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SUPREME COURT OF THE STATE OF WASHINGTON

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WASHINGTON STATE HOSPITAL ASSOCIATION,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellant.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

The legislature directed the Department of Health to review certificate of need applications for any “sale, purchase, or lease of part or all of any existing hospital[.]” RCW 70.38.105(4)(b). The legislature chose not to define the terms “sale, purchase, or lease,” so the Department used its rulemaking authority to define these terms. The Department’s definition matches statutory and dictionary definitions of these terms and best advances the paramount purpose of the statute: to promote and maintain access to health care for all citizens.

Despite the longstanding principle that agencies can adopt rules to define undefined statutory terms, the Washington State Hospital Association argues that the Department had no leeway to define “purchase, sale, or lease” because there is one, and only one, way to define these terms. The Association then advocates the narrowest possible definition of these terms, resulting in the fewest number of hospital transactions being publicly reviewed under the certificate of need statute. The Association’s stingy definition certainly achieves their goal of avoiding the public transparency, systematic review, and statewide data collection afforded by the certificate of need process. CP at 159, 215. But their preferred definition undermines the statutory purposes of maintaining access to health care and involving the public in health planning.

When statutory terms are subject to more than one interpretation, an agency is allowed to choose the interpretation that best advances the legislative purpose. The terms “sale,” “purchase,” and “lease” are subject to more than one reasonable interpretation, as demonstrated by the dozens of ways these terms have been defined in statutes, dictionaries, and case law. The Association is factually wrong in arguing that the Department’s definition upends thirty years of prior interpretation because many of the transactions that hospitals engage in today have just popped up within the last few years. The Association’s argument is also legally wrong because the Department is not Medusa, forever encasing its prior application of these terms in stone. As long as the statutory terms are subject to more than one reasonable interpretation—and here they are—the Department is authorized to use its rulemaking authority to adopt a definition that adapts to changing circumstances in the health care industry, thereby fulfilling the legislative intent and purpose of the certificate of need law. To do otherwise, as the Association urges, frustrates and reduces the certificate of need law to a relic, applying only to how business used to be done, not how the health care business currently operates.

The Department’s rule is consistent with the plain language and purposes of the statute, and should therefore be upheld.

## II. ARGUMENT

### A. The Department's Rule Is Consistent With the Plain Meaning of the Terms "Sale, Purchase, or Lease"

In its opening brief, the Department identified over a dozen different definitions for the terms "sale" and "purchase." Opening Br. at 15-17. These diverse definitions are found in dictionaries, statutes, and case law. The existence of plausible alternative definitions demonstrates that the statutory language is subject to alternative interpretations.

*National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992). Indeed, "[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." *Id.*

The Department adopted a reasonable interpretation when it defined "sale, purchase, or lease" to include transactions in which control is transferred from one entity to another. This is consistent with the concept of "selling" as transferring ownership from one entity to another or as an "exchange." *See e.g. Webster's Third New International Dictionary* 2003 (2002); RCW 15.53.901(28). It is also consistent with the concept of "purchase" as getting something into one's possession, any voluntary transaction creating an interest in property, or any contract to acquire something. *Webster's* at 1844; RCW 62A.1-201(29); 15 U.S.C. § 78c(13). Since the Department's rule is consistent with common

definitions of these terms, the rule is, at a minimum, reasonably consistent with RCW 70.38.105(4)(b) and should be upheld. *Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003).

Statutory descriptions of corporate transactions further support the reasonableness of the Department's rule. In a merger, for example, the surviving corporation acquires all of the rights, privileges, immunities, franchises, property, debts, and interests of the merged corporation. RCW 24.03.210(4); RCW 23B.11.060(1)(b). In a consolidation, the new corporation likewise acquires all of the rights, privileges, and interests of the former entities. RCW 24.03.210(4). In other words, control is transferred to the surviving or new corporation by an exchange or voluntary transaction, consistent with common definitions of "sale" and "purchase."

