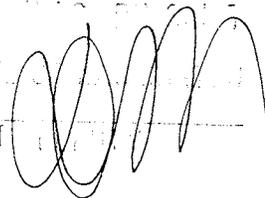


No. 36489-1-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON



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ODYSSEY HEALTHCARE OPERATING B, LP AND  
ITS PARENT COMPANY, ODYSSEY HEALTHCARE, INC.,  
Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,  
Respondent,

KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a  
EVERGREEN HOSPICE; FRANCISCAN HEALTH SERVICES; and  
PROVIDENCE HOSPICE AND HOME CARE OF SNOHOMISH COUNTY  
AND HOSPICE OF SEATTLE;  
Intervenor Respondents.

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JOINT BRIEF OF INTERVENOR RESPONDENTS

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## I. INTRODUCTION

King County Public Hospital District No. 2, d/b/a Evergreen Hospice (“Evergreen”), Franciscan Health Services (“Franciscan”), and Providence Hospice and Home Care of Snohomish County and Hospice of Seattle (“Providence”) submit this joint brief in response to Appellant’s (“Odyssey’s”) Opening Brief. Odyssey’s request for relief should be denied because the trial court and administrative law judge correctly determined that the methodology applied by the Department of Health (the “Department”) for calculating future need of hospice services in a county (the “Methodology”) is reasonable, rational, and appropriate. The agency record demonstrates significant idle capacity in the counties where Odyssey seeks to provide additional hospice services.

Odyssey’s approach is result-oriented, mathematically flawed, leads to absurd results, and would cause the area to be flooded with a surplus of hospice services. Odyssey seizes upon selective language, misinterprets one provision of the Methodology (Step 2), and ignores the rest of the Methodology. Odyssey claims that there is only an 87% variation between its approach and the Methodology applied by the Department is a misstatement. *See* App. Brief at 4 (“the result between the literal application of the formula and using the Department’s subset of four additional calculations is an 87 percent variation”). When the

Methodology is calculated according to Odyssey's approach, the seeming need for additional hospice services balloons by more than 800%.

Of critical importance is the fact that under Odyssey's desired approach, the total number of county residents that will use hospice services in a given year will exceed the total number of deaths *from all causes* in the county. This is obviously impossible and wrong. Only a certain percentage of people dying in a county will need or use hospice services. The use of hospice services could never exceed the total number of deaths in a given county, but this is what Odyssey's argument suggests. Odyssey's approach and the resulting absurd and irrational impact are exactly what the certificate of need ("CN") laws were designed to prevent.

In a new argument, Odyssey conflates the issues by contending that the survey results that were used to obtain data for the Methodology were somehow flawed. This argument, however, is not supported by the record and does not provide any rationale for Odyssey's flawed interpretation. The Department commonly conducts surveys for health planning purposes (i.e. hospital need Methodology, ambulatory surgery center need Methodology, etc.). The fact that the Department could never expect to obtain 100% returns does not necessarily make the survey information invalid. The agency rule expressly authorizes the agency to conduct a survey to obtain the information necessary for conducting the Methodology.

In addition, Odyssey's concern over survey data is unsupported because it has not met its burden of demonstrating that there would be need for additional hospice services had the Department obtained additional data. On the other hand, at least one affected party presented an analysis at the public hearing (which is part of the record) using even more complete survey data, and which demonstrated that there was still no need for additional hospice services, *even* when the Methodology is projected out further than required by the agency rule.

The purpose of certificate of need laws is to try to best predict the need for additional healthcare services without flooding the market, resulting in increased costs for all consumers. The Department rationally applied the Methodology in this case. Odyssey cannot meet its burden of proving that the Department's interpretation of its own rule should be abandoned, and, therefore, the denials of Odyssey's CN applications should be affirmed.

## II. ISSUES

1. Was the trial court and administrative law judge correct in applying deference to the Department's application of the Methodology?

2. Was the trial court and administrative law judge correct in finding that it was appropriate for the Department to interpret the agency rule as a whole, as opposed to just reviewing selective isolated provisions of the agency rule as Odyssey suggests?

3. Was the trial court and administrative law judge correct in finding that the Department's application of the Methodology was reasonable, rational, and appropriate?

4. Was the trial court and administrative law judge correct in finding that the agency rule authorized the Department to conduct a survey to obtain the data for performing the Methodology?

5. Was the trial court and administrative law judge correct in finding that Odyssey's interpretation of the Methodology was result-oriented, mathematically flawed, led to absurd results, and substantially overestimated the actual need for hospice services?

6. Was the trial court and administrative law judge correct in finding that Odyssey had not met its burden of demonstrating the invalidity of the Department's interpretation of the Methodology?

### III. STATEMENT OF THE CASE

#### A. Legal Background.

To evaluate the need for new hospice agencies such as those that Odyssey proposes to establish, the Department applies the hospice "need projection" methodology that is set forth in WAC 246-310-290(7) (the "Methodology"). The Methodology consists of a series of mathematical calculations that "build on each other and should be read together." AR 2797 (CN Program Evaluation: Pierce County); *see also* AR 5054 (the Department's Final Order, "[t]he steps are building blocks, one building upon the other.") This series of mathematical calculations are set forth in the Methodology as six steps:

(a) **Step 1.** Calculate the following four statewide predicted hospice use rates using CMS and department of health data or other available data sources.

(i) The predicted percentage of cancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years

for patients the age of sixty-five and over with cancer by the average number of past three years statewide total deaths sixty-five and over from cancer.

(ii) The predicted percentage of cancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-five with cancer by the current statewide total of deaths under sixty-five with cancer.

(iii) The predicted percentage of noncancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients age sixty-five and over with diagnoses other than cancer by the current statewide total of deaths over sixty-five with diagnoses other than cancer.

(iv) The predicted percentage of noncancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-five with diagnoses other than cancer by the current statewide total of deaths under sixty-five with diagnoses other than cancer.

(b) **Step 2.** Calculate the average number of total resident deaths over the last three years for each planning area.

(c) **Step 3.** Multiply each hospice use rate determined in Step 1 by the planning areas average total resident deaths determined in Step 2.

