NO. 92746-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVITA HEALTHCARE PARTNERS, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, ET AL.,

Respondents.

RESPONDENT NORTHWEST KIDNEY CENTERS' RESPONSE TO DAVITA HEALTHCARE PARTNER INC.'S PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

In four separate cases before three different health law judges dating back to 2009, DaVita repeatedly has lost a narrow issue of regulatory interpretation. This case is one of those four. Here, DaVita also lost before the Thurston County Superior Court and Division I of the Court of Appeals. The health law judges and courts all have concluded DaVita's interpretation of certain certificate of need regulations applicable to kidney dialysis providers is inconsistent with the plain language of those regulations. Most recently, in mid-March 2016, a Review Officer, granted authority under recently enacted legislation to review HLJ decisions and render final Department decisions, considered the same regulatory issue (in a different case)—and ruled against DaVita.

Yet DaVita now presses this Court to take discretionary review of the decision of the Court of Appeals under RAP 13.4(b)(4), which applies to "an issue of substantial public interest that should be determined by the Supreme Court." Nowhere in its petition does DaVita explain how adoption of its incorrect regulatory interpretation will improve access to dialysis services or lower the cost of those services. In fact the contrary is the case here: the record is uncontroverted that the HLJ's decision (and the decisions of Superior Court and the Court of Appeals) permitted Northwest Kidney Centers to begin offering the needed dialysis services

that are at the heart of the dispute far earlier than DaVita could have, at a fraction (one-twentieth) of the capital cost DaVita would have incurred, and at a commercial price well below that which DaVita proposed.

This case does not present an issue of "substantial public interest." It presents a settled and narrow issue that affects only kidney dialysis providers. No conflict or ambiguity exists for this Court to resolve. And the application in this case of what has been the plain language interpretation of the regulations since 2009 benefitted the public and furthered the goals of our State's certificate of need law. The Court should deny the motion for discretionary review.

II. ISSUE PRESENTED

Does this case involve an issue of substantial public interest under RAP 13.4(b)(4) when it involves a narrow and well-settled regulatory interpretation issue that affects only kidney dialysis providers in certificate of need contests and where the result in this case benefitted the public?

III. STATEMENT OF THE CASE

A. The Certificate of Need Law

The legislature enacted the CN law in 1979 in response to congressional encouragement to use planning "to control health care costs." *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 735 (1995) (citing Pub. L. No. 93-641, 88 Stat. 2225 (repealed

in 1986)); *see generally Nat'l Gerimed. Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 386 (1981) (explaining basis for CN regulation). The legislature "intended the [CN] requirement to provide accessible health services and assure the health of all citizens in the state while controlling costs." *King Cnty. Pub. Hosp. Dist. No. 2 v. Dep't of Health*, 178 Wn.2d 363, 366 (2013).

The CN "program seeks to control costs by ensuring better utilization of existing institutional health services and major medical equipment." *St. Joseph*, 125 Wn.2d at 736; *see also* RCW 70.38.115(2)(h). Health care providers who wish "to establish or expand" certain defined services or facilities must first obtain a CN. *St. Joseph*, 125 Wn.2d at 736; RCW 70.38.105(4)(a). Such providers, including kidney dialysis centers, must meet four criteria: an applicant must show there is a need for the project (WAC 246-310-210), that the project is financially feasible (-220), that it will meet the criteria for structure and process of care (-230), and that it will further cost containment (-240). WAC 246-310-200(1).

The Department has adopted additional standards for kidney dialysis CN applicants. WAC 246-310-280 to -289. One of these regulations provides: "If two or more applications meet all applicable review criteria, ... the department will use tie-breakers to determine which

application ... will be approved." WAC 246-310-288.

B. NKC and Its CN Application

Until 1962, when NKC became the first provider of outpatient kidney dialysis services in the world, chronic kidney failure was almost always fatal. AR 791, 1517-19, 2422. Since its origins in the basement of the nurses' residence in Swedish Hospital in Seattle, NKC has grown to 13 dialysis locations across King County, with one in Clallam County. AR 791, 1518, 2507; CP 55 ¶ 1.1. NKC is a Washington not-for-profit, tax-exempt 501(c)(3) corporation run by a community-based board of directors. AR 791, 1518, 2422; CP 55 ¶ 1.1.

On May 31, 2011, NKC applied for a CN to expand its existing 25-station SeaTac Kidney Center by five stations at a capital cost of $100,969. AR 792, 2422, 2477, 2486-87. In its application, NKC projected its revenue would exceed its expenses every year, and that it would be able to open the new stations within one month of receiving the CN. AR 2488, 2518, 2491. Shortly after the HLJ's decision in March 2013, NKC added and began operating the five new stations and patients began receiving—and continue to receive— the care they need. AR 792.

C. DaVita, Inc., and Its CN Application

DaVita, Inc., is a publicly traded, for-profit corporation that operates 1,642 outpatient kidney dialysis centers in 43 states and the

District of Columbia, as well as inpatient dialysis services in 720 hospitals. AR 12, 791, 1780, 1917-18, 2422; CP 55 ¶ 1.1. It owns 25 facilities in Washington in 12 counties, including four in King County. AR 2422. DaVita admits in its public filings with the Securities and Exchange Commission (which it submitted with its CN application) that its business depends on earning a substantial profit from payments made by commercial insurers. In fact, DaVita states, "payments we receive from commercial payors generate nearly all of our profits." AR 1922. Medicare reimbursement is critical for dialysis providers, but DaVita reports "average commercial payment rates are generally significantly higher than Medicare rates." *Id.* Consequently, DaVita explains, "[i]f the number of patients with higher-paying commercial insurance declines, then our revenues, earnings and cash flows would be substantially reduced." AR 1930.

In May 2011, DaVita applied for a CN to build a new facility that would house five dialysis stations and serve the same geographical area that NKC proposed to serve by expanding its existing facility. On June 30, 2011, DaVita submitted an amended CN application. In that application, DaVita estimated the capital cost necessary for the facility at $1,992,705. AR 1773, 1777, 2426. It also projected it would operate at a

loss in the first three years of operations. AR 1915, 2297.[1] Later, after the Program requested clarification, AR 2297, DaVita revised its profit and loss statement to ignore certain operating expenses required under its lease. *Compare* AR 1915, *with* AR 2305; AR 2226 ¶ 8(b); CP 59 n.20. This allowed DaVita to show a profit in the third year of operations (but still not in the first two years). *Compare* AR 1915, *with* AR 2305. *See also* AR 1464-66, 1777, 2226 ¶ 8(b). DaVita estimated it would need six to seven months to build and open the new facility. AR 1773.

D. The CN Program Skipped a Required Step in the CN Analysis and Mistakenly Granted the CN to DaVita

The CN Program reviewed NKC's and DaVita's applications under its concurrent review process, which requires the Program to "compare[] the applications to one another." WAC 246-310-280(3); *see also* WAC 246-310-282; RCW 70.38.115(7); AR 2422-56. In February 2012, it awarded the CN to DaVita. AR 2422-56, 2461. The Program found both applications met the first three CN criteria for need, financial feasibility, and structure and process of care. AR 2428-47. It then turned to the cost containment criterion under -240. That provides, in relevant part, that the "determination that a proposed project will foster cost containment shall be based on the following criteria ... (1) Superior

[1] To obtain bottom line profit or loss figures from DaVita's pro forma projections one must deduct the "Corporate G&A" and "Division G&A" from the "Pre-G&A EBITA" line that appears near the bottom of each pro forma. *See* AR 2297 ¶ 6.

alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable."[2] Instead of comparing the two applications to see which was superior under -240(1), as the rule requires, the Program followed an unwritten "multi-step approach," AR 2447, that ***avoided*** the required comparison. Here is what the Program did:

First, it reiterated that both applications met the criteria in -210 through -230. AR 2447-48; CP 64 ¶ 1.23. Then it analyzed whether each applicant chose the best alternative ***for itself*** from the alternatives ***open to it***. So, the Program determined that NKC, by electing to expand its existing facility rather than build a new one, chose the superior alternative ***for NKC*** (because expansion was far cheaper and quicker than new construction). But it also found that DaVita, by electing to build a new facility instead of doing nothing, chose the superior alternative ***for itself*** (because doing something is better than doing nothing). The one thing the Program studiously did ***not*** do was ***compare*** the applications ***to each other***

[2] WAC 246-310-240 states, in its entirety:

> A determination that a proposed project will foster cost containment shall be based on the following criteria:
> (1) Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable.
> (2) In the case of a project involving construction:
> (a) The costs, scope, and methods of construction and energy conservation are reasonable; and
> (b) The project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons.
> (3) The project will involve appropriate improvements or innovations in the financing and delivery of health services which foster cost containment and which promote quality assurance and cost effectiveness.

to see which was superior in terms of cost, efficiency, or effectiveness. AR 2448-49, 1412-13, 1447-52.

