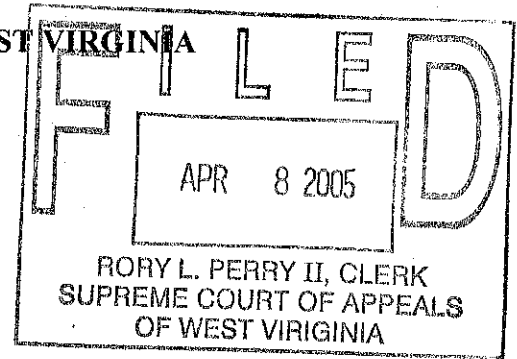


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 32565



**FAMILY MEDICAL IMAGING, LLC,
GARY L. POLING, D.O. and
SCOTT C. LOSTETTER, D.O.,
Appellants/Applicants Below**

v.

**WEST VIRGINIA HEALTHCARE AUTHORITY,
Appellee/Respondent Below**

**Honorable H. L. Kirkpatrick, III
Circuit Court of Raleigh County
Civil Action No. 04-AA-15-K**

BRIEF OF APPELLANTS

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I. NATURE OF PROCEEDING AND RULING OF THE CIRCUIT COURT

This is an Appeal of an Order of the Circuit Court of Raleigh County, West Virginia, entered on or about September 1, 2004, in Civil Action No. 04-AA-15-K. In that proceeding, the Circuit Court erroneously denied the Appellants' appeal of a decision of the West Virginia Healthcare Authority in CON File #02-1-7565-X/E and the Healthcare Authority/Office of Judges (OOJ) decision in Ap. Doc. No. 03-HC-4.

In the administrative agency hearings, the Healthcare Authority and Office of Judges denied the Appellants' (Applicants in the administrative proceedings) request for approval of their application for a Certificate of Need (CON) for the operation of an ultrasound machine. The Appellants appealed those denials to the Circuit of Court of Raleigh County, West Virginia. It is the Circuit Court's affirmation of the Healthcare Authority and Office of Judges' rulings that the Appellants seek to have this Court overturn and reverse.

II. STATEMENT OF FACTS

This matter arises from an application by the Appellants seeking the approval of Family Medical Imaging's (hereafter FMI) acquisition of an ultrasound machine and a CON which would permit the Appellants to provide ultrasound services to patients referred by other physicians. The Appellants filed their request for determination of reviewability on December 3, 2002. On January 8, 2003, the Health Care Authority (hereafter HCA) determined that the proposed acquisition was reviewable and accepted the request as a letter of intent.

On January 8, 2003, FMI filed its expedited application and paid the appropriate application fee. On January 9, 2003, HCA acknowledged the receipt of the application and fee.

On January 9, 2003, Raleigh General Hospital (hereafter RGH) requested affected party

status and was approved by HCA as an affected party.

After reviewing all documents filed, on January 31, 2003, HCA deemed the application of FMI to be complete and subsequently issued a Notice of Review on February 3, 2003.

Thereafter, on March 7, 2003, RGH requested an administrative hearing in this matter, and HCA acknowledged the request and issued a Notice of Prehearing Conference and Administrative Hearing.

On March 31, 2003, HCA issued a Time Frame Order and a Notice of Rescheduled Administrative Hearing and Cancellation of Prehearing Conference. The Time Frame Order entered by HCA set the following deadlines: Hearing date of April 16, 2003; Discovery completion date of April 10, 2003; and an April 11, 2003, deadline for exchange of "a summary of direct testimony that will be offered at the hearing...". Additionally, the Notice of Rescheduled Administrative Hearing restated the deadline for the parties to exchange their lists of witnesses and a summary of all direct testimony that would be offered into evidence. The Notice of Rescheduled Administrative Hearing went further to admonish each party that **FAILURE TO PROVIDE** these items, including a summary of the direct testimony to be offered, would result in a refusal to admit the proposed evidence, unless good cause for the failure could be demonstrated. (Emphasis original)

Thereafter, each of the parties submitted discovery requests to the other side. FMI filed its Interrogatories and Requests for Production of Documents to RGH, on April 2, 2003. RGH filed its responses to FMI's discovery on April 10, 2003. On April 11, FMI filed its responses to the discovery requests of RGH, and RGH filed its Witness List with HCA.

After reviewing the discovery responses of RGH and the witness list submitted by RGH,

FMI filed a Motion to Exclude Evidence and Testimony on April 14, 2003. The basis for this motion focused on RGH's failure to supply information requested by FMI's discovery requests related to the anticipated direct testimony of two (2) individuals RGH intended to call as "expert witnesses", and RGH's failure to properly identify or provide a sufficient summary of the direct testimony to be offered by RGH's expert witnesses, as required by the Time Frame Order, the Notice of Rescheduled Administrative Hearing entered by HCA, and the discovery requirements of the West Virginia Rules of Civil Procedure.

On April 15, 2003, RGH filed a Motion to Compel seeking additional information requested in its discovery and filed follow-up discovery responses with HCA. The supplemental discovery responses did not contain any additional information related to the evidence to be offered by RGH's experts, nor did they provide the basis for any opinions or evidence to be offered by said experts.

An Administrative Hearing to address the Appellants' Motion to Exclude and RGH's Motion to Compel was held on April 16, 2003, immediately prior to the full evidentiary hearing on this matter. At the conclusion of the Administrative Hearing the HCA denied RGH's Motion to Compel and denied the Petitioner's Motion to Exclude.

After ruling on the issues of the Administrative Hearing, the public hearing on this matter was conducted, and recorded by Rebecca Baker, Court Reporter. However, on April 30, 2003, Ms. Baker informed HCA and the parties of technical difficulties which resulted in portions of the hearing transcript being unintelligible. Due to this problem, HCA issued a letter to all parties seeking their positions on the condition of the transcript and each parties' position on how to handle this problem. Neither party requested a rehearing and both parties agreed to proceed with

the transcript in its current condition.

After receiving the parties' responses concerning the problems with the transcript, HCA announced a time frame for each party to submit their proposed findings of fact, conclusions of law and legal briefs. FMI filed its Proposed Findings of Fact and Conclusions of Law on May 30, 2003, and RGH filed its Brief of Legal Issues, Proposed Findings of Fact and Conclusions of Law on the same day. Each party filed their response briefs on June 13, 2003.

Although the HCA met on numerous occasions after the brief filing deadline of June 13, 2003, and despite repeated inquiries as to the status of the matter by the Appellants, a decision on FMI's application was not made until October 9, 2003. The final decision denied the Appellants' application for a CON based upon a finding that the project was not needed and the project was not consistent with the State Health Plan.

After receiving the HCA's decision, the Appellants filed a Request for Review with the Office of Judges, the party designated by statute to hear all appeals of HCA decisions. Subsequently, Raleigh General Hospital filed a response to the Request for Review as well as a Motion to Dismiss based upon a perceived error in the timing and method of service of the Request for Review by counsel for the Appellants upon Raleigh General Hospital.

On January 12, 2004, a hearing on the Appellants' Request for Review was scheduled before Administrative Law Judge Martha Hill of the Office of Judges. Prior to the hearing on the Review, Judge Hill heard arguments on RGH's Motion to Dismiss. At the conclusion of the arguments on the Motion to Dismiss, Judge Hill conducted a full hearing on the issues raised by the Appellants in their Request for Review, without ruling on the Motion to Dismiss.

On February 20, 2004, Judge Hill entered an Order granting RGH's Motion to Dismiss

and therefore declined to rule on Appellants' Request for Review. The Appellants filed an appeal of Judge Hill's decision with the Circuit Court of Raleigh County, West Virginia. After hearing argument of all counsel of record, the Honorable H. L. Kirkpatrick, III, by Order entered April 14, 2004, reversed the Order granting RGH's Motion to Dismiss and remanded the matter to Judge Hill for a determination on the merits of the Appellants' Request for Review.

On May 26, 2004, Judge Hill issued an Order upholding the HCA's denial of the Appellants' request for a CON.

After receipt of Judge Hill's decision, FMI filed an appeal with the Circuit Court of Raleigh County, West Virginia, and a hearing was conducted before the Honorable H. L. Kirkpatrick, III, on August 13, 2004. As a result of the August 13 hearing, Judge Kirkpatrick entered an Order on September 1, 2004, denying FMI's appeal and affirming the decision of the HCA and the Office of Judges. It is the Order of Judge Kirkpatrick which the Appellants now appeal to this Court.

