COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2012-SC-000090

COMMONWEALTH OF KENTUCKY CABINET
FOR HEALTH AND FAMILY SERVICES, ET AL. APPELLANT

Appeal From Kentucky Court of Appeals
No. 2009-CA-001846-MR

v.

PROFESSIONAL HOME HEALTH CARE AGENCY, INC. , ET AL APPELLEES

BRIEF OF APPELLEES PROFESSIONAL HOME HEALTH CARE AGENCY, INC. AND WHITLEY COUNTY HEALTH DEPARTMENT

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served by United States mail, first class, postage prepaid, on January 14, 2013 to the following individuals: Judge Thomas D. Wingate, Franklin Circuit Court, 669 Chamberlain Avenue, Frankfort, KY 40601; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Marian J. Hayden, Cull & Hayden, PSC, P. O. Box 1515, Frankfort, KY 40602; and Ann Hunsaker, Cabinet for Health & Family Services, 275 East Main Street, Frankfort, KY 40621.

Carole D. Christian

INTRODUCTION

This appeal concerns the instructions to be given to an administrative agency for conducting a hearing on remand of a certificate of need application, where the original hearing wrongfully denied Appellees the right to be heard. The Court of Appeals correctly held that justice and the agency's own regulation require use of the most recent health planning need calculation, and that there should be no artificial limits on the evidence that the parties may introduce on remand.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees believe oral argument will be helpful to the Court because it will facilitate a thorough discussion of the many ways that the Circuit Court's original directions for the conduct of a remand hearing "will not effectuate justice," as found by the Court of Appeals.

TABLE OF POINTS AND AUTHORITIES

May It Please the Court:

OVERVIEW

Appellant wants the remand of its application for a certificate of need to occur in a world that no longer exists, i.e., to have the remand based on 2006 population calculations and utilization data that were known to be wrong in at least one way at the time, and which have obviously been superseded by new data and a new reality. In essence, it wants a decision concerning an important matter of policy to turn on "facts" that the parties and the hearing officer all know to be stale or discredited, or both. As the Court of Appeals correctly recognized, however, our health planning law mandates consideration of the latest available information – the most accurate evidence – in all certificate of need decisions, whenever they occur. Appellees respectfully urge this Court to ensure that health planning decisions are based on current, true need, and the latest available information about other review criteria, and to affirm the decision of the Court of Appeals.

STATEMENT OF THE CASE

In November, 2006 Appellant Comprehensive Home Health Services, Inc. d/b/a Family Home Health Care S.E. ("Family") was approved for a certificate of need to provide home health services to Whitley County. It is now settled that this approval denied due process to the Appellees here – Professional Home Health Care Agency, Inc. ("Professional") and Whitley County Health Department d/b/a Whitley County Home Health (the "Health Department") by depriving them of the opportunity to be heard. Yet, in the present appeal to this Court, Family seeks to

perpetuate the injustice by applying an outdated and flawed need calculation and again limiting Appellees' opportunity for a full hearing on all issues when this matter is remanded.

The Regulatory Scheme

As Family acknowledges in its Brief of Appellant, one purpose of the certificate of need process is to prevent proliferation of health care services that increases the cost of healthcare. KRS 216B.010. To this end, certificate of need applications can only be approved if they satisfy five statutory review criteria. In particular, KRS 216B.040(2)(a)2.a. states that "[e]ach proposal approved by the Cabinet shall be consistent with the State Health Plan." The other review criteria are: (1) Need and Accessibility; (2) "Interrelationships and Linkages"; (3) Costs, Economic Feasibility and Resource Availability; and (4) Quality of Care. KRS 216B.040.

The State Health Plan is the official document that expresses the dynamic health planning policy of the Cabinet for Health and Family Services (the "Cabinet"). KRS 216.015(28) defines it as "the document *prepared triennially, updated annually*, and approved by the Governor" (emphasis added). Since 1998, the current version of the State Health Plan has been incorporated by reference in 900 KAR 5:020, and has been amended more or less annually to incorporate the annual updates and other changes.[1]

[1] The history of the regulation as shown in the version published in the 2012 Kentucky Administration Register, Vol. 9, page 352 shows that 900 KAR 5:020 (continued...)

The State Health Plan is not a self-executing document. For home health, as with many other services, the State Health Plan sets out a formula that requires the Cabinet to plug in three types of data: population "estimates" (The Kentucky State Data Center's, or "KSDC's," calculation of the population that was present in a geographic area for a recent past period); population projections (KSDC's predictions of *future* population in a given area using projection models and assumptions about trends); and recent home health utilization statistics, in order to calculate how many additional patients are presumed to need home health in the county proposed by the applicant. Although the exact formula has changed since 2006,[2] then – as now – the Plan established a minimum threshold of 125

(...continued)

was first effective in 1998 and was amended in 1999, 2000, 2003, 2004, 2006, 2007, 2009, 2010 and 2011.

[2] In 2006, the Plan formula calculated a historical county-specific use rate, by age group, using the Data Center's estimate of the population in each age group and utilization reports of the providers for the most recent two years, which at the time were supposed to be 2004 and 2005. It then applied that county-specific use rate to projections for the population one year in the future, in that case 2007, to calculate the predicted growth in home health usage in the county. Thus, the Plan would produce a need only if the Data Center's population projections for 2007 future years were significantly higher than the population estimates used by the Cabinet for 2004 and 2005.

In 2007, after the hearing cycle in which Family's application was heard, the formula was tweaked, and it has remained essentially unchanged to the present. Under the revision, the use rate that is applied to the county's future population projections is calculated based on statewide data (i.e., average utilization by age group for the most recent two years, using state population estimates and utilization data) rather than a county-specific use rate. The resulting need projection then, is not tied solely to predicted changes in the county population, but is a function of both the relative volume of services agencies have been

(continued...)

additional patients needing home health services in order for an application to be approved.

Because each of these elements of source data is updated at least once every year, the regulatory scheme provides rules for changes that occur in the course of review of an application. The Regulation of the Cabinet 900 KAR 6:050 §7(1)(b)(2006), states "[i]n determining whether an application is consistent with the State Health Plan, the Cabinet shall apply the latest inventories and need analysis figures maintained by the Cabinet and the version of the State Health Plan in effect at the time of the Cabinet's decision."[3]

Even more explicitly, both the State Health Plan in effect in 2006 (incorporated by reference in 900 KAR 5:020, effective July 24, 2006) and the version in effect today, the 2011 Update to the 2010-2012 State Health Plan (incorporated by reference in the 2011 version of the same regulation), plainly direct the Cabinet to use the latest available need figures in review of applications.