In response, the Association argues that these terms are subject to only one narrow interpretation. The Association then belies its argument by cobbling together a definition from two different dictionaries. Response Br. at 19-20. But even the Association's carefully selected definitional excerpts do not exclude transactions that involve an exchange of items of value for something other than monetary consideration. For example, the Association acknowledges that "sale" can include a transfer for consideration other than a sum of money. Response Br. at 19. At any rate, the

issue is not whether the *Association's* chosen definition is a reasonable interpretation of the statute, but rather, whether the Department's is.

In addition to being consistent with dictionary and statutory definitions of "sale" and "purchase," the Department's definition is consistent with cases that have interpreted these terms broadly in order to accomplish the purposes of a statute. Opening Br. at 17, citing *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 593-94, n.24, 93 S. Ct. 1736, 36 L. Ed. 2d 503 (1973); *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 49 F.3d 541, 544 (9th Cir. 1995); *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 528-31 (9th Cir. 2001). The Association tries to distinguish these cases by arguing that they involved broad statutory definitions, whereas here, the statute does not define "sale, purchase, or lease." But the legislature's failure to define these terms does not mean that the terms must therefore be interpreted as restrictively as possible. Rather, the legislature left the door open for the Department to define these terms by rule, which the Department did in WAC 246-310-010(54). The Department's definition of these terms is entitled to great weight because the Department administers the certificate of need statute. *See Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989).

The Association rejects any deference to the Department by citing a handful of cases that stand for the unremarkable proposition that an

agency cannot pass a rule that contradicts the plain language of a statute. Response Br. at 46-47. None of these cases are on point because they all involved situations where an agency disregarded unambiguous statutory language. Not a single case involved an agency passing a rule to define undefined statutory terms. The cases therefore provide no guidance for when an agency defines terms that are subject to more than one reasonable definition, which is the situation here.

The Association then tries a different tack by arguing that the legislature's definition of different words in different statutory provisions suggests that the legislature intended "sale, purchase, or lease" to be interpreted restrictively. Response Br. at 24-26. To support this assertion, the Association points to RCW 70.44 and RCW 70.45 which define "acquisition" of public district hospitals and nonprofit hospitals. But the legislature's definition of a different term in different statutes does not shed light on whether the Department's definition of "sale, purchase, or lease" is reasonably consistent with RCW 70.38.105(4)(b). This point is further bolstered by the fact that RCW 70.38.105(4)(b) was enacted in 1984 whereas RCW 70.44 and RCW 70.45 were enacted in 1997. Laws of 1984, ch. 288, § 21; Laws of 1997, ch. 332, §§ 2, 18. That the legislature chose to define "acquisition" in two statutes enacted thirteen years after

RCW 70.38.105(4)(b) tells us nothing about how the legislature intended the terms “sale, purchase, or lease” to be defined under the earlier statute.

The Association’s reference to RCW 70.38.111(5) fares no better. Response Br. at 24. This statutory provision provides an exemption from the certificate of need requirement for certain nursing homes owned or operated by a continuing care retirement community. However, the exemption does not apply to the sale, lease, *acquisition*, or use of part or all of the nursing home unless such sale, lease, acquisition, or use is by a continuing care retirement community. RCW 70.38.111(5)(c), emphasis added. The word “acquisition” is not defined in the certificate of need statute, but the dictionary defines it as “the act or action of acquiring.” *Webster’s Third New International Dictionary* 19 (2002). “Acquire” is then defined as “to come into possession, control, or power of disposal often by some uncertain or unspecified means.” *Webster’s* at 18. This term is nearly synonymous with the word “purchase” which means “to get into one’s possession: GAIN ACQUIRE[.]” *Webster’s* at 1844. The Association does not explain why the Legislature’s use of the word “purchase” in RCW 70.38.105(4)(b) and the nearly synonymous word “acquisition” in RCW 70.38.111(5)(c) should result in a narrow reading of the former statute but not the latter. Rather, in both instances, the

Legislature chose not to define the terms, thereby authorizing the Department to do so.