(d) **Step 4.** Add the four subtotals derived in Step 3 to project the potential volume of hospice services in each planning area.

(e) **Step 5.** Inflate the potential volume of hospice service by the one-year estimated population growth (using OFM data).

(f) **Step 6.** Subtract the current hospice capacity in each planning area from the above projected volume of hospice services to determine unmet need.

WAC 246-310-290(7)(a) – (f) (emphasis added).

The Methodology acknowledges that terminally ill patients do not utilize hospice services in a uniform fashion. Step 1 begins with the calculation of “four statewide predicted hospice *use rates*” that are a function of the ages and diagnoses of patients:

- cancer patients age 65 and over,
- cancer patients under age 65,
- non-cancer patients age 65 and over, and
- non-cancer patients under age 65.

WAC 246-310-290(7)(a)(i) – (iv).

Thus, from the outset, the Methodology is based upon a fundamental premise that an accurate and reasonable calculation of a given county’s overall need for hospice services must be based upon age-specific and diagnosis-specific calculations. The *use rate* is the average number of hospice patient admits in the age and diagnosis specific category divided by the average number of deaths in the age and diagnosis specific category. By definition, therefore, the use rate is age and diagnosis specific.

The purpose of Steps 2 through 5 is to calculate the future “projected volume of hospice services” (i.e., the future number of hospice

patients) in a particular county. WAC 246-310-290(7)(f). Again, the Methodology is based upon the fundamental premise that, depending upon their ages and diagnoses, terminally ill patients have a greater or lesser likelihood of using hospice services. Any attempt to interpret or to apply the language of WAC 246-310-290(7) must be founded upon this underlying premise. Therefore, the only appropriate way to mathematically calculate the future volume of hospice patients throughout the Methodology is to base that calculation upon the historical number of deaths *in each of the age-specific and diagnostic-specific categories described in Step 1.*

**B. Procedural History.**

Odyssey applied for certificates of need to establish new hospice agencies in Pierce County (AR 2280-2456)<sup>1</sup>, King County (AR 715-898), and Snohomish County (AR 1285-1461). Each application was denied by the Department for lack of need. AR 1239-56, AR 1811-28, AR 2793-2810. Odyssey requested a consolidated reconsideration of the denials. AR 3525-3759. The Department granted Odyssey reconsideration and conducted a consolidated reconsideration hearing. AR 3761. Odyssey and interested and affected parties submitted additional materials. AR

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<sup>1</sup> Page numbers in the administrative record submitted to the Court of Appeals are referenced with the abbreviation "AR."

3769-4109, AR 4115-4229. The Department again denied Odyssey's CN applications. AR 1268-83, AR 1838-53, AR 2821-36.

Odyssey requested an adjudicative hearing to appeal each decision. AR 1-90. Franciscan, Evergreen and Providence each moved to intervene as interested and affected parties, and then moved to consolidate the three separate adjudicative proceedings because each addressed the identical legal issue, namely, the correct application of the Methodology in WAC 246-310-290(7). The Health Law Judge granted the motions to intervene and the motions to consolidate. AR 221-30; AR 1854-57.

The Department and Odyssey filed cross motions for summary judgment based on the Methodology found in WAC 246-310-290(7). AR 1907-88 (Odyssey's motion and supporting materials), AR 2013-63 (CN Program's motion and supporting materials). Franciscan and Providence filed a joint brief in support of the Department's motion, in which Evergreen also joined. AR 1990-2012; AR 2064-67.

The Health Law Judge granted the Department's motion, affirming the Department's denials of Odyssey's CN applications and upholding the Department's application of the Methodology. AR 5047-60.

Odyssey then appealed the agency decision to Thurston County Superior Court. CP 4-77. In June 2007, Judge Richard D. Hicks, in a reasoned and thoughtful analysis, affirmed the Department's decision. CP 225-26. This appeal then followed.

#### **IV. STANDARD OF REVIEW AND BURDEN OF PROOF**

The interpretation of an agency rule is a question of law that the court reviews de novo. *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000). The party challenging the agency action has the burden of demonstrating the invalidity of the agency's decision. RCW 34.05.570(1)(a); *Musselman v. DSHS*, 132 Wn. App. 841, 846, 134 P.3d 238 (2006). The agency rule is presumed valid. *Assn. of Washington Business v. Dep't of Revenue*, 121 Wn. App. 766, 770, 90 P.3d 1128 (2004).

#### **V. AUTHORITY**

Agency rules can be interpreted through adjudication without going through formal rulemaking. *Budget Rent a Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 898, 31 P.3d 1174 (2001). An agency's interpretation of law is reviewed under the error of law standard, which allows an appellate court to substitute its own interpretation of the statute or regulation for the agency's interpretation. *Roller v. Labor & Indus.*, 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005). An agency's interpretation shall be upheld when it reflects even a plausible construction of the language, which is not contrary to the legislative intent. *Seatoma Convalescent Ctr. v. DSHS*, 82 Wn. App. 495, 512, 919 P.2d 602 (1996); *Roller*, 128 Wn. App. at 926-27.

The plain language and statutory scheme are reviewed to determine legislative intent. *Roller*, 128 Wn. App. at 926-27 (citing *State ex rel Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004)). Indication that the agency's interpretation conflicts with the legislative intent must be compelling to disregard it. *Marquis v. City of Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996). The interpretation cannot reach an absurd result. *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994); *Roller*, 128 Wn. App. at 926-27.

**A. The trial court and administrative law judge properly afforded deference to the Department for the complex Methodology, which was the product of comprehensive rule making.**

An agency's interpretation of an agency rule is entitled to substantial deference when the matter is within its specialized knowledge and experience. *Haynes v. Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976); *Roller*, 128 Wn. App. at 926-27. Great deference is especially provided in cases where the agency rule involves the interpretation of a comprehensive methodology applied by the agency. *See US West Communications, Inc. v. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997) ("courts are not at liberty to substitute their judgment for that of the Commission in rate cases and that within a fairly broad range, regulatory agencies exercise substantial discretion in selecting the appropriate rate-making methodology") and *Cole v. Utilities & Transp. Comm'n*, 79 Wn.2d 302, 309, 485 P.2d 71 (1971) ("burden of

proof is on the appellant to show the findings and conclusions of the Commission are unlawful, unsupported by the evidence, arbitrary or capricious--and this is especially true when the issues involve complex factual determinations peculiarly within the expertise of the Commission”).