(...continued)

providing in the county compared to the state as a whole, and expected population growth in the county.

[3] In 2009, the Cabinet reorganized the regulations governing certificate of need, and divided 900 KAR 6:050 into multiple new regulations, 900 KAR 6:055 through 6:125. A copy of the regulation quoted above in effect in 2006 is attached for the Court's convenience as Appendix A. The regulation directing the use of updated need data is now 900 KAR 6:070, which states in §2(b) that the Cabinet "shall apply the latest criteria, inventories, and need analysis figures maintained by the Cabinet and the version of the State Health Plan in effect at the time of the public notice." Despite the slight change in wording it is clear that the law requires application of the "latest" need figures.

Each of them states in its introductory Technical Notes that "[a]ll certificate of need decisions shall be made using that version of the Plan in effect *on the date of the decision*, regardless of when the letter of intent or application was filed, or public hearing held" and that "in reviewing applications for certificates of need, *the latest published version* of the Cabinet Inventory of Kentucky Health Facilities, Health Services and Major Medical Equipment and published utilization reports shall be used" (emphasis added). (See Appendices B and C hereto, at pages iii and iv, Technical Notes 3 and 6 of each.)[4] The Plan has also consistently stated that all population statistics used in its calculations should be obtained from the Kentucky State Data Center.

Problems With the Calculation of Need Under the 2006 Plan

Application of these rules in the 2006 home health application review cycle was unusually difficult because of delays in publication of population data by KSDC. In fact, the Cabinet's inability to generate a correct need calculation in time for the parties to meet their prehearing filing deadlines, followed by the Hearing Officer's refusal to allow Professional and the Health Department to revise their evidence when the Cabinet's need calculation abruptly changed and made Family's application approvable, combined to produce the denial of due process that the Franklin Circuit Court recognized in its dispositive ruling in this

[4] On November 15, 2012, the Cabinet filed an amendment to the regulation to incorporate by reference the 2012 Update to the State Health Plan. 38 Ky.R. 1322 (2012). The relevant provisions of the Technical Notes and the criteria for home health services remain unchanged in the 2012 version.

case. See the May 15, 2009 Opinion and Order of the Franklin Circuit Court, hereafter, the "Original Circuit Court Decision," Appendix 5 to Appellant's Brief.

Of course, Family has not appealed that ruling; the issues here concern the Circuit Court's later instructions for the conduct of the hearing on remand. However, a discussion of the chronology of that denial of due process and the Circuit Court's ruling is necessary to understand the issues that will arise on remand of this case.

Family's application was filed in June, 2006. Pursuant to the rules of the Cabinet, it was placed on "public notice" in August. Professional and the Health Department, as affected parties to the application, requested a hearing to oppose the application.

On September 21, the Cabinet published notice in its Certificate of Need newsletter that Family's application was set for a hearing on October 25. At the time, the Cabinet had not yet published need calculations for 2006 because the necessary population figures were not yet available from the KSDC.

On October 2, the Cabinet published its first set of calculations under the Plan's home health formula showing a need for **negative 189** patients to be served in Whitley County, meaning Family's application was inconsistent with the State Health Plan and could not be approved. Shortly thereafter, Family, believing that Professional had made an error reporting its utilization, served discovery requests seeking to determine whether Professional had in fact made such a mistake. The same day, Professional filed a Motion for Summary Judgment,

believing that the unfavorable State Health Plan precluded approval of Family's application.

The next day, October 10, the Cabinet published recalculated numbers under the Plan, which showed a need of -20 in Whitley County, still well below the threshold of positive 125 that Family was required to show under the State Health Plan. Family's application was, therefore, still inconsistent with the Plan.

Meanwhile, Professional filed a Motion to Quash Family's discovery requests, arguing that the State Health Plan calculations were binding on the Cabinet. In response, Family argued its theory that Professional had misreported its 2005 utilization, causing errors in the calculation of need numbers under the State Health Plan.[5] Family responded to the Motion to Quash by explaining its suspicion that Professional had misreported its utilization data, which caused the Plan calculations to be inaccurate:

> It is undisputable that the calculation of "net need" [in the State Health Plan] is directly affected by the accuracy of the information submitted by [Professional] to the Cabinet.
>
> Family believes that the information provided to the Cabinet by [Professional] is inaccurate....
>
> ****

[5] Family speculated that Professional had under-reported the number of patients it served and that this caused an underestimation of need in Whitley County. Family was right about the first part and wrong about the second. As later developments proved, Professional had in fact made a mistake, but correction of the mistake resulted in a *reduction* of the need projection under the Plan, rather than the increase that Family had assumed. There is no suggestion the error was anything other than good faith, and indeed the fact that the reporting mistake harmed rather than helped Professional should rebut any such suggestion.

> [T]the critical element is how the Cabinet calculates average projected need. It does so based upon the information provided by [Professional]. If [Professional] provides inaccurate data, it can single handedly alter the Cabinet's calculation of projected need.

(Family's Response to Motion to Quash at pp. 1, 3.) So, Family itself first questioned the accuracy of the source utilization data used in the State Health Plan calculations, even before the Cabinet's serial publication of wildly varying Plan calculations suggested other problems with the numbers.

In a prehearing conference on October 13 (a Friday, the last business day before the parties' prehearing filings were due on Monday), the Hearing Officer overruled Professional's Motion to Quash and ordered it to produce the requested documents.

Monday, October 16 was the prehearing deadline set by 900 KAR 6:050 §16(8)(2006) for the parties to file their prehearing materials, including a list of witnesses and copies of all exhibits. The parties complied, with Appellees' prehearing materials based on their understanding that Family's application was inconsistent with the State Health Plan and could not be approved. Some time late the same day, however, the Cabinet posted on its website yet another set of calculations under the Plan which, for the first time, showed an "unmet need" number for Whitley County exceeding the 125 threshold required for Family to be deemed consistent with the Plan.