The Association also claims that the rule is too broad because it applies to transactions involving “*part* or all of any existing hospital.” Response Br. at 20, 23, 45 (quoting WAC 246-310-010(54)). But this language in the rule exactly recites the statutory language: “The sale, purchase, or lease of *part* or all of any existing hospital.” RCW 70.38.105(4)(b). Since the rule repeats this statutory language verbatim, the Department did not exceed its statutory authority by applying its rule to part or all of an existing hospital.

The Association then trots out a list of extreme scenarios that it claims will be encompassed by WAC 246-310-010(54). For example, the Association erroneously implies that the rule could apply to facilities other than hospitals. Response Br. 23. The rule, however, explicitly applies only to part or all of an existing *hospital*. WAC 246-310-010(54). Similarly, the Association complains that the rule will apply to “a simple change in composition” in a hospital’s board of directors or a change to third-party contracts for a hospital’s laundry, cafeteria, or recordkeeping services. Response Br. at 21, 46. However, neither the certificate of need statute nor the Department’s rule is intended to reach these ancillary aspects of hospital administration, nor would such an interpretation be consistent

with the purposes of the statute or the plain language of the rule. The Association's conjecture that the rule will have these extreme consequences is unwarranted.

Last, the Association goes so far as to suggest that the Department does not have *any* rulemaking authority to define the contours of certificate of need review and can instead only pass rules related to the certificate of need process. Response Br. at 43. However, RCW 70.38.135(3)(c) expressly authorizes the Department to “[p]romulgate rules *in implementation of the provisions of this chapter*, including the establishment of procedures for public hearings for predecisions and post-decisions on applications for certificate of need[.]” Emphasis added. The Department therefore has broad authority to implement the certificate of need statute. While this authority “*includ[es]*” the authority to establish procedures for certificate of need review, its plain language is not limited to establishing procedures. *See, e.g., Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921 (2001) (“include” is a term of enlargement, not limitation). Indeed, if it were true that the Department's authority were limited to merely establishing the process for certificate of need review, then the bulk of the Department's certificate of need rules would be invalid because most of them apply to the criteria for obtaining a certificate of need rather than the process. *See generally* WAC 246-310.

The Department's authority to implement the certificate of need statute, however, is not so limited.

In sum, the statutory terms "sale, purchase, or lease" are subject to more than one reasonable interpretation. The Association has not met its burden of demonstrating that the Department's interpretation is unreasonable or otherwise invalid. WAC 246-310-010(54) should therefore be upheld.

**B. The Department's Rule Helps Accomplish the Paramount Purpose of the Statute by Ensuring That Access to Health Care Is Not Compromised**

Courts interpret statutes to further, not frustrate, their intended purposes. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007). The overriding purpose of the certificate of need statute is to promote and maintain access to health care services for all citizens. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 55, 239 P.3d 1095 (2010); RCW 70.38.105(1). Another critical purpose of the statute is to include both consumers and health care providers in statewide health planning. RCW 70.38.015. As explained in the Department's opening brief, WAC 246-310-010(54) accomplishes both of these purposes. Opening Br. at 21-25.

The Department's rule promotes access by ensuring that major hospital transactions are reviewed before they are finalized. A community

can lose a broad range of hospital services when control is transferred from one entity to another, and that loss of services can occur for a variety of reasons, including cost-saving measures, convenience, or the religious doctrines of the acquiring hospital. *See, e.g.*, AR at 180 (decrease in on-site pediatric care); 248-50 (ban on certain emergency care for pregnant women); 249 (failure to honor living will directives); 265 (threatened loss of laboratory services); Transcript at 15-16 (loss of emergency services and a mammography machine). The certificate of need process evaluates whether a transaction will eliminate an existing service and, if so, whether that service is otherwise available in the community. WAC 246-310-210(1)(a). If a service proposed to be eliminated is not otherwise available in the community, the Department can place a condition in a certificate of need that requires the hospital to maintain the service. Without this process, there is no way to ensure that patients will continue to have access to needed health care services within their communities. Particularly for low-income, elderly, or disabled patients, it may be difficult to travel to obtain a service elsewhere. *See* AR 265; WAC 246-310-210(2) (certificate of need process looks at effect on the elderly and medically underserved populations).

