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.

REPLY BRIEF OF DAVITA HEALTHCARE PARTNERS INC.

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I. INTRODUCTION

The central issue the Court must decide is whether the Department must use the objective criteria set forth in WAC 246-310-288 to decide between competing kidney dialysis facility applications. NKC and the Department (now obligated to defend what it previously described as the HLJ's "casting aside the Department's objective tiebreaker rule, in favor of his own subjective superiority analysis") argue that the Section 288 criteria may be used only if two projects cannot be distinguished on grounds such as capital costs or commercial reimbursement rates. This interpretation of the regulations would render Section 288 meaningless. The Court should determine that the Department must use Section 288 as the standard on which to decide between competing kidney dialysis facility applications. This is what the plain language of the regulations requires, and is the only interpretation of the regulations that comports with the principles of regulatory interpretation.[1]

II. NOTE REGARDING TERMINOLOGY

In its opening brief, DaVita distinguished between the Department's interpretation, explained in the Department's evaluation in this matter, that Section 288 must be used to decide between competing

[1] DaVita uses the same defined terms in this reply brief that it identified in its opening brief.

kidney dialysis facility applications, and the HLJ's interpretation that Section 288 is reached only if neither application can be said to be superior. The Department previously has explained its objections to the HLJ's interpretation, and warned of its potential consequences. *See, e.g.*, AR 1259 & 1350. However, as noted in the Department's response brief, the Department now "must defend" the HLJ's decision. *See* Brief of Respondent Department of Health ("Dept. Br.") at 4, n.3. For the sake of consistency, DaVita will continue to refer to the "Department's" interpretation of the regulation as the one explained in the Department's evaluation, while responding to the Department's defense of the HLJ's interpretation below.[2]

III. ARGUMENT

A. The plain language of Section 288 requires it to be used to decide between competing kidney dialysis facility applications.

Section 288 states that "[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

[2] NKC repeatedly cites to the Department's defense of the HLJ's decision, in the Superior Court proceeding, as evidence that the Department actually agrees with the HLJ's decision. *See, e.g.*, Answering Brief of Northwest Kidney Centers ("NKC Br.") at 15 ("the Department ***disagreed*** with DaVita's contention ...") (emphasis in original). To the contrary, the Department has made perfectly clear that it *strongly* disagrees with the HLJ's interpretation of the regulations. *See, e.g.*, AR 1259 & 1350.

246-310-288 (emphasis added). "If the meaning of a rule is plain and unambiguous on its face" the Court should "give effect to that plain meaning." *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010). The meaning of Section 288 *is* plain and unambiguous on its face: The nine tie-breaker points will be used to determine which of two qualifying applications will be approved.

B. The Department's use of the Section 288 criteria to determine superiority for purposes of Section 240(1) harmonizes the regulations.

NKC's core argument is that the proviso, "[i]f two or more applications meet all applicable review criteria...," precludes the Department from applying Section 288 if an application may be deemed "superior" based on "cost, efficiency, or effectiveness." This argument is based on Section 240, which requires the Department to make "[a] determination that a proposed project will foster cost containment" before approving it. WAC 246-310-240. Among the criteria on which this determination is to be based is whether "[s]uperior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable." WAC 246-310-240(1).

NKC argues that this does not merely require the Department to consider whether a superior alternative was available *to the applicant*;

rather, it requires the Department to "compare applications to each other" and determine superiority. *See* NKC Br. at 21.

In other words, NKC considers the comparison of an application to competing applications to be among the threshold "review criteria" that all applications must satisfy, and thus no different from the standards that an application must satisfy if there are no competing applications. Under NKC's approach, competing projects are not compared to each other *after* determining that each satisfies the applicable review criteria; instead, they must be compared to determine *whether* each applicant satisfies the applicable review criteria. If one project is "superior," the other fails the review criteria.

Even assuming this is true, it begs the question: On what *criteria* should the Department compare the applications and determine superiority?

The answer, with respect to kidney dialysis facility applications, is Section 288. That regulation sets forth nine objective tie-breaker points; whichever application receives more points is the superior one and should be approved. This is how the Department interprets the regulations, harmonizing Sections 240(1) and 288 by using the Section 288 criteria to determine superiority under Section 240(1). AR 2447-48. This also is consistent with the Section 200(2) mandate that the criteria set forth in the

CON regulations "shall be used by the department in making the required determinations" as to "[w]hether the proposed project will foster containment of the costs for health care"—i.e., whether it satisfies Section 240(1). WAC 246-310-200(2) & 200(1)(b).

NKC instead would have the Court determine that superiority under Section 240(1) may be determined based on any grounds relating to "cost, efficiency, or effectiveness," which as a practical matter means any criteria the decision-maker chooses. For example, the decision-maker could decide between competing applications based on one of the nine tie-breaker points in isolation (e.g., capital costs) or a criterion that the Department chose not to include in Section 288 (e.g., commercial reimbursement rates). Unlike the Department's interpretation, which harmonizes the regulations, the HLJ's interpretation creates a conflict between Section 240(1) and Section 288.

C. The refusal of HLJs to use the Section 288 criteria to determine superiority for purposes of Section 240(1) underscores the importance of the Court determining the correct interpretation of the regulations.

NKC points out that it is not just the HLJ in the present case who determined superiority based on ad hoc criteria, as opposed to the criteria set forth in Section 288, but that two other Health Law Judges also have done so.

In the first matter, the Department approved DaVita's application to build a 10-station facility in Snohomish County, and denied the competing application of Puget Sound Kidney Centers ("PSKC") to add ten stations to its existing facility, based on the Section 288 tie-breakers. HLJ Theodora Mace determined that superiority must be evaluated separately from Section 288, and that PSKC's application was superior because its expansion would cost less than DaVita's new facility; PSKC could add stations more quickly than DaVita could build a new facility; and PSKC received lower reimbursement from commercial insurers. Accordingly, HLJ Mace reversed the Department's approval of DaVita's proposed facility. AR 854-55.

In response to the Department's objection that this approach renders Section 288 meaningless, because one project will always have lower costs, HLJ Mace stated that Section 288 could be used if two applications were "substantially equal." AR 853. HLJ Mace cited no legal support for reading this qualification into Section 240(1).

In the second matter, the Department similarly approved DaVita's application to build a new facility in Douglas County, and denied the competing application of Central Washington Hospital, based on the Section 288 tie-breakers. Notably, HLJ John Kuntz appears to have recognized that the *intent* of Section 288 was to establish the basis on

which kidney dialysis facility applications will be compared, but concluded that because Section 288 did not explicitly identify its effect on Section 240(1), the regulation was ineffective in so doing. AR 872, n.18 ("The HLJ understands the policy goal behind WAC 246-310-288, and the intention of the stakeholders and the Program in completing the work. Absent any amendment to the language set forth in WAC 246-310-240(1), the rules of statutory construction require the HLJ to follow the plain language of that regulation."). HLJ Kuntz concluded that superiority must be determined apart from the Section 288 criteria.

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Therefore, although three HLJs have found that Section 288 need not be used to determine superiority under Section 240(1), their rationales for doing so have varied. The schism between the Department and the HLJs as to whether Section 288 must be used as the basis to compare competing kidney dialysis facility applications underscores the importance of the Court determining the correct interpretation of the regulations.

D. The Department's interpretation of Section 288 is, at minimum, a reasonable interpretation of the regulation.

The Court will "discern plain meaning not only from the provision in question but also from closely related statutes and the underlying legislative purposes." *Pacific Marine Ins. Co. v. State ex rel. Dep't of*

Revenue, 181 Wn. App. 730, 737, 329 P.3d 101 (2014); *see also Grays Harbor Energy, LLC v. Grays Harbor County*, 175 Wn. App. 578, 583, 307 P.3d 754 (2013) ("When interpreting a regulation," the court follows "the same rules" it uses "to interpret a statute."). "If a statute is susceptible to more than one reasonable interpretation after this inquiry, then the statute is ambiguous and [the Court] may resort to additional canons of statutory construction or legislative history." *Pacific Marine Ins. Co.*, 181 Wn. App. at 737.

As discussed above, the Court should determine that Section 288 is plain on its face in requiring the tie-breaker rule to be used to compare competing kidney dialysis facility applications. At minimum, this is a *reasonable* interpretation of the regulation, permitting the Court to apply the principles of regulatory interpretation.

E. Applying the principles of regulatory interpretation, the Court should determine that Section 288 sets forth the criteria that the Department must use to compare competing kidney dialysis facility applications.

As discussed in DaVita's opening brief, the principles of regulatory interpretation support the Department's interpretation of Section 288. *See* Opening Brief of DaVita HealthCare Partners Inc. ("DaVita Op. Br.") at 25-33.

1. The HLJ's interpretation permits cost control to be the sole basis for comparison, which is inconsistent with the legislative intent underlying the CON laws.

Although the CON laws address both access to healthcare and cost control, the Legislature's "overriding purpose" was "access"; cost control was "of secondary significance." *Overlake Hosp. Ass'n*, 170 Wn.2d at 55; *see also* DaVita Op. Br. at 26-27 (discussing legislative intent). Section 288 is consistent with the legislative intent, because the various tie-breaker points promote access as well as cost control. The HLJ's interpretation is inconsistent with legislative intent, because it allows one project to be approved over another based solely on cost.

NKC discusses what it considers to be the persuasive evidence of how NKC's project will control costs as compared to what NKC considers to be the unpersuasive evidence of how DaVita's project will promote access. NKC Br. at 29-33. NKC's argument misses the point. The Court's interpretation of Section 288 is an issue of law, not controlled by the evidentiary record.

NKC argues that the geographical access and patient choice tiebreaker points are too imprecise. NKC Br. at 30-31. NKC also appears to argue that the tiebreaker rule should include a point for whichever applicant can add stations more quickly. NKC Br. at 31. However, these are issues that NKC should have raised during the rulemaking process.

NKC's view on what criteria applications *should* be compared is irrelevant to the Court's interpretation of the regulation that *was* adopted.

2. The Department's interpretation of the regulation is consistent with the Department's intent in adopting Section 288.

The Department's intent in adopting the tie-breaker rule was to replace, for kidney dialysis facility applications, superiority determinations based on ad hoc standards with objective criteria. This intent is reflected in the rulemaking history and also was explained very well by the Department in its briefing to the HLJ. *See* DaVita Op. Br. at 27-29 (discussing agency intent, with citations).

NKC argues that the Department should have stated explicitly that the Section 288 criteria were replacing the superiority determination identified in Section 240(1). NKC also argues that the Department should not have included the phrase "all applicable review criteria" in the preamble to Section 288. NKC Br. at 28-29. As a preliminary matter, even if a regulation is not drafted as well as it possibly could have been does not mean that it is ineffective, or that it cannot be interpreted consistently with the agency intent. Moreover, the alleged imperfections in the regulatory language identified by NKC make no difference to how the regulation should be interpreted. The actual language of Section 288 reflects the agency's intent that the Section 288 criteria shall be the basis

on which the Department decides between competing dialysis facility applications. *See* WAC 246-310-288 ("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).

NKC's argument that "superiority" is one of the criteria that must be satisfied before the Department may use the tie-breakers to determine superiority is illogical. Because one application may always be deemed to be "superior" on *some* basis relating to "cost, efficiency, or effectiveness" (e.g., whichever project has lower capital costs), the specific Section 288 criteria to determine superiority are never reached. NKC's argument essentially is that the Department adopted a regulation which contains a flaw of circular logic resulting in it never having to be applied; this cannot possibly have been the Department's intent.

3. More specific and more recent regulations should be given primacy.

As explained in DaVita's opening brief, the specific and more recent superiority criteria identified in Section 288 should supersede the more general and older superiority standard identified in Section 240(1). NKC offers no response, other than to argue that these principles of

regulatory interpretation are irrelevant because there is no ambiguity in Section 288 that requires interpretation. *See* NKC Br. at 33.

4. The HLJ's interpretation fails to harmonize the regulations, and would render Section 288 superfluous.

The most striking flaw in the HLJ's interpretation of the regulations is that unlike the Department's interpretation, which harmonizes the regulations, the HLJ's interpretation renders Section 288 superfluous. If superiority must be determined before Section 288 is reached, and superiority may be determined based on ad hoc criteria, the objective criteria set forth in Section 288 need never be applied.

NKC cites HLJ Mace's opinion, discussed above, for the proposition that if two projects are "substantially equal" then neither would be considered "superior" and the tie-breaker rule would be used. NKC Br. at 34. NKC argues, as an example, that if two projects have "similar capital costs" they could be found "equally superior" and reach the tie-breaker rule. NKC Br. at 34. NKC's argument therefore requires changing Section 240(1) from a determination of whether there is a "superior alternative" to whether there is a "substantially" superior alternative.

NKC provides no legal justification for reading such language into the rule. Moreover, the limitation suggested by NKC that "superiority"

may be found only where there is a "substantial" difference is illusory. There will always be a differences between applications relating to "cost, efficiency, or effectiveness" that could be deemed "substantial" (e.g., different geographic locations, if not capital costs or reimbursement rates).

5. The HLJ's interpretation of the regulations leads to absurd results.

NKC states that "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." NKC Br. at 37. This is not DaVita's argument.

The "difficult" reference comes from *the Department*, in explaining that Section 288 was adopted to eliminate ad hoc decision-making and replace it with consistent criteria:

> The objective WAC 246-310-288 tiebreakers were adopted on the heels of the decision in *DaVita v. Dep't of Health*, 137 Wn. App. 174, 151 P.3d 1095 (2007). The case showed the extreme difficulty of the Department trying to apply non-defined factors to distinguish between qualified applicants. The WAC 246-310-288 tiebreakers were intended to remove this difficulty. The HLJ decision takes the Department right back to the difficult days prior to adoption of WAC 246-310-288.

AR 1235, n.5. Quoting the Department, DaVita argued in its opening brief that "[i]f the Court affirms the HLJ's interpretation of the regulations, the Department is—in its own words—'right back to the

difficult days prior to adoption of WAC 246-310-288,' when competing dialysis facility applications were decided based on ad hoc standards which the applicants did not know in advance, and sometimes changed during the application process, as they did during the previous *DaVita* matter." DaVita Op. Br. at 32. DaVita does not argue that the HLJ's interpretation leads to absurd results because ad hoc superiority analysis is difficult. DaVita argues that the HLJ's interpretation leads to absurd results because ad hoc superiority analysis renders Section 288 superfluous.

6. The Department's interpretation of Section 288 would not make Section 240(1) superfluous.

NKC argues that if the Court holds that the Department must use the criteria set forth in Section 288 to decide between competing dialysis facilities, Section 240(1) would be superfluous. NKC Br. at 36-37. This is not the case. First, Section 240(1) would still apply with respect to all types of CON-reviewable projects for which the Department has not adopted specific comparative-review criteria. Second, with respect to kidney dialysis facilities, Sections 288 and 240(1) are harmonized under the Department's interpretation. Section 288 simply provides the standard on which superiority is to be determined under Section 240(1).

7. The pre-Section 288 cases cited by NKC are irrelevant.

Finally, NKC references *pre*-Section 288 cases for the proposition that competing kidney dialysis facility cases may be decided based on ad hoc standards. *See* NKC Br. at 38 (citing *DaVita*, 137 Wn. App. 174). These cases are irrelevant to the interpretation of Section 288. Indeed, Section 288 was adopted by the Department to avoid use of such ad hoc standards in the future. AR 1349.

F. Section 288 promotes consistent agency decision-making.

NKC devotes much of its brief to praising NKC's project, criticizing DaVita's project, and explaining why, in NKC's view, NKC's project is superior to DaVita's project. In so doing, NKC underscores why objective criteria such as those set forth in Section 288 are superior to ad hoc criteria. There will always be differences between competing projects, and therefore arguments to be made in favor of each; Section 288 identifies what the Department has determined to be the criteria, among many possible criteria, on which decisions actually will be made.

1. NKC overemphasizes the alleged advantages of its project.

a. The respective corporate organizations of NKC and DaVita are irrelevant.

NKC emphasizes that it is organized as a 501(c)(3) corporation whereas DaVita is a public company. NKC Br. at 6-7. NKC also touts the

composition of its board of directors. NKC Br. at 6. DaVita's board is similarly impressive. AR 2185. But these facts are irrelevant. There is no legal basis for favoring one dialysis provider over another in awarding CONs based on its corporate structure or board membership.

b. DaVita's proposed facility would cost less than NKC's existing facility.

NKC emphasizes the difference between what it would cost to *add stations* to its existing facility with what it would cost to *build* DaVita's proposed new facility. NKC Br. at 35. This is a false comparison, because adding stations to an existing facility will almost always be less expensive than building a new facility. If the purpose is to evaluate which applicant is more effective at limiting its construction costs, it would be more meaningful to compare what NKC spent to build its SeaTac facility with what DaVita proposes to spend to build its Des Moines facility. DaVita's facility actually will cost less than NKC spent to build its facility. AR 1203.

In any event, capital costs are one of the nine criteria to be considered in the tie-breaker rule. *See* WAC 246-310-288(2)(a). The Department chose to give this criterion no more weight than the other tie-breaker points. NKC was entitled to receive the economies of scale tie-breaker point, and did receive it. This issue has no further significance.

c. Commercial reimbursement rates are irrelevant.

NKC simultaneously (1) criticizes DaVita for being profitable, and (2) criticizes DaVita's proposed facility in this case because it allegedly takes too long to become profitable. NKC Br. at 7-8. NKC also argues that "*commercial reimbursement rates* and construction costs are precisely the types of considerations the Program *must (but did not) review*" in approving DaVita's application. NKC Br. at 35 (emphasis added). NKC offers no legal support for its assertion that the Department must consider commercial reimbursement rates, and there is none. The Department chose not to include reimbursement rates among the tie-breaker criteria.

2. NKC overlooks the advantages of DaVita's project.

In addition to overemphasizing the alleged advantages of its own project, NKC overlooks the advantages of DaVita's project. For example, NKC criticizes DaVita for failing to present evidence of the superiority of its quality of care. NKC Br. at 44. However, when DaVita's witness began to testify at the hearing regarding DaVita's extraordinary record of providing high-quality care, NKC's counsel immediately cut him off:

> Q. Who is in charge of quality at your facilities?
>
> A. I am. So if you want to know about our quality matrix, DaVita uses a much broader, more sophisticated measure of quality. And in that I can speak confidently on because we review it on a regular basis. In fact, since you bring it up, the –

Q. No, let's just stay with – Mr. Bosh, you are getting far afield.

AR 1729. In addition, DaVita's proposed facility would add a second geographic location at which planning-area residents may obtain care, as well as a second choice of provider. These are benefits which the Department has deemed to be important, given that it included them in Section 288. *See* WAC 246-310-288(2)(c)-(d).

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The salient point is that virtually any applicant will be able to point to perceived "cost, efficiency, or effectiveness" advantages of its project over competing projects, just as NKC has done in its response brief. Prior to the adoption of Section 288, the Department engaged in precisely this sort of analysis, and compared projects based on such ad hoc criteria. The question presented by this appeal is whether the Department may continue to do so, or whether the Department must now use Section 288 to decide between competing dialysis applications.

G. The HLJ's finding that DaVita's application failed Section 240(2)(b) is not supported by substantial evidence.

If the Court determines that the Department must use Section 288 to decide between competing dialysis applications, it need not determine whether substantial evidence supports the HLJ's finding that DaVita's project would have an unreasonable impact on health care costs compared

to NKC's project. However, if the Court determines that the HLJ was permitted to decide between the applications based on ad hoc criteria, it should find that there was not substantial evidence supporting the HLJ's finding.

The relevant regulation requires that "[t]he 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)(b). The HLJ determined that insurance companies provide "health services" and appears to have concluded that because commercial insurers pay higher reimbursement rates to DaVita that they pay to NKC, insurance premiums will be higher if DaVita is permitted to build a new facility than they would be if NKC is permitted to expand its facility.

For purposes of the CON regulations, "'Health services' means *clinically related* (i.e., preventive, diagnostic, curative, rehabilitative, or palliative) services and includes alcoholism, drug abuse, and mental health services." WAC 246-310-010(29) (emphasis added). Therefore, the reference to "health services" in Section 240(2)(b) does not relate to insurance premiums. Moreover, even accepting the HLJ's flawed premise, the HLJ's determination that DaVita's project would increase insurance premiums would further require (1) that reimbursement rates for one service, kidney dialysis, would have a material effect on the overall

cost of health insurance, and (2) that opening one, 5-station dialysis facility in Des Moines will cause an increase in the premiums charged by health insurers. The record does not support either of these propositions.

DaVita explained in its opening brief that the HLJ's finding that DaVita's facility would have an "unreasonable impact on the costs and charges to the public of providing health services by other persons," compared to NKC's project, and therefore fails WAC 246-310-240(2)(b), is not supported by substantial evidence. DaVita Op Br. at 35-36. In response, NKC and the Department fail to identify any evidence whatsoever supporting this finding.

H. The HLJ did not fail DaVita's application under Section 220(1).

NKC asserts that the HLJ failed DaVita's application under WAC 246-310-220(1). NKC Br. at 45 ("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."). The HLJ made no such finding. DaVita's application satisfied all applicable review criteria as a stand-alone application; the HLJ failed DaVita's application only *in comparison to* NKC's application. AR 1200-01 & 1203-04.

With respect to whether DaVita's facility in Des Moines would be profitable, the HLJ noted that DaVita amended its financial forecast during the application process and that the Department accepted the revised forecast. AR 1197. The HLJ further noted that although the original forecast projected that the facility would not be profitable until the fourth year of operation, the corrected forecast projected that the facility would be profitable by the third year. AR 1198. The HLJ also observed that DaVita's financial projections reflected higher commercial reimbursement rates than were reflected in NKC's financial projections. AR 1198-1200. The HLJ then moved on to the next criterion, WAC 246-310-220(2). AR 1200.

The HLJ does not state in his order that he rejected DaVita's corrected financial projections or that DaVita's application fails WAC 246-310-220(1). In a footnote, the HLJ describes DaVita's adjustment to its projections as "problematic." AR 1197, n.20. However, he also suggests that profitability by the third year of operation may not be required to satisfy WAC 246-310-220(1). AR 1203, n.28 ("For purposes of this sentence, it does not matter whether DaVita's original pro forma or their revised pro forma was more correct, nor does it matter whether the Program's practice of examining whether a facility is profitable by the third year is a requirement or simply a method of testing financial

feasibility – the sentence is still true."). This would be a non sequitur if, as NKC suggests, the HLJ had failed DaVita's application because the facility was not projected to be profitable until the fourth year of operation.

It appears that the HLJ found that DaVita could meet its operating expenses, and therefore satisfied WAC 246-310-220(1), but was concerned that DaVita would receive higher reimbursement rates than are received by NKC, and therefore moved on to a comparison of the applicants under WAC 246-310-220(2) ("unreasonable impact"). AR 1200 ("If the original figures are more accurate, DaVita is not meeting its operating expenses by the third year. If DaVita's revised figures are more accurate, DaVita is only meeting its operational expenses by the third year by charging commercial carriers more. This brings us to the third prong of WAC 246-310-220[.]").

This also is reflected in the HLJ's denial of the reconsideration motions filed by the Department and DaVita, in which the HLJ references "questions" about when DaVita's facility will become profitable, AR 1378, but appears to be concerned not about *when* DaVita will become profitable, but rather that its profitability will be based on the fact that insurance companies are willing to pay DaVita higher reimbursement rates than they pay NKC. AR 1379 (characterizing the third-year profitability

benchmark as a "Program criteria" as opposed to a regulatory requirement).

I. DaVita accurately represented the record in all respects.

In a footnote, NKC mistakenly suggests that DaVita misrepresented the record. NKC Br. at 39, n.7 ("DaVita misrepresents Mr. Pollock's testimony ..."). NKC is referring to the following citation in DaVita's opening brief:

> *see also* The Report of the ESRD Methodology Stakeholders Committee to the Washington State Department of Health, December 9, 2005, at 4 (recommending that "[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").[1]
>
> [1]Palmer Pollock, NKC's Vice-President of Planning, was a member of the committee that made this recommendation. *See id.* at 2; *see also* Application Record ("AR") 1558-59 (Mr. Pollock's hearing testimony) (Q: "And isn't it true that the committee tried to identify what it considered to be the most important factors in evaluating one applicant against another? A: "I believe that's a fair statement.").

DaVita Op. Br. at 10. DaVita accurately stated that Mr. Pollock was a member of the stakeholders' committee and accurately quoted Mr. Pollock's hearing testimony that the stakeholders' committee attempted to identify the most important factors for comparative review. There was no misrepresentation.

IV. CONCLUSION

In its opening brief, DaVita identified the fundamental flaw in the HLJ's interpretation of the regulations: It would permit any CON Program analyst, any HLJ reviewing a CON Program evaluation, or any Review Officer reviewing an HLJ's initial order to approve whichever of two competing kidney dialysis facility applications he or she wishes on any ground relating to "cost, efficiency, or effectiveness," and accordingly would render meaningless Section 288, which was adopted to replace such ad hoc standards with objective, consistent decision-making criteria. NKC and the Department cannot dispute this is the effect of the HLJ's interpretation. Nor can they explain why the Court should interpret the regulations such that the objective criteria for comparison set forth in Section 288 are considered only if there is no basis on which to distinguish between two competing applications—an absurd result.

The Court should determine that Section 288 must be used by the Department as the basis on which to compare competing kidney dialysis facility applications; set aside the HLJ's decision based on ad hoc criteria; and reinstate the Department's original decision based on Section 288.

Respectfully submitted this 7th day of January 2015.

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CERTIFICATE OF SERVICE

I certify that today I caused to be served the foregoing document on the following persons by the method so indicated:

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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.

Signed this 7th day of January, 2015, at Seattle, Washington.

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