On October 18, Professional and Whitley County Home Health filed a Motion for Continuance of Hearing, requesting additional time to develop evidence in light of the new Plan numbers, including depositions of Cabinet

witnesses to examine the reasons for the ever-changing need figures and investigate the accuracy of the latest set. The same day, Professional agreed that, in fact, it had miscalculated its utilization in its report to the state, and submitted a corrected utilization report to the Cabinet.

On October 23, the Hearing Officer denied Professional's Motion for Continuance based on the belief that Appellees' desire to develop additional evidence was inconsistent with the mandatory prehearing filing requirements. This, of course, was the basis for the Circuit Court's subsequent finding that the hearing denied Appellees the right to due process.

Meanwhile, despite having opened the door to questioning the validity of the data used in the State Health Plan calculation, Family abandoned its effort to take discovery from Professional about its utilization. In fact, under cross-examination at the hearing, Larry Disney, Family's witness who prepared its application and provided a detailed analysis of utilization data in his written testimony, feigned ignorance of any previous questions raised by Family about the accuracy of the Plan figures. However, when asked about the importance of providers submitting accurate information to have accurate Plan calculations, Mr. Disney did concede that "the data is dependent upon each provider submitting it accurately." Transcript of October 25, 2006 Hearing at 51-56. Thereafter, Professional's witness Joyce Lewis testified (through introduction of her pre-filed written testimony) that in response to Family's discovery efforts, Professional received clarification from the Cabinet about how its utilization should have been reported, and had submitted an amended report just prior to the hearing. As

stated by Ms. Lewis – without any dispute from Family – the result of the amendment would be that "the need projections are substantially lower for the counties for which Professional provides services." [Professional Hearing Ex. 1 at ¶7].

The Hearing Officer's Findings of Fact, Conclusions of Law and Final Order (the "Hearing Report") approving Family's application was issued November 15. Among other points, the Hearing Officer found the application to be consistent with the State Health Plan, and also relied on the October 16 Plan calculations as evidence of "Need."

Pursuant to KRS 216B.050, allowing a party to request reconsideration of a certificate of need "for good cause shown," Appellees timely requested a reconsideration hearing, pointing out, among other issues, the known problem with the Plan's need figures. Following Professional's submission of an amended report, on December 8 – while the Request for Reconsideration was still pending – the Cabinet issued an official correction of its State Health Plan calculation, which reduced the Whitley County need projection from 184 to 158. See Appendix D hereto.[6] However, on December 20, the Hearing Officer denied the Request for

[6] Although the Hearing Officer refused to take notice of this change and granted Family's Motion to Strike a filing made by Professional to advise her of this change, it is clearly a matter of which she was required to take judicial notice pursuant to 900 KAR 6:050 §7 and the language of the Plan. Regardless, it is appropriate for the Courts to take judicial notice of the updated Plan numbers in connection with this review. KRE 201.

Reconsideration and let the approval stand, taking no notice of the change in the officially published numbers.

Thus, even before the evidence was closed, and certainly before the matter left the agency's hands, it was known that the State Health Plan need calculation that was first published on October 16, and which was relied on by the Hearing Officer in her Hearing Report, was inaccurate because it was based on inaccurate utilization data. What was not known, because Appellees were wrongfully denied the opportunity to develop their case, is the extent to which other data elements used in the October 16 calculations, or any calculation errors performed by the Cabinet, further affected the results.

The Franklin Circuit Court Finds a Due Process Violation

Professional and the Health Department appealed to Franklin Circuit Court. In its May 15, 2009 decision, the Court agreed that the Hearing Officer's adherence to the filing deadlines and refusal to allow Appellees a chance to develop a case in response to the October 16 change in Plan figures, was a denial of due process. The Court found:

> The SHP figures of need in Whitley County changed several times in October 2006; however, prior to the October 16 deadline, all figures published indicated there was insufficient need for expansion of home health services in Whitley County. This meant the Cabinet could not approve Family's CON application, no matter the other circumstances of the case. Some time on October 16, 2006, [the Health Department] and Professional's deadline to file exhibit and witness lists, the Cabinet posted new SHP figures, which for the first time indicated sufficient need in Whitley County to justify approval of Family's CON application (provided, of course, the other statutory and regulatory requirements were met). Family received notification of these changes on October 16, but the Plaintiffs did not. Indeed, the affected parties did not become aware

of the change in SHP numbers until October 17, 2006, one day after their filing deadline.

Original Circuit Court Decision at 2-3. The Court went on to hold:

> The new SHP figures greatly altered the parties' positions. While before the October 16 deadline, Family's application appeared to categorically require rejection, the unannounced update in the SHP numbers placed Family in a position previously unanticipated, and made it possible for their application to be approved. Less than a day's notice of drastic change in SHP numbers did not provide Plaintiffs sufficient opportunity to change their strategy and gather supporting evidence.... Accordingly, the Hearing Officer's decision violated due process requirements.

Original Circuit Court Decision at 5-6.

The Court concluded:

> [T]he Hearing Officer also prevented the parties from fully addressing the new, dramatically changed circumstances, and in doing so prevented the Plaintiffs from fully arguing the merits of each factor.... The Plaintiffs had had no reason to anticipate the need to persuade the Hearing Officer that the other factors weighed in favor of denying the application. In light of the exclusion of necessary evidence, the Cabinet's factual conclusion, that approving Family's CON was in the best interest of Whitley County and the Commonwealth, was arbitrary.

Original Circuit Court Decision at 10-11.

These rulings by Franklin Circuit Court – that the proceedings below denied Appellees due process and that the Cabinet's factual conclusions were arbitrary due to the refusal to allow Professional and the Health Department to develop a new case following the change in the State Health Plan – are final, as Family has not appealed them.

But the Circuit Court Improperly Limits the Scope of Hearing on Remand

The issues before the Court today arise from a second Opinion and Order issued September 2, 2009 (the "Reconsideration Decision," Appendix 5 to Brief of Appellant) to address Family's Motion to Alter, Amend or Vacate. In the Reconsideration Decision, the Court rejected Family's argument that Professional and the Health Department had failed to preserve the due process-related errors at the agency level. However, the Court accepted Family's argument that, on remand, the Plan figures in effect at the time of the hearing, October 2006, would govern the decision. Interpreting the language of 900 KAR 6:050 §7(1)(b) (providing that the Cabinet shall apply the latest calculations in effect "at the time of the Cabinet's decision") the Court, in its Reconsideration Decision, stated:

> The relevant decision here is the 2006 decision; the relevant issue is whether Family Home Health Care was entitled to a certificate of need under the State Health Plan and figures on the date of the original hearing. The hearing on remand should be limited to the scope of the October 25, 2006 hearing.

