STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VNA HOSPICE OF INDIAN RIVER COUNTY, INC.,

Petitioner,

vs. Case No. 22-0050RU

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

BREVARD HMA HOSPICE, LLC; VITAS HEALTHCARE CORPORATION OF FLORIDA; AND CONTINUUM HOSPICE, LLC,

Intervenors.
_____/

FINAL ORDER

Pursuant to notice, the final hearing in this matter was conducted on February 7, 2022, via Zoom conference before Robert S. Cohen, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Agency for Health Care Administration ("Agency" or "AHCA") has established an unadopted and invalid rule in violation of section 120.54(1)(a), Florida Statutes, regarding Certificate of Need ("CON") applications filed in single hospice provider service areas where there is lack of published numeric need for a new hospice program.

PRELIMINARY STATEMENT

On January 5, 2022, VNA Hospice of Indian River County, Inc. ("VNA"), filed a Petition Challenging Unadopted and Invalid Rules ("Petition"), alleging that certain statements of the Agency constituted unpromulgated and invalid rules in violation of sections 120.56(1) and 120.56(4). An Order of Assignment was issued on January 7, 2022, assigning the undersigned to this case. On January 10, 2022, a Notice of Hearing was issued for the hearing to be held on February 2, 2022.

On January 13, 2022, Brevard HMA Hospice, LLC ("Brevard HMA"), filed an Unopposed Motion to Intervene, which was granted on January 14, 2022. Brevard HMA also filed a notice on behalf of the parties agreeing to commence the final hearing on February 7, 2022.

On January 14, 2022, the undersigned issued an Order Rescheduling Hearing by Zoom Conference to commence on February 7, 2022. On that same date, Brevard HMA filed a Motion to Dismiss VNA's Petition. VNA filed a response in opposition on January 21, 2022. The undersigned did not rule on the motion prior to the commencement of the final hearing.

On January 20, 2022, VITAS Healthcare Corporation of Florida ("VITAS") filed an Unopposed Motion to Intervene, which was granted on the same day.

On January 27, 2022, Continuum Care of Sarasota, LLC ("Continuum"), filed a Motion to Intervene for Limited Purpose of Preserving Objection to Jurisdiction, which was granted on the same day.

On January 28, 2022, the Agency filed a Motion for Summary Final Order and Incorporated Memorandum of Law. VNA filed its response in opposition to the Agency's Motion for Summary Final Order on February 4, 2022. The

undersigned did not rule on the motion prior to the commencement of the final hearing.

On February 4, 2022, the parties filed their Joint Pre-hearing Stipulation, which included stipulated facts. To the extent relevant, those stipulated facts have been incorporated in this Final Order.

On February 3, 2022, VNA filed a Motion for Official Recognition of certain documents. On February 4, 2022, VNA filed a Motion in Limine. Brevard HMA filed responses in opposition to both motions on February 7, 2022.

There were four pending motions that were addressed at final hearing: (1) Brevard HMA's Motion to Dismiss; (2) AHCA's Motion for Summary Final Order; (3) VNA's Motion in Limine; and (4) VNA's Motion for Official Recognition. VNA's Motion in Limine sought to exclude nonlawyers from offering legal opinions. The undersigned did not rule on the first two motions and permitted the parties to address the issues during their opening statements. The undersigned denied VNA's Motion in Limine. Based upon the ruling in this matter, the motions to dismiss and for summary final order will have been addressed and are, therefore, moot since this Order will dispose of the issues of the case. The undersigned previously made it clear that nonlawyers would not be permitted to provide legal conclusions but would be permitted to give their understanding, as expert witnesses, as to what the various applicable statutes and rules mean to them in providing professional advice to their clients. As to VNA's Motion for Official Recognition, the undersigned will take official recognition of the items referenced in the February 3, 2022, motion and has considered them, to the extent relevant to the undersigned's conclusions of law and ruling.

The final hearing convened on February 7, 2022. VNA presented the testimony of James McLemore, unit supervisor, CON, of the Agency, who was accepted as an expert in CON review and health planning, and David Levitt, managing partner of Levitt Healthcare Affiliates, accepted as an expert in health planning. The Agency also presented the testimony of James McLemore. The Agency called no other witnesses. Brevard HMA presented the testimony of Patricia Greenberg, accepted as an expert in health planning and hospice planning. Continuum did not call any witnesses or introduce any exhibits. VITAS also did not call any witnesses or introduce any exhibits.

VNA Exhibits 1 through 12, 14, 17, 18, and 27 were admitted into evidence without objection. The Agency's Exhibits 1 through 15 were admitted into evidence without objection. Brevard HMA Exhibits 1 through 7D and 15 through 19 were received in evidence. Brevard HMA's Exhibits 7E through 7H were not admitted into evidence, but were proffered by counsel.

Any references to the Florida Statutes are to the 2021 codification, unless otherwise stated.

FINDINGS OF FACT

The Parties

1. The Agency is Florida's health planning agency, charged with determining whether CON applications should be approved or denied.

2. VNA is a licensed hospice program serving Hospice Service Area 9A, Indian River County.

3. Continuum is a licensed hospice program serving Hospice Service Area 8D, Sarasota County.

4. Brevard HMA filed CON Application Number 10695 to establish a new hospice program in Hospice Service Area 9A, Indian River County, which was preliminarily approved by the Agency.