The present case involves the interpretation of an agency rule that embodies a complex methodology for forecasting the future need of hospice services in a given planning area. The Department formed a committee of experts in health planning and hospice services to come up with a workable health planning forecasting methodology.

The narrow issue here is whether the Department, the trial court and administrative law judge were correct in viewing the agency rule as a whole and applying a rational and sensible interpretation, rather than seizing upon selective language in the agency rule and applying the Methodology in a manner that necessarily leads to absurd results as *Odyssey* suggests. Because the Methodology in this case is a matter within the agency’s specialized knowledge and expertise and its interpretation is not only plausible, but also reasonable, rational and sensible, the Department’s interpretation should be entitled to substantial deference. *Roller*, 128 Wn. App. at 926-27.

In a new argument on appeal, *Odyssey* now contends that because its interpretation of the agency rule is different than the Department’s

interpretation, this somehow creates inconsistency and, therefore, the Department should not be entitled to deference. App. Brief at 41. In making this argument, Odyssey relies heavily on *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 367 (4th Cir. 1994). *Malcomb*, however, involves a case in which the agency applied different interpretations of the same agency rule in prior and subsequent cases. *Malcomb*, 15 F.3d at 369 (“We find the interpretation of its cross-appeal regulations that the Board applied in the case at bar to have been shockingly inconsistent with its prior and subsequent interpretations”).

Unlike *Malcomb*, however, the Department has applied the Methodology uniformly and consistently in all cases to all CN applicants. The Department applied the Methodology to Odyssey’s applications the same as it has for every subsequent CN application.<sup>2</sup> All parties agree with *Malcomb* that the Department would not be entitled to use different interpretations of the Methodology in different cases. But, that has not happened here. The Department has been entirely consistent in its application of the Methodology on a prospective basis.

In addition, Odyssey’s new argument that the Department somehow inconsistently applied Steps 4 and 5 should be disregarded.

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<sup>2</sup> Prior applications of the Methodology are not at issue here because Odyssey’s CN applications were the first reviewed under the Methodology.

App. Brief at 41-44. This is a red herring. It is Odyssey's position that is inconsistent in this instance. Odyssey applied Steps 4 and 5 of the Methodology in the same manner as the Department. Odyssey did not challenge those steps in the proceedings below. Odyssey cannot have it both ways.

Odyssey is also trying to claim that the Department should have used diagnosis and age specific population growth rates to improve upon the forecast for future demand (Steps 4 and 5). This is also nonsensical. In fact, there are many other statistical factors that "could" go into the health planning forecasts to try and "improve" the health forecasting accuracy, such as gender, height, weight and ethnicity. This, however, is not the issue before this Court and it does not demonstrate selective interpretation by the Department.

In addition, each step in a health planning formula is not identical, but build upon each other. The differences in the steps, however, do not make the Department's application of the Methodology inconsistent. Steps 4 and 5 do not involve age and diagnosis specific use rates like Steps 1 through 3. Step 4 states to "add the four subtotals derived in Step 3 to project the potential volume of hospices services in each planning area." Step 5 then projects that total based upon the population growth rate. This is exactly how the Department applied the Methodology. As explained below, unlike Odyssey's mathematically flawed interpretation of Step 2,

which reaches an absurd result, there is no flaw in the way that the Department applied Steps 4 and 5. Although it may not lead to the results that Odyssey wants, it does not render the Department's application of the Methodology inconsistent.

In sum, the trial court and the administrative law judge were correct in applying the deference standard to the Department's application of the complex and comprehensive Methodology for forecasting the need for future hospice services. The Department has been consistent in every respect and Odyssey's dissatisfaction with the results of the Methodology does not create an inconsistency.

**B. The Methodology must be read as a whole, giving meaning and effect to all of its parts.**

Step 2 of the Methodology requires the Department to “[c]alculate the average number of total resident deaths over the last three years for each planning area.” WAC 246-310-290(7)(b). Odyssey erroneously reads Step 2 of the Methodology in isolation from the other steps in the Methodology and argues that the Department incorrectly applied Step 2 because it did not follow the supposedly plain and unambiguous language of the agency rule.

The plain language of Step 2, however, cannot be determined by reading that provision in isolation from the linked series of calculations in the Methodology. Although the isolated words in Step 2 have commonly accepted definitions, the plain meaning of the provision as a whole is not

self-evident outside of the overall context and purpose of the Methodology, which is to determine the need for hospice services based on age-specific and diagnosis-specific categories.

The “plain meaning” rule of statutory or regulatory construction requires examining “the statute in which the provision at issue is found, *as well as related statutes or other provisions of the same act in which the provision is found*,” to determine “whether a plain meaning can be ascertained.” *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002) (emphasis added) (citing *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002); *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999)). “A term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole.” *Allison*, 148 Wn.2d at 81 (emphasis added).

Furthermore, every agency rule should be interpreted in a “rational, sensible” manner. *Mader v. Health Care Authority*, 149 Wn. 2d 458, 70 P.3d 931 (2003). It should not be construed “in a manner that is strained or leads to absurd results.” *Allison*, 148 Wn. 2nd at 81. It should be “interpreted as a whole, giving effect to all language and harmonizing all provisions.” *Cannon v. Dep’t of Licensing*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002) (emphasis added). An agency rule should be interpreted in a

manner that “give[s] effect to its underlying policy and intent.” *Cannon*, 147 Wn.2d at 56.

*Dep’t of Ecology v. Campbell & Gwinn, L.L.C.* provides the analytical framework for the present case. First, courts should attempt to determine the intent of a statute or rule from the plain meaning, and, then, only if the rule is ambiguous, should the court “resort to aids to construction, including legislative history.” *Campbell & Gwinn*, 146 Wn.2d at 12.

