*, 323 U. S., at 140, 65 S. Ct. 161, 89 L. Ed. 124.

It went on to say, 144 S. Ct. at 2267:

> the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140, 65 S. Ct. 161, 89 L. Ed. 124. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U. S. 89, 98, n. 8, 104 S. Ct. 439, 78 L. Ed. 2d 195 (1983). Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U. S., at 140, 65 S. Ct. 161, 89 L. Ed. 124; *see, e.g., County of Maui v. Hawaii Wildlife Fund*, 590 U. S. 165, 180, 140 S. Ct. 1462, 206 L. Ed. 2d 640 (2020); *Moore*, 95 U. S., at 763, 24 L. Ed. 588.

Courts of Appeals have issued decisions since *Loper* and have deferred to longstanding administrative agency interpretations. *See e.g.*, *Mayfield v. United States DOL*, 116 F.4th 611, 620 (6th Cir. 2024) ("We note, however, that if *Skidmore* deference does any work, it applies here. DOL has consistently issued minimum salary rules for over eighty years.") and *Perez v Owl, Inc.*. 110 F.4th 1296 (2024) ("We think the DOL's consistent position on the meaning of 'regular rate' 'constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)"). Based on the Supreme Court's holding and, as it has been applied by other courts, if this Court considers the *Loper* issue, it should recognize continued deference to an administrative agency's longstanding interpretation of a statute or regulation. As further discussed herein, the

Authority has long recognized that the total relocation of a hospital does not need a CON under W. Va. Code § 16-2D-8(a)(1) and this Court should defer to its expertise in this area.

II. STONEWALL'S TOTAL HOSPITAL RELOCATION PROJECT IS NOT SUBJECT TO A CON UNDER W. VA. CODE § 16-2D-8(A)(1) SOLELY BECAUSE IT INVOLVES "CONSTRUCTION" AT A NEW LOCATION FOR AN EXISTING HEALTH CARE FACILITY.

In its second assignment of error, SJH argues that the ICA and Authority "have misconstrued the plain language of § 16-2D-8(a)(1) because SJH interprets that provision as requiring a CON for any project involving "[t]he construction, development, acquisition, or other establishment of a health care facility[.]" In W. Va. Code § 16-2D-1 *et. seq.*, the West Virginia Legislature created the state CON program. The policy purpose of the CON program is stated in W. Va. Code § 16-2D-1:

It is declared to be the public policy of this state:

> **(1)** That the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state and ***to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services.*** (emphasis added).
>
> **(2)** That the general welfare and protection of the lives, health and property of the people of this state require that the type, level and quality of care, the feasibility of providing such care and other criteria as provided for in this article, including certificate of need standards and criteria developed by the authority pursuant to provisions of this article, pertaining to health services within this state, be subject to review and evaluation before any health services are offered or developed in order that appropriate and needed health services are made available for persons in the area to be served.

The Authority has been delegated with policymaking authority to administer the CON program. In W. Va. Code § 16-2D-3(a) (2017), our Legislature proclaimed that the Authority "shall:"

> **(1)** ***Administer the certificate of need program;***

> **(2)** Review the state health plan, the certificate of need standards, and the cost effectiveness of the certificate of need program and make any amendments and modifications to each that it may deem necessary, no later than September 1, 2017, and biennially thereafter.
> **(3)** Shall adjust the expenditure minimum annually and publish to its website the updated amount on or before December 31, of each year. The expenditure minimum adjustment shall be based on the DRI inflation index.
> **(4)** Create a standing advisory committee to advise and assist in amending the state health plan, the certificate of need standards, and performing the state agencies' responsibilities. (emphasis added).

W. Va. Code § 16-2D-8 (2023) generally establishes which proposed health care service projects require a CON. W. Va. Code § 16-2D-8(a)(1) provides as follows:

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

Stonewall disagrees with SJH's second assignment of error. First and foremost, the Authority has consistently held for decades that total relocation of a health care facility does not require a CON under W. Va. Code § 16-2D-8(a)(1) because the relocation is total, and no new health care facility is being established. The Authority's position is entitled to deference as *statutory stare decisis* and it is consistent with the plain reading and Legislature's intent regarding W. Va. Code §§ 16-2D-1 *et seq.* As such, the prior decisions by the Authority should not be disregarded in the instant appeal. The ICA's analysis utilized the framework of this Court's decision in *Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 466 S.E.2d 424 (1995) (instructing use of the United States Supreme Court holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). The

ICA also acknowledged the Authority's consistent findings that total relocations of health care facilities, including relocations involving construction at the new location, are not subject to CON review under W. Va. Code § 16-2D-8(a)(1). Whether absolute deference is given to the Authority or this Court exercises independent judgment to interpret W. Va. Code § 16-2D-8(a)(1), either mechanism leads to the conclusion that Stonewall's proposed total hospital relocation project involving the "construction" for relocation of an existing health care facility does not require a CON. Although *Chevron* has since been diminished, the conclusions of the Authority and the ICA are nonetheless proper.

A. The Authority properly concluded that Stonewall's proposed total hospital relocation project, including the construction of a new location, is not subject to a CON.