5. VITAS filed CON Application Number 10655 to establish a new hospice program in Hospice Service Area 8C, Glades, Hendry, and Lee Counties, which was preliminarily approved by the Agency.

The CON Program for Hospice

6. Under Florida law, a CON must be obtained before a new hospice program may be established and licensed.

7. A CON is "a written statement issued by the agency evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility or hospice." § 408.032(3), Fla. Stat.

8. In order to determine whether there is a community need for a new hospice program, the Agency is tasked with establishing, by rule, uniform need methodologies for health services which require a CON, including hospice services. § 408.034(3), Fla. Stat. "In developing uniform need methodologies, the agency shall, at a minimum, consider the demographic characteristics of the population, the health status of the population, service use patterns, standards and trends, geographic accessibility, and market economics." *Id*. Additionally, for hospice programs, "[t]he formula on which the certificate of need is based shall discourage regional monopolies and promote competition." § 408.043(1), Fla. Stat. There is no definition of "regional monopoly" in Florida Statutes.

9. The Florida Legislature has further directed the Agency to "provide for [CON] applications to be submitted on a timetable or cycle basis" and "provide for all completed applications pertaining to similar types of services or facilities affecting the same service district to be considered in relation to each other no less often than annually." § 408.039(1), Fla. Stat. These cycles are commonly referred to as "batching cycles." The Agency has adopted two

batching cycles per year for hospice programs. Fla. Admin. Code R. 59C-1.008(1)(g).

10. In reviewing CON applications, including hospice CON applications, the Agency shall consider certain enumerated criteria set forth in section 408.035, Florida Statutes. Additionally, pursuant to section 408.043(1), "[w]hen an application is made for a certificate of need to establish or to expand a hospice, the need for such hospice shall be determined on the basis of the need for and availability of hospice services in the community."

11. Finally, for purposes of health planning and the CON program, the Florida Legislature has divided the state into 11 health service planning districts. § 408.032(5), Fla. Stat. District 9, for example, is comprised of Indian River, Okeechobee, St. Lucie, Martin, and Palm Beach Counties. § 408.032(5), Fla. Stat.

12. Florida Administrative Code Rule 59C-1.0355 is known as the "Hospice Rule," by which the Agency has further divided the 11 health service planning districts established by the Florida Legislature into 27 hospice service areas. Fla. Admin. Code R. 59C-1.0355(2)(k). By example, under the Hospice Rule, District 9 comprises Service Areas 9A, 9B, and 9C. Fla. Admin. Code R. 59C-1.0355(2)(k)23.-25. Service Area 9A consists of Indian River County; Service Area 9B consists of Martin, Okeechobee, and St. Lucie Counties; and Service Area 9C consists of Palm Beach County. *Id.* Some service areas consist of just one county under the Hospice Rule.

13. Paragraph (3) of the Hospice Rule, titled "General Provisions," governs "Quality of Care" and "Conformance with Statutory Review Criteria." Fla. Admin. Code R. 59C-1.0355(3)(a)-(b). The second sentence of subparagraph (3)(b) provides as follows:

> Applications to establish a new Hospice program shall not be approved in the absence of a numeric need indicated by the formula in paragraph (4)(a) of this rule, unless other criteria in this rule and in

> Sections 408.035 and 408.043(1), F.S., outweigh the lack of a numeric need.

14. The Agency's formula for calculating need for hospice services is set forth in subparagraph (4)(a) of the Hospice Rule, "Numeric Need for a New Hospice Program." The formula set forth in subparagraph (4)(a) is the formula referenced in the second sentence of section 408.043(1). The Agency uses the formula codified in subparagraph (4)(a) to calculate numeric need for hospice programs for each of the 27 service areas. *S*ee *The Hospice of the Fla. Suncoast, Inc. v. Ag. for Health Care Admin.*, Case No. 21-0889CON, RO at 8 (Fla. DOAH June 16, 2021; Fla. AHCA July 22, 2021).

15. Under the formula, "[n]umeric need for an additional Hospice program is demonstrated if the projected number of unserved patients [in a service area] who would elect a Hospice program is 350 or greater." Fla. Admin. Code R. 59C-1.0355(4)(a). Thus, if the formula calculates a projected number of unserved patients in a particular service area of 350 or more, there is numeric need for a new hospice program. However, if the formula calculates a projected number of unserved patients of less than 350, there is no numeric need for a new hospice program.

16. Under the Hospice Rule, even if the formula calculates numeric need, "the Agency shall not normally approve a new Hospice program for a service area unless each Hospice program serving that area has been licensed and operational for at least 2 years as of 3 weeks prior to publication of the Fixed Need Pool." Fla. Admin. Code R. 59C-1.0355(4)(b). Likewise, even if the formula calculates numeric need, "the Agency shall not normally approve another Hospice program for any service area that has an approved Hospice program that is not yet licensed." Fla. Admin. Code R. 59C-1.0355(4)(c). These are the only "not normal" circumstances codified in the Hospice Rule.

17. Subparagraph (4)(d) of the Hospice Rule sets forth the limited circumstances under which a hospice CON may be awarded even if the

formula calculates no numeric need and one of the not normal circumstances referenced above are not present:

> (d) Approval Under Special Circumstances. In the absence of numeric need identified in paragraph (4)(a), the applicant must demonstrate that circumstances exist to justify the approval of a new Hospice. Evidence submitted by the applicant must document one or more of the following:
>
> 1. That a specific terminally ill population is not being served.
>
> 2. That a county or counties within the service area of a licensed Hospice program are not being served.

