

FILED

JAN 10 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 311163

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION NO. III**

HOSPICE OF SPOKANE, a Washington-profit corporation,

Appellant,

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, FAMILY HOME CARE CORP., a Washington corporation,

Respondents.

BRIEF OF APPELLANT HOSPICE OF SPOKANE

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 D. Did the trial court err by finding the regulation to be ambiguous as it relates to the number of years that the potential volume of hospice services are to be inflated by the estimated population growth?

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I. INTRODUCTION

Hospice of Spokane (“HOS”) (an intervening party) sought judicial review of the order of the Health Law Judge (“HLJ”) granting the Certificate of Need (“CN”) license to Family Home Care (“FHC”). At the judicial review proceeding in the Superior Court, HOS asserted that the HLJ erred in concluding that both “quantitative need” and “qualitative need” existed in this matter. The trial court affirmed the Department of Health’s (“Department”) decision in approving the CN license in finding that both quantitative need and qualitative need existed.

HOS respectfully asks the Court to reverse the HLJ’s final order granting the CN license to FHC. In this appeal, HOS is limiting the matter to be reviewed by the Court to one issue which involves solely the correct legal interpretation of the “Need Projection” regulation set forth in WAC 246-310-290(7). A copy of WAC 246-310-290 is provided in the Appendix attached hereto for ease of reference. The HLJ erred by incorporating into the need projection formula set forth in WAC 246-310-290(7) a three year reference found in WAC 246-310-290(6) that deals with an independent standard that needs to be met by an applicant for a CN license. The trial court erred by concluding that the need projection of WAC 246-310-290(7) is ambiguous as it relates to the issue in this matter

and, therefore, by concluding that the court must defer to the Department's interpretation of the need projection in section (7) of the regulation.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering the August 17, 2012 Order Affirming Department of Health Decision and Dismissing Petition for Judicial Review ("Order Affirming Department") by construing WAC 246-310-290(6) as establishing the planning horizon under WAC 246-310-290(7) at three years commencing with the first year of intended operation by the applicant. (CP 48).

B. The trial court erred in entering the Order Affirming Department by ruling that WAC 246-310-290(6) and (7) are ambiguous as to whether the planning horizon for projecting need is one year or three years. (CP 47).

C. The trial court erred in entering the Order Affirming Department by ruling that it must defer to the HLJ's decision representing the agency's interpretation of the regulation. (CP 45-49).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. In determining the Need Projection under the WAC 246-310-290(7), is the planning horizon one year or three years? (Assignments of Error A through C)

B. If the planning horizon is three years, is the first year the year that the CN application is filed or is it the year that the applicant intends to commence business? (Assignments of Error A through C)

C. When Step 5 of the Need Projection set forth in WAC 246-310-290(7)(e) states “Inflate the potential volume of hospice service by the one-year estimated population growth”, did the trial court err in deferring to the HLJ’s decision to continue to inflate the potential volume of hospice service over the period of time ending on the applicant’s intended third year of business operations? (Assignments of Error A through C)

D. Did the trial court err by finding the regulation to be ambiguous as it relates to the number of years that the potential volume of hospice services are to be inflated by the estimated population growth? (Assignment of Error B)

E. Did the trial court err in ruling that the reference to “by the third year of operation” set forth in WAC 246-310-290(6) also sets the planning horizon for three years under the Need Projection set forth in WAC 246-310-290(7)? (Assignment of Error A)

F. Is WAC 246-310-290(6) a standard that is separate and apart from the need projection set forth in WAC 246-310-290(7)? (Assignment of Error A)

G. Is the planning horizon of the Need Projection set forth in WAC 246-310-290(7) clear and unambiguous for which deference to the HLJ's decision in this matter is improper? (Assignment of Error C)

IV. STATEMENT OF THE CASE

A. Overview of Regulatory Framework

Pursuant to the Health Planning and Development Act, Chapter RCW 70.38, and the Department's implementing regulations, all health care providers wishing to establish or expand facilities in Washington are required to apply for and obtain a Certificate of Need ("CN") through the Department. The Department's regulations governing the CN application approval process are set forth in Chapter WAC 246-310, *et seq.* The regulations provide that the findings of the Department's review of CN applications shall be based upon, *inter alia*, determinations as to "whether the proposed project is needed..." WAC 246-310-200(1).¹ The regulations further provide that the determinations of need "shall" be based on two separate criteria: "[1] the population served or to be served has need for the project and [2] other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that need." WAC 346-310-210(1). These are respectively referred to herein as the "quantitative need" and "qualitative need" criteria.

¹ Other requisite criteria include financial feasibility, structure and process of care, and cost containment – none of which are at issue herein.

“Quantitative need” is established through a six-step need projection methodology (“Methodology”) set forth by regulation in WAC 246-310-290(7). This regulation sets forth a formula within which certain data is inputted. The purpose of the calculation is to determine whether the current hospice capacity in the county for which the applicant is seeking a license to provide hospice services is sufficient to support the regulatory defined unmet need in the county. If the result of the Methodology is that there are fewer than 35 (on an average dialing census basis) patients who would need hospice services under the need projection, quantitative need is not shown and the applicant’s license must be rejected. If the result is 35 or more average daily census (“ADC”), quantitative need is shown and the Department will proceed to determine whether the other CN license requirements are present.

In addition to establishing “quantitative need” through the six-step need projection Methodology (*i.e.* “the population served or to be served has need for the project”), the determination of need criteria mandates that the applicant also meet the “qualitative need” criterion by establishing by a preponderance of the evidence that: “other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that [quantitative] need.” WAC 246-310-210(1). Although HOS asserted in the review process below that the Department erred in finding

that the “qualitative need” requirement had been met by FHC, HOS is not seeking further review of that determination in this appeal and is limiting the issue on appeal in this matter to whether “quantitative need” existed when the CN application was filed in 2006.

B. Hospice Services in Spokane County When Application Filed

HOS is a not-for-profit entity and one of two Medicare certified hospice agencies serving Spokane County in 2006. (AR 1790.) HOS was among the first hospices in the country, having served in the greater Spokane area since 1977. At the time the application was filed in this matter, Horizon Hospice was the other existing hospice agency operating in Spokane County that had been authorized as a Medicaid and Medicare provider. (AR 2436-2438.)

