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

PROVIDENCE HEALTH & SERVICES - WASHINGTON, D/B/A
PROVIDENCE REGIONAL MEDICAL CENTER EVERETT,
PROVIDENCE HEALTH & SERVICES - WASHINGTON, D/B/A
PROVIDENCE SACRED HEART MEDICAL CENTER, and SWEDISH
HEALTH SERVICES, D/B/A SWEDISH MEDICAL CENTER/FIRST
HILL,

Petitioners,

v.

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON,

Respondent.

**RESPONDENT DEPARTMENT OF HEALTH, STATE OF
WASHINGTON RESPONSE BRIEF**

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I. INTRODUCTION

Providence Health & Services (Providence) contests a decision by the Department of Health's (Department) granting of a Certificate of Need to add 79 additional beds at the University of Washington Medical Center (UWMC).

A Certificate of Need applicant must show that the population to be served has "need" for the project. The evidence shows that patients need additional beds at UWMC because: (1) UWMC is at maximum effective capacity, and is turning away patients who need its services; (2) 89 percent of UWMC patients come from outside the North King County planning area where the hospital is located; (3) UWMC provides tertiary and quaternary services to patients needing complex care; (4) UWMC is home to the only medical school in a five-state region; and (5) compared with other hospitals, a high percentage of UWMC patients are low-income patients on Medicaid.

Providence wants UWMC's application denied based on a numeric methodology showing that the *three* hospitals in the North King planning area have an adequate *combined* number of beds to meet future demand for beds in that planning area. Using the methodology makes sense in a planning area where patients can choose between hospitals that offer comparable care. In such case, an underutilized hospital in the planning

area can take patients when another hospital becomes full. This means that the public has no need for additional beds at the full hospital.

However, using this numeric methodology makes no sense in evaluating the public need for additional beds at UWMC. The lack of need under the methodology occurs because the two other North King hospitals—Northwest and Swedish Ballard—have a significant number of unoccupied beds. But compared with UWMC, these two smaller hospitals do not offer the same range and complexity of services; do not serve a significant number of patients from a wide geographic area; and do not operate a medical school.

It would harm healthcare in Washington to deny UWMC needed additional beds for its patients and medical school simply because Northwest and Swedish Ballard have unoccupied beds. The primary purpose of the Certificate of Need law is the “promotion and maintenance of access” to needed health care services. *Overlake Hosp. Ass’n v. Dep’t of Health*, 170 Wn.2d 43, 55, 239 P.3d 1095 (2010). This purpose is served by UWMC having a sufficient number of beds available to all patients who will want care there in the future.

A Certificate of Need applicant also must show the project is “financially feasible.” Providence challenges the financial feasibility of the UWMC project by alleging that UWMC’s application omitted

\$34 million in pre-incurred capital costs. This allegation is factually incorrect, as UWMC *did* disclose and account for the \$34 million.

Because the UWMC application to add 79 new beds meets all requirements for Certificate of Need approval, this court should affirm the Department's approval of the application.

II. STATEMENT OF CASE

A. UWMC's Certificate Of Need Application

A healthcare provider must obtain a Certificate of Need from the Department prior to taking certain types of actions. RCW 70.38.105(4). Adding beds to an existing hospital requires a Certificate of Need. RCW 70.38.105(4)(e). For approval, an applicant must meet four 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).

UWMC operates a hospital with 365 acute care beds. On November 11, 2012, UWMC filed an application to add 79 beds. Administrative Record (AR) at 3505-3738. The expansion was UWMC's first acute-care bed expansion request in 32 years. AR at 6742. Following the application, the Department's Certificate of Need Program (Program) commenced a thorough review of the proposed project. Under WAC 246-310-090, the Program asked screening questions to gather

additional information about the application. AR at 3740-41. UWMC responded. AR at 3744-3823. Under WAC 246-310-180, the Program then held a public hearing and allowed written comments on the application. AR at 3843-4126. Providence submitted extensive comments opposing the application. AR at 3902-4078. Under WAC 246-310-160, UWMC submitted rebuttal comments supporting the application. AR at 4127-4221, 4586-4712. Providence submitted rebuttal comments opposing the application. AR at 4224-4991, 4464-4523.

On November 5, 2013, the Program issued a decision approving UWMC's application under the four Certificate of Need criteria. AR at 4712-58. UWMC accepted the conditions for approval. AR at 4759-60. The Department issued the Certificate of Need for 79 new beds at UWMC. AR at 4763-64.

B. Adjudicative Proceeding

Competitors have standing to contest a Department approval of a Certificate of Need application. *St. Joseph Hosp. v. Dep't of Health*, 125 Wn.2d 733, 742, 887 P.2d 891 (1995). As UWMC competitors, three Providence hospitals requested an adjudicative proceeding under RCW 34.05 to contest the approval of UWMC's application. AR at 1-62.