Historically, these two special circumstances have been interpreted to include underservice—as opposed to a complete lack of service—to a specific terminally ill population or county.

18. Therefore, as agreed to by each of the experts testifying in this proceeding (Mr. McLemore, Mr. Levitt, and Ms. Greenberg), in the absence of a calculated numeric need, the rule requires that an application shall not be approved unless the following three sets of criteria outweigh the lack of numeric need: (i) the "other criteria in this Rule"; (ii) the criteria in section 408.035; and (iii) the criteria in section 408.043(1).

19. The "other criteria" in rule 59C-1.0355(3)(b) establish a variety of considerations including: the "Special Circumstances" provisions to demonstrate a population group or county that is underserved; an applicant's commitment to serve populations with unmet needs; a commitment to serve patients without primary caregivers at home, the homeless, and patients with AIDS; establishing a physical presence in an underserved county; obtaining letters of support from health organizations, social service organizations and other entities in the service area; and the applicant's overall description of the programs and services that will be offered.

20. As recently as last year, the Agency made clear that an applicant seeking a hospice CON in the absence of published numeric need must demonstrate one of the two special circumstances set forth in subparagraph (4)(a) in order to be approved. *See Tidewell Hospice, Inc. v. Ag. for Health Care Admin. & Continuum Care of Sarasota, LLC*, Case No. 20-1712CON (Fla. DOAH Jan. 13, 2021), modified and reversed on other grounds, Case No. 2020004566 (Fla. AHCA Mar. 9, 2021) ("Continuum is required by rule 59C-1.0355(4)(d) to demonstrate: 1. that a specific terminally ill population is not being served; or 2. that a county or counties in a service area are not being served."); *see also Odyssey Healthcare of Collier Cnty., Inc. v. Ag. for Health Care Admin.*, Case No. 10-1605CON (Fla. DOAH Nov. 30, 2010; Fla. AHCA Feb. 2, 2011) (explaining that a CON applicant for a new hospice program seeking approval in the absence of numeric need must document the existence of one of those two special circumstances in rule 59C-1.0355(4)(d)).

21. There are ten statutory criteria in section 408.035, and eight of them are relevant to consideration of hospice CON applications including:

> (1) The need for the health care facilities being proposed.
>
> (2) The availability, quality of care, accessibility, and extent of utilization of existing health care facilities in the service district of the applicant.
>
> (3) The ability of the applicant to provide quality of care and the applicant's record of providing quality of care.
>
> (4) The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation.
>
> (5) The extent to which the proposed services will enhance access to health care for residents of the service district.

> (6) The immediate and long-term financial feasibility of the proposal.
>
> (7) The extent to which the proposal will foster competition that promotes quality and cost-effectiveness.
>
> (8) The costs and methods of the proposed construction, including the costs and methods of energy provision and the availability of alternative, less costly, or more effective methods of construction [typically, not at issue with hospice service proposals].
>
> (9) The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent.
>
> (10) The applicant's designation as a Gold Seal Program nursing facility pursuant to s. 400.235 [also, not at issue in a hospice CON proposal][.]

22. The hospice special provisions criteria in section 408.043(1) states, in pertinent part, as follows:

> (1) HOSPICES.--When an application is made for a certificate of need to establish or to expand a hospice, the need for such hospice shall be determined on the basis of the need for and availability of hospice services in the community. The formula on which the certificate of need is based shall discourage regional monopolies and promote competition.

23. The use of the term "regional monopolies" in the above-quoted statutory provision is at the heart of this challenge brought by Petitioner. Through his testimony, Mr. McLemore made it clear that he personally disfavors monopolies in any type of health care being provided. He noted that the hospice statute reads that the "[hospice] formula on which the certificate of need [sic] shall discourage regional monopolies and promote competition." He testified that, "in his personal view, certainly, it's failed miserably."

24. Mr. McLemore confirmed that the Agency does not have a definition of a "regional monopoly" or of a "single service area monopoly." He further went on to say that, "if you look it up in the dictionary … a monopoly is … you only got one provider for something." While he concedes that "you can't just come in and say, well, gee, there is a monopoly here, I need to be approved. The applicant has to demonstrate that there is [sic] other criteria met."

25. Even if he were to recommend approval, in whole or in part, because of his conclusion there was a monopoly in the service area, Mr. McLemore concedes that his word is not final; his recommendation must be approved by an assistant secretary or the secretary of the Agency before such recommendation is issued. Moreover, since the First District Court of Appeal issued its decision in *Compassionate Care Hospice of the Gulf Coast, Inc. v. Agency for Health Care Administration*, 247 So. 3d 99 (2018), he testified that the existence of a monopoly is not, in and of itself, sufficient to approve a hospice CON special circumstances application.

Unadopted Rule Allegations

26. In its Petition, VNA alleges that, rather than applying the statutory and rule criteria discussed above, the Agency follows an unadopted rule that is not contained within any statute or properly promulgated rule. The result of the Agency's alleged reliance on an unadopted rule is that there may be specific incidents of the Agency automatically approving a hospice CON application in a service area that has only one existing hospice provider, without regard to any statutory criteria or the rule provisions set forth in rule 59C-1.0355.

27. Brevard HMA points to seven alternate versions of unadopted rule statements in VNA's Petition:

> A. First Statement: In a single provider hospice service area where the Agency predicts no numeric need, any CON application will be approved if it alleges a lack of competition.