At issue in *Campbell & Gwinn* was the proper application of the “plain meaning” rule, and the Washington State Supreme Court held that the plain meaning of a provision is best determined by reading all the language in the statute or agency rule at issue, rather than attempting to determine the plain meaning of words in isolation. *Campbell & Gwinn*, 146 Wn.2d at 11-12. Determining the plain meaning “from all that the Legislature has said in the statute and related statutes . . . is the better approach because it is more likely to carry out the legislative intent.” *Campbell & Gwinn*, 146 Wn.2d at 11-12.

The Washington State Supreme Court acknowledged that some cases have held that “consideration of a statutory scheme as a whole . . . is part of the inquiry into legislative intent only if a court determines that the plain meaning cannot be derived from the statutory provision at issue,” but the Washington State Supreme Court soundly rejected this approach.

*Campbell & Gwinn*, 146 Wn.2d at 10. An agency rule “should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole . . . .” *Campbell & Gwinn*, 146 Wn.2d at 11 (citing *Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993)).

Here, when the plain meaning rule of statutory and regulatory construction is correctly applied to the present case, Step 2 of the Methodology requires calculation of the “total resident deaths over the last three years for each planning area.” WAC 246-310-270(7)(b). As the Department determined, the plain meaning of this step cannot be determined by reading this provision in isolation. “It is logical to rely upon the underlying premise that patients, depending on their age and diagnosis, use hospice care at different rates as indicated in the language and mathematical results of Step 1.” AR 5053 (*Prehearing Order No. 3, p. 7*). This is because “[t]he steps are building blocks, one building upon the other.” AR 5054 (*Prehearing Order No. 3, p. 8*).

Therefore, the plain meaning of Step 2 of the hospice need Methodology must be discerned in conjunction with Step 1 (the calculation of the four age-specific and diagnosis-specific hospice use rates) to derive the future “potential volume of hospice services” in a county. WAC 246-310-290(7)(d) and (e). Step 2 plainly requires determining the total resident deaths in each of the four categories described in Step 1 (WAC 246-310-290(7)(a)(i – iv)).

The entire Methodology for determining the future of hospice services is based upon the fundamental premise that, depending upon their ages and their diagnoses, terminally ill patients have a greater or lesser likelihood of using hospice services. Because this meaning is plain, the Court need not delve into statutory interpretation. The Department's interpretation here is the correct, a plausible construction of the language, and, therefore, should be upheld. *Seatoma Convalescent Ctr.*, 82 Wn. App. at 512; *Roller*, 128 Wn. App. at 926-27 (plausible interpretations should be upheld when consistent with Legislative intent).

**a. Odyssey fails to limit *Campbell & Gwinn's* holding on the plain meaning rule.**

Odyssey fails to limit *Campbell & Gwinn's* holding on the plain meaning rule.<sup>3</sup> Odyssey only cites one case to support its contention that the *Campbell & Gwinn* should not be followed. As discussed below, *Edelman v. State ex rel. Public Disclosure Com'n of Washington*, 152 Wn.2d 584, 599, 99 P.3d 386 (2004) is factually distinct from the present case, in no way limits the plain mean rule, and only mentions *Campbell & Gwinn* in its dissent in passing without any connection to the *Campbell & Gwinn* holding on the plain meaning.

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<sup>3</sup> Odyssey apparently has abandoned its previous faulty analogy to *State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003), which it previously contended provided authority that the Court should not look to the agency rule as a whole to understand it.

*Edelman* addressed whether the Public Disclosure Commission had the authority to fill in an arguable gap in a statute regarding campaign funding limits when the plain language of the statute did not address campaign limits under particular circumstances – “what happens when a parent organization ‘stays out’ of a state campaign.” *Edelman*, 152 Wn.2d at 590 (quotes in original). Without citing to *Campbell & Gwinn*, the court held that there was no ambiguity in the statute, so the Public Disclosure Commission did not have authority to “interpret” the statute to fill in the “gap” that existed by not covering this particular circumstance. *Edelman*, 152 Wn.2d at 591.

*Edelman* is not factually analogous to the present case. Here, the issue is not whether the Department has the authority to interpret a statute, or even its own rules. The issue is whether the plain meaning of the Methodology is found by reading Step 2 of Methodology in isolation, or in conjunction with the entire Methodology. *Campbell & Gwinn* squarely addressed this question, and *Edelman* in no way altered the correct analysis.

Of critical importance, the court in *Edelman* was not interpreting a methodology with mathematical calculations that build upon each other. A reading of the statute as a whole in *Edelman* did not provide any rationale for the court to find any rationality for the agency’s interpretation of the statute. The *Edelman* court found “no Legislative

intent” that supported the agency’s interpretation. *Edelman*, 152 Wn.2d at 591. The *Edelman* court, however, did not say that the statute as a whole could not be read to understand the legislative intent.

Odyssey cites long passages from *Edelman* in which the Court declines to “strain to find ambiguity where the language of the statute is clear.” App. Brief at 33 (quoting *Edelman*, 152 Wn.2d at 590-91) (quotes in original). But, this quote is misleading in the present case because here the issue is how to correctly determine the Methodology’s plain meaning – either by reading the language of the methodology as a whole, or by reading one step in isolation.<sup>4</sup>

The *Edelman* majority opinion does not even mention *Campbell & Gwinn*, which refutes Odyssey’s argument that in *Edelman* somehow limits *Campbell & Gwinn*. The *Edelman* dissent does mention *Campbell & Gwinn*, but only in passing to describe an argument that the dissent itself rejects. *Edelman*, 152 Wn.2d at 599-600. It is, therefore, misleading for Odyssey to imply that the *Edelman* majority opinion somehow responded to and limited *Campbell & Gwinn*. App. Brief at 33.

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<sup>4</sup> Odyssey does not argue that the language of the Methodology is ambiguous, in fact it agrees with Franciscan, Evergreen and Providence that the methodology is unambiguous. App. Brief at 31. The issue is how to correctly interpret the plain meaning of the Methodology. However, even if this Court holds that the language of the Methodology is ambiguous, when correctly read as a whole, the present case is distinct from *Edelman* because *Edelman* involved whether the language was latently ambiguous, as applied to certain factual situations, not whether it was patently unclear on its face. *Edelman*, 152 Wn.2d at 590.