A Department Presiding Officer held a five-day hearing on June 16-20, 2014. He admitted into evidence the entire record compiled

by the Program in the course of reviewing the application. Based on information in the record, eight witnesses testified in support of the application: Stephen Zieniewicz (UWMC Executive Director—AR at 6445-6585); April Delgado (UW Medicine’s Transfer Center Director—AR at 6588-6642); Cynthia Hecker (Northwest Hospital Director—AR at 6660-6738); Helen Shawcroft (UWMC Senior Associate Administrator—AR at 6740-6891); Jody Corona (UWMC Consultant—AR at 6906-7190, 7292-7325); Ric Ordos (Department Financial Analyst—AR at 7325-78); Bart Eggen (Department Executive Director—AR at 7192-7238); and Robert Russell (Department Analyst—AR at 7759-68). On the other side, Providence’s retained healthcare economist, Dr. Frank Fox, was the only witness testifying against the application. AR at 7242-91, 7441-7758.

UWMC and the Program urged the Presiding Officer to approve the application, and Providence urged denial. The parties each filed two extensive post-hearing briefs in support of their positions. The Presiding Officer issued a 38-page Initial Order approving UWMC’s application under the four Certificate of Need criteria. AR at 3117-56.¹

¹ Providence complains of unfair time constraints that “stacked the deck” against it. Providence Brief (Prov. Br.) at 15. This complaint has no merit. Providence agreed to a five-day hearing. Time limits may be imposed on a hearing. *Monotype Corp. v. Int’l Typeface Corp.*, 43 F.3d 443, 451 (9th Cir. 1994); *Amarel v. Connell*, 102 F.3d 1494, 1513 (9th Cir. 1996). Moreover, Providence was allowed to: (1) place an unlimited amount of written information into the record during the application process; (2) call all four of its identified witnesses to testify at the hearing; (3) consume more time examining witnesses and making arguments than UWMC and the Program combined (AR at 3361);

Providence petitioned a Department Review Officer for administrative review of the Initial Order. AR at 3157-3284. In advance of the decision, Providence moved for a stay to prevent UWMC from proceeding with the project pending judicial review of an application approval by the Review Officer. Based on briefing of the parties (AR at 3157-3393), the Review Officer issued a Final Order, approving UWMC's application and denying the stay motion. AR at 3490-3507.²

Providence filed a petition for judicial review in King County Superior Court. Clerk's Papers (CP) at 41-170. At the parties' request, the Court of Appeals accepted direct review. CP at 174-77. Providence has not sought a judicial stay of the Department's order, meaning UWMC has been able to proceed with its 79-bed expansion pending judicial review.

and (4) file two post-hearing briefs with no page limit. Providence fails to identify what evidence it was unable to present because of the five-day limit on the hearing.

² Providence repeatedly alleges that the Department's approval of UWMC's application stemmed simply from wanting to assist another state agency. Prov. Br. at 1, 4, 19, 24, 27, 40, 49. Providence unfortunately chooses to attack the Department's integrity, rather than simply arguing the merits of the case. The Department actually decided the case strictly on the merits without any bias in favor of UWMC. Notably, Swedish Health Services, now owned by Providence, had no bias complaint when the Department granted Swedish a Certificate of Need for a liver transplant program over UWMC's strong opposition. *See Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 187 P.3d 243 (2008).

III. ISSUES

A. To obtain a Certificate of Need, UWMC must show “need” for additional beds. RCW 70.38.115(2)(a). In making this determination:

1. May the Department consider whether patients, who will want care at UWMC in the coming years, need additional beds at the hospital in order to assure their continued access to care at UWMC?

2. Given that UWMC provides complex medical care to patients from a wide geographic area and provides care to a large number of low-income patients, does the public need additional beds at UWMC when the hospital is currently at maximum capacity and when the population is growing and becoming proportionately older?

3. Given that UWMC operates the only medical school in a five-state region, should additional beds at UWMC be approved when those beds will enhance UWMC’s training and research functions?

B. A Certificate of Need applicant must disclose the capital costs of the project. WAC 246-310-220(1). For its expansion project, UWMC disclosed both new capital costs of \$70.8 million and pre-incurred capital costs of \$34 million. Did UWMC fail to disclose its total capital costs because it never expressly added together the two amounts into one lump sum?

C. Has Providence met its burden to show that the Department erred in approving UWMC's application under the Certificate of Need criteria in WAC 246-310-210, WAC 246-310-220, WAC 246-310-230, and WAC 246-310-240?

IV. JUDICIAL REVIEW STANDARD

Providence challenges the Department's decision to approve UWMC's Certificate of Need application to add 79 beds. Providence bears the burden of showing the invalidity of the decision. RCW 34.05.570(1)(a).

A. Substantive Evidence

A court must uphold the Department's challenged findings unless 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). Upholding a finding does not require the court to agree with the finding. Instead, there simply must be a "sufficient quantity of evidence to persuade a fair-minded person on the truth or correctness" of the finding. *Hardee v. Dep't of Soc. and Health Servs.*, 172 Wn.2d 1, 7, 256 P.3d 339 (2011). This test is "highly differential" to the agency. *ARCO Prods. Co. v. Wash. Utils. and Transp. Comm'n.*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). In Certificate of Need cases, the 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). Instead, the court reviews the evidence “in the light most favorable” to the party that prevailed at the administrative hearing. *Id.* at 104.