Reconsideration Decision at 3.

The Court of Appeals Reversed, Defining the Proper Scope on Remand

The Circuit Court incorrectly applied the law in limiting the hearing on remand "to the scope of the October 25, 2006 hearing" and also created a hopelessly unworkable proceeding. Appellees therefore appealed this ruling. In its June 10, 2011 Opinion Vacating and Remanding (the "Court of Appeals Decision," Appendix 1 to Brief of Appellant), the Court of Appeals vacated the Circuit Court's Reconsideration Decision and remanded the matter "without limiting the evidence to be considered on remand." The Court summarized the

various versions of 900 KAR 6:050 §7(1)(b) (Court of Appeals Decision at 8-9 and note 7), and language in the Technical Notes to the State Health Plan itself (*Id.* at 9), then concluded:

> To restrict the numbers on remand to the incorrect numbers used at the October 25, 2006 hearing would not effectuate justice. In addition, we find that the language of the applicable regulations (then 900 KAR 6:050; now 900 KAR 6:070) requires the use of the latest numbers available at the time of the decision. Moreover, as the appellants note, the State Health Plan itself requires the use of the latest numbers available at the time of the decision. This is in accord with previous decisions by our Courts upon reversal of analogous agency determinations.

Court of Appeals Decision at 12-13.

It should be noted that several passages in the Brief of Appellant suggest that Family is attempting, by sleight of hand, to reopen the Original Circuit Court Decision that it did not appeal. As evidenced by the passages quoted above, the Circuit Court Decision recognized Appellees' right to a rehearing on all of the Certificate of Need review criteria because the last-minute change in the Plan calculations, which made Family's application suddenly approvable, fundamentally changed the issues. Family did not appeal. Thus, the issues before this Court do not include which of the five review criteria are at issue on remand; all of them are relevant and must be considered on remand. The issue here is what set of Plan figures will apply and whether the evidence relating to the five review criteria will be subject to some artificial restriction based on what was, or what might have been, presented in the 2006 hearing.

ARGUMENT

I. THE COURT OF APPEALS DECISION FOLLOWS APPLICABLE LAW AND PROMOTES DUE PROCESS.

The Court of Appeals Decision properly applied the applicable law, recognizing that the explicit Certificate of Need regulation, as well the State Health Plan language that is incorporated by reference, provide a mandate that the latest need calculations shall be used in every certificate of need decision. The Court also correctly found that any other result "would not effectuate justice."

At all stages of this proceeding – when Family's application was filed, when it was placed on public notice, when the hearing was held, when the initial decision was issued, when the reconsideration request was denied, and throughout the intervening six years – the law has provided that every certificate of need applicant will at all times be subject to the latest criteria, inventories and need analysis figures maintained by the Cabinet. The Cabinet has declared through its regulations that this is its health policy, and Family has no claim to any different result. This is particularly so where, as here, Family itself initiated an attack on the data used in making the 2006 Plan calculations, which attack was eventually successful, and where the wild swings in the Plan calculations in October 2006 gave rise to other unanswered questions about the calculations.

In its Brief of Appellant, Family cites no cases to support its claim that 2006 State Health Plan calculations should apply on remand. It does cite several cases to support a general policy of restricting evidence on remand, none of which remotely supports application of the concept here. *Browning Manufacturing*

Division v. Paulus, 539 S.W.2d 296 (Ky. 1976), *Searcy v. Three Point Coal Co.*, Ky., 134 S.W.2d 228 (Ky. 1939), and *Broadway & Fourth Avenue Realty Co. v. Metcalfe*, 20 S.W.2d 988 (Ky. 1929) (cited on page 5 of the Brief of Appellant) are all workers' compensation cases that, if anything, support Appellees. In *Searcy*, the only issue was the Board's refusal to re-open a decision and hear evidence on a single contested issue after the Board had entered a decision. The Court found that refusal to be within the Board's discretion. In no way does *Searcy* support Family's proposed limitation of the evidence on remand, much less dictate the choice between past and current versions of the State Health Plan. In *Broadway & Fourth Avenue Realty Co.*, the Court held that a lower court order remanding a case to the agency for additional proof on the issue of whether an injury caused a worker disability to be permitted under the Workers' Compensation statute governing judicial review, where the employer had challenged the Court's authority to remand a case for additional evidence at all. It is not remotely relevant to the present dispute.

The *Browning* case supports Appellees' argument for an exploration of all facts on remand, unfettered by any conception of the date of the evidence. That was an appeal from a Circuit Court decision remanding a claim to the Board "for further proceedings including but not limited to the extent and duration" of the claimant's disability. The Supreme Court held that the remand was proper because "the facts have not been fully developed so as to adequately present the issues" and a remand would allow the facts to be "fully explored by the Board." 539 S.W.2d at 297.

Family places much reliance on the bromide that a remand order "cannot serve to improve a party's position while simultaneously placing the other party at a significant disadvantage" [Brief of Appellant at 6], citing *Getty v. Federal Savings & Loan Ins. Corp.*, 805 F.2d 1050, 1061 (D.C. Cir. 1986). But *Getty* actually supports Appellees here. In applying the stated principle to a case in which two bidders sought to purchase a struggling thrift institution from the Federal Savings and Loan Insurance Corp. (FSLIC), the Court did not instruct the agency on remand to ignore the passage of time. Rather, the Court expressly directed the agency to consider changed circumstances and allow updated bids from the litigants.

One basis for the Court's reversal in *Getty* was the FSLIC's refusal to seek a new bid from Getty when the other party had been allowed to re-bid. Even though, due to the urgent nature of the case, only a few *months* had passed from the agency decision to the Court's reversal, the Court recognized that the passage of time, the knowledge the parties gained about each other through litigation, and the possibility that the value of the target had increased, required that both parties start fresh, with new bids. The Court stated: "[s]ince we have concluded that under the changed circumstances it would be unfair to permit Getty to simply submit a new offer, we remand to FSLIC to allow both parties to submit new offers *as if the two were beginning the bidding afresh* [emphasis added]. 805 F.2d at 1062.

