No. 46384-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DAVITA HEALTHCARE PARTNERS INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH and
NORTHWEST KIDNEY CENTERS,

Respondent.

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# ANSWERING BRIEF OF NORTHWEST KIDNEY CENTERS

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## I. INTRODUCTION

In March 2013, Health Law Judge Frank Lockhart reversed the Department of Health's Certificate of Need ("CN") Program and awarded a CN to Northwest Kidney Centers, instead of to DaVita, Inc., to operate five kidney dialysis stations in King County ESRD Planning Area #4. He did so because he found NKC's proposal to add five dialysis stations to its existing SeaTac facility at a capital cost of $100,000, and to provide care at a lower cost per treatment and at lower commercial rates, would better contain health care costs under WAC 246-310-240 than would DaVita's $2 million proposal to build a new dialysis center in Des Moines, and to provide the same care at higher costs and higher commercial rates.

Although DaVita's application would have a much greater impact on health care costs than NKC's proposal, the CN Program originally awarded DaVita the CN. It did so because it did not do what the CN statute and regulations require in a comparative review: it did not ***compare*** NKC's and DaVita's applications to each other to determine which would be the "[s]uperior alternative[] ... in terms of cost, efficiency, or effectiveness." WAC 246-310-240(1); *see also* WAC 246-310-200(2); WAC 246-310-280(3); RCW 70.38.115(7).

HLJ Lockhart corrected this error. He concluded (as have two other HLJs before him) that the plain language of WAC 246-310-200 and

-240 require the Department to compare competing applications under -240(1) to determine which would better contain health care costs. He then found NKC's proposal satisfies all four CN criteria (need, financial feasibility, structure and process of care, and cost containment), while DaVita's satisfies only two (need and structure and process of care).

The Thurston County Superior Court affirmed on all grounds.

HLJ Lockhart's decision, as affirmed by the Superior Court, comports with the plain language and intent of the CN law. The legislature enacted that law to promote access to health care and to control health care costs by regulating entry into the market and maximizing use of existing facilities. *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 735-36 (1995); RCW 70.38.015(1); RCW 70.38.115(2)(h). The Court should affirm the HLJ's decision for two reasons:

***First***, as HLJ Lockhart correctly determined, WAC 246-310-200(2), -240, and -288 require the Department to (1) determine if competing applications meet all four CN criteria; (2) ***compare*** the applications to determine which would better contain costs, WAC 246-310-240; and (3) apply the kidney dialysis tie-breakers in -288 ***only*** "[i]f two or more applications meet all applicable review criteria," WAC 246-310-288. DaVita argues the Department must replace the predicate, cost

containment superiority analysis in -240 with the conditional tie-breaker analysis in -288. But DaVita points to ***no language*** in the CN statutes or regulations allowing for that result.

***Second***, substantial evidence supports the HLJ's determination that NKC's application satisfies the CN law's cost containment and financial feasibility criteria, while DaVita's does not. NKC showed its application would have lower capital costs ($100,000 vs. $2 million), lower operating expenses, lower revenue per treatment, and lower commercial rates (more than 13% lower). NKC also showed its revenue would exceed expenses beginning every year of operation, and it could open the five new stations immediately. In contrast, the evidence showed DaVita would operate at a loss until the third year (or the fourth year, if it included certain lease operating expenses in its pro forma, as it should), and would not open for at least six or seven months. DaVita also failed to present any evidence showing its facility would improve access or provide better care.

## II. STATEMENT OF THE ISSUES

1. Did the HLJ correctly conclude that (a) WAC 246-310-200(2) and -240(1), required the Department to compare the competing applications against each other to determine which is the "[s]uperior alternative[]"; and (b) the tie-breakers in -288 apply only "[i]f two or more applications meet all applicable review criteria," including the

comparative cost containment review criteria in -240?

2. Does substantial evidence support the HLJ's findings that NKC's proposal satisfies the financial feasibility criteria in -220 and the cost containment criteria in -240, but DaVita's does not? [1]

## III. STATEMENT OF THE CASE

### A. The Certificate of Need Law

"Since 1979, Washington has controlled the number of healthcare providers entering the market" through the CN law. *King Cnty. Pub. Hosp. Dist. No. 2 v. Dep't of Health*, 178 Wn.2d 363, 366 (2013). The legislature enacted the law in response to congressional encouragement to use planning "to control health care costs." *St. Joseph*, 125 Wn.2d at 735 (citing Pub. L. No. 93-641, 88 Stat. 2225 (repealed in 1986); *Nat'l Gerimed. Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 386 (1981)). Congress worried "'that marketplace forces in [the health care] industry failed to produce efficient investment in facilities and to minimize the costs of health care.'" *Id.* at 735-36 (quoting *Nat'l Gerimed.*, 452 U.S. at 386). The legislature "intended the [CN] requirement to provide accessible health services and assure the health of

[1] This appeal does not involve a challenge to the HLJ's determination that both NKC's and DaVita's applications satisfy the need and structure and process of care criteria and so, NKC does not address those criteria here. WAC 246-310-210, -230; CP 56-57, 63-64.

all citizens in the state while controlling costs." *King Cnty.*, 178 Wn.2d at 366.

The "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). It does this by requiring certain health care providers "wishing to establish or expand facilities ... to obtain a CN." *St. Joseph*, 125 Wn.2d at 736; RCW 70.38.105(4)(a). Such providers, including those competing to operate kidney dialysis centers, must satisfy four criteria: the project's need, financial feasibility, structure and process of care, and containment of health care costs. *King Cnty.*, 178 Wn.2d at 367. The CN regulations state the Department "shall" review all CN applications under these four criteria. The Department described these criteria in WAC 246-310-210 (need), -220 (financial feasibility), -230 (structure and process of care), and -240 (cost containment). "[I]n making the required [CN] determinations," the Department "***shall***" use the criteria contained "in WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240." WAC 246-310-200(2) (emphasis added).

The Department also has adopted regulations specific to the kidney dialysis context. *See* WAC 246-310-280 to -289. Under those regulations, "[i]f 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 (emphasis added).

### 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 always fatal. AR 791, 1517-19, 2422. NKC now has 14 dialysis locations, 13 in King County and 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 that includes the head of the division of nephrology at the University of Washington and the CFOs of Children's Hospital and Virginia Mason Medical Center, among other board members. AR 791, 1518, 2422; CP 55 ¶ 1.1.

On May 31, 2011, NKC submitted an application to the CN Program to expand its existing SeaTac Kidney Center by five stations at a capital cost of $100,969. AR 792, 2477, 2487. The Center is across the street from SeaTac airport, on Highway 99. AR 792, 1519-20, 2422. NKC has run this center for many years, and has operated 25 stations at the facility since 2008. AR 792, 2422, 2486. In its CN application, NKC projected its revenue would exceed its expenses every year and 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, NKC added and began operating the five new stations, for a total of 30. AR 792.

### C. DaVita, Inc., and Its CN Application

DaVita, Inc., is a publicly traded 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.

In 2008 (the last year for which it reported results in its CN application), DaVita earned $374 million in profit on revenues of $5.66 billion. AR 1968. DaVita reported that 65% of its revenues derived from government payors (namely, Medicare) and 35% from commercial payors (Blue Cross Blue Shield, United, Aetna, etc.). AR 1921. Although commercial payors accounted for only about one-third of its revenues, DaVita admitted its business depends on maximizing these revenues: "The payments we receive from commercial payors generate nearly all of our profits." AR 1922. DaVita explained this is so because "average commercial payment rates are generally significantly higher than Medicare rates." *Id.*; *see also id.* at 1921-22.

