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NO. 66304-6-I

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

KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a
EVERGREEN HEALTHCARE, a Washington public hospital district,
SWEDISH HEALTH SERVICES, d/b/a SWEDISH VISITING NURSE
SERVICES, a Washington non-profit corporation, PROVIDENCE
HOSPICE AND HOME CARE OF SNOHOMISH COUNTY, a
Washington non-profit corporation, and HOSPICE OF SEATTLE, a
Washington non-profit corporation,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington
governmental agency, SECRETARY MARY SELECKY, Secretary of
Washington's Department of Health in her official and individual
capacity, ODYSSEY HEALTHCARE OPERATING B, LP, a Delaware
corporation, and ODYSSEY HEALTHCARE INC. a Delaware
corporation,

Appellants.

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I. INTRODUCTION

Under Washington law, a new hospice agency cannot be established unless it first satisfies the criteria for and obtains a Certificate of Need (“CN”). The narrow issue before this Court is whether the Department of Health (the “Department”) can grant a CN to Odyssey Healthcare Operating B, LP and Odyssey Healthcare, Inc. (“Odyssey”) to establish a hospice agency in King County even though Odyssey’s proposed agency does not satisfy the applicable CN criteria.

In early 2007, the Department denied Odyssey’s 2006 CN applications for King, Pierce, and Snohomish Counties because they did not satisfy the CN criteria. Applying the CN criteria, the Department concluded that Odyssey’s application was “not consistent with Need . . . Financial Feasibility . . . Structure and Process of Care . . . [and] Cost Containment” criteria.¹ AR 11.² Dissatisfied with this decision, Odyssey filed a federal lawsuit against the Department and its employees asserting violations of federal law. In December 2009, to settle the federal claims, the Department agreed to approve Odyssey’s 2006 CN application for King County based on a “special circumstance.” The “special circumstance” was to use data obtained in December 2008, well after the

¹ The Department’s April 2007 evaluation of the need for hospice services in King, Pierce, and Snohomish Counties is hereinafter referred to as the “2007 Methodology.”

² AR as referenced in this Brief stands for Administrative Record.

agency record had closed for Odyssey's 2006 CN application, which is contrary to longstanding Department policy. The Department asserted that the data obtained in December 2008 provided the requisite support for its settlement decision even though the Department had previously informed Odyssey that the same data could not be used for Odyssey's 2006 CN application.

The King County Superior Court correctly determined that the Department's action was arbitrary and capricious and remanded the matter back to the Department to evaluate, under the same standards applied to other CN applicants, whether Odyssey's proposed hospice agency satisfies the CN criteria based on the information available at the time the record was open. The Superior Court's determination is consistent with the Department's position before it entered into the settlement with Odyssey. The Superior Court's determination also is correct as a matter of law and should be affirmed.

II. STATEMENT OF THE ISSUE

Whether the Superior Court was correct to reverse the Department's issuance of a CN to Odyssey and to remand the matter to the Department to determine whether Odyssey's application satisfies all of the CN criteria based upon the applicable law and information available to the Department at the time the agency record was open.

III. STATEMENT OF THE CASE

A. As the Department's CN Evaluations and Monitoring Have Consistently Demonstrated, King County Is Well Served By Its Eight Existing Hospice Providers.

Hospice care is an important aspect of our healthcare system, and is closely monitored by the Department's CN Program. King County is served by an excellent and diverse group of hospice providers: Evergreen Hospice; Swedish Visiting Nurse Services; Providence Hospice of Seattle; Good Samaritan Home Health and Hospice; Group Health Home Health & Hospice; Highline Home Health and Hospice; Franciscan Hospice and Palliative Care; and Kline Galland. CP 470; AR 1191-92 & 1194.

These eight existing hospice providers have met and are continuing to more than adequately meet the hospice needs of King County residents. This is confirmed by the Department's recent denials of CN applications to establish additional hospice agencies in King County. In 2007, the Department denied Odyssey's application to provide hospice services in King County, specifically finding that no need existed for another hospice agency. CP 51. Similarly, in 2008, in another hospice CN evaluation, the Department determined that there was no need for additional hospice agencies in King County at least through 2012. AR 1331, 1342. Even Odyssey concedes that the existing providers have met and are meeting the hospice needs of King County residents. Brief of Appellants Odyssey

Healthcare (“Odyssey Br.”) at 12. The quality of care provided by, and accessibility of, the existing providers has never been challenged by Odyssey and is not at issue in this appeal.

B. Odyssey Is a For-Profit Hospice Provider With a History of “Significant Non-Compliance Issues” in Multiple States.

Odyssey is a for-profit corporation based in Dallas, Texas, which operates hospice agencies throughout the country. AR 862; CP 49. At least three different states have reported “significant non-compliance issues at one or more of the healthcare facilities operated by Odyssey HealthCare within the last 3 years.” *Id.* The State of Georgia reported “immediate jeopardy in two separate investigations in 2005 and 2006.” *Id.* The non-compliance issues resulted in disciplinary action being taken by those states’ surveying agencies. *Id.* Two other states identified either minor claims or “minor deficiencies that resulted in fines.” *Id.*

C. An Odyssey Hospice Agency Would Undermine King County’s Hospice-Care System.

Odyssey has been attempting to enter the Puget Sound “market” for a long time. These efforts are discussed in detail below. It is worth considering as a preliminary matter, however, what the impact would be on King County’s existing hospice-care system if Odyssey were successful in setting up one of its for-profit hospice operations here.

Seven of King County's existing providers are local non-profits; the eighth (Evergreen) is a public hospital district. Consistent with their non-profit and public-agency missions, they provide a number of services to King County residents for which they receive no financial reimbursement. CP 463, 473. These include, as but one example, Providence's "Safe Crossings" program, which helps children prepare for the death of a loved one and offers ongoing support after the death occurs. *Id.* Providence offers these services to any grieving children at a direct cost to Providence of more than \$200,000 per year. CP 463-464.

An additional King County hospice agency will reduce the existing hospice providers' revenue, and, in turn, limit their ability to provide non-revenue-generating programs consistent with their non-profit and public-agency missions. CP 467. Odyssey, on the other hand, must generate profits for its shareholders, and does not have the same incentives to provide these types of uncompensated services. *Id.* Moreover, establishing a ninth hospice agency in King County will unnecessarily fragment care and stretch the local healthcare workforce even more thinly, thereby "diluting an already fragile system." *Id.* This was made abundantly clear at the CN public hearing, where the testimony was overwhelmingly against Odyssey's proposal. AR 1383, 1425-29.

In short, it would be detrimental to hospice patients and the local healthcare system if Odyssey, a company with a national reputation for regulatory noncompliance, was permitted to set up a for-profit hospice agency at the expense of existing, non-profit and public agency providers.