C. FHC’s 2006 CN Application Process

On October 26, 2006, FHC filed the CN application for hospice services in Spokane County which is at issue herein. (AR 1394-1542.) At the time, FHC anticipated the project would commence in January 2008, (approximately one and one half years after the filing of the application) and be completed on July 1, 2008. (AR 1407.) FHC specified that its project would cost approximately \$32,000 (AR 1428), and would merely entail moving “general office equipment and furnishings” into a preexisting 1200-1310 sq. feet building. (AR 1407.)

On November 30, 2006, the Department's CN Program ("Program") requested additional information from FHC including evidence addressing whether existing providers were available or accessible to meet the need as per WAC 246-310-210(1). (AR 1546-1551.)

On December 27, 2006, FHC submitted its response to the Program's request. (AR 1559.)

In January, 2007, the Program again requested additional information. (AR 1686-1687.)

The public hearing for FHC's CN application was held on February 20, 2007, during which hundreds of letters and testimony were submitted on behalf of Hospice of Spokane and Horizon Hospice evidencing that existing providers were sufficiently available and accessible to meet the need for hospice care in Spokane County. (AR 1790-2045; AR 2097-2099.) FHC submitted just twenty-nine form letters in support of its application, which provided an overview of FHC and merely stated that the addition of hospice services for FHC would result in continuity of care for its own patients. (AR 2064-2095.)

On April 20, 2007, the Program denied FHC's application concluding that, *inter alia*, FHC had not met the standards and

Methodology criterion in WAC 246-310-290 and FHC had not met the qualitative need criterion in WAC 246-310-210. (AR 2132-2152.)

On May 17, 2007, FHC filed a request for reconsideration for which the hearing was held on July 12, 2007. (AR 2183-2184; AR 2207.) Upon reviewing the rebuttal submission and comments submitted by FHC and HOS, the Program again denied FHC's application based on, *inter alia*, FHC's failure to meet both criteria related to need. (AR 2332.)

On October 5, 2007, FHC requested an adjudicative proceeding which was granted (Docket No. 07-10-C-2005CN) but which was subsequently stayed pending the outcome of *Odyssey Healthcare v. Department of Health*, 145 Wn.App.131, 185 P.3d 652, (2008) Division II, Court of Appeals and Odyssey Healthcare's pending requests for adjudicative proceedings in Docket Nos. 07-09-C-2003CN, 07-09-C-2004CN, and 07-09-C-2005CN. (AR 2391.)

In April 2008, HOS filed a petition to intervene in the adjudicative proceeding which intervention was granted by stipulation. (AR 241-246.)

Sometime in 2008, the Program received updated survey data for years 2004 and 2005 from hospice providers that it used at Step 1 of the Methodology (calculation of hospice use rates for the previous three

years).² (AR 2395; AR 2773, lines 7-12.) On November 6, 2009, the then presiding Health Law Judge remanded the case to the Program for reevaluation based upon the receipt of the updated survey data. (AR 2391-2393.)

On February 11, 2010, the Program issued its initial Remand Decision in which it concluded that a quantitative need under WAC 246-310-290(7) was shown based on the updated 2004 and 2005 survey data the Program obtained in 2008. (AR 2408-2415.) The Program also concluded that FHC had met the separate criteria for qualitative need under WAC 246-310-210(1). (AR 2415; *see also* AR 2797, lines 18-25; AR 2798, lines 1-3.) Thereafter, rebuttal comments were submitted by HOS which pointed out errors in the Program's Methodology calculation for quantitative need. (AR 2440-2443.)

On May 5, 2010, the Program issued its final Remand Decision denying FHC's CN Application. (AR 2562-2584.) The Program explained that "when correcting the data for years 2004 and 2005, the Department inadvertently entered incorrect data into the spreadsheet, which resulted in erroneous calculations and conclusions." (AR 2571.) Based on these corrections, the Program concluded that FHC had not met the criterion for

² It is undisputed that the requisite years for hospice use data at Step 1 are 2003, 2004 and 2005, which are the three years prior to the filing of FHC's application in 2006.

quantitative need under WAC 246-310-290(7). The Department further concluded that FHC had further failed to meet the qualitative need requirement under WAC 246-310-210(1). (AR 2576-2577.)

In May of 2010, FHC submitted a request for a second adjudicative proceeding (Master Case No. M2008-117721) and HOS filed a notice of appearance in that proceeding. (AR 280-410; AR 415-417.)

In October of 2010, FHC filed a motion for summary judgment and in December of 2010, HOS filed a cross-motion for summary judgment, both arguing that this matter should be resolved as a matter of law based upon respective calculations of the Methodology. (AR 418-565; AR 612-833.)

During the summary judgment motion process, the Program changed its position from the final Remand Decision and joined FHC's motion for summary judgment (AR 643-644, ¶ 3.)

The HLJ denied both FHC's and HOS's motions for summary judgment in January, 2011, and the adjudicative hearing was held on March 2-4, 2011. (AR 2591-3033.) HOS presented testimony and other evidence supporting its arguments that, *inter alia*, the projection horizon for the need Methodology under the regulation is one year and not six years (three years from the proposed commencement of the project) –

which conclusively and undisputedly established no quantitative need for an additional hospice provider in Spokane County.

The HLJ served his Final Order on June 24, 2011 (AR 1309-1341), in which he granted FHC's application upon finding and concluding, *inter alia*, that FHC had met both the quantitative and qualitative need criteria. (AR 1386, ¶¶ 2.7, 2.8.) The Final Order was amended for technical corrections on July 21, 2011. (AR 1358-1391.)

D. Judicial Review

HOS filed a petition for judicial review in the Spokane County Superior Court on July 21, 2011 with an Amended Petition filed on August 2, 2011. (CP 10) A hearing on the petition for judicial review was held on June 1, 2012, resulting in an Order Affirming Department of Health's Decision and Dismissing Petition for Judicial Review filed on August 17, 2012. (CP 39)

In the judicial review proceeding, HOS asserted that the HLJ had erred in his prior ruling in which he found that FHC had shown both quantitative need and qualitative need in the application review process. The trial court affirmed the HLJ's decision as to all matters under review. As to the quantitative need issue, the trial court ruled that WAC 246-310-290(6) and (7) are ambiguous as to the number of years the potential volume of hospice services are to be inflated by the estimated population

growth to project need (the “planning horizon”). (CP 47). Because of this finding of ambiguity, the trial court ruled that it must defer to the HLJ’s decision representing the Department’s interpretation of the regulation. (CP 45 – 49). Accordingly, the trial court ruled that the HLJ did not err by using the 3-year planning horizon in determining need. (CP 46 – 47). Noticeably absent from the trial court’s ruling was whether that 3 year planning horizon should commence in the year that the CN license application was filed (2006) or in the year that the applicant stated in its application that it intended to commence operations (2008).

