

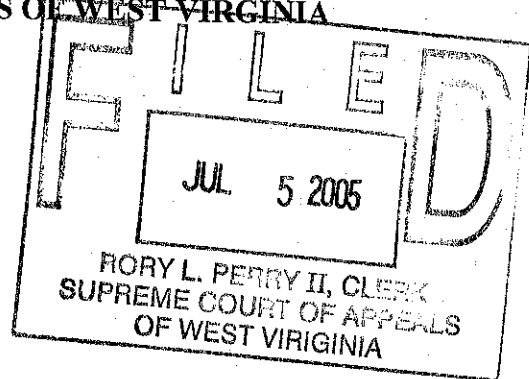
No. 32669/32670

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**FAIRMONT GENERAL HOSPITAL, INC.**  
Appellee,

v.

**WEST VIRGINIA HEALTH CARE AUTHORITY,  
UNITED HEALTH CENTER, INC., and  
WEST VIRGINIA UNITED HEALTH SYSTEMS, INC.**  
Appellants.



**REPLY OF APPELLEE FAIRMONT GENERAL HOSPITAL, INC.**

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## INTRODUCTION

This matter arises out of a certificate of need proceeding regarding the replacement of United Health Center Inc.'s ("United") facility in Clarksburg, Harrison County, with a new facility in Bridgeport, Harrison County. The applicable State Health Plan requires replacement facilities to be within 5 miles of existing facilities. The United replacement facility is beyond the 5 mile limit, and thus, inconsistent with the State Health Plan.<sup>1</sup>

W. Va. Code § 16-2D-3 provides that an applicant proposing a new institutional health service such as the construction of a replacement hospital must obtain a certificate of need. W. Va. Code § 16-2D-9(b) requires an applicant for a certificate of need to demonstrate, *inter alia*, that the application is consistent with the State Health Plan. If the applicant cannot demonstrate that the project is consistent with the State Health Plan a certificate of need may not be granted.

United cannot prove its application is consistent with the State Health Plan and the West Virginia Health Care Authority ("HCA") should have denied its application for a certificate of need. The HCA instead granted the application, a decision that was later upheld by the West Virginia Health Care Authority/ Office of Judges ("OOJ").<sup>2</sup> By an order dated November 24, 2004 the Circuit Court of Marion County ("Order") reversed the Decision of the OOJ and the HCA. This Court should affirm the Order of the Circuit Court.

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<sup>1</sup>The State Health Plan is the "document approved by the governor after preparation by the former statewide health coordinating council, or that document as approved by the governor after amendment by the former health care planning council or the state agency." W. Va. Code § 16-2D-2(ee).

<sup>2</sup>The Offices of Judges, Bureau of Employment Programs, is the entity given the authority to review the decisions of the HCA. W. Va. CSR § 65-7-18.

## STATEMENT OF THE CASE

United and the HCA have appealed the November 24, 2004 Order of the Circuit Court of Marion County which reversed the Decision of the OOJ, which upheld an earlier HCA Decision granting a Certificate of Need ("CON") to United for the construction of a new hospital to be located in Bridgeport, Harrison County, West Virginia. Fairmont General Hospital ("FGH"), the Appellee, is a community hospital located in Marion County, West Virginia. FGH was granted affected party status in the matter below because of the impact the proposed facility would have upon it.

Because a comprehensive factual and procedural history of this matter is contained in the record below, this section will be limited to a brief discussion regarding the statutory authority of the HCA and the sole factual and legal issue in the case.

The HCA is an administrative agency, created by statute and bound by the restrictions of statute. In awarding certificates of need, the HCA is guided by the provisions of W. Va. Code § 16-2D-1 *et seq.* Specifically, W. Va. Code § 16-2D-9(b) provides that "[a] certificate of need may only be issued if the proposed new institutional health service is: (1) Found to be needed; and, (2) Except in emergency circumstances that pose a threat to the public health, **consistent with the State Health Plan.**" (emphasis added).