In its public SEC disclosures (submitted with its CN application), DaVita described the importance of high commercial rates to the

company: "if our negotiations result in overall commercial rate reductions in excess of our commercial rate increases, our revenues and operating results could be negatively impacted." AR 1922. Similarly, it stated: "If the number of patients with higher-paying commercial insurance declines, then our revenues, earnings and cash flows would be substantially reduced." AR 1930. Again emphasizing the importance of high commercial rates, DaVita warned that if average rates paid by commercial payors "decline significantly, it would have a ***material*** adverse effect on our revenues, earnings and cash flows." *Id.* (emphasis added).

DaVita submitted its CN application on the same day as NKC. DaVita Br. at 11; AR 2426. One month later DaVita submitted an amended application, in which it estimated a capital cost of $1,992,705. AR 1773, 1777; DaVita Br. at 15. Originally, DaVita projected it would operate at a loss in the first three years of operations. AR 1915; AR 2297.[2] 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 operation (but not the first two years). *Compare* AR 1915, *with* AR

[2] 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.

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.

DaVita thus proposed to provide the same service as NKC, but at a capital cost nearly 20 times higher, with greater expenses, higher negotiated commercial rates, and a significantly longer delay to opening than NKC. *Compare* AR 1773 & 1915, *with* AR 2477 & 2518.

### D. Program Review of the Competing Applications

The CN Program reviewed the two 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, the Program awarded the CN to DaVita. AR 2422-56, 2461. In doing so, it first found both applications met three of the four CN criteria: need, financial feasibility, and structure and process of care. AR 2428-47; WAC 246-310-210, -220, -230. The Program then turned to the fourth criterion, which requires a "determination that a proposed project will foster cost containment." WAC 246-310-240; *see also* WAC 246-310-200(2). Under this criterion, the Program must, among other things, decide that "[s]uperior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable." WAC 246-310-240(1).

The Program found DaVita's application would better contain

costs than NKC's application—even though by every measure (capital costs, operating costs, rates to commercial patients) DaVita's proposal would cost far more than NKC's. The Program reached this peculiar result by ignoring the plain language of WAC 246-310-240(1). Instead of ***comparing*** the two applications to see which was superior "in terms of cost, efficiency, or effectiveness," the Program followed an unwritten "multi-step approach," AR 2447, that ***avoids*** the required comparison:

First, the Program reiterated that both applications met the criteria in -210 through -230. AR 2447-48; CP 64 ¶ 1.23.

Second, the Program analyzed whether each applicant chose the best alternative ***for itself***, without regard to how the applications ***compared to each other*** in terms of cost, efficiency, or effectiveness under -240. So, the Program found, by electing to expand its existing facility rather than build a new one, NKC chose the superior alternative for itself; and, by electing to build a new facility rather than do nothing, DaVita chose the superior alternative for itself. AR 2448-49, 1412-13, 1447-52.

Third, having decided both applications were individually superior to the alternatives available to each applicant, considered in isolation, the Program declared a "tie." AR 2448-53, 1413, 1483-84; CP 64 ¶ 1.23. It then replaced the cost containment analysis in -240 with the tie-breaker criteria in -288. AR 2448-53, 1413, 1483-84; CP 64 ¶ 1.23. Applying the

tie-breakers, the Program found DaVita's 20-times-more-expensive application to be superior in terms of cost, efficiency, and effectiveness. AR 2449-53.

The Program embarked on this analysis and reached this conclusion even though -288 states the tie-breakers apply ***only*** "[i]f two or more applications meet ***all*** applicable review criteria," which include the comparative cost containment analysis in -240. WAC 246-310-288 (emphasis added). Because the Program never compared the applications under the "cost containment" criterion in -240, it failed to make a finding required to trigger the tie-breakers. And because the Program never compared the applications to each other under -240, it reached the illogical conclusion that the less superior alternative in terms of cost and efficiency—building a new DaVita facility with higher operating costs and rates, rather than expanding an existing NKC facility with lower costs and rates—would best contain health care costs. *See* AR 1447:23-1452:15.

### E. Adjudicative Review Proceeding Before the HLJ

***Petition for Adjudicative Proceeding.*** Because the Program awarded DaVita the CN based on a misreading and misapplication of the CN regulations, NKC requested an adjudicative proceeding. AR 1-48; DaVita Br. at 13. NKC argued the Program improperly replaced the cost containment analysis in -240 with the tie-breakers in -288 and, as a result,

reached the nonsensical conclusion that the more costly application (DaVita's) would better contain health care costs than the less costly one (NKC's). AR 2 ¶ 4; AR 4 ¶ 6. NKC also identified factual bases for reversing the Program's decision. It showed NKC's application would cost one-twentieth of DaVita's, would not operate at a loss in any year of operations, would be implemented more quickly and in a convenient location, and would result in lower charges to commercial patients and their insurers. AR 2-4 ¶ 6; *see also* WAC 246-310-220(1)-(2) (financial feasibility criteria include operating and capital costs); WAC 246-310-240(1) & (2)(b) (cost containment criteria include comparative cost, efficiency, and effectiveness, and impact on health care costs).

***Final Order.*** HLJ Lockhart held a two-day hearing, in which the parties presented evidence and argument. AR 1382-1770. After the hearing and significant post-hearing briefing, he issued an order reversing the Program and awarding the CN to NKC. CP 52-74; AR 782-1154. He found both NKC's and DaVita's applications met the need and structure and process of care criteria. CP 56-57, 63-64. He then interpreted WAC 246-310-200, -240 and -288 as written, concluding—as have two other HLJs in separate CN proceedings—that: "An application for 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 (other HLJ decisions reaching same determination).

Applying that analysis, the HLJ found, based on the administrative record and evidence presented in the hearing, that 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).

The HLJ also found DaVita's application would have an "unreasonable impact on the costs and charges to the public of providing health services by other persons" under -240(2)(b) because DaVita would charge higher commercial rates, increasing health care costs. CP 65-66 ¶ 1.25. He further determined DaVita's application did not satisfy -240(3) because DaVita presented no evidence showing its facility would improve competition. CP 66-67 ¶ 1.27.

The HLJ concluded DaVita's application failed to meet the financial feasibility criteria for similar reasons. CP 62-63 ¶¶ 1.16-1.17. First, he explained DaVita either would not meet its operating expenses by

its third year or would do so only "by charging commercial carriers more." CP 62 ¶ 1.16; WAC 246-310-220(1). Second, he found DaVita's application would unreasonably impact health care "costs and charges" because "[e]ither patients would be paying more, or insurance companies would be paying more (and passing those costs onto their insured[s].)." CP 65-66 ¶ 1.25; WAC 246-310-220(2).

***Order Denying Reconsideration.*** DaVita and the Program moved for reconsideration. AR 1213-30, 1248-64. DaVita primarily: (1) disagreed with the HLJ's conclusion that the Program must compare the applications and conduct a full cost containment analysis under -240 before turning to the tie-breakers in -288 (if necessary); (2) complained the HLJ improperly prioritized the CN law's cost concerns over access; and (3) challenged the HLJ's calculations. AR 1213-30. NKC opposed the motions, and the HLJ denied them. AR 1299-1346; CP 76-82. In doing so, the HLJ reaffirmed his interpretation of WAC 246-310-200(2), -240 and -288, clarified he focused on cost because "cost was the only area of dispute," and emphasized "[n]o evidence of improvements in care was offered at hearing." CP 77-80.