III. ASSIGNMENTS OF ERROR

- 1. THAT THE CIRCUIT COURT CLEARLY ERRED BY UPHOLDING THE HCA'S IMPROPER INTERPRETATION AND APPLICATION OF THE CERTIFICATE OF NEED GENERAL STANDARDS, WHICH WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN ACCORDANCE WITH THE LAW.**
- 2. THAT THE CIRCUIT COURT CLEARLY ERRED BY UPHOLDING THE HCA'S DETERMINATION THAT THE PROPOSED SERVICE AREA WAS TOO LARGE BASED UPON THE CLEAR AND CONVINCING EVIDENCE.**
- 3. THAT THE CIRCUIT COURT CLEARLY ERRED BY FINDING THAT THE HCA'S ADMISSION OF EXPERT TESTIMONY FROM LAWRENCE PACK AND RAYMONA KINNEBERG WAS**

**APPROPRIATE, BASED UPON RALEIGH GENERAL
HOSPITAL'S FAILURE TO PROPERLY DISCLOSE SAID
EVIDENCE IN RESPONSE TO DISCOVERY REQUESTS.**

IV. POINTS AND AUTHORITIES RELIED UPON

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8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, <i>Federal Practice and Procedure</i> 2023 (2d ed. 1994).....	26
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V. DISCUSSION OF LAW

A. STANDARD OF REVIEW

The supreme court's review of a circuit court's decision to uphold an administrative agency's decision, requires a de novo review of all questions of law, and all factual findings made by the circuit court and/or the administrative agency are to be evaluated under a clearly wrong or clearly erroneous standard. *Wheeling Pittsburgh Steel Corp. v. Rowing*, 205 W.Va. 286, 517 S.E.2d 763 (1999).

In the present case, a review of the Raleigh County Circuit Court's decision involves a review of a question of law. The question of law focuses on the HCA's application of and reliance on, standards which were not properly promulgated, not properly adopted by the Legislature, and which were not properly approved by the Governor. The review of the reliance upon these standards should therefore be a de novo review.

Additionally, the Appellants will address factual findings made by the HCA, the OOJ and the Circuit Court, which the Appellants assert were clearly wrong or were clearly erroneous.

B. ARGUMENT

- I. **THAT THE CIRCUIT COURT CLEARLY ERRED BY UPHOLDING THE HCA'S IMPROPER INTERPRETATION AND APPLICATION OF THE CERTIFICATE OF NEED GENERAL STANDARDS, WHICH WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN ACCORDANCE WITH THE LAW.**

West Virginia Code §16-2D-5(a) places the responsibility for administering the CON program with the HCA. *West Virginia Code* § 16-2D-5(a). Part of the HCA's responsibility in

administering the CON program includes coordinating, developing, amending and modifying the State health plan, including the CON standards, according to the law. *West Virginia Code* §16-2D-5(b).

West Virginia Code §16-2D-5(b) was last modified or amended by the legislature during the 1999 Regular Session, and those modifications had an effective date of June 11, 1999. As part of the Legislative mandates contained in *West Virginia Code* §16-2D-5(b), the HCA was **required** to review the State health plan, including the certificate of need standards and make any **necessary amendments and modifications**, within three (3) years from the effective date of the legislation. *West Virginia Code* §16-2D-5(b) (Emphasis added). Therefore, any necessary amendments or modifications to the certificate of need standards and the State health care **must** have been made prior to June 11, 2002. This deadline for amending or modifying the CON standards and the State health plan was prior to the filing of FMI's application which is the subject of this appeal, and no modifications or amendments were made by the Legislature, the HCA or any other entity during the time specified in the statute.

It is undisputed by all parties and all witnesses, that at the time FMI filed its application for a CON, the *State Health Plan, Certificate of Need Standards* in effect, were those approved by the Governor on October 5, 1992. It is also undisputed, that the only approved standards, contain **only one** (1) specified standard pertaining to the determination of the service area for a service proposed by a diagnostic center. This standard states:

“The applicant shall delineate the service area by documenting the **expected** area around the ambulatory care facility from which the center is **expected** to draw patients. *State Health Plan, Certificate of Need Standards, Ambulatory Care Centers, §IIA.*(Emphasis added).

In the present case, in denying FMI's application, the HCA relied upon and applied a different standard to FMI's application. The standard applied by the HCA had not been, and still has not been filed with the Secretary of State's Office, has not been published in the state register, has not been reduced to writing for public comment, has not been the subject of a public hearing, has not been approved by the Governor, and is contrary to the clear standard quoted above.

West Virginia Code §16-2D-5(1)(1) sets forth the procedure the HCA **must** follow in developing certificate of need standards and/or the modification of existing or previously adopted standards. *West Virginia Code* §16-2D-5(1)(1) states:

“...When the state agency proposes amendments or modifications to the certificate of need standards, it **shall** file with the secretary of state, for publication in the state register, a notice of proposed action, including the text of all proposed amendments and modifications, and a date, time and place for receipt of general public comment. To comply with the public comment **requirement** of this section, the state agency may hold a public hearing or schedule a public comment period for the receipt of written statements and documents.”*West Virginia Code* §16-2D-5(1)(1) (Emphasis added).

In order to insure that the general public is informed of the standards by which CON applications are to be judged and evaluated, and to insure that the HCA does not act arbitrarily, the Legislature placed an additional requirement upon the HCA before proposed certificate of need standards become valid. *West Virginia Code* §16-2D-5(1)(2) requires the HCA, after first complying with *West Virginia Code* §16-2D-5(1)(1), to seek the final approval of the governor before the standard becomes valid. *West Virginia Code* §16-2D-5(1)(2) states:

“All proposed amendments and modifications to the certificate of need standards, with a record of the public hearing or written statements and documents received pursuant to a public comment period, **shall** be presented to the governor. Within thirty days of receiving the proposed amendments or modifications, the governor **shall** either approve or disapprove all or part of the amendments and

modifications,..." *Id.* (Emphasis added).

These sections of the West Virginia Code make it abundantly clear that before the HCA can create a standard or apply a standard, the HCA **must** follow the proper procedures contained in the statutes, must have the proposed standard properly reviewed, the standard must be made available to the public, the standard must be approved by the Legislature, and finally, the standard must be approved by the governor. All of these steps must be followed, before the HCA can rely upon or apply a standard to a CON application.

In ruling on the Appellants' appeal to the Circuit Court of Raleigh County, Judge H. L. Kirkpatrick, III, found:

"Admittedly, there appears to be **no express** definition contained in the Standards, or in any other regulation of what may constitute a proper service area for a new health service provider. See *Raleigh County Circuit Court Order* page 6. (Emphasis added).

Judge Kirkpatrick further stated:

"As Judge Hill points out, while the Standards **do not explicitly define** a service area for a diagnostic center, the process of determining how the service area is to be established may readily be found therein. An applicant **must** delineate, through testimony or documentation, the **expected** areas from which the diagnostic center **will** draw its patients." *Id.* (Emphasis added). See also Office of Judges Order, page 8.

However, in reviewing the Appellants' application, the HCA elected to disregard the only properly adopted standards which are applicable to diagnostic centers. The HCA, without proper authority, applied standards which were adopted for acute care facilities, and were not applicable to any other entity. This application by the HCA was clearly wrong, arbitrary, capricious and contrary to the law.

The properly adopted General Standards which are applicable to ambulatory care centers (which includes diagnostic centers), set forth the Need Methodology as follows:

“For ambulatory care centers for which no specific need methodology is set forth in Section III, below, the following general need methodology **shall** be used.” *State Health Plan, Certificate of Need Standards, Ambulatory Care Centers, §IIA.* (Emphasis added).

As pointed out by Judge Kirkpatrick’s decision, it is undisputed that at the time of FMI’s application there was no legislative, HCA, or governor adopted, **specific** need methodology applicable to diagnostic centers. Therefore, based upon the clear and unambiguous language set forth in the General Standards above, the general need methodology of the State health plan was the only applicable need methodology which should have been applied to FMI’s application for a CON. The general need methodology states:

“The applicant **shall** delineate the service area by documenting the **expected** areas around the ambulatory care facility from which the center is **expected** to draw patients.” *State Health Plan, Certificate of Need Standards, Ambulatory Care Centers, §IIA.* (Emphasis added).

Although Judge Kirkpatrick and Administrative Law Judge Hill (hereafter ALJ HILL) correctly determined that no specific need methodology was set forth in the general standards, both incorrectly proceeded to evaluate the HCA’s decision based upon an improper application of a standard that is not applicable to diagnostic centers.