Similar to the provisions of the above statute, W. Va. CSR § 65-7-12.1 provides that a certificate of need may only be issued if the proposed new institutional health service is "consistent with the State Health Plan." In W. Va. CSR § 65-7-2.7 "consistent with the State Health Plan" is defined to mean "a determination made by the board that the preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan unless the State Health Plan is in conflict with any statute or this rule."

Finally, the West Virginia Supreme Court of Appeals has ruled that “under West Virginia Code § 16-2D-9(b), the legislature has provided that a certificate of need may only be issued upon a finding that the proposed health service is both needed and consistent with the State Health Plan.” Princeton Community Hospital v. State Health Planning, 174 W.Va. 558, 328 S.E.2d 164, 170 (1985).

United filed its application for a certificate of need (“the Application”) under the provisions of the State Health Plan, Certificate of Need Standards chapter on “Renovation-Replacement of Acute Care Facilities and Services” that had been approved by the Governor in January 1997 (“the Standards”). The Application proposes that United construct a new hospital to be located in Bridgeport, WV. The new hospital would replace the existing United Hospital Center located in Clarksburg. The proposed new hospital is to be located more than five miles from the old facility. The Standards outline the requirements that must be met by an applicant such as United seeking to renovate or replace their physical facilities. The Standards specifically define a replacement hospital as:

Replacement: A project for the erection, construction, creation or other acquisition of a physical plant or facility as a result of which:

1. The number of hospital beds currently licensed to the applicant at the licensed site prior to the project are not increased as the result of the project; and
2. All hospital beds are, or will be, located within five miles of the original facility following completion of the project. (Emphasis Added) *See* State Health Plan Certificate of Needs Standards §I(W).

There is no dispute that the facility in question will be located more than five miles from the original facility, thus it is impossible for the Application to be consistent with the State Health Plan.

## STANDARD OF REVIEW

This Court has stated that the appellate court is to review a circuit court's decision concerning appeals from an administrative agency with "clearly wrong" and "arbitrary and capricious standards." The W.Va. Health Care Cost Review Authority v. Boone Memorial Hosp., 196 W. Va. 326, 335, 472 S.E.2d 411, 420 (1996). While "interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review, [a]n agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference." Id. According to Justice Cleckley's opinion in Boone Memorial, a court reviewing the HCA's "legislative rules is limited to asking (1) whether they were enacted pursuant to the procedures required by law; and (2) whether [HCA]'s interpretation and application of the rules were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id.

Furthermore, in reviewing a decision of an administrative agency, this Court held in St. Mary's Hospital v. State Health Planning and Development Agency, 178 W. Va. 792, 364 S.E.2d 805, 808-809 (1987), that the circuit court should utilize the standard of judicial review applied under the Administrative Procedures Act:

[T]he 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 records; or (6) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.'

Citing, Syl. Pt. 2, Shepherdstown Volunteer Fire Department v. Human Rights Commission, 172 W. Va. 627, 309 S. E.2d 342 (1983).

The Appellants have failed to demonstrate that the Marion County Circuit Court's decision was clearly wrong or arbitrary and capricious, thus their Appeal should be denied. The Order of the Circuit Court reaches a result which is fully supported by the evidence and the controlling case law, as discussed more fully, *infra*.

### ARGUMENT

The sole issue in this case is whether United's proposal for a replacement facility was consistent with the State Health Plan. As the project proposes locating the replacement facility more than five miles from the existing hospital beds it is impossible for the Appellants to demonstrate that the Application was consistent with the State Health Plan. Since United cannot prove that its project is consistent with the State Health Plan the Appellants devote much of their briefs discussing theories of the burden of proof and public policy. None of the theories regarding the burden of proof placed upon an applicant in a certificate of need case that are argued by the Appellants are supported by West Virginia law. Further, the arguments raised by the Appellants regarding public policy do not outweigh the requirement that the CON proposal be consistent with the State Health Plan. A review of the facts and the evidence of this case demonstrates that the Circuit Court's finding was correct.