For decades, the Authority consistently interpreted W. Va. Code § 16-2D-8(a)(1) to conclude that the total relocation of an existing health care facility from one site to another does not constitute the construction, development, acquisition, or other establishment of a health care facility because the health care facility already exists. The polar star in all of the CON provisions is "to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." W. Va. Code § 16-2D-1(1). The relocation of an existing health care facility does not unnecessarily duplicate services. Nothing changes but the location of the services or facility. The facility, services, location, and the beds already exist. They are simply being relocated.

The Authority's position on this subject has remained consistent for decades. The Legislature requires the Authority's Board to be comprised of experts in various sectors of the health care field. *See* W. Va. Code § 16-29B-5(b)(2)[8]. These experts are charged with the creation

[8] "[. . .] No more than three of the board members may be members of the same political party. One board member shall have a background in health care finance or economics, one board member shall have

and enforcement of the CON program. Even as the individual members serving on the Authority's Board have changed, the determination that a total relocation of a health care facility, services or beds does not implicate the provisions of W. Va. Code § 16-2D-8(a)(1), or its predecessor statutes, has not wavered. This Court should seek aid from the Authority's consistent decisions in its consideration of the instant case as a statutory precedent. *See Loper, supra,* at 2273.

The multitude of cases cited herein and below reflects that the Authority has never wavered on its interpretation. In its rulings, the Authority has always differentiated between "categories" of relocations: total relocations from one location to another and other relocations that result in an additional site (i.e. less than total relocations where both sites exist). Four types of relocations were identified by the Authority in two decisions[9] issued in 1999:

1. the relocation from a hospital's campus to an off campus location;
2. relocations from one on-campus location to another;
3. relocation from off-campus to on-campus; and
4. the complete relocation, from one off-campus site to another off-campus site.

Only the first situation, the relocation from a hospital's campus to an off-campus location, has been held by the Authority as subject to CON review as it constitutes the development of a new health care facility. Stonewall cited numerous decisions in the record before the Authority and attached three to its request for a DOR[10] request in this matter that support the legal interpretation

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previous employment experience in human services, business administration or substantially related fields, one board member shall have previous experience in the administration of a health care facility, one board member shall have previous experience as a provider of health care services, and one board member shall be a consumer of health services with a demonstrated interest in health care issues." W. Va. Code § 16-29B-5(b)(2).

[9] *In re: Ohio Valley Medical Center*, CON File No. 99-10-6721-X; *In re: Reynolds Memorial Hospital*, CON File No. 99-10-6776-X.

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

that the total relocation of existing services does not require a CON. (JA 0595-597). Those decisions include:

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

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

3) The determination that United Hospital Center, Inc. did not require a CON for the relocation of its ambulatory health care facility ("AHCF") in Lewis County at a cost of $5.1 million. The Authority stated: "The Authority determines that the proposal does not constitute a reviewable health service as defined in W. Va. Code § 16-2D-8."

The three decisions involve different forms of health care facilities: one involving a day hospital, one involving health care services, and one involving an ambulatory health care facility ("AHCF"). Regardless, the Authority consistently found that no CON was necessary. The Authority's decisions in the aforementioned cases involved projects where the CON applicant requested total relocation of existing beds, services or health care facilities, and the cost to relocate was below the minimum expenditure. These interpretations are consistent with the purpose of the CON provisions (*i.e.* limiting duplication of health care services) as a total relocation cannot logically be considered duplicative. The health care facility already exists. What already exists cannot be recreated or redeveloped. The new facility will open, the former will close, and the services will continue at the new location.

Whether this Court decides to give the Authority's interpretation due deference or whether it exercises its own independent judgment, *Loper* advises this Court that the Authority's interpretations and consistency in the application of W. Va. Code § 16-2D-8(a)(1) are afforded great weight, and the *status quo* should be maintained regarding statutory precedent unless SJH produces "special justification." *Loper,* 144 S. Ct. at 2273. As heretofore discussed, the threshold for CON review went through a major change when Senate Bill 613 was enacted, because it increased the expenditure minimum within W. Va. Code § 16-2D-8(a)(3) from just under $6 million to a whopping $100 million. Among the numerous decisions predating Senate Bill 613, which found that the total relocation of a health care facility was not subject to CON review, were several decisions approving the total relocation of health care facilities that also involved the construction of new facilities. In those cases where the cost of construction of a new health care facility was under the applicable expenditure minimum, the relocation was ruled to be not subject to CON review.[11] As cited below, there were also rulings where the total relocations were subject to CON review because the capital expenditure involved with the cost of construction of the new location exceeded the capital expenditure minimum.[12]

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

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

As noted above, the Authority has a long history of interpreting W. Va. Code § 16-2D-8(a)(1) to conclude that the total relocation of a health care facility is not subject to CON review.[13] Most of these matters involve the relocation of an AHCF, not a hospital. West Virginia Code § 16-2D-2(16) defines "health care facility" as "a publicly or privately owned facility, agency or entity that offers or provides health services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in whole or in part[.]" Under W. Va. Code §§ 16-2D-1 *et seq.*, both AHCFs and hospitals are both health care facilities. *See also* W. Va. Code §§ 16-2D-2 (2) and 16-2D-2(21).

