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

KADLEC REGIONAL MEDICAL CENTER, a  
Washington nonprofit corporation,

Petitioner,

v.

DEPARTMENT OF HEALTH OF THE STATE OF  
WASHINGTON,

Respondent.

**RESPONSE BRIEF OF KENNEWICK PUBLIC HOSPITAL  
DISTRICT d/b/a KENNEWICK GENERAL HOSPITAL**

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## I. INTRODUCTION

Kennewick Public Hospital District dba Kennewick General Hospital (“KGH”) is an intervenor in this judicial review action. There is a parallel adjudicative proceeding at the administrative level before a Health Law Judge (“HLJ”) brought by KGH regarding the same underlying subject matter, which will be set for hearing upon conclusion of this appeal. Petitioner Kadlec Regional Medical Center’s judicial review action before this Court relates to a portion of the issues that may be considered at the adjudicative proceeding regarding acute care beds in the Benton County/Franklin County planning area. But it cannot address all the issues regarding the need methodology and population forecasting data for the Benton/Franklin planning area because the issues that will be considered at the adjudicative proceeding are broader than those before the Court of Appeals.

In particular, in the adjudicative proceeding, KGH is challenging the decision by the Washington State Department of Health (“Department”) to deny KGH’s Certificate of Need application to add 25 acute care beds to KGH’s existing campus in Kennewick, Washington, and to grant a CN to Kadlec to add 55 acute care beds to its existing hospital in Richland, Washington. KGH maintains that the Department did not appropriately consider all relevant information and did not apply the CN criteria or the acute care bed need projection methodology

correctly. *See* Administrative Record (“AR”) 82-215 (KGH’s Application for Adjudicative Proceeding). In other words, Kadlec should not have been approved for 55 beds, let alone its excessive requests for the 75 or 114 bed alternatives it seeks.

With respect to this judicial review action, KGH respectfully requests that if the Court of Appeals does not affirm the dismissal of Kadlec’s appeal or remand it to the HLJ, then it should decline to independently grant 75 or 114 beds to Kadlec, as such an order would be inaccurate, premature and based on an incomplete factual record. It would also be prejudicial to KGH and the administrative litigation that is not yet concluded, which is slated to consider bed need methodology issues and for which expert testimony is expected.

## **II. ISSUES**

If the Court of Appeals concludes that Kadlec’s administrative appeal for 75 or 114 beds was properly dismissed by the Health Law Judge, should this Court separately review the Department’s decision to use certain types of population projections with respect to Kadlec’s request for 75 or 114 beds and independently approve that request?  
[Answer: No.]

## **III. STATEMENT OF THE CASE**

### **A. The Department’s Evaluation of the Kadlec and KGH Certificate of Need Applications.**

On or about November 6, 2009, Kadlec submitted a CN application to add 55, 75 or 114 acute care beds to its existing hospital in

Richland, Washington. On or about December 7, 2009, KGH submitted a CN application to add 25 acute care beds to its Auburn campus in Kennewick. Both applications related to facilities in the Benton/Franklin planning area. The applications submitted by KGH and Kadlec were reviewed concurrently by the Department.

On November 3, 2010, the Department of Health issued its "Evaluations of the following two Certificate of Need applications proposing to add acute care bed capacity to the Benton/Franklin planning area: Kadlec Regional Medical Center proposing to add 114 acute care beds to the existing hospital in Richland; Kennewick General Hospital proposing to add 25 acute care beds to the Auburn Campus in Kennewick." AR 8-62 (Evaluation).

**B. The Consolidated Adjudicative Proceeding.**

On December 1, 2010, KGH timely requested reconsideration of the Evaluation. AR 1642-1708.

On December 1, 2010, Kadlec filed an Application for Adjudicative Proceeding regarding the denial of Kadlec's alternative requests to add 75 or 114 beds to its existing hospital.

Following the denial of its reconsideration request, KGH filed its Application for an Adjudicative Proceeding on January 24, 2011. AR 82-215.

The KGH and Kadlec administrative appeals were consolidated in a Consolidated Adjudicative Proceeding. AR 252-256.