The HCA, the Office of Judges and the Circuit Court of Raleigh County took the position that because there is no specific manner of determining a service area expressed in the general CON standards, that the HCA should be given great discretion and deference in determining a basis for determining the reasonableness of a service. This position is incorrect.

West Virginia Code § 29A-1-2(i) defines a "Rule" as follows:

"Rule" includes every regulation, **standard** or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure,..." *West Virginia Code* §29A-1-2(i) (Emphasis added).

This section further requires that

"[e]very rule shall be classified as "legislative rule," "interpretive rule" or "procedural rule," all as defined in this section, and shall be effective only as provided in this chapter." *West Virginia Code* §29A-1-2(i).

A "Legislative rule" is defined as

"...every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit." *West Virginia Code* §29A-1-2-(d).

Therefore, based upon the above definitions and the purpose of the certificate of need standards, certificate of need standards are by definition, legislative rules because they are used in granting or denying a specific benefit, such as the granting or denial of a CON.

The Legislature was very clear about the legal authority and effect legislative rules were intended to have, and limited their authority as follows:

"Unless lawfully promulgated as an emergency rule, a legislative rule is **only** a proposal by the agency and has **no legal force** or effect **until promulgated** by specific authorization of the legislature." *Id.* (Emphasis added).

Taking these sections together and applying them to the case at hand, it is clear that the only properly promulgated and adopted certificate of need standards, and therefore, the only

standards with any legal force, are those which were approved by the Governor in October 1992. It is equally clear, that the only definition of service area for ambulatory care centers found in those properly adopted standards, clearly defines a service area as “the expected areas around the ambulatory care facility from which the center is expected to draw patients”.

This Court has previously adopted the following rule when considering the weight of legislatively approved regulations:

“...[o]nce a disputed regulation is legislatively approved, it has the force of a statute itself... Being an act of the West Virginia Legislature, it is entitled to more than deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.” *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 336, 472 S.E.2d 411 (1996), citing *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

This Court has previously spoken on the process to be used in evaluating an agency’s positions which arise as a result of interpretation. This Court has held that deference to an agency’s view is only required, when there is a statutory gap or ambiguity. *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 337, 472 S.E.2d 411 (1996).

The Court went further in *HCCRA v. Boone Memorial Hospital* to state

“If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts **must** read the relevant law according to its unvarnished meaning, **without** judicial embroidery. *HCCRA v. Boone Memorial Hospital*, 196 W.Va. 326, at 336. (Emphasis added)

In determining whether the HCA’s position should be sustained as a proper statement of the law, the Court must apply the standards set out by the United States Supreme Court 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), as cited by the Court in *HCCRA v. Boone Memorial Hospital. Supra.*

This analysis begins by first determining

“[w]hether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. No deference is due the agency’s interpretation at this stage.” *HCCRA v. Boone Memorial Hospital*, 196 W.Va. 326, at 337.

Based upon the ruling in *HCCRA v. Boone Memorial Hospital*, the HCA was required to give the adopted CON standards controlling weight. However, the HCA elected to ignore the legislatively approved standards, without showing that the adopted standards were arbitrary or capricious, or without showing that said standards were adopted by a process which exceeded the constitutional or statutory authority of the HCA. The failure of the HCA to give controlling weight to the adopted certificate of need standards and the general need methodology for ambulatory care centers (diagnostic centers) was an abuse of its legal power and was an arbitrary and capricious action.

In this matter, all of the parties have agreed that there is only one expression of how a service is to be determined—the area from which the applicant expects to draw patients. The HCA, by interjecting the 25/10 acute care facility standards, has failed to give the proper deference to the clearly expressed language of its own rules, regulations and standards, which have been properly promulgated and adopted. Furthermore, the HCA has improperly tried to give an interpretation of the standards, when the standards are clear and unambiguous.

Since the October 5, 1992 standards are the only standards or rules which have been properly proposed and lawfully promulgated, they are the only standards which should have been

applied to FMI's application. Furthermore, since the Legislature and the HCA have directly spoken on the issue of the applicability of the standards, no interpretation is proper under the directives of *Chevron* and *HCCRA v. Boone Memorial Hospital*. Therefore, the HCA's interpretation was an improper application of the law, was an abuse of the HCA's authority, was clearly wrong, and should have been reversed by the Circuit Court.

The HCA would have the Court accept the position that since the standards for acute care facilities do not expressly limit the application of the 25/10 acute care facility standards to **only** acute care facilities, that the HCA is free to adopt and apply the reasoning behind those standards to other entities, under the guise of interpretation. However, this position contradicts the clear intent and language of the properly adopted standards, which clearly state

"For ambulatory care centers for which **no specific need methodology** is set forth in Section III below, the following general need methodology **shall** be used. *State Health Plan, General Standards, Need Methodology*, page 4. (Emphasis added).

Here, the language chosen to be included in the standards, clearly uses the mandatory directive **shall** when indicating which standards are to be used. This standard does not give the HCA or any other entity reviewing the CON process the right to use any other methodology, nor does it give the HCA the right to supplement, interpret or expand the application of other entity standards to ambulatory care centers. The HCA is required to use **only** those general standards specifically adopted and approved for ambulatory care centers, and can not substitute standards applicable to acute care facilities or any other facility under the guise of interpretation. The actions of the HCA therefore violated the clearly expressed standards, and the ruling in *Chevron*, by using interpretation to substitute or adopted a rule which is contrary to the plain language of

the properly adopted standard which clearly speaks to the issue.

The HCA's use of a standard which had not been properly promulgated or properly adopted, based upon a theory that since the standard did not expressly restrict the application of the acute care facility standards, it could be applied to other entities without specific guidelines, is inconsistent with previous rulings of this Court. In footnote 6, of *Chico Dairy Company v. Human Rights Commission* previously cited, this Court held:

"...silence or inaction of the legislature with respect to a proposed legislative rule is **not** to be deemed an approval thereof but, instead, a disapproval thereof by virtue of *W. Va. Code*, 29A-3-12(b) [1982, 1986]." *Chico Dairy Company v. Human Rights Commission*, 382 S.E.2d 75, at 82.

Since the Court has held that Legislative inaction or silence is disapproval of a proposed rule, it is consistent that the failure to make the 25/10 acute care facility, standards applicable to other entities, and the failure to amend, modify, or create a new standard which puts quantitative requirements on diagnostic centers, should be viewed as the disapproval of any action which attempts to amend or modify the standards which have been properly promulgated and adopted. To allow an agency to use "interpretations" to avoid the possible disapproval or rejection of a standard, would allow an agency to circumvent the requirements of general public comment, legislative approval and the governor's approval, before a rule or standard becomes applicable and has legal effect.

Having recognized the only adopted standard, both Judge Kirkpatrick and ALJ Hill, incorrectly accepted the HCA's application of the acute care facility standards to FMI's application. In accepting the HCA's use of the acute care facility standards, both Judge Kirkpatrick and ALJ Hill improperly allowed the HCA to improperly modify the general standards

to include a requirement that FMI serve a significant percentage of the population of the proposed service area, before the area could be properly included. The general standards approved by the governor on October 5, 1992, do not set forth this requirement and clearly and unambiguously state

“...The applicant **may** submit **testimony or documentation** on the **expected** service area.” *State Health Plan, General Standards §II, A. Need Methodology*, page 4. (Emphasis added).

The HCA, ALJ Hill and Judge Kirkpatrick incorrectly held that FMI was **required** to submit testimony and/or documentation to show FMI would serve a significant percentage of the proposed service area’s population. Both ALJ Hill and Judge Kirkpatrick used the term **must** in describing FMI’s obligation to justify its proposed service area. This was the wrong standard.

Furthermore, it appears that the HCA, ALJ Hill and Judge Kirkpatrick all ignored or overlooked the Appellants’ application and the testimony of Gary L. Poling on how the service area was determined. Both of these sources indicated that the parties selected the proposed service area, not based solely upon expectation, but based upon the fact that both Dr. Lostetter and Dr. Poling were already drawing patients from the proposed service area.

No where in the properly adopted standards applicable to diagnostic centers, is there a requirement that a certain statistical percentage of the population be served, before an area can be included in the proposed service area of a diagnostic center. The heightened level of proof required by the HCA therefore, conflicts with the express language of the adopted standards, and arbitrarily increased the requirements for a CON for a diagnostic center beyond those properly approved through the legislative process.