Prior to the recent large increase in the expenditure minimum, there were only two cases, both discussed below, involving the relocation of a hospital. The simple reason is that, prior to the dramatic increase included in Senate Bill 613, the cost of relocating a hospital far exceeded the $6 million expenditure minimum. The effect of this change is that a hospital can now totally relocate its facility without a CON so long as the cost does not exceed $100 million. If the total relocation is under the statutory minimum expenditure, no CON review is required. The capital costs involved with constructing the new facility for the totally relocated Stonewall hospital, do not come close to the $100 million threshold, so Stonewall no longer needs to apply for a CON. After Senate Bill 613 was enacted, Stonewall sent the Authority its letter request for a DOR allowing it

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

to construct a new facility to which it would totally relocate its hospital. The Authority determined that Stonewall's proposed capital expenditure was below the expenditure minimum and, therefore, no longer subject to CON review and issued its DOR Decision reflecting the same. The DOR Decision is consistent with all of the decisions cited herein and with numerous other decisions the Authority has issued since the 1990's.

The Authority's position that total relocation involving construction is not contemplated by W. Va. Code § 16-2D-8(a)(1) has been consistent. A relocated facility does not result in the "establishment" of a health care facility as contemplated in that section; the health care facility already exists and is simply moving to a new location. The Authority's position is compatible with the stated purpose of W. Va. Code § 16-2D-1, *et seq*: "to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." This interpretation also remains in line with the Legislature's continued modification of the CON laws over the years, relaxing CON requirements from a highly restricted environment to today's more permissive regulation. Again, the polar star in all the CON provisions is "to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." W. Va. Code § 16-2D-1(1). The relocation of an existing health care facility does not unnecessarily duplicate services. The facility, services, location, and the beds already exist. They are simply being relocated to a much needed modern health care facility.

B. The ICA properly affirmed the Authority's decision that Stonewall's proposed total hospital relocation project is not subject to a CON under W. Va. Code § 16-2D-8(a)(1).

1. The ICA's consideration of prior Authority decisions of total relocation is permitted under *Loper, supra.*

The ICA affirmed this case applying the *Chevron* deference analysis. Stonewall agrees with and supports the factors considered within ICA's independent analysis and findings. This Court

has established that consistent interpretation of the CON standards by the Authority is entitled to judicial deference when its interpretation is not arbitrary or capricious:

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

Syl. Pt. 5, *Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va.*, Inc., 245 W. Va. 398, 402 (2021). If this Court should decide that *Chevron* deference is no longer applicable law, the Supreme Court's decision in *Loper, supra*, cautions courts to still consider the "interpretations and opinions" of the relevant agency and accord "due respect" for the specialized expertise and informed judgement of the agency. In overturning its holding in *Chevron,* the Supreme Court held in *Loper,* 144 S. Ct. at 2262, that:

> The [Administrative Procedure Act (APA), 5 U.S.C.S. § 551 et seq.], in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. [. . .] And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.

This admonition to consider the consistent interpretation of the statute by the relevant agency is entirely consistent with this Court's prior interpretations of the power granted to the

Authority by the Legislature. *See Amedysis,* 245 W. Va. at 414, 859 S.E.2d at 341 ("the Legislature has delegated matters involving public health to the Authority, *see* [W. Va. Code §§ 16-2D-1 *et seq.*], which has the institutional expertise needed to resolve difficult issues of public health and citizens' access to public health services.") However, the weight of those interpretations and opinions will "depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control." *See Loper,* 144 S. Ct. at 2259 (emphasis added).

In considering the implications of *Loper* upon the ICA's decision in the instant matter, this Court should note that although the Supreme Court denounced *Chevron*, it also specifically proclaimed that:

> [b]y doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. [. . .] Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." [. . .] ***That is not enough to justify overruling a statutory precedent.*** (emphasis added).

Loper, supra. at 2273. As such, *Loper* does not direct this Court to utterly disregard the Authority's decades long interpretation of W. Va. Code § 16-2D-8(a)(1). Rather, *Loper* permits this Court to seek aid from the Authority's interpretations as the regulatory body responsible for implementing the CON program. *See generally,* W. Va. Code § 16-2D-3(a)(1) (2017). Likewise, this Court's decision in *West Virginia Citizen Action Group v. PSC of West Virginia*, 233 W.Va. 327, 333, 758 S.E.2d 254 (2014) recognizes the "precedential value of administrative agency decisions."

> While a certain amount of asymmetry is lawful, an agency may not adopt significantly inconsistent policies that result in the creation of conflicting lines of precedent governing the identical situation. The precept counseling avoidance of inconsistent administrative policies at least demands that when an agency departs significantly from its own precedent, it must confront the issue and explain the reasonableness of its current position. Before this Court, an agency will not be permitted to flirt [sic] serendipitously from case to case, like a bee buzzing from flower to flower, making up its rules and policies as it goes along.

Id. at 233 W. Va. 333-334, 758 S.E.2d at 260-261 (*quoting State ex rel. Hoover v. Berger,* 199 W. Va. 12, 19, 483 S.E.2d 12, 19 (1996)). As previously discussed, the Authority has a decades long history interpreting this section to proposed projects involving complete relocation of existing healthcare facilities. In in Footnote 2 of in its Opinion, the ICA acknowledged the Authority's position regarding complete relocation not being subject to a CON:

> It should be noted that the Authority has consistently held the position that a complete relocation is not subject to a CON. Although the expenditure minimum caused any substantial project proposals to require a CON, this position can be seen in the Authority's decisions regarding proposed relocations that had an expenditure below the $5 million expenditure minimum. *See In re: Select Specialty Hospital – Charleston, Inc*., CON File No. 06-3-8441-X; *In re: Raleigh General Hospital*, CON File No. 98-1-6531-X.