B. Legal Interpretations

A court may overturn an agency's interpretation of a law. RCW 34.05.570(3)(d). In Certificate of Need cases, a court must accord “substantial deference” to the Department's interpretation of the law, given its experience and expertise in applying the law. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010) (upholding Department interpretation of need methodology for ambulatory surgery facilities); *Odyssey Healthcare v. Dep't of Health*, 145 Wn. App. 131, 142, 185 P.3d 652 (2008) (upholding Department's interpretation of need methodology for new hospice agencies).

C. Arbitrary Or Capricious

A court may overturn an “arbitrary or capricious” agency decision. RCW 34.05.570(4)(c)(iii). This narrow standard is met only when the decision results from the agency's “willful and unreasoning disregard of the facts and circumstances.” *Overlake Hosp. Ass'n*, 170 Wn.2d at 50.

V. ARGUMENT

The Presiding Officer and the Review Officer³ rejected the arguments raised by Providence against approval of UWMC's application, and found that UWMC's application met the four Certificate of Need criteria: WAC 246-310-210 - Need (AR at 3133-42, 3151-53, 3497-3503); WAC 246-310-220 - Financial Feasibility (AR at 3142-46, 3153-54); WAC 246-310-230 - Structure and Process of Care (AR at 3146-47, 3154); and WAC 246-310-240 - Cost Containment (AR at 3147-48, 3154-55). As discussed below, Providence's contentions that UWMC failed to meet these criteria are without merit.

A. The Department Has Two Alternative Approaches For Determining Need For Additional Hospital Beds

A Certificate of Need applicant must show "need" for the proposed project. RCW 70.38.115(2); WAC 246-310-210(1). The law itself does not prescribe any method for determining the need for new hospital beds. In such case, as found by the Presiding Officer (AR at 3135) and the Review Officer (AR at 3499), the Department may apply standards set by professional organizations in Washington. WAC 246-310-200(2)(a)(ii); WAC 246-310-200(2)(b)(ii). Accordingly, the Department uses the guidelines in the 1987 State Health Plan to determine hospital-bed need.

³ The Review Officer's Final Order contained its own findings, and also adopted the Presiding Officer's Initial Order. Hence, the argument below cites to both the Initial and Final Orders.

AR at 4724. The State Health Coordinating Council developed the Plan pursuant to RCW 70.38. AR at 5255. Though “sunsetting” in 1989 with the repeal of RCW 70.38, the Plan remains a valid planning tool. AR at 4724. In fact, both UWMC and Providence use provisions of the Plan to make arguments for and against the need for 79 additional beds at UWMC.

1. One Method For Determining Need For New Hospital Beds Under the State Health Plan Is A Numeric Methodology For Evaluating The Need For Beds In A Planning Area

The State Health Plan adopts a numeric methodology for determining the need for new hospital beds. AR at 5339-42. The methodology focuses on the need for more beds at all hospitals within the “planning area” where the proposed new beds would be located. It counts the number of existing hospital beds in the planning area. It determines hospital “use rates” and projects population growth in the planning area. It sets a hospital’s “occupancy standard”—indicating a need for more beds—of 50 percent to 75 percent of maximum capacity depending on the size of the hospital. AR at 5335. To determine need, the State Health Plan recommends projecting seven to ten years into the future. AR at 5328.

Accordingly, under the numeric methodology, need exists for new hospital beds if, projecting out seven to ten years, the future need for hospital beds in the planning area exceeds the combined occupancy standard for all hospitals in the planning area. In other words, the methodology determines whether there are currently a sufficient number of *total* hospital beds in the planning area to meet the *total* demand for beds in the planning area over the next seven to ten years.

UWMC, with 365 acute-care beds⁴, is located in the North King planning area along with two other smaller hospitals: Northwest (206 beds) and Swedish Ballard (123 beds). The Presiding Officer found the methodology shows no need for 79 additional beds at hospitals in the North King planning area. AR at 3140-41. Providence contends that UWMC's application should be denied because the methodology did not show need. The underlying reason is that Northwest beds are only about 45 percent occupied (AR at 3929, 4239), and Swedish Ballard beds are only about 30 percent occupied (AR at 4135).

⁴ UWMC also has 50 neonatal intensive-care beds, 16 dedicated psychiatric beds, and 19 rehabilitation beds. AR at 3518, 3522.

2. An Alternative Method For Determining Need Under The State Health Plan Is Assessing Whether The Public Needs Additional Beds At The Applicant Hospital

Providence's contention that a need determination must be based *solely* on the results of the State Health Plan's numeric methodology is at odds with the Plan, which states:

Hospital bed need forecasts are only one aspect of planning hospital services for specific groups of people. Bed need forecasts by themselves should not be the sole criterion used to decide whether a specific group of people or a specific institution should develop additional beds, services or facilities. Even when the total bed supply serving a group of people or planning area is adequate, it may be appropriate to allow an individual institution to expand.