The evidence clearly shows that FMI **expects** to draw patients from all of those counties

included in the proposed service based upon their actual service of patients from those areas. Since **expectation** is the only requirement contained in the applicable standards, **actual service** should be more than adequate proof that patients are expected to be drawn from those areas. The uncontradicted testimony of Dr. Gary Poling and the statements contained in the application are a proper form of evidence to support the proposed service area.

It is clear, that the decisions of the HCA, the Office of Judges, and the Circuit Court of Raleigh County, West Virginia, hinged on the HCA's application of the 25/10 acute care facility standards, which are not in the certificate of need standards for diagnostic centers. This misapplication of the standards by the HCA was an improper amendment of the certificate of need standards to contain a quantitative threshold on the number of patients an applicant must expect to serve from a proposed service area, before the area may be included in the proposed service area. This quantitative threshold has never been subjected to public comment, nor has it been adopted by the legislature or the governor, and therefore should have no legal force and was therefore, an arbitrary application of the standards by the HCA, which is contrary to adopted law.

The HCA's position completely disregards the clear language of the properly adopted CON standards set forth above. The application of a specific quantitative standard by the HCA is directly in conflict with the clear language of the standards, which were are binding upon HCA and applicants.

This Court has repeatedly held:

"Procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute. *Chico Dairy Co. v. Human Rights Commission*, 382 S.E.2d 75, 85 (W.Va. 1989), quoting *State ex rel. Callaghan v. W. Va. Civil*

Service Commission, 166 W. VA. 117, 273 S.E.2d 72 (1980) (Emphasis added).

It is clear, that the position taken by the HCA does not apply the only properly promulgated standards in effect at the time of FMI's application. In applying the State health plan's 25/10 acute care study standards in evaluating the proposed service area for FMI's application, when FMI is a not an acute care facility, the HCA improperly enlarged the application of the acute care study and the standards for acute care facilities, beyond that approved by the Legislature and the governor. Therefore, based upon the ruling in *Chico Dairy Co. v. Human Rights Commission*, *supra*, the HCA's determination should not have been upheld, but should have been reversed.

Since the CON standards were adopted in 1992, the HCA, the Legislature and the governor have had ample time to submit proposals to expand the CON standards. This opportunity included the right to make the standards for an acute care facility applicable to a diagnostic center, and to make other quantitative amendments or alterations to the CON standards. However, no such amendments, modifications or proposed changes have been put forth by any entity, and it is undisputed that the standards have not been changed to include such language.

In order for the acute care facility standards used by the HCA to be applicable to a diagnostic center, the HCA or some agency, must have promulgated the standard in compliance with the statutory procedures contained in *West Virginia Code* §29A-1-1 et seq. and *West Virginia Code* §16-2D-5, and all other applicable procedures. No such action has been taken by the HCA or any other agency. Therefore, the HCA's reliance on an unadopted standard

circumvents the legislative approval process, is contrary to the properly adopted standards, is an abuse of its discretion, is an improper application of the law which is clearly wrong, and was arbitrary and capricious.

II. THAT THE CIRCUIT COURT CLEARLY ERRED BY UPHOLDING THE HCA'S DETERMINATION THAT THE PROPOSED SERVICE AREA WAS TOO LARGE BASED UPON THE CLEAR AND CONVINCING EVIDENCE.

Since no evidence was offered in opposition to the Appellants' assertion that there was an unmet need for ultrasound services in the proposed service area, the Appellants' application should have been approved. If the HCA would have applied the appropriate standards for determining the service area, it is clear that the record shows that no evidence was introduced to rebut the Appellants' assertion that there is an unmet need.

RGH's entire argument focused on the size of the proposed service area based upon an application of the State Health Plan's 25/10 acute care study. However, RGH and no other entity introduced any evidence in opposition to the facts and figures submitted by the Appellants on the unmet need in the proposed service area, and no statistical evidence was introduced refuting the need for additional ultrasound services in the proposed service area.

The only evidence RGH introduced analyzed the need for ultrasound services in the reduced or limited service area testified to by Ms. Kinneberg as being the proper service area for the Appellants. Ms. Kinneberg testified that the reduced, undisputed service area did not have a need for ultrasound services, based upon assumptions and calculations made by Ms. Kinneberg.

Therefore, should the Court find that the service area proposed by the Appellants is

proper, the only evidence contained in the record, clearly indicates an unmet need for ultrasound services in the proposed service area, and therefore the HCA's decision is clearly wrong and should be reversed and the Appellants' application for a CON should be approved.

III. THAT THE CIRCUIT COURT CLEARLY ERRED BY FINDING THAT THE HCA'S ADMISSION OF EXPERT TESTIMONY FROM LAWRENCE PACK AND RAYMONA KINNEBERG WAS APPROPRIATE, BASED UPON RALEIGH GENERAL HOSPITAL'S FAILURE TO PROPERLY DISCLOSE SAID EVIDENCE IN RESPONSE TO DISCOVERY REQUESTS.

It is the undisputed law, that any public hearing held by the HCA on a CON application shall be conducted in accordance with the requirements for administrative hearings found in *West Virginia Code* §29A-5-1 et seq. *West Virginia Code* §16-2D-7(1)(1) and CSR 65-7-11.9.

Furthermore, *West Virginia Code* §29A-5-2(a) states that "The rules of evidence as applied in civil cases in the circuit courts of this state **shall** be followed." *West Virginia Code* §29A-5-2(a). (Emphasis added)

Based upon the above referenced statutes and regulations, any hearing before the HCA must follow the West Virginia Rules of Civil Procedure, because those rules are applied in the Circuit Courts of this state. One of the most crucial and strongly enforced of the Rules of Civil Procedure is Rule 26. This rule requires all parties to:

"identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to **state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.**" *West Virginia Rules of Civil Procedure*, Rule 26(b)(4)((A)(i). (Emphasis added)

When it comes to discovery, the well established rule is that "one of the purposes of the

discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure.” *McDougal v. McCammon*, 455 S.E.2d 788, 796 (W.Va. 1995).

In the present case, as in all hearings before the HCA, the parties are permitted to undertake discovery “as provided by the West Virginia Rules of Civil Procedure” and the scope of such discovery is limited to relevant and admissible evidence. CSR 65-7-11.21 In accordance with these provisions, FMI submitted discovery requests to RGH on April 2, 2003. As part of these requests, FMI specifically requested in various Interrogatories that RGH provide information necessary for FMI to properly prepare for the hearing in this matter.

By way of Interrogatories, FMI requested the following information from RGH:

“Interrogatory No. 1: Please identify all individuals you intend to call as a witness at the hearing scheduled in this matter, and include a **complete summary** of information each witness has pertaining to this matter, **the information each witness has reviewed in connection with the application**, and the **expected testimony of each witness**. (Emphasis added).

Interrogatory No. 2: Please identify all individuals which have participated in any capacity, in the review of the Application on behalf of Raleigh General Hospital or for the benefit of Raleigh General Hospital. For each person involved in the review of the Application, please provide a summary of each person’s role in reviewing the Application and a summary of any information provided by said individual as part of the review of the Application.

Interrogatory No. 3: Please provide a **summary of all sources of information used by any individual in the review of the Application** and a summary of the information contained in each source. (Emphasis added).

Interrogatory No. 7: Please describe **all forms of evidence you intend to introduce at the hearing in this matter**, which you believe supports your position that there is not a sufficient need for additional ultrasound services in the area specified in the Application. Please **include the source of each form of information** and the **person or entity that produced said information**.” (Emphasis added).

In response to these requests, RGH provided none of the specific information requested

by FMI or required by the Rules of Civil Procedure. The only information which RGH did supply was the names of the people involved in the review of the application, to-wit; Raymona Kinneberg, Lawrence A. Pack, and Karen Bowling, Joseph Koch, Renee Cross, and Mike Baker. See Answer to Interrogatory No. 2. However, as part of its response, RGH also objected to the disclosure of the specific information requested, and claimed that the material requested was protected by the “**Attorney-Client privilege and the Attorney Work Product Doctrine.**” See Answer to Interrogatory No. 2. (Emphasis added).

Based upon RGH’s failure to fully and appropriately responded to FMI’s discovery requests, FMI filed a Motion to Exclude Evidence and Testimony. This motion sought to prohibit RGH from offering any undisclosed information or testimony related thereto, in order to avoid undue surprise. The HCA improperly allowed RGH to introduce the evidence, even though RGH’s basis for not disclosing the information is not supported by the law.