B. Second Statement: In a single provider hospice service area where the Agency predicts no numeric need, any CON application will be approved if it alleges a lack of competition, regardless of whether competition would promote quality or cost-effectiveness.

C. Third Statement: In a single provider hospice service area where the Agency predicts no numeric need, any CON application will be approved if it alleges a lack of competition and any service deficiency, no matter how small.

D. Fourth Statement: When reviewing applications filed in single provider service areas where no numeric need has been predicted, the Agency must consider the discouragement of regional monopolies and promotion of competition" as a review criterion, which may outweigh all other criteria.

E. Fifth Statement: A hospice application for a single provider service area need not demonstrate a special circumstance sufficient to overcome a presumption of no need in order to have the remainder of the statutory review criteria applied by the Agency.

F. Sixth Statement: Competition alone may serve as a sufficient basis to approve an application for a single provider service area.

G. Seventh Statement: The presence of a single existing provider in any one hospice service area, constitutes a regional monopoly.

28. VNA's expert, Mr. Levitt, concedes that none of the seven statements alleged in the Petition are contained in any written communications.

29. The seven State Agency Action Reports ("SAARs") received in evidence from VNA do not contain any statements to indicate the Agency used any of the alleged unadopted rule statements as a basis for the Agency's preliminary decisions in hospice service areas with only a single hospice provider. Each of

the SAARs includes a summary of the information contained in the CON application, and a finding that the preliminary approval was based upon a demonstration by the applicant of underserved populations and an overall weighing and balancing of the CON statutory and rule review criteria.

30. Based upon testimony from Mr. Levitt and Ms. Greenberg, the alleged seven statements also cannot be found in any final order, recommended order, memorandum, email, or other written communications of the Agency.

31. VNA asserts that the unadopted rule might not be any of the seven specific statements alleged, but something similar to those statements, or, perhaps, that the statements might be qualified or have other caveats based on consideration of some of the statutory criteria. Thus the "text" of the alleged unadopted rule is somewhat nebulous, without clear parameters, but generally might be described that AHCA places too much weight on issues of "competition" and favors approval of CON applications seeking to introduce a new competing hospice provider in markets where currently only one provider exists.

32. Mr. Levitt agreed that the Agency is free to look at competition and whether competition will enhance the quality of care under the CON review criteria. In short, he conceded, the Agency can consider the number of hospices and whether there are improvements that might be had from adding a new hospice provider in a service area.

33. Moreover, no evidence was presented that the alleged unadopted rule statements are contained in any verbal communications from any AHCA representative or employee with authority to issue policy pronouncements for the Agency. Mr. McLemore testified that, as supervisor of the CON unit, he has never been informed by anyone at AHCA to follow any unadopted policies, including approval of an application based on a regional monopoly without any consideration of whether there is an underserved population. He testified he has never based his recommendations for any preliminary CON decision on any of VNA's alleged seven statements of unadopted rules.

34. Similarly, Ms. Greenberg testified that she has met with Agency representatives in advance of filing CON applications, including applications in service areas with a single existing hospice provider, and she has never been informed of any unadopted policy or rules involving approval of CON applications in service areas with a sole existing provider.

Prior Hospice CON Decisions

35. Petitioner placed great emphasis on the Agency's alleged change in position regarding hospice CON decisions prior to 2019 and post-2019. SAARs were admitted into evidence to examine whether the Agency changed its way of evaluating hospice applications when Mr. McLemore came back to head the CON unit in August 2019. During the ten-year period (2009 to 2019) prior to Mr. McLemore's return, Petitioner analyzed the Agency decisions in situations where there was no published numeric need and the service area was served by only one provider. The service areas at issue in those cases were 5B (Pinellas County), 3D (Hernando County), 6C (Manatee County), and 8D (Sarasota County).

36. The conclusion drawn was that prior to 2019, the Agency generally denied hospice CON applications filed in service areas in the absence of published numeric need. Between October 2009 and October 2019, the Agency preliminarily approved just two hospice CON applications filed in service areas served by a single hospice provider in the absence of published need. After formal administrative hearings, both applications were denied by final agency action.

37. As noted above, the initial approval or denial of a CON application is set forth in a SAAR. § 408.039(4)(b), Fla. Stat. The SAARs prepared by the CON unit typically do not contain detailed reports of the Agency's findings or opinions regarding filed applications. Instead, the SAARs largely regurgitate the applicant or applicant's arguments for approval. However, in recent years, the Agency has begun inserting italicized language at the end of a SAAR to identify the arguments raised by an applicant with which the

Agency agreed and why, in a comparative review, the Agency selected one applicant over others.

38. In the October 2019 Hospice Batching Cycle, Continuum filed a CON application to establish a new hospice program in Service Area 8D, Sarasota County, in the absence of published numeric need. At the time, Sarasota County was served by a single hospice provider. Strikingly similar to Compassionate Care's argument just several years prior, Continuum argued in favor of the approval of its application based, in part, on the existing provider's alleged "regional monopoly." In fact, the special circumstances alleged by Continuum were nearly identical to those alleged by Compassionate Care just a few years before. However, this time, the Agency preliminarily approved the application. As indicated in the SAAR, the Agency preliminarily approved the application, in part, due to the "support for a second hospice provider from many Sarasota County healthcare providers."