V. ARGUMENT

A. Standard of Review

Washington’s Administrative Procedure Act (“WAPA”) governs judicial review of administrative agency decisions. RCW 34.05.510. WAPA requires the reversal of an agency’s final order when the decision is, *inter alia*, based upon an erroneous interpretation or application of the law or is arbitrary or capricious. RCW 34.05.570(3)(d) & (i). 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) (under WAPA “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 v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). This Court is to defer to the Department’s findings of fact; however, issues of law and application of facts to the law are reviewed *de novo*. *Terry v. Employment Sec. Dept.*, 82 Wn.App. 745, 748-49, 919 P.2d 111, 114 (1996).

As to questions of law, rules of statutory construction apply to administrative regulations. *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). If a regulation “is clear on its face, its meaning is to be derived from the plain language of the provision alone.” *Id.* A regulation “is not ambiguous simply because different interpretations are conceivable” and thus, “[t]his court is not obliged to discern any ambiguity by imagining a variety of alternative interpretations.” *Dept. of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002) (citations omitted). In any case, “[a] reviewing court should construe agency rules in ‘a rational, sensible’ manner, giving meaning to the underlying policy and intent.” *Odyssey Healthcare Operating BLP v. Dept. of Health*, 145 Wn.App. 131, 143-144, 185 P.3d 652, 658 (2008); (quoting *Mader v. Health Care Auth.*, 149 Wn.2d 458, 70 P.3d 931 (2003)). In addition,

agency rules “are to be interpreted as a whole, giving effect to all the language and harmonizing all provisions.” *Cannon*, 147 Wn.2d at 57. Furthermore, a reviewing court “must avoid interpretations that are unlikely or absurd.” *Odyssey*, 145 Wn.App. at 143 (citing *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 321, 382 P.2d 639 (1963)). Most significantly, this Court need not defer to the Department’s interpretation of its own regulations. This Court may substitute its interpretation of a clear and unambiguous regulation. *See Children's Hosp. & Med. Ctr. v. Dept. of Health*, 95 Wn.App. 858, 868, 975 P. 2d 567 (1999) (“a court should apply its plain language and may not look beyond the language to consider the agency's interpretation”). Moreover, deference “is inappropriate when the agency’s interpretation conflicts with the [enabling] statute.” *Brown v. Dept. of Soc. & Health Servs.*, 145 Wn.App. 177, 183, 185 P.3d 1210 (2008) (internal quotations and citation omitted); *see also Conway v. Dept. of Soc. & Health Servs.*, 131 Wn.App. 406, 120 P.3d 130 (2006) (holding as a matter of law that an agency’s interpretation conflicted with the unambiguous language and intent of statute).

Finally, an agency’s decision must be reversed if it is arbitrary and capricious, which is a “willful and unreasoning action in disregard of facts and circumstances.” *Children’s Hospital*, 95 Wn.App at 864 (holding that

Department's decision that CN review was not required was arbitrary and capricious) (quotation and citation omitted).

B. The Department Erred in Concluding That “Quantitative Need” Existed Under the Need Methodology Set Forth in WAC 246-310-290(7).

1. HLJ's Interpretation of Regulations

As set forth above, to obtain CN approval for an additional hospice provider in Spokane County, FHC was required in its CN application to establish quantitative need through the need Methodology set forth in WAC 246-310-290(7). The Department's decision to grant FHC's application was based upon the HLJ's interpretation and application of the projection horizon (*i.e.* in which year must need be shown) as set forth in the regulation. Based on his interpretation of the regulation, the HLJ concluded that: (1) the projection horizon is three years, (2) the three years commence as of the applicant's proposed commencement date of operations (which here is 2008 and, thus, the HLJ concluded there must be a need shown by 2011 – six years from the application date) and (3) the “Methodology shows need beginning in 2009 and continuing through 2011.” (AR 1378, ¶ 1.42.) The HLJ's conclusions are based upon an erroneous interpretation of the regulations.

2. The regulatory subsections at issue are unambiguous and deference to the Department's interpretation is inappropriate.

At the outset, the subsections of the regulation with respect to this issue (*i.e.* subsections (7)(e)-(g)) are unambiguous and, accordingly, this Court need not and should not defer to the Department's interpretation. *Children's Hospital*, 95 Wn.App. at 868. Respondents argue otherwise by stating that this is not the first time that the Methodology set forth in WAC 346-310-290(7) has been subject to a judicial dispute. *See, e.g., Odyssey*, 145 Wn.App. at 131. It is of note, however, that the issue in *Odyssey* dealt with Step 2 of the Methodology (*i.e.* subsection (7)(b)), which, without getting into the details, is indeed ambiguous.³ Because of the ambiguity in Step 2 of the Methodology, the court in *Odyssey* determined that it should defer to the Department's expertise and interpretation of the Methodology for the limited purpose of interpreting the inherent ambiguities in Step 2. The court in *Odyssey* explained:

When read in the context of the entire WAC methodology, Step Two's application is ambiguous. Despite the simple language used to describe the mathematic methodology in WAC 246-310-290(7),

³ FHC raised issues with the Department's calculations and interpretations of Step 2 throughout this process and during the adjudicative hearing further revealing the ambiguity of provision 7(b). However, HOS agrees with the Department's application of Step 2, which is in line with *Odyssey* and, therefore, this is not an issue in this appeal. The ambiguity of provision (7)(b) is not relevant to and has no bearing on the plain and unambiguous meaning of provisions (7)(e)-(g).

there is ample room for disagreement about various interpretations of the formula used to calculate the unmet hospice care 'need' for each county. The WAC 246-410-290(7) methodology in its entirety is a complex formula, not a simple numerical computation. Therefore, we defer to the Department's expertise and interpretation. (Emphasis added.)