Accordingly, the Department's interpretation here should be afforded great deference.

**b. Odyssey's contention that methodologies cannot be interpreted is misplaced.**

Odyssey appears to suggest that because the Methodology involves a mathematical formula, it is shielded from interpretation. App. Brief at 35 (“[w]hen an agency has chosen to adopt a mathematical formula into rule, there is even less basis to ‘interpret’ the rule.”) and App. Brief at 40 (“Such variance illustrate why courts have found mathematical formulae to be unambiguous and not subject to change through interpretation.”). The law does not support Odyssey in this regard.

The Washington State Supreme Court has expressly stated that agency rules can be interpreted through adjudication without going through formal rulemaking. *Budget Rent a Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 898, 31 P.3d 1174 (2001). Agency rules can and should be interpreted through adjudication, and great deference should be afforded to an agency that reasonably interprets a complex and comprehensive methodology unless the challenger can meet its burden of demonstrating that it is arbitrary and capricious. *See US West Communications, Inc. v. Utils.*, 134 Wn.2d at 56 (“courts are not at liberty to substitute their judgment for that of the Commission in rate cases and that within a fairly broad range, regulatory agencies exercise substantial discretion in selecting the appropriate rate-making Methodology”) and

*Cole*, 79 Wn.2d at 309 (“burden of proof is on the appellant to show the findings and conclusions of the Commission are unlawful, unsupported by the evidence, arbitrary or capricious – and this is especially true when the issues involve complex factual determinations peculiarly within the expertise of the Commission”).

Here, the Department would be the one acting arbitrarily and capriciously if it adopted Odyssey’s approach because it leads to absurd results and would result in flooding the planning area with unneeded hospice services when a surplus of hospice services already exists. As observed by Odyssey itself, “the vast majority of public testimony stated that there is no need for additional hospice agencies in the King, Pierce and Snohomish Counties. AR 3251. The Department’s application of the Methodology verified that this was the case.

Odyssey relies on unpersuasive cases from other jurisdictions to support its contention that mathematical methodologies cannot be interpreted. App. Brief at 35-36. None of these cases are controlling authority, nor are any of them persuasive. *Shearson Lehman*, upon which Odyssey heavily relies, is particularly unsupportive of Odyssey’s arguments. *Shearson Lehman Bros., Inc. v. Hedrich*, 639 N.E.2d 228, 232 (Ill. 1994).

*Shearson Lehman* did not involve an administrative agency’s interpretation of its own rule. *Shearson Lehman* involved an

arbitrator's decisions on issues surrounding employees' discharge from a securities brokerage. If the employees were wrongfully discharged, they should have been considered fully vested in their deferred compensation plan and the arbitrator had to apply a particular mathematical formula to their interest in that plan. *Shearson Lehman*, 639 N.E.2d at 232-33. If the employees were not wrongfully discharged, they were not fully vested in their deferred compensation plan, and the arbitrator was to apply another formula to the interest in the plan. *Shearson Lehman*, 639 N.E.2d at 232-33. The employees argued that the arbitrator awarded damages that bore "no relation whatsoever to the unambiguous mathematical formulas . . . ." *Shearson Lehman*, 639 N.E.2d at 231. The court agreed and held that the arbitrator erred when it applied neither interest rate to the plan and awarded "mysteriously calculated amounts." *Shearson Lehman*, 639 N.E.2d at 233.

*Shearson Lehman* does not stand for the proposition that an agency rule should not be read as a whole, as Odyssey suggests. *Shearson Lehman* simply held that the arbitrator exceeded his authority by completely abandoning the interest rates that were expressly identified in the deferred compensation plan. *Shearson Lehman*, 639 N.E.2d at 233. Of particular note, in *Lehman*, the court specifically found that the arbitrator was applying a wholly different interest rate than was *expressly stated* in the deferred compensation plan. *Shearson Lehman*, 639 N.E.2d

at 233. *Lehman* does not support Odyssey's contention that this Court should not look to the agency rule as a whole.

**c. The Department did not admit that it “unilaterally inserted an entirely new group of calculations into Step 2 of the methodology” as Odyssey asserts.**

Odyssey incorrectly asserts that the Department “admits” it added calculations into Step 2 of the Methodology. App. Brief at 22, 36-37. This claim is wrong. Only from Odyssey's incorrect perspective of an isolated reading of the individual words of Step 2, could the Department's reading of Step 2's plain meaning be interpreted as “adding” calculations to the Methodology. Franciscan, Evergreen and Providence simply argued before the Health Law Judge that the meaning of the agency rule could not be properly understood without reading all of the agency rule.

Odyssey takes the term “total resident deaths” from Step 2 of the Methodology out of context. As explained above, “total resident deaths” can only mean the total number of deaths in each of the four categories of patients identified in Step 1 of the Methodology. This is the only rational reading of the Methodology when the plain language of the entire Methodology is read as a whole. Once again, determining the plain meaning “from all that the Legislature has said in the statute and related statutes . . . is the better approach because it is more likely to carry out the legislative intent.” *Campbell & Gwinn*, 146 Wn.2d at 11-12.

**C. Odyssey's reading of the plain language of Step 2 of the Methodology leads to absurd, unlikely, and strained results.**

Odyssey's proposed interpretation is neither rational nor sensible. It disregards the plain meaning of the Methodology when read appropriately as a whole. Odyssey's interpretation strains the language of Step 2 by reading it in isolation from the rest of the Methodology, the Department's certificate of need rules, and the authorizing statutes. Odyssey's proposed interpretation, therefore, violates all of the principles of statutory construction discussed above and it is not the correct "plain meaning" of the Methodology.

If the language of Step 2 is applied in isolation from the other steps, as advocated by Odyssey, the fundamental premise of the need calculation is violated, which requires that an accurate and reasonable calculation of a given county's overall need for hospice services be based upon age and diagnosis specific calculations.