Finally, having decided each applicant chose the superior alternative for itself under -240, the Program declared a "tie" and turned to the "tie-breakers" in -288 and found for DaVita. AR 2448-53, 1413, 1483-84; CP 64 ¶ 1.23; DaVita Mot. at 7. As a result, the Department came to the completely illogical conclusion that DaVita's application—which was ***20 times*** more costly than NKC's—was superior in terms of cost, efficiency, and effectiveness. AR 2449-53.

E. The HLJ Applied the Plain Language of the CN Regulations and Granted the CN to NKC

NKC requested an adjudicative hearing with a health law judge appointed to serve as the designee of the Department's Secretary (and ultimate agency fact finder). After a two-day hearing and substantial post-hearing briefing, the HLJ in March 2013 reversed and awarded the CN to NKC. AR 1-48; CP 52-74; AR 782-1154. He interpreted WAC 246-310-200, -240 and -288 as written and concluded—as had two other HLJs in two earlier CN proceedings, dating back to 2009—that "[a]n application for [a] CN must be analyzed under WAC 246-310-240 equally as thoroughly as the other WACs, and ***the analysis under WAC 246-310-240(1) requires a comparison of the two applications with each other***."

CP 64-65 ¶ 1.23 (emphasis added). *See also* AR 834-75 (two other HLJ decisions from February and April 2009 reaching the same conclusion).

Applying that analysis, the HLJ here found NKC's application was superior in terms of cost, efficiency, and effectiveness under -240(1):

> Because of the ***enormous*** costs of the new facility (DaVita's), it is unclear whether it can be profitable by the third year of operation. If DaVita can become profitable by the third year of operation, it is only because it is charging (and receiving) more from commercial carriers than NKC would be charging for the same service.

CP 65 ¶ 1.24 (emphasis added). Therefore, the HLJ found, "[e]ither patients would be paying more, or insurance companies would be paying more (and passing those costs onto their insured.) In comparing the two applications, NWKC is the superior alternative." CP 66 ¶ 1.25. The HLJ found DaVita's application also failed financial feasibility under -220 for the same reasons. *See id.* at 58-63, 65-67.

The Program (not the Department, AR 1232) and DaVita sought reconsideration. The HLJ denied both motions, reaffirming his reading of the plain language of WAC 246-310-200, -240, and -288. He also clarified he focused on cost because "cost was the only area of dispute," emphasizing, "No evidence of improvements in care was offered at hearing." CP 77-80.

F. The Superior Court Affirmed the HLJ's Plain Language Interpretation

DaVita sought review in the Thurston County Superior Court to reverse the HLJ's ruling. ***The Department*** and NKC opposed. CP 4. The Superior Court affirmed, stating, "the language [of WAC 246-310-200] is clear. It is not ambiguous as it relates to what the requirements are in this case. Clearly, when the Department of Health looks at these, there are four general criteria that they are to evaluate." RP 5:6-10, 20-23 (May 1, 2014, Tr. of Oral Ruling). The court emphasized that -200, which mandates consideration of the criteria in -210 to -240, nowhere refers to -288 "or a requirement to use 288 when looking at these other subsections." *Id.* 5:24-6:2. The court reasoned if the Program were required to use the tie-breakers in -288 every time it found two applications satisfied -210 to -230, without regard to -240, "then[] 288 wouldn't be called the tiebreaker. It would be more likely just part of the general criteria outlined in 210, 220, 230 and/or 240." *Id.* 6:10-13.

The court found the HLJ properly "never got to 288, because he found that DaVita's application did not meet all applicable review criteria, specifically looking at 240," and "appropriately analyzed this case legally, pursuant to both the RCW and the purpose of these laws, as well as the clear, unambiguous language of the WACs." *Id.* 6:21-7:5.

G. The Court of Appeals Affirmed the HLJ's Plain Language Interpretation

In December 2015, the Court of Appeals also affirmed the HLJ, agreeing "the plain language is clear that the tie breakers [in -288] are applied only if both applications first satisfy all other review criteria" in -210 to -240. *DaVita*, 192 Wn. App. at 115. The Court emphasized that both WAC 246-310-200 and -284 "mandate consideration of the criteria in" -210 to -240. *Id.* (citing WAC 246-310-200(2) & -284). It held the HLJ correctly compared the applications under -240(1) to determine which was superior because "both the general CN application process and the specific kidney treatment center CN application processes are, by law, concurrent review processes" that are "designed to be competitive." *Id.* at 116 (citing RCW 70.38.115(7); WAC 246-310-282 & -280(3)).

In addition, the Court correctly concluded the HLJ properly considered capital costs and commercial reimbursement rates in evaluating financial feasibility under -220 and cost containment under -240, because "commercial payor reimbursement rates have the capability of directly impacting the cost of health services and the cost of the project to the public—criteria directly enumerated in WAC 246-310-220 and -240." *Id.* at 117; *see also id.* at 118 ("[c]apital costs are relevant" under -240(1)). In rejecting DaVita's argument that higher commercial reimbursement rates

could reflect better care, the Court explained DaVita neither challenged the HLJ's finding that "basic dialysis procedures are standardized and similar," nor provided any "controverting evidence." *Id.* at 118.[3]

H. The Review Officer Reached the Same Conclusion

DaVita laments it could not invoke a procedure adopted after the HLJ's decision in this matter was final, under which a "Review Officer," with final decision-making authority from the Secretary of the Department, can review an HLJ's decision. DaVita Mot. at 11-12. DaVita speculates that had the procedure been available to it, the Review Officer would have reversed the HLJ's decision. *See id.*[4]

Not only is DaVita's speculation on what would have happened if the rules had been different irrelevant, but also on March 2, 2016, in another CN dispute between NKC and DaVita, the Review Officer also concluded the plain language of the relevant regulations requires the Program to compare competing applications under -240(1) before turning, in the event of a real tie, to the tie-breakers in -288. App. A at 10-11.

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[3] The Court also found substantial evidence supported the HLJ's factual findings. *DaVita*, 192 Wn. App. at 119-20.

[4] This is an odd argument. The Department followed the process in place at the time (any other course would have been unlawful), and the HLJ's decision here properly became the decision of the Department.

IV. ARGUMENT

A. This Case Involves a Narrow Regulatory Interpretation Issue that Does Not Warrant Review

The Court should deny DaVita's motion for discretionary review because, far from presenting an issue of substantial public interest, this case involves the narrow question whether the plain language of the tie-breaker regulation, WAC 246-310-288, requires a threshold determination that competing kidney dialysis applicants satisfied all four CN criteria in WAC 246-310-210 to -240, including the comparative superiority analysis in -240(1), before reaching the tie-breaker. Because the critical sub-regulation, -288, applies only to kidney dialysis providers, this case has limited application even in the healthcare context.

The cases on which DaVita relies for the proposition that the Court should take review any time a case involves the CN law do not justify review in this case. DaVita Mot. at 13-14. At issue in *King County Public Hospital District No. 2 v. Washington State Department of Health*, 178 Wn.2d 363 (2013), was whether the HLJ correctly approved a settlement over the objections of three hospice providers who had intervened to comment and oppose the settlement, and whether the HLJ violated the intervenors' due process rights. *Id.* at 371. The dispute involved many health care providers and the rights that interested parties with standing to

obtain judicial review of CN decisions have under the CN law. *Id.* at 380-81. The latter issue extended beyond the immediate hospice providers in that case to all health care providers and thus had broad impact.

Similarly, in *University of Washington Medical Center v. Washington State Department of Health*, 164 Wn.2d 95 (2008), the Court accepted review to resolve the scope of evidence relevant in an adjudicative proceeding before a health law judge. *Id.* at 103-04. As in *King County Public Hospital District No. 2*, the case presented an issue whose resolution would apply broadly to all health care providers, not just to the liver transplant provider in that case.

Here, by contrast, the Court of Appeals' interpretation of WAC 246-310-288 will never extend beyond a narrow scope of providers: kidney dialysis providers. This case does not raise questions concerning the rights of interested parties. It does not involve the intervention of numerous health care providers. It does not impact the scope of evidence admissible in adjudicative proceedings. This case presents a narrow question concerning how to read the plain language of a sub-regulation.