(JA 0020). This consideration of the Authority's prior decisions was not required under the ICA's *Chevron*/*Appalachian Power Co.* analysis. Nonetheless, the ICA considered the Authority's prior consistent decisions under W. Va. Code § 16-2D-8(a)(1) when it affirmed the Authority's DOR Decisions in this case.

Although the United States Supreme Court has held that "statutory *stare decisis* is not absolute," the manner of updating or correcting statutory precedents is a component left to the "legislative process." *Allen v. Milligan*, 599 U.S. 1, 42, 143 S.Ct. 1487, 216 L.Ed.2d 60 (2023). SJH, in essence, now requests this Court to do exactly what the Supreme Court in *Loper*

specifically advised it not to do. This Court should not ignore the fact that the cases interpreting the Authority's actions are "subject to statutory *stare decisis.*" *Id.* SJH boldly states that "it is for the Court, not the Authority, to determine what the law is." *Petitioner's Brief* at p. 13. SJH also misconstrues the Authority's statement within that "[n]one of the Board members are lawyers" as an admission by the Authority of "never engag[ing] with the statutory text." *Id.* (*quoting* JA 0077). Simple review of the statutes reveals that there is no requirement for the Authority to have a lawyer on its Board. *See* W. Va. Code § 16-29B-5(b)(2)[14].

Aside from being a blatant mischaracterization of the Authority's statement, that factoid bears no weight on the Authority's competency in evaluating DORs. There is no requirement for administrative agencies to have "special expertise in statutory construction." *Petitioner's Brief* at p. 13. The Authority's statement is not only true, it also establishes that the Authority complied with its statutory provisions, specifically W. Va. Code § 16-2D-5(b)(2). SJH cites to an admission of statutory compliance by the Authority to bolster its argument of failure to abide by statutory text.

Next, the Authority's assertion that this is a "case of first impression" is not referring to the issue whether projects involving construction and total relocation of hospitals are subject to W. Va. Code § 16-2D-8(a)(1). In fact, the preceding sentence states:

> This is a very simple case challenging whether the Authority 1) had the jurisdiction and authority to evaluate Stonewall's RDOR while the CON denial of the same project was being appealed, and whether the Authority 2) properly found the project was not subject to CON review based on changes to the CON law.

[14] No more than three of the board members may be members of the same political party. One board member shall have a background in health care finance or economics, one board member shall have previous employment experience in human services, business administration or substantially related fields, one board member shall have previous experience in the administration of a health care facility, one board member shall have previous experience as a provider of health care services, and one board member shall be a consumer of health services with a demonstrated interest in health care issues.

JA 0082. The Authority goes on to state: "The case is one of first impression for the Authority following ***legislative changes*** that will ultimately depend on the wisdom of this court to decide." *Id.* (emphasis added). The referenced legislative change is the ballooning of the expenditure minimum to the whopping $100 million dollars under Senate Bill 613. *See e.g.*, JA 0178; JA 0179; JA 0180.

As previously noted, Senate Bill 613 was sponsored by Senator Dr. Michael J. Maroney. Dr. Maroney's full-time employment was as a radiologist at another hospital within WVUHS. Senate Bill 613 was also voted for by Senate Majority Leader, Dr. Tom Takubo. Dr. Takubo is executive vice president for provider relations for WVUHS. The so-called quandary that the Authority found itself in is not, as SJH argues, an inability to look at its prior decisions or a lack of knowledge regarding how to interpret W. Va. Code § 16-2D-8(a)(1), rather it was evaluating the impact of the increased expenditure minimum on its prior decision. (JA 0083); *see also Petitioner's Brief* at p. 13. The issue was solely how to address the whopping increase in the expenditure minimum under Senate Bill 613.

The Authority's reference to this legislative change was omitted by SJH in its argument. *See Petitioner's Brief* at p. 13. Rather, the full statement by the Authority is as follows:

> The Authority was in a quandary, if they ignored the RDOR or claimed they lacked jurisdiction they risked a mandamus action. If they followed the change in the law and ruled the matter was nonreviewable they risked the instant appeal. If they ruled the matter was reviewable, they risked an appeal from Stonewall for failing to incorporate the new law. ***After considering all their past practices, consultation with their analysts and acting CON director, as well as legal counsel***, the Authority determined they did have the jurisdiction to issue a decision on Stonewall's RDOR and their decision would follow their long-standing practice of finding that the complete replacement of health care services under the capital expenditure limit were not subject to reviewability JA 0083 (emphasis added).