145 Wn.App. at 143. The court's ruling in *Odyssey* does not apply to this case because, here, the projection horizon set forth in Step 5, or subsection (e), of the Methodology and the subsequent steps for determining need set forth in subsections (f) and (g) are unambiguous particularly when read in the context of the entire Methodology and the entire regulatory and statutory scheme.

In any case, as set forth below, the Department's interpretation of the regulation runs counter to the regulatory and statutory scheme as a whole and leads to an absurd result. Therefore, deference to the Department's interpretation here is inappropriate. *Brown*, 145 Wn.App. at 183. Any reasonable reading of WAC 246-310-290(7)(e)-(g) on its face leads to only one conclusion – that the projection horizon to be used in the Methodology is clearly one year and it is to be based on the application date and not some contrived future commencement date proposed by the applicant. The Department's interpretation and application of the regulation is a clear error of law and, thus, the Department's final decision to grant FHC's CN application based on this flawed interpretation must be

reversed pursuant to RCW 34.05.570(d) (“[t]he agency has erroneously interpreted or applied the law”).

3. The plain language of the regulation as a whole establishes a one year projection horizon.

WAC 246-310-290 by its title sets forth the “standards **and** need forecasting method” for hospice services. (Emphasis added). Section (7) thereof unambiguously sets forth the “Need forecast” Methodology whereas the other sections, including section (6), set forth *other* standards. Nowhere in section (7) does it say “three years” and nowhere in the regulation does it define “forecast year” as anything other than the “one year” projection horizon as explicitly and unambiguously specified in subsection (7)(e). Nevertheless, for purposes of applying the need forecast Methodology at section (7), the Department has contrived an interpretation of the regulation as establishing a “three year” projection horizon which horizon commences on the applicant’s proposed commencement date of operations (which here results in a projection horizon of six years from the application date). The Department reaches this conclusion by pulling language from an independent standard set forth at section (6). Such an interpretation and application of the projection horizon defies the plain meaning of the regulation as a whole.

a. Subsections (7)(e)-(g) – Need projection horizon

WAC 246-310-290(7), entitled “Need projection” sets forth the Methodology for determining the quantitative need. It involves a six step process. Steps 1 through 4 (*i.e.* subsections (7)(a)-(d)) require certain calculations of hospice use rates for the three years prior to the application (here 2003, 2004 and 2005) to derive the average volume of hospice services for those three years. Then, Step 5 (*i.e.* subsection (7)(e)), instructs that this average volume of hospice services is to be inflated by the “one-year estimated population growth” to derive the projected volume of hospice services for the year of the application. The final calculation in the Methodology is found in Step 6 (*i.e.* subsection (7)(f)), which provides: “Subtract the current hospice capacity in each planning area from the **above** projected volume of hospice services to determine unmet need.” (Emphasis added). This makes clear that the projection has already occurred “**above**”, which directly refers to the preceding step of inflating the average volume of the three prior years by the “**one-year**” projection horizon. Subsection (7)(g) then instructs the Department to simply “[d]etermine the number of hospice agencies in the proposed planning area which could support the unmet need with an [average daily census] of thirty-five.” Quantitative need is therefore established if the “average daily census” reaches 35 in the projection horizon year already

provided. In other words, if, by dividing the projected ADC by 35 results in a number that is one (1) or greater, then the need for one or more additional hospice agencies exists and the Department must then evaluate the other criteria of the regulations. If the number derived in subsection (7)(g) is less than one, there is no quantitative need and the CN application must be denied unless there are extenuating circumstances as set forth in the regulation, which circumstances are not present here. There are no other steps in the regulation requiring or supporting the projection of need into years two, three, four, five or six as was done by the Department in this matter.

According to this plain reading of the unambiguous subsections at issue – WAC 246-310-290(7)(e)-(g) – the projection horizon is one year; i.e., to project need (by inflating average usage by population growth) for the year in which the application is filed. Here, the projection year is 2006 (*i.e.*, the average volume of hospice services based on use rates of 2003, 2004 and 2005 inflated by the “one-year” projection horizon to determine whether there is need in 2006). There is undisputedly no showing of need under the Department’s Methodology determinations until 2009. (AR 1378, ¶ 1.42.)

The following chart sets forth the results of the Department’s calculations of need in this matter utilizing the Methodology set forth in

WAC 246-310-290(7) for the years 2006 – 2011. The second column of the chart shows the inflation of the potential volume of hospice services by the estimated population growth year by year. The right column shows the resulting average daily census of unmet need. That resulting number is divided by 35 in accordance with subsection (7)(g). If the resulting number is less than one, there is no quantitative need. As shown by this chart, the first year that quantitative need is shown (an ADC of 35 or more) is 2009.

2006	205	x	50.6	÷	365	=	28 ADC
2007	220	x	50.6	÷	365	=	31 ADC
2008	236	x	50.6	÷	365	=	33 ADC
2009	252	x	50.6	÷	365	=	35 ADC
2010	267	x	50.6	÷	365	=	37 ADC
2011	286	x	50.6	÷	365	=	40 ADC

In following the clear language of subsection (7)(e) and inflating the potential volume of hospice service by the one year estimated population growth, the result is 28 ADC in the year 2006; i.e., no quantitative need. If the potential volume of hospice service is inflated for two additional years by the estimated population growth (for a total of three years), this results in a 33 ADC as of 2008, again no quantitative

need. Therefore, the only way that the HLJ was able to find quantitative need in this matter was: (1) to hold that the planning horizon is three years and not one year as it relates to the population growth and (2) to hold that the first year of that planning horizon is 2008 (the year that the applicant intended to commence operations) which extended the planning horizon to 2010 in which the result was 37 ADC. The HLJ reached this result by incorporating into the need projection of section (7) a separate three year standard set forth in section (6).

b. Section (6) is a separate standard

The Department's interpretation of the regulation is contrived by pulling language from section (6), which is not part of the need Methodology set forth in section (7). Section (6) clearly and unambiguously provides an independent standard that applicants must "demonstrate that *they* can meet a minimum average daily census (ADC) of thirty-five patients *by its third year of operation.*" (Emphasis added). It addresses an applicant's required showing of performance. It does *not* state that an applicant "must demonstrate that there will be a minimum need of thirty-five ADC using the need projection in section 7 below" which is, essentially, how FHC and the Department are interpreting the regulations.