RGH’s first claim of privilege should not apply to the information requested in connection with those individuals identified as witnesses on behalf of RGH. The attorney-client privilege only pertains to communications between the client and its attorney. This privilege does not extend to information which forms the basis of a claim or the defense thereto. Furthermore, the communications and discussions of counsel for RGH and the witnesses called on behalf of RGH are not covered by the attorney-client privilege.

In order to assert an attorney-client privilege, RGH is required to present three elements:

“(1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the **advice** must be **sought by the client** from that attorney in his capacity as a legal advisor; (3) the **communication between the attorney and client** must be [intended] to be confidential.” *State Ex Rel. United Hospital v. Bedell*, 484 S.E.2d 199, 209, (W. Va. 1997) citing Syllabus Point 2, *State v.*

Burton, 163 W. Va. 40, 254 S.E.2d 129 (1979). (Emphasis added).

In the present case, it is clear that all of the information requested by the Appellants in their discovery pertaining to Ms. Kinneberg and Mr. Pack is not covered by this privilege. Neither of these individuals retained Mr. Casto to provide them legal advice; neither of these parties contemplated that they had retained Mr. Casto; and none of the information sought was intended to be confidential, to the contrary, it was going to be offered at trial, and therefore none of their communications can be considered as between attorney and client and intended to be kept confidential. This analysis clearly indicates that the information requested by FMI should not have been withheld by RGH and the HCA should have granted the Appellants motion to exclude all testimony related to the information which was not disclosed.

The next step in reviewing whether RGH should have supplied the information requested, pertains to RGH's claim the information was "work product". Although, the Appellants agree that there is a work product doctrine, this Court has held that the doctrine "does not label protected material as "privileged" and thus outside the scope of discovery under Rule 26(b)(1), *W. R. C.P. "State Ex Rel. Chaparro v. Wilkes*, 190 W.Va. 395, 397 (1993).

Furthermore, in *State Ex Rel. United Hospital, supra*, the Court quoted the United States Supreme Court declaration that

"...all written materials **obtained** or prepared by an adversary's counsel **with an eye toward litigation** are [not] necessarily free from discovery in all cases. Where relevant and *nonprivileged* facts remain hidden in an attorney's file and **where production of those facts is essential to the preparation of one's case**, discovery may properly be had." *State Ex Rel. United Hospital v. Bedell*, 484 S.E.2d 199, at 210, quoting *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed.451 (1947). (Italics original, bold added).

This Court has gone further to state,

“the work product doctrine “furnishe[s] no shield against discovery, by interrogatories or by deposition, of the *facts* that the adverse party’s lawyer has learned, or the persons from whom he or she had learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.” *Id.*, Citing 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, 2023 at 330-31 (2d ed. 1994), (Emphasis original) Additional citations omitted.

This ruling makes it clear, that even if the requested information was prepared with an eye to litigation, RGH would still be required to disclose the facts themselves, and the existence of the documents from which the facts were taken, even though the actual documents may not be discoverable.

A review of the Transcript in this matter will show that none of the information testified to by Raymona Kinneberg or Lawrence A. Pack was prepared by counsel for RGH, nor was it prepared in anticipation of trial. To the contrary, when questioned about the basis of his opinions and the calculations of estimated average payments for ultrasound examinations, Mr. Pack testified that he was unsure of the basis for the evidence he offered and stated he relied upon from RGH. See Transcript page 186.

Ms. Kinneberg testified that the information she relied upon was information from **other** CON applications, the State Health Plan, and **other** forms of information already in existence. Since this information was in existence prior to this application or developed separate from this litigation, the precise information and the source of the information should have been disclosed, since it was not work product developed in preparation for this hearing.

In this case, RGH danced around its obligation by vague assertions designed to prevent the disclosure of the facts so that FMI would not be prepared to rebut RGH’s assertions and positions. The failure of the HCA to exclude this evidence, since it was not properly disclosed as

part of discovery, was an arbitrary act which violated the Appellants' rights under the West Virginia Rules of Evidence, was clearly wrong and prejudiced FMI's ability to prepare information to rebut the experts' testimony and opinions.

The exclusions contained in the Rules of Civil Procedure which do not require the disclosure of work product, are limited to opinions sought to be obtained from an opposing party's consultant, when the information is otherwise available to the party seeking discovery without undue hardship. *West Virginia Rules of Civil Procedure*, Rule 26(b)(3). In the present case, the time frame established by HCA did not provide sufficient time for the Appellants to obtain the information independently, and did not provide adequate time for the Appellants to challenge the responses of RGH, except by Motion to Exclude, which the Appellants did file.

A review of the testimony offered by RGH's experts clearly shows that RGH failed to properly reply to FMI's discovery requests and the evidence should have been excluded. Based upon the timing of the discovery deadlines the Appellants were unable to effectively challenge the asserted privilege, in order to determine if the information should have been protected, and were prevented from presenting evidence that the information was not available by other means without undue hardship.

At the hearing, the Appellants argued that the limited information supplied by RGH did not comply with the directives of HCA's order for each party to provide a summary of the expected testimony, and also argued that the responses did not provide information which should have been disclosed pursuant to the rules of discovery. Had RGH provided a more detailed summary of the expected testimony and the sources which the experts were relying upon, the Appellants would have been in a better position to contest the non-disclosure prior to the hearing

and would have been better able to rebut or challenge the evidence being offered.

It was not until the hearing had begun, that the Appellants learned of the sources being relied upon by Ms. Kinneberg and the lack of a source for Mr. Pack's testimony. RGH's tactic of failing to properly disclose the requested information prevented FMI from being prepared to rebut, refute or otherwise argue against the admission of said evidence. The HCA's clearly wrong ruling permitting the testimony, resulted in the HCA relying upon information which should have been excluded, and thereby makes the HCA's decision clearly wrong.

Furthermore, since the information which was used by Ms. Kinneberg and was used by Mr. Pack was not shown to be the result of work performed by individuals retained as experts for RGH in anticipation of this litigation, the work and opinions were not covered by the attorney work product doctrine, and therefore should have been disclosed. The HCA's failure to exclude the evidence in response to the objections and motion of the Appellants was improper and resulted in the admission of evidence which should have been excluded.

Although the HCA has taken the position that the information supplied by RGH satisfied this requirement, it is clear that the HCA's decision is incorrect and must be based upon an incorrect application of the law pertaining to the discovery requests, as evidenced by hearing examiner Dellinger's belief that discovery only applies to written documents and not information reviewed by an expert in preparation for rendering an opinion. Transcript page 203.

Specifically, on page 203 of the Transcript, Examiner Dellinger incorrectly states that "Discovery relates to written documents; they've responded; she's not offered any documents." Transcript page 203, lines 4-6. This ruling incorrectly states the law as it applies to discovery. When interrogatories are propounded that request information that is not written, the fact that the

information is not written does not preclude its disclosure or discovery. The examiner's rulings were therefore based upon a incorrect and mistaken understanding of the law, and improperly permitted evidence to be introduced and considered by the HCA.

The actions of RGH are further tainted by the fact that in addition to the requirements of Rule 26(b)(4)(A)(i), and the case law cited above, in the present case the HCA directed all parties to supply and exchange witness lists and to provide a **"summary of direct testimony which will be offered at the hearing."** See Time Frame Order, Item #2. (Emphasis added).

Based upon the representations of counsel for RGH in the disclosures provided in response to the Time Frame Order and interrogatories, the only information which the Appellants should have reasonably expected the experts to offer, would come directly from the Appellants' application or from the State Health Plan. Although the testimony of Ms. Kinneberg and Mr. Pack did discuss some of the information contained in the application and referred to the State Health Plan, the vast majority of their testimony and all of their opinions came from or were based upon information previously compiled prior to this application or based upon information maintained by RGH in the normal course of business.

Ms. Kinneberg also testified that much of her testimony was based upon her knowledge of prior CON applications and decisions, (Transcript page 211-212), yet none of those prior decisions or authorities were specifically identified in discovery responses as the basis for her opinions. Furthermore none of the financial information relied upon by Mr. Pack and no other information reviewed by either expert in preparation for testifying in this matter was disclosed to the Appellants.

Since the work product exception did not apply, the information should have been

disclosed as a matter of law. The HCA's subsequent failure to exclude the information which was not properly disclosed, violated the HCA's own policy and was an arbitrary application of the law which prejudiced the Appellants and lead to the denial of their application.

RGH also failed to comply with the requirements of the rules pertaining to discovery by not fully identifying all sources of information to be used by its potential witnesses. In Answer to Interrogatory No. 3, RGH stated that the only source of information used in the review of the Application is **the Application itself, the State Health Plan, past certificate of need filings for diagnostic centers and past HCA decisions.** See Answer No. 3. (Emphasis added).