After the HLJ dismissed Kadlec's administrative appeal for 75 or 114 beds (i.e., its request to receive even more beds than the 55 beds it received), the HLJ continued the Consolidated Adjudicative Proceeding to allow the Superior Court an opportunity to review that dismissal. CP 117-119 (Prehearing Order No. 5: Order of Continuance).

**C. KGH's Position in the Consolidated Adjudicative Proceeding.**

In the Consolidated Adjudicative Proceeding before the HLJ, KGH contests the Department's decision to grant Kadlec 55 beds and deny KGH 25 beds on several grounds, including the following grounds summarized below, all facts and issues identified in KGH's request for reconsideration (AR 1959-2023), and the grounds raised in KGH materials presented to the Department during the application process and reflected in the record (*see* AR 623-2266, KGH's application, screening responses, rebuttal, reconsideration request, and associated back-up documents and factual information):

1. The Department made material errors in calculating the future bed need for the Benton/Franklin planning area. For example, the Department erroneously included acute rehabilitation days in the calculation of the use rate and trend line, but excluded certain dedicated acute rehabilitation beds from the count of current supply. The impact of this error alone is approximately 20 beds over the seven-year planning horizon included in the Evaluation. The Department also erred by using outdated OFM populations figures that served to overstate the baseline use rate and therefore artificially overstate projected patient days in future

years, exacerbating the purported need for beds in the planning area by approximately 10 beds. The Department's analysis of need was inconsistent with past practice and reflects an erroneous application of information, procedures and applicable law, including but not limited to WAC 246-310-210. An analysis based on accurate facts and information is essential to best determine how to meet the long-term needs of patients in the Benton/Franklin planning area.

2. The Department erred in denying KGH's CN application. The Department did not follow its adopted procedures in determining that KGH's application failed an element of the financial feasibility criterion, which led the Department to conclude that it also failed the criteria for structure and process of care and cost containment. The Department's analysis of KGH's application was inconsistent with past practice and reflects an erroneous application of information, procedures and applicable law, including but not limited to WAC 246-310-220, WAC 246-310-230 and WAC 246-310-240. KGH's application met the financial feasibility, structure and process of care and cost containment criteria when the project financials are appropriately considered.

3. The Department erred in approving Kadlec's CN application. Kadlec's application proposed a 114-bed expansion project with two smaller alternative options of 75 beds and 55 beds. Due to the errors in applying the bed need methodology, the Department approved Kadlec's proposed 55 bed option. When the Department's errors are corrected, however, the bed need methodology projects need for only 20

or 30 beds, a project too small to be evaluated against the financial projections contained in Kadlec's application. Kadlec's application was therefore erroneously approved. Kadlec's application cannot demonstrate that it meets the financial feasibility, cost containment and structure and process of care criteria.

4. The Department erred when it rejected KGH's CN application and approved Kadlec's application, despite the fact that KGH's application best met the CN criteria and the needs of the patients of the Benton/Franklin planning area. The Department failed to follow adopted procedures in reaching its decision. If all relevant information was appropriately considered and applied by the Department, it would have become apparent that KGH's application met the CN criteria and was the best option because it closely matched the corrected need projection. The Department's decision and findings were erroneous, not adequately supported by evidence, and not made in accordance with applicable law, including but not limited to RCW 70.38.115 and WAC 246-310-210, WAC 246-310-220, WAC 246-310-230, WAC 246-310-240 and WAC 246-310-490.

5. The Department erred in not allocating any beds to KGH in its Evaluation.

6. The Department erred when it rejected KGH' request for reconsideration under WAC 246-310-560.

Issues relating to KGH's CN application are not before this Court because they are the subject of the pending administrative action and those

remedies have not been exhausted. But is important to note that the issue of the appropriate bed need methodology for the Benton/Franklin planning area also remains before the HLJ, which should preclude a premature and prejudicial determination by the Court of Appeals regarding bed need methodology and Kadlec's request for beds, which could result in a procedural pretzel and inconsistent decisions from different layers of the appeal process.

**D. Kadlec's Further Appeal.**

In February 2012, the Thurston County Superior Court affirmed the HLJ's decision regarding the dismissal of Kadlec's appeal. CP 226-230. KGH was an intervenor in that judicial review action, and submitting briefing to the Superior Court. CP 110-185; CP 223-225. This appeal by Kadlec ensued.