This potential loss of access is what prompted the Governor to direct the Department to use its existing tools to protect access. The

Governor was concerned that the certificate of need program had not kept current with changes in the health care marketplace. AR at 1. Thus, the Governor wanted the Department to use its tools to ensure a transparent and thorough review of transactions that are functionally equivalent to the types of transactions that hospitals previously called “sales” or “purchases.” CP at 345.

The Association belittles the public and governmental interest in maintaining access to health care by fixating on a report prepared by the Office of Financial Management (OFM). Response Br. at 2, 13-16, 43, 49. The Association’s reliance on the report is flawed for three reasons. First, the superior court excluded the report from the record and the Association did not cross appeal that ruling. Any reference to the report should therefore be disregarded by this Court. *See, e.g., Kailin v. Clallam Co.*, 152 Wn. App. 974, 990, 220 P.3d 222 (2009) (cross appeal is essential if respondent seeks affirmative relief by the appellate court). Second, the report was properly excluded by the superior court because it was not finalized until March 2014, three months after WAC 246-310-010(54) was adopted. Judicial review of a rule is generally limited to the administrative record, and new evidence can be considered only if it relates to the validity of the agency action at the time it was taken. RCW 34.05.562(1); *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 119 Wn.2d 464, 474-75,

832 P.2d 1310 (1992), *superseded by statute on other grounds as stated in Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 903-04, 64 P.3d 606 (2003).

Third, the report looked at only a tiny sliver of health care services—abortion, tubal ligation, and assisted suicide. As the Association admits, these services are not typically performed in hospitals. Response Br. at 14. However, as the rulemaking process made clear, the public was concerned about a much broader range of services that *are* typically performed in hospitals. For example, multiple commenters were concerned about whether all hospitals would be willing to comply with the terms of living wills (AR at 187, 249; Transcript at 48) and whether some hospitals might refuse necessary emergency care to pregnant women (AR at 248-50, 271; Transcript at 23-25). Thus, the small number of non-hospital services considered by OFM did not ultimately provide much useful information about whether access to hospital services would be impaired by the continuing proliferation of hospital “affiliations,” “strategic alliances,” and “system integrations.”

In addition to maintaining access, WAC 246-310-010(54) serves the purpose of promoting public involvement in health care planning by ensuring that interested members of the public and other health care providers can review and submit comments on major hospital transactions

before they are approved. The Association dismisses this public interest by arguing that these types of transactions undergo expedited certificate of need review, so that the public would only have twenty days to submit comments. Response Br. at 39. Members of the Association also take the position that the public does not have any legitimate interest in these transactions and should therefore allow these transactions to be negotiated confidentially. AR at 159, 215. The Association is wrong on both counts.

First, even in an expedited process, the Department hears and considers public comments before making a final decision and the Department has the option of holding a public hearing on an expedited application. RCW 70.38.115(9) (Department is not required to conduct public hearing for expedited or emergency review, but statute does not prohibit public hearings in expedited context); WAC 246-310-150(1)(a) (Department receives “public comments” during first twenty days, not limited to just written comments). Second, while the hospitals might believe that the public should have no interest in these transactions, the extensive public involvement during the rulemaking process shows that members of the public are in fact very concerned about these transactions occurring without any public involvement or regulatory oversight.

The Association also implies that many of the transactions that it seeks to exempt from certificate of need review already undergo a public

process under the non-profit conversion statute (RCW 70.45) or the statute governing acquisitions of public district hospitals (RCW 70.44.315).

Response Br. at 39. That is factually incorrect because those statutes are limited to very specific types of transactions. Of the twenty-four acquisitions or affiliations that occurred between 1998 and 2012, only six were required to be reviewed under RCW 70.45 or RCW 70.44.315.