### F. Adjudicative Proceeding Before the Superior Court

DaVita submitted a timely petition for review in the Thurston County Superior Court. CP 4. It argued the HLJ erred when he analyzed

the applications under WAC 246-310-240, as -200(2) required him to do, and when, based on that analysis, he did not reach the tie-breakers in -288. CP 9, 108-15, 119-21, 132. DaVita also challenged the HLJ's factual findings. CP 115-67, 122-31.

The Department and NKC both opposed DaVita's challenge to the HLJ's decision. In particular, the Department ***disagreed*** with DaVita's contention that "any *comparative* review of two applications must be performed under the tiebreakers, and not under a superiority analysis" in -240. CP 168. In the Department's words, "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. "[T]he WAC 246-310-240 superiority analysis should not be discarded in favor of simply applying the tiebreakers as the means for comparing two competing applications." *Id.*

The Department also recognized the HLJ's "decision does not render the tiebreakers a nullity, as the Department will apply the tiebreakers whenever it determines that no application is superior to the competing application." *Id.* Finally, the Department urged the court to affirm the HLJ's factual determination that NKC's application satisfied the financial feasibility criteria in -220 and the cost containment criteria in -240, while DaVita's did not. CP 169-71.

The superior court affirmed the HLJ's decision, stating: "from the court's perspective, 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"—the criteria contained in -210, -220, -230, and -240. RP 5:6-10, 20-23 (May 1, 2014). The court further recognized: "Nowhere in 200 does it reference 288 or a requirement to use 288 when looking at these other subsections. And, in fact, in 288, it nowhere references any other section as well." *Id.* 5:24-6:2. As the court explained, if the Department were required to jump to the tiebreakers in -288 every time it found two applications satisfied -210 (need), -220 (financial feasibility), and -230 (structure and process of care), without regard to how the applications stacked up under -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 rightly concluded: "It is clear, when the [HLJ] looked at this case, he never got to 288, because he found that DaVita's application did not meet all applicable review criteria, specifically looking at 240, the determination of the cost containment. And I find that the [HLJ] 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. The court also affirmed the HLJ's factual findings as supported by substantial evidence. *Id.* 7-8.

## IV. STANDARDS OF REVIEW

NKC agrees the Washington Administrative Procedure Act governs judicial review of the HLJ's decision. DaVita Br. at 20; RCW 70.38.115(10)(a); RCW 34.05.570(3). The HLJ's decision constitutes final "agency action," subject to judicial review under the APA, because when the HLJ issued his decision, he was the Secretary of Health's designee, with "authority to make final decisions and issue a final order for CON applications." *DaVita, Inc. v. Wash. State Dep't of Health*, 137 Wn. App. 174, 181 (2007); *see also King Cnty.*, 178 Wn.2d at 366; DaVita Br. at 19-20.[3] NKC agrees this Court reviews the HLJ's decision directly. DaVita Br. at 20. As the final agency decision, the HLJ's orders are "***presumed correct*** and the challenger bears the burden of proof." *King Cnty.*, 178 Wn.2d at 372 (emphasis added) (quoting *Providence Hosp. of*

[3] DaVita speculates that had the procedure for seeking review of an HLJ decision by a "final decision-maker appointed by the Secretary of Health" existed in March 2013, the CN Program's original determination that the higher cost application would better contain health care costs would have been upheld. DaVita Br. at 19-20 (citing RCW 18.130.050); *see also* RCW 43.70.740. But the procedure did not exist then, so DaVita's speculative claim is irrelevant. DaVita's speculation also does not make sense, given that two HLJs previously reached the same conclusion as HLJ Lockhart here. Further, nothing about this procedure affects parties' ability to appeal a final agency decision-maker's decision to the court, which affirmed HLJ Lockhart's decision awarding the CN to NKC.

*Everett v. Dep't of Soc. & Health Servs.*, 112 Wn.2d 353, 355 (1989)). RCW 34.05.570(3) enumerates the limited circumstances under which a court may reverse an agency order (here, the HLJ's order).

This Court reviews the interpretation of agency rules de novo, using the same principles it applies to statutes. DaVita Br. at 21-22 (quoting *Grays Harbor Energy, LLC v. Grays Harbor Cnty.*, 175 Wn. App. 578, 583 (2013)). "As with statutory interpretation, where a regulation is clear and unambiguous [the Court] ***must give effect to that plain meaning***." *Bravern Residential, II, LLC v. State, Dep't of Revenue*, 334 P.3d 1182, 1186 (2014) (enforcing regulation's plain meaning) (emphasis added) (citing *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52 (2010)). In addition, "[u]nder the error of law standard, the court ... substantially ***defers*** to the agency's interpretation, particularly where the agency has special expertise." *King Cnty.*, 178 Wn.2d at 372 (emphasis added). "The court affirms an agency's factual findings unless they are not supported by substantial evidence," and reviews "an administrative law judge's evidentiary decisions for abuse of discretion." *Id.* (citing RCW 34.05.570(3)(e)).

## V. ARGUMENT

### A. The Tie-Breakers in WAC 246-310-288 Apply if Competing Applications Meet all Four CN Criteria

DaVita admits the Department "must follow [its] own rules and regulations." DaVita Br. at 22 (quoting *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 44 (2009)). Yet DaVita urges the Court to reverse the HLJ's decision because he did precisely that: he correctly concluded (as have two other HLJs before him) that the plain language of the CN regulations requires the Department to analyze competing applications under ***all four*** CN criteria, including comparing applications under the cost containment criteria in -240, ***before*** turning to the tie-breakers in -288. CP 55 ¶ 1.2; CP 64-65 ¶¶ 1.22-1.23; CP 77-78 ¶ 1.5; AR 834-75. DaVita's appeal to the Program's supposed unwritten intent in promulgating the tie-breaker rule cannot overcome the plain language of the CN regulations. *See* DaVita Br. at 22.

#### 1. The CN Statutes and Regulations Require the Cost Containment Analysis in WAC 246-310-240

DaVita agrees the Department must consider the four CN criteria in deciding whether to award a CN. DaVita Br. at 6-7; WAC 246-310-200(1)(a)-(d) & (2). The plain language of both the CN statutes and regulations requires this result.

### a. The CN Statute Requires a Comparative Cost Containment Analysis

The CN statute provides:

> (2) Criteria for the review of [CN] applications ... ***shall*** include but not be limited to consideration of ...
> (b) The availability of less costly or more effective alternative methods of providing such services; ...
> (g) Improvements or innovations in the financing and delivery of health services which foster cost containment; [and]
> (h) .... the efficiency and appropriateness of the use of existing services and facilities similar to those proposed.

RCW 70.38.115(2)(b), (g), (h) (emphasis added). In no uncertain terms, the legislature has directed the Department to consider whether "less costly or more effective alternative methods" exist. RCW 70.38.115(2). This analysis, by its nature requires ***comparing*** the proposed project with "alternative methods." *Id.* DaVita cannot seriously argue otherwise, having acknowledged the term "shall" is "mandatory." DaVita Br. at 24. And in the context of competing applications (as here), the legislature has directed the Department to use "[c]oncurrent review ... for the purpose of ***comparative analysis*** ... to determine ***which of the projects may best*** meet identified needs." RCW 70.38.115(7) (emphasis added).

Reading these statutes together, as the Court must, leads to the unremarkable conclusion that the Department must ***compare*** competing applications against each other to determine which presents the most cost effective method of providing the needed services. *See* RCW

70.38.115(2)(b), (g), (h), (7).