**I. THE CIRCUIT COURT APPROPRIATELY FOUND THAT LOCATING A REPLACEMENT HOSPITAL FACILITY MORE THAN FIVE MILES FROM THE OLD FACILITY IS NOT CONSISTENT WITH THE APPLICABLE PROVISIONS OF THE STATE HEALTH PLAN.**

An application cannot be consistent with the State Health Plan when it is in direct violation of one of the applicable provisions contained in the Plan. In fact, the Application is inconsistent with, and in direct violation of, the very definition of the project proposed in the Application. The new facility proposed in the Application will be located at least eight miles from the old one. The State Health Plan defines a replacement hospital as one where the new beds will be located no more than **five** miles from the old beds. See State Health Plan Certificate of Need Standard § I(w) (emphasis added). In spite of this, the HCA found as matter of law that the Application was consistent with the State Health Plan. The Circuit Court properly disagreed.

**A. United's application for a Certificate of Need was not consistent with the State Health Plan.**

The Appellants allege that the HCA has the discretion to rule that proof that the proposed location is close to the required five mile limit is acceptable proof that the Application is consistent with the State Health Plan. An application cannot be consistent with a document that it plainly contradicts. Further, the HCA, an administrative agency, has no authority to rule beyond its statutory powers. It is well settled law that administrative agencies are "creatures of statute....Their power is dependent upon statutes, so they must find within the statute warrant for any authority which they claim. They have no general or common law powers but only such as have been conferred upon them by law expressly or by implication." Mountaineer Disposal Service, Inc. v. Dyer, 156 W. Va. 766, 197 S.E.2d 111, 115 (1973) citing Walter v. Ritchie, 156 W.Va. 98, 191 S.E.2d 275 (1972).

The statutes and legislative rules clearly require an applicant to demonstrate that its proposal is consistent with the State Health Plan which is defined as a demonstration that a “preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan.”

W. Va. CSR § 65-7-2.7. Given the definition in the Standards, a replacement hospital located more than five miles from the old hospital cannot support the achievement of the applicable provisions of the State Health Plan, in that it directly violates an applicable provision of the State Health Plan.

The Appellants’ argue that “consistent with the State Health Plan” means that an applicant must prove some of the applicable provisions by a preponderance of the evidence, but not all of the applicable provisions. The result of this reading would be to make the Standards a moving target. Unless an applicant must prove that its application is consistent with all of the applicable provisions of the State Health Plan there is no way for an applicant or an affected party to identify which applicable provisions must be proven by a preponderance of the evidence. The parties would have to guess which applicable provisions are applicable and which are not.

In this instance, the HCA’s ruling was that proof that the replacement facility will be located eight miles from the existing facility is proof by a preponderance of the evidence that the replacement facility will be located five miles from the existing facility. The ruling is, on its face, incorrect. If such a ruling is allowed to stand the issue would become, if eight miles equal five miles, does ten miles? Does fifteen miles? There are numerous other numerical requirements or thresholds in the State Health Plan, Certificate of Need Standards that must be proven by an applicant. Are these requirements that must be proven by a preponderance or mere suggestions? These questions demonstrate why there must be bright line rules of proof in cases such as this. Five miles was

written into the rule and the rule must be enforced as written. The only alternative is to have no rules.

**B. The West Virginia Code does not provide for a “substantially consistent” or “not materially inconsistent” standard.**

Because they cannot demonstrate by a preponderance of the evidence that the Application is consistent with the State Health Plan, the Appellants assert that an application for a CON need only be ‘substantially consistent’ or ‘not materially inconsistent’ with the State Health Plan. This is in direct conflict with W. Va. Code § 16-2D-9(b) which requires that the certificate of need be “(1) Found to be needed; and (2) Except in emergency circumstances that pose a threat to public health, **consistent** with the State Health Plan.” (emphasis added). The West Virginia Code does not provide a limitation on the term ‘consistent.’ As the Circuit Court of Marion County stated, “[h]ad the Legislature intended the use of a lesser standard, such as materially or substantially consistent, the language of the statute would have reflected this intent. Clearly the Legislature intended that all approved applications conform to the requirements of the State Health Plan.” Order, p.9, ¶ 13.