The fact the Court of Appeals correctly interpreted the plain language of the sub-regulation (-288) only reinforces this conclusion. The regulation states "***[i]f*** two or more applications meet ***all*** applicable review criteria ... the department will use tie-breakers to determine which

application or applications will be approved." WAC 246-310-288 (emphasis added). By its own terms, -288 makes clear the Program can apply the tie-breakers only if the two applications meet "***all***" review criteria, not just ***some*** review criteria. The Court of Appeals held the plain language of -288 "is clear." The tie-breakers "are applied only if both applications first satisfy all other review criteria in WAC 246-310-210, -220, -230, and -240." *DaVita*, 192 Wn. App. at 115.

The Court also correctly held that in reviewing CN applications under WAC 246-310-240(1), the Program must compare the applications to each other, rather than analyze them in isolation, as the Program incorrectly did. *Id.* at 116. Under -240(1), the Department must determine whether "[s]uperior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable." WAC 246-310-240(1). In a concurrent review, such as this one, the Department must "compare[] the applications to one another and these rules." WAC 246-310-280(3). The governing statute is specific on this: the Department must compare "competing or similar projects in order to determine which of the projects may best meet identified needs." RCW 70.38.115(7).

Thus, the Court correctly interpreted -288 as requiring the Program to conduct a comparative superiority analysis under -240(1) to determine if a tie between competing applicants actually exists so as to trigger the

tie-breakers in -288 (i.e., the competing applicants satisfy all the criteria in -210 to -240, and are substantially equal under -240(1)).

The clarity of -288 distinguishes this case from *Overlake Hospital Ass'n v. Department of Health*, 170 Wn.2d 43 (2010), on which DaVita relies. DaVita Mot. at 14. In *Overlake* the Court of Appeals failed to defer to the Department's interpretation of an ambiguous CN regulation. *Id.* at 53-55. The ambiguity created the Court's "need to resolve the dispute." *Id.* at 55. No such ambiguity exists here.

Further, because WAC 246-310-288 (as well as -200, -240, and -284) is clear and unambiguous, the Program's supposed intent in drafting -288 is irrelevant and cannot justify discretionary review. DaVita Mot. at 5-6, 8, 16-18. "[W]hen faced with an unambiguous regulation, [as here], the court may ***not*** speculate as to the intent of the regulation or add words to the regulation." *Children's Hosp. & Med. Ctr. v. Wash. State Dep't of Health*, 95 Wn. App. 858, 869 n.19 (1999) (emphasis added) (quoting *MultiCare Med. Ctr. v. State, Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 591 (1990)); *see also Overlake*, 170 Wn.2d at 52.

DaVita's intent arguments do not bring this case within RAP 13.4(b)(4).[5]

[5] *Olympic Healthcare Servs. II, LLC v. Dep't of Soc. & Health Servs.*, 175 Wn. App. 174 (2013), on which DaVita relies, DaVita Mot. at 17, does not change this statutory interpretation rule. And the same holds true for the sundry other principles of statutory

B. This Case Involves a Well-Settled Regulatory Interpretation Issue

This case involves not just narrow, regulatory issue, but also a well-settled one. Since 2009, three different HLJs in four different proceedings have held -240(1) requires a threshold comparative superiority analysis and the plain language of -288 does not change that. AR 871-73; AR 834-75.[6] The two HLJ decisions in 2009, and the HLJ decision in this case (issued in March 2013) were, as DaVita acknowledges, the final decisions of the Department. *See* DaVita Mot. at 11-12; *DaVita, Inc. v. Wash. State Dep't of Health*, 137 Wn. App. 174, 182 (2007) (HLJ, as Secretary's designee, had "authority to make final decisions"); *King Cnty.*, 178 Wn.2d at 366.

In this case, the Department has repeatedly advocated a plain language reading of the regulations. It argued in the Superior Court that "the WAC 246-310-288 tiebreakers should be applied only ***after*** the Department determines under WAC 246-310-240 that one application is not superior to the competing application." CP 169 (emphasis in original). ***In the Department's words***, "the WAC 246-310-240 superiority analysis

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interpretation that DaVita cites. DaVita Mot. at 16-17. "When [as here] the statutory language is plain, the statute is not open to construction or interpretation." *Green River Community Coll. v. Higher Ed. Personnel Bd.*, 95 Wn.2d 108, 113 (1980).

[6] *See also In re Evaluation Dated Oct. 27, 2014 of the Cert. of Need App'ns Submitted by Nw. Kidney Ctrs., Fresenius Med. Care Holdings, Inc., & DaVita Health Care Partners, Inc.*, Findings of Fact, Conclusions of Law, and Initial Order, M2015-102, at 21-22 (Oct. 28, 2015) (reaching same plain language interpretation).

should not be discarded in favor of simply applying the tiebreakers as the means for comparing two competing applications." *Id.* In the Court of Appeals the Department argued that "the plain language of WAC 246-310-288 ... requires that the tie-breakers will be applied *only* when the competing applicants meet 'all applicable review criteria.'" App. B. (Br. of Resp. Dep't of Health at 11) (emphasis in original).

Most recently, in March 2016, in a separate proceeding, the Review Officer (with final agency authority since July 2013) again held the Program must review competing applications under -240 before turning, if necessary, to the tie-breakers in -288. App. A at 10. In doing so, the Review Officer rightly rejected DaVita's "nullity" argument, explaining the plain language interpretation "does not render the tie-breakers in -288 meaningless since it is possible for a concurrent review to result in a finding that no application is superior." *Id.* at 10.

Thus, the Court of Appeals' plain language interpretation has been the Department's consistent interpretation since 2009, and the consistent interpretation of every decision-maker to consider the issue since 2009. This interpretation "is entitled to 'substantial deference' on judicial review." App. B. at 11-12 (quoting *Overlake Hosp.*, 170 Wn.2d at 49-50). The Court correctly interpreted the plain language of -288 and in doing so, deferred to the Department's consistent interpretation.

These circumstances distinguish this case from *Washington State Hospital Ass'n v. Washington State Department of Health* ("*WSHA*"), 183 Wn.2d 590 (2015). DaVita Mot. at 13. As DaVita acknowledges, the Court took review in *WSHA* because, for more than two decades, the Department had interpreted a critical CN statute one way, before issuing a rule that changed its interpretation of the statute, and that did so in a way that went well beyond the plain language of the statute. *Id.*; *WSHA*, 183 Wn.2d at 593. No such inconsistency justifying review exists here.

C. The Court of Appeals' Decision Benefits the Public

DaVita suggests the Court should take review because the Court of Appeals' decision will somehow harm the public. DaVita Mot. at 19-20. In particular, DaVita complains the Court's decision will "prevent any new facilities from being approved." *Id.* But the goal of the CN law is not to encourage building of "new" facilities; rather, the goal is to "control[] the number of healthcare providers entering the market," so as to contain cost and improve access. *King Cnty.*, 178 Wn.2d at 366. If, all else being equal, the choice is between a provider who proposes spending $2 million to build a new facility and a provider who proposes spending $100,000 to expand an existing facility to fulfill the same need, it makes sense the latter will be the "superior" alternative in terms of cost, efficiency, and effectiveness. WAC 246-310-240(1); RCW 70.38.115(1)(e), (g), (h).

But if all else is not equal a "new" facility could win a CN depending on other objective cost containment factors, such as the cost of the other facility (i.e., if the disparity were not large), commercial reimbursement rates and expenses per treatment, and quality of care.[7] DaVita appears to argue it is unfair that its new facility was not approved despite the facts which, as the HLJ found them, showed: (1) "DaVita's capital costs were 19 times that of NKC's"; (2) "NKC's expenses per treatment would thus be significantly lower than DaVita's"; (3) DaVita seeks and obtains higher commercial reimbursement rates than NKC; and (4) NKC could (and ultimately did) provide the service immediately, while DaVita could not do so for at least six to seven months. *DaVita*, 192 Wn. App. at 120. The HLJ's and the courts' decisions in this case have meant the patients who needed care received it immediately and have received it for nearly three years. The outcome here benefited the public.

V. CONCLUSION

For the foregoing reasons, the Court should deny DaVita's motion for discretionary review.

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[7] Capital costs and commercial reimbursement rates are objective factors that HLJs and courts have long considered when reviewing CN applications; they are not unpredictable, unanticipated "ad hoc" factors, as DaVita argues. DaVita Mot. at 4-6, 18; *DaVita, Inc. v. Wash. State Dep't of Health*, 137 Wn. App. 174, 177 (2007). The HLJ, and the Court of Appeals, focused on cost because that was the evidence in the record: DaVita presented no evidence it would provide better geographic access or quality care. CP 79 ¶ 1.8; *DaVita*, 192 Wn. App. at 117-18.