The Court of Appeals relied on longstanding Kentucky law that squarely supports an unrestricted remand hearing. In *Whittaker v. Southeastern Greyhound*

Lines, 234 S.W.2d 174, 314 Ky. 131 (Ky. 1950), the Court upheld the Circuit Court's reversal of an award of a certificate of convenience and necessity to operate a bus route in eastern Louisville, which was opposed by three existing companies. Finding that the Division of Motor Transportation had not properly analyzed the question of public necessity, the Court remanded for a fresh review of all pertinent information available at the time of remand, without any limitations relating to the date of the original hearing:

> Without prejudice to applicant's rights, we think the entire matter should be remanded to the Division for the purpose of having it reconsider the reasonable needs for additional service on this route; to consider any pending applications, proposed new schedules, or offers to furnish additional service[s] by [the existing carriers].

234 S.W.2d at 177-178. Similarly, in *Williams v. Cumberland Valley National Bank*, 569 S.W.2d 711 (Ky. 1978), where the Court reversed a 1973 decision of the Department of Banking and Securities to award a new bank charter, the Court directed the Franklin Circuit Court to "remand the proceedings to the Commissioner of Banking for a factual determination of whether there has been a significant change of conditions or circumstances since December, 1973 [when the erroneous charter was issued] to warrant the issuance of a charter." 569 S.W.2d at 714.

These decisions recognize the impossibility of conducting a remand hearing without some recognition of the passage of time. Here, any attempt to conduct a hearing based solely on what might have been introduced in October 2006 will inevitably lead to inconsistent and arbitrary rulings, and findings of fact that are belied by intervening developments.

The Brief of Appellant [at 6] goes on to argue that some limitations on remand hearings are necessary for jurisprudential reasons, to prevent interminable litigation and reversals. The cited case, *Phillips v. Charles*, 267 S.W.2d 748 (Ky. 1954), concerned a defendant who sought to amend an answer and introduce an entirely new defense into the case after the matter had been remanded. The Court upheld the Circuit Court's refusal to allow amendment of the answer to present a matter that the defendant "might, with the exercise of reasonable diligence, have brought forth the first time." *Id*. The case manifestly does *not* support limiting the evidence to be introduced in a remand hearing where a party who sought to develop evidence the first time around was denied the right to do so.[7]

To confuse the matter further, Family never makes clear what it thinks the Franklin Circuit Court's Reconsideration Decision means, or why the Court of Appeals Decision would place it at such a disadvantage. It should be noted that,

[7] Family's concern about interminable litigation seems to apply only to attempts by other parties to exercise their rights. When the State Health Plan changed abruptly in Family's favor in 2006, Family opposed Appellees' efforts to address the new developments while the matter was still before the agency, which might have averted the inevitable due process challenge in the courts that has now consumed six years. Later, when the Franklin Circuit Court ruled in Appellees' favor, Family moved for reconsideration seeking a limitation of the evidence on remand. When Appellees took the matter to the Court of Appeals, Family moved to dismiss it, arguing that the Circuit Court decision was not final and any appeal should be deferred until after the remand hearing. Following the Court of Appeals Decision, Family filed a Petition for Rehearing. And now, rather than accept the remand to the agency and give its best shot, Family has taken the matter up with this Court. At every turn, Family has availed itself of the chance to prevent or further delay Appellees' ability to have a full and fair hearing on the relevant issues. Family's argument about interminable litigation rings hollow.

while the formula set forth in the State Health Plan (as well as the requirement that the Cabinet apply the latest version in any decision) is law because it is incorporated by regulation, no particular set of numbers that is calculated by the Cabinet is actually incorporated into a regulation or subjected to the same regulatory scrutiny. And it is unquestioned that, on remand, both parties have the right to examine the figures used in any set of calculations for correctness, adherence to the Plan and whether or not the results are arbitrary. So, is Family's position that the *formula* in the 2006 State Health Plan should be controlling, that some particular set of 2006 data that was used to produce a calculation in 2006 should govern, or that current data should be plugged into the 2006 formula to produce a new set of calculations? Clearly Family believes that application of the need figures published on October 15 are most advantageous to it, but neither Family nor the Franklin Circuit Court has ever justified the reasoning behind treating "the October 25, 2006 hearing" date as the definitive moment in time to fix the parties' rights, particularly when the evidence presented at the hearing established the inaccuracy of one of the data elements.[8]

The Brief of Appellant also assumes, without explaining, that remand according to the Court of Appeals' ruling will disadvantage Family. In fact, Family goes so far as to state that it will "sweepingly eradicate a meaningful appeals

[8] Family's statement in its Brief of Appellant, at 12, that "[t]here is absolutely no evidence in the record that the numbers in the 2006 *State Health Plan* at the time of decision were 'wrong,'" blatantly ignores the fact that Family first questioned the utilization data used in the Plan calculations, and that the hearing evidence established that the utilization data were incorrect.

process as Family will be improperly precluded from even proceeding to a hearing." [Brief of Appellant at 6]. This hyperbolic statement is simply untrue. Presumably Family alludes to the fact that current calculations of need under the State Health Plan show a negative need, which would require disapproval of Family's application, but that is *exactly the same position Family was in prior to October 15, 2006,* when it had made the decision to proceed with its application, notwithstanding apparent inconsistency with the Plan's need calculation, based on its belief that the underlying utilization data were wrong. The right that the Circuit Court vindicated for Appellees includes the right to challenge the underlying calculation of need figures according to the Plan, and Family will have the same right if the Plan calculation is unhelpful to it on remand. Furthermore, because the Plan figures are updated whenever the Plan changes or when new source data is published, there is no basis to assume that the most current calculations will be unfavorable to Family when this matter is finally remanded.

As a matter of law, the Court of Appeals Decision does not place either party in a better or worse position than it was in 2006. What both parties were entitled to the first time around was a due process hearing in which they were free to present relevant evidence and have the Hearing Officer render a decision based on the record and the need figures in effect at the time of decision, and that is what the Court of Appeals properly ordered for the remand hearing.[9]

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[9] Family's argument also ignores the reality that the parties' relative positions can never be restored to 2006 conditions. Even though the 2006 decision violated Appellees' rights to due process, Family was allowed to proceed with (continued...)