The Authority knew that SJH would appeal its consistent interpretation based on the new law, even though the statutory change in its expenditure limit was influenced by SJH's parent corporation, WVUHS. Nonetheless, the Authority properly applied its prior decisions, past practices, and legal advice in finding that the complete replacement of health care services under the capital expenditure limit were not subject to reviewability. Under the applicable $100 million expenditure minimum, Stonewall's relocation was not subject to CON review. *Id.*

Now, SJH asserts that the Authority is suddenly unaware of how to "articulate" a coherent interpretation of, *inter alia,* W. Va. Code § 16-2D-8(a)(1). *Petitioner's Brief* at p. 13. Not only has the Authority articulated coherent interpretations, but it has also consistently done so for decades. The Authority was consistent in following the law. SJH is simply not happy that the change in the law it precipitated permits a project other than its own. *See Kalamazoo Cty. Rd. Comm. v. Deleon,* 574 U.S. 1104, 1104, 135 S. Ct. 783, 190 L.Ed.2d 887 (2015) ("An old maxim warns: Be careful what you wish for; you might receive it."). The unanticipated consequences of Senate Bill 613 on a WVUHS subsidiary are a far cry from the type of justification that SJH would need to show to overrule statutory *stare decisis*, even under *Loper.* Whether this Court applies the analysis in *Chevron* or in *Loper*, the Authority's decision on Stonewall's proposed total hospital relocation project was correct, and the ICA's decision should be affirmed.

2. The ICA and the Authority's interpretation of W. Va. Code § 16-2D-8(a)(1) is consistent with the Legislative purpose of CON law.

The primary object when a court is construing a statute is, of course, to ascertain and give effect to the intent of the Legislature. As stated in *Spencer v. Yerace*, 155 W. Va. 54, 180 S.E.2d 868 (1971):

> In the construction of statutes, it is the legislative intent manifested in the statute that is important and such intent must be determined primarily from the language of the statute . . . . In ascertaining the

> legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.

Id. at 59-60, 872. Furthermore, statutes which relate to the same subject matter should be read and applied together, i.e. in *pari materia*, so that the Legislature's intention can be gathered from the whole of the enactments. *State ex rel. Campbell v. Wood*, 151 W. Va. 807, 155 S.E.2d 893 (1967); *State v. Boles*, 147 W. Va. 674, 130 S.E.2d 192 (1963); *State ex rel. Graney & Ford v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958).

The total relocation of Stonewall's hospital proposed in this matter does not duplicate services. The hospital, the beds, and the services already exist. The hospital, beds, and services are simply being totally relocated a few miles down the road, in the same town, in the same county in the same service area. The ICA found that W. Va. Code § 16-2D-8(a)(1) is ambiguous in the context of the instant action because W. Va. Code § 16-2D-8(a)(1) does not plainly describe relocation. Again, W. Va. Code § 16-2D-8(a)(1) provides:

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

In arguing that a CON is unambiguously required by W. Va. Code § 16-2D-8(a)(1) for Stonewall's total hospital relocation project, SJH's extremely plain interpretation of the statute hinges upon the term "construction[.]" Because "construction" is not defined in W. Va. Code §§ 16-2D-1 *et seq.*, SJH reasons that Stonewall's total hospital relocation involves "construction" of the replacement health care facility. Thus, SJH concludes that the proper interpretation is that a CON is required by § W. Va. Code § 16-2D-8(a)(1) for any project which involves "construction" of a health care facility, relocation or otherwise.

"In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety." *Parkins v. Londeree*, 146 W.Va. 1051, 1051, 124 S.E.2d 471 (1962). This Court has held that in reviewing the construction of a statute, portions of a single section of a statute must be read in the context of each other. *See Durham v. Jenkins*, 229 W.Va. 669, 672, 735 S.E.2d 266 (2012) ("Just as separate statutes of the same subject matter must be read *in pari materia* to give meaning to those statutes, portions of a single section of a statute must also be read together.") For example, Syllabus Point 1 of *State ex rel. Holbert v. Robinson,* 134 W. Va. 524, 59 S.E.2d 884 (1950) states:

> A statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the statute. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts.

SJH is now asking this Court to ignore the entirety of the statute as well as ignore the legislative findings in W. Va. Code § 16-2D-1(1). SJH then reads something into W. Va. Code § 16-2D-8(a)(1) which simply does not exist. Isolating the term "construction" and applying the literal definition of that term when the Legislature included it in the phrase "construction, development, acquisition, or other establishment of a health care facility," reads something into W. Va. Code § 16-2D-8(a)(1) that the Legislature did not write. SJH proposes that the plain language of W. Va. Code § 16-2D-8(a)(1) requires that a CON would be necessary when a project proposes ***any*** of the following four actions: "(1) construction of a health care facility; (2) development of a health care facility; (3) acquisition of a health care facility; or (4) establishment of a health care facility." *Petitioner's Brief* at 14. As the ICA noted, the term "establishment" cannot be ignored.

The Authority, and the ICA, looked at the entire statute, and they applied all of the terms. Looking at W. Va. Code § 16-2D-1(1) and the "establishment" phrase clearly shows that the issue the Legislature was asking the Authority to regulate involves new projects that would duplicate services. That is why the Authority decided decades ago that the total relocation of a health care facility, that does not "establish" a new one or create a duplication of services, did not need to be reviewed.

SJH confusingly cites cases where this Court has declined to permit an administrative agency from reading words into the statute which do not exist in support of its argument that this Court should do so. It is disingenuous for SJH to argue that it is asking for this Court to do anything other than change the meaning of W. Va. Code § 16-2D-8(a)(1). *See AP v. Canterbury,* 224 W. Va. 708, 713, 688 S.E.2d 317 (2009) (*quoting Banker v. Banker,* 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996)). ("It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.")