RESPECTFULLY SUBMITTED this 25th day of April, 2016.

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PROOF OF SERVICE

I hereby certify that on April 25, 2016, I caused the foregoing to be served on counsel of record as follows:

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

Executed this 25th day April, 2016, in Seattle, Washington.

Rebecca Francis

Appendix A

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF THE SECRETARY

In the Matter of: EVALUATION DATED OCTOBER 27, 2014, OF THE CERTIFICATE OF NEED APPLICATIONS SUBMITTED BY NORTHWEST KIDNEY CENTERS, FRESENIUS MEDICAL CARE HOLDINGS INC., AND DAVITA HEALTHCARE PARTNERS INC., TO ADD DIALYSIS CAPACITY TO KING COUNTY PLANNING AREA #1 DAVITA HEALTHCARE PARTNERS INC., Petitioner, NORTHWEST KIDNEY CENTERS, Intervenor.	Master Case No. M2015-102 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

APPEARANCES:

Petitioner DaVita Healthcare Partners, Inc., by
Perkins Coie, LLP, per
Brian Grimm and Anastasia Anderson, Attorneys at Law

Intervenor Northwest Kidney Centers, Inc., by
Davis Wright Tremaine LLP, per
Brad Fisher and Lisa Rediger Hayward, Attorneys at Law

Department of Health Certificate of Need Program, by
Robert W. Ferguson, Attorney General, per
Richard A. McCartan, Assistant Attorney General

ORIGINAL

PROCEDURAL HISTORY ON REVIEW

This matter comes before the Review Officer for administrative review of the Findings of Fact, Conclusions of Law, and Initial Order (Initial Order) dated October 27, 2015, of the Presiding Officer, John F. Kuntz. The Presiding Officer issued the Initial Order after a contested administrative hearing held June 8-9, 2015, regarding two Certificate of Need (CN) applications to establish five additional kidney dialysis stations in King County Planning Area #1 (King 1). DaVita Healthcare Partners, Inc. (DaVita) submitted an application to establish a new kidney dialysis facility at 18503 Firlands Way North, Seattle, Washington. Northwest Kidney Centers, Inc. (Northwest) submitted an application to expand an existing facility, located at 14524 Bothell Way NE, Lake Forest Park, Washington, by five additional stations.

The Initial Order approved the CN for Northwest to add dialysis stations to its existing facility and was served on the parties on October 28, 2015. DaVita filed a timely Petition for Administrative Review (Petition) on November 18, 2015. Northwest and the Certificate of Need Program (Program) filed timely responses on December 8, 2015.

The Review Officer reviewed the administrative record including, but not limited to, the Petition and both responses, application record, hearing transcript, written closing arguments and rebuttals of all parties, Northwest's Notice of Supplemental Authority and the replies of DaVita and the Program.

PETITION FOR REVIEW

DaVita contends the Presiding Officer improperly relied on criteria other than the methodology in WAC 246-310-288 to compare the competing CN applications to meet the

need for five additional dialysis stations in King 1. Pet. at 1. DaVita argues that the Department enacted -288 "to create an objective, consistent standard on which it would decide between competing dialysis applications." Without adherence to -288, potential dialysis providers endure "the uncertainty, inconsistency, and inevitable litigation" that results from use of ad hoc criteria. Therefore, DaVita requests that the Review Officer reverse the Initial Order, approve its application, and deny Northwest's application. Pet. at 2.

NORTHWEST'S RESPONSE

Northwest argues that the Presiding Officer appropriately determined that in a concurrent review of competing kidney dialysis CN applications, WAC 246-310-240 and -288 require a comparison of the applications to determine superiority in terms of cost, efficiency, and effectiveness. The tiebreaker criteria in -288 should only be used if both applications meet all the criteria in WAC 246-310-210 through -240, and neither application is clearly superior under WAC 246-310-240(1). Northwest requests that the Review Officer affirm the Initial Order approving its application. NW Resp. at 2.

In addition, in its Notice of Supplemental Authority, Northwest asks the Review Officer to "reject the Program's attempt to contingently challenge" the Initial Order because the Program agrees the CN was properly awarded to Northwest; the Program never filed a petition for review; and the Program's "position that DaVita could fail financial feasibility under -220 but somehow still be equally superior under -240 defies common sense and contradicts the substantial evidence supporting the Presiding Officer's determination." NW Notice of Supp. Auth. at 2.

THE PROGRAM'S RESPONSE

The Program requests that the Review Officer affirm the grant of the CN to Northwest but for the reasons articulated in the Program's evaluation rather than the Initial Order. Prog. Resp. at 1. The Program's evaluation found that Northwest met all the criteria for the CN but failed DaVita under WAC 246-310-220 because it proposed to build 16 stations when there was established need for only five. Prog. Resp. at 2. Therefore, questions regarding comparative superiority between the two applications and/or use of tiebreaker criteria are not relevant to this case.

INTERVENING CASE LAW

On December 28, 2015, while this case was under review, Division One of the Washington Court of Appeals filed a published opinion in the case of *DaVita Healthcare Partners, Inc. v. Washington State Department of Health and Northwest Kidney Centers*, -- P.3d --, 2015 WL 9461629, no. 73630-2-1. The fundamental issue in that case was very similar to the current case – whether the "superior alternative" analysis required by WAC 246-310-240 involves a comparison of each individual applicant's proposal to its own alternatives or also a comparison of the applicants' proposals to each other.

The Court held:

1) The plain and unambiguous language of WAC 246-310-288 requires the use of tiebreaker criteria only if both applications first satisfy all other review criteria;[1]

[1] In footnote 6 the Court stated "Because we conclude that the language of WAC 246-310-288 is plain on its face and unambiguous, we do not reach DaVita's arguments that the legislative and agency intent favor its interpretation. Nor do we reach any of DaVita's arguments based on other canons of construction."

2) The Presiding Officer[2] did not err by directly comparing the two applications under the relevant review criteria and determining reasonability based on that comparison; and
3) Substantial evidence showed DaVita's more expensive proposal would result in significantly greater costs to provide dialysis services than Northwest's proposal. The inference that those costs would be passed to private pay patients or their insurers was not unreasonable.

The parties provided additional briefing following issuance of the Court of Appeal's decision. Northwest asserts the case definitively determines that the CN rules require a comparative superiority analysis under 246-310-240(1) before turning to the tiebreakers in WAC 246-310-288. NW Notice of Supp. Auth. at 2. If the Review Officer does revisit the financial feasibility determination as requested by the Program, Northwest requests a finding that DaVita did not satisfy WAC 246-310-220 because DaVita's proposal would be roughly 16 times more expensive than Northwest's proposal. *Id* at 4-5.

DaVita responds that although the Court of Appeals held that a superiority analysis must be conducted, it did not determine what criteria should be used in that analysis. It advocates for use of the tiebreakers in WAC 246-310-288. Under the tiebreakers, DaVita would be the successful applicant. DaVita's Reply at 11.

The Program makes alternative arguments. First, that DaVita's application fails to meet the WAC 246-310-220 criterion because it proposes to overbuild by 11 stations. In the alternative, if DaVita's application does meet the -220 criterion, neither application is superior

[2] When the administrative case was decided, Presiding Officers had authority to issue final orders.

under WAC 246-310-240(1). Therefore, the CN should be granted based on the tie-breaker criteria under WAC 246-310-288 which would result in DaVita being the successful applicant.

In addition, the Program contends that its arguments should be considered by the Review Officer although it did not file a petition for administrative review. This is because under RCW 34.05.464(4), the Review Officer has authority to fully decide the case as if she had actually presided over the hearing. Program's Reply at 2.

REVIEW OFFICER'S ANALYSIS

Consideration of Program's Response

As an initial matter, the Review Officer will evaluate Northwest's contention that the Program's responsive brief should not be considered for various reasons, including because it failed to file a petition for administrative review.

The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing. RCW 34.05.464(4). The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties. RCW 34.05.464(5). The reviewing officer shall afford each party an opportunity to present written argument and may afford each party an opportunity to present oral argument. RCW 34.05.464(6). [An] opposing party may file a response to a petition for administrative review filed as provided in this section. WAC 246-10-701.

Based on the law and rules, the Program was entitled to file a response and the Review Officer will consider it as part of the record.