AR at 5325. This institution-based alternative to the planning-area methodology for determining need is known as "Criterion 2." The Presiding Officer and the Review Officer both applied Criterion 2 to consider the need for UWMC's 79 additional beds. AR at 3133-42, 3497-3502. The Criterion 2 analysis is consistent with case law from other states prohibiting a state from denying a bed application solely based on the results of a numeric methodology to the "exclusion of other factors." *Oak Park Manor v. Ohio State Cert. of Need Review Bd.*, 27 Ohio App. 3d 216, 219, 500 N.E.2d 895 (1985). *See also Lenoir Mem'l Hosp. v. North Carolina State Dep't of Human Res.*, 98 N.C. App. 178, 185-86, 390 S.E.2d 448 (1990);

Irvington Gen. Hosp. v. State of New Jersey Dep't of Health,
149 N.J. Super. 461, 465-66, 374 A.2d 49 (1977).

The State Health Plan identifies a specific situation where it is particularly appropriate to use Criteria 2, rather than using the numeric methodology:

Bed forecasts for hospitals providing regional tertiary care services may need to be made separately from the forecasts for other hospitals in the planning area. These hospitals serve a relatively widespread clientele with a large portion of patients coming from outside the planning area.

AR at 5132. This situation precisely fits UWMC's case. Providence admits that UWMC is an "important provider of tertiary and quaternary services in the region." AR at 4528. And 89 percent of UWMC's patient days are attributable to patients who reside outside the North King planning area. AR at 3515.

Providence originally acknowledged that need for additional hospital beds may be found even when State Health Plan's numeric methodology showed no need. AR at 4434, 3917. However, at the adjudicative proceeding, Providence reversed course, and argued that lack of need under the methodology prevented approval of an application. This argument has no merit.

Providence argues that the Department may not use Criterion 2 because the State Health Plan is "defunct." Prov. Br. at 16, 21, 25. But

Providence does not contest that the Plan remains a reliable planning tool. In fact, it uses the Plan's numeric methodology to argue against the need for additional beds at UWMC. The Review Officer found "puzzling" Providence's contention that the Department may use the Plan's numeric methodology, but may not use the Plan's Criterion 2 analysis. AR at 3497.⁵

RCW 70.38.115(2) requires UWMC to show that the "population to be served" has need for the new beds. Providence argues that the statute prevents the Department from using Criterion 2 to find that UWMC needs new beds, as "institutional needs are not part of the statutory framework for evaluating CON applications." Prov. Br. at 22. In applying Criterion 2, the Department is evaluating whether the *population served by UWMC* needs additional beds at UWMC. Hence, Criterion 2 is an appropriate means of evaluating need under RCW 70.38.115(2). The Department's interpretation of the law is entitled to substantial deference, and should be upheld.

Providence further argues that the Department, having never before relied on Criterion 2 to find need, may not give UWMC "special

⁵ While building its case against UWMC's expansion based on the State Health Plan's numeric methodology, Providence argues that the Plan's Criterion 2 is not a "standard" that may be used by the Department under WAC 246-310-200(2) because the Plan no longer has any legal effect. Prov. Br. at 25-26. If this inconsistent argument is somehow correct, then the analysis below in Section B, showing need for new beds at UWMC, is valid *without* needing to reference Criterion 2.

treatment.” Prov. Br. at 18-19, 21, 23-24. However, Criterion 2 has always been available to *any* hospital attempting to demonstrate need for additional beds. In fact, in 2012, a Department Presiding Officer held that Providence could attempt to show need for additional beds at Spokane’s Sacred Heart Hospital despite a lack of need in the planning area under the State Health Plan’s numeric methodology. AR at 2455 (¶ 1.6).⁶ The Department has never prohibited a hospital from attempting to show need under Criterion 2.⁷

In conclusion, the Department was not arbitrary or capricious in applying the common-sense Criterion 2 analysis. Under certain circumstances, the public may need additional beds at a particular hospital, even when the numeric methodology shows no need for additional beds at hospitals inside the planning area. Indeed, as courts in other states have

⁶ However, the Presiding Officer decided to deny new beds to Sacred Heart based on the numeric methodology, given that comparable hospitals in the planning area had unused beds. AR at 2465 (¶ 1.32).

Providence erroneously cites to the *Valley Medical Center* case to support its argument that need must be decided under the methodology. Prov. Br. at 9, 23, 45. While the Presiding Officer in that case did apply the numeric methodology to decide need, no party even raised the issue of whether need existed under Criterion 2. AR at 2362-2439.