Contrary to FHC's assertion, HOS is not arguing that section (6) has no effect, is meaningless or is somehow part of a financial feasibility analysis. This section explicitly provides a separate standard that an applicant must demonstrate that *they* can meet a minimum daily census (ADC) of thirty-five patients by its *third year of operation*. In other words, an applicant must show at the time of its application that it will be able to have sufficient services and business operations in place by its third year of operation to serve an average daily census of 35 hospice patients. Section (6) has nothing to do with the issue of whether there is a projected need in the planning area based upon the operations of existing providers. Under the plain meaning of the regulations as a whole, the reference in section (6) to "three years" is not relevant to the need projection under the need Methodology set forth in section (7).

That the standard in section (6) is separate and distinct from the need forecast Methodology in section (7) is further revealed by other sister certificate of need regulations. Indeed, to properly interpret the regulation, this Court "must also examine the context of the 'statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found.'" *Odyssey*, 145 Wn.App. at 142-143 (quoting *Wash. Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002)). During the adjudicative hearing, Jody

Carona, a health planning consultant with Health Facilities Planning and Development (“HFPD”) and an expert on CN applications,⁴ provided the example of the Department’s regulations for percutaneous coronary intervention (“PCI”), where there are clearly separate requirements for: (1) the threshold of demonstrating that the applicant can meet certain performance **standards** within a specified grace period and (2) the showing quantitative need in the planning area under the **need Methodology** within a specified projection horizon. (AR 2995, lines 1-24.) In the PCI rules, these separate requirements are located in separate regulations: (1) WAC 246-310-720, aptly entitled “Physician volume **standards**”, provides that the CN applicant must demonstrate that it can “perform a minimum of three hundred adult PCIs per year by the end of the *third year of operation*” (emphasis added) and (2) WAC 246-310-245, aptly entitled **Need forecasting method**, provides that the “forecast year” is the “*fifth year* after the base year” and further provides that the base year is based on the “first day of the application.” In the same vein, the regulation governing pediatric cardiac surgery and interventional treatment centers (“PCS”) (similar to the regulation for hospice services)

⁴ Jody Carona provided consulting services to HOS throughout FHC’s CN application review process and was called upon to provide expert testimony at the adjudicative hearing. Carona testified that she has been a health planning consultant for and/or participated in well over 400 CN applications through the Department’s CN program involving various health services. (AR 2970, lines 16-17; *see also* AR 672-673, ¶ 3-6.)

is identically entitled “**standards and need forecasting method.**” WAC 246-310-263. (Emphasis added). For PCS, section (7), entitled “**standards**”, provides that “a minimum of one hundred pediatric cardiac surgical procedures ... per year and a minimum of one hundred fifty catheterizations must be performed at a hospital with a pediatric cardiac surgery and interventional treatment center by the *third year of operation...*” (Emphasis added). Section (8) of WAC 246-310-263 then sets forth the “**Need forecasting method**” and section (9) provides certain definitions “for purposes of the forecasting method in this section.” The “forecast year” is explicitly defined as the “*fourth year*” from the application review process. Accordingly, just as with CN applicants for hospice services, the CN applicants for both PCI and PCS have a three-year grace period for meeting the threshold **standard** for performing *their* services. This threshold performance standard is separate and distinct from the respective five year projection horizon for PCI, four year projection horizon for PCS, and one year projection horizon for hospice services. Moreover, unlike the threshold performance standard which is explicitly based upon the applicant’s proposed commencement date of operation, each of the respective projection horizons is based on the application date.

In sum, the Department’s conclusion that the need projection Methodology set forth in section (7) provides a three-year planning

horizon and that the three years begin as of the year of the applicant's proposed commencement year defies the plain meaning of the Department's regulatory scheme as a whole. *Odyssey*, 145 Wn.App. at 142 ("a term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole"). The Department's reliance on section (6) to artificially extend the need forecast set forth in section (7) is clearly an erroneous interpretation of the regulation.

c. Neither the Department nor this Court may rewrite the regulation.

The adjudicative process and judicial appeal process are not appropriate venues for addressing purported flaws or disagreements with the plain meaning of WAC 246-310-290(7)(e)-(g). *Odyssey*, 145 Wn.App. at 144-145.⁵ Nevertheless, amending subsections (7)(e)-(g), and section (6), to obtain the result it desires is essentially what the Department is attempting to do here.

⁵ While the court in *Odyssey* stated that the "contention that WAC 246-310-290(7) methodology contains significant flaws is not without merit" the court instructed: "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 rulemaking avenues." *Odyssey*, 145 Wn.App. at 145, n.6. As a result of the *Odyssey* decision, the Department is currently undertaking rule-making to amend the Methodology for hospice services. In the meantime, this Court is bound to apply the plain meaning of the regulation, and, naturally, to avoid any interpretation that would lead to an "absurd result." *Id.*

To extend the projection horizon for six years, as the Department has done in this case, subsection (7)(e) of the regulation would need to be amended to read something like this: “Inflate the potential volume of hospice services by the one-year estimated population growth (using OFM data) *and continue to increase this annual inflated potential volume for the years following the year of the filing of the application until the end of the projected third year of operation of the applicant.*” Subsections (7)(f) and (g) would then be applied to determine the unmet need. The current regulation does not contain language along these lines and neither the HLJ nor this Court has the authority to read into the regulation such language when considering FHC’s application.

The regulation, as presently written, clearly and unambiguously specifies a one year projection horizon for the determination of quantitative need under the Methodology and the Department’s attempt to amend the regulation through the adjudicative process represents a clear error of law.

d. The Methodology Advisory Committee recommended a one year projection horizon, the language of which mirrors the regulation.

During the process of the drafting of the regulations that are at issue herein, the Hospice Methodology Advisory Committee to the Department of Health (“Advisory Committee”) originally contemplated

but unequivocally rejected a three year projection horizon for the Methodology in its reports. Throughout the adjudicative hearing in this matter, the Department earnestly relied upon a single page of an earlier version of these reports dated April 2001, which states: “need should be projected three-years into the future (that is, three years later than the year in which an application is being reviewed).” (AR 2633-2635; AR 3006, lines 11-23 (quoting AR 2359).) It is interesting to note that even this comment by the Advisory Committee addressed three years from the application date and not three years from some future date of when the applicant intended to commence business operations. However, in that report, the Advisory Committee warned that such a prolonged projection horizon would give a “leg up to a new agency” and questioned: “How could existing agencies contest in a large county, if they claim all current need is being met but increase in use between past measurement and future projection would in itself appear to justify a new agency?” (AR 2360; *see also* AR 2695.)