The Appellants further assert that United’s application is not materially inconsistent with the State Health Plan. This argument crystalizes the problem with United’s position. The statute and legislative rules in question all state that an application must be consistent with the State Health Plan, not materially consistent. The reason for this is demonstrated by reviewing the reason for the five mile rule. As the Circuit Court stated:

The regulatory protections embodied in the State Health Plan were purposely enacted. One reason for their enactment is to protect other area hospitals from the encroachment of new facilities into area traditionally serviced by those other area hospitals. One need only look at geography, as well as other considerations, to conclude that allowing the certificate of need sought by United would have a

devastating effect upon FGH. Therefore, these regulatory provisions should be recognized and enforced as drafted to ensure that such protections are maintained.

Order, p. 8, ¶ 12.

If the Applicant and the HCA are allowed to ignore the five mile rule, the reason for the rule's enactment is rendered moot. Allowing United to comply with the five mile rule by being close but not within five miles leads to the same result. That is the reason why an administrative agency must enforce its rules as those rules are written, not as they see fit to do on a case-by-case basis.

**C. As a matter of law, the West Virginia Code requires the application to be consistent, not 'substantially consistent' with the State Health Plan.**

United cites two cases where the HCA granted certificates of need on applications that were inconsistent with the State Health Plan as evidence of the HCA's consistent past practice of approving applications that are inconsistent with the State Health Plan. United Brief, p. 32-33. United's citation of these cases ignores some very relevant facts and issues as well as the actual decisions in the cases. Furthermore, these decisions do not create a standing policy of the HCA that it is permissible to accept applications that are inconsistent with some provision in the State Health Plan.

United refers to In re: Fairmont General Hospital, CON File #84-6-2006-H and 84-6-2076-H, p. 6 (West Virginia Health Care Cost Review Authority December 7, 1984). United Brief, p. 32-33. This case was decided under the old State Health Plan that did not have specific standards that must be met, only general goals and objectives that had very few qualitative or quantitative requirements. The goal and objective that is the subject of In re: Fairmont General Hospital merely requires an applicant to prove "the need that the population served or to be served by such services has for such

services proposed to be offered or expanded...” In re: Fairmont General Hospital, Decision at p. 6.

There was no required numerical need methodology. There was no specific mileage restriction.

There was simply a requirement that the applicant demonstrate a need for the service. The State

Health Planning and Development Agency (SHPDA), the HCA’s predecessor agency, specifically

found that there was a need for the beds sought in the application. Thus, the decision by the HCA’s

predecessor is not a decision that clearly violates a specific restriction in the State Health Plan.

The other cases cited by United in footnote 14 on page 33 of its Brief, similarly do not stand

for the proposition that an application that is inconsistent with a specific provision in the State

Health Plan can be found to be consistent with that plan. The specific provision of the State Health

Plan applicable in those cases contained exceptions to the birth threshold. Thus, the HCA could

properly rule that both applications were consistent with the State Health Plan.

United next argues that FGH took a similar position in another certificate of need case, In re:

Triad Hospitals, Inc. and Fairmont Health Systems, LLC, CON File No. 02-6-7536-H, and as a

result, should be precluded from raising its arguments in this case. The certificate of need

application that is referenced by United was not filed by FGH. It was filed by an entirely different

and independent company that was planning to acquire FGH and proposed to build a replacement

facility in Marion County. That application was withdrawn before the hearing process even started.

The application was never litigated nor ruled upon by the HCA. Thus, United is attempting to

impute a position to FGH on a certificate of need application it did not file and that was withdrawn

without any ruling being made on it by the HCA.