### b. The CN Regulations Require a Superior Alternatives Cost Analysis

The Department has long understood this legislative mandate. Its own regulations state it "***shall***" base certificate of need determinations on "[w]hether the proposed project will foster containment of the costs of health care," and "***shall***" use the "[c]riteria contained ... in WAC ... 246-310-240 ... in making the required determinations." WAC 246-310-200(1)(b) & (2) (emphasis added); *see also* CP 78 ¶ 1.5 (quoting same). The HLJ correctly concluded that under the words of the Department's own regulations, the Department must engage in the cost containment analysis in WAC 246-310-240. CP 78 ¶ 1.5. DaVita effectively admits as much. DaVita Br. at 22 (citing WAC 246-310-200).

The cost containment regulation, WAC 246-310-240, in turn, provides, in relevant part: "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." WAC 246-310-240(1) (emphasis added). On its face, subsection -240(1) requires the Department to compare applications to each other to determine which would be the superior alternative "in terms of cost, efficiency, or effectiveness"—not to consider the

applications in isolation. *Id.*; CP 64-65 ¶ 1.23; CP 78 ¶ 1.5.

Even the Program admitted -240(1) requires it to compare applications against each other. AR 1236:3-6.[4] The Program's admission comes as no surprise given the words of -240(1) and the directive in the CN regulations and statutes to "compare[] the applications to one another and these rules." WAC 246-310-280(3); *see also* RCW 70.38.115(7) (Department must compare "competing or similar projects"). In requiring the Department to compare applications to determine superiority, WAC 246-310-240 does ***not*** mention the tie-breakers in -288 or the "multi-step approach" DaVita advocates using in the place of -240. *Id.*; DaVita Br. at 12-13, 23-24, 28-29; AR 1081:15-18.

DaVita, however, argues that WAC 246-310-288 requires that in every review of competing kidney dialysis CN applications, the Department must ***skip*** the comparative analysis required under -240(1) and jump straight to the "tie-breakers" in -288. DaVita reaches this conclusion by reasoning that because the term "will" appears twice in WAC 246-310-288, resort to the regulation is "mandatory" in every case.

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[4] DaVita admits -240 requires comparing applications submitted by providers other than kidney dialysis centers (such as hospitals), but argues no comparison is required for dialysis applications because the Department has developed the tie-breaker rule for those applications. DaVita Br. at 29. But the words of -240 do not mean one thing for hospitals and something else for kidney dialysis centers. Those words require that the Department compare two competing applications, regardless the type of provider involved.

DaVita Br. at 24. By so urging, DaVita ignores the plain language of RCW 70.38.115(2)(b), (g), and (h), WAC 246-310-200(1)-(2), and WAC 246-310-240. DaVita Br. at 24. Each of those provisions states the Department "shall" engage in a cost containment analysis, including the comparative analysis under -240(1). RCW 70.38.115(2)(b), (g), (h); WAC 246-310-200(1)(b), (2); WAC 246-310-240; DaVita Br. at 24.

The words of -288 do not relieve the Department of this obligation. Quite the contrary: the plain language of -288 makes clear the Department can apply the tie-breakers only "***[i]f*** two or more applications meet ***all*** applicable review criteria." WAC 246-310-288 (emphasis added). The "superior alternatives" analysis in -240(1) is one of the "review criteria." WAC 246-240(1), -288, -200(2). By its terms, -288 does not permit the Department to apply the tie-breakers if the Department finds two applications meet only ***some*** of the four CN criteria. *Id.* DaVita's contention the HLJ should have analyzed each application "as a stand-alone project" is unmoored from the words of the CN statute and regulations. DaVita Br. at 17.

Without citation to any support, DaVita also asserts the HLJ "perceived a conflict" between the tie-breaker rule in -288 and the cost containment criteria in -240. DaVita Br. at 25. Not so. The HLJ read those regulations in harmony, as DaVita admits he must. *Id.* at 33. The

HLJ recognized the Department can comply with WAC 246-310-200(1) and (2), WAC 246-310-240, ***and*** WAC 246-310-288 by applying these rules as written—as requiring engaging in the comparative cost containment analysis in -240 ***before*** turning, if necessary, to the tie-breakers in -288. CP 64-65 ¶ 1.23; CP 66-67 ¶ 1.27; CP 78 ¶ 1.5; *see also* AR 853 ¶ 2.17; AR 871-73 ¶¶ 2.14-2.15. The HLJ did not perceive a conflict and none exists. DaVita's statutory construction argument that a more recent enactment prevails over an older one therefore has no bearing here. DaVita Br. at 30. As DaVita admits, that principle applies only if an ambiguity exists ***and*** "there is an apparent conflict." *Id.* (quoting *Am. Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 585-86 (2008)).

The HLJ correctly concluded he must interpret WAC 246-310-200(2), -240(1), and -288 so as "to give effect to all language in the [regulation] and to render no portion meaningless or superfluous." *Hospice of Spokane v. Wash. State Dep't of Health*, 178 Wn. App. 442, 453 (2013) (affirming HLJ decision interpreting regulation as written); *see also Overlake*, 170 Wn.2d at 51-52; CP 64-65 ¶ 1.23; CP 78 ¶ 1.5; DaVita Br. at 30-32. So too should this Court. The regulations plainly require the Department to compare competing applications under -240(1) to determine which presents the superior alternative in terms of cost, efficiency, and effectiveness. Only if ***both*** are equal, so that neither is

"superior," may the Department invoke the tie-breakers in -288. Because the CN statute and rules are "clear and unambiguous, a court should apply [the] plain language and may not look beyond the language to consider the agency's interpretation." *Children's Hosp. & Med. Ctr. v. Wash. State Dep't of Health*, 95 Wn. App. 858, 868 (1999).

The HLJ's plain-language conclusion is consistent with *Children's Hospital & Medical Center v. Department of Health*, on which DaVita relies. DaVita Br. at 22-23. There, Children's Hospital sought judicial review of the Department's letter decision that Tacoma General Hospital did not need to obtain a CN before beginning to offer pediatric cardiac surgery services. 95 Wn. App. at 861-62. The court reversed the decision because the Department's regulations stated it "shall" consider certain factors in determining whether a service is a "tertiary service" for CN review, but it failed to consider those factors. *Id.* at 868.

So too here. The regulations at issue here state the Department "shall" review CN applications for cost containment under -240, it "shall" analyze whether "superior alternatives" exist under -240(1), and it must compare competing applications to determine which best satisfies the CN criteria. WAC 246-310-200(1)(b) & (2); WAC 246-310-240; WAC 246-310-280(3); *see also* RCW 70.38.115(2)(b), (g), (7). Only "[i]f two or more applications meet all applicable review criteria," may the

Department turn to the tie-breakers in -288. WAC 246-310-288. As in *Children's*, the CN Program here did ***not*** compare the two applications under the predicate criteria in -240, and it never engaged in the "superior alternatives" analysis required under -240(1). AR 1447:23-1451:4; AR 2447-48. Instead, it tumbled right to the tie-breakers in -288. Because the Program did not consider the threshold -240 factors, the HLJ properly reversed the Program's decision.

### 2. The HLJ's Plain Language Interpretation Comports with Prior HLJ Orders

Two other HLJs have reached the same conclusion as did HLJ Lockhart here. In *In re Puget Sound Kidney Centers*, Master Case No. M2008-118753 (Feb. 27, 2009), Puget Sound Kidney Centers submitted a CN application to expand an existing kidney dialysis station by ten stations, while DaVita proposed to build a new facility at a higher cost. AR 835, 839 ¶ 1.4. In the concurrent review process, the Program refused to compare the applications under -240(1). Instead, the Program invoked the tie-breakers in -288, just as it did here. AR 843 ¶ 1.16. HLJ Mace reversed, explaining:

> The plain language of WAC 246-310-240(1) requires a comparison and determination whether concurrent applications may be superior to each other. To substitute the WAC 246-310-288 tie-breaker analysis for the required comparison of applications under WAC 246-310-200 and WAC 246-310-240(1), is to stand the review process on its

> head and nullify the importance of judging applications on the four basic review criteria established by the rule.