Sigman Reply Decl. to Stay Motion ¶ 3, Ex. A. Two of the eighteen that were not required to be reviewed under one of these statutes were reviewed under the certificate of need statute, meaning that sixteen likely received no public review and approval process whatsoever. Sigman Reply Decl. ¶ 3, Ex. A.

The fact is that the public wants an opportunity to weigh in on major hospital transactions that impact their communities, and the certificate of need process facilitates their involvement by providing a forum where their voices are heard. WAC 246-310-010(54) effectively advances this interest in transparency as well as maintaining access to health care services, thereby effectively advancing the statutory purposes.

Controlling costs is another statutory purpose, but it is secondary to the goal of promoting and maintaining access to health care. *Overlake Hosp. Ass'n*, 170 Wn.2d at 55. And the Association exaggerates the cost to hospitals. The record does not demonstrate, as the Association alleges, that

the cost of the application process averages \$100,000 and is often over \$500,000. Response Br. at 5-6. To the contrary, when hospitals were asked to self-report their estimated costs to the Department, several declined to provide any estimate and others provided a range, beginning as low as \$10,000. AR at 92-96. It is also worth noting that a certificate of need application is a one-time cost paid for out of the hundreds of millions or even billions of dollars in patient revenue that hospitals bring in annually.<sup>1</sup>

The Association also exaggerates the amount of time it takes to process a certificate of need application under RCW 70.38.105(4)(b). For example, the Association cites to an outdated Joint Legislative Audit and Review Committee report to argue that 64 percent of certificate of need decisions are not made within the statutory timeframes. Response Br. at 6. But more recent and relevant data shows that, from 2003 through the present, only three out of fourteen certificate of need decisions under RCW 70.38.105(4)(b) were late, and none were more than two weeks late. Sigman Reply Decl. to Stay ¶ 4, Ex. B. Furthermore, certificate of need

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<sup>1</sup> For example, in 2013, Swedish Medical Center had over \$3.1 billion in patient revenue and a net operating revenue of over \$166 million. The Kadlec Regional Medical Center in Richland had patient revenues exceeding \$988 million and net operating revenue of over \$18 million. This information is contained in the hospitals' year-end reports which are publicly available on the Department's website at: <http://www.doh.wa.gov/DataandStatisticalReports/HealthcareinWashington/HospitalandPatientData/HospitalFinancialData/YearEndReports/2013HospitalYearEndReports>.

transactions under RCW 70.38.105(4)(b) are rarely appealed—In fact, only one was appealed and that was in 1989. Sigman Stay Decl. ¶ 3.

When a statute is subject to more than one reasonable interpretation, “the interpretation which better advances the overall legislative purpose should be adopted[.]” *Weyerhaeuser Co. v. Dep’t of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976). The terms “sale, purchase, or lease” are subject to more than one reasonable interpretation. The Department’s interpretation furthers the statutory purposes whereas the Association’s interpretation frustrates those purposes. WAC 246-310-010(54) is valid and should be upheld.

**C. The Department Was Authorized to Adopt a Rule That Adapts to Changes in the Health Care Marketplace**

It is a well-established principle of administrative law that an agency can adopt or change rules in response to changing circumstances. Courts give deference to agencies based on the presumption that the legislature intended that any statutory ambiguity would be resolved “first and foremost, by the agency[.]” *Smiley v. Citibank, N.A.*, 517 U.S. 735, 740-41, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996). A change in agency position is not grounds for invalidating a rule and does not eliminate the discretion traditionally given to the agency. *Id.* at 742. Courts grant substantial deference to even a changed interpretation if there is good

reason for the change. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56, 109 S. Ct. 1835 (1989).<sup>2</sup>

Here, the parties do not dispute that the health care marketplace has changed dramatically under the federal Affordable Care Act. AR at 1, 183, 1234. These changes have resulted in “the structuring of new relationships among health care facilities, provider systems, and insurers.” AR at 1. The facts also demonstrate that non-traditional transactions have mushroomed in recent years. The Association’s own records demonstrate that the word “affiliation” was first used to describe a hospital transaction in 2009, and has been used ten times since then along with new titles such as “strategic partnership” and “system integration.” CP at 231, 286-293. WAC 246-310-010(54) was adopted in response to these changes.