Financial Feasibility

WAC 246-310-200 requires that the Program's review of CN applications, and the decision of the Secretary's designee, be based on four factors:

- Determination of need (WAC 246-310-210);
- Determination of financial feasibility (WAC 246-310-220);
- Criteria for structure and process of care (WAC 246-310-230); and
- Determination of cost containment (WAC 246-310-240).[3]

Both Northwest and the Program argue that DaVita's application did not meet the financial feasibility criteria because DaVita's capital costs were significantly higher due to overbuilding. Specifically, DaVita proposed to build 11 stations that are not currently needed, essentially "banking" them for later use when additional need arises in the planning area. Additionally, Northwest argues that DaVita's charges per commercial treatment are significantly higher than Northwest's.

The Court of Appeals decision is instructive. In that case, the Presiding Officer found that Northwest's application was superior because DaVita's capital costs were 19 times more ($1,992,705 compared to $100,969). There was evidence that Northwest's revenue would exceed its expenses in every year of operation while DaVita's would not. There was also evidence that Northwest's expenses per treatment would be significantly lower than DaVita's. Substantial evidence supported the Presiding Officer's determination that DaVita's proposal could result in an unreasonable impact on the costs and charges for

[3] Additional methodology and exceptions related to determining need for kidney dialysis facilities are found in WAC 246-310-284 and -287. Those rules are not at issue in this case because the parties agree there is need for five new dialysis stations in King 1.

dialysis services because private pay patients and/or their insurers would be charged significantly higher rates for dialysis services.

In the present case, the Presiding Officer found that both Northwest and DaVita met the applicable criteria under WAC 246-310-220 for financial feasibility even though DaVita proposed to build out expansion space for 11 additional stations and its capital expenditure was significantly higher than Northwest's ($1,923,388 compared to $128,616). This was based on findings that: a) both parties could finance the project from existing cash reserves; b) projected net revenues for both projects would exceed operating expenses during or before the third full year of operation; and c) DaVita's higher costs (and any potential impact on the costs and charges for health services) were not inherently unreasonable given the average cost per station of other dialysis projects and its ability to finance the project with existing funds.

Bob Russell, the Program staff who wrote the evaluation, testified the only reason DaVita's application was denied was the overbuilding of future expansion stations. TP2 at 351, 353.[4] He testified that he had no particular guidance from his superiors about the number of excess stations that could be appropriately built (TP2 at 344-345) and the Program had not, to his knowledge as a CN analyst since 2008, previously denied a project based on overbuilding. TP2 at 346. Mr. Russell further testified that the Program did not do any analysis of how much, if any, the expansion space would increase cost for healthcare services, nor did it determine what exactly the impact on the cost of healthcare services would be if DaVita's project was approved. TP2 at 354.

[4] TP2 refers to day two of the transcript of the proceedings.

While it is tempting and easy to assume that substantially higher costs or building stations in excess of current need will necessarily result in an impact on the costs of charges for health services, the evidence must show the impact would probably be unreasonable. Based on Mr. Russell's testimony and other evidence in the record, the Presiding Officer correctly held that the Program's determination of DaVita's financial feasibility under -220 was erroneous because there was no evidence it would probably cause an unreasonable impact on the costs and charges for health services. Thus, DaVita did not fail the financial feasibility criteria in WAC 246-310-220.

Superiority

The Program reviews CN applications for kidney dialysis facilities during four concurrent review cycles per year. WAC 246-310-282. Concurrent review is defined as "the process by which applications competing to provide services in the same planning area are reviewed simultaneously by the department. The department compares the applications to one another and the rules." WAC 246-310-280 (emphasis added). During a concurrent review, "[i]f two or more applications meet all applicable review criteria and there is not enough station need projected for all applications to be approved, the department will use tie-breakers to determine which application or applications will be approved." WAC 246-310-288.

In its Petition (which was filed before the decision of the Court of Appeals), DaVita argued that this case presents "precisely the type of issue for which the Review Officer's role in reviewing CON decisions is essential," namely resolving conflicts between how the Program interprets and applies a rule and how a presiding officer interprets and applies the

same rule. Pet. at 2. DaVita is correct. This is one role of the Review Officer. However, in this situation the Court of Appeals unwittingly intervened before the review was complete.

As noted above, the Court of Appeals has determined the tie-breakers are only used if both applications first satisfy all other review criteria, including the superiority analysis in -240(1). The Review Officer is compelled to follow case law. Although doing so significantly reduces the role of the tie-breakers, it does not render them meaningless since it is possible for a concurrent review to result in a finding that no application is superior.

WAC 246-310-240(1) states:

> A determination that a proposed project will foster cost containment shall be based on the following criteria:
>
> (1) Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable.
>
> ...

In this case, the Presiding Officer found that Northwest's application was the superior alternative under -240(1). Specifically, Northwest's application was superior because its project is "easier to complete, costs less, and would be accessible to provide needed kidney dialysis treatment to patients seven months earlier than DaVita's project." Finding of Fact 1.44. Therefore, both applications did not satisfy all the criteria in rule and the tie-breakers were not used.

DaVita argues in favor of using the tie-breaker criteria to determine superiority under -240(1). This is not an illogical argument because it attempts to reconcile the intent of the rules. But, as the Court of Appeals alluded to in footnote 6, such reconciliation is not

attempted when the rule language is unambiguous and plain on its face as it is here. Tie-breakers will only be used if two or more applications meet all applicable criteria in rule.

Conclusion

Nothing in this decision should be taken to mean faster and cheaper is always better. Many factors not present in this case could balance the scales in the other direction. However, in a situation such as this where both applications are equally viable but one could be implemented seven months earlier and at a greatly reduced cost, it can reasonably be viewed as the superior alternative.

Although DaVita's application met the criteria in chapter 246-310 WAC for an award of the CN when considered on its own merits, it is not the superior option when compared to Northwest's application. For this reason, the Initial Order is AFFIRMED.

I. FINDINGS OF FACT

1.1 The Findings of Fact in the Initial Order dated October 27, 2015, are adopted herein.

II. CONCLUSIONS OF LAW

2.1 The Department of Health is authorized and directed to implement the CN Program. RCW 70.38.105.

2.2 The Secretary is authorized to designate a Review Officer to review initial orders and to enter final orders. RCW 43.70.740.

2.3 DaVita's Petition for Administrative Review and the responses of Northwest and the Program were timely filed. WAC 246-10-701.

2.4 The Conclusions of Law in the Initial Order dated October 27, 2015, are adopted herein.

III. FINAL ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the Initial Order dated October 27, 2015, is AFFIRMED.

Dated this 2nd day of March, 2016

JOHN WIESMAN, DrPH, MPH
SECRETARY OF HEALTH

Kristi Weeks

By KRISTI WEEKS
REVIEW OFFICER

NOTICE TO PARTIES

Any Party may file a petition for reconsideration. RCW 34.05.461(3); RCW 34.05.470. The petition must be filed within ten (10) days of service of this Order with:

Adjudicative Clerk Office
Adjudicative Service Unit
PO Box 47879
Olympia, WA 98504-7879

A copy must be sent to the other parties. If sending a copy to the Assistant Attorney General in this case, the mailing address is:

Agriculture and Health Division
Office of the Attorney General
P.O. Box 40109
Olympia, WA 98504-0109

The petition must state the specific grounds upon which reconsideration is requested and the relief requested. WAC 246-10-704. The petition for reconsideration is considered denied twenty (20) days after the petition is filed if the Adjudicative Clerk Office has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A petition for judicial review must be filed and served within thirty (30) days after service of this Order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the thirty (30) day period for requesting judicial review does not start until the petition is resolved. RCW 34.05.470(3).

The Order remains in effect even if a petition for reconsideration or petition for judicial review is filed. "Filing" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

Final orders are public documents, and may be placed on the Department of Health's website and otherwise released as required by the Public Records Act, chapter 42.56 RCW.

Appendix B

NO. 46384-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVITA HEALTHCARE PARTNERS, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH and NORTHWEST KIDNEY CENTERS,

Respondents.

BRIEF OF RESPONDENT DEPARTMENT OF HEALTH

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I. INTRODUCTION

In 1979, the Legislature established the Certificate of Need program within the Department of Health (Department) as a component of Washington State's health planning regulatory process. It declared that health planning should be concerned with public health and health care financing, access, quality, and cost control of health services. RCW 70.38.015(5). As part of that process, an entity must obtain a Certificate of Need if it wishes to establish or expand a kidney disease treatment center. For approval, the applicant must meet certain standards in WAC 246-310.

Northwest Kidney Centers (NWKC) applied for a Certificate of Need to add five kidney dialysis stations to its existing facility in SeaTac, Washington. DaVita Healthcare Partners, Inc. (DaVita) also applied, within the same planning area, to build a new five-station dialysis facility, in Des Moines, Washington. Under the applicable criteria, the Department initially approved DaVita and denied NWKC. However, following an adjudicative proceeding, a Department health law judge determined that NWKC's application met the criteria for approval, and DaVita's application did not. Hence, the health law judge approved NWKC and denied DaVita. DaVita petitioned for judicial review. The

decision is supported by substantial evidence, and correctly applied the law. It should be upheld by this Court.