While this response identifies some sources of information reviewed, its does not state a summary of the information or sufficiently identify each source that was being relied upon as requested by Interrogatory No. 3, nor does this response indicate that any information was compiled or prepared as part of the litigation of this matter. Since none of these sources of information qualify as work product, as addressed previously, and since they were not prepared in anticipation of this litigation, they should have been fully disclosed.

RGH also failed to disclose the financial figures which Mr. Pack testified he was provided in making his decisions and none of the studies or figures relied upon by Ms. Kinneberg pertaining to populations and the area from which patients travel to Raleigh County were provided. Yet, the HCA admitted this information into evidence and relied upon the information in rendering its decision.

The failure of RGH to provide the information testified to at the hearing by Mr. Pack and Mr. Kinneberg in response to discovery requests, resulted in a surprise to FMI for which they were unable to produce rebuttal evidence or experts on such short notice. Furthermore, the

information testified to by Mr. Pack and Ms. Kinneberg, which was refuted by Dr. Poling on behalf of FMI, was the sole evidence identified by HCA as the basis for the denial of FMI's application, and but for this information, HCA would have been compelled to approve the application. This improperly admitted evidence formed the basis of the HCA's denial of the Appellants' application and therefore the decision should be reversed as clearly contrary to the properly received evidence.

Even though the HCA improperly allowed the evidence of RGH's experts to be introduced, a close review of the evidence shows that the HCA's decision was clearly wrong and contrary to the credible evidence which was admitted.

During direct examination, Ms. Kinneberg testified, without supporting documentation, that she felt that the service area proposed by FMI was too large, and that McDowell County and Nicholas County should be excluded from service area. See Transcript pages 198-199. However, as previously pointed out, under cross examination, Ms. Kinneberg acknowledged that **there is no specific definition for service area for an outpatient service like the one set forth in the application.** See Transcript page 214 (Emphasis added).

Even though Ms. Kinneberg acknowledged that there was no specific definition for service area except for the language of State Health Plan Certificate of Need Standards, the HCA adopted Ms. Kinneberg's position that the proposed service was too large, based upon FMI's failure to treat a specific, unidentified volume of patients in the proposed counties. See HCA Decision, page 18. However, Ms. Kinneberg conceded that the counties of Raleigh, Fayette, Summers, and Wyoming were a proper service are for FMI's services.

Therefore, the HCA should have, in the alternative to totally disregarding FMI's

application, considered the reduced or limited service area acknowledged by Ms. Kinneberg in its analysis of the Appellants' application. See Transcript pages 199-202.

Based upon the undisputed, and uncontradicted evidence, the population for these four counties is 161,971 (see page 24 of the Application), although in her testimony Ms. Kinneberg rounded this number down to 160,000, thereby eliminating 1,971 people from her calculations. While this may seem to be a trivial point, its importance is compounded by the tendency of Ms. Kinneberg to always round her calculations in such a manner as to benefit RGH and attempt to discredit the figures of FMI.

The second aspect of the calculations used by Ms. Kinneberg is the "use rate". While Ms. Kinneberg testified that there is no established use rate for ultrasound services, she could not provide any other use rate than that supplied by the Appellants in their application, and therefore, she based her calculations on the use rate submitted by the Appellants. See Transcript pages 200-201. It is important to understand, that the use rate of .27 for ultrasound services as proposed by the Appellants, had previously been approved by the HCA in prior CON applications pertaining to ultrasound services.

Therefore, the undisputed service area population of 161,971 should be multiplied by .27 to determine the number of anticipated ultrasounds to be performed within the service area in any given year. This calculation comes to 43,732.17 ultrasound examinations per year. However, Ms. Kinneberg, based upon her tendency to round down, testified that approximately 40,000 examinations would be performed per year in the undisputed service area. See Transcript pages 200-201. This figure is not supported by Ms. Kinneberg's own rounded population of 160,000. Using her rounded population of 160,000, multiplied by the use rate of .27, the correct number of

ultrasounds would be 43,200. By using her rounded figures and not the actual numbers which were not disputed and which were uncontradicted, RGH and Ms. Kinneberg have eliminated 3,732.17 examinations per year from the actual unrounded numbers, and 3,200 from their own rounded population.

The third facet of the review performed by Ms. Kinneberg, the number of ultrasound examinations available based upon the number of machines currently in use, was also flawed. Ms. Kinneberg testified that there are 22 ultrasound machines currently in use in the undisputed service area, including the Appellants' machine. See Transcript page 202. In all of its responses, the HCA contends that review of the undisputed evidence would be improper, because there was no evidence on the correct number of ultrasound machines in the undisputed service area, clearly that position is wrong.

In her analysis, Ms. Kinneberg failed to recognize that several of the ultrasound machines are restricted in their use, and not available on a full time basis or are not available for use to the general public. Specifically, two (2) of the machines, one owned by Dr. Siddiqui and one owned by Dr. McFarlane, are used only one (1) day per week, each, and one of those is used only for echocardiograms and carotid Dopplers. See Application page 25. Yet Ms. Kinneberg in her calculations made no allowance for this restricted and limited use.

Ms. Kinneberg calculated these machines as being used full time and without limitation on their usage, even though the physicians which use these machines, do not have CON's and therefore the machines cannot be used on patients outside their limited specializations, and the evidence showed that each of these physicians limit their machine's usage to specialized testing for echocardiograms and carotids. This limited use results in a reduction in the amount of services

available. Also, these machines operate only one-fifth or twenty percent (20 %) of the work week. Therefore they should only be counted as four-tenths ($4/10$ or $.40$) of a machine (2 machines X $1/5$ or $.20$ equals $4/10$ or $.40$) or they should reflect only 50 operational days per year, based upon $1/5$ of 250 days).

Additionally, Ms. Kinneberg's figure of 22 ultrasound machines, includes two (2) machines located at the Veteran's Hospital in Beckley, Raleigh County, West Virginia. Again, Ms. Kinneberg does not make any adjustments in her calculations for the fact that these machines are only available to Veterans. Although Ms. Kinneberg desires to include the ultrasound machines at the Veterans Hospital in her calculation of the ability to meet the area's need, she does not take into consideration the expanded service area from which the VA Hospital draws its patients in her calculations of the population to be served by these machines.

The next step in determining whether there is an unmet need of ultrasound examinations is to calculate the number of examinations which the current volume of machines can perform. This calculation, and the mathematical process used by Ms. Kinneberg, and which was also undisputed, goes as follows:

The number of machines X 8 hours per day X 250 operational days per year equals the number of examinations possible.

Therefore, in order to determine the number of examinations available in the undisputed service area, using the twenty (20) full time ultrasound machines and the two (2) part time machines of Dr. Siddiqui and Dr. McFarlane, for a total of 20.4 machines, multiplied by 8 hours per day, multiplied by 250 days per year, the total need is 40,800.00 ($20.4 \times 8 \times 250 = 40,800$ or $[20 \times 8 \times 250] + [2 \times 8 \times 50] = 40,000 + 800 = 40,800$). This amount, 40,800 is arrived

at by using Ms. Kinneberg's figures for the number of ultrasound machines, with an adjustment for the machines used by Dr. Siddiqui and Dr. McFarlane, but includes full use of the Veteran's Hospital's machines without restrictions and without a corresponding increase in the population base, even though they are only available to Veterans, from a wider coverage area.

If no adjustments are made for the limited use of the machines of Dr. Siddiqui and Dr. McFarlane, and the Veteran's Hospital's machines are included, the undisputed evidence indicates a current availability for ultrasound services of 44,000 examinations (22 machines X 8 X 250 =44,000). Ms. Kinneberg testified that this number exceeds the need of the population of the undisputed service area and therefore the Appellants' application fails to show an unmet need. However, this position is incorrect.

The final step in determining whether there is an unmet need for ultrasound services, is to compare the number of examinations needed for the service area population and the number of examinations available based upon the current number of ultrasound machines. Based upon the population of the reduced, undisputed service area and the accepted method for determining the need, the actual number of examinations needed for the undisputed population is 43,732.17 examinations per year.

The agreed upon availability figures are based upon 2,000 examinations per machine, per year (1 machine X 8 hours per day X 250 work days per year). Therefore, in order to fulfill the need of the undisputed population, you would need 21.86 machines (43,732.17 examinations divided by 2,000 examinations per machine). Since it is impossible to have a partial machine, this number must be rounded up to require 22 machines to met the needs of the population.