AR 853-54 ¶ 2.18.

Similarly, in *In re Central Washington*, Master Case No. M2008-118469 (Apr. 15, 2009), HLJ Kuntz found the Program erred when it failed to compare Central Washington's CN application against DaVita's and instead imported into -240 the tie-breakers in -288. AR 863 ¶ 1.4, 867 ¶ 2.3. The HLJ explained that even after -288's enactment in 2007:

> [T]he Program ***still retains the duty to compare*** the two applications against each other, pursuant to the superior alternative language set forth in WAC 246-310-240(1). The Program ***must*** determine if one application is a superior alternative to the other.

AR 872 ¶ 2.14 (emphasis added).

This Court, as ***three*** HLJs (and the Superior Court, RP 5:6-7:9) now have done, also should interpret WAC 246-310-200, -240, and -288 as written and should conclude the HLJ correctly compared NKC's and DaVita's applications to determine which would be superior in terms of cost, efficiency, and effectiveness under -240. AR 1202-04, 1376-77. Even DaVita, in its comments in support of its CN application, acknowledged the cost containment criterion requires this comparative review. *See* AR 2335 (arguing its application was superior to NKC's).

### 3. DaVita's Arguments Lack Merit

#### a. The Program's Alleged Unwritten Intent Is Irrelevant

DaVita contends the Court should reverse because although not reflected in the language of WAC 246-310-200(2), -240, or -288, the Program's alleged unwritten intent, according to DaVita, was to replace -240 with the tie-breakers in -288 for concurrent kidney dialysis review. DaVita Br. at 7-10, 27-29. But because the plain language of WAC 246-310-200(2), -240, and -288 is clear and unambiguous, the Program's supposed unwritten intent is irrelevant. DaVita Br. at 25-33. "[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.*, 95 Wn. App. at 869 n.19 (emphasis added) (quoting *MultiCare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 591 (1990)); *see also Bravern Residential*, 334 P.3d at 1186 (court must give effect to regulation's plain meaning).

If the Program had wanted the tie-breakers in -288 to replace the cost containment criteria in -240 for every concurrent kidney dialysis review, it should have revised WAC 246-310-200(2) and -240 to so state, and it should not have made -288 contingent on both applications satisfying "all review criteria." *Cf. Mahoney v. Shinpoch*, 107 Wn.2d 679,

685 (1987) ("[I]f the Legislature had wanted to mandate [a result], it would have used express language to that effect."). If the Program now wants to make these rule changes, it must do so through the normal rulemaking process. *See Erringer v. Thompson*, 371 F.3d 625, 635 (9th Cir. 2004) (agency must promulgate rule amending legislative rule "under notice and comment rulemaking").

**b. The CN Law's Access Goal Does Not Support Reversal**

For the same reason—the rules at issue here are unambiguous—this Court need not consider whether the legislature intended to prefer access concerns over cost containment in the CN law. *Children's Hosp.*, 95 Wn. App. at 869 n.19 (quoting *MultiCare*, 114 Wn.2d at 591); DaVita Br. at 26-27. When, as here, the language of the rules is plain, the rule "is not open to construction or interpretation." *Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Personnel Bd.*, 95 Wn.2d 108, 113 (1981).

Even if the Court were to consider the legislature's policy objectives in the CN law, it should still reject DaVita's arguments. DaVita complains the HLJ only considered cost control, not access. DaVita Br. at 27. According to DaVita, that is inconsistent with the CN law because in *Overlake*, the Washington Supreme Court described cost containment as a "secondary" policy goal to access. *Id.* DaVita's argument, however,

challenges the HLJ's evidentiary decisions, ***not*** the HLJ's plain reading of WAC 246-310-200(2), -240, and -288. *See id.* The HLJ correctly focused on cost because "***[n]o evidence*** of improvements in care was offered at the hearing"—DaVita presented no evidence its project would improve access while NKC's would not. CP 79 ¶ 1.8 (emphasis added). As the HLJ explained, "there is ***nothing*** in the Application Record in this case to demonstrate that DaVita's project would [increase the quality of the health services in the planning area]." CP 67 ¶ 1.27 (emphasis added). Indeed, the Program analyst admitted she did not consider whether DaVita's location would be closer to patients than NKC's. AR 1459-61. Even DaVita admitted the record contained no evidence to support its claim its facility would promote access. AR 1708.

Instead, DaVita ***assumed*** that adding a second provider to the planning area and placing that provider's facility as far as possible from NKC's SeaTac location (to get a tie-breaker point under -288(2)(c)) would improve care and access. But the actual evidence does not support this assumption. There are five patient zip codes in the planning area. Four of those (98148, 98158, 98188, and most if not all of 98166) are closer to NKC's SeaTac facility than to DaVita's Des Moines facility. AR 814, 3437, 2528. The only zip code where some patients might live closer to DaVita's proposed facility than to NKC's is 98198. That zip code has

only 24 patients. Given the zip code's shape, some or all of those patients could actually live closer to NKC's facility than to DaVita's. AR 814-15, 2528, 3437. The evidence in the record does not show otherwise.

Further, as the Program analyst admitted, dialysis patients can seek treatment ***outside*** the planning area. AR 1501. In fact, many of NKC's current patients live outside the planning area. AR 2528. As NKC showed in the hearing, patients in the 98198 zip code have access to numerous dialysis facilities outside the planning area and thus already have plenty of choice. AR 815, 3446. DaVita's contention its application was superior to NKC's "based solely on adding geographic diversity of facilities or provider choice," DaVita Br. at 32, lacks any factual or evidentiary basis.

The parties' evidence also showed DaVita's facility would not open for six to seven months, while NKC's would be ready within one month of beginning construction. *Compare* AR 1773, *with* AR 2491. Measured in terms of when the service would be available to patients, NKC's application would promote access, while DaVita's would not.

In awarding the CN to NKC "because [NKC's application] cost less and [NKC's] commercial rates were lower," the HLJ fulfilled the CN law's goals. *DaVita*, 137 Wn. App. at 177. The HLJ did not conclude cost control was "the *only* consideration," DaVita Br. at 27, but rather

described it as an "important criteria" under the CN law. *See* CP 79 ¶ 1.8. Even DaVita agrees that controlling health care costs is a "priority" of the CN law. DaVita Br. at 26 (citing RCW 70.38.015(1)). Indeed, in the CN law, the legislature declared that "health planning should be concerned with public health and health care financing, access, and quality ... and ***emphasizing cost control*** of health services, including cost-effectiveness and cost-benefit analysis." RCW 70.38.015(5) (emphasis added).[5]

The Program analyst in this case understood as much, testifying that "cost containment" under WAC 246-310-240 refers to the "[c]osts of the healthcare services" generally. AR 1511. She explained:

> If you have three hospitals in a planning area and you have an application under review for a fourth hospital in that same planning area that proposes to serve all of those same types of patients and provide all of those same types of services, it's not really a containment of costs, even if they state that they can do it cheaper, because then you have more hospitals actually requesting to serve all of the same patients and everybody is competing for the same thing.

*Id.*

[5] The U.S. Supreme Court, in a decision on which the Washington Supreme Court relied, acknowledged CN laws exist in large part because "[i]nvestment in costly health care resources ... is frequently made without regard to the existence of similar facilities or equipment already operating in an area," and "not only results in capital accumulation, but also establishes an ongoing demand for payment to support those services." *Nat'l Gerimed.*, 452 U.S. at 386 n.10 (*cited in St. Joseph*, 125 Wn.2d at 736).