II. FAMILY HAS NO VESTED RIGHT TO APPLICATION OF THE OCTOBER 2006 PLAN FIGURES.

The Brief of Appellant alleges that the Court of Appeals Decision will violate its due process rights. To the extent that Family may be arguing that it has a vested right in a particular set of Plan calculations, it is simply wrong.

In a case arising in Kentucky, the United States Supreme Court made clear that a litigant invoking a statutory process has no vested right to be free from changes in that process during a judicial appeal. *Western Union Telegraph Co. v. Louisville & Nashville Railroad Co.*, 258 U.S. 13, 42 S.Ct. 258, 66 L. Ed. 437 (1922), concerned Western Union Telegraph Company's right to condemn an easement on a railroad right of way. Pursuant to a Kentucky statute, the telegraph company sought and won a condemnation that was reversed on appeal. When the matter was remanded to the District Court, the law authorizing the condemnation had been repealed. On further appeal, the Supreme Court rejected the telegraph company's arguments that it had acquired a vested right to condemn the easement and held that the telegraph company's rights were determined by the law in effect at the time of remand.

(...continued)

implementing its project during the pendency of any appeals. Thus it has enjoyed the profits of operating a home health agency in Whitley County for the past six years. Family's argument makes no account for the advantage it has garnered from the unjust approval of its application, and in reality that is damage to Appellees that can never be undone by a remand order.

The question has not come up in any Kentucky certificate of need case, but the courts of New Jersey and New York have addressed similar issues. In *Saint Joseph's Hospital and Medical Center v. Finley*, 379 A.2d 467, 153 N.J. Super. 214 (1977),[10] a hospital was denied approval to establish a cardiac surgery program. While its appeal was pending, the agency adopted new guidelines under which the application would have been disapproved. The Court opined that, if the case were remanded, there would be no injustice in applying the new rules to the old application, because the Department of Health that promulgated them was "the agency charged by the Legislature with the regulation of health services" and, as such, had the "ever-continuing responsibility ... to administer the provisions of its governing statute in the public interest." 153 N.J. Super. at 223 (citations omitted). The Court discussed at some length the role of administrative agencies in promulgating rules that advance the legislative purpose, and eschewed a result that would force the agency to act "contrary to the existing legislation." *Id.* at 225 [citations omitted]. *See also, Anderson v. Blum,* 80 A.D. 2d 674, 436 N.Y.S. 2d 378 (S. Ct. App. Div. 1981) (discussing change in law during pendency of a certificate of need application and rejecting argument that applicant had vested right in prior law).

Similarly, in *Merry Heart Nursing & Convalescent Home, Inc. v. Dougherty*, 330 A.2d 370, 131 N.J. Super 412 (1974), the Court was asked to review a

[10] Copies of the decisions from state courts other than Kentucky's are attached hereto in Appendices E through G for the Court's convenience.

decision by an agency board that remanded a nursing home application to a hearing officer, with directions to consider an intervening change in the need inventory. The Court held that the "Commissioner would be derelict in his duty if he did not take into consideration the latest available information in passing on an application for a certificate of need and would be acting contrary to the very interest and purpose of the statute." The Court noted that this rule should prevail regardless of whether the changes in the statistics are favorable or unfavorable to the applicant. 131 N.J. Super. at 419, 330 A.2d at 373.

It is presumably in recognition of this same "ever-continuing responsibility" that the General Assembly requires the Cabinet to revise the State Health Plan every three years and to update it annually. The Cabinet has furthered the same policy by consistently providing in its regulations and every relevant version of the Plan that, regardless of the date of any other proceedings, a hearing officer should apply the latest need figures and inventories, *without regard to the date of the hearing*. It does no injury to Family's rights to apply on remand the law that has applied continuously since the date its application was first filed.

III. FAMILY'S ARGUMENT RELIES ON MISINTERPRETATION OF 900 KAR 6:050

Family's Brief of Appellant attempts to avoid the clear import of the Certificate of need law by suggesting that, under 900 KAR 6:050 §7(1)(b)(2006), the "plain meaning" of the word "decision" is narrow and can only refer to the decision rendered in November, 2006, after the hearing and before Appellees filed their Request for Reconsideration. There is no case, statute, regulation or

dictionary that supports this affront to everyday usage. "Decision" is not a lofty legal term with an obscure and narrow meaning. *Webster's Ninth New Collegiate Dictionary* defines "decision" as "a: the act or process of deciding; b: a determination arrived at after consideration: CONCLUSION."

KRS 216B.085(4) provides that "[a]ny decision of the Cabinet to issue or deny a certificate of need shall be based solely on the record established with regard to the matter." Clearly, a "decision" is what follows creation of a record, and any record created on remand will result in a new "decision." There is no way to reconcile the Circuit Court's statement that "[t]he relevant decision here is the 2006 decision" [Reconsideration Decision at 4] with this statute or common usage, and no basis to believe that a decision on remand is not a "decision" for purposes of 900 KAR 6:050.[11] The Court of Appeals Decision properly interpreted the regulations of the Cabinet to apply here.

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[11] Family and, now (belatedly) the Cabinet, seem to be saying that the plain meaning of the word "decision" is something that happens only once in the course of a certificate of need application. In addition to defying common usage, this view is at odds with the language of KRS chapter 216B and the Cabinet's own regulations. KRS chapter 216B uses the word "decision" freely in a variety of contexts. KRS 216B.090(2) refers to a "decision on reconsideration" and states that such "decision of the cabinet shall be final for purposes of judicial appeal." KRS 216B.115(2) uses the same terminology to refer to the result of a request for reconsideration. Use of the word "decision" in its natural sense is even more pervasive throughout the Cabinet's regulations. The Cabinet makes a "decision" on whether an application is subject to non-substantive review instead of formal review (900 KAR 6:080 §5); a "decision" on a request for reconsideration (id. at §10); a "decision" following a hearing on a request for an advisory opinion (900 KAR 6:105 §2); and a "decision" on an application for an emergency exception to the law (900 KAR 6:080). Presumably all these decisions are "decisions" within the meaning of 900 KAR 6:050; certainly it would make no sense that the most recent available data and planning policies would be inapplicable to any of these.