As was previously stated, Ms. Kinneberg testified that there are 22 machines in the

undisputed service area, however, this figure includes the Appellants' machine. Therefore, if we exclude the Appellants' machine, there are only 21 other machines available to meet the needs of the population. Those 21 machines can **only** perform 42,000 examinations based upon the agreed upon method for calculating the availability.

This results in an unmet need of 1,732.17 examinations based entirely upon the figures of Ms. Kinneberg, without any adjustments for the limited use of the machines, without considering the limited availability of the VA Hospital machines, and without considering the fact that some of the machines are not covered by CON's which would prevent them from being used outside of the physicians' own practices.

It is therefore clear, that in order to met the need as calculated using the undisputed figures, the Appellants' machine is needed. The undisputed evidence supports the Appellants' position that there is an unmet need in the undisputed service area, without their machine. Therefore, even using the figures of RGH and Ms. Kinneberg, without any alterations, there is undisputed and uncontroverted evidence that an unmet need exists without the Appellants' ultrasound machine, and therefore the Appellants' application should have been granted.

If the HCA would have used the undisputed population figures and excluded the Veteran's Hospital and reduced the availability of the machines owned by Dr. McFarlane and Dr. Siddiqui, the available number of examinations would be even less. Based upon those reductions there are only 36,800.00 ($18.4 \times 8 \times 250 = 36,800$) examinations available, and the unmet need would be even greater than that arrived at using the undisputed figures.

The key point is, had the HCA looked at the undisputed, non-rounded numbers, for the undisputed service area, they would have seen, that regardless of whose numbers they would have

used, the need for the undisputed service area population is not met, without the Appellants' machine. Therefore, their decision to deny the Appellants' application was unsupported by the evidence and was clearly wrong based upon a review of the undisputed evidence received.

A close review of the relevant figures pertaining to population, number of available ultrasound machines, the accepted use rate, and the accepted method for calculating need, indicate that under the Appellants' proposed service area there is an unmet need. The same close review of the limited service area which RGH's expert testified was reasonable, also indicates an unmet need without the Appellants' ultrasound machine. Therefore, the HCA's decision is clearly wrong based upon a review of the evidence and should therefore be reversed and the Appellants' application granted.

In support of its denial of FMI's application, the HCA found that the financial information submitted by the Appellants in their application, failed to establish financial feasibility for the proposed project, based upon a number of reasons, including the failure to consider expenses for Medicaid provider tax, city B&O taxes, and payroll taxes. See HCA Decision page 19.

Here, as with the evidence received from Ms. Kinneberg, the HCA has relied upon the testimony of RGH's expert witness Lawrence Pack over the objection of FMI. As with Ms. Kinneberg's testimony, the evidence which was presented by Mr. Pack was not properly disclosed to FMI during discovery or by way of summary of expected testimony as required by the Time Frame Order of the HCA, and was challenged by the Appellants in their motion to exclude evidence. The Appellants rely upon the same legal arguments presented previously herein, to support their position that the admission of this evidence was improper.

To justify the failure to disclose Mr. Pack's testimony and the basis for his opinions,

counsel for RGH argued that the information was “work product”, see Transcript pages 175, 176, and 180, and also attempted to justify the introduction of this information by asserting that the information was “received verbally from the hospital that morning”. See Transcript pages 174-175.

RGH’s reliance upon verbal communications as being non-discoverable, is not supported by the law. The Rules of Civil Procedure require the disclosure of all information used by an expert in forming his or her opinion. *West Virginia Rules of Civil Procedure*, Rule 26(b)(4)(A)(i). The failure by RGH to disclose the opinions of its expert witnesses and the information relied upon and reviewed in making those opinions was contrary to the law, should not have permitted, and greatly prejudiced FMI’s ability to respond to this testimony with rebuttal information.

For purposes of rebutting the opinions of Mr. Pack, in the event that the Court does not immediately agree that the information should have been excluded, the Appellants will address the points raised by Mr. Pack.

Dr. Gary Poling offered explanations for the financial figures submitted by FMI and repeatedly pointed out that the figures were conservative estimates. See Transcript page 47. He also pointed out that the figures were low estimates so as not to overstate their anticipated revenues. Furthermore, the figures used by FMI in the application do not use the accepted figure of eight (8) scans per day, which is the figure previously accepted by the HCA, and which was used in all calculations by Ms. Kinneberg and RGH in their calculations of examinations available in the proposed service area. How can RGH argue that FMI will perform 8 scans per day for meeting the area’s need, but that it will only perform 6 scans per day to meet its financial needs?

Mr. Pack testified that his opinions were based upon figures for RGH's average ultrasound revenue which were given to him by RGH. See Transcript page 183. Mr. Pack testified he was unsure if the average figure provided by RGH included the more expensive echocardiograms and carotids (see Transcript page 183), yet the HCA allowed Mr. Pack to testify using an estimated figure of \$150.00 per examination for which he could provide no factual basis, and no reasoning or calculation on how the figure was obtained. Although there was no supporting documentation for the figures or opinions offered by Mr. Pack, the HCA relied upon Mr. Pack's testimony to determine that the Appellants' application was financially unsound.

In reviewing this determination, it is clear that the figure of \$150.00 is not realistic and is not supported by any information provided during the hearing. To the contrary, an analysis of the revenue for ultrasound services provided by RGH in response to discovery requests, which were part of the record, indicates that in the year 2002, RGH received revenue from ultrasound examinations totaling \$2,722,236.00. Taking this figure for revenue and dividing by the total number of ultrasound examinations disclosed by RGH, indicates an average net revenue of \$369.17 per ultrasound exam.

It is shocking to see, that this average figure for RGH, is more than double the figure allowed by Mr. Pack for the Appellants. What makes this discrepancy all the more shocking, is the fact that RGH argued that it is required to accept more indigent patients than FMI; suffers a greater percentage of write offs for bad debt; and accepts more forms of insurance and thereby receives less "full payment" based upon the use of reasonable and customary payments from insurance copies than FMI. These arguments should result in RGH having a lower net revenue per ultrasound examination than FMI would have in its private practice. Yet Mr. Pack only

allowed the Appellants a revenue of \$150.00 per exam, based upon unspecified and unsupported calculations and figures which were supplied by RGH.

Mr. Pack focused part of his review and his opinions on the estimated financial projections for the Appellants' third year of operation. See Transcript page 169. While FMI acknowledges that certain expenses were omitted from the expense list, it is also clear, that the Appellants did include a figure for other non-itemized expenses. Additionally, it is crucial that the figure of \$150.00 per exam used by Mr. Pack (Transcript pp 181-182) was an extreme underestimate without any supporting evidence. This estimate was clearly, contradicted by the evidence of FMI and the figures for RGH's net revenues. Transcript p.183.

The HCA erred by considering this undisclosed and unsupported testimony of Mr. Pack. Not only was the information unreliable and not disclosed prior to the hearing, but Hearing Examiner Dellinger specifically advised Dr. Poling during his cross-examination of Mr. Pack on the use of his figures, that **the information was taken out of the record**. See Transcript page 186 (Emphasis added). Therefore, if the information was taken out of the record as indicated by Ms. Dellinger, how could HCA make the determination that the proposed project was not financially sound? No other evidence was presented by RGH to show that the estimates of FMI were not sufficient to cover the costs of the expenses for this project, and therefore, the only evidence not "taken out of the record" was the financial figures of FMI which indicate financial feasibility.

If the testimony of Mr. Pack which should have been disclosed, but wasn't, is excluded as it should have been, or is excluded as indicated by Ms. Dellinger, no other evidence was presented at the hearing to rebut the figures submitted by FMI. However, if the testimony is not

excluded, but merely closely examined, the inability of Mr. Pack to identify the source of his information or properly identify the figures relied upon, should have resulted in the total disregard or discrediting of the value of his testimony.

It is interesting to note that during his testimony analyzing the financial aspects of year three (3) of the application, Mr. Pack determined that there would a \$10,000.00 loss for FMI. See Transcript pages 169-182. However, it is important to note, that in reviewing this testimony, the calculations and therefore the opinions, are incorrect, based upon the accepted standards.

First, Mr. Pack based his opinions on FMI performing only 1500 examinations per year, at \$150.00 per examination. See Transcript page 181, line 5. These figures are inconsistent with the use rates and calculations that have been accepted by the HCA, that a machine is capable of performing 2000 examinations per year, and is inconsistent with the position expressed by Ms. Kinneberg that FMI's machine will be able to perform 2000 examinations a year, without a CON and therefore there is no unmet need in the proposed service area, as expressed by Ms. Kinneberg's calculations mentioned previously.