D. The CN Laws Prevent “Unnecessary Duplication and Fragmentation” of Healthcare Services.

Under Ch. 70.38 RCW and Ch. 246-310 WAC, certain healthcare facilities and providers are required to obtain a CN prior to establishing a new healthcare facility or service in Washington. The Legislature enacted the CN laws in response to a Congressional mandate that states adopt planning procedures to, among other things, prevent “unnecessary duplication and fragmentation” of healthcare services. 1979 Wash. 1st Ex. Sess., Ch. 161, § 1.

One of the services requiring CN approval is hospice care. RCW 70.38.105(4)(a) & 70.38.025(6). Hospice care is comprised of “symptom and pain management provided to a terminally ill individual” at the individual’s residence. WAC 246-310-290(1)(e). A hospice agency must obtain a CN only if the agency intends to serve Medicare or Medicaid patients. WAC 246-310-010(31). To obtain a CN, the entity must file an application with the Department. WAC 246-310-090. Upon request, the Department then holds a public hearing. WAC 246-310-180. In

reviewing the application, the Department is required to evaluate four regulatory criteria: “Need” (WAC 246-310-210; WAC 246-310-290); “Financial Feasibility” (WAC 246-310-220); “Structure and Process of Care” (WAC 246-310-230); and “Cost Containment” (WAC 246-310-240). RCW 70.38.115(2).

Applying these criteria, the Department issues written findings either approving or denying the application. WAC 246-310-490. If the Department denies the application, the applicant has the right to an adjudicative proceeding under Washington’s Administrative Procedure Act (the “APA”), Ch. 34.05 RCW and Ch. 246-310 WAC. RCW 70.38.115(10)(a).

A Health Law Judge (“HLJ”), an administrative law judge employed by the Department, conducts the adjudicative proceeding under Ch. 34.05 RCW and Ch. 246-10 WAC and issues a final order deciding whether the application should be approved or denied. If the applicant or a competing provider is dissatisfied with the HLJ’s decision, it may file a petition for judicial review in Superior Court. RCW 34.05.514. The Superior Court reviews the Department’s decision under the standards set forth in the APA, and affirms, reverses, or remands to the Department. RCW 34.05.574(1). The matter may be appealed to the Court of Appeals. RCW 34.05.526.

E. The Department of Health Applies a Health Forecasting Methodology To Evaluate “Need” For Additional Hospice Providers.

In 2003, the Department promulgated WAC 246-310-290, which is a six-step methodology used to help determine need for a new hospice agency in a given county. The need methodology is a health planning “forecasting” tool developed by industry experts for hospice care. Prior to the adoption of WAC 246-310-290, the Department established the Hospice Methodology Advisory Committee (the “Committee”) to make recommendations to the Department. The Committee was comprised of twelve members with varied backgrounds, who were selected by the Department in consultation with the Washington State Hospice Organization and the Home Care Association of Washington.

Ultimately, the Committee recommended the promulgation of WAC 246-310-290. Under this rule, if the applicant establishes that a sufficient shortage exists within a specified forecast period, then the “Need” criterion is met, and the applicant must then establish that the other three CN criteria have also been met. If the applicant does not establish that a sufficient shortage will exist, then the “Need” criterion is not met, and the inquiry ends there.

F. The Department Denied Odyssey's 2003 Certificate of Need Applications Because They Did Not Satisfy the CN Criteria.

Odyssey has sought to open for-profit hospice operations in the Puget Sound for several years. In 2003, it applied for certificates of need to open hospice agencies in King, Snohomish, and Pierce counties. *See Odyssey Healthcare Operating B, LP v. Washington State Dep't of Health*, 145 Wn. App. 131, 134, 185 P.3d 652 (2008). The Department denied all three applications because, among other reasons, the hospice need methodology under WAC 246-310-290 demonstrated a surplus of hospice agencies serving the needs of county residents. *Id.* at 136.

G. The Court of Appeals, Division II, Affirmed the Department's Denials of Odyssey's Applications.

Odyssey appealed the Department's decision to the Court of Appeals, Division II. The Court of Appeals affirmed both the Department's forecasting methodology for evaluating hospice CN applications and the Department's denial of Odyssey's applications under that methodology. *Id.* at 146.

H. The Department Appropriately Denied Odyssey's 2006 CN Applications Because They Failed to Meet the Need, Financial Feasibility, Structure and Process of Care, and Cost Containment Requirements For Obtaining a CN.

In October 2006, while its appeal of the 2003 applications was still pending, Odyssey filed another set of CN applications to establish new hospice agencies in King, Snohomish, and Pierce counties. AR 385-404.

A public hearing was held under WAC 246-310-180, in which the public comments demonstrated overwhelming disapproval of Odyssey's proposal. AR 1383, 1425-29. In August 2007, the Department denied Odyssey's applications. AR 11-38. Applying the exact same methodology upheld by the Court of Appeals in the earlier case, the Department determined that Odyssey's applications were "not consistent with the Certificate of Need review criteria".³ AR 11.

I. Odyssey Appealed the Department's Denials of Its 2006 CN Applications.

Following the Department's denial of its 2006 CN applications, Odyssey requested adjudicative proceedings in September 2007 for all three denials, arguing again that the Department had misinterpreted and misapplied the hospice need methodology. AR 118. The proceedings

³ The Department's conclusions on the three criteria other than "Need" were supported, in part, by the July 28, 2007, letter submitted by Respondents Providence and Swedish in opposition to Odyssey's CN application. That letter demonstrated why Odyssey failed to meet all four criteria. For example, with regard to the Financial Feasibility criteria, Respondents documented the deficiencies with Odyssey's proposed staffing for bereavement staff and the mix of administrative staff as compared to clinical staff. CP 639. They also established that Odyssey never provided a charity care policy or any policy or form that discusses how charity care would be applied, which is a requirement. *Id.* With regard to the Structure of Process of Care criterion, Respondents explained how Odyssey's proposed hospice agency would not meet that criteria. CP 639 – 646. Finally, Respondents highlighted Odyssey's underwhelming response regarding the Cost Containment criteria and demonstrated that the absence of information provided by Odyssey failed to establish that the Cost Containment criteria had been met. CP 646. The Department never rejected the information submitted by Respondents, and instead, adopted much of that information in determining that Odyssey did not meet any of the four criteria.

were consolidated and stayed until resolution of the Court of Appeals case regarding Odyssey's 2003 applications, which was then still pending. AR 165-170, 177-78, 183-84. Evergreen, Swedish, and Providence all ultimately intervened in the adjudicative proceeding as "affected persons." AR 151-53, 1009, 1420.

J. Odyssey Unsuccessfully Sought To Change the Applicable Regulations.

In October 2008, after losing in the Court of Appeals, Odyssey sought to change the applicable regulation. Odyssey petitioned for rulemaking and obtained another continuance of the then-pending adjudicative proceeding relating to Odyssey's 2006 applications. AR 195, 198-99. In December 2008, the Department denied Odyssey's petition for rulemaking because (1) the methodology was based upon the collective knowledge of industry experts and (2) the Court of Appeals upheld the need methodology rejecting Odyssey's arguments that the Department's application was arbitrary and capricious.⁴ AR 271.