Odyssey argues that the isolated language of Step 2 requires the Department to multiply each of the four use rates derived in Step 1 by the total number of resident deaths from all causes *four separate times* to calculate the number of future hospice patients. AR 3758.

This is mathematically flawed. The use rate (Step 1 of the Methodology) is by definition *a function of* the average number of patients admitted in a given age and diagnosis specific category divided by the average number of deaths in a given age and diagnosis specific category.

In order for Step 3 of the Methodology to mean anything, the use rate for the particular age and diagnosis specific category must be multiplied by the planning area death rate for the particular age and diagnosis specific category. The reason is that the mathematical formula in Step 3 of the Methodology produces the number of patients admitted in that particular category. Here is the correct mathematical interpretation:<sup>5</sup>

$$\text{Step 1} = \text{Use Rate} = \frac{\text{Avg. patients statewide in specific category}}{\text{Avg. deaths statewide in specific category}}$$

$$\text{Step 2} = \text{Avg. deaths in specific category (planning area)} = \text{DP}$$

$$\text{Step 3} = \text{Use Rate} \times \text{DP}$$

$$= \frac{\text{Avg. patients in specific category}}{\text{Avg. deaths in specific category}} \times \text{Avg. deaths in specific category}$$

$$= \text{Avg. patients in specific category in the planning area}$$

Odyssey, on the other hand, wants to multiply *each* use rate by the total overall deaths in the planning area, which leads to a mathematical

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<sup>5</sup> Odyssey's mathematical representation fails to identify the appropriate units for the calculations. When the units are expressed (i.e. patients in a specific category, deaths in a specific category, etc.), Odyssey's mathematical flaw becomes apparent.

flawed result.<sup>6</sup> It is meaningless to multiply an age and diagnosis specific use rate by a death rate that is not a function of age and diagnosis.

To simplify, if a person has five apples for every 10 oranges, the use rate is 5 apples divided by 10 oranges or .50. If one then wants to find out how many apples the person has if he has 20 oranges, one would simply multiply the use rate (0.50) times the number of oranges (20) to get an answer of 10 apples. It would not make sense, however, to multiply the use rate (0.50) times the whole bowl of fruit (i.e. 20 oranges plus 10 grapes plus 30 raspberries). The answer of 30 mixed-fruit (60 total fruit x 0.50) would be meaningless.

This simplistic example helps to illustrate the absurdity of Odyssey's interpretation. The use rate, being a function of age and diagnosis, must be applied against a death rate that is also a function of age and diagnosis to mean anything at all.

In the present case, the use rates calculated in Step 1 of the Methodology correspond to the total planning area deaths based upon each

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<sup>6</sup> Odyssey now agrees it does not make sense to multiply a use rate that is a function of age and diagnosis by a factor that is not related to age and diagnosis. App. Brief at 12 ("this factor would tend to over-predict hospice use because . . . it applies each subgroup's percentage use of hospice to the county's average total resident deaths and not to the number of deaths in each age/diagnosis subgroup . . ."). Nevertheless, even though it admits that it does not make sense, Odyssey argues that this is the way the Department should apply it. App. Brief at 31-39.

age and diagnosis category, which is exactly how the Department applied the Methodology.

For Pierce County, Odyssey's proposed interpretation inflates the number of projected future hospice patients by over 800% in comparison with the Department's application of the Methodology. AR 3758. In addition, Odyssey's hospice need would be 124 percent above the number of persons dying in the county. In other words, the number of future hospice patients would exceed the total number of resident deaths **from all causes**. AR 3758. This is an absurd result. Even Odyssey agrees now that this is an absurd result. *See supra* fn. 4.

Thus, under Odyssey's interpretation, the derivation of the category-specific use rates in Step 1 of the Methodology and the application of those use rates in Step 3 of the Methodology are rendered meaningless. Furthermore, the resulting calculation of overall hospice need under Step 6 of the Methodology would also be rendered meaningless under Odyssey's interpretation.

As stated above, Odyssey's construction of the Methodology is mathematically flawed and leads to absurd results. In contrast, the Department's interpretation and application of Step 2 of the Methodology is reasonable and rational. The Department has interpreted the term "total resident deaths" in Step 2 of the hospice need Methodology to mean the total number of resident deaths *in each of the four categories of patients*

*identified in Step 1 of the Methodology* (WAC 246-310-290(7)(a) and (b)). In other words, Step 2 of the Methodology is a consistent function of the use rate calculated in Step 1. Unlike the absurd results flowing from Odyssey's interpretation, the Department's interpretation does not result in the total number of projected future hospice patients significantly exceeding the total number of resident deaths from all causes.

**D. Odyssey raises new arguments on appeal that should be disregarded under RAP 2.5(a) and, in any event, the Department has been consistent and uniform in its application of the Methodology to all applicants.**

Section VII.B through Section VII.D of Odyssey's brief should be stricken because they contain new arguments that were not presented to the trial court or the administrative law judge. Arguments or theories not presented to the trial court will generally not be considered on appeal. *See* RAP 2.5(a); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). Odyssey has now brought up several new arguments on appeal that were not presented below including:

- (1) A new theory asserting inconsistent *subsequent* application of the Methodology by the Department – App. Brief at 40-45 (Section VII.B);
- (2) A new theory involving projection of too few patients – App. Brief at 45-47 (Section VII.C); and

- (3) A new theory involving “zeroing out” in the survey theory (Odyssey now claims that survey results are materially inaccurate).<sup>7</sup> App. Brief at 47-50 (Section VII.D).

Because these arguments were not addressed to the trial court or administrative law judge, this Court should not consider them here. In addition, Odyssey does not argue that the Methodology was improperly adopted or that it should be invalidated and, therefore, all of these arguments should be disregarded.