**IV. ARGUMENT**

**A. The Court of Appeals Should Not Independently Grant 75 or 114 Beds to Kadlec.**

If this Court concludes, as did the Department and the Superior Court, that Kadlec's administrative appeal for 75 or 114 beds was properly dismissed by the Health Law Judge, then this Court should not independently approve Kadlec's request for 75 or 114 beds.

In the pending adjudicative proceeding, KGH maintains that the Department did not appropriately consider all relevant information and did not apply the CN criteria correctly in a manner that best meets the long-term needs of patients in the Benton/Franklin planning area. AR 82-215

(KGH's Application for Adjudicative Proceeding). Based on the facts and law, Kadlec should not have been approved for 55 beds, let alone its excessive requests for the 75 or 114 beds alternatives it now seeks. An independent grant of 75 or 114 beds by the Court of Appeals would be inaccurate, premature, based on an incomplete factual record, and prejudicial to KGH and the administrative litigation that has not yet concluded, which is slated to consider bed need methodology issues and for which expert testimony is expected.

**B. There Are Numerous Factual Grounds for Denying Kadlec's Request for 75 or 114 Beds.**

The factual record before the Court of Appeals does not support Kadlec's request for 75 or 114 beds. There are numerous factual bases for denying Kadlec's request, including facts that will be the subject of KGH's pending administrative proceeding and expert testimony.

For example, the Department calculated a need for 61 new beds in the Benton/Franklin planning area by 2016. However, the Department made material errors when it applied its acute care bed need projection methodology. When these errors are corrected, and within the acute care bed need projection horizon of seven years for expansion projects, the need is for significantly fewer beds. Kadlec's proposal requests a number of beds that will significantly oversupply the planning area. The KGH proposal provides a "best fit" match to the bed need projections.

In addition, Kadlec did not provide a pro forma scenario that would allow the Department to evaluate fewer than 55 beds. Given that

the true need is for significantly fewer beds, the Department lacked data to determine conformance of the project with financial feasibility requirements.<sup>1</sup>

Moreover, as explained below, because there are not sufficient beds “needed” to award all the beds requested by the two applicants, KGH should be deemed the superior applicant under WAC 246-310-240(1) because it is the best fit and has the lowest cost. Kadlec’s request for 75 or 114 beds should be rejected because the record lacks sufficient data to determine the feasibility of a smaller, or right-sized, proposal.

**1. Application of the acute care bed need projection methodology.**

The Department consistently uses the 12 step Acute Care Bed Need Projection Methodology outlined in the sunset State Health Plan to evaluate CN applications for new acute care beds, and consistently uses OFM’s medium series population estimates. Despite the Department advising both KGH and Kadlec in advance of filing applications that it intended to use medium series in this CN review as well, Kadlec elected to put forth a faulty and inflated bed need based on OFM high series. AR 1690 (KGH’s CN Application, p. 20, n.1).

OFM’s high series population has not been a more accurate predictor of population growth in recent years – especially in Benton County. Further, limitations of OFM’s high series render it highly limited for purposes of acute care bed projections. For example, OFM’s high

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<sup>1</sup> KGH also notes that it believes Kadlec puts most of its write offs in charity care, not bad debts, which could artificially inflate Kadlec’s charity care numbers.

series does not provide estimates by age, and this is a key component of the bed need methodology. It was in large part because of these limitations that the Department formally advised both parties that it would use medium series in its analysis of bed need related to these projects before either project was submitted. AR 1690, n.1. The Department further explicitly stated that the planning horizon is 7 years (AR 1619, Department's Evaluation, p. 11):

*A seven-year horizon for forecasting acute care bed projections will be used in this evaluation which is consistent with the recommendations within the state health plan that states "For most purposes, bed projections should not be made for more than seven years in to the future." Further, a seven year forecast is consistent with most projects for hospital bed additions reviewed by the CN Program as was the target year applied by both applicants. Prior to the release of this evaluation, the department produced the 2009 hospital data used to compile the bed forecasts. As a result, the department will set the target year as 2016, which is seven years after the most recent available data (2009).*

In addition, as KGH informed the Department in correspondence dated November 23, 2010 (AR 2023), the Department erroneously included acute rehabilitation days (defined as MSDRGS 945 and 946, or Medicare Severity Diagnosis Related Groups) in the calculation of the use rate and trend line, but excluded dedicated acute rehabilitation beds from the count of current supply. Specifically, as noted below, the Department excluded 22 beds of supply.