At the Adjudicative Hearing, HOS introduced two subsequent reports of the Advisory Committee in which the Committee expressly rejected a three year projection horizon in favor of a one year projection horizon. (AR 2695-2701.)

First, in a subsequent report dated September 13, 2001, the Advisory Committee made the following recommendation:

“Recommendation #3 – Future Projections – Project the need for hospice services 1-year into the future by **inflating the estimated need by the Office of Financial Management’s 1-year estimated population growth.**” (AR 2372 (Emphasis added).) The Advisory Committee explained:

“The choice in the numeric need portion of the methodology to look at actual utilization over a 3-year period [at Step 1] assures the method will continue to reflect increases in utilization. The choice to additionally use a one-year projection horizon also will take into account future population growth that will impact utilization. Along with these elements in the method encouraging increased utilization, the Committee will place intent language in the rule that supports increased utilization and encourages existing providers to increase hospice penetration in communities.” (AR 2383) (Emphasis added).

The Advisory Committee reiterated its choice of a one-year projection horizon in its revised “working draft” dated November 11, 2001:

“Future need for hospice services is expected to continue to change. For example, while hospice use rates are increasing, the average length of stay is decreasing. The choice in the numeric need portion of the methodology to look at actual utilization over a 3-year period assures the method will continue to reflect increases in utilization and changes in length of stay or other elements. **The choice to additionally use a one-year projection horizon** also will

take into account future population growth that will impact utilization.”
(AR 2277) (Emphasis added).

This was the last report issued by the Advisory Committee before it was disbanded.

The final rule adopted by the Department is consistent with this last recommendation made by the Advisory Committee. Step 5 of the Methodology states that the potential volume of hospice services is to be inflated “by the one-year estimated population growth (using OFM data).” WAC 246-310-290(7)(e). It is indisputable that the latest recommended language by the Advisory Committee is the same language that is in the regulation. This corroborates the plain meaning of the regulation which unambiguously establishes a “one-year projection horizon.”⁶

- e. **A one year projection horizon is in line with the underlying intent of the State Health Planning and Resources Development Act to ensure utilization of existing services.**

In enacting the Health Planning and Development Act, RCW 70.38, which established the CN Program, the Washington

⁶ In the trial court, FHC’s argued that the Advisory Committee drafts of the regulation should be rendered obsolete by the mere fact they are entitled “drafts” and/or that the committee was disbanded. Such arguments are without merit. Indeed, “events surrounding the enactment of a statute are considered a source of information of a legislative intent embodied therein.” *State v. Zuanich*, 92 Wn. 2d 61, 593 P.2d 1314 (1979). Such legislative history includes committee reports, statements and explanations of the draftsman and sequential drafts of the legislation. *Id.*; *see also, Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992). As FHC pointed out, the Advisory Committee disbanded due to staffing cuts. It was certainly not due to any lack of credibility in its actions or recommendations.

State Legislature sought to oversee development of Washington’s health and medical resources. An express purpose of the CN program is: “to control costs by *ensuring better utilization of existing* institutional health services and major medical equipment.” *Children’s Hosp.*, 95 Wn.App. at 865 (Emphasis added) (quoting *St. Joseph Hospital v. Dept. of Health*, 125 Wn.2d 733, 736, 887 P.2d 891 (1995) (citing RCW 70.38)). This is because “[t]he United States Congress and our Legislature made the judgment that competition had a tendency to drive health care costs up rather than down and government therefore needed to restrain marketplace forces.” *St. Joseph Hospital*, 125 Wn.2d at 736. This underlying purpose of the CN program explains why the Advisory Committee recommended, and the Department ultimately adopted, a one-year projection horizon which “supports increased utilization and encourages existing providers to increase hospice penetration in communities.” (AR 2383.) The Advisory Committee’s comments relating to its recommendation of a one year projection horizon embody the express purpose of the CN program and, moreover, lend a practical rationale to the plain meaning of the regulation.

The Advisory Committee explicitly rejected the unfair result inherent in a three year projection horizon in the context of hospice services. The absurdity is revealed by the Advisory Committee’s question: “How could existing agencies contest in a large county, if they claim all

current need is being met but increase in use between past measurement and future projection would in itself appear to justify a new agency?” (AR 2360; *see also* AR 2695.) The Advisory Committee keenly recognized that a three year projection horizon would compound the inflation factor over numerous years and inevitably establish an increase in need each year – thereby always giving a new agency a “leg up” even though the population, demographics and need for hospice services may fluctuate. (AR 2360.) Jody Carona of HFPD testified that the absurdity of this result is further revealed by the fact the actual utilization of existing providers is averaged over a three-year period, which ultimately understates the capacity of the existing providers at the time of the application. (AR 3009, lines 10-19.) Carona explained that inflating the need and freezing the average capacity of the existing providers improperly assumes that the existing providers will not have any piece of that incremental market in the future and thereby unfairly favors the new agency. (AR 2974, lines 15-21.) Automatically giving the new agency a “leg up” is directly contrary to the purpose of the CN program which seeks to control costs by ensuring better utilization of existing services.

The need projection Methodology set forth in the regulation is intended to adequately address inherent fluctuations in future need for hospice services by averaging utilization over a three year period at Step 1

and applying a one year projection horizon at Step 5. The Department's contrived interpretation of the regulation as requiring a three year projection horizon (commencing with the applicant's first year of operation) is inconsistent with the enabling statute and purpose of the CN program. Therefore, it is inappropriate for this Court to defer to the Department's interpretation in this matter. *Brown*, 145 Wn.App. at 177 (deference to an agency interpretation of its rules "is inappropriate when the agency interpretation conflicts with the [enabling] statute"); *Odyssey*, 145 Wn.App. at 143 ("reviewing court should construe agency rules in 'a rational, sensible' manner, giving meaning to the underlying policy and intent"). The regulation, as presently written, clearly and unambiguously specifies a one year projection horizon which is in accordance with the statute and purpose of the CN program.

f. A one year projection horizon is not impossible and the Department's mere practice of running calculations for three years is irrelevant.