DaVita's witness made the same point: "Cost containment can mean a lot of things.... There's costs to the payor. There's costs to the patient in terms of financial costs and quality-of-life costs. ***There's costs to the overall healthcare system. And that I think is the golden egg, where we want to reduce overall costs.***" AR 1631 (emphasis added).

The HLJ's decision to award the CN to NKC, the lower-cost and faster-to-open applicant, aligns with the goals of the CN law, particularly given the lack of evidence that DaVita's higher cost proposal would improve access, quality, or price competition.

### c. DaVita's Other Statutory Construction Arguments Do Not Apply

DaVita presents the Court with sundry other statutory construction arguments, but again, because the regulations are plain, these statutory construction principles do not apply and the Court need not consider them. *See Bravern Residential*, 334 P.3d at 1186; *Green River*, 95 Wn.2d at 113; DaVita Br. at 29-32. Even DaVita recognizes as much, admitting these principles apply only if an ambiguity were to exist—but none does. DaVita Br. at 25.[6]

[6] *Kustura v. Department of Labor & Industries*, 169 Wn.2d 81, 88 (2010), on which DaVita relies for the generic proposition that a more specific statute controls over a more general one, does not apply. DaVita Br. at 29. In *Kustura*, the specific statute that superseded the general one applied to the question presented—whether the petitioners had a statutory right to government-paid interpretive services. 169 Wn.2d at 88-89. Here, in contrast, the rule that DaVita argues is the more specific and controlling one—

### (1) The HLJ's Plain Language Interpretation Does Not Render the Tie-Breakers Superfluous

Turning to the generic principle that a court must not interpret a statute so as to render it superfluous, DaVita argues the HLJ's plain language interpretation (and that of two other HLJs before him and the Superior Court) render the tie-breaker rule "superfluous." DaVita Br. at 30-32. But as HLJ Mace observed, the plain language interpretation of -200(2), -240, and -288 that HLJ Lockhart applied here would not "render the tie-breaker provisions meaningless." AR 853 ¶ 2.17. "[T]he tie-breaker provisions remain as a means of judging which application should be successful when concurrently reviewed applications are otherwise substantially equal in meeting the criteria in WAC 246-310-200 and neither is the superior alternative under WAC 246-310-240(1)." *Id.*

One could easily imagine situations in which two competing projects satisfy all four CN criteria, creating a "tie." For instance, if both NKC and DaVita had proposed building a new facility and had estimated similar capital costs, the Program might well have found the applications equally superior under -240(1), permitting it to turn to -288 (assuming both applications met all other criteria).

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the tiebreaker rule in WAC 246-310-288—***does not*** apply to DaVita and NKC. Their CN applications did not both "meet all applicable review criteria," as required for -288 to apply. Thus, the fact the language in -288 refers to kidney dialysis and the language in -240 does not makes no difference.

DaVita, however, contends a tie could never occur because that would require "*exactly* the same capital budgets, which would never be the case when an expansion application is competing with a new-facility application, and two applications have negotiated *exactly* the same reimbursement rates with commercial insurers." DaVita Br. at 31 (emphasis in original). Here, evidence from both parties showed Medicare and Medicaid cover most dialysis patients and reimburse both NKC and DaVita at generally the same rates. AR 1430, 1444, 1740-42, 1930. Thus, the only way reimbursement rates could be unequal would be for one applicant to set ***higher*** commercial rates than the competing application, as DaVita admittedly has done here. *See* AR 1430, 1444, 1740-42, 1930. Disparities in commercial reimbursement rates and construction costs are precisely the types of considerations the Program must (but did not) review under the CN laws and regulations.

The legislature also has directed the Program to consider "the efficiency and appropriateness of the use of ***existing*** services and facilities similar to those proposed." RCW 70.38.115(2)(h) (emphasis added). The Department recognized this in promulgating WAC 246-310-240(1). If, all other things being equal, an existing facility would satisfy the need more efficiently and cost effectively than building a new facility, the existing facility would be the "[s]uperior alternative[], in terms of cost [and]

efficiency" under WAC 246-310-240(1). And if one CN applicant would charge commercial insurers more, then, all other things being equal, its application would not be the "[s]uperior alternative[] ... in terms of cost" under WAC 246-310-240(1).

Contrary to DaVita's contentions, the HLJ did not rely on only one superiority criterion in deciding NKC's application would better contain health care costs under -240. *See* DaVita Br. at 31-32. Instead, the HLJ found: (1) NKC's capital costs would be substantially less than DaVita's; (2) NKC's revenues would exceed expenses in every year of operation, while DaVita's showed an operating loss in the first two years and likely, the third; and (3) DaVita could only become profitable in the third year by charging higher commercial reimbursement rates (and eliminating certain required lease expenses from its profit and loss statement). CP 65 ¶ 1.24; CP 66 ¶ 1.26. The HLJ did not cherry-pick cost containment factors. Instead, he compared which application would be the superior alternative "in terms of cost, efficiency, or effectiveness" based on all the evidence actually presented. CP 65 ¶ 1.24; CP 66 ¶ 1.26; CP 79 ¶ 1.8.

Notably, if the Court were to agree with DaVita that despite the words in WAC 246-310-200(2), -240, and -288, the Program must skip the -240 analysis and apply the tie-breakers in -288 in every case of competing applications, the Court would render -240 a complete nullity

and the language in -200(2) meaningless. As DaVita argues, "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." DaVita Br. at 30 (citation and quotation marks omitted).

### (2) The HLJ's Plain Language Interpretation Does Not Lead to Absurd Results

DaVita claims the HLJ's decision leads to "absurd results" because the Program would need to engage in the "difficult" analysis required under WAC 246-310-200(2) and -240. DaVita Br. at 32. But the only absurd result here is the one the Program reached, the HLJ corrected, and DaVita now urges this Court to reinstate. The Program compared DaVita's proposal to build a new facility for $2 million against the option of doing nothing. Not surprisingly, the Program decided building was better than doing nothing. Simultaneously, the Program found NKC's proposal to expand its existing facility was superior to building a new facility. *See* AR 1412-13, 1448-52, 684-89. The next logical step in the analysis should have been to conclude that NKC's proposal (to expand) was superior to DaVita's (to build, at 20 times the cost of an expansion). Instead, at this point the Program truncated its analysis under -240 and incongruously declared a tie.

This approach was "absurd," to borrow DaVita's language. In his

subsequent decision, the HLJ took the logical step the Program avoided and compared the competing projects against each other. By doing so, he did not just use common sense, but also he followed the law. The statute plainly requires the Department to consider "the efficiency and appropriateness of the use of existing ... facilities," and to compare competing projects against each other. RCW 70.38.115(2)(h) & (7).

HLJs and courts for many years have determined superiority by considering evidence of capital costs, commercial rates, estimates of revenue and expenses per treatment, duration from beginning the project to opening the facility, and the possibility of improved patient access and price competition. AR 1118-19, 1310-12. DaVita knows this, having lost CN applications because its competitors proposed lower commercial rates, lower expenses per treatment, and a faster time to opening. AR 1118. For example, in *In re: Comparative Review of Cert. of Need App'ns of Olympic Peninsula Kidney Ctr. & DaVita dba Poulsbo Cmty. Dialysis Ctr.*, No. 04-06-C-2003CN (May 26, 2005), *aff'd*, *DaVita*, 137 Wn. App. at 177, the HLJ declared Olympic Peninsula Kidney Centers' application superior to DaVita's because Olympic would charge lower rates, have lower expenses per treatment, and open more quickly. AR 932-34. This Court affirmed "because [Olympic's application] cost less and its commercial rates were lower." *DaVita*, 137 Wn. App. at 177.