II. ISSUES

1. Can DaVita meet its burden of proof to show that the health law judge erred in finding that NWKC's application met all criteria for Certificate of Need approval, and that DaVita's did not?

2. Can DaVita meet its burden of proof to show that the health law judge erred in not approving its application under the tie-breakers in WAC 246-310-288?

III. STATEMENT OF THE CASE

A. Certificate of Need Law

RCW 70.38 and WAC 246-310 require healthcare providers to obtain a Certificate of Need from the Department to establish certain health care facilities and services. A kidney dialysis treatment center[1] is one type of facility or service requiring a Certificate of Need. RCW 70.38.105(4); 70.38.025(6). A kidney dialysis treatment center provides services, including outpatient dialysis, to persons who have end-stage renal disease. WAC 246-310-280(6) and (7).

[1] "Kidney disease treatment center" and "kidney dialysis facility" have the same meaning for the purposes of the Certificate of Need rules. WAC 246-310-280(6) and (7).

The Certificate of Need process involves an application; an opportunity for public comment on the application; and a decision by the Department to approve or deny the application. RCW 70.38.115. An application may be approved only if the proposed project meets four general criteria: Need (WAC 246-310-210); Financial Feasibility (WAC 246-310-220); Structure and Process of Care (WAC 246-310-230); and Cost Containment (WAC 246-310-240). Additional rules apply to kidney dialysis treatment center applications. WAC 246-310-280 *et seq.*

B. NWKC's And Da Vita's Kidney Dialysis Applications

In May 2011, DaVita submitted a Certificate of Need application to construct a new five-station kidney dialysis facility in Des Moines, with an estimated capital expenditure of $1,992,705. Administrative Record (AR) at 1773, 1777.[2] Also in May 2011, NWKC submitted a Certificate of Need application to increase from 25 to 30 the number of stations at its existing facility in SeaTac, with an estimated capital expenditure of $100,969. AR at 792, 2477. Because both applicants proposed to serve residents in the same planning area within King County, the Department

[2] The Administrative Record (AR) compiled by the Department's Adjudicative Service Unit consists of the entire record on file with the Department. Clerk's Papers (CP) at 83-89. The Application Record, compiled by the Certificate of Need program in the course of reviewing the DaVita and NWKC applications, can be found at AR 1771-3420.

reviewed the applications concurrently. AR at 2420-56. The Department found "need" for five additional stations in the planning area. AR at 2428-2431. The Department also found that, on their own merits, both applicants met all criteria for Certificate of Need approval. AR at 2428-2450. However, because need existed for only five stations, only one of the applications could be approved by the Department. In such cases, WAC 246-310-288 lists various "tie-breaker" factors to apply in deciding which applicant should be approved. Based on the tie-breakers, the Department granted DaVita's application, and denied NKC's application. AR at 2451-2455.

NWKC requested an adjudicative proceeding to contest the Department's decision. A health law judge issued an order (AR at 1190-1211) and a reconsideration order (AR at 1375-1381) reversing the Department. [3] He found that NWKC's application met all criteria for approval, and DaVita's application did not, making it unnecessary for him to apply the tie-breakers to determine which application should be approved. Accordingly, he granted NWKC's application and denied

[3] At the conclusion of the administrative adjudicative proceeding, the health law judge's Decision became the decision of the Department, superseding the Certificate of Need program's decision. *DaVita, Inc. v. Dept. of Health,* 137 Wn. App. 174, 176, 151 P.3d 1095 (2007). It is this decision, the final agency decision, that is subject to judicial review and that the Department's attorneys must defend. The undersigned was assigned the matter on judicial review, and did not appear before the health law judge.

DaVita's application.

DaVita petitioned for judicial review of the health law judge's Order under chapter 34.05 RCW. CP at 4-82. Judge Christine Schaller, Thurston County Superior Court, upheld the order. CP at 185-186. DaVita appealed to this Court.

IV. STANDARD OF REVIEW

An appellate court stands in the same position as the superior court in reviewing an administrative decision. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). As petitioner, DaVita carries the "burden of demonstrating the invalidity" of the health law judge's Order approving NWKC's Certificate of Need kidney dialysis treatment center application. RCW 34.05.570(1)(a).

Challenged factual findings may be overturned only when they are "not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). Upholding a finding under this substantial evidence test does not mean that the court would necessarily have made the same finding. Rather, it means there is a "sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Hardee v. Dep't of Soc. and Health Serv's*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011). The substantial evidence

standard is "highly deferential" to the agency. *ARCO Prods. Co. v. Wash. Utils. & Trans. Comm'n.*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). A court does not "reweigh" the evidence. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008).

An appellate court generally reviews an agency's interpretation of a rule de novo. *Nevers v. Fireside Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997). However, Certificate of Need decisions are "presumed correct," and courts must accord "substantial deference" to the Department's legal interpretations. *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102. This deference is appropriate, given the Department's knowledge and expertise in applying the Certificate of Need law. *Id.; Overlake Hosp. v. Dep't of Health*, 170 Wn.2d 43, 56, 239 P.3d 1095 (2010); *Odyssey v. Dep't of Health*, 145 Wn. App. 131, 142, 185 P.3d 652 (2008). "Deference" means that an agency's reasonable conclusions should be upheld even if the reviewing court might find a different conclusion more persuasive. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851 (1989).

V. ARGUMENT

An application for a kidney dialysis treatment center Certificate of Need must meet the standards in WAC 246-310-284 as well as the applicable review criteria of WAC 246-310-210 (Need), 246-310-220

(Financial Feasibility), 246-310-230 (Structure and Process of Care), and 246-310-240 (Cost Containment). WAC 246-310-284. If two entities apply to meet projected need in the same planning area and both applicants meet the review criteria, but there is only sufficient need to approve one of them, the "tie-breakers" in WAC 246-310-288 are used to determine which applicant will be granted a Certificate of Need.

DaVita argues that the health law judge erred in finding that its application did not meet the review criteria of Financial Feasibility (WAC 246-310-220) and Cost Containment (WAC 246-310-240) and in finding that NWKC was a "superior alternative" under WAC 246-310-240(1). DaVita also argues that the health law judge erred in not applying the tie-breakers in WAC 246-310-288 as "standards" under WAC 246-310-200(2).[4]

A. The Health Law Judge Correctly Applied WAC 246-310-220

An applicant must demonstrate the financial feasibility of its project under WAC 246-310-220 based on the following criteria: 1) The immediate and long-range capital and operating costs of the project can be met; 2) The costs of the project, including any construction costs, will

[4] The health law judge found both applicants satisfied the criteria of Need (WAC 246-310-210) and Structure and Process of Care (WAC 246-310-230). AR at 1194, 1202. Because DaVita does not contest these findings, they are not at issue in this appeal.

probably not result in an unreasonable impact on the costs and charges for health services; and 3) The project can be appropriately financed. WAC 246-310-220(1) - (3).

The health law judge found that NWKC's application met these criteria, but DaVita's did not. AR 1196-1201, 1203 at ¶ 25. This finding should be upheld because it is supported by substantial evidence. *See* NWKC Brief, § III C. The health law judge found DaVita's proposed project financially "problematic" for several reasons. AR at 1197-1201. First, he found that DaVita was able to show profitability by the third year of operations only by removing landlord operating expenses from its revised pro forma. AR at 1197, n.20. He further found that DaVita had not provided an adequate explanation of how it could meet its higher operating expenses and capital costs with the same number of dialysis stations and roughly the same percentage of patients with fixed-rate (Medicare and Medicaid) reimbursement plans. AR at 1197-1200.

The health law judge also found that WAC 246-310-220(2) is similar to, and related to, WAC 246-310-240(2)(b): whether the costs of a project involving construction "will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons." AR at 1200-1201; 1202. As stated above, the NWKC five-station expansion would cost $100,969, while DaVita's new

five-station facility would cost $1,992,705. The health law judge found that DaVita's higher construction costs could not help but have an impact on the costs of health services. AR at 1200. He determined that deciding the question of whether such an impact is "unreasonable" necessarily requires a comparison of the two competing applications. AR at 1201-1202. Based on its higher construction costs, the health law judge concluded that DaVita's application did not meet the criteria of Financial Feasibility. AR at 1203-1204.