Odyssey’s inappropriate and inaccurate discussion of “subsequent cases” (App. Brief at 42-44) should also be stricken because the cases are not part of the agency record on review and Odyssey has not properly requested supplementation of the agency record. RCW 34.05.558 (judicial review is confined to the agency record); *see also Waste Management of Seattle, Inc. v. Utilities & Transp. Comm’n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994) (issues of fact must be confined to the record on judicial review unless properly supplemented as permitted under the APA). None of this information was presented to the trial court or the administrative law judge. In addition, Odyssey contention that no other applications have

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<sup>7</sup> Although Odyssey argued to the trial court that the Department did not have a right to conduct a survey (as discussed above), it did not argue anything with respect to the adequacy of the survey results. As such, those arguments should be disregarded.

been approved by the Department since October 2003 (App. Brief at 47) is also outside of the agency record, and also incorrect.<sup>8</sup>

In sum, because the foregoing discussed sections violate RAP 2.5(a), improperly supplement the record, and would be valid only in circumstances if Odyssey were attempting to invalidate the agency rule, this Court should disregard those sections.

**E. The Department has not applied Steps 4 and 5 of the Methodology inconsistently. App. Brief at 40-45 (Section B).**

For the first time on appeal, Odyssey contends that the Department has somehow applied Steps 4 and 5 of the agency rule differently than Steps 1 through 3 and that this difference makes the Department's application of the Methodology inconsistent. This is not accurate for the reasons discussed in Section V.A *supra*.

In short, each step in a health planning formula is different than the previous. Steps 4 and 5 do not involve a use rate like Steps 1 through 3. Steps 4 and 5 have different language than Steps 1 through 3. But, this does not make the Department's application of the Methodology inconsistent. Step 4 states to "add the four subtotals derived in Step 3 to project the potential volume of hospices services in each planning area." Step 5 then projects that total based upon the population growth rate. This is exactly how the Department applied the Methodology.

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<sup>8</sup> For example, CN#1314 was issued on 7/2705 to Klickitat County Public Hospital District No.1. Nevertheless, as stated above, this is improper to discuss on this

There is nothing in the record to support Odyssey's assertion that the Department's application of Steps 4 and 5 "under-predicts" the number of residents likely to seek hospice services. App. Brief at 42. While population growth rates may be increasing for persons over age 65, this fact alone would not necessarily increase the need because the Methodology also applies to persons under age 65.

Furthermore, as pointed out by the Department, Odyssey has not met its burden of demonstrating that any different application of Steps 4 or 5 would have led to its applications being approved. Just pointing to random areas of the Methodology that Odyssey may disagree with is insufficient to invalidate the Department's denials of Odyssey's CN applications.

**F. Odyssey's assertion that the Department's application of the Methodology leads to absurd results is inaccurate. App. Brief at 45-47 (Section C).**

The Department's application of the Methodology is verified by the testimony at the public hearing. AR 3251 ("The vast majority of public testimony stated that there is no need for additional hospice agencies in the King, Pierce or Snohomish Counties.") (quote from Odyssey). Furthermore, as indicated by the Department, the negative net need of 488 patients in King County does not mean that these patients are going without services, as Odyssey attempts to convey. App. Brief at 46.

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appeal because it is outside the scope of the agency record.

That is not what it means. 488 is the number of patients above the statewide average who **were** served by existing King County hospices in 2003. The Methodology does not preclude hospices from exceeding the statewide averages as Odyssey suggests.

In addition, the fact that the forecasting Methodology shows a surplus or a deficit in a health planning community does not make the Methodology flawed. App. Brief at 45-47. Like most methodologies, sometimes the Methodology will under-predict actual demand and sometimes it will over-predict actual demand. But, certainly, Odyssey's irrational, nonsensical and absurd approach that inflates the need by over 800% and exceeds the total death rate in the planning area by 124% would be considered poor health planning under any reasonable standards.

**G. As the trial court and administrative law judge concluded, the Department appropriately used the survey data.**

As discussed above, Step 1 of the Methodology provides for the calculation of "four statewide predicted hospice use rates." WAC 246-310-290(7)(a). In making the calculations, the Department is to "us[e] CMS [Centers for Medicare & Medicaid Services] and Department of Health data *or other available data sources.*" WAC 246-310-290(7)(a) (emphasis added). The administrative law judge correctly determined that the Department was authorized by the agency rule to rely upon survey data and that the data was not required to be available at the time Odyssey filed its application. AR 5057.

Odyssey argues that Step 1 is flawed because the CMS data did not exist. Odyssey further argues that the Department could not use the hospice survey data that it collected because the data was not “available” to Odyssey prior to the submission of its certificate of need application. Finally, in a new argument on appeal, Odyssey suggests that it was supposedly prejudiced because the Department did not achieve a 100% return rate on its survey. None of these arguments are valid.

Step 1 states that the Department may use CMS data, Department data, “*or other available data sources*” to calculate the four hospice use rates. WAC 246-310-290(7)(a). As Odyssey acknowledges, the Department – faced (through no fault of its own) with the unavailability of CMS or Department data – decided to obtain the required data by conducting a survey of existing hospices. There can be no dispute that the Department had the authority to utilize the survey data since it clearly qualifies as an “other available data source.” AR 5057.

Faced with this conundrum, Odyssey, as noted above, adopts the position that the word “available” in fact means “available to a CON applicant at the time that it submitted its CON application.” However, as the administrative law judge determined, the language of the agency rule does not support this position. AR 5057. The agency rule simply states, “the following steps will be used to project the need for hospice services.” WAC 246-310-290(7). Obviously, the Department bears the ultimate

responsibility for applying the need Methodology. In doing so, it may utilize “other available data sources” to calculate the hospice use rates under Step 1. The fact that such sources were not “available” to an applicant prior to the submission of its application is not a requirement of the agency rule.<sup>9</sup> It is not unusual for the Department to use survey data that may not have been available to a CN applicant at the time of submitting its application. For example, the Department also uses surveys in the health planning methodology for ambulatory surgery centers.

Accordingly, the Department is expressly authorized to utilize “other available data sources” to perform the Step 1 use rate calculations. Such data does not have to be “available” to an applicant prior to the submission of its application since the Department, not the applicant, has the legal authority and duty to apply the Methodology. Thus, Step 1 of the Methodology is not, as Odyssey argues, “flawed.”