Further, it is this Court's duty "to avoid whenever possible the construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results." *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990). "The absurd results doctrine merely permits a court to favor an otherwise reasonable construction of the statutory text over a more literal interpretation where the latter would produce a result demonstrably at odds with any conceivable legislative purpose." *See State ex rel. McLaughlin v. Morris,* 128 W. Va. 456, 461, 37 S.E.2d 85, 88 (1946) (citing *Newhart v. Pennybacker,* 120 W. Va. 774, 200 S.E. 350 (1938)). Assuming, *arguendo,* that this Court finds that the statute is without ambiguity and the statute should not be construed, the literal application suggested by SJH leads to an absolutely absurd result. See *Coal & Coke Railroad Co.* v. *Conley,*

et al., 67 W. Va. 129, 178, 67 S.E. 613 (1910). Requiring the Authority to conduct a CON review for a project that does not change anything within a service area would be absurd. The services, the beds, and the facility already exist and have already been granted a CON by the Authority. Relocating those same services within the same service area does not create or establish anything new to review, and the Authority properly issued a DOR in this case.

As previously stated, W. Va. Code § 16-2D-1 sets forth the legislative findings of the CON program. W. Va. Code § 16-2D-1(1) states that the CON program seeks to, *inter alia,* "[. . .] avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services**.**" Additionally, this Court has recognized the 1977 creation of the CON program as "the passage of state legislation complementary to a national trend to deal with spiraling health care costs through reviewing the appropriateness of proposed major capital expenditures by health care institutions." *St. Mary's Hosp. v. State Health Planning & Dev. Tax Commr*., 178 W. Va. 792, 795, 364 S.E.2d 805, 808 (1987). It is utterly nonsensical that the construction associated with relocating a health care facility to an updated building was contemplated by the Legislature in W. Va. Code § 16-2D-8(a)(1) as part of the overarching purpose to avoid duplication of services. How can a replacement ever be considered a duplication?

If the Legislature wanted to require a CON for any project involving construction of a health care facility, including construction to relocate an existing health care facility, the Legislature can plainly say that. As it did with Senate Bill 613, WVUHS can go to the Legislature and ask it explicitly to require a CON for the relocation of any health care facility if they so wish. It is unlikely that will occur. When Senate Bill 613 was passed and the expenditure minimum was increased, the CON reviewability by the Authority for many other cases, including the Stonewall proposed total hospital relocation project in the instant DOR appeal, simply disappeared. While

SJH, which is a subsidiary of WVUHS, argues here that W. Va. Code § 16-2D-8(a)(1) requires that a CON must be obtained prior to the relocation of a health care facility that involves construction of a new facility, another WVUHS facility has taken the opposite position. United Hospital Center ("UHC") recently a DOR from the Authority that its relocation of an AHCF located in Elkins, West Virginia to a new location only about 25 miles from SJH did not require a CON. UHC is constructing a new facility to house the totally relocated AHCF. The projected price tag for the new AHCF is around $37,000,000.[15] Interestingly, in its request for a DOR, UHC did not disclose the full cost of the construction of the new facility. UHC's DOR Request to the Authority reported that the project involved the total relocation of an AHCF with a capital expenditure of $20,000. After the Authority's approval, UHC announced in the press that it was constructing a $37 million health care facility to house the one physician identified in the letter, as well as many other physicians.

Unlike SJH, UHC did not argue that the construction of a $37 million health care facility was subject to CON review under W. Va. Code § 16-2D-8(a)(1). In fact, UHC has never requested permission to build the $37 million health care facility. UHC was so confident that its construction project was not reviewable, that it did not request permission to construct a $37 million health care facility in its DOR. The UHC project involves the complete relocation of all services from one location to another, just as this Stonewall project does. The UHC project involves the construction of a health care facility, just as this project does. Both projects involve capital costs in the tens of millions of dollars. SJH argues here that the provisions of W. Va. Code § 16-2D-8(a)(1) require Stonewall to obtain a CON before it can construct a health care facility. UHC has taken the opposite

[15] *See* documents and decisions at https://wv-dhhr.arkcase.com/foia/portal/records-search, key word "United", category Certificate of Need, year, 2024, CON File No. 24-7-12956-X and CON File No. 24-7-12974-PV.

position in the *Elkins* case. UHC's relation project was approved by the Authority without a CON, just like Stonewall's proposed total hospital relocation project. This Court should affirm that approval.

III. STONEWALL'S PROPOSED TOTAL HOSPITAL RELOCATION PROJECT IS NOT SUBJECT TO W. VA. CODE § 16-2D-8(A)(5) BECAUSE THE RELOCATION OF STONEWALL'S HOSPITAL BEDS TO A NEW LOCATION IS NOT A SUBSTANTIAL CHANGE IN BED CAPACITY.

SJH's third assignment of error asserts that the ICA and the Authority have failed to properly apply W. Va. Code § 16-2D-2(45) and W. Va. Code § 16-2D-8(a)(5) because those statutory provisions "require a CON for the relocation of beds from one physical facility or site to another when there is a capital expenditure." Again, SJH's request to this Court woefully misinterprets the plain meaning and clear intent of this section. As such, SJH now requests this Court to completely scrap the Authority's longstanding interpretation of W. Va. Code § 16-2D-2(45). As discussed, both above and more fully below, the Authority's interpretation of W. Va. Code § 16-2D-8(a)(5) and § 16-2d-2(45) are subject to statutory *stare decisis* as they are consistent with Legislative intent. The ICA properly concluded as such. SJH's interpretation of these statutory provisions is contrary to the Legislative intent. As such, SJH's third assignment of error is completely unjustified by the law, even without *Chevron*.