B. The Health Law Judge Correctly Applied WAC 246-310-240

An applicant must also demonstrate that its project fosters Cost Containment under WAC 246-310-240. WAC 246-310-200. The first question is whether "superior alternatives, in terms of cost, efficiency, or effectiveness are not available or practicable." WAC 246-310-240(1).

If a project involves construction, as DaVita's project does, the reviewer must determine whether "the costs, scope, and methods of construction and energy conservation are reasonable" and whether the project "will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons." WAC 246-310-240(2). The health law judge found that NWKC's application was "superior" to DaVita's application for two reasons. First, as discussed above, he noted that DaVita's capital costs were considerably

higher than NWKC's. AR 1203, ¶ 1.24. Second, he found that DaVita's project would result in higher costs to patients and insurers, compared to NWKC's costs of providing care. AR at 1198-1200, ¶¶ 1.15 through 1.17. Thus, he concluded, DaVita's application failed under WAC 246-310-240 because it was not the "superior" alternative for adding five new stations to serve the planning area. AR at 1205, ¶ 1.28; 1210, ¶ 2.9. Again, these findings should be upheld because they are supported by substantial evidence. *See* NWKC's Brief, § III C.

C. The Health Law Judge Correctly Declined To Apply The "Tie-breakers" In WAC 246-310-288

WAC 246-310-288 states:

> "If two or more applications meet all applicable review criteria and there is not enough station need projected for all applications to be approved, the department will use tie-breakers to determine which application or applications will be approved."

(Emphasis added.) In such cases, under WAC 246-310-288, an applicant can earn up to nine tie-breaker points, based on a variety of factors. The applicant or applicants earning the most points will be approved over the competing applications.

DaVita argues that the tie-breakers should have been applied to decide which application to approve. In rejecting this argument, the health law judge concluded that "one never gets to the tie-breaker in a concurrent

evaluation if one applicant is found to be superior to the other." AR at 1205. This conclusion is entirely consistent with the plain language of WAC 246-310-288, which requires that the tie-breakers will be applied *only* when the competing applicants meet "all applicable review criteria." Here, as stated above, the health law judge found that NWKC's application met all applicable criteria, while DaVita's application did not meet the criteria in WAC 246-310-220 and -240. AR at 1205, ¶ 1.28. Hence, the tie-breakers never came into play in this case.

WAC 246-310-200(2)(a)(i) requires that the Department consider the "consistency of the proposed project with service or facility standards contained in this chapter." Citing this rule, DaVita argues that the WAC 246-310-288 tie-breakers are "standards" that should have been applied in deciding which application to approve. This argument must be rejected because, under the explicit language of WAC 246-310-288, the tie-breakers apply *only* when competing applications meet "all applicable review criteria," which would include WAC 246-310-220 and -240. In fact, the introductory sentence to WAC 246-310-284 specifically states that, for approval, an applicant must meet the criteria in WAC 246-310-220 and -240.

The Department's interpretation of a Certificate of Need regulation is entitled to "substantial deference" on judicial review. *Overlake Hosp.*,

170 Wn.2d at 49-50; *Odyssey*, 145 Wn. App. at 142. In this case, the health law judge's interpretation constitutes the Department's interpretation because it is the final agency decision. *DaVita, Inc. v. Dept. of Health,* 137 Wn. App. 174, 176, 151 P.3d 1095 (2007).[5] The Secretary of Health delegated final authority over Certificate of Need applications to the health law judge. *Id.* The health law judge's legal conclusion – that a superiority analysis under WAC 246-310-240 must be made in deciding between competing kidney dialysis applications – is entitled to substantial deference, and should be upheld by this Court.

The plain language of WAC 246-310-288 cannot be changed in order to produce a result that DaVita believes would be better policy. *See State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 7282 (2005); *Dean v. McFarland*, 81 Wn.2d 215, 222, 500 P.2d 1244 (1972). DaVita's interpretation of WAC 246-310-200 and WACs 246-310-240 and -288 health law judge found that DaVita's project's enormously higher construction costs for the same five kidney dialysis stations is counter to one of the primary purposes of the Certificate of Need law—to contain health care costs. AR at 1205.

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[5] RCW 18.130.050(10) was amended in 2013 to provide that "[p]residing officers acting on behalf of the secretary shall enter initial orders." Laws of 2013, chapter 109 § 1. The amendment took effect on January 1, 2014, nine months after the health law judge issued Findings of Fact, Conclusions of Law, and Final Order in this case.

DaVita asserts that its project would better promote access to care merely because it would have scored a tie-breaker point under WAC 246-310-288(2)(c)(i) if the tie-breakers had been applied by the health law judge, based on the fact that its proposed facility would be five or six miles away from the existing facility. Appellant Brief at 26. However, access to care was not at issue during the administrative proceeding as both applicants had met the review criteria of WAC 246-310-210, where access is addressed within the need methodology. DaVita has provided no evidence that its proposed facility would promote access. AR at 1708.

Comparison of the two projects under the superiority analysis of WAC 246-310-240 serves the goals of the Certificate of Need law to "promote, maintain, and assure the health of all citizens in the state, provide accessible health services, health manpower, health facilities, and other resources, while controlling increases in costs" and "emphasizing cost control of health services." *Overlake Hosp.,* 170 Wn.2d at 55; RCW 70.38.015(1) and (5).

VI. CONCLUSION

Based on the foregoing, the Department of Health respectfully requests that the Court affirm the decision to grant Northwest Kidney Center's Certificate of Need application and deny DaVita's application to establish a kidney dialysis treatment center in King County.

RESPECTFULLY SUBMITTED this 8th day of December, 2014.

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DATED this 8th day of December, 2014 at Olympia, WA.

Krystle A. Berry
KRYSTLE BERRY
Legal Assistant

WAC 246-310-200 No agency filings affecting this section since 2003

Bases for findings and action on applications.

(1) The findings of the department's review of certificate of need applications and the action of the secretary's designee on such applications shall, with the exceptions provided for in WAC 246-310-470 and 246-310-480 be based on determinations as to:

(a) Whether the proposed project is needed;

(b) Whether the proposed project will foster containment of the costs of health care;

(c) Whether the proposed project is financially feasible; and

(d) Whether the proposed project will meet the criteria for structure and process of care identified in WAC 246-310-230.

(2) Criteria contained in this section and in WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240 shall be used by the department in making the required determinations.

(a) In the use of criteria for making the required determinations, the department shall consider:

(i) The consistency of the proposed project with service or facility standards contained in this chapter;

(ii) In the event the standards contained in this chapter do not address in sufficient detail for a required determination the services or facilities for health services proposed, the department may consider standards not in conflict with those standards in accordance with subsection (2)(b) of this section; and

(iii) The relationship of the proposed project to the long-range plan (if any) of the person proposing the project.

(b) The department may consider any of the following in its use of criteria for making the required determinations:

(i) Nationally recognized standards from professional organizations;

(ii) Standards developed by professional organizations in Washington state;

(iii) Federal medicare and medicaid certification requirements;

(iv) State licensing requirements;

(v) Applicable standards developed by other individuals, groups, or organizations with recognized expertise related to a proposed undertaking; and

(vi) The written findings and recommendations of individuals, groups, or organizations with recognized expertise related to a proposed undertaking, with whom the department consults during the review of an application.

(c) At the request of an applicant, the department shall identify the criteria and standards it will use prior to the submission and screening of a certificate of need application: Provided however, That when a person requests identification of criteria and standards prior to the submission of an application, the person shall submit such descriptive information on a project as is determined by the department to be reasonably necessary in order to identify the applicable criteria and standards. The department shall respond to such request within fifteen working days of its receipt. In the absence of an applicant's request under this subsection, the department shall identify the criteria and standards it will use during the screening of a certificate of need application. The department shall inform the applicant about any consultation services it will use in the review of a certificate of need application prior to the use of such consultation services.

(d) Representatives of the department or consultants whose services are engaged by the department may make an on-site visit to a health care facility, or other place for which a certificate of need application is under review, or for which a proposal to withdraw a certificate of need is under review when the department deems such an on-site visit is necessary and appropriate to the department's review of a proposed project.

[Statutory Authority: Chapter 70.38 RCW. WSR 96-24-052, § 246-310-200, filed 11/27/96, effective 12/28/96. Statutory Authority: RCW 70.38.135 and 70.38.919. WSR 92-02-018 (Order 224), § 246-310-200, filed 12/23/91, effective 1/23/92. Statutory Authority: RCW 43.70.040. WSR 91-02-049 (Order 121), recodified as § 246-310-200, filed 12/27/90, effective 1/31/91. Statutory Authority: RCW

70.38.135. WSR 85-05-032 (Order 2208), § 248-19-360, filed 2/15/85; WSR 81-09-012 (Order 210), § 248-19-360, filed 4/9/81, effective 5/20/81. Statutory Authority: Chapter 70.38 RCW. WSR 79-12-079 (Order 188), § 248-19-360, filed 11/30/79.]