Jody Carona testified that hospice services projects (such as the one proposed by FHC) do not require extensive infrastructure as compared to, for example, building a hospital. (AR 3008, lines 14-25; AR 3009, lines 1-9.) This further explains why a one-year projection horizon was adopted and establishes that such a projection horizon is both appropriate and attainable in the context of CN applications for hospice

services. Carona testified that, in all instances of past hospice decisions under this Methodology wherein the Department approved the CN application (except for the Department's approval of FHC's 2006 CN application at issue herein) there was a showing of need within the one year projection horizon. (AR 2976, lines 3-7; AR 2996, lines 25; AR 2997, lines 1-12.) Moreover, the Department has in all other cases based its Methodology determinations from three years of the date the application was filed and not on some contrived commencement date proposed by the applicant. (AR 2999, lines 1-12.) The Department's actions here are unprecedented and, if allowed to stand, could result in future applicants artificially extending the need forecast by simply proposing a later date of commencement of operation.

It is of further note that HOS recognizes that it has been the practice of the Department to run calculations for three years from the date applications were filed (which, in this matter, would be 2006, 2007 and 2008) although there is nothing in the regulations requiring or supporting this. (AR 2997, lines 22-25, AR 2998, lines 1-3 (Carona testifying that when she asked the Department's consultant about this practice, he said "I'm just going to keep going").) In this matter, however, the Department ran its calculations for six years (2006, 2007, 2008, 2009, 2010, and 2011) and based its decision on calculations running for three years from FHC's

proposed commencement date of its operations (2008, 2009 and 2010). Nevertheless, the Department's mere routine and practice to run numbers for three years (or six years) into the future does not mean that the projection horizon is three years (or six years) pursuant to the regulation. The Department's mere practice in this regard is irrelevant and does not change in any way the plain meaning of the regulation.

g. Basing the projection horizon on the applicant's proposed commencement date of operations leads to an absurd result.

Finally, even if we were to assume, *arguendo*, that the projection horizon set forth in the regulation is three years, there is no language in the regulation supporting the Department's action in this matter to use, as the first year of that three year projection, the applicant's proposed commencement date of operations. This, effectively, extended the projection over six years. This is significant here because, even if the projection horizon in the regulation is three years (which it is not), an accepted finding by the Department in this matter is that FHC cannot establish the requisite quantitative need in the third year from its 2006 application date (by 2008). Again, under the Department's calculations, there was no showing of need until 2009. (AR 1378, ¶ 1.42.) (See chart on page 21 above.)

HOS ardently takes issue with the Department's conclusion that the applicant can artificially expand the projection horizon by delaying its commencement date into the future. Not only does such an interpretation defy the plain meaning of the regulation and regulatory scheme as a whole (including sister regulations as explained above), it leads to an absurd result and, therefore, represents a clear error of law. *Odyssey*, 145 Wn.App. at 143 (reviewing court "must avoid interpretations that are unlikely or absurd").

For example, if there are two applicants for CNs with both applications filed in 2006 with one applicant intend to commence operations in 2007 and the other in 2008, under the Department's position, different projection horizons (to determine whether there is 'need') would have to be applied to the simultaneously filed applications leading to the absurd result that one application could be denied and the other approved on that basis alone.⁷ Unlike the separate performance standard in section (6) which requires an applicant to show that it will be able to serve an average daily census of 35 by its third year of operation, the projection horizon must be constant because it would be both unjust and

⁷ While WAC 246-310-548 requires that projects must commence within two years following the issuance of the CN, nothing in this provision or in WAC 346-310-290 provides that the projection horizon may fluctuate per applicant.

impracticable in a concurrent review process (or otherwise) if a more favorable projection horizon was applied to the savvier applicant.

h. Summary

For the reasons stated above, the Department's interpretation of the regulation by which it commenced the three year projection horizon from the year that FHC intended to commence operations (2008) rather than the year of the CN application (2006): (1) is not supported by the clear language of the regulation, (2) is internally inconsistent with the regulatory scheme as a whole, (3) ignores the last Advisory Committee recommendations and conclusions which mirror the language of the regulation ultimately adopted by the Department, (4) is inconsistent with the intent and purpose of the CN program as set forth in the enabling statute, and (5) makes no sense in the practical application of the regulation. Upon applying the only reasonable interpretation of the regulation, FHC failed to establish the requisite quantitative need and, therefore, its 2006 CN application should have been denied. Accordingly, the Department's Final Order must be reversed pursuant to RCW 34.05.570(d) ("[t]he agency has erroneously interpreted or applied the law").

VI. CONCLUSION

In order for FHC's CN application to be granted, FHC was required to prove that there was a quantitative need as of the date of its application. Under any reasonable interpretation of the regulation, quantitative need cannot be shown. For the foregoing reasons, Hospice of Spokane respectfully requests this Court to reverse the Department's decision and final order granting FHC's 2006 CN Application.

DATED this 10th day of January, 2013.

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APPENDIX

WAC 246-310-290

Hospice services — Standards and need forecasting method.

The following rules apply to any in-home services agency licensed to provide hospice services which has declared an intent to become medicare certified as a provider of hospice services in a designated service area.

(1) Definitions.

(a) "ADC" means average daily census and is calculated by:

(i) Multiplying projected annual agency admissions by the most recent average length of stay in Washington (based on Centers for Medicare and Medicaid Services (CMS) data) to derive the total annual days of care; and

(ii) Dividing this total by three hundred sixty-five (days per year) to determine the ADC.

(b) "Current supply of hospice providers" means:

(i) Services of all providers that are licensed and medicare certified as a provider of hospice services or that have a valid (unexpired) certificate of need but have not yet obtained a license; and

(ii) Hospice services provided directly by health maintenance organizations who are exempt from the certificate of need program. Health maintenance organization services provided by an existing provider will be counted under (b)(i) of this subsection.

(c) "Current hospice capacity" means:

(i) For hospice agencies that have operated (or been approved to operate) in the planning area for three years or more, the average number of admissions for the last three years of operation; and

(ii) For hospice agencies that have operated (or been approved to operate) in the planning area for less than three years, an ADC of thirty-five and the most recent Washington average length of stay data will be used to calculate assumed annual admissions for the agency as a whole for the first three years.