⁴ Contrary to Odyssey's suggestion (Odyssey Br. at 10), the Department has not barred any further review of its hospice rules through rulemaking. In fact, in early 2010, as it periodically does with most CN rules, the Department began the rulemaking process of updating the need forecasting methodology for hospice services, incorporating stakeholder input through various workshops and comment opportunities. See <http://www.doh.wa.gov/hsqa/fs/certneed/Hospice.htm> (last visited April 14, 2011). Participating in rulemaking is the appropriate way for Odyssey to have its concerns with the hospice rules addressed. *Odyssey*, 145 Wn. App. At 145, n. 6.

K. Odyssey Filed a Lawsuit Against the Department and Its Employees in Federal Court.

After having all six of its applications denied by the Department for failure to satisfy the CN criteria, after losing its argument in the Court of Appeals concerning how the Department evaluates “Need”, and after failing in its efforts to change the regulations themselves, Odyssey tried a new tactic: strong-arm the Department into issuing a CN even though Odyssey’s proposals did not satisfy the CN criteria.

In February 2009, Odyssey requested another stay of the pending adjudicative proceeding (concerning the denials of the 2006 applications) because it planned on filing a lawsuit against the Department and its employees in federal court. AR 251.

In April 2009, Odyssey filed the federal lawsuit. In the federal lawsuit, Odyssey alleged that the Department’s regulations were unconstitutional and a violation of federal antitrust laws. Odyssey also named the Secretary of Health and three other Department of Health employees in their individual capacities, and sought punitive damages and attorney fees under a Section 1983 theory. AR 257-78.

The Department initially was willing to defend its regulations against Odyssey’s baseless challenge. In June 2009, the Department filed its Answer in federal court, and continued to assert that it had properly

evaluated and denied Odyssey's 2006 CN applications. AR 1081-88. The Department asserted in its answer that (1) it had properly evaluated Odyssey's 2006 CN applications; (2) that the "2009 Methodology" requested by Odyssey (i.e., using 2007 data which became available in 2008) could not be used as the basis for evaluating Odyssey's 2006 CN applications denied in 2007; and (3) that even the "2008 Methodology" (i.e., using 2006 data which became available in 2007, the year it denied Odyssey's application) showed no need for additional hospice agencies in King County. *See id.*

L. The Department and Odyssey Settled the Federal Lawsuit.

Notwithstanding the Department's initial willingness to defend its (correct) decisions denying Odyssey's applications based on the CN criteria applied to every other applicant, Odyssey's strong-arm tactics ultimately had their intended effect. In September 2009, Odyssey informed the HLJ that it was engaged in settlement negotiations with the Department "on both the federal and administrative proceedings" and received yet another stay of the adjudicative proceeding until November 2009. AR 279-80. None of the Respondents had been advised of these settlement negotiations, even though Evergreen already had intervened in the adjudicative proceeding, and the only reason Providence had not yet

intervened was that its petition for intervention had been stayed pursuant to Odyssey's request.

On September 25, 2009, the Department and Odyssey agreed to settle the federal lawsuit if, among other things, the Department agreed to grant Odyssey's 2006 CN application for King County based upon data obtained in December 2008 (the "2009 Methodology"). AR 1093-95. This was the same 2009 Methodology the Department consistently stated could not be used to evaluate Odyssey's applications. AR 1081-88.

The federal settlement stated that "[t]he parties *will enter* into the attached Settlement and Stipulation in the pending adjudicative proceeding before the Department of Health." AR 1091 (emphasis added). The federal settlement also contained a specific "bad faith" provision to ensure that the Department would present the Settlement to the HLJ and support his approving it. AR 1092.

The Department stated that it "conducted a survey of existing King County providers based on services offered in 2007[,] . . . the data shows a current need for two additional hospice agencies in King County,⁵ [and] . . . [b]ased on this data showing need, the undersigned parties propose

⁵ The Department now takes the position that the data, which Respondents assert is incomplete, shows need for only one additional hospice agency. Respondent State of Washington Department of Health's and Secretary Mary Selecky's Brief ("Dept. Br.") at 13. When considering complete data, however, no need exists.

settlement under RCW 70.38.115(10)(c) approving Odyssey's [2006] application to establish a new hospice agency in King County" AR 1094. Odyssey agreed to withdraw its 2006 CN applications for Snohomish and Pierce counties and agreed to a few conditions normally associated with the grant of a CN. AR 1094-95.

The stipulation included an attachment showing the Department's need calculation for Odyssey's 2006 CN application based upon new 2007 use data, which was obtained in December 2008 and applied in 2009 (the "2009 Methodology"). AR 1096-1101. The attachment did not include any re-evaluation of the other CN criteria found to be unmet in the original evaluation, i.e., financial feasibility, structure and process of care, and cost containment. *Id.* The attachment also did not address a multitude of issues such as whether Odyssey had any additional citations by surveying agencies in the other states in which it operates, and if so, the extent of any such citations or whether they had been resolved. *Id.*

The Department's decision to grant a CN to Odyssey for King County was central to the settlement. Odyssey's counsel had previously stated that "[a]s you know, the King County CN is central to Odyssey's willingness to settle and any added risks and hurtles [sic] making that less likely to occur correspondingly make Odyssey less willing to settle." CP 871. In response, the Department's counsel stated, "Frankly, the idea that

we are ‘trying to avoid’ giving Odyssey its CN, ‘putting up hurdles,’ and ‘making additions’ to the agreed settlement is simply ridiculous.” *Id.*

M. The Department Issued a Notice of Proposed Settlement Granting Odyssey’s 2006 CN Application For King County Based on a “Special Circumstance.”

On September 29, 2009, the Department issued a Notice of Proposed Settlement to Respondents and another King County provider, Franciscan Health System (“Franciscan”), and invited comments. AR 297-99, 348-351, 515-517. The proposed settlement stated, “[b]ased on this data showing need, the undersigned parties propose settlement under RCW 70.38.115(10)(c) *approving Odyssey’s application to establish a new hospice agency in King County*” AR 298 (emphasis added). The Department based its decision on a “special circumstance,” which it described as follows:

In 2008, the Program conducted its survey of existing King County providers for 2007 use data. Applying the hospice need methodology to this data [the 2009 Methodology] showed a current need for two additional hospice agencies. Due to a *special circumstance*, the Program will consider this new data in deciding whether to approve Odyssey’s King County application. *The special circumstance is that this new need data was not available to Odyssey by the deadline for application in 2008.*⁶

⁶ The application deadline referenced is for the 2008 applications and not the 2006 applications.