⁷ Providence three times tries to mislead the court into thinking that Department Financial Analyst Ric Ordos believed the results of methodology precluded the Department from finding need for additional beds at UWMC. Prov. Br. at 12, 14, 41. Mr. Ordos testified that he failed UWMC on financial feasibility (AR at 4768) under his mistaken belief that the Program had decided to use the methodology to find no need for the additional beds. AR at 7338. Mr. Ordos testified that he would not have failed UWMC on financial feasibility had he known that the Program would decide to use Criterion 2 to find need for the additional beds. AR at 7360. Mr. Ordos did not express any objection to the Department using Criterion 2.

held, it would be arbitrary or capricious to determine need solely under a planning-area methodology. This Court should uphold the Department's decision to apply Criterion 2.

B. Criterion 2 Shows Need For Additional Beds At UWMC

The State Health Plan's Criterion 2 contains a non-exclusive list of conditions that might demonstrate need for additional beds at a hospital when the methodology shows no need for additional beds in the planning area:

The proposed development would significantly improve the accessibility or acceptability of services for underserved groups.

The proposed development would allow expansion or maintenance of an institution which has staff who have greater training or skill, or which has a wider range of important services, or whose programs have evidence of better results than do neighboring or comparable institutions

The proposed development would allow expansion of a crowded institution which has good cost, efficiency, or productivity measures of its performance while underused services are located in neighboring or comparative institutions with higher costs, less efficient operations, or lower productivity.

In such cases, the benefits of expansion are judged to outweigh the potential costs of the possible additional surplus.

AR at 5326. As discussed below, the Presiding Officer and the Review Officer found need for new beds at UWMC under Criterion 2.

Substantial evidence clearly supports the need for 79⁸ additional beds at UWMC to serve the number of patients who are expected to want care there in future years.

1. UWMC Is At Maximum Effective Capacity

The threshold question under Criterion 2 is whether the applicant hospital needs more beds to meet the future demand for its services. Providence does not contest that a midnight⁹ occupancy of 75 percent at UWMC indicates need for additional beds. AR at 7481-82, 7697-98. The Presiding Officer found that UWMC's 365 acute care beds are at "maximum [75 percent] effective capacity." AR at 3137. The fact that UWMC's average midnight occupancy in 2013 regularly exceeded 75 percent supports this finding. AR at 4129, 4146, 6472-73.¹⁰

The Presiding Officer found that UWMC's Intensive Care Unit (ICU) regularly exceeded 90 percent capacity. AR at 3137. In 2012, the ICU occupancy was 84-92 percent, and often exceeded 100 percent. AR at 3535, 4088, 6467-73. In early 2013, the ICU occupancy regularly

⁸ If the court upholds the Department's finding of need, Providence does not argue that 79 beds are more than necessary to meet the need. So the proper number of additional beds needed at UWMC is not at issue in this case.

⁹ Midnight is the point of a hospital's lowest census during a day. AR 6963-64.

¹⁰ Providence claims the occupancy was 71%. Prov. Br. at 32. However, that was for 2011. AR 3929.

exceeded 95 percent. AR at 4146, 6468-69.¹¹ The Presiding Officer (AR at 3138) also found that UWMC has been turning away patients for lack of beds: 93 in 2011, 138 in 2012, and 43 through April in 2013. AR at 4084.

Moreover, the bed shortage will worsen if UWMC cannot add new beds. The Presiding Officer (AR at 3136) found that the five-state WWAMI (Washington, Wyoming, Alaska, Montana, and Idaho) region's population of 10.5 million people in 2010 will grow by 11 percent over the next decade, including a 36 percent growth in people age 65 and older who have much greater need for hospital care. AR at 3543.

Furthermore, in performing the methodology, Providence predicted the demand for hospital care in North King hospitals will grow 2.8 percent¹² per year through 2020. AR at 3377. UWMC made a strong case that demand for care at its hospital will actually grow 3.7 percent per year. AR at 3316-22.

¹¹ To alleviate the ICU overcrowding, UWMC's expansion will include 24 new ICU beds. AR at 3520. An occupied ICU bed generates 1.6 acute-care days in the hospital. AR at 6787.

¹² Providence projects a 1 percent "historical" growth rate for UWMC. Prov. Br. at 42. However, using this historical growth rate is very deceptive because it does not take into account the accelerating growth in the population nor the increasing percentage of the population age 65 and older. That age cohort needs six times more hospital care. AR at 3542. The methodology, used by Providence, takes these population factors into account when projecting a 2.8 percent annual growth in hospital days for North King.

UWMC and Northwest Hospital are part of UW Medicine. Providence argues that the solution to UWMC's bed shortage is for UWMC to shift some care to Northwest's unused beds. Prov. Br. at 41-42, 48. The Presiding Officer correctly rejected this argument. AR at 3137. UWMC is experiencing a bed shortage despite its efforts to shift less complex care to other facilities. AR at 3533. Since 2010, UWMC has transferred about 3,000 patient days per year to Northwest for midwifery, hip and knee replacement, thoracic treatment, and multiple scoliosis treatment. AR at 3794, 4152. UWMC transferred these service lines after a deliberative process to determine what services could be offered at Northwest. AR at 6808-09. UWMC has determined that adding new beds at UWMC is more efficient and cost effective than trying to further duplicate the necessary staff, infrastructure, equipment, and ancillary support services at Northwest. AR at 3799, 4606, 6807-10. Providence offered no counter opinions.

Furthermore, Northwest's Executive Director testified that her hospital does not deliver the same level of complex care that is available at UWMC. AR at 4161, 6665, 6720. Indeed, during the application process, Providence did not even attempt to portray Northwest as comparable to UWMC in terms of complexity of care. AR at 4005-4015, 4048, 4233-35.

In arguing that Northwest may care for UWMC patients, Providence claims that Northwest performs 92 percent of the same Diagnosis Related Groupings (DRGs) as UWMC. Prov. Br. at 48. This argument is misleading. DRGs are merely a grouping of services for Medicare billing purposes. They do not capture the acuity, complexity, of co-morbidity of a particular patient receiving the service. AR at 4592, 4597, 4605.

Finally, acknowledging a bed shortage at UWMC, Providence proposes that, rather than adding beds at UWMC, patients unable to gain admission to UWMC should be forced to find care elsewhere. Prov. Br. at 32. This Court should reject this proposal. Criterion 2 is a common-sense approach that allows a crowded hospital under certain circumstances to expand to meet the future demand for its services, even when the numeric methodology shows no need for new beds at hospitals in the planning area.

2. Eighty-Nine Percent Of UWMC Patients Come From Outside The North King Planning Area

The Presiding Officer (AR at 3136) found the 89 percent of UWMC's patient days are attributable to patients who reside outside the North King planning area. AR at 3516. In 2011, that number equaled 84,440 patient days of the hospital's 95,031 patient days. About

75 percent of those from outside North King came from elsewhere northwest Washington, 15 percent from other parts of the state, and 10 percent from outside the state. AR at 3543.

The wide geographic patient distribution shows that UWMC offers a special type of care that attracts significant numbers of patients willing to travel long distances and bypass closer hospitals in order to obtain care at UWMC. By contrast, in 2011, the two under-utilized neighboring hospitals in North King had far fewer patient days from outside the planning area: Northwest (22,104) and Swedish Ballard (10,577). AR at 1105. These two hospitals simply lack UWMC's ability to attract a significant number of patients from a wide geographic area. Hence, this Court should not deny UWMC's application simply because there are unused beds at Northwest and Swedish Ballard.

3. UWMC Provides Complex Care

The Presiding Officer found that UWMC "provides a higher percentage of state-wide care for such tertiary and quaternary area as cardiology, high-risk pregnancy, oncology, and organ transplant than other providers in the state." AR at 3136. The record supports this finding. AR at 3534-35, 3918-29. The Presiding Officer also found that UWMC receives transfer requests from 150 hospitals, including Providence

hospitals. AR at 3138. The record also supports this finding. AR at 4140-41.

Indeed, UWMC presented a very powerful case for the importance of its tertiary and quaternary services, as compared to other hospitals. AR at 3312-3316, 3327-35. Providence even admitted that UWMC is “an important provider of tertiary and quaternary services in the region.” AR at 4528. Providence makes no similar claim for Northwest or Swedish Ballard.

Providence contends that UWMC should not be approved for more beds because its services are obtainable elsewhere. Prov. Br. at 27-28, 31. In relying on the State Health Plan’s planning-area methodology, Providence wants UWMC denied additional beds because there are unused beds at Northwest and Swedish Ballard. Yet, Northwest’s Executive Director stated that her hospital does not offer the same level of complex care as UWMC. AR at 4160-61. And Providence admits that Swedish Ballard does not provide such care. AR at 7735. Hence, given the importance of patient access to UWMC’s complex care, it would make no sense to deny UWMC additional needed beds simply because there are unused beds at Northwest and Swedish Ballard.

4. As The Only Medical School In A Five-State Region, UWMC Needs Additional Beds To Carry Out Teaching And Research

In deciding a Certificate of Need application, the Department must consider the “impact” on training programs. RCW 70.38.115(2)(d). The Presiding Officer found (AR at 3138) that UWMC is the only teaching hospital training physicians in the five-state region of Washington, Wyoming, Alaska, Idaho, and Montana, having 1,318 residents. AR at 6487. He found (AR at 3138) that the school’s accreditation required a minimum volume of cases. AR at 6408. UWMC stressed that a lack of beds restricts its ability to carry out its responsibility to train enough new physicians to serve the region. AR at 3520, 3538, 3549. Furthermore, UWMC is the top public research institution in the country, and more beds will serve its research mission. AR at 3549. In short, UWMC is an important state and regional hospital for training and research, and a bed shortage should not compromise these functions.

5. A High Percentage Of UWMC Patients Are On Medicaid

The Presiding Officer found that UWMC cares for a higher percentage of low-income Medicaid patients than any King County hospital, except for its affiliated Harborview. AR at 3128. About 23 percent of UWMC patients are on Medicaid, compared to only

14.6 percent at other King County hospitals. AR at 3537. In addition, excluding Harborview, UWMC provides an above-average amount of charity care among King County hospitals. AR at 3540. Additional beds will enable UWMC to serve more low-income Medicaid and charity-care patients. Promoting access to medical services for underserved groups is an important consideration in deciding the need for a proposed project. WAC 246-310-210(2).

C. The Presiding Officer Did Not Abuse His Discretion In Excluding 2012 CHARS Data

Each year hospitals report their cases to the Department's Comprehensive Hospital Abstract Reporting System (CHARS). Providence contends that the Presiding Officer (AR at 3141) improperly excluded UWMC's CHARS data for 2012. Prov. Br. at 44-47.

WAC 246-310-160 allows public comment on Certificate of Need applications. In UWMC's case, the public comment period ended on May 31, 2013. AR at 4587-88. The Department extended the deadline to July 11, 2013. AR at 4587, 4781-82. UWMC did not receive the 2012 CHARS data until July 10, 2013. That was just one day before the end of public comment, and no party incorporated the data into its public comment on the application. AR at 1097, n.4. The Department bases a Certificate of Need decision on a "snapshot of facts around the time the

application is filed.” *Univ. of Wash. Med. Ctr. v. Dep’t of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008).

A Presiding Officer has discretion to exclude information coming into existence after close of the public comment period. *Id.* at 104. The Presiding Officer excluded the 2012 CHARS data because it was not available until just one day before the end of the extended public comment period. AR at 3141. He reasoned that the data became available too late for incorporation into the application. AR at 3141.

A court reviews a Presiding Officer’s decision to exclude evidence under the narrow “abuse of discretion” standard. *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 104. Abuse of discretion occurs only when the challenged ruling is “manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458-59, 229 P.3d 735 (2010). Excluding the 2012 CHARS data was not an abuse of discretion because the ruling had a reasoned basis: the data simply became available too late for UWMC to incorporate the data into its application.

In any event, the issue is a tempest in a teapot. The Review Officer correctly found that, if admitted, the 2012 CHARS data would not alter her finding of need for UWMC’s additional beds under Criteria 2. AR at 3503. Providence singles out only two cursory arguments for why

inclusion of this data would matter in deciding the case. Prov. Br. at 48-49. Neither argument has merit.

Providence's first argument relates to the number of patients at UWMC. In its application, UWMC projected 98,837 patient days for 2012, a number annualized from data for the first 11 months of 2012. AR at 3792. The 2012 CHARS data showed UWMC had 96,917 patient days. AR at 2739. Providence does not explain how this slightly lower 2012 total would obviate the need for more beds at UWMC. In performing the methodology, Providence projected an annual 2.8 percent growth rate in North King hospital days through 2020. AR at 3377. Using the 2.8 percent growth rate, UWMC, without new beds, would exceed the 75 percent occupancy standard by 2013. AR 2882. The lower patient-day count in the 2012 CHARS would result in only about a one-year delay in UWMC exceeding the 75 percent occupancy standard. Of course, this one-year delay would not defeat the need for additional beds at UWMC.

Providence also claims that the 2012 CHARS data supports its claim that UWMC needs no additional beds because Northwest Hospital—which is affiliated with UW Medicine and has unused beds—allegedly performs 92 percent of the procedures performed at UWMC.

Because Providence made the same claim based on the 2011 CHARS data, the 2012 CHARS data provides Providence with no *new* argument. As explained above, UWMC offers more complex care than Northwest, and has a bed shortage despite having already transferred appropriate services to Northwest.

D. UWMC Disclosed And Accounted For Its Capital Costs As Required By WAC 246-310-220

WAC 246-310-220(1) requires UWMC to demonstrate that its project's "immediate and long-range capital and operating costs can be met." Providence contends that UWMC failed under WAC 246-310-220(1) because it allegedly did not disclose \$34 million in capital costs. Prov. Br. at 33-40. Providence accuses UWMC of being "pernicious"; lacking "good faith"; "manipulation and deception," and destroying the "integrity" of the process by "gaming" the system. This harsh rhetoric attempts to mask the frivolity of Providence's allegation concerning the \$34 million.

In one place, UWMC's application lists \$70.8 million as capital cost to add the 79 beds. AR at 3795. The \$70.8 million included \$28 million in construction costs. AR at 3795. UWMC was clear that the \$28 million did *not* include \$34 million in cost previously incurred in building the physical shell of the floor where the new beds would be located.

AR at 3747.¹³ UWMC had previously disclosed \$34 million shelling cost in connection with a different Certificate of Need application to provide neonatal care at the hospital. AR at 3518. Given these facts, the Presiding Officer made the irrefutable finding that UWMC did not “obfuscate, disguise or hide building costs.” He further found that it was not a “mistake” for UWMC to omit the \$34 million in the capital budget page of the application given that the \$34 million was disclosed elsewhere in the application. AR at 3145.¹⁴

Providence in effect argues that UWMC’s application should be denied because in identifying capital costs, UWMC never *added together* the disclosed \$70.8 million and the disclosed \$34 million. It would have been arbitrary or capricious for the Department to deny UWMC’s application for such a trivial reason.

Providence further contends UWMC did not account for the \$34 million in its financial pro forma. Prov. Br. at 38-40. This contention also is baseless. UWMC paid the \$34 million from cash reserves. Department Financial Analyst, Ric Ordos, testified (AR at 7362) that the

¹³ Providence claims that UWMC applied for 79 additional beds simply because it needed to do something with this shelled space. Prov. Br. at 10-11. Actually, the record clearly substantiates that UWMC applied because it was experiencing a serious bed shortage.

¹⁴ In two earlier Certificate of Need applications for its own hospital expansion projects, Providence did not list pre-incurred construction costs as a capital expenditure. AR at 4150, 6792.

\$34 million asset would be reflected in the depreciation line of UWMC's pro forma. AR at 3829. UWMC confirmed this fact, which Providence does not dispute. AR at 6748-6752, 6821-23.¹⁵ In summary, the evidence is beyond reasonable dispute: not only did UWMC disclose the \$34 million in pre-incurred constructions costs, but it also accounted for the \$34 million in its pro forma.

E. Because Of Need For The 79 New Beds, UWMC's Application Satisfied The WAC 246-310-230(4) Criteria

WAC 246-310-230(4) requires UWMC to show that its project "will not result in an unwarranted fragmentation of services." The Presiding Officer found UWMC met this requirement. AR at 3146-47, 3154. Providence contends UWMC failed to meet this requirement because no need exists for 79 new beds at UWMC. Prov. Br. at 43-44. This contention lacks merit because, as explained above, the Presiding Officer and Review Officer properly found need for the additional beds.

F. Because Of Need For The 79 New Beds, UWMC's Application Satisfied The WAC 246-310-240(1) Criterion

WAC 246-310-240(1) requires that "superior alternatives" to adding the 79 new beds "in terms of cost, efficiency, or effectiveness are not available or practical." The Presiding Officer found that UWMC met

¹⁵ After making the \$34 million expenditure, the depreciation line on UWMC's pro forma in fact increased from \$32 million in 2012 to \$41 million in 2013, with further increases thereafter. AR at 3829.

this requirement. AR at 3147-48, 3154-55. Providence contends that UWMC failed to meet this requirement because no need exists for 79 new beds at UWMC. Prov. Br. at 41-42. This contention lacks merit because, as explained above, the Presiding Officer and Review Officer properly found need for the additional beds.

G. Providence's Criticism Of The Certificate Of Need Program's Evaluation Do Not Affect The Validity Of The Final Order

Providence criticizes how the Certificate of Need Program evaluated UWMC's application. Prov. Br. at 11-14. This criticism is not germane. That is because once Providence requested an adjudicative proceeding to challenge the Program's decision, the Presiding Officer conducted a *de novo* review of the evidence. *See DaVita v. Dep't of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007). The Review Officer's decision, which adopted the Presiding Officer's decision, became the Department's final decision, supplanting the Program's decision. *Id.* The final decision (not the Program's preliminary decision) is subject to judicial review.

In any event, Providence's criticisms of the Program decision are unjustified. Providence makes much of the fact that the Program Analyst, Robert Russell, originally proposed finding no need for UWMC's project based on the numeric methodology, but then his supervisor, Bart Eggen,

decided the Program would not use the methodology. The Presiding Officer found it unsurprising that the Program would consider different approaches, and that ultimately the supervisor would make the decision for the Program. AR at 3141.

Providence also alleges that Mr. Eggen made the decision to find need for UWMC's additional beds without sufficiently reviewing the application record himself. However, as stated, the subsequent adjudicative proceeding involved a *de novo* review that supplanted the Program's review. Moreover, in the adjudicative proceeding, Mr. Eggen strongly defended approval of UWMC's application. AR at 7213-7231.¹⁶ Indeed, the evidence shows that Mr. Eggen made the right call in finding need for additional UWMC beds, even though the numeric methodology did not show need.

Finally, the Program found that additional beds are needed at UWMC because the hospital is crowded, and the other two hospitals in the planning area, though having unoccupied beds, do not offer comparable care. AR at 4735-36. Providence complains that, in making this finding, the Program did not expressly reference Criterion 2 of the State Health Plan. The validity of the decision did not depend on making this express reference. Moreover, in his *de novo* review of the case, the Presiding

¹⁶ Providence alleges that the Program did not defend its decision to approve the application. Prov. Br. at 16. This allegation is simply not true. AR at 2875-2899.

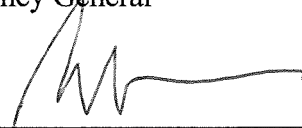
Officer made clear that Criterion 2 did apply in evaluating need for UWMC's additional beds. AR at 3140.

VI. CONCLUSION

Based on the foregoing, the Department respectfully requests that, under RCW 34.05.574(1)(a), the court affirm the Department's decision to approve UWMC's Certificate of Need application to add 79 beds.

RESPECTFULLY SUBMITTED this 20th day of November, 2015.

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

DATED this 20 day of November 2015, at Olympia, Washington.

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