

No. 91569-5

NO. 46937-5-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON,

Appellant,

v.

THE POLYCLINIC, a Professional Corporation, a Washington
corporation and SWEDISH HEALTH SERVICES, a Washington
nonprofit corporation,

Respondents.

**WASHINGTON AMBULATORY SURGERY CENTER
ASSOCIATION'S *AMICUS CURIAE* BRIEF**

Emily R. Studebaker, WSBA #31901
GARVEY SCHUBERT BARER

Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
(206) 464-3939

FILED
COURT OF APPEALS
DIVISION II
2015 MAR 19 PM 1:30
STATE OF WASHINGTON
BY
DEPUTY

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	4
A. An Increase in the Number of ORs at an Existing CN-approved ASF Does Not Constitute the Establishment of a New Health Care Facility.....	4
B. Promulgation of the Increase in Outpatient ORs Rule Exceeds the Department’s Authority Because Washington Does Not Permit an Administrative Agency to Amend a Statute Where the Legislature’s Intent and Language Are Clear.....	8
C. The Department’s Purported Re-definition of the Word “New,” Which Is Essential to the Increase in Outpatient ORs Rule. Improperly Ignores Directly Applicable Washington Precedent and Is Not Entitled to Deference by the Court.	12
D. The Department’s Increase in Outpatient ORs Rule Is a Significant Legislative Rule. Subject to the Administrative Procedures Act.	13
E. The Department’s Action in Implementing the <i>Increase in Outpatient ORs Rule Is Arbitrary and Capricious</i> . Because It Disregards More Than 35 Years of Agency Precedent and Discriminates against ASFs.	16
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Barrie v. Kitsap Cnty.</i> , 93 Wn.2d 843, 613 P.2d 1148 (1980).....	21
<i>Centennial Villas, Inc. v. State, Dept. of Social and Health Services</i> , 47 Wn. App. 42, 733 P.2d 564 (1987).....	7, 8, 9, 17
<i>Christopher v. SmithKline Beecham Corp.</i> , 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012)	19
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wn.2d 38, 959 P.2d 1091 (1998).....	16
<i>Dot Foods, Inc. v. Wash. Dep’t of Revenue</i> , 166 Wn.2d 912, 215 P.3d 185 (2009).....	21
<i>Ellensburg Cement Prod., Inc. v. Kittitas Cnty.</i> , 179 Wn.2d 737, 317 P.3d 1037 (2014).....	14
<i>Failor’s Pharmacy v. Dep’t of Soc. & Health Services</i> , 125 Wn.2d 488, 886 P.2d 147 (1994)	18
<i>Hillis v. Dep’t of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	18, 19
<i>In re Pierce</i> , 173 Wn.2d 372, 268 P.3d 907 (2011).....	14
<i>Jenkins v. Dep’t of Soc. & Health Services</i> , 160 Wn.2d 287, 157 P.3d 388 (2007).....	16
<i>Long Island Care at Home, Ltd. v. Coke</i> , 551 U.S. 158, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007)	19
<i>Probst v. Dep’t of Ret. Sys.</i> , 167 Wn. App. 180, 271 P.3d 966 (2012)	16
<i>Ryan v. Dep’t of Soc. & Health Services</i> , 171 Wn. App. 454, 287 P.3d 629.....	16
<i>Saben v. Skagit Cnty.</i> , 136 Wn. App. 869, 152 P.3d 1054 (2006).....	20

<i>Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007)	20, 21
<i>The Polyclinic et al. v. Dep't of Health of the State of Wash.</i> (Thurston Cnty Super. Ct. Sept. 19, 2014).....	22
<i>Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.</i> , 77 Wn.2d 94, 459 P.2d 633 (1969).....	14
<i>Wash. State Hosp. Ass'n v. Wash. State Dep't of Health</i> , No. 14-2-00285 (Thurston Cnty. Super. Ct. May 12, 2014).....	1, 19

Statutes

RCW 34.05	18
RCW 34.05.010(16).....	17
RCW 34.05.328	18
RCW 34.05.328(5)(c)(iii)	18
RCW 70.230	10
RCW 70.38	7, 14
RCW 70.38.015	23
RCW 70.38.025(6).....	passim
RCW 70.38.105(4).....	11
RCW 70.38.105(4)(a)	passim
RCW 70.38.105(4)(b)	11
RCW 70.38.105(4)(c)	12
RCW 70.38.105(4)(d)	12
RCW 70.38.105(4)(e)	13
RCW 70.38.105(4)(g)	13
RCW 70.38.105(4)(h)	13

WAC 246-310-010(5)..... 5

Other Authorities

MEDICARE PAYMENT ADVISORY COMMISSION, 113TH CONG.,
REPORT TO THE CONGRESS: MEDICARE AND THE HEALTH
CARE DELIVERY SYSTEM, 27-56 (2013)..... 22

Patient Protection and Affordable Care Act, Public Law 111-
148 (2010) 23

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1522
(Philip Babcock Gove et al. 1961) 7

I. INTRODUCTION

Washington's certificate of need ("CN") law expressly subjects eight specific activities to CN review by the Washington State Department of Health (the "Department"). Relevant to this appeal, RCW 70.38.105(4)(a) requires CN review in connection with the "establishment of a new health care facility" RCW 70.38.105(4)(a). Since the CN law was enacted in 1979, the Department has interpreted and implemented this provision as the legislature wrote it, subjecting only the establishment of a new ambulatory surgical facility ("ASF") to CN review. For more than 35 years, the Department has consistently held that an increase in the number of operating rooms ("ORs") at an existing CN-approved ASF does not result in the establishment of a new health care facility and therefore is not subject to CN review. Now, the Department has reversed its longstanding interpretation of RCW 70.38.105(4)(a) and unilaterally determined that CN review is required where an existing CN-approved ASF seeks, *not to open a new facility*, but only to increase the number of ORs at the existing facility. This new rule is referred to below as the "Increase in Outpatient ORs Rule."

The Department's reversal in its position is not tenable, for at least three reasons. First, adopting the new Increase in Outpatient ORs Rule exceeds the Department's authority. The Department is attempting to make

new law, rather than faithfully administering the law as enacted by the legislature. Second, even if the Department had authority to add to the statute new triggering events for CN review (which it does not, as explained below), the Increase in Outpatient ORs Rule would nevertheless be invalid because the Department failed to comply with the statutory requirements for adopting a significant legislative rule. Third, the new Increase in Outpatient ORs Rule is arbitrary and capricious. The Department has disregarded its longstanding interpretation of the CN law in adopting the new rule, has applied the new rule only to a limited subset of the outpatient surgical facilities that are otherwise subject to CN review, and has ignored critical facts and circumstances in promulgating the new rule.

The Thurston County Superior Court agreed, holding that the Department's action – that is, requiring an existing CN-approved facility to apply for another CN, not required by the legislature through the CN law – was improper, and that the Department failed to engage in rulemaking procedures mandated by the Administrative Procedures Act. On behalf of its members, the Washington Ambulatory Surgery Center Association (“WASCA”) respectfully requests that the Court affirm the Superior Court's holding.¹

¹ These reasons similarly apply to the Department's apparently new rule subjecting an existing CN-approved ASF to review in order to relocate within the same health planning area.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WASCA is a statewide nonprofit association that represents the interests of individuals who own and operate ambulatory surgical facilities ASFs in the State of Washington. Declaration of Hiroshi Nakano in support of Washington Ambulatory Surgery Center Association's Motion for Leave to File *Amicus Curiae* Brief, *The Polyclinic et al. v. Dep't of Health of the State of Wash* (Thurston Cnty. Super. Ct. Sept. 19, 2014) [CP 95-96]. An ASF is an entity that provides specialty or multispecialty outpatient surgical services to patients that are admitted to and discharged from the facility within 24 hours and do not require inpatient hospitalization. *Id.*

WASCA currently represents approximately 140 ASFs, including ASFs solely owned by physicians and those owned by physicians in common with strategic partners such as hospitals. WASCA seeks to safeguard its members' ability to provide high quality and affordable care in accordance with applicable law.

III. STATEMENT OF THE CASE

RCW 70.38.105(4)(a) requires CN review and approval in connection with the establishment of certain new health care facilities, including ASFs.

In 1991, the Department granted CN #1046 to The Polyclinic to establish an ASF at 1145 Broadway in Seattle. Department of Health's

Motion for Stay at Appendix at 2, ¶ 2 (Declaration of Janis Sigman), *Dep't of Health of the State of Wash. v. The Polyclinic et al.* (Ct. of Appeals Dec. 23, 2014) (No. 46937-5-II.). In 2014, the Department informed The Polyclinic that, in order to increase the number of ORs at its ASF, a new CN would be required. *Id.*, Appendix at 3, ¶ 3. This was a reversal of the Department's longstanding interpretation of RCW 70.38.105(4)(a) and at odds with decades of Department decisions that, as a matter of law, CN review and approval is not required where an existing, CN-approved ASF seeks to increase the number of ORs at the existing facility. *Id.*

IV. ARGUMENT

A. **An Increase in the Number of ORs at an Existing CN-approved ASF Does Not Constitute the Establishment of a New Health Care Facility.**

Under RCW 70.38.105(4)(a), the “establishment of a new health care facility” requires CN review. Accordingly, if adding ORs to an existing CN-approved ASF does not result in the establishment of a new health care facility, the Department lacks statutory authority to subject an ASF to CN review before taking this action.

The CN law defines the term “health care facility” as meaning “hospices, hospice care centers, hospitals, psychiatric hospitals, nursing homes, kidney disease treatment centers, ambulatory surgical facilities, and home health agencies” RCW 70.38.025(6). Notably, this definition is

based on the nature of services the facility provides, and makes no reference to the facility's physical characteristics, including its OR capacity.