AR 298 (internal footnote omitted, emphasis added). Odyssey did not file a CN application or letter of intent to submit an application in 2008.

The Department's letter also stated: "Odyssey's position regarding the law applicable to this settlement is not necessarily consistent with the Department's position, but the parties had *agreed* that any disagreements over the interpretation of the applicable law do not affect this settlement." AR 299 (emphasis added). The specifics of the disagreement were not disclosed.

Respondents and Franciscan submitted comments on the "special circumstance." AR 1104-58. The comments explained that the Department had not complied with the CN laws or with its own policies regarding competent information for the evaluation of CN applications. AR 1102-58. Respondents explained that the Department had properly evaluated Odyssey's 2006 CN application in August 2007 using the same methodology upheld by the Court of Appeals and that a deviation would require rulemaking. AR 1115-16, 1125-26, 1128.

Respondents further explained that the Department could not use data obtained approximately fifteen months *after its decision* to deny Odyssey's 2006 CN application to change that decision, because using such data, regardless of its accuracy, is contrary to longstanding departmental policy and irrelevant to forecasting need for a 2006 CN

application. AR 1116-21, 1123-24, 1128. Respondents also explained that the Department failed to include all hospice providers in its 2009 evaluation and artificially extended the forecast horizon applicable for the need methodology. AR 1104-08, 1124-25.

The HLJ granted the petitions of Providence, Swedish, and Franciscan to intervene, but only for the limited purpose of commenting on the proposed settlement under RCW 70.38.115(1)(c).⁷ AR 1001, 1008.

The Health Law Judge stated:

The only issue before the Presiding Officer is whether to accept the Proposed Settlement in the event it is offered by the program. There are not issues regarding discovery, cross-examination, or other participation in the adjudicative proceeding at this time. Limiting intervention to the submission of comments and argument on the Proposed Settlement is appropriate. The plain language of RCW 70.38.115(10)(c) requires nothing more.

AR 1001-02, 1009.

N. The Department and Odyssey Sought Approval of Their Federal Settlement.

On October 30, 2009, the Department submitted its proposed settlement to the Health Law Judge for approval. AR 1018-28. On November 10, 2009, all Respondents and Franciscan submitted responses

⁷ Evergreen had previously been granted full intervenor status. Contrary to Odyssey's contention, Evergreen has consistently objected to Odyssey's proposals for failure to satisfy the CN criteria. Evergreen also objected to the HLJ on the basis of rejecting its request to have a full adjudicative proceeding on the merits.

to the Department's request to have the HLJ approve the settlement proposal with Odyssey. AR 1179-1527. Respondents provided the legal bases for rejecting the Department's settlement of the federal lawsuit, including the fact that it contravened well-established CN laws and longstanding Departmental policy. AR 1179-1527, 1434-43.

On December 8, 2009, the HLJ nevertheless approved the Department's proposed order to grant Odyssey's 2006 CN application for King County using the 2009 Methodology. AR 1721-24. On January 13, 2010, the Department issued CN #1416 to Odyssey. CP 972.

O. The Superior Court Revoked the CN and Remanded the Matter To the HLJ To Complete Odyssey's Adjudicative Proceeding Based On the Relevant Data.

Respondents sought judicial review of the Department's action in King County Superior Court, before the Honorable Mary Yu. On October 29, 2010, after careful consideration of the agency record and written submissions, and after conducting a full hearing on the merits with oral argument by the parties' counsel, Judge Yu issued the Findings of Fact, Conclusions of Law and Judgment. CP 966-75.

Judge Yu concluded that issuance of a CN, without requiring that Odyssey satisfy the same CN criteria applied to all applicants, to settle an unrelated, federal lawsuit, was arbitrary and capricious and therefore, impermissible. Judge Yu remanded the matter back to the Department so

that the HLJ could complete the adjudicative proceeding commenced by Odyssey, to evaluate Odyssey's claim that its application *does* satisfy the CN criteria, and determine whether or not Odyssey should be awarded a CN, based on those criteria. CP 973-74.

P. Odyssey Again Sought Review By the Court of Appeals.

Odyssey, but not the Department, appealed the Superior Court's decision to this Court. CP 977-79.

IV. STANDARD OF REVIEW

The Department and Odyssey misstate the applicable standard of review. *See* Dept. Br. at 8 (stating that "in considering whether the Health Law Judge improperly considered new data, the standard is 'abuse of discretion'") and Odyssey Br. at 41 ("the standard of review . . . is whether an abuse of discretion has occurred"). The Department's and Odyssey's citations address review of evidentiary rulings, which are not at issue here. The proper standard of review is provided in the APA.

A reviewing court may grant relief from an agency decision under the APA if (1) the decision is unconstitutional;⁸ (2) the agency engaged in

⁸ Although the Court need not reach the constitutional issue, Evergreen asserts that the Department violated procedural due process by failing to solicit comments in advance of the federal settlement, and then depriving them of their right to challenge the decision in an adjudicative proceeding. "Integrity of the fact finding process and basic fairness of the decision are principal due process considerations." *Parker v. United Airlines*, 32 Wn. App. 722, 728, 649 P.2d 181 (1982); *see also* ROBERT F. UTTER & HUGH D. SPITZER,

unlawful procedure or decision-making or failed to follow prescribed procedures; (3) the agency erroneously interpreted or applied the law; (4) the decision is not supported by substantial evidence; (5) the decision is inconsistent with a rule of the agency unless a rationale basis has been established; and/or (6) the order is arbitrary and capricious. RCW

THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 36 (2002) (“Procedural due process means that procedures by which persons are deprived of life, liberty, or property must contain basic fairness.”). The *sine qua non* of due process is notice and opportunity to be heard. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950).

The legislature unambiguously intended the Department to engage in meaningful dialogue with competitors *before* entering into settlement. RCW 70.38.115(10)(c) (“the department shall so inform the health care facility or health maintenance organization and afford them an opportunity to comment, *in advance*, on the proposed settlement.”) (emphasis added). Here, however, the Department had already entered into settlement before providing any opportunity to comment. The Department’s gesture of requesting input from the similar providers *after* it had already entered into the settlement is not due process. *Mullane*, 339 U.S. at 314 (“process which is a mere gesture is not due process.”).

The Department then refused to allow an adjudicative proceeding to challenge its decision. It is indisputable that the Department has long permitted competitors to challenge the grant of a CN in an adjudicative proceeding. See <http://www.doh.wa.gov/hsqa/fsl/CertNeed/Docs/1723.pdf> (the Department’s monthly summary report for July 2010 showing several active adjudicative proceedings filed by competitors). Washington’s Supreme Court has recognized that competitors have standing to challenge the Department’s grant of a CN. *St. Joseph Hosp. & Health Care Ctr.*, 125 Wn.2d at 742 (“[w]hile an applicant who is denied a CN has both a motive and a statutory right to seek review of the Department’s determination, no comparable motivation or statutory authority to seek review exists when the Department grants a CN. Practically, this review can only be achieved if competitors have standing.”).