Odyssey also makes a new argument in this appeal by contending that the fact that the Department did not receive 100% return on the surveys led to a smaller need in the community. Contrary to Odyssey’s

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<sup>9</sup> It is not uncommon for the Department to utilize the most current information or information not available to applicants when forecasting need for future healthcare services. For example, in forecasting future need for dialysis services, the Department uses the most recent data available from the Northwest Renal Network (<http://www.nwrenalnetwork.org/>). When forecasting future need for ambulatory surgery facilities (surgery centers), the Department surveys current providers of outpatient surgical services for numbers to be used in the calculation of future need. The Department is attempting to best calculate future demand based upon what it believes to be the best information available at the time of performing the Methodology.

assertions, the Department did not apply a zero in every case where a provider did not provide survey results. If the Department had historical data for a facility, then it would in some cases appropriately use that historical data to fill in the missing information for the facility. In the few situations where the Department did not have any data for a facility, it would not count that facility in the Methodology.

Odyssey, however, does not demonstrate that its applications would have been approved even if the Department had obtained more complete survey results. In fact, affected parties submitted analyses at the public hearing with more complete survey results that demonstrated that it had little to no effect on the Methodology results. AR 2919. Because the vast majority of providers responded to the survey and because Odyssey is unable to demonstrate that a more complete survey would have resulted in its applications being approved (and also other information in the record suggests the contrary), Odyssey's claim that the results of the survey had any material impact on their applications should be disregarded.

**H. Should Odyssey again bring up the issue of the Last Acts Report, it should not be considered.**

Evergreen, Overlake, and Providence anticipate that Odyssey could again bring up the Last Act Report, and, therefore, the following responses to that anticipated argument. Odyssey apparently believes that if the Methodology does not wildly overestimate the need for hospice care (as it would under Odyssey's reading of Step 2), Washington State will

not achieve increased utilization of hospice services, as recommended by the Last Acts Report. AR 2070-2168.

The Agency's Final Order, however, notes that although there is much room for improvement in Washington's hospice services, "[a]bsent from this list of recommendations for improving care for the terminally-ill is increasing the number of hospice providers." AR 5057 (*Prehearing Order No. 3, p. 11 n. 14* (citing page 48 (AR 2123) of the Last Acts Report)). This Court should likewise reject Odyssey's attempt to justify its misconstruction of Step 2 to correct a problem that does not exist.

Furthermore, the Last Acts Report (a secondary non-binding authority, which Odyssey has routinely relied upon to support its illogical application of the Methodology) does not lend any interpretive assistance with respect to the agency rule at issue in this action. The administrative law judge would have been remiss had she relied heavily upon the Last Acts Report to interpret the agency rule, which, although it may coincide with the subjective intent of Odyssey, such subjective intent of a party has no place in the interpretive analysis.

Odyssey presents no credible argument to suggest how the Last Acts Report would cure Odyssey's application of the Methodology, which undeniably leads to absurd results: the number of future hospice patients exceeding the total number of resident deaths from *all* causes.

Apparently, Odyssey's implies that because the Last Acts Report

allegedly says that Washington residents in need of hospice services could be better served, then this Court should disregard the Department's Methodology (or any other planned, orderly health planning measure). This conclusion is unreasoned and irrational and should not be given any consideration whatsoever. Such an approach would be contrary to the legislative intent behind the certificate of need laws.

**I. Odyssey's remedy is through rule-making.**

In arguing that the Methodology, as written, contains errors, Odyssey commits the very same error of interpretation of which it accuses the Department: The issues that Odyssey identifies with the Methodology are only correctible (if they are in fact problems) by amending the agency rule through proper rule-making. For example, Odyssey complains that the Methodology is rooted in statewide averages while each application is seeking to serve a specific county service area. App. Brief at 12 ("this statewide averaging means the projected use will be lower than the actual use"). If this somehow indicates a flaw in the Methodology, the flaw exists regardless of how Step 2 of the need Methodology is read. But, Odyssey argues that this "flaw" should be compensated for by construing Steps 1 and 2 to overstate the need for new hospice services. Step 1 and 2 of the hospice need Methodology are not "flawed."

**VI. CONCLUSION**

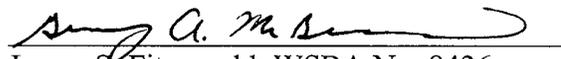
Odyssey has seized upon selective language of Step 2 of the

hospice need Methodology in isolation, rather than determining the plain meaning of the need Methodology as a whole. Odyssey's interpretation of the Methodology leads to absurd results. *Flanigan*, 123 Wn.2d at 426 (absurd and strained results should be avoided). Odyssey has misconstrued the plain meaning of the Methodology, and it has not met its burden of proving that the Department's reading conflicts with the legislative intent or that the Department abused its discretion in any manner whatsoever. Nor has Odyssey established a compelling reason to disregard the Department's reading of its own agency rule.

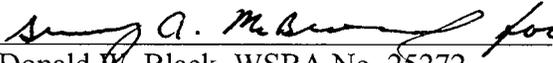
The Court should, therefore, give substantial deference to the Department's specialized expertise in health planning and its understanding of the plain meaning of its own Methodology, and affirm the decisions of the trial court and administrative law judge denying Odyssey's CN applications for new hospice services in Pierce, King, and Snohomish counties.

SUBMITTED this 19<sup>th</sup> day of November, 2007.

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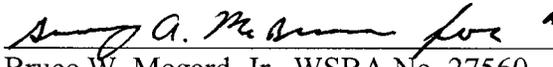
  
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**CERTIFICATE OF SERVICE**

I, KAREN H. SUGGS, am a permanent resident of the United States, over the age of 18 years, and competent to testify as a witness. On the date specified below, I caused the Brief of Intervenor Respondents to be filed with this Court at the address below via Messenger Service and First Class U.S. Mail, and served on Appellant and Respondent at the addresses listed below via Email and First Class U.S. Mail.

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07/10/11 12:41:45 PM  
STATE OF WASHINGTON  
BY: [Signature]  
Clerk of Court

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Executed at Kirkland, WA this 19<sup>th</sup> day of November, 2007.

Karen H Suggs  
Karen H. Suggs