Neither the CN law nor any regulation implementing chapter 70.38 RCW defines the term "new health care facility." The Department agrees, while citing different authority, that "[a]bsent statutory definitions, words used in a statute are to be given their usual and ordinary meaning." *Centennial Villas, Inc. v. State, Dep't of Social and Health Services*, 47 Wn. App. 42, 46, 733 P.2d 564 (1987). The Department also agrees that Webster's Third New International Dictionary serves as an appropriate starting point to define "new" and cites a definition – "having originated or occurred lately" – that is consistent with our own: "having existed or having been made but a short time." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1522 (Philip Babcock Gove *et al.* 1961).

Having established the baseline for interpretation of the word "new," the Department then ignores Washington precedent and applicable statutory construction principles to assert that increasing the number of ORs in an existing CN-approved ASF converts that existing facility to a "new" ASF. That assertion is incorrect, as explained below.

The Department's interpretation ignores case law that is directly on point. The Washington Court of Appeals decision in *Centennial Villas* is the only reported Washington decision to interpret the meaning of the term

“new health care facility.” In *Centennial Villas*, the court considered whether a hospital and a nursing home that had previously obtained CNs for their respective operations were required to apply for additional CNs before engaging in the provision of home health care services. The court observed that the “key” to resolving the issue “hinged” on the interpretation of the term “new health care facility.” *Centennial Villas*, 47 Wn. App. at 47. The court determined that the existing health care facilities, a hospital and a nursing home, were required to apply for a second CN before engaging in home health care services because “[t]he proposed services to be offered by the respondents qualify them as home health care agencies,” which are specifically identified as a type of “health care facility” under RCW 70.38.025(6). *Id.* The court held that assuming an additional identity, that of a home health care agency, by offering services that are “essentially those of another entity causes the existing hospital or nursing home to become a ‘new health care facility’ within the meaning of RCW 70.38.105(4)(a).” *Id.* at 47-48. The court’s holding was based on its rationale that in order to engage in home health care services, a hospital or nursing home “must become a home health agency” and thereby assume “an *additional* identity”, *i.e.*, that of a home health agency. *Id.* (emphasis added).

The court’s reasoning in *Centennial Villas* is consistent with the plain language of RCW 70.38.025(6), which lists facility types based on the

nature of the services the facilities provide. Under the statute and under *Centennial Villas*, an existing facility cannot reasonably be considered a “new health care facility” unless the existing facility seeks to add a type of services, such as home health care, that the facility does not currently furnish, or to change the nature of services that the facility provides. *See Id.*

The facts in *Centennial Villas*, in which existing facilities sought to add a type of services that they did not currently furnish, are clearly distinguishable from those presented in this case, in which an existing CN-approved ASF merely seeks to furnish the same services it currently furnishes using additional ORs. The court’s rationale in *Centennial Villas* supports the Department’s longstanding position that an increase in the number of ORs at an existing CN-approved ASF does not result in the establishment of a new health care facility. Increasing its number of ORs will not enable an ASF to offer services that are “essentially those of another entity,” or otherwise result in the “assumption of an additional identity” so long as the type of the services previously provided by the ASF does not change as a result of the increase in ORs. In fact, after increasing the number of its ORs, the ASF is not required to apply for any additional license, or even to amend its license under chapter 70.230 RCW in order to

operate, while changing the nature of the services it furnishes would require that it do so.

Further, nothing in the CN law or its implementing regulations indicates that an increase in the number of ORs at an existing CN-approved ASF causes the ASF to have been in existence or to have been made “but a short time,” or, citing the Department’s definition, to have “originated or occurred lately.”

Accordingly, the inquiry into whether a proposed action by an existing facility results in the establishment of a “new health care facility” is properly limited to whether the action will result in the creation of a facility described in RCW 70.38.025(6) that did not previously exist, or will enable an existing facility to provide a different type of health care service that it was not previously authorized to provide. An increase in the number of ORs at an existing CN-approved ASF results in neither, and therefore is not subject to CN review. The Superior Court agreed. Accordingly, the Court should affirm the Superior Court’s ruling, invalidating the Increase in Outpatient ORs Rule.

B. Promulgation of the Increase in Outpatient ORs Rule Exceeds the Department’s Authority Because Washington Does Not Permit an Administrative Agency to Amend a Statute Where the Legislature’s Intent and Language Are Clear.

Washington law is well-developed with respect to administrative authority in interpreting statutory content, and does not permit an agency to

regulatorily amend a statute where the legislature has spoken definitively. This concept can be clearly applied to the Department's decision to unilaterally and independently amend Washington's CN statutes, as follows.

RCW 70.38.105(4) describes eight undertakings that are subject to CN review. These undertakings include only the following: (1) the construction, development, or other establishment of a new health care facility (RCW 70.38.105(4)(b)); (2) the sale, purchase, or lease of part or all of any existing hospital (RCW 70.38.105(4)(b)); (3) a capital expenditure for the construction, renovation, or alteration of a nursing home that substantially changes the services of the facility after a date set forth in statute and only provided that the substantial changes in services are specified by the Department in rule (RCW 70.38.105(4)(c)); (4) a capital expenditure for the construction, renovation, or alteration of a nursing home that exceeds a statutory expenditure minimum (RCW 70.38.105(4)(d)); (5) a change in bed capacity of a health care facility that increases the total number of licensed beds or redistributes beds among acute care, nursing home care, and boarding home care (RCW 70.38.105(4)); (6) a new tertiary health services that are offered in or through a rural health care facility (RCW 70.38.105(4)(f)); (7) an expenditure for the construction, renovation, or alteration of a nursing home or change in nursing home services in excess

of a statutory expenditure minimum (RCW 70.38.105(4)(g)); and (8) an increase in the number of dialysis stations in a kidney disease center (RCW 70.38.105(4)(h)).

The law does not state that any increase in the total number of patients who may be treated over a period of time (the facility's "throughput") at a health care facility is the establishment of a new health care facility. Nor does it provide that any increase in the throughput capacity of an existing health care facility requires CN review. It is well-settled under Washington law that "[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* – specific inclusions exclude implication." *Ellensburg Cement Prod., Inc v. Kittitas Cnty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) (stating that where a statute listed an open records hearing and a closed record appeal, it was not permissible for Kittitas to create "its own different type of hearing"); *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) (stating that where the legislature specifically listed "natural persons, corporations, trusts, unincorporated associations and partnerships," the legislature did not "employ language designed to bring public utility districts within the

operation of the statute nor leave room to include them within it by construction”).

It is also clear in Washington law that statutes “must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *In re Pierce*, 173 Wn.2d 372, 378, 268 P.3d 907 (2011). The Department’s action in adding this new trigger for CN review effectively renders meaningless or superfluous all of those provisions in chapter 70.38 RCW that require review when a specific type of health care entity undertakes a specific activity, *e.g.*, increasing the number of licensed health care facility’s acute care beds, nursing home care beds, or boarding home care beds; increasing a licensed rural health care facility’s acute care beds, nursing home care beds, or boarding home care beds; and increasing the number of dialysis stations in a kidney disease center. Because such a sweeping impact is not permitted under Washington law, it is not permissible here.

Washington’s legislature specifically listed the types of activity that require CN review. That list does not include the addition of ORs to an existing CN-approved ASF. Permitting the Department to independently add this activity to the list is impermissible under Washington’s rules of statutory construction as interpreted by Washington courts, and would render meaningless the list that the legislature specifically created.

Accordingly, the Court should affirm the Superior Court's ruling invalidating the Increase in Outpatient ORs Rule.

C. The Department's Purported Re-definition of the Word "New," Which Is Essential to the Increase in Outpatient ORs Rule, Improperly Ignores Directly Applicable Washington Precedent and Is Not Entitled to Deference by the Court.

In claiming that its revision of the CN statute is a mere "rudimentary interpretation," so that the Department's definition of "new" is entitled to deference, the Department ignores a well-established principle of Washington law: Washington's courts are the ultimate authority for statutory interpretation, and a Washington court has interpreted the phrase "new health care facility" in the CN statute. Under Washington law, courts "review questions of statutory interpretation *de novo* and may substitute our interpretation for that of an agency." *See Probst v. Dep't of Ret. Sys.*, 167 Wn. App. 180, 271 P.3d 966 (2012) (citing *Jenkins v. Dep't of Soc. & Health Services*, 160 Wn.2d 287, 308, 157 P.3d 388 (2007)). Additionally, "[u]ltimately, it is for the court to determine the meaning and purpose of a statute." *See Ryan v. Dep't of Soc. & Health Services*, 171 Wn. App. 454, 287 P.3d 629 (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)). Thus, once a Washington court has spoken with respect to statutory interpretation, the Department is subject to that interpretation, and must conduct its activities consistent with the court's interpretation.

As noted above, the Washington Court of Appeals specifically addressed the interpretation of “new health care facility” in *Centennial Villas*. The Department may not ignore that dispositive decision and re-interpret the same statutory phrase. The Department may not now characterize its definition of “new,” which is essential to its Increase in Outpatient ORs Rule, as a “rudimentary interpretation” of the CN statute. Rather, the Department must accept the Court of Appeals interpretation: an existing CN-approved facility cannot reasonably be considered a “new health care facility” unless the existing facility to provide a different type of health care service that it was not previously authorized to provide.

Ignoring the *Centennial Villas* holding, the Department improperly seeks to substitute its judgment for that of the ultimate authority in interpretation of the phrase “new health care facility,” the Washington Court of Appeals. The Department’s action is improper, and the decision of the Superior Court should be affirmed.