**Table 1: Benton/Franklin Hospital Planning Area  
Bed Supply by Hospital for Acute Care Bed Need Methodology**

<b>Hospital</b>	<b>Licensed Bed Capacity</b>	<b>Level II/III Beds</b>	<b>Rehab Beds</b>	<b>Acute Bed Supply for Methodology</b>
Kadlec Medical Center	215	27	12	176
Kennewick General Hospital	111	10	0	101
Lourdes Medical Center	35	0	10	25
Prosser Memorial Hospital	62			25
<b>Total</b>	<b>423</b>	<b>37</b>	<b>22</b>	<b>327</b>

*Source:* AR 1624-1625 (Department's Evaluation, pp. 16-17).

The Department also used outdated population figures (2007 OFM data) notwithstanding the Department's practice of using the most current data available from OFM and the fact that both KGH and Kadlec used current (2009) OFM data. The use of outdated OFM data results in a higher baseline use rate, which caused additional over-estimation of need.

When corrected, the methodology projects need for significantly fewer beds in 2016 (the seven year planning horizon) than calculated by the Department. In projecting bed need for Benton/Franklin under the high series, Kadlec employed underlying assumptions that cannot be supported by any available population data; specifically around the projected size of the 65+ age population in Benton/Franklin. Simply because the elderly use hospital care at rates significantly higher than younger cohorts, these faulty assumptions led to a significant overestimation of bed need. In fact, Kadlec itself, in the December 20,

2010 comments it made regarding KGH's request for reconsideration, found only 18 beds needed in 2016 when it corrected the Department's errors. AR 1090 (p. 5, Table 1, Revised Bed Need Forecast, Row "Net Bed Need", Column "2016"). In addition, using medium series population growth, the bed need by 2016 would have been less than half of what was projected based on calculation errors. Even a high series calculation with the correct 65+ population does not project need in 2016 for anywhere near the 114 beds proposed by Kadlec.

**2. Because the correct need is for significantly fewer beds, the Department lacked data to determine the conformance of Kadlec's project with financial feasibility requirements.**

Kadlec provided three scenarios and two different bed need methodologies in its CN application. The three bed scenarios were for 55 bed, 75 bed and 114 bed expansions. Kadlec provided capital costs and pro formas for each of these scenarios. Kadlec provided two acute care bed need methodologies using the 12 steps relied upon by the Department. One method relied on OFM high series population and the other projected population growth using a linear regression. The only iteration that supported even Kadlec's 55 bed request in 2016 was the one based on OFM high series population.

The Kadlec application lacked sufficient information on capital and operating costs for the Department to make a determination consistent with WAC 246-310-220.

3. **Because there are not sufficient beds “needed” to award all beds requested by the two applicants, KGH should be deemed the superior applicant under WAC 246-310-240(1) because it is the best fit and has the lowest cost.**

The planning horizon for an expansion project is 7 years. While both applicants used slightly different assumptions about which days are included or excluded in the methodology, within 7 years, the bottom line is that the bed need is for approximately 18-30 beds. As will be demonstrated in the adjudicative proceeding pending before the HLJ, the KGH proposal was the best, and in fact, the only, right-sized proposal for the Benton/Franklin planning area.

#### V. CONCLUSION

For the foregoing reasons, KGH respectfully requests that this Court not approve Kadlec’s alternative request for 75 or 114 beds, or if it determines that further proceedings on Kadlec’s 75 or 114 bed request should go forward, remand that request to the HLJ for consideration in the consolidated adjudicative proceeding that will be conducted upon the resolution of this appeal.

RESPECTFULLY SUBMITTED this 28th day of June, 2012.

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**CERTIFICATE OF SERVICE**

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

Richard A. McCartan Assistant Attorney General Office of the Attorney General Agriculture & Health Division 7141 Cleanwater Drive SW P.O. Box 40109 Olympia, WA 98504	<input checked="" type="checkbox"/> Via E-mail and U.S. Mail
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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.

DATED this 28th day of June, 2012.



Elizabeth Whitney