Finally, United relies upon a certificate of need case from Virginia in support of its argument

regarding whether an application can be deemed consistent with the State Health Plan when it is, on

its face inconsistent with certain portions of the plan. United Brief, p. 34. This case is easily distinguishable from the present case. The West Virginia statute in question, W. Va. Code § 16-2D-9(b), provides that a certificate of need cannot issue unless the application is consistent with the State Health Plan. This restriction is also contained in the HCA's legislative rules that were adopted in July, 2000. According to the Court's opinion in Roanoke Memorial Hospitals v. Kenley, 3 Va. App. 599, 606, 352 S.E.2d 525, 529 (1987), the Virginia regulation that was the subject of the proceeding had a great deal of discretion built into it. In fact, a good part of the Court's decision discusses the definition of the word "should" and the Court decides that "the use of the word 'should' in the context of the SHP was intended to confer an appropriate amount of discretionary authority in the administrative body." Roanoke Memorial Hospitals, 352 S.E.2d at 529. The West Virginia State Health Plan CON Standard specifically requiring a maximum five mile distance for a new facility does not provide the flexibility presented in the Virginia case. There was no interpretation by the Agency necessary because the rule is so clear as to leave no doubt about its meaning.

**D. W. Va. Code § 16-2D-9(b) is not in conflict with W. Va. Code § 16-2D-11.**

The Appellants also rely on the provisions of W. Va. Code § 16-2D-11 which provide that "[i]n making decisions in the certificate of need review process, the [HCA] shall be guided by the State Health Plan approved by the governor." This section gives the HCA no authority to ignore, modify or otherwise tamper with plain language of the State Health Plan. In fact, it requires the HCA to apply it to certificate of need cases. Further, the Appellants' argument that this statute is controlling over W. Va. Code § 16-2D-9(b) because it was enacted after § 16-2D-9(b) is without merit. First, the statutes are not, on their face, contradictory. They can certainly be applied in harmony. Second, W. Va. CSR § 65-7-12.1, which provides that a certificate of need may only be

issued if the proposed new institutional health service is “consistent with the State Health Plan” was enacted after the passage of § 16-2D-11. Thus, even if the statutes do conflict, the passage by the legislature in 2000 of W. Va. CSR § 65-7-12.1 is the latest enactment on the issue and, as result, dispositive of the legislature’s intent.

The result is that the HCA must apply the statutory and regulatory provisions applicable to its actions and processes as those provisions are plainly written. The State Health Plan plainly requires a replacement facility to be constructed within five miles of the facility it is replacing. That is not the case in this project and, as a result, the application should have been denied. The decision of the Circuit Court of Marion County that the HCA was in error when it approved the application is proper and should be affirmed.

**E. The Circuit Court of Marion County properly applied the correct standard of review in reviewing the HCA and OOJ Decisions and finding that United’s Application was not consistent with the State Health Plan.**

The Appellants next assert that the Marion County Circuit Court applied the wrong standard of review to the HCA and OOJ Decision.<sup>3</sup> The Circuit Court correctly states that the “appeal is

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<sup>3</sup>Appellants assert that the Court failed to apply the two-pronged test set forth in Boone Memorial, supra. United Brief, p. 23, HCA Brief, p. 10.

The test states “The court must first ask whether 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 to the agency’s interpretation at this stage.” Syllabus Point 3, Appalachian Power Co. v. State Tax Department of W. Va., 195 W. Va. 573, 466 S.E. 2d 424 (1995).

“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.” Syllabus Point 4, Appalachian Power Co. v. State Tax Department of W. Va., 195 W. Va. 573, 466 S.E. 2d 424 (1995). Boone Memorial Hospital, 196 W. Va. at 329, 472 S.E.2d at 414.

subject to standard of review set forth in West Virginia Code § 16-2D-10, which provides that the 'reviewing agency' shall review appeals from the HCA in accordance with the provisions governing the judicial review of contested administrative cases in Code § 29A-5-4." Order, p. 4, ¶ 1. Contrary to the Appellants' arguments, the Circuit Court of Marion County clearly relied upon the Princeton and Boone Memorial standards in its Decision. Irrespective of whether the Court mentioned the applicability of the two-pronged test, the Circuit Court specifically stated:

The Princeton Court concluded that:

(u)nder W. Va. Code § 16-2D-9(b)(Supp. 1984), the legislature has provided that a certificate of need may only be issued upon a finding that the proposed health service is both needed and consistent with the State Health Plan. Neither the [HCA] nor a reviewing tribunal is statutorily empowered to issue a certificate of need without clear findings and conclusions of compliance with both requirements. Accordingly, once it has been determined that denial of a certificate of need application is clearly mandated by the absence of one of these requirements, a determination regarding the other is unnecessary.