(d) "Hospice agency" or "in-home services agency licensed to provide hospice services" means a person administering or providing hospice services directly or through a contract arrangement to individuals in places of temporary or permanent residence under the direction of an interdisciplinary team composed of at least a nurse, social worker, physician, spiritual counselor, and a volunteer and, for the purposes of certificate of need, is or has declared an intent to become medicaid eligible or certified as a provider of services in the medicare program.

(e) "Hospice services" means symptom and pain management provided to a terminally ill individual, and emotional, spiritual and bereavement support for the individual and family in a place of temporary or permanent residence and may include the provision of home health and home care services for the terminally ill individual.

(f) "Planning area" means each individual county designated by the department as the smallest geographic area for which hospice services are projected. For the purposes of certificate of need, a planning or combination of planning areas may serve as the service area.

(g) "Service area" means, for the purposes of certificate of need, the geographic area for which a hospice agency is approved to provide medicare certified or medicaid eligible services and which consist of one or more planning areas.

(2) The department shall review hospice applications using the concurrent review cycle in this section, except when the sole hospice provider in the service area ceases operation. Applications to meet this need may be accepted and reviewed in accordance with the regular review process.

(3) Applications must be submitted and reviewed according to the following schedule and procedures:

(a) Letters of intent must be submitted between the first working day and last working day of September of each year.

(b) Initial applications must be submitted between the first working day and last working day of October of each year.

(c) The department shall screen initial applications for completeness by the last working day of November of each year.

(d) Responses to screening questions must be submitted by the last working day of December of each year.

(e) The public review and comment for applications shall begin on January 16 of each year. If January 16 is not a working day in any year, then the public review and comment period must begin on the first working day after January 16.

(f) The public comment period is limited to ninety days, unless extended according to the provisions of WAC 246-310-120 (2)(d). The first sixty days of the public comment period must be reserved for receiving public comments and conducting a public hearing, if requested. The remaining thirty days must be for the applicant or applicants to provide rebuttal statements to written or oral statements submitted during the first sixty-day period. Also, any interested person that:

(i) Is located or resides within the applicant's health service area;

(ii) Testified or submitted evidence at a public hearing; and

(iii) Requested in writing to be informed of the department's decision, shall also be provided the opportunity to provide rebuttal statements to written or oral statements submitted during the first sixty-day period.

(g) The final review period shall be limited to sixty days, unless extended according to the provisions of WAC 246-310-120 (2)(d).

(4) Any letter of intent or certificate of need application submitted for review in advance of this schedule, or certificate of need application under review as of the effective date of this section, shall be

held by the department for review according to the schedule in this section.

(5) When an application initially submitted under the concurrent review cycle is deemed not to be competing, the department may convert the review to a regular review process.

(6) Hospice agencies applying for a certificate of need must demonstrate that they can meet a minimum average daily census (ADC) of thirty-five patients by the third year of operation. An application projecting an ADC of under thirty-five patients may be approved if the applicant:

- (a) Commits to maintain medicare certification;
- (b) Commits to serve one or more counties that do not have any medicare certified providers; and
- (c) Can document overall financial feasibility.

(7) Need projection. The following steps will be used to project the need for hospice services.

(a) Step 1. Calculate the following four statewide predicted hospice use rates using CMS and department of health data or other available data sources.

(i) The predicted percentage of cancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients the age of sixty-five and over with cancer by the average number of past three years statewide total deaths sixty-five and over from cancer.

(ii) The predicted percentage of cancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-five with cancer by the current statewide total of deaths under sixty-five with cancer.

(iii) The predicted percentage of noncancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients age sixty-five and over with diagnoses other than cancer by the current statewide total of deaths over sixty-five with diagnoses other than cancer.

(iv) The predicted percentage of noncancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-five with diagnoses other than cancer by the current statewide total of deaths under sixty-five with diagnoses other than cancer.

(b) Step 2. Calculate the average number of total resident deaths over the last three years for each planning area.

(c) Step 3. Multiply each hospice use rate determined in Step 1 by the planning areas average total resident deaths determined in Step 2.

(d) Step 4. Add the four subtotals derived in Step 3 to project the potential volume of hospice services in each planning area.

(e) Step 5. Inflate the potential volume of hospice service by the one-year estimated population growth (using OFM data).

(f) Step 6. Subtract the current hospice capacity in each planning area from the above projected volume of hospice services to determine unmet need.

(g) Determine the number of hospice agencies in the proposed planning area which could support the unmet need with an ADC of thirty-five.

(8) In addition to demonstrating need under subsection (7) of this section, hospice agencies must meet the other certificate of need requirements including WAC 246-310-210 - Determination of need, WAC 246-310-220 - Determination of financial feasibility, WAC 246-310-230 - Criteria for structure and process of care, and WAC 246-310-240 - Determination of cost containment.

(9) If two or more hospice agencies are competing to meet the same forecasted net need, the department shall consider at least the following factors when determining which proposal best meets forecasted need:

(a) Improved service in geographic areas and to special populations;

(b) Most cost efficient and financially feasible service;

(c) Minimum impact on existing programs;

(d) Greatest breadth and depth of hospice services;

(e) Historical provision of services; and

(f) Plans to employ an experienced and credentialed clinical staff with expertise in pain and symptom management.

(10) Failure to operate the hospice agency in accordance with the certificate of need standards may be grounds for revocation or suspension of an agency's certificate of need, or other appropriate action.

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury according to the laws of Washington that the following statements are true and correct.

On the 10th day of January, 2013, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input checked="" type="checkbox"/> E-MAIL	Jeffrey A.O. Freimund FREIMUND JACKSON TARDIF & BENEDICT GARRATT, PLLC 711 Capitol Way S., Suite 602 Olympia, WA 98501 <u><i>JeffF@jtlaw.com</i></u>
<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input checked="" type="checkbox"/> E-MAIL	Richard McCartan Assistant Attorney General Washington State Attorney General Agriculture & Health Division P.O. Box 40109 Olympia, WA 98504-0109 <u><i>RichardM@ATC.WA.GOV</i></u>

DATED this 10th day of January, 2013, at Spokane, Washington.



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