(continued...)

In its argument that the Certificate of Need law requires reversal of the Court of Appeals, Family asserts that there is a longstanding Cabinet position that supports its argument. This is simply not true and, notably, the Brief of Appellant fails to cite a single instance where the Cabinet has asserted this position, much less acted upon it. In fact, until today, throughout the history of this case, the Cabinet never filed a brief on this issue. It filed nothing in response to Family's Motion to Alter, Amend or Vacate in the Franklin Circuit Court, and did not file any briefs when this matter was pending before the Court of Appeals. The Cabinet waited until today, the due date of Appellees' brief, to weigh in with an eight-page brief supporting Family's position. It offers no authority, however, to support the premise that a decision on remand is not a "decision" within the meaning of 900 KAR 6:050, or explain why the emphatic policy of the state – as recognized in the statute, the regulation and every iteration of the State Health Plan – should not apply here.

Instead, the Cabinet offers a predictable mantra that its "interpretation" deserves deference. But again, it cites no instance where it has applied this interpretation. And, its interpretation violates the statutes, the regulation and the State Health Plan. The Cabinet's position is therefore incoherently arbitrary.

(...continued)

Nothing in the regulatory scheme suggests a reason to be selective about which decisions are based on the most current available information; clearly they all are intended to be.

First, as the Court observed in *Transportation Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. App. 2004) "it is axiomatic that failure of an administrative agency to follow its own rule or regulation generally is *per se* arbitrary and capricious." *See also Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991) (agency is bound by its regulations and interpretation is valid "only if it complies with the actual language of the regulation"); *Commonwealth ex rel. Meredith v. Frost*, 172 S.W.2d 905 (Ky. 1943) (agency must execute law "fairly and honestly," not arbitrarily). Second, it is plainly irrational and arbitrary to choose old data that is known to be stale or wrong over the latest, most accurate data. It makes no sense at all to use 2006 numbers when the passing of time proves those numbers to be unreliable.

With no citation to authority or evidence, the Cabinet predicts the sky is falling – the need to use "ever changing data" raises the spectre that "no health facilities or services are approved" and "the needs of citizens for health services are never met." Cabinet Brief, p. 7. These histrionics have no foundation in reality. The law compels the use of "changing" data so decisions are never made based on outdated, discredited information. The Cabinet offers no reason why an agency could not approve applications based on current data. Indeed, that is precisely what the agency is supposed to do, and what best serves the public interest.

IV. REGARDLESS OF WHICH PLAN OR NEED ANALYSIS APPLIES, ANY EFFORT TO RESTRICT THE SCOPE OF THE HEARING TO OCTOBER, 2006 WILL DENY DUE PROCESS AND PRODUCE ARBITRARY RESULTS.

The Court of Appeals' action in remanding "without limiting the evidence to be considered on remand" was correct, and essential to any hope of a fair hearing on remand. The Franklin Court's directive in its Reconsideration Decision that the evidence on remand should be "limited to the scope of the October 25, 2006 hearing" can be read to suggest that the evidence at the hearing should be restricted to what was available in October 2006.[12] This is a practical impossibility, in effect asking the parties to travel backward in time and ignore any intervening developments that would show the 2006 evidence to be true, untrue, or irrelevant.

There is no intellectually honest way to conduct a hearing in which the evidence is limited to what existed, or what was in issue, now six years in the past. Examples of the arbitrary distinctions that such a directive might require include:

- Population Data. The Plan figures in effect on October 26 were calculated using population "estimates" for prior years that were developed by the

[12] Much of the possible evidence described hereafter involves official state records, matters that are proper subjects of judicial notice, or matters that Appellees believe are required to be considered on remand pursuant to 900 KAR 6:050. *See also* KRE 201; *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 264 (Ky. App. 2005). To the extent the following discussion might be read to allege facts that are not in the record or subject to judicial notice, Appellants respectfully request that they be treated as hypotheticals to illustrate the evidentiary issues that will arise on remand. Nonetheless, Appellants believe the evidence described exists and can be presented on remand.

Cabinet, because the official population estimates from the KSDC (the official source of population data for the Plan), were not available. The Cabinet's figures also used a series of population projections, for 2007 population, to predict future need. In the six years since the hearing, the KSDC has published official estimates for all the years in question – 2004 through 2007 – that will prove or disprove the validity of the population figures used in October 16 Plan calculations. If the inaccuracy of the Plan figures from October 2006 can be readily ascertained, it will be arbitrary to apply those figures on remand without any examination of their mathematical accuracy. Furthermore, it might not even be possible to recreate what was known or knowable about the accuracy of the underlying data as of October 26, 2006, since even historical population estimates are revised and fine-tuned by the KSDC each year as new information provides more precision, and it is unknown whether old figures are maintained by KSDC in any official form after they are superseded by more complete, precise data.

- Changes in the Plan Formula. Since 2006, the Cabinet has changed the way it projects need in the Plan formula. See note 2, *infra*. Presumably, then, the Cabinet considers this change to produce a better predictor of need for home health in a county. Without regard to which Plan officially applies, the new Plan formula is, at minimum, relevant under the "Need and Accessibility" criterion, because it evidences the Cabinet's blessing of a different approach as a predictor of need. It has always been accepted that certificate of need litigants may present differing formulas and approaches for analyzing need, so it would be arbitrary to exclude such evidence simply because the date of the

Cabinet's adoption was after 2006. However, the Circuit Court's Reconsideration Decision might be read to suggest such as result.

- Actual Utilization. According to the Plan figures in effect in October, 2006, Whitley County was projected to have 1924 home health patients in 2007. The actual number of patients served in Whitley County was significantly lower, 1606,[13] even with Family operating under its flawed certificate of need most of the year. Thus, actual experience was significantly less than projected by the Plan. This would unquestionably be relevant evidence that should not be excluded based on an artificial evidentiary cutoff date. This is particularly true if, as Appellees believe, the discrepancy between what was predicted in 2006 and what actually occurred can be tied in part to mathematical flaws in the population data used by the Cabinet in its October 15, 2006 calculations.