A. The Authority properly interpreted W. Va. Code §§ 16-2D-8(a)(5) and 16-2D-2(45).

Just as SJH argues that the total relocation of a health care facility is subject to CON review, it also argues that the total relocation of Stonewall's licensed beds from the old location to the new one is subject to CON review. In essence, SJH's argument is that the total hospital relocation project requires a CON under W. Va. Code § 16-2D-8(a)(5) because Stonewall's proposal ". . . relocates beds from one physical facility or site to another. . ." W. Va. Code § 16-2D-2(45). West

Virginia Code § 16-2D-8(a)(5) requires a CON for proposed health services involving "A substantial change to the bed capacity of a health care facility with which a capital expenditure is associated[.]" A "[s]ubstantial change to the bed capacity" of a health care facility means "any change, associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, but does not include a change by which a health care facility reassigns existing beds." W. Va. Code § 16-2D-2 (45).

Since 1978, the Authority has established or accepted multiple need methodologies or methods of allocating acute care needs to meet the needs of individual service areas and communities. All of the methodologies revolve around making sure that each county and service area has a proper number of beds to serve those in the county and service area. Stonewall's proposed total hospital relocation project does not change the number of beds in either local Lewis County or the wider service area comprised of Lewis and Gilmer Counties. The existing beds will physically be relocated from the old facility to the new facility. As with the total relocation of a health care facility, as discussed above, the Authority has interpreted the statute to mean that only a change in the number, nature or license of the beds requires a CON review. A total relocation does not.

SJH's request for reinterpretation of the statute is contrary to the Authority's longstanding interpretation of W. Va. Code § 16-2D-2(45). SJH's proposed interpretation utterly misinterprets the plain meaning and intention of the Legislature for this section. Two Authority decisions cited in this matter below show that a total relocation of beds is not subject to review. Select Specialty Hospital of Charleston ("Select Specialty") was awarded a CON for a 32-bed long term acute care hospital in 2000. *See In re: Select Specialty Hospital – Charleston, Inc.,* CON File No. 00-3-6996-H, ("Decision"). *Id.* The hospital was and is licensed as a 32-bed hospital and was located within

CAMC General Hospital. (Decision, p. 41). In 2006, the hospital totally relocated all 32 beds from CAMC General to St. Francis Hospital. *See*, *In re: Select Specialty Hospital – Charleston,* CON File No. 06-3-8441-X. [16] The Authority ruled that "…that the proposal by SSH - Charleston for the complete relocation from CAMC - General to St. Francis Hospital would not constitute a new institutional health service as defined in W. Va. Code § 16-2D-3."[17] *See* Decision on Request for Ruling on Reviewability, pp. 1-2.

In its DOR request, Select Specialty proposed moving all of its 32 licensed beds. The Authority regulates the relocation of beds through a CON when that relocation changes either the number of licensed beds at one or more facilities or the nature of the bed complement at the facilities. When there is a total relocation of all beds, the provisions of W. Va. Code § 16-2D-2 (45) are not implicated, and no CON is needed. In this DOR case, the Authority properly decided that there is nothing to review. This is further supported by another Select Specialty case. In 2022, Select Specialty again relocated, this time from St. Francis to CAMC Memorial Hospital. Again, the relocation was a total relocation of all 32 licensed beds. The Authority again found that the total relocation of beds was not subject to CON review, specifically finding that "the proposal does not constitute a reviewable health service as defined in W. Va. Code § 16-2D-8." *In re: Select Specialty Hospital – Charleston,* CON File No. 22-3-12456-X. Likewise, no CON is needed here.

In the end, as with the provisions of W. Va. Code § 16-2D-8(a)(1), the words of the statute must be viewed in the context of the bigger picture provided by the Legislature and by examining the entirety of the article as well as the entirety of the revisions that have been made over the last

[16] These decisions are all public record and available through the YODA portal at the Authority's website. http://www.hcawv.org/vs5FileNet/. Alternatively, if the Court prefers, Stonewall is willing to download these prior decisions and provide them to the Court as a supplemental appendix.

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

several years. The Authority's interpretation of W. Va. Code § 16-2D-8(a)(5) and W. Va. Code § 16-2D-2 (45) that a CON is not needed for the total relocation of existing beds is reasonable and consistent with the legislative findings mandating that the Authority avoid unnecessary duplication of health services. *See* W. Va. Code § 16-2D-1(1).

Further, since at least 2017, the Legislature has enacted legislation to losen CON regulations, not tighten them. With that statutory and legislative history as background, the Authority ruled that the total relocation of a health care facility, including all beds and services, should not be subject to CON review unless the cost exceeded the expenditure minimum of $100 million. This total hospital relocation does not change the bed capacity of Stonewall. The number of beds on the license the day before the relocation will be the same number of beds on the license of the new location on the first day of operation there.[18] Further, the license will remain the same. The beds are now on Stonewall's license and will remain on Stonewall's license as the relocated facility opens.