The Association tries to depict WAC 246-310-010(54) as a radical departure from the Department’s prior application of the terms “sale,

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<sup>2</sup> See also *Agape Church, Inc. v. Federal Communications Comm’n*, 738 F.3d 397, 408 (D.C. Cir. 2013) (agency may amend statutory interpretation based on changes in the marketplace); *Strickland v. Maine Dep’t of Human Services*, 48 F.3d 12, 18 (1st Cir. 1995) (even sharp departure from prior interpretation is entitled to deference); *New York Dep’t of Social Services v. Shalala*, 21 F.3d 485, 493 (2d Cir. 1994) (agency can and should change course if prior interpretation was unwise); *GenOn REMA, LLC v. Environmental Protection Agency*, 722 F.3d 513, 525 (3d Cir. 2013) (agency is not bound by its prior determinations); *De Osorio v. Immigration & Naturalization Serv.*, 10 F.3d 1034, 1042 (4th Cir. 1993) (agency can change its mind if its position is reasonable and not contrary to congressional intent); *Lansing Dairy v. Espy*, 39 F.3d 1339, 1354 (6th Cir. 1994) (agency can change its interpretation in light of new administration’s philosophy); *Information Tech. & Applications Corp. v. U.S.*, 316 F.3d 1312, 1322 (Fed. Cir. 2003) (agency’s new, significantly broader definition is entitled to deference). Although these are federal cases, the legislature intends that our state Administrative Procedure Act be interpreted consistently with decisions under the federal Administrative Procedure Act. RCW 34.05.001.

purchase, or lease.” Not so. At most, the Department was inconsistent in how it previously applied these terms to specific transactions. For example, although the Association argues that the Department has consistently declined to review mergers, the Department has in fact reviewed about half of the mergers submitted through the application process. CP at 232. And the Association points to another example where the Department “anomalously” reviewed a stock purchase agreement. Response Br. at 9, n.6. What these examples demonstrate “if anything, is that there was good reason for the [Department] to promulgate the new regulation, in order to eliminate uncertainty and confusion.” *Smiley*, 517 U.S. at 743.

But whether WAC 246-310-010(54) addresses prior inconsistency by the Department or represents a new interpretation of the statutory terms is ultimately irrelevant, because the rule should be upheld as long as it is a reasonable interpretation of the statutory terms. The interpretation reflected in WAC 246-310-010(54) is both reasonable and justified based on changed circumstances in the industry. The Department does not argue, as the Association alleges, that changes in the health care marketplace have transformed a previously unambiguous statute into an ambiguous one. Response Br. at 32-36. Rather, the Department recognizes that the statutory terms are subject to more than one reasonable interpretation and

changes in the health care industry warranted a fresh look at how these terms should be interpreted to best accomplish the statutory purposes.

The Association argues that the Department cannot adjust its prior interpretation of these terms because the Department has issued “binding” applicability determinations in response to particular certificate of need applications. Response Br. at 7, 36. But those prior determinations bind the Department only in regard to the specific transactions submitted for review. WAC 246-310-050(5). In other words, the Department could not now re-open those transactions and require them to undergo certificate of need review based on the adoption of WAC 246-310-010(54). Rather, the rule applies to transactions moving forward from the date of the rule’s adoption.