39. "In part" are the operative words here. Following a hearing involving disputed issues of material fact before DOAH, an ALJ issued a Recommended Order recommending the Agency deny the CON application because the applicant failed to prove the existence of one of the special circumstances set forth in subparagraph (4)(d) of the Hospice Rule. *Tidewell*, Case No. 20-1712CON, RO at 53. In its Final Order, the Agency rejected the ALJ's recommendation and granted the CON to Continuum based, in part, "because Tidewell has a monopoly in Service Area 8D." *Id.*, Case No. 2020004566, FO at 8. The appeal of that Final Order is currently pending before the Second District Court of Appeal.

40. Much was made at hearing in this matter, as well as in VNA's Proposed Final Order, about Mr. McLemore's testimony at deposition in the *Tidewell* case. Mr. McLemore candidly testified that he personally believed that there is "nowhere in America where people should have not have [sic] the opportunity to select a healthcare provider of their choice." This statement, no matter how noble, was his opinion, not the articulated position

of the Agency in determining whether to approve or deny CON applications for hospice services. Moreover, Mr. McLemore testified explicitly in the Continuum CON case that the Agency has no policy in place to require a minimum number of hospice providers, and that the Agency had no policy that was not formally adopted in a rule. The operative words here were that the application was granted, "in part," because of a regional monopoly. The CON was also approved, *in part*, because of other reasons, namely, the conclusion of the Agency (and, to a lesser extent, of the ALJ) that special circumstances existed to approve the CON in the absence of numeric need. In its Final Order, the Agency specifically stated that "… Continuum of Sarasota demonstrated that Tidewell is not serving the residents of Sarasota County. As a result, … Continuum of Sarasota's CON application can be approved based on the existence of 'not normal' circumstances alone." Regardless of how the Second District Court of Appeal decides the *Tidewell* appeal, the Agency did not circumvent the CON process by approving Continuum's CON application based solely upon its finding that a regional monopoly existed in the service area.

41. The conclusion to be reached by analysis of *Tidewell* is that, while "discouraging regional monopolies" has been articulated in section 408.043 as a justification for approval of hospice CONs, nowhere does that statute or the Agency's rules state or permit the Agency to approve a CON application solely on the fact that there is only one hospice provider in a single hospice service area.

42. In his testimony in the Affinity Care of Manatee County, LLC ("Affinity"), CON case, offered as an exhibit at this hearing, Mr. McLemore again confirmed multiple factors under the CON review criteria that the Agency considered in reaching its prior decision in the Final Order in the Continuum CON case, including identifying underserved populations, plans to improve access, proposing services not currently offered, and documenting extensive support from community health care providers.

43. In his testimony in the Brevard HMA CON case, Mr. McLemore testified that the preliminary decision in the Brevard HMA CON case was based upon demonstration of underserved populations and that the Agency did not cite to a monopoly on service as being a reason for approval. Mr. McLemore testified that even if a monopoly or regional monopoly is shown, an applicant would still have to prove other circumstances to justify an award of a CON in the absence of numeric need. In his deposition from that case, he testified, "It's not just a matter of there's only one, we're going to approve it." He further testified that among other issues under the statutory criteria, the Agency considers competition that promotes quality including whether approval of an applicant will increase service availability and the types of services offered for patients.

44. With respect to the Brevard HMA CON, Mr. McLemore testified that the decision was not based on the presence of the sole existing provider, but upon consideration of underservice to populations, including African American, Hispanic, and Medicaid populations, in addition to other facts and circumstances that on balance warranted approval of the CON Application.

45. In a case that has gone to hearing (DOAH Case No. 21-2328CON), VITAS filed an application to establish a new hospice program in Service Area 8C, comprised of Glades, Hendry, and Lee Counties, in the absence of published numeric need. At the time, Service Area 8C was served by a single hospice provider. Unlike the applications filed by Continuum and Affinity, VITAS's application did not allege that the sole existing provider in Service Area 8C constituted a "monopoly." Nevertheless, the Agency's SAAR independently found that the existing provider "currently has a monopoly in that it is the sole provider in SA 8C." Additionally, and like the Agency's preliminary approval of Affinity's application, according to the SAAR, the Agency preliminarily approved VITAS's application, in part, due to the "support for a second hospice provider." At hearing, VITAS testified extensively as to its justifications for approval on the basis of special

circumstances. That matter is awaiting proposed recommended orders and no ruling has yet been made by the ALJ, who happens to be the undersigned.

46. Finally, in the August 2021 Batching Cycle, three applications were filed to establish a new hospice program in Service Area 9A, Indian River County, in the absence of published numeric need. Two of the applicants—Brevard HMA and Moments Hospice of Indian River, LLC—asserted that the existing provider's status as the only hospice provider in the service area constituted a "regional monopoly" and, thus, a special circumstance.

47. The third applicant—Hospice of the Treasure Coast Incorporated ("Treasure Coast")—did not specifically assert that the existing provider's status as the single hospice provider constituted a regional monopoly. However, Treasure Coast did observe that "[r]ecent policy declarations by AHCA have advanced the concept that areas served by a single hospice provider benefit from the approval of a second hospice, irrespective of any lack of published numeric need." From this, VNA asserts that the Agency's unadopted rule concerning single provider service areas is apparent to the regulated community.