Order, p. 7, ¶ 9. An in-depth discussion of the Boone Memorial two-pronged test was unnecessary because the Decisions of the HCA and OOJ, on their face, were inconsistent with the State Health Plan.

The HCA, in its Brief, asserts that the Circuit Court of Marion County substituted its own judgment for that of the HCA. HCA Brief, p.10. The Standards, the applicable law in this case, specifically set forth the five mile requirement for a replacement hospital. The Circuit Court did not substitute its judgement for that of the HCA's. The Court merely applied the Standards, as written, to the United Application. The Circuit Court's reference to the definition of consistent is proper. Reference to dictionary definitions of commonly used words is frequently utilized by this Court and is an appropriate means of statutory interpretation. In fact, in a recent opinion, this Court

referred to definitions in the Oxford English, Webster's and Random House Dictionaries in support of defining a term contained in a statute. See Clifford K. and Tina B. v. Paul S., 2005 W. Va. LEXIS 58 (W. Va. June 17, 2005) at 6.

Further, the reference to the dictionary definition is not dispositive in this case, but serves to demonstrate that United's proposal failed to be 'consistent', not only as that term is defined in the HCA's Legislative Rules but also under the plain meaning of the term.<sup>4</sup> Deference to HCA's interpretation of the five mile rule is not required when that interpretation is, on its face, is clearly not in compliance with the rule. The Circuit Court didn't interpret the Standard, it merely applied it according to its plain and unambiguous meaning.

## **II. PUBLIC POLICY AND PERCEIVED FUTILITY DO NOT WARRANT VIOLATION OF THE STATE HEALTH PLAN**

Next, United and the HCA both argue that this appeal is an exercise in futility because of the fact that the Standards have since been changed to allow the construction of replacement facilities that are located more than five miles from the facility they are designed to replace. In effect, they are arguing the Standards should be applied retroactively to their Application without giving FGH the benefit of knowing those Standards would be applied. While it is true that the Standards have changed, there is no law that supports that they should be applied retroactively. The Standards themselves do not provide for retroactive application. West Virginia law and public policy support that the Standards in effect at the time of submission of the Application are to be applied and enforced as written.

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<sup>4</sup> The Circuit Court stated in its Opinion, "The term 'consistent' is colloquially defined as 'free from irregularity, variation, or contradiction.'" Webster's New Collegiate Dictionary 239 (1981)." Order, p.6, ¶ 6.

**A. Public Policy supports application of the existing Standards.**

United and the HCA argue that public policy demands that the application be approved because the five mile rule has since been changed. Public policy is not served by allowing rules to be bent or applied only as needed. As pointed out by the Circuit Court, public policy is supported by the “propriety and integrity of the administrative and legislative processes. Upholding the HCA’s ‘Decision’ would serve only to embark down the slippery slope discussed in Princeton and Statewide Health Coordinating Counsel, resulting in a society in which regulations, and perhaps even statutes, could be disregarded at will.” Order, p. 10-11, ¶ 16.

Further, the argument put forth by United and the HCA actually is an argument that the amended Standards should be applied to this case on a retroactive basis. The retroactive application of the law is severely restricted by statute and by case law. Under W. Va. Code § 2-2-10(bb), a “statute is presumed to be prospective in its operation unless expressly made retrospective.” See State v. Bannister, 162 W. Va. 447, 453, 250 S.E.2d 53, 56 (1978) (holding that “the general rule in West Virginia is that there is a presumption that a statute is intended to operate prospectively, unless it appears, by clear, strong and imperative words or by necessary implication that the legislature intended to give the statute retroactive force and effect.”) and Wampler Foods v. Workers Comp. Div., 602 S.E.2d 805 (W. Va. 2004). Nothing contained in the W. Va. Code, the HCA’s Legislative Rules or the State Health Plan expressly support retroactive enforcement of the Standards.