D. The Department’s Increase in Outpatient ORs Rule Is a Significant Legislative Rule, Subject to the Administrative Procedures Act.

Until its most recent brief, the Department appeared to concede that the Increase in Outpatient ORs Rule constitutes a “rule” and a “significant legislative rule.” Only now does the Department claim its action is a “rudimentary interpretation” of the CN statute, a shift in position that should

not be permitted, as explained below.

As noted by the Department, a “rule” is defined to include “any agency order, directive, or regulation of general applicability . . . which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law” or “which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession[.]” RCW 34.05.010(16).

“A ‘significant legislative rule’ is a rule other than a procedural or interpretive rule that . . . establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or . . . adopts a new, or makes significant amendments to, a policy or regulatory program.” RCW 34.05.328(5)(c)(iii).

The Department’s requirement that CN review and approval is necessary for an ASF to increase the number of ORs at its facility is a “rule” and a “significant legislative rule” pursuant to these statutory definitions. It is an agency directive of general applicability (*i.e.*, to all ASFs) that alters the fundamental qualifications for issuance of a CN, which is akin to a license or permit. It establishes a new CN requirement, not enumerated in the statute, under which an ASF operator must obtain CN approval before increasing the number of ORs at its facility. *See Failor’s Pharmacy v. Dep’t*

of Soc. & Health Services, 125 Wn.2d 488, 497, 886 P.2d 147 (1994); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 398-400, 932 P.2d 139 (1997).

The Department is required to follow the rulemaking procedures set forth in the Administrative Procedure Act before adopting any rule. See RCW 34.05 *et seq.* The adoption of a significant legislative rule is subject to additional requirements. See RCW 34.05.328. The Department concedes that none of these rulemaking procedures were followed with respect to Department's adoption of the Increase in Outpatient ORs Rule.

The purpose of rulemaking procedures is to ensure that affected persons "can participate meaningfully in the development of agency policies which affect them." *Hillis*, 131 Wn.2d at 399; see also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007) (changing regulatory interpretation through notice-and-comment rulemaking prevents "unfair surprise"); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2168, 183 L.Ed.2d 153 (2012) (potential for unfair surprise particularly acute where "an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction"). In fact, the Department itself has stated:

Adopting a rule ... is the best way for an agency to change a prior interpretation of the law. Rulemaking is a public process that allows for a full discussion of the agency's prior interpretation and the proposed new interpretation.

Appendix at 3, 21 (Appendix at 3, 21 (Declaration of Emily Studebaker, Exhibit A (*Respondent Dep't of Health's Response Brief on Admin. Review of Agency Rule* at 14, *Wash. State Hosp. Ass'n v. Wash. State Dep't of Health*, No. 14-2-00285 (Thurston Cnty. Super. Ct. May 12, 2014))("Studebaker Decl.")). The Department failed to follow rulemaking procedures set forth in the Administrative Procedure Act prior to adopting the Increase in Outpatient ORs Rule.

In summary, the Department's attempted shift in position, in which the Department first conceded that the Increase in Outpatient ORs Rule is a significant legislative rule, and now seeks to characterize that Rule as a "rudimentary interpretation." of the CN law, should not be permitted, and the Superior Court's ruling should be upheld.

E. The Department's Action in Implementing the Increase in Outpatient ORs Rule Is Arbitrary and Capricious, Because It Disregards More Than 35 Years of Agency Precedent and Discriminates against ASFs.

The Increase in Outpatient ORs Rule subjects ASFs to CN review in order to increase the number of ORs at their existing facilities, in direct contravention of long-standing Department interpretation of CN law. Additionally, though hospitals furnish through their outpatient surgery departments the same surgical services as ASFs, and do so at significantly higher cost, the Increase in Outpatient ORs Rule requires no such additional

CN review for hospitals. The Department's action is therefore arbitrary and capricious under Washington law.

Washington courts "will not sanction a government agency's arbitrary decision to change its interpretation of rules." *Silverstreak, Inc. v Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 891, 154 P.3d 891 (2007); *see also Saben v. Skagit Cnty.*, 136 Wn. App. 869, 878, 152 P.3d 1054 (2006) (finding the changed interpretation of an ordinance arbitrary and capricious where the "county engaged in a remarkable series of mind changes"). Moreover, those who are subject to a law "must be able to rely on the plain meaning of . . . Department interpretations, without fear that a state agency will later penalize them by adopting a different interpretation." *Silverstreak*, 159 Wn.2d at 903.

Here, ASFs have long relied on the Department's prior interpretation of the CN law, and conducted their businesses with the understanding that if they needed to increase the number of ORs to serve their communities, no additional CN review would be required. The Department should not be able to change its interpretation after more than 35 years of reasonable reliance by ASFs on its prior interpretation. As stated by a Washington court, "where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by amendment or

revision of the statute, rather than a new agency interpretation.” *Dot Foods, Inc. v. Wash. Dep’t of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009).

Additionally, an action is considered arbitrary and capricious in Washington where “the decision is the result of wilful and unreasoning disregard of the facts and circumstances.” *Barrie v. Kitsap Cnty.*, 93 Wn.2d 843, 850, 613 P.2d 1148 (1980). The relevant facts and circumstances of hospitals as compared to ASFs are as follows.

Hospital outpatient departments – or “HOPDs” – perform outpatient surgeries, just as ASFs perform outpatient surgeries. See Declaration of Roger Hillman In Support of Washington Ambulatory Surgery Center Association’s Motion for Leave to File *Amicus Curiae* Brief, Ex. A (MEDICARE PAYMENT ADVISORY COMMISSION, 113TH CONG., REPORT TO THE CONGRESS: MEDICARE AND THE HEALTH CARE DELIVERY SYSTEM, 27-56 (2013) (“MedPAC Report”), *The Polyclinic et al. v. Dep’t of Health of the State of Wash* (Thurston Cnty Super. Ct. Sept. 19, 2014) [CP 98-133]. Hospitals generally are subject to CN laws, just as ASFs are subject to CN laws. See RCW 70.38.025(6). Any change in triggers for CN review that applies to ASFs would thus logically apply to hospitals, which perform the same services. Under the Increase in Outpatient ORs Rule, however, that is not the case. The Department has decreed a change in CN requirements

for ASFs, but not for hospitals, despite the similarity in purpose, function, and service provision at these two types of health care facility.

This requirement for additional CN review for one type of facility, but not for another type that performs the same services, imposes a significantly disproportionate regulatory burden on ASFs as compared to hospitals, and is unsupported by any provision of a Washington statute or regulation. Additionally, the Department has imposed this burden while disregarding a key fact in relation to hospitals and ASFs: ASFs provide the same services available in HOPDs, and do so at significantly lower cost. According to the MedPAC Report, “Medicare rates for most services are 78 percent higher in [H]OPDs than in ASCs [the generic term for facilities that are, in Washington, called ASFs].” *See* MedPAC Report at 48 [CP 125]. The Department’s disregard of this cost savings, and its imposition of additional costs for ASFs that are not imposed on HOPDs, indicates that the Department is ignoring the major changes mandated by the Patient Protection and Affordable Care Act, Public Law 111-148, Stat. 119 (2010) (“ACA”) (codified as amended in scattered sections of the U.S.C.). Under the ACA, cost containment is a primary goal. Similarly, the articulated intent of the legislature in enacting CN law was assuring the health of the state’s citizens “while controlling increases in costs.” *See* RCW 70.38.015. Accordingly, it would be reasonable for the Department to consider the

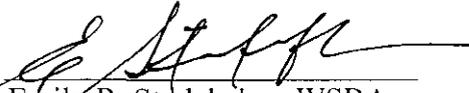
comparative cost of services between HOPDs and ASFs when determining whether to require additional CN review for these facilities. That the Department apparently failed to undertake any such comparison further demonstrates the Department's disregard for the facts and circumstances applicable to the Increase in Outpatient ORs Rule. Accordingly, the Court should affirm the Superior Court's ruling, invalidating the Increase in Outpatient ORs Rule.

V. CONCLUSION

The Increase in Outpatient ORs Rule is invalid because it finds no support or authorization in the plain language of RCW 70.38.105(4)(a), which requires CN review in connection with the establishment of a new health care facility, and ignores applicable Washington precedent. In adopting this rule, the Department has taken it upon itself to add language to the CN law that does not exist. The Department lacks this authority. Furthermore, in ignoring more than 35 years of consistent practice and in applying the Increase in Outpatient ORs Rule only to ASFs and not hospitals, the Department's actions are arbitrary and capricious under Washington law. The Thurston County Superior Court rightly found the Department's action improper. Accordingly, WASCA respectfully requests this court affirm the decision of the Superior Court.

DATED this 19th day of March, 2015.

GARVEY SCHUBERT BARER

By 
Emily R. Studebaker, WSBA
#31901

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
2015 MAR 19 PM 1:38
STATE OF WASHINGTON
BY DEBORAH

DEPARTMENT OF HEALTH OF
THE STATE OF WASHINGTON,

NO. 46937-5-II

Appellant,

**DECLARATION OF EMILY
R. STUDEBAKER IN
SUPPORT OF WASHINGTON
AMBULATORY SURGERY
CENTER ASSOCIATION'S
AMICUS CURIAE BRIEF**

v.

THE POLYCLINIC, a Professional
Corporation, a Washington
corporation and SWEDISH
HEALTH SERVICES, a
Washington nonprofit corporation,

Respondents.