If Mr. Pack would have used the undisputed, standard of 2000 examinations per year for an ultrasound machine, even using his deflated rate of \$150.00 net revenue per examination, the Appellants' net revenues would be \$300,000.00 and not the \$215,400.00 testified to by Mr. Pack. See Transcript page 182, line 14. This difference in revenue clearly indicates that the proposed project is and would be financially sound in year 3 based upon accepted standards of use.

Also, in order to make his figures show a loss, Mr. Pack included various fees and expenses which are not required of a business. Specifically, Mr. Pack included advertising fees which FMI is not required to purchase and are not purchasing at the present time. His figures

assume that FMI will give pay raises and make retirement contributions, which are not guaranteed. He also made deductions for charity cases, bad debt and other factors, which were already included in the net revenue figures supplied to him by RGH, based upon RGH's net revenues. Net revenues already account for those forms of non-payment and uncollectible debts because they are based upon total revenues received and the total number of exams performed, not the amounts billed for each procedure.

Finally, Mr. Pack's own testimony was that he thought the figure of \$150.00 per examination was a "good estimate". See Transcript page 182, lines 1-4. If Mr. Pack's estimate of \$150.00 is off by only \$6.67 per exam ($\$10,000.00$ divided by 1500 examinations = \$6.67) for the reduced number of examinations he estimated FMI would perform in its third year, there would still be no loss. Surely, Mr. Pack's low estimate of revenue and his low estimate of the number of examinations to be performed in the third year, did not justify a finding of financial instability, based upon a mere \$6.67 per exam difference.

If Mr. Pack and the HCA would have used the undisputed use rate and would have more closely scrutinized the net revenue figures, they too would have seen that the application is financially sound and therefore should have been approved.

Additionally, since hearing examiner Dellinger advised Dr. Poling during the hearing that the information used by Mr. Pack had been removed from the record, and he was prevented from questioning about those figures, FMI rightfully believed no other evidence had been introduced to support the opinions of Mr. Pack, and therefore correctly believed there was no need to offer any additional rebuttal evidence, and believed that their figures should have been sufficient to show their financial soundness.

Based upon the ruling of hearing examiner Dellinger, the Appellants did not introduce any additional evidence on the issue of financial ability, and their application clearly indicates financial soundness based upon their figures. The HCA therefore erred, by not accepting the Appellants' figures which clearly show the project to be financially sound. The decision of the HCA was not in conformance with the law and was clearly wrong based upon the evidence properly received.

C. CONCLUSION

Based upon the errors identified herein, it is clear that the HCA erred in its denial of the Certificate of Need Application filed by Family Medical Imaging, LLC, and that the decisions of the Office of Judges and the Circuit Court of Raleigh County, West Virginia, affirming that denial were clearly wrong.

The HCA acted arbitrarily by failing to enforce the Rules of Civil Procedure, the requirements of its own Time Frame Order, by using and applying unadopted definitions, interpretations, and standards, and by permitting the introduction of evidence which should have been excluded based upon the failure of RGH to timely disclose the information in response to discovery requests and Orders.

The HCA's decision that the Appellants' proposed service area was too large, is unsupported by any previously disclosed, adopted, or approved definition of service area, and is contrary to the properly adopted standards. The HCA's decision to reject the proposed service area based upon a lack of statistical evidence, is not supported by any action of the Legislature or the HCA in defining service area, and is clearly contrary to the standards approved by the Governor, which state that the service area is the area from which one **expects to draw patients**.

The only evidence submitted on the proposed service area, clearly indicates that the

service area proposed by FMI has an unmet need for ultrasound services, and therefore, the Appellants' application should have been granted. Since there was no evidence introduced by RGH or any other party contradicting the evidence which clearly shows an unmet need in the service area proposed by FMI in its application, the actions of the HCA in denying the application are clearly contrary to the evidence and were therefore, arbitrary, and should be reversed.

However, having allowed RGH to submit evidence concerning the "undisputed service area" and the availability of ultrasound services in the undisputed service area, over the objection of the Appellants, the HCA erred by not properly reviewing the entire record in this matter and making its decision on the undisputed or agreed upon facts, which indicate an unmet need in the undisputed service area.

Specifically, the undisputed service area of Raleigh, Fayette, Wyoming and Summers Counties was acknowledged by RGH's own witness as being an appropriate service area. Yet the HCA clearly did not use the undisputed population and undisputed number of ultrasound machines from these counties in its analysis of whether there is an unmet need. Had the HCA properly review the undisputed evidence for the undisputed service area, it would have seen that the population of the four (4) counties in the undisputed service area does in fact show a need for additional ultrasound machines, and therefore the application should have been granted based upon the calculations contained above.

It appears that after applying the wrong standard for determination of the proper service area, the HCA accepted Ms Kinneberg's continued rounding of numbers which resulted in an opinion that the undisputed service area did not have a need for additional ultrasound services. A close review and application of the undisputed figures as presented herein, shows that the

population and correct number of available ultrasound machines found in the undisputed service area, does in fact support the need for additional ultrasound services and the approval of FMI's application, regardless of any dispute over the availability for use of several ultrasound machines.

The second basis expressed by the HCA for the denial of the application was the determination that the plan was financially unsound based upon a review of the third year financial projections. This opinion, again was based upon information which should have been excluded for RGH's failure to disclose its experts' opinions and the basis for their opinions, prior to the hearing. The failure of RGH to disclose the basis for these opinions was a direct attempt to prevent FMI from being able to have prepared a more precise and accurate statement of its financial abilities.

Furthermore, the testimony offered by Mr. Pack on the lack of financial ability of FMI, was based upon figures which the witness could not explain, support or even identify how they were calculated. In an attempt to rebut the opinion of Mr. Pack, Dr. Poling pointed out that the figures for the third year were conservative estimates on income and contained projected increases in salaries, which were not guaranteed.

Additionally, it should be noted that the figures offered by FMI were also identified as a worst case scenario and were based upon conservative estimates based upon the current services provided without any referrals from physicians which have indicated their desire to use FMI's services when the CON is approved, were lower than the average revenue figures of RGH, which indicated that instead of \$200.00 per exam as relied upon in the application, a more accurate number for estimates would have been the \$369.17 per exam as realized by RGH. However, based upon their desire to offer more affordable and better services, the Appellants anticipate

charging, on average, less than RGH and therefore lowered their estimate to a more realistic figure, only to have RGH's expert claim their numbers were too low.

Additionally, it is important to note that FMI was advised during the hearing, by the Hearing Examiner, that the information pertaining to the figures surrounding the estimates presented by Mr. Pack **had been removed from the record**. Evidently, the information was not removed, because it formed the basis for the finding of financial unsoundness. How can the HCA justify basing its denial on testimony which the Appellants were advised had been removed from the record? Such an action is not only arbitrary, but is a capricious abuse of discretion, and is contrary to the law.

It should be noted, that as part of the record submitted by FMI, numerous physicians in the proposed service area, sent in letters in support of this application. Many of these letters referred to the need for additional ultrasound services in this area in order to insure timely examinations. These physicians have no financial interest in the outcome of this application, but are merely seeking to have the best service available in a more efficient and timely manner.

However, the HCA elected to ignore this additional evidence of the need for ultrasound services in this area. Surely, the opinions of these uninvolved witnesses should have been viewed as an alternative method for evaluating the need for these services.

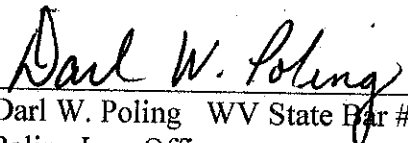
When reviewing the actual, undisputed figures, which were not prepared by or altered by a paid witness, it is clear that FMI demonstrated a need for additional ultrasound services in both the disputed proposed service area and the smaller undisputed service area by showing: (1) that the actual number of ultrasound machines in the proposed service areas are incapable of meeting the needs, based upon widely accepted usage rates, and (2) that this project is consistent with the

State Health Plan.

RELIEF REQUESTED

Therefore, the Appellants request that the decision of the HCA be overturned and that the application of Family Medical Imaging, LLC, for a Certificate of Need, be granted immediately, so that the general public is provided better access to ultrasound evaluation, and Family Medical Imaging does not continue to suffer financial hardship.

RESPECTFULLY SUBMITTED
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