There is a valid reason why laws should be applied prospectively. Participants in a case must know what the law of the case is. The law in this case is the 1997 Standards, not the amended ones that were approved by the Governor after the filing of the Application. FGH prepared its case

based upon the law of the case, the 1997 standards. The HCA never notified FGH that any other standards would be applied. The first time FGH received any notice that the new standards would be applied was when this matter was on appeal. This clearly illustrates the reason that allowing the retroactive application of rules is restricted. Applicants, affected parties and the general public will never know which law applies. Applicants will argue for selective application of the law to find the one that best suits their needs. Affected parties will do the same. In this case, FGH opposed United's application under the only set of rules that were applicable to the application. Now, after the close of the evidence in the case, United and the HCA want to apply another set of rules retroactively. Public policy dictates that the public, including applicants and affected parties, have the right to know which standards will be enforced against them. This Court should conclude as a matter of law that the new Standards do not apply retroactively.

**B. Perceived futility is not a basis to violate the State Health Plan.**

The HCA argues that since the sole issue in this case, the mileage issue, is resolved by the new Standards that this is dispositive of the next application that has yet to be filed. This argument is legally unsupportable and reeks of bias. The fact that no other issues were raised by FGH in the proceeding before the HCA is not evidence that no other issues existed. It is merely evidence that the mileage issue is so clear that no other issues need to be addressed at this time. A new application will be judged under the new Standards, thus essentially presenting new circumstances and new facts. In many cases it could be argued that reversing a decision is a futile act because the final decision may not change. That is not an excuse for overlooking an error. It is merely a justification or worse, a rationalization for the error. Justified or not, the error is clear and the decision, based upon that error, should be reversed.

In a similar vein, United argues that it will have to pay additional costs to file a new application. See United Brief, p. 41-42. Just like the HCA, United presents no West Virginia case law in support of its argument. The Appellant's focus on the "futility argument" is an attempt to distract from the legal issue in this case, which is that HCA's ruling is clearly erroneous as a matter of law.

Finally, the Appellants argue that this case frustrates public policy because of the delay in a needed project, the replacement of the existing United. United Brief, p. 41-42, HCA Brief, p.12. First, the cause of the delay is United's insistence on filing an application that was not consistent with the State Health Plan. Second, the existing United Hospital Center is open and providing health care services to the community. The present facility is currently operating as it has for years. The present facility has not been shut down or restricted by any licensing agency. Further, United does not propose to offer any new services at the new facility. Thus, the argument that the delivery of health care services to the residents of the area has somehow been delayed is simply incorrect.

### **CONCLUSION**

WHEREFORE, based upon the foregoing arguments, FGH, respectfully requests this Court deny the Appellant's Appeal and affirm the Decision issued by the Circuit Court of Marion County.

**FAIRMONT GENERAL HOSPITAL,  
By Counsel**

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**CERTIFICATE OF SERVICE**

I, Thomas G. Casto, hereby affirm that on this date, July 5, 2005, I caused the foregoing **REPLY OF APPELLEE FAIRMONT GENERAL HOSPITAL, INC.** to be served on the following attorneys by depositing a true and accurate copy of the same in the regular United States Mail, first class, postage prepaid, in an envelope addressed to them at their last known address as follows:

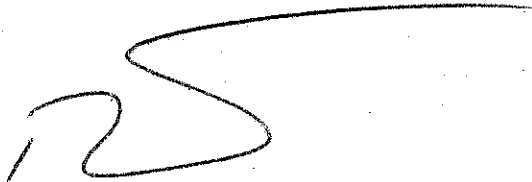
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