There is also no evidence that anyone besides the applicant, the Department, and the Association are even aware that these applicability determinations exist. Therefore, the Association is incorrect in arguing that the legislature may have acquiesced in these determinations. Response Br. at 29-30. Indeed, in contrast to the applicability determinations, the Department went through a very public rulemaking process that culminated in the adoption of a rule that became effective in December, 2013. The legislature took no steps during the 2014 legislative session to undo the effects of the Department’s rule or to otherwise narrow the

interpretation of “sale, purchase, or lease.” To the extent that it is possible to glean anything from legislative inaction, it can more credibly be argued that the legislature acquiesced in the broad definition contained in the Department’s rule than in a narrower interpretation embodied in some applicability determinations, most of which contained little or no written analysis. CP at 105-06, 113-15, 121-23, 136-38, 144-50, 158, 169, 184.

*Dot Foods* does not help the Association here. In that case, the Department of Revenue’s rule was overturned because it contradicted unambiguous statutory language. *Dot Foods, Inc. v. Dep’t of Rev.*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009). In dicta, the Court stated that it would have been more appropriate to seek a statutory change rather than a rule amendment. *Id.* But the dicta was ultimately unimportant to the Court’s decision, which was based on the plain language of the statute.

In short, WAC 246-310-010(54) does not mark a significant departure from the Department’s prior, somewhat inconsistent application of the terms “sale, purchase, or lease.” But even if it did, the Department’s interpretation is reasonable and any change in interpretation is justified by changes in the health care marketplace. An agency “must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.” *Rust v. Sullivan*, 500 U.S. 173, 187, 111 S. Ct. 1759, 114

L. Ed. 2d 233 (1991) (alteration in original) (internal quotation marks omitted). That's what the Department did here.

**D. WAC 246-310-010(54) Is Not Arbitrary and Capricious**

The Association last argues that WAC 246-310-010(54) is arbitrary and capricious. Response Br. at 47-49. The burden to prove that an action is arbitrary and capricious is a heavy one; a challenger must show that the rule is “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). “[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (quotation omitted).

The Association's arbitrary and capricious challenge boils down to three arguments: (1) the Governor's directive was the only reason the Department adopted the rule; (2) the Department had previously interpreted the statutory terms more restrictively; and (3) the Department failed to consider the OFM report. Each argument fails.

The first argument fails factually because the Governor's directive was not the only reason the Department adopted the rule. Rather, the Department held a public rulemaking process in which it received and

considered over one thousand comments, most of which favored the Department's approach. This argument also fails legally because the Governor is entitled to direct one of his cabinet agencies to address a problem, and an agency is authorized to adjust its interpretation of statutory language in response to changed circumstances or a change in administrations. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

The second argument fails because the Association exaggerates the extent to which the Department previously interpreted the terms more restrictively, as explained above. At any rate, the Department is entitled to take a fresh look at its interpretation in light of changed circumstances within the industry. *See, e.g., Smiley*, 517 U.S. at 742.

The third argument fails because the OFM report was correctly excluded from the record and the Association did not appeal that ruling. Even if the report was part of the record, the report is of limited utility because it focused on only three health care services that are not typically performed in hospitals. The rulemaking process made clear that the public was concerned about access to a much broader range of services than the three services considered by OFM. For these reasons, the Association's arbitrary and capricious challenge also fails.

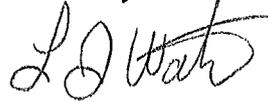
### III. CONCLUSION

Non-traditional hospital transactions have increased exponentially in the last five years, and the certificate of need program had not kept up with these changes. As a result, members of the public had no ability to weigh in on major hospital transactions that could seriously impair their access to needed health care services. To address this problem, the Department undertook a formal rulemaking process resulting in adoption of WAC 246-310-010(54). This rule reasonably interprets the terms “sale, purchase, or lease” and it best accomplishes the statute’s dual goals of protecting access to health care and involving the public in health care planning. The Department neither exceeded its statutory authority in adopting the rule nor acted arbitrarily or capriciously. The rule should therefore be upheld.

RESPECTFULLY SUBMITTED this 3rd day of December 2014.

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Dear Clerk:

Attached for filing in cause number 90486-3, please find the Reply Brief of Appellant, Washington State Department of Health.

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