I, Emily R. Studebaker, hereby certify and declare as follows:

1. I am one of the attorneys representing the Washington Ambulatory Surgery Center Association in this appeal. I am over the age of 18 and have personal knowledge of the information contained in this Declaration and am competent to testify thereto.

2. Attached hereto as Exhibit A is true and correct copy of the Department of Health's Response Brief on Administrative Review of Agency Rule that was filed in *Wash. State Hosp. Ass'n v. Wash. State Dep't of Health*, No. 14-2-00285 (Thurston Cnty. Super. Ct. May 12, 2014).

DATED this 19th day of March, 2015, at Seattle, Washington.

GARVEY SCHUBERT BARER

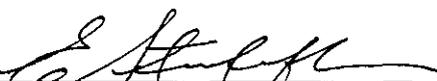
By 
Emily R. Studebaker
WSBA #31901

EXHIBIT A

1 EXPEDITE (if filing w/in 5 court days of
hearing)
2 No Hearing Set
3 Hearing is Set
Date: 5-27-14
Time: 9:00 a.m.
4 The Honorable Carol Murphy/Civil

5
6
7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

9 WASHINGTON STATE HOSPITAL
ASSOCIATION,

10 Petitioner,

11 v.

12 WASHINGTON STATE
DEPARTMENT OF HEALTH,

13 Respondent.
14
15
16
17
18
19
20
21
22

NO. 14-2-00285-5

RESPONDENT DEPARTMENT OF
HEALTH'S RESPONSE BRIEF ON
ADMINISTRATIVE REVIEW OF
AGENCY RULE

TABLE OF CONTENTS

1
2 I. INTRODUCTION..... 1
3 II. BACKGROUND..... 2
4 A. Purpose And Intent Of Certificate Of Need Laws..... 2
5 B. Amendment To WAC 246-310-010 To Define “Purchase, Sale, Or Lease” 3
6 III. ARGUMENT 6
7 A. WAC 246-310-010(54) Is Within The Department’s Statutory Authority And
8 Is Consistent With The Intent And Purpose of Chapter 70.38 RCW 6
9 B. WSHA Is Factually And Legally Incorrect That The Department’s Prior
10 Application Of RCW 70.38.105(4)(b) To Specific Factual Circumstances
11 Should Result In Invalidation of the Department’s Rule..... 11
12 C. WAC 246-310-010 (54) Is Not Arbitrary And Capricious..... 15
13 D. WAC 246-310-010(54) Was Adopted In Compliance With Rule-Making
14 Procedures..... 18
15 IV. CONCLUSION 20
16
17
18
19
20
21
22

TABLE OF AUTHORITIES

Cases

1

2

3 *Alpha Kappa Lambda Fraternity,*
152 Wn. App. 401, 215 P.3d 451 (2009)..... 15

4

5 *American Network, Inc. v. Utilities and Transportation Commission,*
13 Wn.2d 59, 776 P.2d 950 (1989)..... 6

6 *Aviation West Corp. v. Dep't of Labor & Ind.,*
138 Wn.2d 413, 980 P.2d 701 (1999)..... 5

7 *Children's Hospital and Medical Center v. Washington State Dept. of Health,*
95 Wn. App. 858, 975 P.2d 567 (1999)..... 3, 8, 14, 15

8

9 *Dep't of Ecology v. Theodoratus,*
135 Wn.2d 582, 957 P.2d 1241 (1998)..... 14

10 *Dot Foods Inc, v. Dep't of Revenue,*
166 Wn.2d 912, 215 P.3d 185 (2009)..... 13

11

12 *Green River Cmty. Coll. v. Higher Educ. Pers. Bd.,*
95 Wn.2d 108, 622 P.2d 826 (1980)..... 7

13 *Mesa Verde Const. Co. v. Northern Cal, Dis. Council of Laborers,*
861 F.2d 1124, (9th Cir. 1988)..... 14

14

15 *Pacific Wire Works, Inc. v. Dep't. of Labor & Industries,*
49 Wn. App. 229, 742 P.2d 168 (1987)..... 6

16 *Phillips v. City of Seattle,*
111 Wn.2d 903, 766 P.2d 1099 (1989)..... 7, 10

17 *Ravsten v. Dep't. of Labor & Industries,*
108 Wn.2d 143, 736 P.2d 265 (1987)..... 6

18

19 *Seven Seas, Inc. v. United States,*
873 F.2d 225, (9th Cir. 1989)..... 14

20 *Silverstreak, Inc. v. Department of Labor and Industries,*
159 Wn.2d 868, 154 P.3d 891 (2007)..... 18

21

22 *St. Joseph Hospital and Health Care Center v. Dept. of Health,*
125 Wn.2d 733, 887 P.2d 891 (1995)..... 2

1	<i>State v. Faford,</i>	
	128 Wn.2d 476, 910 P.2d 447 (1996).....	9
2		
3	<i>State v. Munson,</i>	
	23 Wn. App. 522, 597 P.2d 440 (1979).....	10
4	<i>Stewart v. Dep't of Social. and Health Servs.,</i>	
	162 Wn. App. 266, 252 P.3d 920 (2011).....	6, 15
5		
6	<i>Wash. Ind. Tele. Ass'n v. Util. & Trans Comm.,</i>	
	148 Wn.2d 887, 64 P.3d 606 (2003).....	15
7	<i>Washington Public Ports Association v. Dep't. of Revenue.</i>	
	148 Wn.2d 637, 62 P.3d 462 (2003).....	6, 7
8		
	<u>Statutes</u>	
9	Laws of 1983, ch.235, § 1(1).....	3
10	RCW ch. 43.370.....	3
11	RCW 24.03.185.....	11
12	RCW ch. 34.05.....	20
13	RCW 34.05.328.....	18, 19, 20
14	RCW 34.05.328(1)(b).....	19
15	RCW 34.05.328(1)(d).....	19
16	RCW 34.05.328(1)(e).....	20
17	RCW 34.05.328(2)(b).....	19
18	RCW 34.05.370(4).....	5
19	RCW 34.05.375.....	18
20	RCW 34.05.562(1)(c).....	5, 12
21	RCW 34.05.570 (2)(c).....	2
22	RCW 34.05.570(2)(c).....	6, 15, 18
	RCW ch. 70.38.....	2, 6,20

1	RCW 70.38.015	1, 3, 7
2	RCW 70.38.015(2).....	3
3	RCW 70.38.015(4)(b).....	7
4	RCW 70.38.104 (4)(b).....	12
5	RCW 70.38.104(4)(b).....	11
6	RCW 70.38.105(4)(b).....	passim
7	RCW 70.38.115 (9).....	3
8	RCW 70.38.135(3)(c).....	6, 20
9	RCW 70.105(4)(b).....	10
	<u>Regulations</u>	
10	WAC 246-310-010	3, 4, 17
11	WAC 246-310-010(54).....	passim
12	WAC 246-310-050	2
13	WAC 246-310-050(54).....	13
14	WAC 246-310-210(1)(a).....	7
15	WAC 246-310-210(2).....	7
16	WAC 246-310-490(3).....	8
17	WAC 246-863-050	11
	<u>Other Authorities</u>	
18		
19	<i>Black's Law Dictionary</i> , 1078-79 (9 th Ed. 2009).....	9
20	<i>Webster's Third New International Dictionary</i> , 1844 (2002)	9
21		
22		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

I. INTRODUCTION

While the Washington State Hospital Association (WSHA) acknowledges and espouses the value in the new relationships being formed among hospitals and health care systems in the current climate of change in the health care delivery system, WSHA insists that the Department of Health (Department) must continue to implement the Certificate of Need law as in the days of old, when transfer of control of hospitals occurred through transactions labeled as a “sale,” “purchase,” or “lease” in which hospital ownership changed for monetary consideration. WSHA’s argument is contrary to the intent and purpose of the Certificate of Need law, would be a disservice to the people served by hospitals in their communities, and would defeat the Certificate of Need’s role in the regional and statewide health care planning processes. *See*, RCW 70.38.015.

Recognizing the need to keep current with changes in the health care delivery system, on June 28, 2013, Governor Jay Inslee issued Executive Directive 13-12, acknowledging the “leading role” health care facilities have in the delivery of health care across the state. The Governor noted that Washington is “poised to fully implement health reform,” and, while changes have been made in the public and private sector for this implementation, the Certificate of Need process had “not kept current with the changes in the health care delivery system in preparation for the implementation of health reform in Washington.” AR at 1. Accordingly, Governor Inslee directed the Department to “consider how the structure of affiliations, corporate restructuring, mergers, and other arrangements among health care facilities resulted in outcomes similar to the traditional methods of sales, purchasing, and leasing of hospitals, particularly when control of part or all of an existing hospital changes from one party to another.” AR at 1.

RCW 70.38.105(4)(b) requires Certificate of Need approval for the “purchase or sale” of hospitals. When the Department reviews hospital transactions under RCW 70.38.105(4)(b),

1 the Department examines whether the services offered at the hospital will be maintained, and,
2 if the services will be changed, whether the community has reasonable alternatives for
3 accessing lost services. The Department also assesses the care that will be provided to
4 underserved populations before and after the transaction. By issuing Directive 13-12, the
5 Governor directed the Department to examine its application of
6 RCW 70.38.105(4)(b) to different types of hospital transactions, including those transactions
7 for which the Department had decided a Certificate of Need was not required under
8 WAC 246-310-050.

9 The Department reviewed the Certificate of Need law, including legislative history, its
10 recent Certificate of Need decisions, and carefully considered the public comments received
11 during its rulemaking process. After full consideration of the record and the intent and purpose
12 of the Certificate of Need laws, the Department adopted an amendment to
13 WAC 246-310-010(54), defining "sale, purchase or lease of part or all of any hospital" in
14 RCW 70.38.105(4)(b) to include any transaction, regardless of how it is denominated, in which
15 control of part or all of a hospital is changed to another party.