The Program is not relieved of its statutory duty to apply the CN law and regulations as written simply because engaging in the analysis required by WAC 246-310-200(2) and -240 sometimes may be "difficult." Nor can it justify interpreting WAC 246-310-200(2), -240, and -288 in a manner inconsistent with the words used. As the HLJ recognized, "[w]hen the 'tie-breakers of WAC 246-310-288 were created, the language of the existing WACs was not altered." AR 1377 ¶ 1.5. *See also* AR 871-72 ¶ 2.14 ("The language in the WAC 246-310-288 tie-breaker rule does not directly amend, change or delete the language in WAC 246-310-240(1) in any manner"); AR 853 ¶ 2.16 ("the tie-breaker rule did not change the basic criteria for review of applications, nor did it change any other provision of Chapter 246-310 WAC").[7]

### B. Substantial Evidence Supports the HLJ's Findings.

DaVita and NKC each must establish its application "meets all applicable criteria." NKC does ***not*** bear the burden of proving DaVita's application does not meet those criteria. WAC 246-10-606; *DaVita*, 137 Wn. App. at 184-85. As the party challenging the HLJ's findings, DaVita

[7] DaVita misrepresents Mr. Pollock's testimony as an admission that the tie-breakers were intended to ensure "[t]he decision-making criteria that are applied in comparative processes are clear, delineated in advance to the applicants and affected parties, and commonly understood by all." DaVita Br. at 10 & n.1. Mr. Pollock made no such admission. He simply agreed the Department promulgated the tie-breakers to distinguish between two or more applications that meet ***all*** four CN criteria. *See* AR 1558-59.

must "establish[] [the] findings are erroneous, and the court will review the evidence in the light most favorable to the party who prevailed in the highest forum that exercised factfinding authority." *Univ. of Wash. Med. Ctr. v. Wash. State Dep't of Health*, 164 Wn.2d 95, 104 (2008) (internal quotation marks omitted). The Court does "not retry factual issues and accept[s] the administrative findings unless [it] determine[s] them to be clearly erroneous, that is, the entire record leaves [the Court] with a definite and firm conviction that a mistake has been made." *Id.* at 102 (quoting *Providence*, 112 Wn.2d at 355-56)). The Court applies a substantial evidence standard, *King Cnty.*, 178 Wn.2d at 372, which means evidence that suffices "to persuade a fair-minded person of the declared premise," *Towle v. Wash. State Dep't of Fish & Wildlife*, 94 Wn. App. 196, 204 (1999).

### 1. The HLJ Did Not Clearly Err in Finding NKC's Application Satisfies the Cost Containment Criteria in WAC 246-310-240(1) and (2) But DaVita's Does Not

The HLJ found NKC's application was the "[s]uperior alternative[]" under WAC 246-310-240(1). CP 66 ¶ 1.25; *see also* CP 78-79 ¶ 1.7. He also determined that unlike DaVita's application, NKC's would "not have an unreasonable impact on the costs and charges to the public of providing health services" under -240(2). CP 65-66 ¶¶ 1.24-

1.26; CP 78-79 ¶¶ 1.7-1.8. The HLJ cited three reasons for his decision:

***First***, the HLJ found NKC's capital costs would be $100,969, as compared to DaVita's capital costs of over $1.9 million. CP 65 ¶ 1.24. ***Second***, the HLJ found NKC's profit and loss statement showed its revenues would exceed expenses every year, while DaVita's showed it might still be operating at a loss in the third year of operation. *Id.* ***Third***, the HLJ determined "[i]f 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." *Id.*; *see also id.* ¶ 1.26.

Substantial evidence supports these findings. The record shows:

- NKC's capital costs would be one-twentieth of DaVita's. AR 1429, 1445, 1773, 2477.
- NKC's revenue would exceed its operations in every year of operation, while DaVita's revenue would not if DaVita properly included in its profit and loss statement operating expenses required under its lease agreement. AR 801-02, 1196-97 ¶¶ 1.10-1.11, 1915, 2305, 1464-66, 1777, 2226 ¶ 8(b) (listing lease operating expenses).
- NKC's expenses per treatment would be significantly lower than DaVita's, and 65% lower in the first three years of operation. AR 810-11, 1434-40.
- NKC's projected average revenue per treatment would be substantially lower than DaVita's. *See* AR 811-12, 886-87, 889-93, 1440-42, 1737-39.
- NKC's commercial rates (charges to commercial payors, such as Regence Blue Shield, Premera Blue Cross, Aetna, etc.) and reimbursements (amount paid by commercial payors) would be

> lower and NKC's commercial reimbursements would be approximately 13.2% lower, *see* AR 812-13, 889-93, 1570-76, 1737-39.

*See also* AR 1305.

DaVita presented ***no evidence*** refuting these facts. In fact, DaVita ***refused*** to produce any information regarding its rates. Instead, DaVita ***admitted*** it would charge higher commercial rates and receive higher commercial reimbursements than NKC. AR 1305, 1742, 322-29, 704-09, 1199 ¶ 1.15 (citing AR 1682, 1739). DaVita's sole witness (who was responsible for DaVita's application, AR 1681) testified:

> Q: So the difference in the revenue for DaVita has to come from charges to commercial carriers or to patients themselves who don't have insurance?
>
> A: That's right.

AR 1742. Because both parties presented evidence showing Medicare and Medicaid cover most kidney dialysis patients and reimburse at generally the same rates, DaVita's higher expenses and revenue per treatment could only come from higher commercial rates. AR 1430, 1444, 1740-42, 1930.

Given that the evidence showed DaVita's capital costs, expenses and revenues per treatment, and commercial rates would exceed NKC's, the HLJ hardly committed "clear error" when he found NKC's application would be the superior alternative under WAC 246-310-240(1), and DaVita's application would have an unreasonable impact on health care

costs under WAC 246-310-240(2). AR 1203-04 ¶¶ 1.24-1.26, 1378 ¶ 1.7.

DaVita admits the HLJ correctly considered capital costs, but complains he could do so only if he also considered the other eight tie-breakers under -288. DaVita Br. at 33-34. But again: because both applications did not "meet all applicable review criteria," the tie-breakers in -288 are irrelevant. The HLJ properly considered capital costs because the Department's regulations and the CN law required it to do so. *See* WAC 246-310-240(2)(a) (Department "shall" consider whether "the costs, scope, and methods of construction … are reasonable"); RCW 70.38.115(2)(e) (Department "shall" consider "the costs and methods of the proposed construction …, and the probable impact of the construction project" on health care costs).