WAC 246-310-220 Agency filings affecting this section

Determination of financial feasibility.

The determination of financial feasibility of a project shall be based on the following criteria.

(1) The immediate and long-range capital and operating costs of the project can be met.

(2) The costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services.

(3) The project can be appropriately financed.

[Statutory Authority: RCW 43.70.040. WSR 91-02-049 (Order 121), recodified as § 246-310-220, filed 12/27/90, effective 1/31/91. Statutory Authority: Chapter 70.38 RCW. WSR 79-12-079 (Order 188), § 248-19-380, filed 11/30/79.]

WAC 246-310-240 Agency filings affecting this section

Determination of cost containment.

A determination that a proposed project will foster cost containment shall be based on the following criteria:

(1) Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable.

(2) In the case of a project involving construction:

(a) The costs, scope, and methods of construction and energy conservation are reasonable; and

(b) The project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons.

(3) The project will involve appropriate improvements or innovations in the financing and delivery of health services which foster cost containment and which promote quality assurance and cost effectiveness.

[Statutory Authority: RCW 43.70.040. WSR 91-02-049 (Order 121), recodified as § 246-310-240, filed 12/27/90, effective 1/31/91. Statutory Authority: RCW 70.38.135. WSR 86-06-030 (Order 2344), § 248-19-400, filed 2/28/86; WSR 81-09-012 (Order 210), § 248-19-400, filed 4/9/81, effective 5/20/81. Statutory Authority: Chapter 70.38 RCW. WSR 79-12-079 (Order 188), § 248-19-400, filed 11/30/79.]

WAC 246-310-284 Agency filings affecting this section

Kidney disease treatment centers—Methodology.

A kidney dialysis facility that provides hemodialysis or peritoneal dialysis, training, or backup must meet the following standards in addition to applicable review criteria in WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240.

(1) Applications for new stations may only address projected station need in the planning area in which the facility is to be located.

(a) If there is no existing facility in an adjacent planning area, the application may also address the projected station need in that planning area.

(b) Station need projections must be calculated separately for each planning area within the application.

(2) Data used to project station need must be the most recent five-year resident in-center year-end patient data available from the Northwest Renal Network as of the first day of the application submission period, concluding with the base year at the time of application.

(3) Projected station need must be based on 4.8 resident in-center patients per station for all planning areas except Adams, Columbia, Douglas, Ferry, Garfield, Jefferson, Kittitas, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, San Juan, Skamania, Stevens, and Wahkiakum counties. The projected station need for these exception planning areas must be based on 3.2 resident in-center patients per station.

(4) The number of dialysis stations projected as needed in a planning area shall be determined by using the following methodology:

(a) Determine the type of regression analysis to be used to project resident in-center station need by calculating the annual growth rate in the planning area using the year-end number of resident in-center patients for each of the previous six consecutive years, concluding with the base year.

(i) If the planning area has experienced less than six percent growth in any of the previous five annual changes calculations, use linear regression to project station need; or

(ii) If the planning area has experienced six percent or greater growth in each of the previous five annual changes, use nonlinear (exponential) regression to project station need.

(b) Project the number of resident in-center patients in the projection year using the regression type determined in (a) of this subsection. When performing the regression analysis use the previous five consecutive years of year-end data concluding with the base year. For example, if the base year is 2005, use year-end data for 2001 through 2005 to perform the regression analysis.

(c) Determine the number of dialysis stations needed to serve resident in-center patients in the planning area in the projection year by dividing the result of (b) of this subsection by the appropriate resident in-center patient per station number from subsection (3) of this section. In order to assure access, fractional numbers are rounded up to the nearest whole number. For example, 5.1 would be rounded to 6. Rounding to a whole number is only allowed for determining the number of stations needed.

(d) To determine the net station need for a planning area, subtract the number calculated in (c) of this subsection from the total number of certificate of need approved stations located in the planning area.

(5) Before the department approves new in-center kidney dialysis stations, all certificate of need approved stations in the planning area must be operating at 4.8 in-center patients per station for all planning areas except Adams, Columbia, Douglas, Ferry, Garfield, Jefferson, Kittitas, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, San Juan, Skamania, Stevens, and Wahkiakum counties. For these exception planning areas all certificate of need approved stations in the planning area must be operating at 3.2 in-center patients per station. Both resident and nonresident patients using the dialysis facility are included in this calculation. Data used to make this calculation must be from the most recent quarterly modality report or successor report from the Northwest Renal Network as of the first day of the application submission period.

(6) By the third full year of operation, new in-center kidney dialysis stations must reasonably project to be operating at:

(a) 4.8 in-center patients per station for those facilities required to operate at 4.8 in-center patients as identified in subsection (5) of this section; or

(b) 3.2 in-center patients per station for those facilities required to operate at 3.2 in-center patients as identified in subsection (5) of this section.

[Statutory Authority: RCW 70.38.135. WSR 06-24-050, § 246-310-284, filed 12/1/06, effective 1/1/07.]

WAC 246-310-288 Agency filings affecting this section

Kidney disease treatment centers—Tie-breakers.

If two or more applications meet all applicable review criteria and there is not enough station need projected for all applications to be approved, the department will use tie-breakers to determine which application or applications will be approved. The department will approve the application accumulating the largest number of points. If sufficient additional stations remain after approval of the first application, the department will approve the application accumulating the next largest number of points, not to exceed the total number of stations projected for a planning area. If the applications remain tied after applying all the tie-breakers, the department will award stations as equally as possible among those applications, without exceeding the total number of stations projected for a planning area.

(1) The department will award one point per tie-breaker to any applicant that meets a tie-breaker criteria in this subsection.

(a) ***Training services (1 point)***:

(i) The applicant is an existing provider in the planning area and either offers training services at the facility proposed to be expanded or offers training services in any of its existing facilities within a thirty-five mile radius of the existing facility; or

(ii) The applicant is an existing provider in the planning area that offers training services in any of its existing facilities within thirty-five miles of the proposed new facility and either intends to offer training services at the new facility or through those existing facilities; or

(iii) The applicant, not currently located in the planning area, proposes to establish a new facility with training services and demonstrates a historical and current provision of training services at its other facilities; and

(iv) Northwest Renal Network's most recent year-end facility survey must document the provision of these training services by the applicant.

(b) ***Private room(s) for isolating patients needing dialysis (1 point).***

(c) ***Permanent bed stations at the facility (1 point).***

(d) ***Evening shift (1 point)***: The applicant currently offers, or as part of its application proposes to offer at the facility a dialysis shift that begins after 5:00 p.m.

(e) ***Meeting the projected need (1 point)***: Each application that proposes the number of stations that most closely approximates the projected need.

(2) Only one applicant may be awarded a point for each of the following four tie-breaker criteria:

(a) ***Economies of scale (1 point)***: Compared to the other applications, an applicant demonstrates its proposal has the lowest capital expenditure per new station.

(b) ***Historical provider (1 point)***:

(i) The applicant was the first to establish a facility within a planning area; and

(ii) The application to expand the existing facility is being submitted within five years of the opening of its facility; or

(iii) The application is to build an additional new facility within five years of the opening of its first facility.

(c) ***Patient geographical access (1 point)***: The application proposing to establish a new facility within a planning area that will result in services being offered closer to people in need of them. The department will award the point for the facility located farthest away from existing facilities within the planning area provided:

(i) The facility is at least three miles away from the next closest existing facility in planning areas that qualify for 4.8 patients per station; or

(ii) The facility is at least eight miles from the next closest existing facility in planning areas that qualify for 3.2 patients per station.

(d) ***Provider choice (1 point)***:

(i) The applicant does not currently have a facility located within the planning area;

(ii) The department will consider a planning area as having one provider when a single provider has multiple facilities in the same planning area;

(iii) If there are already two unrelated providers located in the same planning area, no point will be awarded.

[Statutory Authority: RCW 70.38.135. WSR 06-24-050, § 246-310-288, filed 12/1/06, effective 1/1/07.]

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Re: *DaVita Healthcare Partners, Inc. v. Washington State Department of Health and Northwest Kidney Centers*
Supreme Court Case No. 92746-4

Supreme Court Clerk,

Attached for filing is **Respondent Northwest Kidney Centers' Response to DaVita Healthcare Partner Inc.'s Petition for Discretionary Review**.

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Thank you.

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