16 WSHA challenges the rule amendment under RCW 34.05.570 (2)(c). As explained
17 below, the challenge should be dismissed because the rule amendment does not exceed the
18 Department's statutory authority; is not arbitrary and capricious; and was adopted in
19 compliance with rulemaking procedures.

20 II. BACKGROUND

21 A. Purpose And Intent Of Certificate Of Need Laws

22 The Certificate of Need law, ch. 70.38 RCW, was enacted in 1979 in response to the
National Health Planning and Resources Development Act of 1974. *St. Joseph Hospital and
Health Care Center v. Dept. of Health*, 125 Wn.2d 733, 735, 887 P.2d 891 (1995). As
recognized in *St. Joseph*, 125 Wn.2d at 736, the purpose of the congressional act was to control

1 costs by encouraging state and local health planning and ensuring better utilization of existing
2 institutional health services and major medical equipment. This was to be accomplished “in a
3 planned, orderly fashion, consistent with identified priorities and without unnecessary
4 duplication or fragmentation.” *Children’s Hospital and Medical Center v. Washington State*
5 *Dept. of Health*, 95 Wn. App. 858, 865, 975 P.2d 567 (1999). From its inception, the
6 Certificate of Need law emphasizes health planning efforts and the role of the Certificate of
7 Need process in “public health and health care financing, access, and quality.”
8 RCW 70.38.015. Since 2007, the Certificate of Need review process is part of the strategic
9 health planning efforts, which the Office of Financial Management is responsible for
10 preparing. RCW 70.38.015(2); ch. 43.370 RCW.¹

11 In addition to managing health care costs through orderly planning, the Certificate of
12 Need laws also encourage the involvement of consumers and providers in health planning.
13 1983 Wn. Laws ch.235, § 1(1). The Certificate of Need process includes an opportunity for
14 members of the public and providers to see the materials submitted by the Certificate of Need
15 applicant and to comment upon the proposed changes in the health care delivery system in
16 their community. RCW 70.38.115 (9).

17 **B. Amendment To WAC 246-310-010 To Define “Purchase, Sale, Or Lease”**

18 On June 28, 2013, Governor Inslee issued a directive to the Department to modernize
19 the Certificate of Need process and for greater consumer transparency of health care facility
20 actions and policies. AR at 1-2. In recognizing that the Certificate of Need process “has not
21 kept current with the changes in the health care delivery system in preparation for the
22 implementation of health reform in Washington,” the Governor directed the Department to

¹ Preparation of the strategic health planning report has been delayed by funding and data limitations.
A progress report was issued in April 2010 and is available at this site:
<http://www.ofm.wa.gov/healthcare/planning/report2010.pdf>.

1 begin rulemaking to “consider how the structure of affiliations, corporate restructuring,
2 mergers, and other arrangements among health care facilities results in outcomes similar to
3 the traditional methods of sales, purchasing, and leasing of hospitals[.]” *Id.* The Governor
4 noted that the Certificate of Need process “should be applied based on the effect that these
5 transactions have on the accessibility of health services, cost containment, and quality, rather
6 than on the terminology used in describing the transactions or the representations made in the
preliminary documents.” *Id.*

7 In response to the Governor’s directive, the Department began a rulemaking process.
8 AR at 71, 75. The Department circulated draft rules in July 2013, and held a public workshop
9 on August 5 to receive input on the draft. AR at 124. On October 17, the Department issued
10 its formal notice of proposed rulemaking. AR at 132-33. The Department proposed to add a
11 definition of “sale, purchase, or lease” to its Certificate of Need definitions in
12 WAC 246-310-010:

13 (54) “Sale, purchase, or lease” means any transaction in which the control,
14 either directly or indirectly, of part or all of the existing hospital changes to a
different person including, but not limited to, by contract, affiliation, corporate
membership restructuring, or any other transaction.

15 AR at 154.

16 After issuing its notice of proposed rulemaking, the Department began to accept public
17 comments and held a public hearing on November 26, 2013. AR at 132, Transcript at 1. One
18 thousand forty-one written comments were received. AR at 1187. The vast majority of those
19 comments expressed concern over the increasing affiliations of hospitals and how those
20 affiliations could impact access to health care services, especially reproductive and end-of-life
services. AR at 162-1160.

21 Some of the commenters fully endorsed the Department’s approach, whereas others
22 thought that the Department’s proposed rule may not go far enough. For example, Insurance

1 Commissioner Kriedler submitted a letter supporting the proposal, noting that new hospital
2 arrangements, “[i]f not carefully monitored through the Certificate of Need process . . . have
3 the potential to negatively impact access to health care services and resources in our state.”
4 AR at 183. The National Women’s Law Center and MergerWatch noted that recent
5 agreements between hospitals in our state “have or will limit community access to
6 reproductive health services and end-of-life care” based on religious directives that can
7 prohibit previously secular hospitals from providing certain services. AR at 248-49. These
8 organizations felt that the Department’s proposed rule “goes a long way” towards capturing
9 transactions that are currently evading Certificate of Need review, but that the definition could
10 be strengthened to help ensure that hospitals cannot structure their agreement so as to avoid
11 the review. AR at 250. The American Civil Liberties Union also felt that the definition could
12 be strengthened, noting that “[r]ecent hospital mergers that have resulted in the denial of
13 patient access to medical services have managed to evade [Certificate of Need] review.”
14 AR at 163. And numerous other organizations and individual commenters expressed similar
15 concerns. *See e.g.* AR at 185-87 (comments from Secular Coalition for Washington); AR at
16 262-66 (comments from Planned Parenthood); AR at 271 (comments from League of Women
17 Voters). These comments were consistent with the Department’s own experience that a
18 number of transactions previously described by hospitals as traditional sales or purchases
19 were now avoiding Certificate of Need review because hospitals were no longer using the
20 terms “purchase” or “sale” to describe them. Ex. 1, at Sigman Decl. ¶ 6.²

20 ² The information in Ms Sigman’s Declaration was part of the Department’s institutional knowledge
21 when it promulgated WAC 246-310-010(54) and further explains the basis for the rule. This Court can therefore
22 consider it because it constitutes “material facts in rule making . . . not required to be determined on the agency
record.” RCW 34.05.562(1)(c); RCW 34.05.370(4) (agency’s rulemaking file need not be the exclusive basis for
agency action on the rule); *Aviation West Corp. v. Dep’t of Labor & Ind.*, 138 Wn.2d 413, 418-422, 980 P.2d 701
(1999)(it was proper to consider testimony of agency witnesses explaining the rationale behind a rule).

1 After considering all of the public comments, the Department decided to adopt the rule
2 as proposed. AR at 1187, 1229. WSHA, which had been opposed to the rule from the outset,
3 has now challenged the rule under the state Administrative Procedure Act (APA).

4 III. ARGUMENT

5 WSHA contends that the new rule is invalid under RCW 34.05.570(2)(c) because the
6 rule: (A) exceeds the statutory authority of the agency; (B) is arbitrary and capricious; and (C)
7 was adopted without compliance with rule-making procedures. These contentions have no
8 merit.

9 A. WAC 246-310-010(54) Is Within The Department's Statutory Authority And Is 10 Consistent With The Intent And Purpose of Chapter 70.38 RCW

11 In considering whether a rule exceeds statutory authority, the threshold question is
12 whether the agency has statutory authority to adopt rules. *Stewart v. Dep't of Social. and*
13 *Health Servs.*, 162 Wn. App. 266, 271, 252 P.3d 920 (2011). RCW 70.38.135(3)(c) grants the
14 Department authority, without limitation, to adopt rules implementing the Certificate of Need
15 law. As noted in *Stewart, id.*, "If a legislature grants a department administrator rule-making
16 authority, courts will presume the administrator's rules to be valid so long as they are
17 'reasonably consistent with the statute being implemented.'"

18 The party challenging the agency's rule has the burden of showing "compelling reasons
19 why the regulation is in conflict with the intent and purpose of the statute being implemented."
20 *Ravsten v. Dep't. of Labor & Industries*, 108 Wn.2d 143, 154, 736 P.2d 265 (1987). *See also,*
21 *Washington Public Ports Association v. Dep't. of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462
22 (2003); *American Network, Inc. v. Utilities and Transportation Commission*, 113 Wn.2d 59,
69, 776 P.2d 950 (1989); *Pacific Wire Works, Inc. v. Dep't. of Labor & Industries*, 49 Wn.
App. 229, 234, 742 P.2d 168 (1987). Here, WSHA has not met its burden.

1 RCW 70.38.015(4)(b) makes the “sale, purchase, or lease” of a hospital, or part of a
2 hospital, subject to Certificate of Need review. The statute does not define those terms. The
3 Department therefore amended WAC 246-310-010(54) by adding a definition of “sale,
4 purchase, or lease,” consistent with the legislative intent and purpose of those laws and the
5 changes occurring in the health care marketplace. An agency’s definition of undefined
6 statutory terms should be given great weight where that agency has the duty to administer the
7 statutory provisions. *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989).

8 The plain meaning of a statute “includes not only the ordinary meaning of words, but
9 the *underlying legislative purposes*[.]” *Washington Public Ports Association*, 148 Wn.2d at
10 645-46, (emphasis added.) In reviewing the Department of Revenue’s rule at issue in the
11 *Washington Public Ports Association* case, at 646, the Court referred to the long-standing
12 recognition that “[a]gency rules may be used to “fill in the gaps’ in legislation if such rules are
13 necessary to the effectuation of a general statutory scheme” (citing *Green River Cmty. Coll. v.*
14 *Higher Educ. Pers. Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980)).