Had the Department approved Odyssey’s 2006 CN application in August 2007, it is undisputed that the Department *would have* provided an adjudicative proceeding. The Department offers no principled rationale for its incongruent position that the grant of a CN by settlement shields its decision from review. Even in settlement, the grant of a CN must still comply with the regulatory requirements.

34.05.570(3); *see also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

A court reviewing the agency action may “(a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.” RCW 34.05.570(1)(b); *see also W. Ports Transp., Inc. v. Emp. Sec.*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002) (“[u]nder the APA, the appellate court may affirm, reverse, or remand the agency's decision.”). The burden of establishing invalidity is on the party asserting the invalidity. RCW 34.05.570(1)(a); *Postema*, 142 Wn.2d at 77; *see also University of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008) (quoting *Providence Hosp. of Everett v. Department of Soc. & Health Servs.*, 112 Wn.2d 353, 355-56, 770 P.2d 1040 (1989)) (other citations omitted).

V. ARGUMENT

A. **The Department's Final Order Is Subject To Judicial Review.**

The APA provides for judicial review of an agency order arising from an adjudicative proceeding. RCW 34.05.570(3). The decision by the Department to grant Odyssey a hospice CN came in the form of a

“Final Order Approving Settlement and Granting Odyssey’s King County Hospice Application,” signed by the HLJ on December 8, 2009. AR 1721. As such, the Final Order is subject to judicial review.

The narrow issue here is whether, in its application of the APA’s judicial review standards, the Superior Court was correct to reverse the specific agency action: the Department’s issuance of a CN to Odyssey. This Court is not being asked to decide whether the Department can settle CN cases generally, or to delineate when this would be appropriate. The Court is being asked to determine whether it was arbitrary and capricious for the Department to treat Odyssey differently than every other CN applicant, to disregard long-established policy, and to issue a CN to Odyssey under the circumstances of this case.

B. The Department’s Decision Was Arbitrary and Capricious Because It Was Contrary To Established Department Policy, the CN Laws, and Other Precedent.

1. The Department Willfully Disregarded Longstanding Policy By Granting the CN.

To justify its award of a CN to Odyssey, the Department improperly based its decision on information obtained more than two years after Odyssey submitted its application and more than a year after the record on that application closed and the Department denied the application. AR 298. Instead of considering data from 2003, 2004, and 2005, as it did when it initially reviewed and denied the King County

application and as required by regulation, the Department used data from 2007, which became available in December 2008. *Id.*

The Department did so in willful disregard of its longstanding policy of not allowing data obtained long after the close of the agency record to become part of the record at an adjudicative proceeding. This policy is memorialized in an October 22, 2007, memorandum issued by Department Secretary Mary C. Selecky to Senior HLJ Laura Farris. AR 1260. Secretary Selecky stated, “[allowing] evidence to be submitted . . . that did not exist at the time the program made its decision . . . is contrary to the department’s long practice of not allowing new evidence to come into the record at the adjudicative proceeding.” *Id.* Secretary Selecky reminded the Department’s HLJs that “evidence that did not exist and was not part of the record *at the time the Certificate of Need Program made its decision* should not be admitted into the adjudicative proceeding.” *Id.* (emphasis added).

In a February 2009 e-mail exchange between the Department’s counsel and counsel for Odyssey regarding possible settlement of the Odyssey adjudicative proceeding, the Department confirmed that it needed to follow the policy documented by Secretary Selecky:

As you know, we *always* look at the facts that existed during review. So, we cannot approve your application

based on a Methodology run long after the record is closed.
In such cases, applicants must re-apply.

CP 877 (emphasis added).

Then, in June 2009, the Department again confirmed in its Answer to the federal lawsuit that the 2009 Methodology *could not be used* as a basis for granting Odyssey's 2006 CN application for King County.⁹ Because statements of fact made in responsive pleadings like an answer to a complaint are admissions against the party making them and are in favor of the party's adversary, *see Neilson v. Vashon Island School Dist. No. 402*, 97 Wn.2d 955, 958, 558 P.2d 167 (1976), the Department's change of position in its Final Order must be viewed as a willful and unreasoned act taken without regard to or consideration of the facts and circumstances. The Final Order, therefore, is arbitrary and capricious.

⁹ The Department denied Odyssey's contention that "[t]his projection, based on faulty Methodology and data, incorrectly resulted in Odyssey being denied its [2006] CN application." AR 1069, 1085. The Department admitted the contention that it "advised Odyssey that it could only consider Odyssey's October 2006 CN application under the 2007 Methodology and therefore the 2007 Methodology's projection of need in 2009, 2010, and 2011 applied; whether or not those projections were accurate." AR 1074-75, 1086. The Department further admitted Odyssey's contention that it "refused Odyssey's request for the CN for King County, stating that even though the 2009 methodology showed a projected need in King County in all three years for which Odyssey applied (2009, 2010, and 2011) the Department would not consider the 2009 Methodology in Odyssey's appeal of its denied October 2006 applications." AR 1074, 1086. Finally, the Department admitted Odyssey's contention that even its "2008 Methodology" showed no need through 2011. AR 1073, 1086.

2. The Department Willfully Disregarded the Law By Granting the CN.

The Department's policy regarding what evidence may be considered in evaluating a CN decision in an adjudicative review recently was affirmed by the Washington Supreme Court in *University of Washington Medical Center v. Department of Health*, 164 Wn.2d 95, 187 P.3d 243 (2008), which involved an issue as to the scope of the agency record in an adjudicative proceeding. In that case, the Department explained that "the decision to grant a certificate of need is made on a 'snapshot' of facts around the time the application is filed." *Id.* at 103 (quotes in original, emphasis added). Affirming the HLJ's decision to limit the record on appeal to that which existed at the time the application record closed and the Department made its decision, the Court stated:

Both the statutes and the administrative rules clearly contemplate that the decision will be made quickly; ideally, 90 days from the application's filing. RCW 70.38.115(8); WAC 246-310-160(1). *Requiring the health law judge to admit evidence created long after this period of time would undermine the statutory objective of expeditious decision making and prevent meaningful public input on that evidence. A request for an adjudicative hearing does not begin the application process anew;*

Id. at 104 (emphasis added).

The Court's holding in the *University of Washington Medical Center* case confirms that the Department's reliance on data from time

periods well after the Department's decision in this case was improper. While the issue before this Court involves data used to justify granting a CN by Final Order through settlement and not evidentiary issues at an adjudicative proceeding, the same underlying rationale applies. It is contrary to looking at a "snapshot" in time.