Just as the *Select Specialty* decisions support the Authority's position in the instant case regarding the reviewability of a total relocation of a facility, the *Select Specialty* decisions also apply to the reviewability of the total relocation of Stonewall's beds. The Select Specialty relocations both carried capital expenditures. The relocations did not change the nature of the beds. They were licensed acute care beds located in Kanawha County both before and after the move. Neither move changed the licensee of the beds; Select Specialty was the licensee before the move and after the move. Neither move changed the number of beds. Both times, the Authority ruled

[18] SJH's comparison of this Stonewall relocation to the UHC relocation is almost comical. Stonewall is a small community hospital with an average daily census in teens, while UHC is one of the largest tertiary care hospitals in the state with an average daily census approaching 200 patients per day. Managing the relocation of a few patients from the old Stonewall facility to the new one is not comparable to relocating close to 200 patients.

that the complete relocation from CAMC - General to St. Francis Hospital and back was not subject to review.[19] *See* Decision on Request for Ruling on Reviewability, pp. 1-2 and *In re: Select Specialty Hospital – Charleston,* CON File No. 22-3-12456-X, at p. 3.

There is no material difference between the *Select Specialty* decisions and this matter. Select Specialty is a long-term acute care hospital, not a free-standing hospital. Select Specialty does, however, have CON approved, licensed beds recognized by the West Virginia Office of Health Facilities and Licensure. Select Specialty proposed moving all its 32 licensed beds from one hospital in Charleston to another. As noted above, both times, the relocation of the facility was not found to be reviewable by the Authority, and the Authority properly issued a DOR. The Authority regulates the relocation of beds when that relocation changes either (1) the number of licensed beds at one or more facilities; or (2) the nature of the bed complement at the facilities. Otherwise, the provisions of W. Va. Code § 16-2D-2 (45) are not implicated, and no CON is needed.

SJH argues that the *Select Specialty* decisions are not applicable as the beds at the two Select Specialty hospital locations did not belong to Select Specialty. SJH argues that "[t]he Select Specialty Cases are distinguishable because when an LTACH moves from one host hospital to another it does not bring beds with it." *Petitioner's Brief* at p. 19. As with its other arguments in the instant appeal, SJH's argument fails. SJH appears to be arguing the issue involves whether there is a moving van that moves actual beds from one facility to a new one. The issue contemplated by the statute is not who owns a bed frame or a mattress, but rather whether there is a change in the number of licensed beds. Changing two facilities or creating a new one when the

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

old one still exists with a partial move of the allocated beds can cause the unnecessary duplication of health services. As a result, the new location created by the partial move would have been subject to CON review. That is not what occurred in the Select Specialty cases and is not what is occurring in this case.

SJH's attempt to distinguish these decisions is based on a false narrative of what constitutes a bed under the provisions of state law. What matters in the context of a CON is that there is no change in the bed capacity, no change in the hospital license, and no change in the service area. No change at all means there is no CON issue to review. The Authority has consistently found this as such, and this case is no different. The Authority properly issued a DOR for Stonewall's total hospital relocation project.

B. The ICA properly affirmed the Authority's decision that W. Va. Code §§ 16-2D-8(a)(5) and 16-2D-2 (45) do not require a CON when beds are relocated from the previous location of a health care facility to a new location for the same health care facility even if there is a capital expenditure.

Again, the ICA affirmed this case using the *Chevron* deference analysis that has been previously discussed. As before, Stonewall agrees with and supports the ICA finding based on the *Chevron* deference doctrine. If this Court should decide that *Chevron* deference is no longer applicable law, the Supreme Court's Decision in *Loper, supra,* does not change the result of this matter. The analysis is the same regarding the total relocation of the beds as it is with the relocation of the health care facility. The Authority has a longstanding interpretation of W. Va. Code § 16-2D-8(a)(5) and W. Va. Code § 16-2D-2 (45). That interpretation is that the total relocation of existing hospital beds does not implicate the provisions of the statute and is not subject to CON. While SJH disagrees with this interpretation, it offers no evidence to refute Stonewall's argument that the Authority has long held this interpretation of the CON provisions. More importantly, SJH

cannot articulate why or how the Authority's longstanding interpretation is unreasonable, much less arbitrary and capricious. As evidenced by their contrary stance in the UHC relocation project discussed above, SJH and its affiliates agree with the standards applied by the Authority, just not the application of those same standards to someone else's project. Further, SJH fails to adequately explain how its request for this Court to completely set aside all prior decisions from the Authority interpreting W. Va. Code § 16-2D-2(45) and W. Va. Code § 16-2D-8(a)(5) as inapplicable to a relocation because relocations did not change the nature of the beds. On this basis, this Court should recognize the Authority's expertise in health care matters and, with or without *Chevron* deference, accept the Authority's longstanding interpretation as directed by *Loper*, as affirmed by the ICA.

CONCLUSION

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

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SJH'S HOSPITAL OF BUCKHANNON, INC.
D/B/A SJH'S HOSPITAL,
PETITIONER,

vs.

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

CERTIFICATE OF SERVICE

I, Thomas G. Casto, do hereby certify that on December 9, 2024, I have caused service of the foregoing *Stonewall Jackson Memorial Hospital Company's Response to Brief of Petitioner SJH's Hospital of Buckhannon, Inc.* to be made electronically upon the following counsel of record:

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