48. The undersigned believes that the "regulated community" referenced in the preceding paragraph, employing all of the considerable expertise at its disposal, is nimble enough to search for areas in Florida that are underserved. By "underserved," the undersigned does not mean sole providers. In the absence of numeric need, health care providers who are interested in entering a particular market look to other means of justifying entitlement to a CON, namely, special circumstances. When the market is tight, creative planners and providers find services and pockets of underserved populations that would benefit from what they have to provide. In the case of hospice, these experts have identified areas throughout the state where a particular county's population is underserved whether based upon remoteness from existing providers, by virtue of their specific ethnic or racial group under- or unserved, or due to groups like veterans and the

impoverished not having access to hospice services at the end of their lives. Finding these areas or populations that are underserved is what makes health care providers and their expert consultants not only successful, but leaders in the world of health care providers.

49. VNA argues that, if all the 2019 hospice CON applicants are ultimately approved in the absence of numeric need, there will be just two service areas in the state served by a single provider. If these approvals are granted by the Agency and withstand challenge by existing providers and unsuccessful co-batched applicants, one or both of the following two conclusions can be reached: (a) they proved entitlement to a CON based upon a balancing of the applicable statutory and rule criteria; or, (b) in the absence of any special circumstances (assuming no numeric need) being proven at hearing and upheld by the Agency and a reviewing court on the sole basis of section 408.043's discouragement of regional monopolies, then somewhere along the line an appellate court will have ruled that a single statutory criterion (discouraging regional monopolies) is sufficient to warrant approval of a hospice CON application.

50. In short, despite his passion and dedication to ensuring that all populations have access to hospice services at the end of life, too much weight has been placed upon the shoulders of Mr. McLemore's testimony in this matter and many other hospice CON cases in which he has given deposition and hearing testimony. He is not the ultimate decisionmaker at the Agency when it comes to CONs, as he has honestly and candidly admitted on many occasions. The final hearing and prior testimony of Mr. McLemore do not demonstrate the Agency's reliance on any of the alleged seven unadopted rule statements, or of any policy to automatically approve a CON application for a new hospice that is filed in a service area with only one existing hospice provider.

Ultimate Facts

51. The preponderance of evidence does not support the contention that AHCA used an unadopted rule based upon the various recommendations made in different CON applications for hospice services, whether looking at the period prior to 2019, post-2019, or a combination of the two. No two of the hospice CONs brought to light in this hearing are identical. Each of the applications ultimately stood or fell on its own merits. Some were initially approved by the Agency; others were initially denied, yet found their way to approval via a recommended order from DOAH, some of which were overturned by the Agency and others which were upheld. One made its way to the First District Court of Appeal where an opinion was issued in the *Compassionate Care* case, while yet another made its way to the Second District Court of Appeal where it awaits decision. Still others are awaiting orders from DOAH, are currently in hearing, or are scheduled for hearing later this year. Those still going through the process in cases where no numeric need has been published rely on rule-enumerated special circumstances to justify approval. Some have added to their arguments an additional factor from section 408.043, that the Agency must not use a formula that discourages regional monopolies. In sum, each case is different, with expert opinions attempting to demonstrate a need for hospice services employing every health planning tool at the experts' disposal. The evidence does not support a one-size-fits-all unadopted rule that applies in each case. Therefore, the alleged statements purported to be unadopted rules are not supported by competent substantial evidence.

52. Some of the CON applicants have used the term "monopoly" to indicate when a single or sole provider exists in a service area. However, each of the applications (and the SAARs) where the existence of a single provider in a service area is brought into the equation also evaluate the issue of a "monopoly" within the context of other statutory and rule criteria, such as

underserved populations and services not made available by existing providers that new providers will add to the delivery of hospice care.

CONCLUSIONS OF LAW

53. DOAH has jurisdiction over this rule challenge and the parties pursuant to sections 120.569, 120.57(1), and 120.56(1).

54. Section 120.54(1)(a) provides that "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." *See also S. Baptist Hosp. of Fla. v. Ag. for Health Care Admin.*, 270 So. 3d 488, 503 (Fla. 1st DCA 2019) ("It is well established Florida law that rulemaking is not a matter of agency discretion.").

55. Section 120.56(4)(a) provides that: "Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule."

56. Section 120.52(20) provides "that an '[u]nadopted rule' means an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54."

57. The parties stipulated to standing.

58. The burden of proof is on Petitioner, in this case VNA. § 120.56(1)(a), (4)(a), Fla. Stat.

59. The standard of proof is a preponderance of the evidence. § 120.56(1)(e), Fla. Stat.

60. If the alleged policy is determined to be an unadopted rule, then the Agency shall bear the burden of demonstrating that rulemaking is not feasible or practicable. § 120.56(4)(c), Fla. Stat.

61. Petitions invoking section 120.56(4) must allege facts that are sufficient to demonstrate, first, that the object of the challenge is "an agency statement" and, second, that the agency statement meets the definition of a "rule" that has not been adopted pursuant to section 120.54.

62. An agency statement can be in the form of a declaration, expression, or communication. It does not need to be in writing. *See Dep't of High. Saf. & Motor Veh. v. Schluter*, 705 So. 2d 81, 84 (Fla. 1st DCA 1997). To be a rule, however, the statement or expression must be an "agency statement," that is, a statement that reflects the agency's position with regard to law or policy. Therefore, the offhand comment of an agency employee, without more, is not an "agency statement"; rather, the statement must be "attributable to [the agency head] or some duly authorized delegate." *Id*. at 87 (Benton, J., concurring and dissenting).