Issuing a CN by Final Order based on data obtained approximately two years after the initial application was submitted would also render both the initial application and public hearing process meaningless. It would create an inconsistent position on the limitation of information that is relevant for purposes of deciding whether a CN should or should not be granted. Upholding the Final Order would create an unauthorized after-the-fact method for analyzing the appropriateness of a CN, which arbitrarily takes any analysis outside the statutory and regulatory framework. Furthermore, it impermissibly prevents meaningful public input (through the CN public hearing process) on any new information considered, as happened in this case.

3. The Department's Designation Of a "Special Circumstance" Underscores the Arbitrary and Capricious Nature Of the Final Order.

The Department's designation of its utilization of the 2009 Methodology to analyze Odyssey's 2006 application as a "special

circumstance” (AR 298) confirms that the Department’s approach was arbitrary and capricious. As the Superior Court concluded:

The Department’s decision to settle the Federal Lawsuit by granting Odyssey a CN in King County under the guise of “special circumstance” and based upon its 2009 methodology long after the record was closed on a 2006 application, was arbitrary and capricious.

CP 973.

The availability of 2007 use data in the 2009 Methodology is not relevant to a 2006 CN application. The law requires that data used to determine whether Odyssey’s 2006 application should be granted or denied must be based on data from the years 2003, 2004, and 2005, as it originally was, and not based on data collected for subsequent years.¹⁰ Odyssey could have, but chose not to, file a CN application for King County in 2007, 2008, or 2009. And, while the Department may have intended 2007 use data to be available for 2008 applicants, it was not intended for use with 2006 applicants.¹¹ For example, Heart of Hospice applied for a CN in a different county in 2007, but the Department used

¹⁰ For example, WAC 246-310-290(7)(b) requires the Department, as part of its “Need” calculation, to “calculate the average number of total resident deaths *over the last three years*” in King County for individuals: age 65 or older with and without cancer, and under age 65 with and without cancer. (Emphasis added.)

¹¹ The Department’s use of 2003, 2004, and 2005 use data in the original analysis was consistent with the process upheld by the Court of Appeals.

2006 use data [2008 Methodology] to evaluate and deny that 2007 application. AR 1262-67. Giving Odyssey special treatment (as a result of Odyssey's aggressive tactic of suing the Department and its employees in federal court) is not only unfair to the existing providers who will be harmed by Odyssey's operations, but also is unfair to other applicants who were not provided such special treatment.

4. The Final Order Willfully Disregarded the Underlying Purpose Of the CN Laws.

In enacting Ch. 70.38 RCW, the Legislature sought to oversee development of Washington's health and medical resources "in a planned, orderly fashion" RCW 70.38.015(2). The Department's utilization of data from a period of time randomly selected, which is more than two years after the 2006 CN applications were filed, and approximately a year and one-half after the Department's decision, would be contrary to this legislative goal. As a policy matter, Departmental decisions would have no limits on what information could be used in a CN evaluation, placing uncertainty on the providers who rely upon consistently applied CN laws and policy in their business decisions.

The CN process is a method for "forecasting" future demand by taking a "snapshot" at the time of the application, but there is nothing in the CN laws that guarantee the outcome of every forecast. The forecast is

based upon the best available data in the hands of the Department at the time of the evaluation; and the time period from which the data is obtained is defined by the applicable regulations. If the Department were to abandon these standards, this would generate substantial uncertainty surrounding the Department's decisions. Applicants will be unable to rely upon Departmental precedent, as well as unable to rely upon the Department to apply CN rules in a planned and orderly fashion.

C. Notwithstanding the Improper Use of the 2009 Methodology, the Final Order Was Arbitrary and Capricious Because the Department Failed to Conduct Any Analysis Beyond "Need."

1. The Final Order Was Arbitrary and Capricious Because the Department Made Specific Findings Not Supported By the Record.

The Department's Final Order is based on the following specific findings:

(a) Odyssey's hospice application for King County meets the requirements of WAC 246-310-210, WAC 246-310-220, WAC 246-310-230, and WAC 246-310-240; and

(b) In the exercise of discretion, the Program's 2008 WAC 246-310-290 methodology – showing "need" for an additional hospice agency in King County in 2009 – may be used in deciding that need exists for Odyssey's proposed hospice in King County;

AR 1721-24. While it is not disputed that the three criteria other than "Need" were originally *not* met, the Department engaged in *no subsequent*

analysis to determine whether those criteria *had been satisfied* before making specific findings that they had in the Final Order.¹² The Department also never confirmed whether all other information and representations provided in the initial application were accurate in 2009, despite the lapse of three years.

Respondents do not dispute that the Department can settle CN matters with applicants under some circumstances.¹³ The statute, however, does not abrogate the Department's obligation to ensure that the CN requirements have been met. Even Odyssey admits that "the Department still must determine whether all CN criteria have been met, even in settlement." Odyssey Br. at 29. If the Department, however, fails

¹² After an extensive review of documents and data and after conducting a public hearing that overwhelmingly supported denying Odyssey's application, the Department, on August 17, 2007, concluded that "the application submitted by [sic] on behalf of Odyssey HealthCare proposing to establish a Medicare certified hospice agency to serve the residents of King County is not consistent with the applicable criteria of the Certificate of Need Program, and a Certificate of Need is denied." AR 15. The Department found that Odyssey did not meet any of the required criteria for obtaining Certificate of Need approval for a hospice agency. AR 16, 24, 27, 30. The Department never rejected the information submitted by the public, including Respondents' opposition to Odyssey's application, and instead, adopted much of that information when it denied Odyssey's CN application in 2007.

¹³ The Superior Court's decision and arguments made by Respondents do not construe the settlement statute as precluding settlement whenever the Department modifies a decision denying a CN, as Odyssey asserts; and they do not mean that a CN can only be settled if the Department adheres to its decision denying the CN. For example, settlement may be appropriate in some circumstances where the Department originally denies a CN but, as part of the adjudicative proceeding, the parties discover that the Department made a mistake in its analysis, and using the same data, the correct analysis shows that the requirements are met. That is not the case in this matter. The Superior Court recognized this distinction. CP 973

to ensure that the CN criteria have been met (even in settlement) before issuing a CN, the APA applies and the decision is subject to judicial review.

In this case, where the CN was issued pursuant to a Final Order containing specific findings that all four criteria have been met, it was incumbent upon the Department to actually conduct an analysis to support those findings as it has done in the past.¹⁴ The Department's failure to engage in the required analysis while making specific findings regarding the three criteria other than "Need" represented a willful disregard of the facts and circumstances.¹⁵ Furthermore, RCW 70.38.015(2) requires that the Legislature oversee the development of Washington's health and medical resources "consistent with the statewide health resources strategy and public policy goals that are clearly articulated and regularly updated." Picking and choosing to review only one of the criteria, when the Department has made specific findings as to all of the criteria, does not serve that purpose and is arbitrary and capricious.

¹⁴ The Department's submission prior to presentation of the Final Order confirms that no substantial analysis was conducted regarding the other three criteria. AR 322-23, 352-54, 1020-21, 1688.