15 Here, a key purpose of the Certificate of Need statute is its role in health planning
16 efforts to ensure “access and quality” of health care. RCW 70.38.015. In reviewing changes to
17 *control of hospitals, several aspects of a Certificate of Need review are particularly important*
18 in protecting the access to health care. For example, the Department would evaluate whether
19 the proposed transaction would reduce or eliminate an existing service, and, if so, whether the
20 need for the service by patients could be met by alternative arrangements.
21 WAC 246-310-210(1)(a). The Department would also evaluate the effect of the transaction on
22 services to underserved populations. WAC 246-310-210(2). This evaluation would include
admission policies, patient rights policies, participation in Medicare and Medicaid, and levels
of charity care. The Department could condition any Certificate of Need approval upon the

1 entity in control of the hospital agreeing to maintain policies that assure patient access to
2 services. WAC 246-310-490(3).

3 This type of review is equally important for the patient community whether the
4 proposed change in control of a hospital is accomplished through a traditional sale of a hospital
5 or through a differently named transaction. Access to and quality of health care can be
6 compromised if a new entity takes control of a hospital and fewer services are offered as a
7 result. AR at 163 (restriction on information about aid-in-dying, birth control, tubal ligations,
8 abortions), 180 (reduction in availability of on-site pediatric physicians), 235 (abortions), 240
9 (charity care), 242 (vasectomy, transgender services, infertility treatments, surrogacy), 248-49
10 (end-of-life care, reproductive health services), 265 (lab services to diagnose ectopic
11 pregnancies, semen analysis for vasectomies, treatment for wound care). This problem can be
12 exacerbated in small communities when health care access is often limited to one facility.
13 AR at 264-265, 271, 1154.

14 Acquisitions occur through numerous means. Increasingly, as discussed below,
15 hospitals are using words other than “purchase, sale, or lease” to describe their affiliations and
16 acquisitions, perhaps in part because they have seen that doing so avoids Certificate of Need
17 review. Limiting the Certificate of Need law to only those transaction documents using
18 “magic” terms would defeat the Certificate of Need law’s legislative purpose of health care
19 developing in a “planned and orderly fashion, consistent with identified priorities and without
20 unnecessary duplication or fragmentation.” *Children’s Hospital*, 95 Wn. App. at 865. The fact
21 is that a wide range of change-of-control transactions, regardless of terminology used, can
22 impact access and quality of health care. The Certificate of Need program is designed to
address those concerns in a public process.

1 WSHA argues that the Department's rule exceeds its statutory authority because it is
2 inconsistent with the dictionary definitions of "sale" and "purchase." Opening Br. at 14-16.
3 WSHA is incorrect.

4 The common dictionary definition of purchase is "1: an act or instance of
5 purchasing[.]" *Webster's Third New International Dict.*, 1844 (2002).³ The verb "purchase"
6 is then broadly defined to mean, in pertinent part: "1: a *archaic* to get into one's possession
7 . . . GAIN, ACQUIRE . . . b: to acquire (real estate) by any means other than descent or
8 inheritance." *Id.*

9 These common definitions of "purchase" encompass the types of acquisitions that are
10 covered by the Department's rule. For example, in some transactions, the control of the
11 governing boards are vested in one entity, with the policies of one driving the business
12 decisions of both hospitals, and the lesser entity becoming a division of the other corporation.
13 AR at 249-250. There are numerous types of mergers, many of which involve a transfer of
14 assets from one entity to another. *Bluck's Law Dict.* at 1078-79 (9th Ed. 2009). A
15 consolidation involves the dissolving of two existing entities and the creation of a single new
16 entity, which necessarily involves a transfer of assets to the new entity. *Id.* at 351. Consistent
17 with the purpose of the Certificate of Need law, the Department's rule ensures that these types
18 of transactions will be reviewed so that access and quality of care are not compromised.

19 Indeed, the types of transactions covered by the Department's rule are also consistent
20 with WSHA's preferred definition of purchase: "to obtain in exchange for money or its
21 equivalent." Opening Br. at 15. The amended rule defines "sale or purchase" as occurring
22

³ *Webster's New International Dictionary* appears to be the most frequently cited dictionary by Washington courts. A Westlaw search produced 1602 hits for the International Dictionary, versus 64 hits for the *Webster's College Dictionary* cited by WSHA. See also *State v. Faford*, 128 Wn 2d 476, 483-84, 910 P.2d 447 (1996) (in light of statute's purpose, court accepted broader definitions in *Webster's Third New International Dictionary* instead of the definitions in the Ninth New Collegiate Dictionary).

1 when one entity receives a particular type of benefit: namely, "control" of an existing hospital
2 through a transaction. In relinquishing control, the existing hospital receives a benefit in
3 return, such as the assumption of its bad debts, avoidance of cuts in services or closure,
4 additional resources, or reduction in administrative costs. Thus, one party obtains something of
5 benefit in exchange for something else of benefit.

6 WSHA incorrectly relies on *State v. Munson*, 23 Wn. App. 522, 597 P.2d 440 (1979),
7 to argue that the rule exceeds the Department's statutory authority. In that case, a statute made
8 it unlawful to salmon fish during certain times of the year, subject to Department of Fisheries
9 regulation. Pursuant to that statute, the Department adopted a rule making all fishing areas
10 closed unless specifically opened by the Department. The court struck down the rule on
11 grounds that the Department's rules conflicted with the statute by empowering the Department
12 to periodically open the fishing season, rather than periodically closing it. *Id.* at 442. This
13 reasoning does not apply to WSHA's challenge to WAC 246-310-010(54). The amended rule
14 does not conflict with the statute. It simply defines the meaning of undefined terms in
15 RCW 70.105(4)(b). As such, the Department reasonably filled a gap in the law. As the agency
16 charged with implementing the statute, the Department's definition is entitled to great weight.
17 *Phillips*, 111 Wn.2d at 908.

18 The Department's definition of "sale, purchase, or lease" is consistent with the
19 statutory language and best fulfills the legislative intent and purpose of the Certificate of Need
20 law by keeping it current with changed practices in the dynamic environment of health care
21 delivery. WSHA has not met its burden of proving that the rule exceeds the Department's
22 statutory authority. The rule should therefore be upheld.

1 **B. WSHA Is Factually And Legally Incorrect That The Department's Prior**
2 **Application Of RCW 70.38.105(4)(b) To Specific Factual Circumstances Should**
3 **Result In Invalidation of the Department's Rule**

4 WSHA also argues that the Department exceeded its statutory authority because of the
5 way in which the Department applied RCW 70.38.105(4)(b) to specific situations in the past.
6 Opening Br. at 16-17. This argument fails both factually and legally.

7 Transactions denominated "affiliations, corporate reorganizations, strategic alliance or
8 partnerships, or system integration" have only been submitted to the Department within the last
9 few years for a determination of reviewability under WAC 246-863050. Ex. 1, Decl. of Janis
10 R. Sigman ¶3. Mergers, which have been submitted to the Department since the inception of
11 the Certificate of Need law, have been individually reviewed for application of the Certificate
12 of Need law. Some mergers required a Certificate of Need and others did not. Ex. 1, Decl. of
13 Janis R. Sigman ¶5. Therefore, the application of RCW 70.38.104(4)(b) has not consistently
14 excluded mergers as portrayed by WSHA. And the other types of transactions have only
15 recently sprung into existence, so the Department cannot possibly have a thirty-year history of
16 excluding such transactions from Certificate of Need review, as WSHA alleges.

17 One of WSHA's examples involving Providence Medical Center and Swedish Hospital
18 demonstrates that hospitals have significantly changed the way in which they describe
19 transactions. The 2000 Providence Medical Center-Swedish transaction was described as a
20 merger in the documents submitted to the Department. WSHA's Opening Brief, Exhibit B.
21 Then, when the same transaction was reviewed by the Antitrust Division of the Office of the
22 Attorney General, it was called a "Strategic Alliance," although the term merger was included

1 in those materials. Ex. 2.⁴ The proposal included the creation of a third corporate entity,
2 Newco. Ex. 2, C-2 through C-5.

3 Then, in a listing entitled “Washington Hospital Closures, Openings, Mergers, and
4 Acquisitions” produced and maintained by WSHA on its website⁵, this 2000 transaction is
5 described as “Providence Seattle Medical Center Acquired by Swedish Health Services” with
6 the nature of the transaction described as an “acquisition.”⁶ Ex. 3, A-4. Thus, examining this
7 single transaction reveals that multiple terms were used to describe it, highlighting the fallacy
8 of relying on the most restrictive interpretations of the terms “sale, purchase, or lease”,
9 particularly when WSHA’s own document describes this transaction as an acquisition, which is
often synonymous with “sale” or “purchase.” Ex. 3, A-4.

10 Three other transactions referenced in WSHA’s brief as not subject to Certificate of
11 Need review under RCW 70.38.104 (4)(b), the 2005 HCA/Capella transaction (Opening Brief
12 at 6:12), the 2006 Good Samaritan/Multicare transaction (Opening Brief at 6:4), and the 2007
13 Franciscan/Enumclaw transaction (Opening Brief at 6:2), are similarly described as
14 “acquisitions” in WSHA’s “Washington Hospital Closures, Openings, Mergers, and
15 Acquisitions” document. Ex. 3, A-2-3. WSHA’s compilation of hospital closures, openings,
16 mergers and acquisitions reveals that the description “affiliation” was not used until 2009,
17 when it was used to describe the transaction between Northwest Hospital and the University of
18 Washington. Ex. 3, A-2. Between 2009 and 2012, the last year reported on WSHA’s
document, there was only one acquisition. Ex. 3, A-1-2. In those three years, using WSHA’s

19 _____
20 ⁴ The documents attached as exhibits to this brief formed a basis for the agency’s rule and, therefore, are
properly considered under RCW 34.05.562(1)(c). *See supra*, n. 2.

⁵ <http://www.wsha.org/chronology.cfm>

21 ⁶ Swedish similarly refers to this 2000 transaction as an acquisition in its Facts & Figures timeline on its
22 website: <http://www.swedish.org/about/overview/facts-figures> [“2000 - Swedish Medical Center acquired
Providence Seattle Medical Center (now Swedish Medical Center/Cherry Hill) and Providence Medical
Group (now Swedish Physicians).”] Ex. 5, A-2.

1 own document, there were eleven “affiliations” or pending “affiliations,” one “strategic
2 partnership,” and one “system integration.” Ex. 3, A-1-2. Based on WSHA’s document,
3 between 1979 and 2009, there were 23 acquisitions and 13 mergers (none since 1998). Ex. 3,
4 A-2 through A-7. Six of the 13 mergers were subject to Certificate of Need review. Ex. 4,
5 Decl. of Jan Sigman. There were no “affiliations,” “corporate restructuring,” “strategic
6 alliances or partnerships,” or “system integration” in the 30 years between 1979 and 2009. Ex.
7 3, A-2 through A-7.

8 Thus, contrary to WSHA’s claim of a long-standing history of excluding transactions
9 denominated as something other than “sale, purchase, or lease” from Certificate of Need
10 review, it is clear that transactions denominated “affiliations” or something other than a “sale,
11 purchase or lease” are a recent development. Therefore, WSHA’s reliance on *Dot Foods Inc.*
12 *v. Dep’t of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009), in arguing that an agency
13 should seek an amendment to a statute rather than change its long-standing interpretation of a
14 statute by rule, is wrong. Unlike the circumstances in *Dot Foods*, the nature of the hospital
15 transactions have only recently changed from “sales” and “purchases” to transactions with
16 different names. WSHA has not established that the exclusion of these recent transactions is a
17 long-standing practice by the Department. For that reason, *Dot Foods, id.*, does not apply to
18 the Department’s amendment of WAC 246-310-050(54).

19 As WSHA itself acknowledges, these newer transactions are at least partially in
20 response to recent changes in the health care marketplace, including the implementation of the
21 Affordable Care Act. WSHA’s Opening Brief, Ex. A, 1-2. Given the continuing
22 implementation of these health care marketplace changes, one can expect more of these newer
23 transactions to surface in response to changes in health care delivery, access and resources.
24 Having these transactions reviewed through the certificate of need program furthers the intent
25 and purpose of the certificate of need legislation for development and utilization of health care

1 facilities and services “in a planned, orderly fashion, consistent with identified priorities and
2 without unnecessary duplication or fragmentation.” *Children’s Hospital and Medical Center*
3 *v. Washington State Dept. of Health*, 95 Wn. App. 858, 865, 975 P.2d 567 (1999). This is not
4 so much a change in existing interpretation as a recognition that acquisitions which used to be
5 described as sales or purchases are now accomplished under a different moniker.

6 However, even if WSHA were correct, and the Department had changed its
7 interpretation of RCW 70.38.105(4)(b), that alone would not constitute grounds for
8 invalidating the Department’s rule. An agency is not forever bound by a prior interpretation
9 of the law, especially when the interpretation is no longer justified due to changing
10 circumstances. *See Seven Seas, Inc. v. United States*, 873 F.2d 225, 227 (9th Cir. 1989)(“Our
11 courts have never held that any agency cannot change its collective mind on a legal issue.”);
12 *Mesa Verde Const. Co. v. Northern Cal. Dis. Council of Laborers*, 861 F.2d 1124, 1134 (9th
13 Cir. 1988)(en banc)(NLRB “is free to change its interpretation of the law if its interpretation is
14 reasonable and not precluded by Supreme Court precedent”); *Dep’t of Ecology v.*
Theodoratus, 135 Wn.2d 582, 598 957 P.2d 1241 (1998)(Ecology did not act arbitrarily and
capriciously in abandoning prior unlawful practice and switching to new practice).

15 Adopting a rule, as the Department did, is the best way for an agency to change a prior
16 interpretation of the law. Rulemaking is a public process that allows for a full discussion of
17 the agency’s prior interpretation and the proposed new interpretation. Thus, to the extent that
18 the Department’s rule changed its prior interpretation, this change occurred only after all
interested parties had the opportunity to weigh in.

19 WSHA also suggests that the Legislature acquiesced in the Department’s prior
20 decisions to exclude certain transactions from certificate of need review. Opening Br. at 17.
21 This argument fails in light of the fact that hospitals only recently started using some of the
22 new terminology at issue in this case. Furthermore, the doctrine of silent acquiescence is

1 inapplicable, when there is no indication that the Legislature was aware of decisions that the
2 Department made for individual transactions. *Children's Hospital, supra* at 870.

3 Contrary to WSHA's assertions, the Department does not have a history of interpreting
4 RCW 70.38.105(4)(b) to exclude all transactions denominated something other than a "sale,"
5 "purchase," or "lease." These newer transactions are of recent origin and excluding them
6 from certificate of need review would be contrary to the legislative intent and purpose of the
7 certificate of need law. The Department did not exceed its statutory authority in promulgating
8 a definition of "sale, purchase, or lease." Its rule should be upheld.

8 **C. WAC 246-310-010(54) Is Not Arbitrary And Capricious**

9 A rule may be invalidated under RCW 34.05.570(2)(c) if the rule is "arbitrary and
10 capricious," a narrow standard of judicial review. This standard is met only when the rule "is
11 willful and unreasoning and disregards or does not consider the facts or circumstances."
12 *Stewart*, 162 Wn. App. at 273, (citing *Alpha Kappa Lambda Fraternity*, 152 Wn. App. 401,
13 421, 215 P.3d 451 (2009)). A decision is not arbitrary and capricious "if there is room for
14 more than one opinion, and the decision is based on honest and due consideration, even if the
15 court disagrees with it."⁷ *Id.*

16 To make this determination, a court will consider "relevant portions of the rule-
17 making file and the agency's explanations for adopting the rule[.]" *Wash. Ind. Tele. Ass'n v.*
18 *Util. & Trans. Comm.*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003). Here, a review of the rule-
19 making record and the agency's explanation for the rule reveals that WAC 246-310-010(54) is
20 not arbitrary and capricious.

21 The Department began the rulemaking process upon receiving Governor Inslee's
22 Executive Directive 13-12. In that Directive, he noted that the certificate of need laws are "an

⁷ Instead of relying on state cases articulating the "arbitrary and capricious" standard under the State
APA, WSHA instead cites to federal cases interpreting the federal APA. Opening Br. at 20.

1 important component in the health resources strategy to promote, maintain, and ensure the
2 health of all citizens in the state by providing accessible health services, health facilities, and
3 other resources.” AR at 1. He recognized that there have been changes in the health care
4 delivery marketplace, “including the structuring of new relationships among health care
5 facilities, providers systems, and insurers.” AR at 1. He expressed concern that the
6 Department’s certificate of need process had “not kept current with changes in the healthcare
7 delivery system in preparation for the implementation of health reform in Washington.” AR at
8 1.

9 The Department’s subsequent rulemaking process established that the Governor’s
10 concerns were well-founded. The proposed rule generated a substantial amount of public
11 comment, and the overwhelming number of comments were in favor of using the certificate of
12 need process to ensure that hospital transactions do not diminish access to quality health care.
13 *See generally* AR at 158-1183, Transcript 1-71. Numerous public participants expressed
14 concern that there would be a loss of access to health care services, especially reproductive and
15 end-of-life services, if newly-labeled hospital transactions evaded any kind of review.⁸ The
16 Department knew through its own experience that hospitals increasingly described transactions
17 as something other than purchases, sales, or leases, even though they were the functional
18 equivalent of purchases and sales. Ex. 1, Decl. of Janis R. Sigman ¶ 6. Based on all of the
19 information considered during the rulemaking process, the Department concluded:

20 The public policies advanced by the certificate of need law are not tied to the
21 use of specific words in transactional documents. Instead, those public policies
22 are better advanced by examining the outcome of the documents. To do
otherwise would elevate form over substance permit evasion of the certificate of
need processes, including the opportunity for public notice and comment, by
clever drafting of transactional documents, defeating the public purpose of

⁸ *See, e.g.*, AR at 162-64, 180, 183-87, 191-94, 197, 199-200, 202-03, 205, 207-10, 217-18, 222-28, 235,
240-42, 248-51, 262-66, 271, 274-285, 287-291, 298-303, 308-10, 321, 343-407, 409-419, 421, 444-62, 661,
1054-57, 1059-62, 1077, 1154-55, 1184.

1 advanced by the certificate of need law. The purpose of this clarification is to
2 focus on the outcome of these transactions to bring them within CoN [certificate
3 of need] review. CoN evaluation includes a review of reduction or loss of
4 services, and the community's access to alternatives if there is a reduction or
5 loss.

6 AR at 1188.

7 In its significant legislative rule analysis, the Department further explained:

8 In general, as part of the CoN review, applicants must demonstrate that there is
9 a need for their facility and include identifying services to be provided. The
10 applicant must also demonstrate that the proposed project is financially feasible,
11 that the staffing and quality of care (structure and process of care) is sufficient,
12 and that there are no better options to meeting the community's identified need
13 (cost containment). For hospital projects, changes in control through the current
14 interpretation of sell, purchase, or lease, the review does not revisit the need of
15 the facility. Instead the review is focused on impact to the community's
16 residents on access to existing services, financial viability of the new controlling
17 organization, and historical provision of quality care by the new controlling
18 organization. The CoN review is a public process that is an extensive exercise
19 for both the applicants to develop the required materials and the department's
20 formal review of the applications. It also provides the community that is
21 affected by the changes in the control of their local hospital the ability to
22 participate in the review by having access to the application materials and
providing the department input before a final CoN decision is made.

Since 2000, seven facilities completed a merger or affiliation through the
restructuring of an existing or newly created organization. Under existing rules,
these transactions were not required to complete a CoN review. The
department's position, however, is that these arrangements, in effect, have the
same potential impacts to the residents of the community that sale, purchases,
and leases have but without the assurances afforded by the public CoN review
process these proposed rules put forward. This change of control through the
restructuring of an existing or newly created organization justifies the need to
conduct a new CoN review.

AR at 107.

The analysis also concluded that the proposed amendment "will achieve the
authorizing statutes' goals and objectives by ensuring that changes in hospital ownership or
control are reviewed in a public process under CoN." AR at 106. The amendment to
WAC 246-310-010, defining "sale, purchase, or lease," "improves transparency of significant
hospital changes that have long lived impacts on the communities they serve." AR at 105.

1 The Department thus engaged in a deliberate rule-making process which included the
2 opportunity for public comment, including comments by WSHA. The Department's adoption
3 of WAC 246-310-010(54) is not "unreasoning," is in full regard of the "facts and
4 circumstances," and is "based on honest and due consideration" of the rulemaking record and
5 the legislative purpose and intent of the Certificate of Need laws.

6 WSHA nevertheless argues that the rule is arbitrary and capricious because it reflects a
7 change in the Department's interpretation of RCW 70.38.105(4)(b). In making this argument,
8 WSHA cites to *Silverstreak, Inc. v. Department of Labor and Industries* for the proposition
9 that courts "will not sanction a government agency's arbitrary decision to change its
10 interpretation" of its own rules. Opening Br. at 21, citing to 159 Wn.2d 868, 891, 154 P.3d
11 891 (2007). WSHA neglects to mention, however, that the *Silverstreak* court *accepted* the
12 agency's new interpretation of its rule, concluding that the agency's interpretation was entitled
13 to proper deference. *Silverstreak*, 159 Wn.2d at 884-85. The portion of the case cited by
14 WSHA simply held that equitable estoppel barred the agency from retroactively applying its
15 new interpretation to wholly past conduct. *Id.* at 891. Equitable estoppel is not at issue here
16 because the Department does not seek to apply its rule to transactions that have already been
17 excluded from Certificate of Need review.

18 WSHA has not met its burden of proving that the rule is arbitrary or capricious. The
19 rule should therefore be upheld.

20 **D. WAC 246-310-010(54) Was Adopted In Compliance With Rule-Making**
21 **Procedures**

22 A rule may be invalidated under RCW 34.05.570(2)(c) if the agency fails to
substantially comply with rule-making procedures RCW 34.05.375 (requiring "substantial
compliance" with the APA's rulemaking requirements). WSHA alleges that the Department
failed to comply with certain requirements of RCW 34.05.328. RCW 34.05.328 prescribes

1 factors which must be addressed by an agency prior to adopting "significant legislative rules".
2 The Department *did* prepare an analysis under RCW 34.05.328 and addressed all of the factors
3 it was required to address. Hence, the Department substantially complied with rulemaking
4 procedures. No ground exists for invalidating the rule based on WSHA's disagreement with
5 the *content* of the RCW 34.05.328 analysis.

6 First, under RCW 34.05.328(1)(b), the agency must determine that the rule is needed
7 to achieve the "goal and objectives" of the statute implemented by the rules.
8 RCW 34.05.328(2)(b). In preparing the Significant Legislative Analysis, the Department set
9 out the legislative intent and purpose of the certificate of need laws. AR at 105-106. The
10 Department then described how these laws help ensure access to quality health care services:

11 Collectively, the statutes' objectives are to promote access to health care
12 facilities in a planned and orderly manner through a public review process. The
13 CoN rules are intended to help ensure that Washington residents have access to
14 facilities and services by health care providers that are needed for quality patient
15 care within a particular region or community.

16 AR at 106.

17 Next, the Department described how the rules will advance the purposes of the
18 statutes: "The proposed rules will achieve the authorizing statutes' goals and objectives by
19 ensuring that changes in hospital ownership or control are reviewed in a public process under
20 CoN." AR at 106. *See also* AR at 107, discussed *supra* at p. 21. The Department thus clearly
21 articulated how WAC 246-310-010(54) fulfilled the goals and objectives of the certificate of
22 need laws.

Second, WSHA alleges that the Department failed to determine, under
RCW 34.05.328(1)(d), that "the probable benefits of the rule are greater than its probable
costs." This allegation lacks merit. The Department surveyed 81 hospitals on this issue, and
received 54 responses. AR at 108-111. The Department then made a cost-benefit determination
as follows:

1 The proposed rules will have a financial impact on those hospitals that have to
2 complete a CoN review for an arrangement, other than a traditional sale,
3 purchase, or lease where the control of the hospital is changed from one person
4 to another. . . . The benefits are: ensuring that there is a public process for
reviewing changes in hospital ownership or control under CoN and increasing
transparency of hospital operations regarding access to care. Therefore, the
total probable benefits of the rule exceed the total probable costs.

5 AR at 119.

6 Third, WSHA alleges that the Department failed to identify any alternatives to the rule
7 and to determine, under RCW 34.05.328(1)(e), whether alternatives to the rule would be least
8 burdensome to hospitals. Opening Br. at 23-24. But after careful consideration, the
9 Department was not able to identify any alternative to the proposed rule. AR at 107. The only
10 alternative offered by WSHA was to simply not adopt the rule. Although the APA does
11 require an agency to consider viable alternatives to significant legislative rules, it does not
12 require an agency to concoct and analyze non-viable alternatives that will not accomplish the
purposes of the statute.

13 The Department complied with RCW 34.05.328 in its completion of the Significant
14 Legislative Analysis. AR at 105-120. WSHA does not meet its burden of proving otherwise.

15 IV. CONCLUSION

16 The Department adopted WAC 246-310-010(54) under authority granted in
17 RCW 70.38.135(3)(c). WAC 246-310-010(54) is consistent with and furthers the legislative
18 intent and purpose of the certificate of need laws, ch. 70.38 RCW. The amendatory rule was
19 adopted after deliberate consideration of the facts and circumstances. The Department
20 complied with the rulemaking procedures in the APA, ch. 34.05 RCW.

1 Based on the foregoing, WSHA's Petition, challenging the validity of the
2 WAC 246-310-010 (54) should be dismissed.

3 DATED this 12th day of May, 2014.

4 ROBERT W. FERGUSON
5 Attorney General

6 /s/Joyce A. Roper
7 JOYCE A. ROPER, WSBA No. 11322
8 Sr. Assistant Attorney General
9 7141 Cleanwater Drive SW
10 PO Box 40109
11 Olympia, WA 98504-0109
12 Telephone: (360) 664-4968
13 JoyceR@atg.wa.gov
14 ahdolyef@atg.wa.gov

15 /s/Richard A. McCartan
16 RICHARD A. MCCARTAN, WSBA No. 8323
17 Senior Counsel
18 7141 Cleanwater Drive SW
19 PO Box 40109
20 Olympia, WA 98504-0109
21 Telephone: (360) 586-4998
22 RichardM@atg.wa.gov
ahdolyef@atg.wa.gov

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF HEALTH OF
THE STATE OF WASHINGTON,

Appellant,

v.

THE POLYCLINIC, a Professional
Corporation, a Washington
corporation and SWEDISH
HEALTH SERVICES, a
Washington nonprofit corporation,

Respondents.

NO. 46937-5-II

PROOF OF SERVICE

BY

DEPOTY

STATE OF WASHINGTON

2015 MAR 19 PM 1:38

FILED
COURT OF APPEALS
DIVISION II

Paula Jean Yurko declares under penalty of perjury as follows:

I am at all times hereinafter mentioned a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on March 19, 2015, I caused true copies of the following documents:

1. Washington Ambulatory Surgery Center Association's *Amicus Curiae* Brief;
2. Declaration of Emily R. Studebaker in Support of Washington Ambulatory Surgery Center Association's *Amicus Curiae* Brief; and
3. Proof of Service

to be served upon:

///

Richard A. McCartan
Attorney General's Office
Agriculture and Health Division
7141 Cleanwater Drive Southwest
Olympia, WA 98501

- Via facsimile
- Via legal messenger
- Via first-class U.S. mail
- Via email -

*Attorneys for Department of Health
of the State of Washington*

Brian W. Grimm
Perkins Coie
1201 Third Avenue, Ste 4900
Seattle, WA 98101

- Via facsimile
- Via legal messenger
- Via first-class U.S. mail
- Via email

*Attorney for Respondent Swedish
Health Services*

Donald W. Black
Ogden Murphy Wallace PLLC
1601 Fifth Avenue, Ste 2100
Seattle, WA 98101-1686

- Via facsimile
- Via legal messenger
- Via first-class U.S. mail
- Via email -

Attorney for The Polyclinic

I declare under penalty of perjury under the laws of the State of
Washington and the United States of America that the foregoing is true
and correct.

DATED this 19th day of March, 2015.


Paula Jean Yurko

GSB.5036910.1