63. Agency statements subject to challenge as unadopted rules are those that reflect the agency's policy statements, in that they were "issued by the agency head for implementation by subordinates with little or no room for discretionary modification" and "were applied and were intended to be applied with the force of a rule of law." *Dep't of Admin. v. Stevens*, 344 So. 2d 290, 296 (Fla. 1st DCA 1977).

64. The requirement for agency rulemaking, codified in section 120.54(1), prevents an administrative agency from relying on general policies that are not tested in the rulemaking process, but it does not apply to every kind of statement an agency may make. *See McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977) (stating that rulemaking requirements were never intended to "encompass virtually any utterance by an agency"), superseded by statute on other grounds, § 120.54(1)(a), Fla. Stat. (Supp. 1996), as recognized in *Schluter*, 705 So. 2d at 81. Rulemaking is required only for an agency statement that is the equivalent of a rule.

65. An agency's application of the law to a particular set of facts is not itself a rule. *See Amerisure Mut. Ins. Co. v. Fla. Dep't of Fin. Servs., Div. of*

Workers' Comp., 156 So. 3d 520, 531 (Fla. 1st DCA 2015) (concluding that the agency did not rely on an unadopted rule, but "simply applied the governing statute to the information" reported by the relevant entity), superseded by state constitutional amendment on other grounds, Art. V, § 21, Fla. Const., as recognized in *Lee Mem'l Health Sys. Gulf Coast Med. Ctr. v. Ag. for Health Care Admin.*, 272 So. 3d 431, 437 (Fla. 1st DCA 2019); *see also* § 120.57(1)(e)1., Fla. Stat. (expressly authorizing "application of … applicable provisions of law to the facts").

66. Accordingly, where an agency statement analyzes existing law, as it applies to a particular set of circumstances, the statement is not itself a rule and is not subject to the rulemaking process. *Env't Trust v. State, Dep't of Env't Prot.*, 714 So. 2d 493, 498 (Fla. 1st DCA 1998). To conclude otherwise would effectively require an agency to adopt a rule for every possible circumstance that may arise. Instead, "an agency is free to simply apply a statute to facts ... without engaging in rulemaking." *Off. of Ins. Regul. v. Guarantee Tr. Life Ins. Co.*, Case No. 11-1150, RO at 75 (Fla. DOAH Mar. 16, 2012; Fla. OIR June 28, 2012).

67. It is important in an unadopted rule challenge proceeding to distinguish between alleged statements that apply to an individual party and those statements of general applicability that apply uniformly to all persons, or a sufficiently identified class of persons, such that the alleged unadopted rule is shown to have a comprehensiveness and uniformity in application. Here, there was no evidence of any written statements or verbal expressions of such a uniform policy. Instead, VNA seeks to show an "unadopted rule" essentially on the basis of AHCA's rulings in the Final Order in the *Continuum* case, and in two subsequent SAARs, which examine the particular facts and circumstances presented in the individual CON applications submitted by Affinity and Brevard HMA (VNA concedes it is not relying on the SAAR in the VITAS SAAR to show an unadopted rule.). Based upon a detailed discussion in this matter of how the Agency reviewed

numerous hospice CON applications filed between 2009 and 2021, it has become clear that the Agency did not repeatedly rely upon statements of general applicability that implements and interprets the law to determine an issue (the approval of CONs in the absence of published numeric need) in the same manner in every case. *See Grabba-Leaf, LLC v. Dep't of Bus. & Pro. Regul.*, 257 So. 3d 1205, 1211 (Fla. 1st DCA 2018) (explaining that an agency statement or policy constitutes a rule when it is "a statement of general applicability that implements and interprets the law" and constitutes an unadopted rule when "rulemaking procedures weren't followed, and it is not 'readily apparent' from the statute itself" that the agency's interpretation of a statute is correct).

68. A statement which, by its terms, is limited to a particular person or singular factual situation is not generally applicable, nor is one whose applicability depends on the circumstances. Such ad hoc directives are orders, not rules. By contrast, "general applicability" requires that the scope of the statement--its field of operation--be sufficiently encompassing as to constitute a principle; there must be, in other words, a comprehensiveness to the statement, which distinguishes the statement from the more narrowly focused, individualized orders that agencies routinely issue in determining the substantial interests of individual persons. A generally applicable statement purports to affect not just a single person or singular situations, but a category or class of persons or activities. *See McCarthy v. Dep't of Ins.*, 479 So. 2d 135 (Fla. 2d DCA 1985) (letter prescribing "categoric requirements" for certification as a fire safety inspector was a rule). *See Harmony Env't, Inc. v. Dep't of Bus. & Pro. Regul.*, Case No. 14-5334RU, FO at 31 (Fla. DOAH Feb. 26, 2015).

69. To be generally applicable, a statement need not apply universally to every person or activity within the agency's jurisdiction. It is sufficient, rather, that the statement apply uniformly to a class of persons or activities over which the agency may properly exercise authority. *See Schluter*, 705 So.

2d at 83 (policies that established procedures pertaining to police officers under investigation were said to apply uniformly to all police officers and thus to constitute statements of general applicability); *see also Disability Support Serv., Inc. v. Dep't of Child. & Fams.*, Case No. 97-5104RU, 1997 Fla. Div. Admin. Hear. LEXIS 5331, at *11 (Fla. DOAH June 4, 1997) ("[The agency's] arguments equate generally applicable with universally applicable. It is unnecessary for Petitioner to show that the [statements] apply to all parties contracting with [the agency] for the provision of any sort of service or product subject to Medicaid reimbursement. It is enough to show that the [statements] are generally applicable to classes of providers."). *Harmony Env't*, Case No. 14-5334RU, FO at 32.