¹⁵ The Department's argument that the three criteria other than need were not satisfied under the original analysis only because "Need" had not been satisfied is not supported by the record. *See* AR 24-29.

2. The Final Order Was Arbitrary and Capricious Because the Financial Feasibility Criteria Were Not Satisfied In the Department's 2007 Decision and Were Never Re-analyzed.

The Department found several problems with Odyssey's proposal when it performed its analysis in 2007 of the Financial Feasibility criteria. AR 24-27. For example, the Department found that Odyssey was inconsistent on its use of the average length of stay.¹⁶ AR 25. The Department also found Odyssey's projection for number of patient days, average daily census, and unduplicated census to be suspect because Odyssey used the same numbers for King, Pierce, and Snohomish Counties.¹⁷ *Id.* The Department did not readdress these concerns or reevaluate Odyssey's financials when it made its specific finding regarding Financial Feasibility and approved the settlement.

The Superior Court recognized the willful disregard for the facts regarding unmet criteria when it concluded: "The Health law Judge's

¹⁶ Odyssey used an average length of stay for its revenue and expense forecast that was 20 days longer than what it used in its evaluation of need. (*Id.*) The Department also found that the average length of stay used by Odyssey was "28 days higher then [sic] the state average and 25 days greater than the average length of stay of 55 days for the hospice providers currently serving King County." (*Id.*) The Department concluded that using a more realistic average length of stay would considerably lower Odyssey's 2011 financial projections. (*Id.*)

¹⁷ The Department stated, "[t]he department is concerned that the projections as presented may not be reflective of what the applicant actually expects to provide but instead is what is needed to project having an average daily census by the 3rd year of operation as required by rule." AR 25.

subsequent summary adoption of the settlement agreement without an adjudication or finding that Odyssey had actually met all four of the CN criteria was similarly arbitrary and capricious” CP 973.

3. The Final Order Was Arbitrary and Capricious Because the Structure and Process of Care Criteria Were Not Satisfied In the Department’s 2007 Decision and Were Never Re-analyzed.

In its 2007 decision denying Odyssey’s application, the Department found that Odyssey would need to agree to a condition “requiring it to provide copies of [ancillary and support agreements] for review and approval, identifying vendors and charges for these services consistent with the draft provided.” AR 28. The Department also required that Odyssey identify a director clinical services and a back-up. AR 29. Prior to issuing the Final Order in 2009, the Department never articulated whether those requirements remained, and if so, never evaluated whether those requirements had been met or could be met. To the extent those requirements were no longer imposed, the Department never explained why; thereby making the Final Order arbitrary and capricious.

D. Notwithstanding the Improper Use of the 2009 Methodology, the Department Engaged in an Incomplete and Faulty Analysis In Its Health Planning Forecast of the “Need.”

1. The Department Arbitrarily Did Not Include All Hospice Providers in Its 2009 Methodology.

The Department must include all hospice agencies operating in the planning area when evaluating “current hospice capacity.” WAC 246-310-290(1)(c); WAC 246-310-290(7)(f). The Department, however, failed to include Kline Galland in its 2009 Methodology. On October 29, 2009, Kline Galland received an exemption to provide hospice services up to an average daily census (ADC) of 40 patients. AR 1191-92, 1194.

This information was available to the Department before it granted Odyssey’s CN. Because Kline Galland has been in the planning area for less than three years, the Department should have allocated an ADC of thirty-five and the most recent Washington average length of stay data for the assumed annual admissions for the first three years. WAC 246-310-290(1)(c)(ii). The Department’s omission of Kline Galland was willful and violates WAC 246-310-290.¹⁸ If Kline Galland had been included,

¹⁸ The Department has argued that Kline Galland should not be considered because the legislation granting its exemption, ESHB 1926, was approved after Odyssey’s application. The Department, however, has simultaneously advocated that Odyssey’s 2006 application should be approved based on the 2009 Methodology, which included data available only after Odyssey’s 2006 application was submitted and after the Department’s original denial had been made. The Department cannot credibly advocate for the inclusion of the data from the 2009 Methodology but the exclusion of the data regarding Kline Galland.

then there would be no need. AR 1105-06. The Department's use of *some* after-the-fact data but not *all* known after-the-fact data further demonstrates the arbitrary and capricious nature of its decision.

2. The Department Arbitrarily Extended the Planning Horizon By Two Years.

In the 2009 Methodology, the Department extended the planning horizon to 2013 to make it appear as though the 2009 Methodology would support two hospice agencies. AR 1108. As the Department now concedes, the correct planning horizon for the 2009 Methodology should be 2009-2011 even if one assumes the 2009 Methodology could be used. AR 1687. Therefore, using the appropriate planning horizon, the Department's 2009 Methodology shows need for no more than one additional hospice agency; but that need disappears when Kline Galland is appropriately included in the calculation. AR 1104-08.

3. The Department's 2008 Methodology [Using 2006 Use Data] Also Demonstrates No Need in King County During the Appropriate Planning Horizon.

The correct planning horizon for Odyssey's 2006 application is 2007 through 2009. The Department has admitted that even its "2008 Methodology," which applied to 2007 applications, showed no need in 2008, 2009, 2010, or 2011. AR 1073, 1086. Additionally, in the 2008 Heart of Hospice decision, the Department denied Heart of Hospice's 2007 application for a hospice CN using the 2008 Methodology. AR

1328-42. The Department determined that there was no need for additional hospice agencies in King County through 2010 in a decision on a CN application submitted one year after Odyssey's 2006 application. AR 1342. The Department's Final Order ignores this finding, grants a CN where hospice is not needed, and demonstrates the arbitrary nature of its decision, as well as the inconsistent treatment of CN applicants.

E. Avoiding the Defense Of a Federal Lawsuit Does Not Justify Abrogating the CN Laws.

The underlying reason for the Department's granting a CN to Odyssey for King County was to avoid having to defend a federal lawsuit brought by Odyssey. In order to settle that case, the Department issued a CN even though the CN criteria had not been met. There is not, and never has been, a legitimate dispute over whether Odyssey's application satisfied the CN criteria. The survey data used to evaluate Odyssey's 2006 applications in 2007 was more complete than data used in prior hospice CN reviews, and the survey responses were obtained from all providers identified by Odyssey as serving King County.¹⁹ AR 1282.

¹⁹ In its 2007 evaluation, the Department stated, "Although not all hospice providers in the state responded to the program's surveys, 7 of the 8 surveys mailed to King County providers identified by the Department were returned. In contrast, all providers identified by the applicant [Odyssey] as serving King County provided responses." AR 1282.

The Department also evaluated and properly denied the applications using the same methodology affirmed by the Court of Appeals in Odyssey's previous appeal, in which Division II stated:

The judicial appeal process is not the appropriate venue for addressing Odyssey's arguments about the inherent defects in WAC 246-310-290(7)'s methodology. Instead, Odyssey should raise its concerns through administrative rule making avenues.