DaVita also complains the HLJ erred when he considered the reimbursement rates because "the Department chose not to include reimbursement rates as one of the tie-breaker criteria" in -288. DaVita Br. at 34. But the tie-breaker criteria do not apply because no "tie" under -288 existed. DaVita also contends reimbursement rates do not make for a good comparison because a commercial insurer ***might*** pay a dialysis provider more if that dialysis provider has been more successful in keeping patients from incurring higher hospital or surgical costs. *Id.* This abstract proposition may or may not be true, but in the hearing DaVita

presented no ***evidence*** that the higher commercial rates it projected reflect better quality treatment. Instead, it offered only the argument of its counsel and the unsupported conclusions of its sole witness, who admitted he does not negotiate DaVita's rates and so has no basis on which to speculate why DaVita's rates are higher. AR 1307-08, 1647-48, 1695-96. But unsupported, self-serving testimony does not establish a factual issue. *Curtiss v. YMCA*, 82 Wn.2d 455, 467 (1973) (Brachtenbach, J., concurring); *see also Villiarimo v. Aloha Island Air. Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (court will not find issue of fact based on uncorroborated, self-serving testimony). Even more significantly, DaVita failed to present any evidence that its care is better than NKC's. CP 79 ¶ 1.8 (DaVita offered "[n]o evidence of improvements in care"). At the same time, DaVita ***objected*** when NKC attempted to introduce evidence regarding quality. AR 1725.[8]

The HLJ did not clearly err in finding DaVita failed to show that its facility would improve care or access, and in deciding to give weight to NKC's evidence that it would provide the same service at a substantially lower cost. CP 66-67 ¶ 1.27; CP 79-80 ¶ 1.8.

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[8] The HLJ recognized that under WAC 246-310-240(3), "it would be possible for an applicant to offset an increased impact on the cost of health services by offering services that increased the quality of the health services in a planning area." CP 67 ¶ 1.27. But DaVita submitted no evidence to support such an offset.

### 2. The HLJ Did Not Clearly Err in His Financial Feasibility Analysis, and Substantial Evidence Supports His Determination

Under the financial feasibility regulation, the Department must consider whether the project can meet "immediate and long-range capital and operating costs," and whether "[t]he costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services." WAC 246-310-220(1)-(2).[9] The HLJ correctly found NKC's application satisfies both while DaVita's does not. CP 57-63; CP 65-66 ¶ 1.25.

#### a. The HLJ Did Not Clearly Err in Finding NKC's Application Satisfies WAC 246-310-220(1) but DaVita's Does Not

The HLJ found NKC would meet its "immediate and long-range capital and operating costs," but DaVita would not, because NKC's revenues would exceed expenses every year, while DaVita's would not do so until the fourth year. CP 58-62. The HLJ based this finding on DaVita's original pro forma, which showed the new facility would operate at a loss in its third year, even though its projected income would be higher than NKC's, because DaVita's expenses would be higher. *Id.* Substantial evidence supports this conclusion.

[9] The parties do not dispute the HLJ's finding that both applications satisfy the third financial feasibility criteria that "[t]he project can be appropriately financed," so NKC does not address that criteria here. WAC 246-310-220(3); AR 1195 ¶ 1.8.

DaVita does not dispute that NKC's revenue would exceed its operations every year. Nor does any dispute exist that if DaVita included in its pro forma the operating expenses required under its lease agreement, the pro forma would show a loss for the first three years of operations. *See* CP 58-59 ¶¶ 1.10-1.11; AR 801-02, 1915, 2305, 1464-66, 1777, 2226 ¶ 8(b) (listing lease operating expenses). The HLJ properly considered these expenses. As even DaVita admitted, if it were preparing a profit and loss statement for its own purposes, not for a CN application, it would include the lease expense as an expense to be deducted from its revenue. AR 1722-23. DaVita does not argue otherwise on appeal.

**b. The HLJ Did Not Clearly Err in Finding NKC's Application Satisfies -220(2) but DaVita's Does Not**

The HLJ also found NKC's application satisfies WAC 246-310-220(2), but DaVita's does not, because NKC's revenues and expenses per treatment, and thus its commercial rates, would be lower. CP 59-62; CP 65-66 ¶ 1.25. NKC presented substantial evidence showing DaVita's revenues and expenses per treatment would greatly exceed NKC's. *See* AR 810-12, 886-87, 889-93, 1434-40, 1440-42, 1737-39. NKC also showed (and DaVita admitted) that DaVita would charge higher commercial rates. *See* AR 812-13, 889-93, 1570-76, 1737-39, 1305. Based on this evidence, the HLJ calculated the parties' third-year revenues

and concluded that because DaVita's third-year revenues and expenses exceeded those of NKC, and because the evidence showed the parties would receive similar reimbursements from Medicare and Medicaid, DaVita could meet its operating costs only by charging higher commercial rates. CP 59-62; CP 65-66 ¶ 1.25. Because DaVita's capital costs, revenues, expenses, and commercial rates would all exceed NKC's, the HLJ found DaVita's application would be more likely to have "an unreasonable impact on the costs and charges for health services." WAC 246-310-220(2); *see* CP 59-62; CP 65-66 ¶ 1.25.

DaVita does not deny it would charge higher commercial rates or that its project would have higher revenues and expenses. *See* DaVita Br. at 34-36. Instead, it criticizes the HLJ's decision because he did not find DaVita's application "objectively unreasonable." *Id.* at 35-36. In particular, DaVita complains the HLJ should ***not*** have engaged in a "binary comparison" between the two competing applications. *Id.* at 35. According to DaVita, the HLJ should have considered only whether DaVita's application was "objectively unreasonable" based on the "range of reasonable actions" available to it, ***without*** comparing DaVita's application to NKC's. But the CN law and regulations require otherwise. *See* RCW 70.38.115(7); *see also* WAC 246-310-240(1). The only case DaVita cites for its "objectively unreasonable" proposition provides no

support.[10] Indeed, the law provides otherwise, recognizing, as the HLJ did here, that "[w]hether an inference is reasonable cannot be decided in a vacuum; it must be considered 'in light of the competing inferences'." *Silvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 818 (4th Cir. 1995) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)); *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 767 (2006) ("reasonable notice depends on the circumstances"); *Firestone Tire & Rubber Co. v. Pac. Transfer Co.*, 120 Wash. 665, 667 (1922) ("reasonable care ... depend[s] largely upon circumstances").

DaVita asserts the HLJ erred because according to it, "there was no evidence of [the] actual impact" DaVita's higher capital cost and revenues would have on health care costs. DaVita Br. at 35-36. But WAC 246-310-220(2) does not require such a finding. It simply requires the Department to analyze whether 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." WAC 246-310-220(2)

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[10] DaVita cites *U.S. West Communications, Inc. v. Washington Utilities & Transportation Commission*, 134 Wn.2d 74, 116 (1997), for this "objectively unreasonable" proposition. But there, the Court concluded a regulatory commission had set a telecommunications company's "rate of return *within the range of reasonableness*" under Washington's Telecommunications Act. It did not hold that a finding of unreasonableness always requires a finding the action is "outside a *range* of reasonable actions" in every context.

(emphasis added); *see also* DaVita Br. at 36 (quoting same). The HLJ did just that. Based on the evidence presented in the hearing, the HLJ found DaVita's "expenses are 19 times that of [NKC]," and the only way DaVita could "become profitable by the third year of operation" (one of the tests the Department applies for financial feasibility, CP 58 ¶ 1.9) would be by "charging (and receiving) more from commercial carriers than NWKC would be charging for the same service." CP 62-63 ¶ 1.17; CP 65-66 ¶ 1.25; *see also* CP 78-80 ¶¶ 1.7-1.9.

As a result, and in the absence of any evidence DaVita's application would improve health care, the HLJ correctly found DaVita's higher cost application would have a greater impact on health care costs and thus, as compared to NKC's lower cost application, would have an unreasonable impact on health care costs. CP 65-66 ¶ 1.25. WAC 246-310-220(2) did not require the HLJ to determine the precise "actual impact."

## VI. CONCLUSION

For the foregoing reasons, the Court should affirm the HLJ's decision awarding the CN for King County Planning Area #4 to NKC.

RESPECTFULLY SUBMITTED this 8th day of December, 2014.

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## CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing *Answering Brief of Northwest Kidney Centers* 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 8th day of December, 2014, in Seattle, Washington.

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