70. On the other hand, if the class of persons or activities is too narrow, a statement pertaining solely to that category might be considered not "generally applicable." For example, in *Agency for Health Care Administration v. Custom Mobility, Inc.*, 995 So. 2d 984 (Fla. 1st DCA 2008), it was alleged that AHCA's statistical formula for cluster sampling, which the agency used in some cases to calculate Medicaid overpayments, was an unadopted rule. The court found, however, that the formula was not a statement of general applicability because it did not apply to all Medicaid providers, or even to all providers being audited, but rather only to some of the providers being audited. *Id.* at 986. The category of "all providers being audited using cluster sampling"--which comprised about ten percent of all auditees--was too specific to support a finding of general applicability. *Harmony Env't*, Case No. 14-5334RU, FO at 33.

71. Here, the only rule of general applicability in the review process is the general weighing and balancing of promulgated statutory and rule criteria against the facts set forth in the CON applications at issue. The fact that AHCA has recently preliminarily approved three CON applications in the absence of numeric need is too narrow to demonstrate any rule of general applicability. The three individual CON applications involved various facts,

circumstances, and data that presented "special" and "not normal" circumstances as contemplated by the CON statutes and rules when seeking approval in the absence of numeric need. The Agency found that the overall weighing and balancing of the statutory and rule criteria warranted approval in those specific cases based upon the information presented.

72. Clearly, from a review of the plain meaning of the statutory criteria set forth in section 408.035 and the rule criteria in rule 59C-1.0355, AHCA has substantial discretion in its review of CON applications based on a weighing and balancing of all the CON review criteria. The cases stating this date back nearly 40 years and confirm that the Agency must weigh and balance all CON statutory and rule criteria. No single criterion, including the presumption tied to a published numeric fixed need pool, is controlling. A presumption pursuant to a numeric need is only a starting point, and other "not normal" circumstances must be considered. *Balsam v. Dep't of HRS*, 486 So. 2d 1341, 1345, 1349 (Fla. 1st DCA 1986); *Suncoast Hospice of Hillsborough, LLC v. Cornerstone Hospice & Palliative Care, Inc. & VITAS Healthcare Corp. of Fla.*, Case No. 20-1733CON, RO at 261 (Fla. DOAH Mar. 26, 2021; Fla. AHCA June 1, 2021). "[T]he appropriate weight to be given to each individual criterion is not fixed, but rather must vary on a case-by-case basis, depending upon the facts of each case." *Collier Med. Ctr., Inc. v. State, Dep't of HRS*, 462 So. 2d 83, 84 (Fla. 1st DCA 1985); *Humana, Inc. v. Dep't of HRS*, 469 So. 2d 889 (Fla. 1st DCA 1985).

73. Rather than demonstrating an alleged series of unadopted Agency statements perceived to be rules, the main thrust of VNA's allegations is that it disagrees with the evaluation of the statutory and rule criteria based upon the arguments made in the CON applications currently in the DOAH hearing process. As found throughout this Order, the Agency followed a specific statute, section 408.043, and a duly promulgated rule, 59C-1.0355(4)(d) and (3)(d). No unadopted rule statement has been relied upon or made by the Agency that should hinder in any fashion the pending or completed hearings

concerning the "not normal circumstances" or "special circumstances" alleged by the applicants in the following matters: *Hope Hospice and Community Services, Inc. v. VITAS Healthcare Corporation of Florida, Inc., and Agency for Health Care Administration,* DOAH Case No. 21-2328CON; *Tidewell Hospice, Inc. v. Affinity Care of Manatee County, LLC, and Agency for Health Care Administration,* DOAH Case No. 21-2329CON; or *VNA Hospice of Indian River County, Inc. v. Brevard HMA Hospice, LLC, and Agency for Health Care Administration,* DOAH Case No. 22-0209CON (the low case number in a matter consolidated with 22-0210CON.

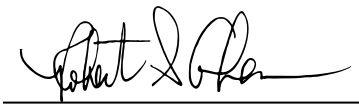
74. Overall, the evidence presented fails to establish that the Agency has based its preliminary decision (contained in a SAAR) to approve Brevard HMA's CON application on the basis of any unadopted rule. Rather, it appears that the preliminary decisions of the Agency expressed in the SAAR regarding the Brevard HMA, the VITAS or the Affinity applications referenced in the preceding paragraph, are simply the Agency's preliminary determinations based on weighing and balancing of statutory and rule provisions of individual applicants as required by law. As to DOAH Case No. 22-0209CON, the petitioner, VNA, has preserved its rights by petitioning for a hearing involving disputed issues of material fact and will have the opportunity to dispute the Agency's preliminary decision through the pending proceeding on the merits of the CON application.

75. Based upon the foregoing Findings of Fact and Conclusions of Law, VNA has failed to demonstrate by a preponderance of the evidence that the Agency has adopted statements or made decisions based upon such statements that constitute an unadopted and invalid rule outside the Agency's rulemaking authority and in violation of statutory requirements.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that VNA's Petition Challenging Unadopted and Invalid Rules is hereby DISMISSED.

DONE AND ORDERED this 25th day of March, 2022, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.