145 Wn. App. at 145, n.6.²⁰ The Department has consistently taken the position that Odyssey's application was properly denied.

The Department's obligation and responsibility to follow well-established CN law and policy cannot be overridden by the Department's desire to avoid defending its regulations against Odyssey's federal challenge. Upholding the Department's decision to award a CN to Odyssey would set a precedent that an out-of-state, for-profit provider with significant non-compliance problems can avoid satisfying the criteria of "Need," "Financial Feasibility," "Structure and Process of Care," and "Cost Containment," imposed on all Washington healthcare providers, simply by strong-arming the Department with the threat of having to defend against federal litigation. This would be an anathema to sound

²⁰ Any argument regarding incomplete survey results was already considered and rejected by the Court of Appeals in the first Odyssey appeal.

healthcare facility planning, public policy, and the purposes underlying CN law.

F. Respondents Had Standing to Seek Judicial Review.

Although it is unclear as to whether Odyssey is asserting that Respondents had no standing to file a petition for judicial review with the Superior Court (Odyssey Br. at 31-38), to the extent that it is, the argument is without merit. Under the APA, a party has standing to commence a judicial review proceeding if it meets the following standard:

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530.

Respondents sought judicial review of the Department's December 8, 2009 Final Order and issuance of a CN to Odyssey (CN #1416), which qualifies as an "agency action" as defined under the APA. *See* RCW 34.05.530(3) ("Agency action" includes "licensing"). Respondents satisfy all three prongs of the standing test to challenge this agency action, and therefore, they had standing to commence a judicial review.

1. The Department's Issuance of a CN To Odyssey Is Likely To Prejudice Respondents.

The Department's issuance of a CN to Odyssey will prejudice Respondents. The CN would permit Odyssey to establish a hospice agency in King County competing with Respondents' hospice services. Diversion of revenue away from Respondents to Odyssey also is likely to limit Respondents' ability to provide uncompensated services to the community. CP 467. It also will unnecessarily fragment care and stretch the local healthcare workforce even more thinly, and thus have staffing impacts on all three Respondents. *Id.*

2. Respondents' Interests Were Among Those That The Department Was Required To Consider.

Respondents' interests were among those that the Department was required to consider when it issued the certificate of need to Odyssey. This is implicit in the CN regulations. For example, before issuing a CN, the Department must determine that "[t]he population served or to be

served has need for the project and *other services and facilities of the type proposed* are not or will not be sufficiently available or accessible to meet that need.” WAC 246-310-210(1) (emphasis added.) The Department must also determine that the proposed project will “not result in an unwarranted fragmentation of services” and that it will “have an appropriate relationship to the service area’s *existing* health care system.” WAC 246-310-230(4) (emphasis added).

Moreover, in *St. Joseph Hosp. & Health Care Ctr. v. Department of Health* 125 Wn.2d 733, 744, 887 P.2d 891 (1995), Washington’s Supreme Court specifically addressed whether “competing service providers” satisfy the second prong of the statutory standing test in RCW 34.05.530, and concluded that they do: the Supreme Court held that in CN cases “*competitors have standing[.]*” *St. Joseph*, 125 Wn.2d at 739-742.

3. A Judgment In Favor of Respondents Would Substantially Eliminate the Prejudice Caused to Respondents.

A judgment in favor of Respondents here would substantially eliminate the prejudice caused by the agency action. This is perhaps self-evident. If this Court affirms the Superior Court’s decision, Odyssey will not have a CN and cannot open a hospice agency in King County. Therefore, the harm to Respondents will not occur.

Odyssey also appears to argue that the Superior Court erred in remanding the matter back to the HLJ for an adjudicative proceeding on the merits because, according to Odyssey, Respondents would not have been able to obtain an adjudicative proceeding had Odyssey's application been approved by the CN Program. This line of argument is completely irrelevant to what happened in this case.

Respondents did not request an adjudicative proceeding; rather, *Odyssey* did, after the CN Program denied its applications. The Superior Court's remand to the Health Law Judge was to conclude the adjudicative proceeding that had been requested *by Odyssey*, to determine whether the CN Program correctly denied Odyssey's application under the appropriate standards, or whether, as argued by Odyssey, its application did in fact satisfy the CN criteria and should have been approved.

G. Reversal of the Department's Issuance of a CN and Remand to the Health Law Judge Based on the Arbitrary and Capricious Final Order Will Not Preclude Odyssey From Moving Forward With The Agency Appeal That It Requested.

The issuance of a CN to Odyssey does not rise and fall on this Court's decision as to whether the Department's Final Order is arbitrary and capricious. If the Final Order is reversed and Odyssey pursues an adjudicative proceeding in which it satisfies all four of the CN criteria for establishing a hospice agency, then the HLJ will approve Odyssey's

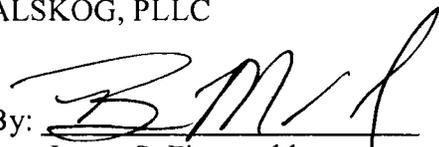
application on the merits. Alternatively, if Odyssey believes it cannot show need at an adjudicative proceeding, it may file a new application with more recent data, which it claims, supports the need for a new hospice agency in King County.

VI. CONCLUSION

The Department's issuance of a CN to Odyssey was arbitrary and capricious and in violation of its longstanding policies governing CN review. Odyssey should only be permitted to open a hospice agency in King County if the Department determines that Odyssey satisfies the same CN criteria that every other applicant is required to satisfy. Respondents respectfully request that this Court affirm the Superior Court and allow this matter to be remanded to the HLJ to make this determination.

Respectfully submitted this 18th day of April, 2011.

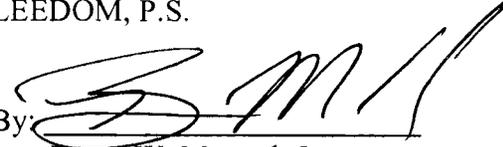
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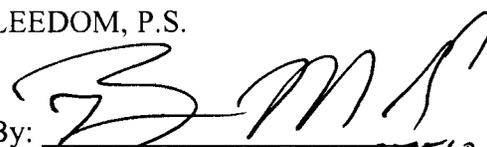
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CERTIFICATE OF SERVICE

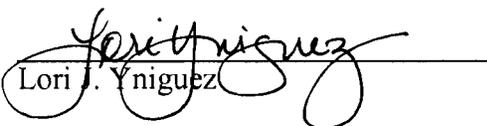
The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of **BRIEF OF RESPONDENTS**, to be electronically mailed and mailed, via postage prepaid First Class Mail, unless otherwise noted, to the following addresses of record:

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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 at Seattle, Washington this 18th day of April, 2011.


Lori J. Yniguez

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