- Changes in the Applicant. In its 2006 application, Family devoted significant attention to the benefits and experience of the "Family Home Health" group of providers. However, the "Family Home Health" corporate identity has been replaced by another company, Amedisys, and the company that is a party to this appeal now does business as Amedisys rather than Family Home Health. (See Appendix I hereto, containing copies of state records reflecting the change in Appellant's assumed name.) Although the entity, Comprehensive Home

[13] The source of this information is the 2007 Kentucky Annual Home Health Services Report. A copy of the relevant report is attached hereto as Appendix H. As set forth in note 12, *infra*, Appellees believe this is a proper subject for judicial notice by this Court but in any event should be admissible on remand.

Healthcare Services, Inc., still exists, the affiliation with Family Home Health, which was a significant theme its 2006 application, does not. Would a hearing "limited to the scope of the October 25, 2006 hearing" require the applicant to behave as if it is still affiliated with Family? Certainly, the application it submitted in 2006 is no longer accurate, and the change in ownership might very well require a new line-up of witnesses for the applicant. Thus, a hearing that is limited to conditions as they existed in 2006 may be impossible for Family as well as for Appellees.

- Other Criteria. Family's 2006 application contained numerous financial projections and statements of intent – for example, predictions about number of patients to be served, referral sources, and profitability. If, in the six years it has operated in Whitley County, it has not done what it promised to do, that should be admissible. Certainly actual experience is more probative than an applicant's statement of intent or a challenger's attempt to probe the sincerity of it. And if Family has done what it said it would do, then it should be allowed to take advantage of whatever credibility that would give it on remand.

This is just a sampling of the issues Appellees expect on remand if the Circuit Court's Reconsideration Decision concerning the scope of the remand hearing is reinstated. In a case that has been remanded because the agency denied Appellees the opportunity to develop a case, it seems particularly inappropriate to set up a remand hearing for such arbitrary and unwieldy rules about the scope of the evidence.

The Original Circuit Court Decision turned on recognition that Appellees should have been given a full opportunity to develop a case on all review criteria,

including the October 16 Plan figures, in the 2006 proceeding. The evidence Appellees hoped to develop, but were not given the opportunity to, would have involved an analysis of the October 16 Plan figures and their mathematical accuracy, in addition to proof of the applicant's inconsistency with the other review criteria. Notwithstanding the Circuit Court's recognition of Appellees' rights to a full and fair hearing, its Reconsideration Decision can be read to take away the rights Appellees believed had been vindicated, and the Court of Appeals was correct in vacating it.

V. ANY DIFFERENCES BETWEEN THIS CASE AND THE LAUREL COUNTY CASE DO NOT WARRANT A DIFFERENT RESULT.

Family's Brief of Appellant argues that the Court of Appeals mistakenly relied on another Court of Appeals decision in a parallel case, *Family Home Health Care, Inc. v. St. Joseph Health System, Inc. d/b/a Seton Home Health*, No. 2008-CA-001790-MR (Ky. App. Aug. 7, 2009)(*unpublished decision)* (the "Laurel County Decision") (copy attached hereto as Appendix J). That case involved an application by a sister agency to Family that was approved to expand into Laurel County, in the same hearing cycle and with a similarly serpentine history of State Health Plan calculations. Professional, which also operates in Laurel County, was an affected person and, along with Seton Home Health, successfully appealed the approval of the Family Home Health for Laurel County.

Just as in the instant case, the applicant in the Laurel County case was approved following the last-minute changes in the State Health Plan that converted the application from not-approvable to approvable, when it was too

late for the affected parties to amend their pre-hearing filings. Just as in the instant case, the Hearing Officer denied the affected parties the opportunity to develop a case in light of the new developments. Just as in this case, the Laurel County need figures changed significantly on December 8, while a decision was pending on the affected parties' motion for reconsideration. And, just as in this case, the Hearing Officer refused to consider any calculations of need under the Plan other than the ones released on October 15.

On appeal, the Court of Appeals agreed with the Franklin Circuit Court that the result was a denial of due process to the affected parties, and quoted extensively from the Franklin Circuit Court's opinion:

> Applicants for certificates of need have in the past challenged the validity of need figures in the SHP regulation by presenting evidence in this issue during the administrative hearing in anticipation of an appeal. This Court has previously invalidated SHP need methodologies either because the figures used in the calculation were inaccurate or because the statistical method chosen was found to be an invalid method for determining need for the particular nursing home at issue. [Footnote omitted]
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> * * *
>
> In the case at bar, the Cabinet's publication of several corrections to the need assessment for home health services in a relatively short period of time is in effect an admission that the previous figures were incorrect. The numerous corrections also lead to the inescapable conclusion that each party had a rational basis for wanting to present evidence testing the validity of the most recent published figures.

Laurel County Decision at 8-9 (quoting Franklin Circuit Court opinion, in *Marymount Medical Center, Inc. v. Commonwealth of Kentucky Cabinet for Health and Family Services*, No. 07-CI-00061 (May 27, 2008)). The Court there went on

to note that the amendment of need figures yet again on December 8, while a motion for reconsideration was pending, "put the hearing officer on notice that the factors relied upon in reaching her earlier decision to approve Family's application were incorrect." *Id.* at 10-11.

The Court of Appeals Decision [at 12] in this case discussed both the similarities to and the differences from the Laurel County Decision, reasoning:

> Although new State Health Plan numbers were released after the Cabinet's decision in this case, they were not so low as to preclude the grant of a CON to Family. Although the figures were consistent with the State Health Plan in this case, the parallel between *St. Joseph* and the present case is obvious. Even though the later-published State Health Plan numbers in this case would not necessarily have resulted in a different decision with respect to the CON, the numbers relied upon were still incorrect. As previously stated, sufficient State Health Plan numbers for unmet need do not guarantee that a CON will be granted, as the hearing officer must consider other statutory factors as well.

Thus, contrary to Family's assertions, the Court of Appeals here did not "overlook" distinguishing factors between the two cases [Brief of Appellant at 10, 11]; it expressly considered them. As the Court recognized, the December 8 calculations under the Plan showed that the October 15 figures were wrong. Even if the December 8 figures would allow an approval under the Plan, approval would not be automatic, and would warrant further review under all review criteria. At best, then, Family is asking this Court to reach a different result than the Court of Appeals, but offers no reason to do so.

CONCLUSION

For all the foregoing reasons, Appellees respectfully request the Court to affirm the decision of the Court of Appeals in this matter.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS