

NO. 46384-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DAVITA HEALTHCARE PARTNERS, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH and
NORTHWEST KIDNEY CENTERS,

Respondents.

BRIEF OF RESPONDENT DEPARTMENT OF HEALTH

ROBERT W. FERGUSON
Attorney General

GAIL S. YU
Assistant Attorney General
WSBA No. 31551
PO Box 40109
Olympia, WA 98504-0109
(360) 586-9190
OID# 91030

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES.....2

III. STATEMENT OF THE CASE.....2

 A. Certificate of Need Law.....2

 B. NWKC’s And Da Vita’s Kidney Dialysis Applications.....3

IV. STANDARD OF REVIEW.....5

V. ARGUMENT6

 A. The Health Law Judge Correctly Applied WAC 246-310-2207

 B. The Health Law Judge Correctly Applied WAC 246-310-240.....9

 C. The Health Law Judge Correctly Declined To Apply The “Tie-breakers” In WAC 246-310-28810

VI. CONCLUSION14

TABLE OF AUTHORITIES

Cases

<i>ARCO Prods. Co. v. Wash. Utils. & Trans. Comm'n.</i> 125 Wn.2d 805, 888 P.2d 728 (1995).....	6
<i>DaVita, Inc. v. Dept. of Health</i> 137 Wn. App. 174, 151 P.3d 1095 (2007).....	4, 12
<i>Dean v. McFarland</i> 81 Wn.2d 215, 500 P.2d 1244 (1972).....	12
<i>Hardee v. Dep't of Soc. and Health Serv's</i> 172 Wn.2d 1, 256 P.3d 339 (2011).....	6
<i>Marsh v. Or. Natural Res. Council</i> 490 U.S. 360, 109 S. Ct. 1851 (1989).....	6
<i>Nevers v. Fireside Inc.</i> 133 Wn.2d 804, 947 P.2d 721 (1997).....	6
<i>Odyssey v. Dep't of Health</i> 145 Wn. App. 131, 185 P.3d 652 (2008).....	6, 12
<i>Overlake Hosp. v. Dep't of Health</i> 170 Wn.2d 43, 239 P.3d 1095 (2010).....	6, 11, 13
<i>State v. Tvedt</i> 153 Wn.2d 705, 107 P.3d 7282 (2005).....	12
<i>Univ. of Wash. Med. Ctr. v. Dep't of Health</i> 164 Wn.2d 95, 187 P.3d 243 (2008).....	6
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> 141 Wn.2d 169, 4 P.3d 123 (2000).....	5

Statutes

Laws of 2013, chapter 109 § 1.....	12
------------------------------------	----

RCW 18.130.050(10).....	12
RCW 34.05	5
RCW 34.05.570(1)(a)	5
RCW 34.05.570(3)(e)	5
RCW 70.38	2
RCW 70.38.015(1).....	13
RCW 70.38.015(5).....	1, 13
RCW 70.38.025(6).....	2
RCW 70.38.105(4).....	2
RCW 70.38.115	3

Regulations

WAC 246-310.....	1, 2
WAC 246-310-200.....	9, 12
WAC 246-310-200(2).....	7
WAC 246-310-200(2)(a)(i).....	11
WAC 246-310-210.....	3, 6, 7, 13
WAC 246-310-220.....	passim
WAC 246-310-220(1).....	8
WAC 246-310-220(2).....	8, 9
WAC 246-310-220(3).....	8

WAC 246-310-230.....	3, 7
WAC 246-310-240.....	passim
WAC 246-310-240(1).....	7, 9
WAC 246-310-240(2).....	9
WAC 246-310-240(2)(b).....	8
WAC 246-310-280.....	3
WAC 246-310-280(6).....	2
WAC 246-310-280(7).....	2
WAC 246-310-284.....	6, 7, 11
WAC 246-310-288.....	passim
WAC 246-310-288(2)(c)(i).....	13

I. INTRODUCTION

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

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

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

II. ISSUES

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

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

III. STATEMENT OF THE CASE

A. Certificate of Need Law

RCW 70.38 and WAC 246-310 require healthcare providers to obtain a Certificate of Need from the Department to establish certain health care facilities and services. A kidney dialysis treatment center¹ is one type of facility or service requiring a Certificate of Need. RCW 70.38.105(4); 70.38.025(6). A kidney dialysis treatment center provides services, including outpatient dialysis, to persons who have end-stage renal disease. WAC 246-310-280(6) and (7).

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

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

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

In May 2011, DaVita submitted a Certificate of Need application to construct a new five-station kidney dialysis facility in Des Moines, with an estimated capital expenditure of \$1,992,705. Administrative Record (AR) at 1773, 1777.² Also in May 2011, NWKC submitted a Certificate of Need application to increase from 25 to 30 the number of stations at its existing facility in SeaTac, with an estimated capital expenditure of \$100,969. AR at 792, 2477. Because both applicants proposed to serve residents in the same planning area within King County, the Department

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

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

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

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

DaVita's application.

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

IV. STANDARD OF REVIEW

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

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

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

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

V. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WAC 246-310-288 states:

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

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

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

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

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

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

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

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

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

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

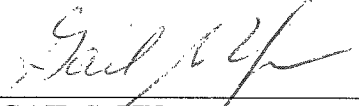
Comparison of the two projects under the superiority analysis of WAC 246-310-240 serves the goals of the Certificate of Need law to “promote, maintain, and assure the health of all citizens in the state, provide accessible health services, health manpower, health facilities, and other resources, while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

VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 8th day of December, 2014.

ROBERT W. FERGUSON
Attorney General



GAIL S. YU
WSBA No. 31551
Assistant Attorney General
Attorneys for State of Washington
Department of Health and
Secretary John Wiesman
(360) 586-9190

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their
counsel of record on the date below as follows:

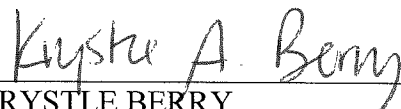
JAMES A. BEAULAUER
LAW OFFICE OF JAMES M. BEAULAUER
1700 SEVENTH AVE, STE 2270
SEATTLE, WA 98101
jmblaw@seanet.com
jcourage@seanet.com

DOUGLAS C. ROSS
LISA REDIGER HAYWARD
DAVIS WRIGHT TREMAINE LLP
1201 THIRD AVE, STE 2200
SEATTLE, WA 98101
douglasross@dwt.com
lisahayward@dwt.com
rebeccafrancis@dwt.com
cc: deniseratti@dwt.com

- U.S. Mail Postage Prepaid
- ABC/Legal Messenger
- Electronic Service Agreement
- State Campus Delivery
- Hand delivered by _____

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

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



KRYSTLE BERRY
Legal Assistant

WAC 246-310-200

No agency filings affecting this section since 2003

Bases for findings and action on applications.

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

- (a) Whether the proposed project is needed;
- (b) Whether the proposed project will foster containment of the costs of health care;
- (c) Whether the proposed project is financially feasible; and
- (d) Whether the proposed project will meet the criteria for structure and process of care identified in WAC 246-310-230.

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

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

- (i) The consistency of the proposed project with service or facility standards contained in this chapter;
- (ii) In the event the standards contained in this chapter do not address in sufficient detail for a required determination the services or facilities for health services proposed, the department may consider standards not in conflict with those standards in accordance with subsection (2)(b) of this section; and
- (iii) The relationship of the proposed project to the long-range plan (if any) of the person proposing the project.

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

- (i) Nationally recognized standards from professional organizations;
- (ii) Standards developed by professional organizations in Washington state;
- (iii) Federal medicare and medicaid certification requirements;
- (iv) State licensing requirements;
- (v) Applicable standards developed by other individuals, groups, or organizations with recognized expertise related to a proposed undertaking; and
- (vi) The written findings and recommendations of individuals, groups, or organizations with recognized expertise related to a proposed undertaking, with whom the department consults during the review of an application.

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

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

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

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

WAC 246-310-220

Agency filings affecting this section

Determination of financial feasibility.

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

- (1) The immediate and long-range capital and operating costs of the project can be met.
- (2) The costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services.
- (3) The project can be appropriately financed.

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

WAC 246-310-240

Agency filings affecting this section

Determination of cost containment.

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

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

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

WAC 246-310-284

Agency filings affecting this section

Kidney disease treatment centers—Methodology.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WAC 246-310-288

Agency filings affecting this section

Kidney disease treatment centers—Tie-breakers.

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

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

(a) Training services (1 point):

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

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

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

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

(b) Private room(s) for isolating patients needing dialysis (1 point).**(c) Permanent bed stations at the facility (1 point).**

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

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

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

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

(b) Historical provider (1 point):

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

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

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

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

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

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

(d) Provider choice (1 point):

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

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

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

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

WASHINGTON STATE ATTORNEY GENERAL

December 08, 2014 - 10:03 AM

Transmittal Letter

Document Uploaded: 463849-Respondents' Brief.pdf

Case Name: Da Vita Healthcare Partners, Inc. v. Washington State Department of Health and Northwest Kidney Centers

Court of Appeals Case Number: 46384-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Krystle Berry - Email: krystleb@atg.wa.gov

A copy of this document has been emailed to the following addresses:

krystleb@atg.wa.gov